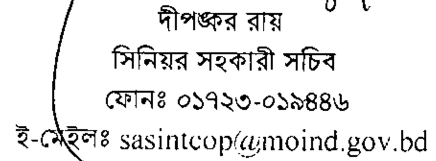
শিল্প মন্ত্রণালয়
আন্তর্জাতিক সহযোগিতা শাখা

বিষয়ঃ শিল্প মন্ত্রণালয়ের অনুবিভাগ এবং অনুবিভাগ সংশ্লিষ্ট দপ্তর/সংস্থার দাপ্তরিক কার্যাদি সম্পাদনে রেফারেন্স হিসেবে ব্যবহৃত আইন/নীতি/পরিপত্র প্রেরণ।

সূত্র: প্রশাসন-সংস্থাপন শাখার স্মারক নম্বর: ৩৬.০০.০০০০.০৪৬.১৮.০৩৮.১৭.৬৬৫ তারিখ: ২৭ জুলাই ২০২১ খ্রি.

উপর্যুক্ত বিষয় ও সূত্রোক্ত পত্রের পরিপ্রেক্ষিতে শিল্প মন্ত্রণালয়ের আন্তর্জাতিক সহযোগিতা শাখা সংশ্লিষ্ট দাপ্তরিক কার্যাদি সম্পাদনে যে সকল আইন/নীতি/পরিপত্র রেফারেন্স হিসেবে ব্যবহৃত হয়ে থাকে সে সকল আইন/নীতি/পরিপত্র (কপি সংযুক্ত) স্পাইরাল বাইন্ডিং করে পরবর্তী প্রয়োজনীয় কার্যক্রম গ্রহণের লক্ষ্যে নির্দেশক্রমে এতদসংগে প্রেরণ করা হলো।

সংযুক্তিঃ বর্ণনামতে।



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সচিবের দপ্তর
শিল্প মন্ত্রণালয়, ঢাকা।

ইউ.ও.নোট নং- ৩৬.০০.০০০০.০৭৬.২৪.০১৫.২০২০.২১৯ তারিখঃ ১৯/০৯/২০২১ খ্রি.

অনুলিপিঃ

০১। অতিরিক্ত সচিব (নীতি, আইন ও আস) এর ব্যক্তিগত কর্মকর্তা, শিল্প মন্ত্রণালয়, ঢাকা (অতিরিক্ত সচিব মহোদয়ের সদয় অবগতির জন্য)।

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
শিল্প মন্ত্রণালয়
আন্তর্জাতিক সহযোগিতা অধিশাখা

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Vienna Convention on Diplomatic Relations (1961)

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A. Introduction

1 The Vienna Convention on Diplomatic Relations ('Convention'; 'VCDR') codifies rules of international law on diplomatic intercourse, privileges, and immunities (Immunity, Diplomatic). It was adopted by the United Nations Conference on Diplomatic Intercourse and Immunities on 18 April 1961 and entered into force on 24 April 1964. The Conference also adopted two optional protocols: the Optional Protocol concerning Acquisition of Nationality and the Optional Protocol concerning the Compulsory Settlement of Disputes, both of which entered into force on the same day as the Convention. The Convention is one of the most significant legal documents on diplomacy, an outstanding example of the codification and progressive development of international law by the International Law Commission (ILC), and has become a universal treaty with 186 State Parties as of 2009. The Optional Protocol concerning Acquisition of Nationality currently has 51, and the Optional Protocol concerning the Compulsory Settlement of Disputes has 66 State Parties.

B. Historical Background

1. Early History

2 Rules on diplomatic relations are amongst the earliest rules of international law. Ancient cultures all over the world provided emissaries with some form of protection, usually based on religious norms. Roman law—as Cicero noted, both human rules and divine ordinance—protected envoys, and while the Roman claim to universal rule prevented the development of a concept of international law regulating the behaviour of similar subjects and led to increasing violations of the protection of envoys, the Roman concepts exerted a strong influence on the later development of diplomatic immunity (History of International Law, Ancient Times to 1648).

3 Pursuant to the merely sporadic and extraordinary nature of diplomatic contacts in early times, ambassadors originally served ad hoc and were sent on missions—one of the etymological roots of the word 'ambassador'. In the Middle Ages diplomatic contacts became more frequent, in particular between the Italian city States, and the need for more flexible and constant contacts with other States, including monitoring their political developments, arose. Accordingly, emissaries were at times invested with broader powers, at times sent to another State for longer periods. The development culminated in the establishment of permanent embassies between the 13th and the mid-15th century. Increasing contact between nations spread this practice universally, despite strong resistance against permanent embassies on the part of some countries as late as the 17th century (History of International Law, 1648 to 1815).

4 By the time of Hugo Grotius a rich body of customs had developed in the area of diplomatic relations, as evinced by his statement that '[e]verywhere, in fact, we find mention of the sacred affairs of embassies, the inviolability of ambassadors, the law of nations which is to be observed with reference to ambassadors, divine and human law, the right of legation sacred among nations' (*De Jure Belli ac Pacis Libri Tres* [FW Kelsey (tr) William S Hein Buffalo 1995] Book II Chapter 18 Section 1 [references deleted]). But while the law of diplomatic relations has been comparatively stable in modern times, uncertainty persisted in many areas. Thus, frequent disputes led to a regulation concerning the relative ranks of diplomatic agents adopted during the Vienna Congress (1815) and supplemented by the Congress of Aix-la-Chapelle in 1818 (History of International Law, 1815 to World War I). The 19th century witnessed a proliferation of provisions on the reciprocal grant of diplomatic privileges and immunities in bilateral treaties, mainly between European nations or the United States and countries in Latin America or the Near, Middle, or Far East. Many of these treaties did not specify the content of the privileges and immunities to be granted and instead referred to the law of nations. The only major multilateral instrument dealing with diplomatic privileges and immunities that came into force before World War II is the Convention regarding Diplomatic Officers adopted by the Sixth International Conference of American States at Havana in

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1928 and ratified by a number of American States, but neither by the United States nor by Canada (History of International Law, World War I to World War II).

5 Attempts to codify the area of diplomatic relations already took shape in the League of Nations. The issue of diplomatic privileges and immunities was originally included in a list of topics ripe for international regulation by the League of Nations Committee of Experts for the Progressive Codification of International Law and was the subject of a report and a questionