

Chapter 3: Diplomatic Functions and Duties

3.1 Introduction

The majority of States today have foreign representatives. The term “diplomatic agent” referred only to the head of mission but now the term also includes members of staff. Article 1 of the Vienna Convention divides diplomatic staff into diplomatic agents, which includes the head of the mission, administrative and technical staff, service staff and lastly private servants. The distinction between the different types of diplomats and staff has to be defined owing to the increase in the number of lower level diplomats and the increase in numbers of staff in missions. Furthermore, its significance is accompanied by the notion of reducing immunity of staff in certain circumstances as opposed to having blanket immunity.

Each and every diplomatist is required to perform certain functions. **Henry Watson** has said through light heartedly that “An ambassador in an honest man who is sent to speak lies abroad for the good of his own country”.¹ These views were very appealing and acceptable to Machiavelli. Now there has been a considerable change and today it is believed that main function and responsibility of a diplomat is look after the interest of his country.

Palmer and Perkins in their book ‘*international relations*’ have discussed about functions of diplomat as “diplomat is eyes and ears of his government in the state in which he is posted. His for most responsibility is to promote the interest of his government in the receiving state and to keep it informed about important happening and events which have any bearings on the relations of two governments”.² They have further said that diplomats have four functions to perform representation, negotiation, reporting and protecting the interest of the nation and its citizen in foreign states.

Leou B. Powlad’s has said diplomat has five functions to perform namely, “the management of conflict, problem solving, trans-cultural function, negotiations and bargaining and programme management”.³ The management of conflicts is that

¹ Mukhi H.R, *Diplomacy Theory and Practice*, (2nd (Ed), SBD Publishers Distributors, Delhi), 2008, p.193

² Palmer and Perkins, *International Relations the World Community in Transition*, (3rd (Ed), Scientific Book Agency, Calcutta), 1998, p. 84

³ *The American Journal of International Law*, Vol. 27, No. 1 (Jan., 1933), p. 80

where there is inter-section of interests a diplomat should try to resolve the crisis by persuasion, bargaining, negotiations and bargaining, negotiations etc. He has to act as to not develop the crisis do not develop. He should act as problem solving agent. In international relations many problem arises and a diplomat should decide about the best available choice for solving the problem.

According to **Harold Nicolson** “*Today a foreign secretary from his desk in the Downing Street can telephone to six ambassadors in the course of one morning or can even descend upon them quite suddenly from the sky.*” This view towards diplomat of today is no more than a clerk at the end or a line. But it is too extreme and too narrowing a view about the present position of diplomat. **Sardar K.M Panikaj’s** who was a practical diplomat an eminent historian has said “diplomacy based on cheating and deceit does not serve much purpose because such diplomacy does not create goodwill for the sending state in the receiving state.”⁴

According to **Oppenheim** the function of an envoy is “Negotiation i.e., acting as a medium between his home state and foreign state; observation, i.e., keeping a vigilant eye over the happening in the foreign state; and protecting i.e., protecting the person and property of the nationals of his home state staying abroad.”⁵

Rosier states that “The business of an ambassador’, he says again and again, ‘is peace.... An ambassador labours for the public good.... The speedy completion of an ambassador’s mission in the interest of the all... an ambassador is scared because he acts for the general welfare.’ ‘The office of an ambassador is always for good, never for discord or evil... and the ambassador of evil coming for a bad purpose brings evil upon himself and will come to a bad end.’⁶ So it was believed in the olden days the ambassador who used his office for other than its proper ends forfeits his immunity, and is liable to punishment at the hands of an offended prince. And the proper end of his office, the proper functions of the ambassador, is to serve the general welfare, by promoting peace. The present International Convention also gives rights to receiving state waive the rights, when the diplomat makes a serious of

⁴ Supra Note 1, p.50

⁵ Tandon M.P, *Public International law*, (16th (Ed), Allahabad Law Agency), 2005, p.269

⁶ Garrett Mattingly, *Renaissance Diplomacy*, (1st (Ed), Jonathan cape thirty Bedford square, London), 1955, p.48

breach. Sometimes the diplomat misuses his immunity in the functions that may lead to lapse of diplomatic relations between the nations.

3.2 Kinds of Diplomats

Diplomatic agents are sent by every state all over the world, but all diplomatists are not covered in the same category. Today they have been categorized as ambassadors, High commissioners, Charge'd affairs, Ministers Plenipotentiary, Envoy Extraordinary and so on. Each diplomatic agent has certain duties to perform and responsibilities to discharge based on which each one enjoys certain privileges and immunities as well. Question of ranks, precedence, and protocol once plagued international relations. Sometimes they seriously delayed the conduct of the diplomatic business. Persistently they led to friction, and on occasion even brought on the threat of war. In order to reduce such difficulties, the states have 'gradually developed certain rules and principles governing diplomatic intercourse'.

In other words, they have "developed international laws defining common interests and putting certain relationships on an orderly and predictable basis."⁷ The Special Rapporteur to the ILC gave identical privileges and immunities to all members of the mission, including the administrative, technical and service staff, provided they were foreign nationals. However, as Articles passed through stages of ILC debates it became increasingly necessary to classify and distinguish between different categories of embassy staff. In the early years, States relied on the good faith of the sending State and it was considered intrusive to enquire into how the mission was organized. The only time the receiving State enquired into the organization of the mission was if it believed that the sending State was abusing the system.⁸

In ancient Indian literature there were different kinds of diplomatic minister. All these were found generally styled *Dutah* whatever their rank and the mission on which they were sent. This practice continued throughout the Epic period in which we are able to discern little difference between one kinds of diplomatic agent and

⁷ Lakshman Sing Rathore, *Foundations of Diplomacy*, (1st (Ed) Jain Brothers, New Delhi), 1973, p. 320

⁸ E Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, (2nd (Ed), Clarendon Press: Oxford), 1998, pp.13-16

another. In later ages different names were given to particular grades of minister in accordance with their status and power.

In Arthashastra kautilya classifies the diplomat into three category based on the functions they perform (1) Nisrishtarthah (2) Parimitarthah (3) Sasanaharah. The first class was left in charge of the most responsible duties such as issuing ultimatum before war, declaring war and concluding treaties. It was left to these to act in such a way as not to prejudice the interests of their states and to keep the 'balance of power' which in the age of kautilya formed the most important point in statecraft. The classical example of an ambassador of this kind was Sri Krishna who was sent by the Pandavas to Kauravas for negotiations with the latter just before the outbreak of the 'Great War'. The next kind of diplomat was Parimitarthah (Dutta) these was generally used term used to cover all the forms. Kautilya had assigned special power and functions to these kind, where in they had been dispatched to country, were they live on friendly terms with the important officers and acquaint themselves with the situation there and provide their states with detailed information about defenses of the country to which they are sent and not comparative strength of its army, navy, fortification. Sasanaharah minister coming under this category acted merely in the capacity of 'carriers of messages' from one court to another.⁹

Necessity for classification of diplomats arose once before at the Treaty of Westphalia and later, at the Congress of Aix-la-Chapelle. The former marks the transition from the International Law of the Middle Ages to that of modern times. Perhaps Kutilya's classification lies midway between that at Westphalia and the one at Vienna.

There was no categorization of diplomatic agents before Middle Ages; each ambassador lived according to the dignity and status of master. The king used to come out in processions at the time, which should be in front line, posed a serious problem. The ambassador, who was in the front, was considered to be the most important person. When this became a serious problem, pope came forward to solve

⁹ Vishvantha S.V, *International Law in ancient India*, (Longmans' Green Co., Bombay), 1925, pp.70-71

that, since he commanded respect among all the kings, it was considered most appropriate that he should solve this ticklish problem.¹⁰

During the sixteenth century a distinction between two classes of diplomatic envoys gradually arose, and by about middle of the seventeenth century, after permanent legations had come into general vogue, two such classes became generally recognized namely extraordinary envoys, called ambassadors, and ordinary envoys called residents. Dispute arose frequently regarding precedence and the states tried in vain to avoid them by introducing during the eighteenth century another class namely, the so called ministers plenipotentiary.

Prof. Oppenheim classifies diplomats into two categories names those who are sent aboard for conclusion of treaties and those who are sent to attend ceremonies and inform foreign government about changes in the government at home. Both the types of diplomats enjoy equal status. The ambassador of first category has been further divided into two categories i.e, permanent and temporary. The latter do not do permanently stay in any state capital and come back as soon as the purpose for which they are sent is over.¹¹

The Havana Convention of Diplomatic officers 1928, Article 2 classifies diplomatic officers with permanent representative functions as 'ordinary', and those on special missionary or representing their government at the conferences and congresses as 'extraordinary'. Kluber has said in 1890 "that by reason of the matters with which he has to deal, a diplomatic agent must always be regarded as the immediate representative of his Government and that the consequently posses the representation character. This quality, he adds is essential and the same for all minister to whatever class they belong."¹²

Russian revolution which brought Communists in power in Russia brought far reaching changes in world scenario. The new communist government, order to abolish all distinctions at diplomatic level placed all diplomatic agent in one category namely polpreds. But Western World refused to accept this new category and as such

¹⁰ Supra Note 1, p.211

¹¹ Robert Jennings, *Oppenheim's International Law*, (5th (Ed) Universal Law Publishing Co., Delhi), 1986, p.1056

¹² Kluber, 'Codification of International Law', *The American Journal of International Law*, Vol. 22, No. 1, (Jan., 1928), p.114.

erstwhile U.S.S.R had to face many difficulties at the time of international conferences, which compelled that government to change name of diplomatic agents, as 'diplomat' diplomats in commonwealth countries are called High Commissioners, who enjoy the privileges of an ambassador and also his status.

The classification adopted by eight powers: Austria, France, Great Britain, Portugal, Prussia, Russia, Spain and Sweden in Congress of Vienna (1815) broadly categorized diplomatic representatives into three categories namely:

- Ambassadors, including Legates and Nuncios. They came in the first categories and considered competent to speak on behalf of their sovereigns.
- In the second category were included Envoy, Minister, Envoys Extraordinary, Minister Plenipotentiary and other duly accredited diplomats.
- In the third category were covered Charge'd Affaires who were the representatives of their own Foreign Minister to the Foreign Minister of other states of which they were being sent.¹³

The Congress of Vienna and Congress of Aix La Chapelle 1818 settled the classification of diplomatic agents. Envoys are, broadly, classified into two categories

- (a) Envoys ceremonial-sent specially on occasions of marriage, coronation, funeral etc., and
- (b) Envoys political- sent for political negotiations and establishment of friendly relations¹⁴

Since Congress of Vienna and Congress of Aix La Chapelle evolved rules for classification of ranks, diplomats have been divided into four categories; they are in order of rank:

- Ambassadors extraordinary and plenipotentiary, and Papal legates or nuncios, who are accredited to Heads of states;
- Envoys extraordinary and minister plenipotentiary, similar accredited to Head of states;

¹³ Supra Note 1, p.211

¹⁴ Protocol of Aix-la-Chapelle of November 21, 1818.

- Ministers Resident, accredited to Heads of states now infrequently used since most states confer the title upon ministers;
- Charge d' affaires, ad hoc and ad interim, who are either permanently or temporarily in charge of a mission and accredited to the Foreign Minister, but not to the Head of the State.

If the sending State accredits a head of mission to one or more other States it may establish a diplomatic mission headed by a chargé d' affaires ad interim in each State where the head of mission has not his permanent seat.¹⁵ It is simple by courtesy and for the sake of convenience therefore, the classification thus adopted has been generally followed.

Article 1 of the Vienna Convention defines a diplomatic agent as the head of a mission or a member of the diplomatic staff having diplomatic rank. The head of the mission is the person who is sent by the State to act in that capacity. The general rule is that diplomatic agents are persons designated by the sending State, and the receiving State simply receives representatives in their country. It should be noted that bearing a diplomatic passport does not itself indicate diplomatic status; neither does the possession of a diplomatic visa or an identification card issued by the foreign ministry constitute acceptance as a diplomatic agent with such status.

The controversy regarding the designation and relative status of diplomatic representatives was resolved by the Congress of Vienna of 1815 and the same classifications have been adopted by Article 14 to 18 of the Vienna Convention. Article 14 divides heads of diplomatic missions into three classes

1. Ambassadors or nuncios accredited to Heads of State and other heads of mission of equivalent rank.
2. Envoys, ministers, and internuncios accredited to Heads of State.
3. Chargés d' affaires accredited to Ministers for Foreign Affairs.' The title of nuncio denotes a permanent diplomatic representative of the Holy See. In 1965, the Holy See established a new rank of Apostolic Pro-Nuncio which was accredited to States which did not bestow a representative of the Holy See the status of *doyen* of the diplomatic corps. A problem when classifying diplomats is that when ambassadors were sent on

¹⁵ Article 5 (2) Convention 1961

a temporary mission they were called Extraordinary, as contrasted with resident envoys.

However, today the title Ambassador Extraordinary and Plenipotentiary is given to all ambassadors, whether resident or not. An issue concerning the second grouping of diplomats is that it is virtually non-existent, and there have been debates on whether to simplify the classification of the head of mission into just two classes. When the change was proposed it was rejected primarily by the major powers. Therefore, the heads of missions remained divided into three classes. It is for the states concerned to agree upon the class to which the heads of their respective missions shall be assigned. Although there is no difference between heads of missions by reason of their class, there is an exception as regards precedence and etiquette, and separate mention of each class is therefore called for. In the course of arriving at an agreement, consideration is paid to the volume of the interest of the agent will have to protect in the foreign country. Formerly the United States of America did not send any ambassadors, but only the agents of lesser rank. Now the practice, however, has been changed. Besides the agents and Counsel-Generals who are accredited to states not fully sovereign where a foreign power has a large interest to protect.

The Ambassador is the diplomatic agent of highest rank and is regarded as the personal representative of the sovereign, and as such has the right to direct access to the sovereign, although this is very little importance at the present day. He has the right of being addressed as “His Excellency” in all communications. There is little difference between the Minister Plenipotentiary and the Minister Resident, both are accredited to the Head of the state, but whilst the Minister Plenipotentiary has the courtesy title of “His Excellency” the Minister Resident has not. The Charge d’ Affaires is the class of diplomatic agent and is accredited to the minister of Foreign Affairs and not to the Head of the State. He must be distinguished from charge d’ Affaires who take charge of the mission temporarily during the absence of the head of the mission.¹⁶

¹⁶ Sen.B, *International Law Relating to Diplomatic Practice*, (1st (Ed), Metropolitan Book Company Ltd., Delhi), 1950, pp. 21-22

The primary responsibility of heads of missions is to carry out the instructions of their ministry and to report back to it with the information gathered. They are expected to use their initiative in recommending policy that the government should adopt and report any significant information; they are responsible to their own government and the receiving State for the conduct of the mission. Technology now ensures instantaneous contact between the missions and the sending State. Diplomatic agents should in principle be of the nationality of the sending State with the intention of serving the sending State's interest. Heads of missions may be accredited to more than one State, provided there is no objection on the part of any of the States concerned. This is generally used in interest sections. The head of mission may also act on behalf of his State for any international organization. Further Article 14(1)(a) to (c) of Convention 1961 divides the head of the missions into three classes, the ambassador or nuncios accredited to heads of state, and other Heads of missions or equivalent rank; that of Envoys, Ministers and Internuncios accredited to Head of State; that Charge d' affaires accredited to Ministers of Foreign Affairs.

Convention 1961 under Article 14 (2) also states except for precedence and etiquette, there shall be no differentiation between Heads of Missions by reason of their class." The Convention gives discretionary to the states to make arrangement regarding class to which Head of the missions by the agreement between them.¹⁷ The category diplomats fall into determines the degree of privileges and immunities to which they may be entitled. The US Department of State has reserved the right to determine the proper classification of diplomatic staff. However, a US district court has said that diplomats do not hold such a right or discretion, especially when the rights and prerogatives of third parties may be affected.

The UK's Foreign and Commonwealth Office sometimes tries "*informally to persuade missions to withdraw a nomination in cases where the appointee is clearly fulfilling an administrative and technical rather than a diplomatic function*". A record of all the names and designations of heads of mission, staff and other institutions and individuals received in a diplomatic capacity are documented in the diplomatic list. This includes all personnel in the mission, the date of taking up function, names, rank of staff, address of the mission and resident addresses, whether

¹⁷ Article 15 of Convention 1961

they are married or not, whether a spouse has accompanied them and in some countries the names of unmarried daughters over the age of 18 years. The list is regularly revised and printed to ensure the right of the diplomat's status and immunity.¹⁸ A clear distinction must be drawn between the list compiled by the mission and the list compiled by the foreign ministry: the list compiled in the mission cannot be regarded as evidence of entitlement to immunity. It must be noted that notification is not a limitation on the right of the sending State to freely appoint its members.

In the present International Law the sovereign is no longer a crowned head at the apex supreme power. The nation alone is sovereign, and only the nation's interests are entrusted to diplomatic agents. The latter therefore, whether they are nationals of a great power or a small state, a monarchy or a republic, or whether they be called ambassadors or ministers, all derive their mission from same source. The interests which they have in their keeping are identical; the aim which they pursue is the same. The credentials by which ambassadors and minister plenipotentiary are accredited are absolutely identical, as are their rights and duties; the privileges and immunities granted them and the methods of communication with their own government and those to which they are accredited. Therefore, there is no longer any reason to place ambassadors in a higher category than minister.

Charges d'affaires differ chiefly in one point from the others in that they are accredited from Foreign Minister to Foreign Minister, whereas the other classes are accredited from Head of State to Head of State. Charges d'affaires do not enjoy, therefore, so many honors as other diplomatic envoys. A distinction has to be made between charges d'affaires (who is the permanent head of diplomatic mission) and charge d'affaires ad interim, the latter is a member of a mission who is appointed to act provisionally as head of mission while the regular head of mission is absent or unable to perform his function.¹⁹ Such charge d'affaires ad interim ranks below the regular charge d'affaires; he is not formally accredited from foreign minister to foreign minister, but simply delegate of the absent head of the mission.

¹⁸ G V McClanahan, *Diplomatic Immunity: Principles, Practices, Problems*, (Hurst: London), 1989, pp.86-91.

¹⁹ Article 19 of Convention 1961

In recent times the concept of *ad interim* has been greatly stretched, perhaps as a device to avoid having to call a diplomatic mission something other than an embassy. Thus from 1977 to 1980, due to their deteriorating relations over the Falkland Islands/Las Malvinas, Argentina and Britain reduced their diplomatic missions in each other's capitals to ones headed by a chargé d'affaires, but each officer was designated as acting *ad interim*. Likewise, the Argentinean head of mission in South Africa from 1974 to 1984 was a chargé d'affaires *ad interim*. And throughout the 1990s tension in the relations between Britain and Iran led to a situation in which the missions they exchanged were each headed by a chargé d'affaires.²⁰

The Vienna Convention on Diplomatic Relations (1961) defines the staff of a diplomatic mission as follows:

- The 'head of the mission' (chef de mission) is the person charged by the sending state with the duty of acting in that capacity;
- The 'members of the mission' (member de la mission) are the head of the mission and the members of the staff of the mission ;
- The 'members of the staff of the mission' (members du personnel de la mission) are the members of the diplomatic staff, of the administrative and technical staff and the service staff of the mission;
- The 'members of the diplomatic staff' (members du personnel diplomatique) are the members of the staff of the mission having diplomatic rank;
- A 'diplomatic agent' (agent diplomatique) is head of the mission or a member of the diplomatic staff of the mission;
- A 'member of the administrative and technical staff' (member du personnel administratif et technique) is a member of the staff of the mission employed in the administrative or technical service of the mission;
- A 'member of the service staff' (member du personnel de service) is a member of the staff of the mission in the domestic service of the mission;

²⁰ Berridge G. and Alan James, *A Dictionary of Diplomacy*, (2nd (Ed), Palgrave Macmillan, Great Britain), 2003, p. 234

- A 'private servant' (domestique prive) is a person who is in the domestic service of a member of the mission and who is not an employee of the sending state.²¹

No differentiation may be made between heads of mission on account of their standing between missions except in matters of precedence and protocol. In certain States the diplomatic representative of the Holy See takes precedence over all other heads of States in the same category. This was especially the case within Christian States. The Convention 1961 does not make mention of the role of the *doyen* or stipulate his functions. This can be the result of countries being sovereign to one another and the decrease of religion as a political influence. For his diplomatic colleagues the *doyen* acts as a spokesperson on matters of common concern especially on status, protocols, privileges and immunities. He speaks for the diplomatic body on public occasions and informs colleagues of developments of general interest to them.

Should the head of mission be temporarily vacant, absent or unable to fulfill his functions, the next member of the diplomatic staff with seniority will fill the post as *chargé d'affaires ad interim*.²² In order for this charge to be formalised, the receiving State must be notified and advised when the head of the mission will resume his functions. It must be noted that the *chargé d'affaires ad interim* is not accredited to the receiving State and is not officially the head of the mission, but merely acts as the head of the mission until such time as the head of the mission is liable to resume his function. If the *chargé d'affaires ad interim* is unable to continue with his appointment, the Ministry of Foreign Affairs and not the current *chargé d'affaires ad interim* may appoint a new *chargé*. In the event there is no diplomatic member available, a member of the administrative or technical staff may be appointed, but only if this has been approved by the receiving State.

The Vienna Convention on Diplomatic Relations 1961 broadly accepts the classification of Vienna congress 1815, while deleting 'Minister Resident' from classification of diplomatic agents. Legates are entrusted with special mission by the Holy See and they are normally chosen from ranks of cardinals. They are considered as Papal Ambassadors Extraordinary. Nuncios are generally chosen outside the rank

²¹ Article 1 (a) to (h) of Convention 1961

²² Lord Gore-Booth, *Satow's Guide to Diplomatic Practice*, (5th (Ed), Longman: London), 1979, p. 87

of cardinals and are treated as ordinary ambassadors-Resident. The state Holy See generally prefers sending Nuncios to states where Catholic Christians constitute a majority of population. These classes of envoys are treated as first-class diplomatic agents. They fully represent the sovereign of their states in the receiving state.

3.3 Appointment

The appointment of diplomats is necessary in diplomatic practice. It is the right of the receiving State to help to decide whether or not a diplomat may enter its borders. This in turn assists in limiting the number of foreign representatives from entering the receiving State and potentially causing disorder and/or abusing their status. During the 19th century the practice of seeking confidential approval from the receiving State went from general practice to customary rule. Therefore, before a head of mission is appointed to a post, the receiving State must first give its approval.²³ Article 4 of the Vienna Convention provides for the sending State to make certain that the agreement has been given by the receiving State for the representative it proposes to accredit as the head of the mission. The receiving State has the power to refuse acceptance and is not obliged to give reasons for its decision to the sending State. The UK claimed that it had a right to be free in its choice of ambassadors. Although it had to conform to the practice on agreement it expected reasons to be given for refusals.

Further, Article 4 is the exception to Article 7, which states that the sending State is permitted to freely appoint the members of the staff of the mission. The justification lies in the sensitivity of the appointment of a head of mission and the need for acceptance by both States to ensure effective diplomacy.

The agreement procedure is welcomed due to its informal nature. A head of mission is provided with credentials to prove his authenticity to the Head of State; this can include the curriculum vitae of the member. If the Head of State (who is a sovereign) dies, the credentials of all heads of mission accredited to the sovereign become invalid and therefore require renewal from the new Head of State. This practice does not apply to the death of a President.²⁴ The agreement may be revoked

²³ Brownlie, *Principles of Public International Law*, (5th (Ed), Oxford University Press: Oxford), 1998, p.353

²⁴ R G Feltham, *Diplomatic Handbook*, (7th (Ed), Longman: London), 1998, p.5

after it has been given, provided that the new head of mission has not yet arrived in the receiving State's territory. If the head of the mission is already in the receiving State, the appropriate options available to the receiving State are to declare the head of the mission *persona non grata* or to request the removal of the head of mission. Preuss states that it is as much the right of the State that requests an *agreement* as it is for the State refusing it that an envoy that is personally declared *persona non grata* before arrival should not enter into the State and perform any functions.²⁵ An example of a withdrawal was in 1968 when King Faisal of Saudi Arabia withdrew the *agreement* to the appointment of Sir Horace Phillips as Ambassador, on the grounds that the Saudi Arabian government had become aware that he was of Jewish descent. Since the receiving State is not required to give reasons for the refusal of the agreement, there are no legal constraints on its discretion. Suspicion of criminal activity or serious violation of human rights would be a sufficient reason to refuse an agreement in democratic States.

In 1984, the US rejected the nomination of Nora Astorga as the Ambassador for Nicaragua for his involvement in the assassination attempt on the President of Nicaragua. It has been accepted that the reasons for refusal should relate to the proposed head of mission, rather than to the relations between the two States.²⁶ States may refuse to receive diplomatic representatives either: (a) generally, or in respect to a particular mission of negotiation; or (b) because a particular representative is not personally acceptable. As a consequence of the right to refuse diplomatic relations or the right to refuse specified individuals, a State may impose certain conditions on the reception of individuals. Through these conditions it is possible for States to avoid their own nationals taking part in a foreign diplomatic mission and thus prevent a situation which is contrary to policy in most States. Once agreement is obtained, the accrediting State can proceed with the formal appointment of its representative.

3.4 Functions and Duties of Diplomatic Agents

A diplomat is at times a spoken as the eyes and ears of his government in other countries. His chief functions are to execute the policies of his own country; to protect its interests and its nationals, and keep his government informed major

²⁵ L. Preuss, 'Capacity for Legation and Theoretical Basis of Diplomatic Immunities', *New York International Law Quarterly Review*, (1932- 1933), p.170

²⁶ Supra Note 8, pp. 42-43.

developments in the rest of the world. According to Manu “an envoy alone makes allies and separates allies. He performs that functions where by rules are bought into alliance or separated.”²⁷ He has laid down three explicit functions; declaring of war peace, make or break alliances and should play his part in foreign land as not to imperil his personal security.

Kautilaya in his Arthasastra has discussed at some length the duties of ambassador who is sent to represent his country. Kautilaya laid stress on monarchy and was not favorable inclined to republics. He therefore, wanted that the powers and position of the monarch should be strengthened. The ambassador therefore, represented the king and his interest.

Some of the duties and functions that were assigned by Kautilaya were as under:

- Responsibility of delivering the message of master to other sovereign, and duty replay to his master, indicating real treatment of Darbar, receiving sovereign, the extent of his pleasure or wrath and so on.
- Responsibility to see that treaties properly implemented.
- To give impression about increasing power or strength of his sovereign.
- To ensure number of enemies to be reduced.
- Responsibility to reduce friends of the enemy by creating frictions.
- To intimate the military strength of the enemy to his sovereign.
- To collect copies of secret treaties concluded by any foreign government against his sovereign.
- To make sure that the enemy was weak, it was his responsibility to see that offensive and aggressive language was used, so that the enemy got excited and there was sufficient opportunity to invade the enemy and conquer his territories.
- To make treaties conclude in such a way that the imprisoned spies of his country are released from the prisons.

²⁷ Supra Note 7, p.52

- Responsibility to ensure that the strength of the enemy is destroyed and weakened.²⁸

In the ancient India the functions that were performed by an ambassador was that of a dignified spy. If he was to be success, for that it was essential that he should be expert in the art of spying and past master in creating friction. He should know the art of 'divide and rule'. He was always to be doubted and seen with suspicion. He was never to be depended upon.

According to **Lord MacLehose of Beoch**, *British Ambassador to Vietnam and Denmark, and British Governor and Commander-in-Chief at Hong Kong* viewed that "The embassy is large or small, he is the head of a family consisting of his staff, and he and its senior members must train, drill, direct, rebuke and encourage them so as to make the embassy a smooth-running machine that can be relied on to handle efficiently any situation, however, important or however trivial. Consequently a good ambassador must have personality and be a leader, be someone whom it is natural for his staff to look up to and someone also for whom looking down at his staff in friendship and in collaboration is natural."²⁹

Feltham on the tasks of Diplomats: R. G. Feltham, Director of the Oxford University Service Course for overseas diplomats, has admirably summed up the tasks of diplomats in his concise and illuminating 'Diplomatic Handbooks'.³⁰ These include the following:

- i. Preparing a precise and cogent memorandum on a situation based on reports and documents;
- ii. Making verbal statement to, or holding discussion with an individual, a committee, or a large gathering of people;
- iii. Organizing a conference, visit or celebration;
- iv. Planning the tactics of a diplomatic move, or the policy to be adopted at a conference;
- v. Reporting on events, policies, people and trends in a foreign country;
- vi. Presenting a favorable image of one's country;

²⁸ Mazumdar R.C., *The Vedic Age*, (Vol I, 1st (Ed)), 1952 p.67

²⁹ *The American Journal of International Law*, Vol. 21, No. 4, (Oct., 1927), p.742

³⁰ *Supra* Note 24, pp. 33-34

- vii. Putting across to a foreign diplomat, official, industrialist, etc., a policy based on instructions received from his own government ; and
- viii. Facing up a verbal duel or confrontation- at a meeting, conference, or man- to-man.

Prof. Morgenthau emphasizes that “*As the foreign office is the nerve centre of foreign policy, so are the diplomatic representatives its outlays fibers maintaining the two-way traffic between the centre and the outside world.*”³¹ Further, he has stated that the three basic function of diplomat towards his government such as symbolic, legal and political.

Joseph C. Grew explained the “supreme purpose and duty of an ambassador”:

“He must be, first and foremost, an interpreter, and this function of interpreting acts both ways. First of all tries to understand the country which he serves-its conditions, its mentality, its actions, and its underlying motives, and to explain these things clearly to his own Government. And then, contrariwise, he seeks means of making known to the Government and the people of the country to which he is accredited the purposes and hopes and desires of his native land. He is an agent of mutual adjustment between the ideas and forces upon which nations act.”³² The changed attitude of the late fifteenth-century Italians towards the duties of ambassador, and the reorientation of changes, emerge clearly from the first literary treatment of new diplomatic machinery.

According to Ermolao Barbao’s “the first duty of an ambassador is exactly the same as that of any other servants of government, that is, to do, say, advise and think whatever may be best serve the preservations and aggrandisement of his own state.”³³ Kulski on the Functions of Diplomatic Agents: W.W. Kulski in his ‘International Politics in a Revolutionary Age’ enumerates the tasks of diplomats as:

- i. To gather and asses the information;
- ii. To offer advice (home government) ; and

³¹ Anatha Krishna Bhat .P, *International Relations*, (1st (Ed), Mangalore Publication, Mangalore), 2001, p.82

³² Supra Note 2, p.320

³³ Supra Note 6, p.109

- iii. To carry out the decisions of the government in their personal contacts with the representatives of foreign governments.³⁴

These three essential functions of the diplomatic agents have been defined throughout the long history of diplomatic practice and have not declined in importance at the present time. They constitute the heart of the so called old diplomacy, which is old as judged by the ancientness of its history but which remains young as long as we live in a multistate system. This century added new methods of international intercourse, such as personal diplomacy, the use of mass propaganda as a weapon of conflict, economic and technical assistance as a new means of foreign policy, and the multiplication of non diplomatic agents of implementation. However, the three traditional functions of diplomacy remain as important as ever.

J.R. Childs point out that diplomat is expected to perform the following four functions:

- Representation
- Negotiation
- Reporting
- Protecting the interest of his nationals abroad.³⁵

The present international instrument on diplomatic relations has accepted these functions under Article 3 of Vienna Convention of Diplomatic Relations 1961.

The traditional distrust of diplomatic missions as instruments of espionage and intrigue has all but vanished, and has been supplanted by an appreciation of their functions as agencies for facilitating the pacific intercourse of states. The scrupulousness with which the diplomatic character is now respected and the growing security of the legal order in most states make possible a reduction of diplomatic prerogatives without jeopardizing the successful and independent fulfillment of the mission which it is their purpose to secure. The widest pretensions to exemptions to exemption from the authority of the receiving state were advanced at precisely those

³⁴ W.W. Kulski, *International Politics in a Revolutionary Age*, (J.B. Lippincott Co., New York) 1963, p. 552

³⁵ Supra Note 31, p.82

times in which diplomats were in practice subjected to the greatest amount of interference and control.

Further, Article 3 of the Convention enumerates the functions of diplomats as representing the sending State in the receiving State; protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law; negotiating with the Government of the receiving State; ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State; promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.³⁶ Reporting on conditions and developments in the receiving state, though originally meant to refer only to political matters, would appear to include in the modern context cultural, social, economic activities of the country, and generally all aspects of life which may be of interest of the sending state. Not only the interest of sending state but he owes some duty towards the receiving state.

Mr. Lansing, a Former Secretary of State of the United States of America, once observed: "Formerly diplomacy was confined almost exclusively to political and legal subjects and the training of the members of the Diplomatic Services was devoted to that branch of international intercourse. Today our embassies and legations are dealing more and more with commercial, financial and industrial questions."³⁷ The observations are even truer today than at the time they were made. A diplomatic representative does also perform functions which were traditionally regarded as falling within the scope of consular functions. The present International Law on diplomatic relations is based on the theory of interest of functions. The immunities are founded on common usage and tacit consent of nations. It is believed that basis for dealing the subject of diplomatic immunities is the necessity of pertaining free and unhampered exercise of the diplomatic function and maintaining the dignity of the diplomatic representative of state which he represents and the respect properly due to secular tradition.

³⁶Article 3(a) to (e) of Convention 1961

³⁷ Supra Note 16, pp. 46-47

Article 104 and 105 of the Charter of the United Nations provide that “Organisation shall enjoy in the territory of each of its Members such legal capacity and such privileges and immunities as are necessary for the fulfillment of its purposes, and that representatives of the members and officials of the Organisation shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation”. The function of diplomatic immunities the theory *ne impediatur legation* or the interest of function is now predominant, having supplanted the function of extra-territoriality as the theoretical basis of diplomatic privileges and immunities. It shares the field with the representative theory, without being excluded by it.

Representation

The main function of diplomat is that of representing the sending state, protecting its interest and those of its nationals. The diplomat has thus represents his state in legal proceedings in the receiving state, either as plaintiff or defendant.³⁸ The diplomat acts as agent of communication between his own foreign office and that of a state to which he accredited. In the eyes of many citizens of the country he represents, and that his country is judged according to the personal impression he makes. The diplomat must cultivate a wide variety of social contract, with his fellow diplomats, with influence persons in all walks of life, and with articulate groups in the country. Ambassador *Grew*, a career diplomat of long experience, referred to them as “the X-Ray language vibrating beneath the surface of the spoken and written word,”³⁹ which is simple a diplomat’s way of saying that a trained mixer-observer-auditor can often pick up information or intelligence of great value in-or from- conversations at social functions.

Negotiation

Article 3 of the 1961 Vienna Convention on Diplomatic Relations (in short Convention 1961) mentions, inter-alia, the conduct of negotiations with the government of the receiving state as one of the functions of a diplomatic mission. That function has been justly considered as one of the core tasks of diplomacy

³⁸ Castiglioni V/s Federal People’s Republic of Yugoslavia, ILR, 19 (1952) No 43, http://www.ILR.org/newweb/newsletter/No73/what_is_diplomati_immunity.htm (accessed on 20th march 2009)

³⁹ Supra Note 2, p. 84

throughout the long history of international relations. The art of negotiating is so closely associated with the profile of a diplomat that it has become commonplace to view the diplomatic representative of a state as a negotiator par excellence. Negotiation and bargaining these terms are well known to laymen and scholars alike but the actual work symbolized is not too well understood by either. These terms often evoke images of tired old men around a green baize tables in Geneva or The Hague trying to outwit each other, resorting to cunning subterfuges to gain points for their side. While it is true that some important negotiations take place at the international conference tables, the diplomatic function of negotiation and bargaining has a much broader and deeper connotation.

Cambon has written that “the art of diplomat stems from the art of governing, for every diplomatic action ends in negotiation, and who ever says negotiation means, at least in part, compromise.”⁴⁰ The art of diplomacy is the art of compromise to know how and when to compromise is the hallmark of the accomplished negotiator. A good diplomat is always a good compromise unless the policy of his nation is to prepare way for war by the extortion of diplomatic concession a process Hitler brought to near perfection.

The art of negotiating is so closely associated with the profile of a diplomat that it has become commonplace to view the diplomatic representative of a state as a negotiator par excellence. However, it must be recognized that the average diplomat of today, when assigned to a typical bilateral embassy, very rarely acts as a negotiator in the traditional sense. As a general rule, the business of conducting negotiations in the bilateral relationship is left to experts or representatives from the capitals. The embassy and its diplomatic personnel are no longer the main instruments or conduits of bilateral negotiations, as they were in the past. This state of affairs is hardly surprising in a world of instant communication where direct contacts between the authorities concerned leave little room in the bilateral negotiating process for the diplomatic missions. The role of a bilateral embassy in the classic domain of negotiations can be described as best as ancillary. The embassy may be called upon to perform such minor tasks as the formal signature of an agreed text by the ambassador

⁴⁰ Fredrick.H. Hartmann, *The Relations of Nations*, (1st (Ed), The MacMillan Company, New York), 1987. p.94

or to provide the logistics to the negotiators from the capitals. Negotiation involves a delicate balance between giving what is asked and getting what is wanted. To obtain the desired result, the negotiator must turn everything into account. Admiral Turner Joy the chief delegate to the Korean Armistice Conference recommended that “never concede anything to the communists for nothing, merely to make progress. Make the communists pay for your acceptance of their point of view. Require an equivalent concession to match yours To a communist, you’re ready for acceptance of his proposed solution merely because it is logical and correct is a sign of at least undue haste, indicating a precarious basis on your part.”⁴¹

In these days, a new trend has been developed in which, the diplomats are providing all necessary assistance, whereas actual negotiation takes place by the Heads of Government or States or Foreign Affairs Ministries. In other words, the diplomats do furnish only a supportive role in the sphere of negotiations in the international community of today with the growing interdependence of nations, the need for mutual consultations among governments have proved to be a much greater importance than it was in the past, and in this sphere the diplomatic agent plays an important role in negotiation.

A recent trend which has been marked since World War II, is that governments often seek support for their points of view from other nations in respect of their claims or international disputes in which they may be involved, the reason being that international disputes in which they may be involved, the reason being that in the international community of today world opinion has become a powerful factor which cannot be ignored even by the most powerful of nations. For the same reason, business is also ready to invest in intercultural seminars, while governments often see this as unnecessary. Ministries of foreign affairs, in particular, feel that their diplomatic mores overarch cultural differences and that culture is therefore not a real factor in negotiation processes.

Reporting

Article 3(d) Convention 1961, ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the government of the

⁴¹ Ibid, p.95

sending State; reporting from diplomats in the field is the raw material of foreign policy. These reports cover nearly every conceivable subject, from technical studies to appraisals of the psychology of nations. Diplomats must, must above all, be good reporters. According to United states Department of States on the American Foreign services diplomats are expected to “observe, analyze and report on political, social and economic conditions and trends of significance in the country in which they are assigned. Some major subjects of these reports are legislative programs, public opinion, market condition, trade statistics, finance, production, labor, agriculture, forestry, fishing, mining, natural resources, shipping, freights, charters, legislation, tariffs and laws.”⁴²

The diplomat has to prepare periodic reports is therefore, a regular feature of the work of diplomatic missions. In former times, diplomats were often considered to be official spies, and for this reason envoys resident in the Muslim countries of West Asia were looked upon with much suspicion. Even in Europe, diplomatic representatives were regarded as honorable spies as they supplied the information necessary to guide their respective government in shaping their foreign policies. It was for this reason that King Henry VII of England was disinclined to have an ambassador of any foreign king within his within his realm though he himself occasionally sent ambassador to transact state business with foreign rules.

In modern times, however, an envoys right to report to his home government on the conditions in the state to which he is accredited not only regarded as legitimate but is also considered to be in the mutual interest of nations. With the growing contacts between nations practically in every sphere of life consequent upon the increased facilities of communications, the welfare of one state has become closely linked with welfare of others.

Protecting the Interest

Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;⁴³ it is the duty of the diplomat to protect the persons, property and interests of his native land situated in the

⁴² The foreign services of the United States Dept. of State Pub.3612, Foreign Services Series 6 (Washington, D.C: Government printing office, August 11, 1946) <http://www.dfa.gov.za/foreign/forrep/forf.htm> [Accessed on 28 June 2009]

⁴³Article 3(b) Convention 1961

foreign state. There shall be great responsibility upon the diplomats at the time of wars than at the time of peace. Generally, there shall be tensions between the two states at war-time. Then the diplomats should work cautiously, just like walking on the edge of knife.

The diplomat has a duty to look after the interests, persons, and property of citizen of his own state in the receiving state. He must be ready to assist them when they get into trouble abroad, may have to take charge of their bodies and effects if they happen to die on a trip, and in general acts as a “troubleshooter” for his fellow nationals in the receiving state. Diplomat has to perform his functions of representation and negotiation carefully in order to protect the interests of his national and as well as the interest of his nationals in the representing country. A good number of his countrymen who are in the nation where he is stationed look up to him to safeguard their interests including security. In short, he has to take utmost care that the multifarious interests of his motherland and nationals are not jeopardised in the nation where he is accredited.

The diplomats not only have the duty towards the sending state but also have the duty towards the receiving state in many respects.⁴⁴ The diplomat is having the duty not to use the premises of the mission in any manner incompatible with the functions of the mission as laid down in the Vienna Convention or by other rules of general international law or by any special agreements in force between the sending and the receiving State. Diplomats have not only been prohibited from using the premises in a manner prejudice to the receiving state. And respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State. And shall always conduct official business with the receiving State entrusted to the mission by the sending State only through the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed.

It is fairly obvious that the diplomatic agent in order to discharge his functions effectively must receive the cooperation and assistance of the state to which he is accredited. The receiving state is thus under an obligation in conformity with international law and practice to allow him every opportunity to carry on his activities without let or hindrance, and for this purpose to treat him in a manner benefitting his

⁴⁴Article 41 (1) to (3) Convention 1961

position and to accord him the necessary immunities and privileges. The diplomatic agent however, has the corresponding duties towards the receiving state, that is, his duty of non-interference in the internal affairs of the state, the obligation of respects the local laws and regulations and in duty not to abuse his rights and privileges. The express prohibition imposed on an envoy in Article 41 of the Vienna Convention not to interfere in the internal affairs of the receiving state appears to be correct both on principle and in the interest of comity of nation. In principle it would appear to be a sound proposition to say that a diplomatic officer is not within his rights to interfere in the internal affairs of the state.

Looked at from true perspective it would appear that the internal affairs of the state are hardly of any consequence to him in discharging his functions, and it may well be said that he has only to do his best in the circumstances and conditions that may be obtaining in the receiving state. It may, however, be argued that the receiving state and to obtain advantages for his nationals by all possible means at his disposal including the overthrow of the government in power by rendering aid and assistance to opposition parties if the attitude and policies of the government are detrimental to the interests of his home state or its nationals. If this position were to be accepted it would not only lead to chaos but would also strike at the very root of diplomatic relations.

Apart from his duty of non-interference, the diplomat is expected to respect the laws and regulation of the receiving state. He should don't violate such laws himself nor should he encourage or connive at violation of laws by others. A diplomat is, no doubt exempted from the jurisdiction of the receiving state but this only means that he cannot be proceeded against in that state for any violation of the laws. His immunity does not mean that he need not observe the laws- in fact he is expected to respect such laws in the interest of comity. It is also a duty to see that servants and persons under his control do not violate the laws and regulations of the receiving state, and if they do so, to see that they are adequately punished. He should also refrain from giving shelter to fugitives from justice and surrender persons wanted in connection with violation of local laws.⁴⁵

⁴⁵ Not in the case in Tehran diplomats in U.K in 1984

The diplomat must not abuse the privileges accorded to him by the receiving state. It would be a violation of his duty if he uses the diplomatic premises for a purpose for which it is not legitimate to use such premises, like allowing any part of premises to be used for the purpose of trade or business, or if he used for wrongful confinement of a person as happened in the Kasenkina case in New York, it would amount to an abuse of his privilege.⁴⁶

The concept of diplomat duty towards the receiving state as long been recognized by jurist and writers on international law as also in the practice of the state. The practice and competence of the receiving states in international law to declare an offending diplomat *persona non-granta* itself shows that the diplomat owes a duty to the receiving state can take action by refusing to receive him any longer in the capacity of an accredited diplomatic agents. Oppenheim says: “the presupposition of privileges he (the diplomatic envoy) enjoys is that he acts and behaves in such a manner as harmonizes with the internal order of the receiving state. He is therefore expected voluntarily to comply with all such commands and injunctions of municipal law as do not restrict him in effective exercise of his functions.”⁴⁷ The same principle has been embodied in Article 12 of the Havana Convention on Diplomatic Officers, Article 40 of the Draft Article drawn up by the Asian-African Legal Consultative Committee and Article 40 of the Draft Articles drawn up by International Law Commission. The position has now been accepted by the Convention 1961 can be regarded as universally accepted.

The position of diplomats while performing his functions and duties is like a person standing on knife where he has not only perform the functions in manner to protect interest of his, but also has to respect the sovereignty and law of the state where he is performing his functions. The diplomat has a great responsibility unlike the ancient time where his duty and functions where totally towards the protecting of interest of his state and state alone as propounded by Kautilaya in his Arthasastra. But this is not the case of ambassador today. He is a dignified person with high character and responsibility. He is expected to develop healthy relations with the ambassadors of other states and to see that the image of his state in the eyes of other

⁴⁶ Supra Note 16, p. 78

⁴⁷ Supra Note 11, pp.708-709

states increases. He cannot afford to be deceit or cunning because today it is believed that cunningness in the long run is likely to do more harm than good to his country.

3.5 Staff

The need for discussing various levels and categories of staff will indicate what level of immunity and privileges they are allotted. Immunity and privileges have changed from past practices of absolute immunity to restricted immunity. Members of diplomatic staff are defined as the members of staff of the mission having diplomatic rank, which include attachés, advisers and members of other ministries.⁴⁸ Article 1 of the Vienna Convention divides the staff of the mission into the following categories:

1. The diplomatic staff, which consists of the members of the mission having diplomatic rank as counselors, diplomatic secretaries or attachés.
2. The administrative and technical staff, which include clerical assistants and archivists.
3. The service staff, who are the other employees of the mission itself, such as drivers and kitchen staff.

The value of ensuring proper classification of staff is to prevent, for example, a driver being notified as a member of the administrative and technical staff who enjoys full immunity from criminal jurisdiction, while they instead belong to the service staff, which enjoys immunity in respect of acts performed during the course of their duties.

Article 7 allows for the sending State to freely appoint members of staff subject to certain exceptions. The text of Article 7 seems clear, but several delegations at the Vienna Convention found that the Article needed consent from the receiving State. It was decided in *R v Lambeth Justices, ex parte Yusufu*⁴⁹ that Article 7 was qualified by Article 10⁵⁰ and that failure to notify the receiving State destroyed the representative's claim to immunity. Further, Article 7 does not indicate whether the receiving State has to provide reasons should there be a rejection of any particular representation. Since heads of missions and diplomatic agents follow a system of

⁴⁸ Supra Note 22., p.90

⁴⁹ Supra Note 23, p.354

⁵⁰ Article 10 provides for notification of staff appointments and movements.

notification it would only be sensible that notification of staff should also follow this route.

If the freedom of the sending State to appoint members is to be effective, then the persons appointed must be admitted to the receiving State and exempted from immigration restrictions. Further, the freedom to appoint extends to the freedom to dismiss. This freedom is broadened to allow the sending State the freedom to specify the functions members are to perform, and their classification, Article 10 of Convention 1961 sets out the duties of notification of the receiving State, which previously was imposed not by customary rules, but through common practice. Notification is not only required for the nomination of members of staff, but also of the arrival and departure of members of staff and domestic staff, including their families. It has been stated by governments like the UK that the Vienna Convention has not provided an objective definition of staff categories. The UK aired its concerns in its White Paper in 1985 by stating:

*“[I]t is virtually impossible in most cases for the FCO [Foreign and Commonwealth Office] to tell whether a person should more properly be described as a diplomat or as a member of the administrative and technical staff or indeed as a member of the mission at all.”*⁵¹

Governments then can investigate the matter after notification and then answer the questions relating to nationality, residence and family status. The duration of any appointment depends on various factors like the number of staff, their importance, policies and any arguments in favor of remaining in office for a lengthy period. These arguments can include the need to settle down domestically before they begin to concentrate on their work; the need for an opportunity to get to know and understand the country, its language, history, politics and culture; and the need to make personal contacts and save on travel and costs of transfer expenses for the government. A disadvantage of the above is that the representative may become emotionally involved in the problems of the receiving State and be unable to act and advise his own government without influence. Another problem is that the representative, by staying

⁵¹ Higgins, 'UK Foreign Affairs Committee Report on the Abuse of Diplomatic Immunities and Privileges: Government Response and Report', *American Journal of International Law*, 1986, p. 138.

so long in the receiving State, may begin to lose touch with the attitudes and events of his home country.

3.6 Family

According to Higgins, the UK Government stated that the Vienna Convention requires but has failed to provide a definition of “*members of the family forming part of the household*”.⁵² The concern behind this lacuna is that receiving States, and to a lesser extent sending States, are uneasy about supporting unnecessarily large diplomatic entourages. Receiving States also have added pressure from family members seeking local employment. Family members are not bound by Article 42 to refrain from practicing for personal profit in any professional or commercial activity. States are in the practice of prohibiting employment of family members in the absence of any bilateral agreements or arrangements.

The Canadian Department of External Affairs notified its policy to all heads of mission in 1986 whereby “member of the family” was interpreted as those “dependent” on the diplomatic agent, and this could be “*the spouse, the aged or infirm parents of either spouse; unmarried sons/daughter under the age 21 who live with their parents; unmarried sons/daughters between the ages of 21 and 25 who are attending a Canadian educational institution full-time and living with their parents; and unmarried sons/daughters over the age 21 who are physically or mentally disabled*”.⁵³ Courts have not had any difficulty in finding that minor children form part of the “*members of the family*”.⁵⁴ The courts have had difficulty deciding as to whether adult children dependent on a diplomat parent is entitled to immunity. The Convention 1961 does not provide any clarification. The UK’s practice is to allow children of the age 18 or over the equivalent immunity as the rest of the family, provided they are clearly resident with the family members of the mission and are not engaged in employment on a permanent basis.

The US Secretary of State issued a policy to all the heads of missions in 1986 that recognized that the concept of “family” differs among societies and claims that it

⁵² R Higgins, ‘The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience’, *American Journal of International Law*, 1985, p. 138.

⁵³ J Brown, ‘Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations’, *International & Comparative Law Quarterly*, 1988, p. 65.

⁵⁴ A grandson has been accepted as a “member of the family” and together with spouses it has been held that they enjoy immunity and inviolability.

should be resolved according to the standards of the receiving States and on the basis of reciprocity. In the US, application of ‘family’ includes a spouse of a member of a mission and his unmarried children under the age of 21. Children under the age of 23 who attend an institution on a full-time basis also fall under the definition. Other persons who reside with diplomats in his household can, under exceptional circumstances and with the approval from the Department of State, be considered “family”. Thus, as Brown states, the term “*member of the family*” should not be interpreted narrowly, for it can in certain circumstances include extended family.

3.7 Diplomatic Missions

The establishment of diplomatic missions is through mutual consent and understanding of the functions that will be undertaken by the mission and its representatives. Diplomatic missions consist of diplomatic representatives from the sending State to the receiving State together with the staff. The functions of the missions are consistent with the functional approach theory as stated in the Convention 1961. The first time that this had been published in a formal legal instrument was in Article 3 in the listing of functions. By agreeing to establish permanent diplomatic missions, a State implicitly accepts certain obligations, namely, to provide a facility and immunity that enables the mission to function satisfactorily and for those working in the mission to have personal privileges to carry out their functions. Diplomatic missions are situated in the capital of the State, and additional offices may only be established in other parts of the country with permission.

For instance in South Africa, the Republic of Finland has embassy offices in both Pretoria and Johannesburg, while the embassy of France is situated in both Pretoria and Cape Town.⁵⁵ Article 11 provides that without a specific agreement between States, the receiving State may require that the size of mission be kept within reasonable limits. The test is not an objective one, but simply the opinion of the receiving State. However, it must be pointed out that should the receiving State object to the size of missions it would be a breach of the provision. Yet limiting the size of a mission could possibly aid in reducing abuses of immunities.

⁵⁵ Department of Foreign Affairs, South Africa *Foreign Representation in South Africa* <http://www.dfa.gov.za/foreign/forrep/forf.htm> (accessed on 28 June 2009)

3.8 Special Missions

Special *ad hoc* missions are sent by the sending State to fulfill a specific purpose. Such missions may be accredited irrespective of whether there are permanent diplomatic and consular missions and relations. A special mission can be defined as a “temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task.”⁵⁶ The Convention on Special Missions in 1969 (in short Convention 1969) was formulated to guarantee immunities to special missions. Interestingly, this Convention 1969 only came into force in June 1985 and it is based primarily on the Vienna Convention 1961, but also borrows some texts from the Consular Convention 1963. The Convention 1969 was drafted only after the conclusion of the Convention 1961. Special missions have different motives for their existence; for instance, where a foreign minister visits another State for negotiations, or a visit of a government trade delegation to another country for official business. For example, in 1978, a US-Egypt agreement allowed for the formation of a special mission that headed an Economic, Technical and Related Assistance Agreement. This mission was to carry out and discharge the responsibility of the US Government to Egypt.⁵⁷

The preamble of the Convention 1969 acknowledges that it was based on and complements the Convention 1961 and Consular Convention 1963. Furthermore, preamble of the Convention 1969 states that the functional necessity theory forms the foundation for the immunities and privileges granted to special missions. As with most Conventions, Article 1 contains a list of definitions which lays down the necessary condition a mission must fulfill in order to be regarded as a special mission.

Article 2 of Convention 1969, enumerates that in order for a special mission to be established, there needs to be consent from the receiving State. Unlike permanent missions, consent for special missions can vary from a formal treaty to a tacit consent. Further, the Special Missions, Convention, unlike the Vienna Convention, does stipulate the functions of the mission. Article 3 states the functions of the special

⁵⁶Article 1 of the Special Missions Convention 1969

⁵⁷ Supra Note 18, p.72.

mission would be determined by mutual consent of the parties involved. Should there be any conflict; the sending State would decide how to deal with such conflict.

Article 6 allows for two or more States to send a special mission at the same time to another State in order to work together on a subject of common interest. The sending and receiving of special missions occurs between States that have diplomatic or consular relations, but Article 7 states that it is not a prerequisite that such relations must be present. With regard to the appointment of members taking part in the special mission, as based on Article 7 of the Vienna Convention, there are two distinct differences. Firstly, Article 8 applies to all members of the special mission, while in permanent missions it only refers to the head of the mission; and secondly, the sending State must inform the receiving State of the size and composition of the special mission.

The composition of the special mission depends on the nature of the task. There is no distinction made between special missions of a technical nature and those of a political nature. However, the Special Missions Convention does stipulate that every special mission must include at least one representative from the sending State. Commencement of the functions of the special mission occurs as soon as it makes official contact with the Ministry of Foreign Affairs or the specific organ. The location of the mission is mutually agreed upon between the States and its office is established near the place where it performs its functions.⁵⁸

As with permanent missions, special missions enjoy inviolability of their premises, archives and documents, and freedom of communication.⁵⁹ Article 27, dealing with freedom of movement, is based on Article 26 of the Vienna Convention, except for one difference that the words “*as is necessary for the performance of the functions of the special mission*” was added and this further emphasised the fact that they are short-term and specific, thus not requiring too much freedom of movement to travel as widely as is needed in permanent missions. Privileges and immunities are granted to members of special missions to an extent similar to that accorded to permanent diplomatic missions. Immunity from jurisdiction includes immunity from criminal prosecution and limited civil immunity, as stipulated in Article 31 of the

⁵⁸ International Law Commission, *Yearbook of the International Law Commission*, 1967, p. 356.

⁵⁹ Article 25, 26 and 28

Convention 1969 and Article 31 of the Convention 1961. This is extended to members' families; members of the administrative and technical staff also enjoy the privileges and immunities that are specified in Articles 29 to 34 of the Convention 1969, except that immunity from civil and administrative jurisdiction does not extend to acts performed outside of official acts. Members of the service staff and private staff only enjoy immunities in respect of acts performed in the course of their duties, but they also are granted exemption from dues and taxes on the emoluments they receive and exemption from social security legislation.

Nationals of the receiving State receive immunities only with regard to the official acts performed by them. Immunities are granted to a mission in transit through a third State only if that State has been informed beforehand of the transit and no objection has been raised. As with the Vienna Convention, members of the special mission must respect the laws and regulation of the receiving State and not interfere with its internal affairs. Should a member abuse his position, the receiving State reserves the right to declare such member *persona non grata* at any time. This rarely occurs, owing to the short duration and limited field of activity performed by special missions. The sending State also has the right to waive the member's immunity, expressly to allow for prosecution.⁶⁰

3.9 When Diplomacy is Revoked

In modern times every foreign officer has to be prepared to face unexpected situations where they may have to terminate overnight the Diplomatic Mission in the receiving state. By International Convention it has been agreed that a Diplomatic Mission has to be terminated for specified reasons mentioned therein both under the Havana Convention and reiterated under Vienna Convention on Diplomatic Relations 1961.

A diplomatic mission can be terminated in various ways. The most common way is by recalling by accrediting State. Termination of missions may be withdrawn by mutual agreement or through an act of foreign policy, such as prelude to war. A letter of recall is handed to the Head of State or the Minister of Foreign Affairs and the envoy in turn receives a *Lettre de Récréance* acknowledging the recall. Another

⁶⁰ Article 36, 37, 38, 41 to 43 and 48 Convention 1969, this provision is similar to Article 32 of the Convention 1961.

method is where the sending State notifies the receiving State that the mission's function has come to an end.⁶¹

A diplomatic agent whether he be accredited as the head of a permanent mission, or sent temporarily for a specific purpose, has a mission to fulfill, and his mission comes to an end in one of the various ways.

The Havana Convention 1928 states that:

“A mission of diplomatic officer ends:

- By the official notification of the officer's government to the other government that the officer has terminated his function;
- By expiration of the period fixed for the completion of the mission;
- By the solution of the matter, if the mission had been created for a particular question;
- By delivery of passports to the officer by the government to which he is accredited;
- By the request for his passport made by the diplomatic officer to the government to which he is accredited.”⁶²

The United Nation Conference on Diplomatic Privileges and Immunities supersedes, in a way, the provisions of Articles of the Havana Convention.

The Vienna Convention on Diplomatic Relations contains specific provision relating to termination of diplomacy. The Convention states that “the function of a diplomatic agent comes to an end inter alia: “on notification by the sending state to the receiving state that the function of the diplomatic agent has come to an end; on notification by the receiving State to the sending State that, in accordance with paragraph 2 of Article 9, it refuses to recognize the diplomatic agent as a member of the mission.”⁶³ Further, the Convention states that “The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest

⁶¹ As regulated by Article 43 of the Convention 1961.

⁶² Article 25 of Havana Convention 1928

⁶³ Article 43 (a) and (b) of Convention, 1961

possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.”⁶⁴

The movement the notification is made both by the sending state and the receiving state as to the termination of the mission; it is the duty of the diplomatic agent to adopt a formal procedure in leaving the receiving state.⁶⁵ Such formal procedure includes a request to the Head of State of the receiving state to grant him farewell audience. The purpose of granting farewell audience is to cordially send back the diplomatic agent in accordance with the dignity and status of sending state. The termination of a diplomatic mission may come about in a number of ways. The diplomatic may, of course, resign.

Recalling

Article 9 allows for recall at the request of the receiving State, and should such an event occur the receiving State is not obliged to provide reasons or any explanations for such a request. A more obvious scenario would be where the receiving State delivers passports to the mission and its staff when a war breaks out between the sending and receiving States. Furthermore, the receiving State may declare representatives *persona non grata* and thus no longer recognize them as members of the mission. Even if a mission is withdrawn and diplomatic relations has broken off between the countries, contacts between them are rarely ever terminated completely. A prime example is when consular offices are used to ensure ongoing relations.

Recalling by the accreting state temporarily breaks off diplomatic relations for any grave cause.⁶⁶ The envoy may be recalled either due to the dissatisfaction of his own government to which he is accredited. Sometimes the receiving state may also demand the recall of an envoy if he made obnoxious to the government of the receiving country. The accrediting state has a right to ask for reasons leading to the demand of recall by the by the receiving state. If the reasons are inadequate, the accrediting state may mark its sense of disapproval by leaving the embassy in charge

⁶⁴ Article 44 of Vienna Convention

⁶⁵ Krishnamurthy GVG, *Dynamics of Diplomacy*, (1st (Ed), Nation Publishing House New Delhi), 1968 p. 95

⁶⁶ Government of India over the question of Goa withdrew their representative from Lisbon (Portuguese).

of an inferior member of its diplomatic service. Such recall may also occasion a rupture of diplomatic intercourse.

Different views have been expressed by various authorities as to whether a state should recall its envoy when requested by a receiving government. The United States of America has given its sanction to what seems to be the better view which is that a state is in duty bound to recall any envoy's who has become unacceptable to the government of which he is accredited and that such a state has right to ask for the reasons for recall or terminate the function of diplomat.⁶⁷ The opposite view is that a country need not recall its agent or acquiesce in his dismissal unless it is satisfied that the reason alleged is of sufficient gravity.

Dismissal

Dismissal of an envoy by the receiving state is the extreme step taken by it when its demands for recall of the envoy are not complied with. There may as well be differences between the sending state and the receiving state and passports may be given to the envoys of the receiving state marking his dismissal.

If the sending state declines to recall its envoys, either because it does not recognize his act as misconduct or for other reasons, the receiving state may refuse to recognize him as a member of the mission.⁶⁸ The difference between the 'recall' and 'dismissal' is, that in recall the receiving state will wait for the orders of the sending state recalling the envoy, whereas in dismissal without notice there is no such procedure adopted and it is the duty of the sending state to make immediate arrangements for the termination of diplomat's functions in the receiving state. It is called *Persona non granta*, procedure is adopted but with reference to dismissal it is summary and procedure is simplified. With growing complexity in international relations it is not possible to dispense with either of these two methods of termination of a mission.

Notification of someone as unacceptable, without further step of either the recall or termination of functions of that person by the sending state or notification by the receiving state that it refused to recognize him as a member of the mission, has been held not to result in loss of immunity. When a state dismisses an envoy without

⁶⁷ Article 9 (1) Convention 1961

⁶⁸ Article 9 (2) and Article 43 (b) Convention 1961

waiting for his recall on the ground of misconduct, not only the dignity of the envoy, but that of his state is so involved that justice and courtesy alike demand that reason should be given sufficient to warrant a proceeding of such gravity. The dismissing state should formulate the grounds upon which the action is based. The diplomatic immunity of an ambassador whose mission is terminated extends over a reasonable time afterwards in order to enable him to wind up his official business.

Outbreak of War

The outbreak of war between the receiving state and sending state brings about the end of the mission and the envoy and his staff their passport, but this may not happen.⁶⁹ Even apart from war, a state may ask for the closure of the legation of another state on account of strained relations.⁷⁰ Whether or not diplomatic relations are about to be broken off, legal justification for the infringement of inviolability in such circumstances is difficult to find.

The Vienna Convention on Diplomatic Relations thus provides that the on all occasion where diplomat assignment is terminated, the receiving state is under an obligation under international law to respect the privileges he is entitled to, and accord all facilities so that he may safely go back to his home state without any interests being infringed even during the time of war.

Constitutional changes and Revolutionary changes

With the change of government on account of revolution, like changing a republic into a monarchy⁷¹ or when either Head of State ceases to be such, this will at least formally affect the continuation of the appointment by or received Head of State.⁷² The present Vienna Convention on Diplomatic Relation 1961 is very much salient on this. As general principle of international law, where the change in Head of State comes about in a normal and constitutional way, as where his term of office expires, the termination of an ambassador's appointment resulting from the change is

⁶⁹ Diplomatic relations between china and India were not broken off during the war between them in 1962

⁷⁰ The Government of India decided to ask for closure of Portuguese legation in New Delhi on account of the recalcitrant attitude adopted by Portugal with regard to the transfer of sovereignty of the Portuguese territories in the Indian union.

⁷¹ When in 1973 Greece changed from monarchy to a republic, it appears that ambassadors already in post did not need new letter of credence.

⁷² Article 25 & 28 of the Havana Convention on Diplomatic Officer 1928

nowadays more formal than substantial significance. New letters of credence may be required, but an ambassador's place in order of precedence is not affected, and his diplomatic status continues pending the arrival of new letters of credence.

Death of envoy

On the death of the envoy, the mission comes to close and letter of credence loses its force. When a new envoy is appointed, a fresh letter of credence has to be issued. In olden days public funeral was accorded to a foreign minister when he died at his post, and facilities were provided if his relatives wanted to take his body home. His movable property is allowed to export without payment of custom duties, and his widow and family are accorded usually privileges for a reasonable period, as long as they remain in the country. The death of the head of diplomatic mission involves only in a technical sense, the termination of the mission of which he was the head. In practice the mission continues, and its personnel remain *en poste* with *charged' affaires* ad interim as its provisional head, and they will continue to enjoy diplomatic status and the consequential privileges and immunities. When the functions of an entitled persons have come to an end (i.e. he has ceased to be a member of staff of the mission), his privileges and immunities normally cease on his final departure from the receiving state.⁷³

In 1985-1988, and more particularly in 1985-1986, there occurred a series of what were described to be 'tit-for-tat' expulsions of minor diplomatic personnel on various alleged grounds, i.e. the receiving country's expulsion being matched by the sending country's reacting in likewise expelling personnel attached to the former's legation in the latter country. This practice is a apparently the subjects of an unusual degree of blasé acceptance and toleration by the states concerned, notwithstanding that it is hard to reconcile with the spirit of the Vienna Convention, although the letter of the Convention is not violated.⁷⁴

Breaking off diplomatic relations between States, as a method of diplomacy though intended to achieve limited results, contributes very little to promotion of peace. The prime object of diplomacy is to achieve settlement of disputes by

⁷³ Article 39 (1), (2), (3) and (4) Convention 1961

⁷⁴ Starke J.G, *Introduction to International Law*, (10th (Ed), Aditya Book ButterWorths Publication, New Delhi), 1994, p. 429

negotiation through peaceful methods. Every State is, thus, obliged to pay due attention to the interests of peace and to some extent graduate and make its national interests subservient to international peace. States are interdependent and relations usually continue through some intermediary in the receiving State. In some instances the head of the mission leaves temporarily and then returns. However, in more serious cases, the head of mission and the majority of the staff depart, leaving a few people who will remain to protect the interests of their country. These members retain their personal privileges and immunities, enabling them to still communicate with their government and continue to function normally, except they may not fly their national flag or display their national emblem on the premises.

3.10 Reception and Termination

Article 10 requires that the Ministry for Foreign Affairs of the receiving State be notified of the appointment of members of the mission, their day and place of arrival and their final departure or the termination of their functions with the mission. In practice, as part of the notification process, some States have required that a great number of details be submitted. From these details the foreign ministry can classify the staff appropriately and accord privileges and immunities. The importance of the notification system is that it enables the foreign ministry of the receiving State to know who is a diplomatic agent. Australia considers it the prerogative power of the government to know the status of diplomatic representatives.⁷⁵

On arrival, the head of the mission will usually be met by the Chief of Protocol of the receiving State. He must inform the Minister of Foreign Affairs of the receiving State of his arrival and request an appointment so that he may present the minister with a copy of his credentials. Should the head of mission hold the rank of *chargé d'affaires en titre* he will be accredited by the Minister of Foreign Affairs, to whom he will deliver his letter of appointment. Once the head of mission has officially assumed his functions he should, in accordance with diplomatic protocol, introduce himself to the other heads of missions in the receiving State.

When the functions of the head of mission or a member of the diplomatic staff have come to an end, a note announcing their recall must be sent to the Minister of

⁷⁵ Supra Note 53, p. 57.

Foreign Affairs. With regard to the head of mission, he must request an audience with the Head of State to bid farewell. The head of mission's function is terminated either when he leaves the country or at an earlier date if it is specified in the note announcing his recall. What occurs in practice is the successor of the diplomat being recalled while delivering his credentials will also hand his predecessor's letter of recall to the Minister of Foreign Affairs of the receiving State.

Article 43 deals with the termination of the duties of a diplomatic agent. This Article shows the effects of the pressure which the Vienna Conference was under in its concluding stages. For instance, Article 13 lays down how and when the head of mission takes up his functions. Therefore, Article 43 should be its counterpart, prescribing when, in what instances and the time at which a diplomatic agent is regarded as having terminating his functions. The Vienna Conference was aware of this problem, but due to time constraints they did not clarify the text. Denza states that there are four possible ways to terminate the functions of a diplomatic agent:⁷⁶ through the expiration of a fixed time period, or the completion of a specific task by the agent; through death of the diplomatic agent; by a breach of diplomatic relations which may or may not occur on the outbreak of armed conflict; or by disappearance of the sending or the receiving sovereign.

Article 44 indicates the duty to grant facilities for departure. This is especially necessary when there is deterioration in relations between the sending and receiving State, particularly when there is an outbreak of war or armed conflict and the right to a safe departure is of great importance. However, in ordinary circumstances, this is not of great importance except for conferring exemption for exit visa requirements.

3.11 Waiver of Diplomatic Immunity

The diplomatic agents enjoy a number of immunities and privileges. These immunities and privileges may be waived or lost under certain circumstances. There are certain circumstances under which diplomatic agent may lose his immunities. For example, if a case is filed against a diplomatic agent, he is entitled to refuse to go to court and may simply send the message that he enjoys the immunity from jurisdiction of the court. But if he does not do so and presents himself unconditionally in the

⁷⁶ G Von Glahn, *Law Among Nations: An Introduction to Public International Law*, (7th (Ed), The Macmillan Company: London), 1996, pp. 418-419.

court and allows the case to proceed, he may lose immunity from court jurisdiction. If a diplomatic agent files a suit in a court of it will mean that he has waived his immunity and has accepted to be under the jurisdiction of the court, thus waived his immunity from jurisdiction of the court in the receiving state.

The waiver of immunity, empowered by Article 32, is the “*act by which the sending State renounces that immunity with regard to the person concerned*”. Once waiver occurs, the local courts in the receiving State will have jurisdiction to prosecute and punish the offender. The Preamble of the Vienna Convention states that the purpose of a diplomatic agent’s immunity is not to benefit the individual, but to ensure that his performance to represent his State is unhindered.

There was a debate in both the ILC and the Conference as to who was entitled to waive immunity and whether there should be a distinction between civil and criminal jurisdiction. A further aspect of the problem was whether the head of the mission was entitled to waive immunity of any member of his staff or if it always required a formal decision by the sending State. The view that the head of mission could waive immunity was rejected by the majority of the ILC.⁷⁷ Furthermore, waiver by the sending State is a serious decision, for it places the diplomatic agent, as far as legal responsibility is concerned, in a situation where he is equal to that of a citizen in the receiving State. Diplock LJ in *Empson v Smith*⁷⁸ interprets diplomatic actions as voidable rather than void. It has been stated by international authors and a court decision by Kerr LJ in *Fayed v Al-Tajir*⁷⁹ that jurisdictional immunity is not personal to the diplomatic agent but belongs to the sovereign of the sending State; hence that waiver can only be given by the sending State and not by a diplomatic agent.

Definition of Waiver

Waiver means “the process whereby a state, in respect of one of its diplomatic agents or consular officers, sets aside the right of diplomatic or consular immunity which is normally enjoyed by the individual in question. This is not a frequent

⁷⁷ J C Barker, *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?*, (Dartmouth: Aldershot), 1996, p.120

⁷⁸ E Young, ‘The Development of the Law of Diplomatic Relations’, *British University of International Law*, 1964 p.141.

⁷⁹ C A Whomersley, ‘Some Reflections on the Immunity of Individuals for Official Acts’, *International & Comparative Law Quarterly*, 1992, p.848

occurrence, and is only done after careful consideration. However, in recent years waiver appears to have been sought by a receiving state rather more strongly than hitherto, often with success".⁸⁰

Waiver is a voluntary relinquishing of a right or privilege. Although a waiver may result from an explicit surrender or by circumstances, courts frown on accepting waivers of constitutional rights. The party waiving a right must have knowledge of that right and the informed intention of surrendering it. Further it is a paper by which a person surrenders his or her rights; for example, when the courier delivered the package, the recipient may sign a waiver relieving the former of any further responsibility.

In terms of paragraph 2 of Article 32 of the Convention 1961, waiver must always be express and irrevocable. In recent years there has been an increase of rigorous requests for waiver. In the UK it is standard practice to press for waiver in cases of drunken driving. In other countries it has also become common to persuade the local press to take up victims' grievances to pressure governments into granting waiver. Negotiation for waiver seldom occurs because the sending State has no obligation to waive immunity.

Right of Waiver

The right of a person entitled to diplomatic immunities to waive his privilege of exemption from the local jurisdiction is recognized by many authorities on international law. Even as early as the congress of Nymwegen in the seventeenth century, the ambassadors who attended it agreed to waive their rights and by consent allow the magistracy to do justice between the members of their suits. "The privilege of diplomatic immunity can be waived in accordance with the maxim: "*Quilibet potest renunciare juri pro se introducto*." The 1952 British Report states that in cases where diplomatic immunity would put the diplomat in an unnecessarily advantageous position the Foreign Office approaches the diplomatic mission concerned and requests that the immunity be waived. If this is not waived the Foreign Office would inform

⁸⁰ Supra Note 20, p. 275

the mission concerned that the 'diplomat was no longer persona grata'. This practice is adopted in civil and criminal matters.⁸¹

As it is understood, a waiver of immunity under Article 30 was intended to apply to Articles 27 (Personal inviolability) and 29 (Immunity from jurisdiction); it would be logical for it to include also the diplomatic courier referred to in Article 25, paragraph 5. However, the expression "diplomatic agents" in Article 30, paragraph 1, did not include couriers. Moreover the expression "waiver of immunity of jurisdiction" in Article 30, paragraph 4, did not cover a waiver of the non-liability of a diplomatic agent to arrest or detention under Article 27. Article 30, paragraph 1, rightly recognized that the waiver of immunity, like the granting of immunity, was the prerogative of a government. If a diplomatic agent announced that he was waiving his own immunity, there was no knowing whether or not he had his government's consent to do so, and it was essential for the receiving State to have official notification from the government concerned.⁸²

The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State. Under Article 37 immunity is granted to family of diplomatic missionary and members of the administrative and technical staff of the mission together with their families, and members of the service staff of the mission and private servants may be waived by the by sending state by express communication.⁸³ The Convention prohibits initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim. The Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

Waiver by a person entitled to diplomatic privileges of the privileges of exemption from the jurisdiction of the local courts must be definite and in due form.

⁸¹ Supra Note 7, p.129

⁸² Volume I of the *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities* http://www.uno.org/newweb/newsletter/No73/what_is_diplomati_immunity.htm [Accessed on 20 May 2009]

⁸³ Article 32 (1) and (2) of Convention 1961

The Vienna Convention states that waiver of immunity must be express. The only waiver allowed is that incurred by the initiation of proceedings by diplomats. If the person claiming privilege is of lesser rank than the head of the legation, the waiver must be made by or on behalf of the superior envoy or his government, and must be made with full knowledge of the circumstances and of that person's rights; a waiver merely by a solicitor as such for that person is insufficient.⁸⁴ British courts usually insist on strict proof of waiver.

If the ambassador or other head of mission waives the privileges of a subordinate diplomatic official, then that privilege ceases irrespective of the desire of that official to retain his immunity. A waiver of immunity from jurisdiction does not imply waiver of immunity in respect of the execution of judgment already made, for which a separate is necessary. The ambassador or minister has full discretion to waive the diplomatic immunity of any of his subordinates. A member of the diplomatic mission may not oppose a renunciation made for him by his government or by the chief of his mission.

The privileges and immunities are of the diplomatic representatives and if they waive them, the immunities of their servants also come to end. In *R v Kent*⁸⁵, Kent was a code clerk in American embassy in England. He was dismissed from his service on the charge of stealing two documents. On the same day, the American ambassador waived immunities in this respect, Kent was arrested and tried. Kent argued that being a servant of diplomatic envoy he was immune from the jurisdiction of the court. The court observed that the privileges and immunities are of the diplomatic envoys and finally of the state concerned which has accredited him. The privileges and immunities end when the diplomatic envoy waives them.

From the standpoint of international law, as applied by English Courts, this judgment deserves attention, because it not only confirms points of the law of diplomatic immunity established before, but also presents the first case in which a court had the opportunity of establishing a clear and necessary distinction between the rules governing the termination of a diplomatic mission and those applicable in the

⁸⁴ *R V Madan* (1961) 2 QB 1 <http://www.dfa.gov.za/departement.prot1.htm#intro> [Accessed on 16 February 2010]

⁸⁵ Kapoor S.K, *International Law* (14th (Ed), Central Law Agency), 2004 p.436

case of the waiver of immunity on behalf of the member of the mission by his superior ambassador and of the subsequent dismissal of that diplomatic agent.

The Diplomatic Relations (Vienna Convention) Act, 1972, which passed by the parliament of India to give effect to the Vienna Convention on Diplomatic Relations 1961 and to provide for matters connected therewith. “For the purpose of Article 32 of the Convention set out in the schedule, a waiver by the head of the mission of any state or any person for the time being performing his functions shall be deemed to be waived by that state.”⁸⁶ The sending state has the right to waive the immunity at any point of time when the state thinks that the diplomat sent has not performed duty for which he has sent they may either terminate him or waive the immunity that has been accorded to him in the receiving because of his status as representative of the state to which he is accredited.

The American practice is that under its Foreign Service regulations a diplomat must seek the State Department’s consent although wives, families and domestics may waive without it. The similar view is held by Poland. In 1925, the Supreme Court held that a contracting out of immunity by a diplomat was not binding if not consented by the sending state.⁸⁷ Under the international Convention and as well as the state practice is that the waiver of immunity is the prerogative of the state and not the diplomat. The diplomat has to waive his immunity only with permission of the state to which he is accredited. The other person accredited to diplomat can waive there right without any permission. But once the head of missionary waives the right then the other member of diplomacy cannot claim the immunity even thought they have not waived there rights.

However, there are instances where waiver has occurred, such as in 1997 when a second-ranking diplomat from the Republic of Georgia to the US was held responsible for the death of a sixteen-year-old American girl in a car accident. The diplomat was driving at 80 miles an hour in a 25 mile zone. A blood test was taken and it was established that the diplomat’s blood alcohol was twice the legal limit. Immunity was invoked, but President Clinton withheld \$30 million in aid to Georgia.

⁸⁶ Section 5 Indian Diplomatic Relations (Vienna Convention) Act, 1972

⁸⁷ Supra Note 7, pp. 130-31

As a result the President of Georgia waived the immunity of the diplomat and he was duly prosecuted.⁸⁸

When a diplomat is found smuggling drugs and claims immunity, the receiving State in most instances will request waiver of immunity from the sending State. For example, in 1985, London police arrested a man in possession of two kilograms of heroin that he obtained from a house in London. The police went to the house and searched the premises and found more heroin. The occupant claimed immunity as a third secretary of the Zambian mission. When confirmation was made of the man's identity, they stopped their search and withdrew. The Zambian mission protested and the Foreign Office issued an apology. The police had strong suspicions that the drugs had arrived through a diplomatic pouch, so the Foreign Office approached the mission and demanded the waiver of immunity of the third secretary. The head of the mission, displeased, consulted with President Kaunda, who swiftly waived immunity and the third secretary was arrested and prosecuted. In a letter Kaunda conveyed that diplomatic immunity was never intended to prevent investigation of serious crimes.⁸⁹ There have even been instances where the sending State would grant a conditional waiver. For example, in 1989, Van den Borre, a 25-year-old soldier assigned as a clerk in the Belgian Embassy in Washington DC, admitted to the murders of Egan, a gay airline reservations clerk, and Simons, a gay cab driver. The Belgian government waived his immunity only on condition that he did not receive the death penalty as a possible sentence.⁹⁰

Despite the fact that the above examples show that some States do waive immunity of diplomats, family or staff, waiver is seldom granted. The decision to waive immunity is not based on a legal decision but rather on a political basis; for instance, retaliatory measures taken against their own diplomats or even fabricated charges being brought against their personnel in the receiving State. Waiver is a good remedy if States are willing to grant it. A possible solution is for States to enter into agreements for automatic waiver in serious criminal offences. This would serve as a better deterrent than merely having the option to waive immunity. The best example is

⁸⁸ Schmidt, 'Testing the Limits of Diplomatic Immunity', *American Journal of International Law*, (1998), p.222

⁸⁹C Ashman and P Trescott, *Diplomatic Crime: Drugs, Killings, Theft, Rapes, Slavery and other Outrageous Crimes!*, Acropolis Books Ltd: Washington D.C. (1987), p.56.

⁹⁰ Ibid.

that of the Teheran embassy in U.K in 1984 where in a woman police officer was shot dead by a gunman from the embassy of Teheran where in the U.K. Government sought for waiver of immunity, the Tehran state refused to do so, U.K terminated the diplomatic relation even then the person was given safe passage.

In *Musurus Bey V Godban* the House of Lords have held that “immunities continue during the period that the mission may not suspended; and even where the mission has terminated, immunity continues for a reasonable time after the termination of the envoy’s mission to enable him to wind up his affairs and to be able to withdraw the mission.”⁹¹ The waiver of immunity does not prevent committing of serious crimes, but can allow justice to take its course where such crimes have been committed. Even then there is no guarantee that states will waive the immunity of their diplomats and as a traditional rule, an undertaking by the state or its agent that immunity will be waived if dispute arises is of no legal effect. This question is more likely to be relevant in case of civil prior matters, for example, when a landlord is reluctant to rent accommodation to diplomats and asks for such prior statement. The Convention 1961 and its *travaux preparatoires*, however, do not say anything about the effect of the prior agreement on waiving of diplomatic immunity. But as in the field of sovereign immunity it is now accepted that a state may agree in advance to submit a class of dispute to the jurisdiction of the court of another state and such agreement may constitute a valid waiver of immunity there seems to be no reason why the state, which has the sovereign power to waive diplomatic immunity, could not do so in advance. Though prior waiver of immunity in respect of criminal offences is still very unlikely, receiving states should consider such steps in regard to such other states whose diplomat tend to gravely misbehave.

3.12 Conclusion

Diplomatic agents used to be sent in the ancient past. There, however, used to be no categorization of diplomatists and there was no system of having permanent agents as well. It was only in the middle ages that the system started. The Greek, the Romans and the Indians when at height of their culture, did not send permanent representatives to other countries. The system is, therefore, comparatively of recent origin. Diplomatic agents require specialist knowledge in order to represent their

⁹¹ Supra Note 5, p. 276

country, fulfill their functions and report back on any information needed to promote relations. The classification of heads of missions is important in order to know what their functions are and to ensure they receive the necessary privileges and immunities.

The difference of rank which will subsist at the present time between ambassadors and minister plenipotentiary is due to historical traditions rather than to the importance of the posts. Many of ministers have more important and more delicate task to carry his colleague who may be an ambassador in another capital, with duties merely representative. So it would therefore, be entirely logical to employ a collective term to designate the entire diplomatic representative belonging to this class, including the representatives of the Holy See.

Ambassadors, legates should be included in the same class and designation with envoys or minister. These later agents have, moreover, almost entirely disappeared from diplomatic nomenclature. It is very rare for a government to give its responsibility a title conferring on them the same duties as the other agents but placing them in a lower rank.

The staff form part of the mission and in some cases have diplomatic rank, which allows for the existence of immunity. Family members of diplomats and staff also play an important role and immunity is accorded to them. Diplomatic missions are the face of the sending State in the receiving State and the staff must be familiar with their functions in order to determine not only the mission's inviolability, but also to protect everyone working and any items stored in the mission from local jurisdiction.

The Vienna Convention on Diplomatic Relations in laying down the functions of diplomatic mission has followed broad heads whilst indicating certain other functions, such as promoting friendly relations between sending states and receiving state, and developing their economic, cultural and scientific relations which in consequence of the establishments have steadily acquired importance. These practices, established on a customary basis, were codified in the 1961 Vienna Convention on Diplomatic Relations. Countries which have recognized the Convention believe that such practices contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems. This view is reflected in paragraph 3 of the preamble to the Vienna

Convention. The purpose of diplomatic privileges, immunities and exemptions, as described in the Convention, is not to benefit individuals themselves but to ensure the efficient performance of the functions of diplomatic missions that represent States.

In the present day diplomacy the diplomats not only owe a duty and function towards the sending state but also towards the receiving state. The present day diplomat is treated dignified representative of state and not as dignified spy of the representing state as in the olden days. The present international law makes no obligation upon the receiving state to accept any person as diplomatic representative of the sending state against its will. The receiving state may refuse a diplomatic agent without giving any reasons whatsoever and it can also terminate the diplomat when the sending state does not recall the diplomat when the receiving state has made representation to recall the receiving state may declare that person as *persona non grata*.

It is also within the discretion of the receiving State to declare any member of the diplomatic staff of a mission *persona non grata* (or unwanted person). This may be done at any time and there is no obligation to explain such a decision. In these situations, the sending State, as a rule, would recall the person or terminate his/her function with the mission. Thus, the Vienna Convention provides for specific measures that can be taken by both the sending and receiving States in cases of misuse or abuse of diplomatic privileges and immunities. On the whole, diplomatic privileges and immunities have served as efficient tools facilitating relations between States. Understanding the basic functions, requirements and classification of diplomats and the diplomatic staff provides a way of formulating a possible solution to curbing abuse of diplomatic immunity within the realm of criminal jurisdiction.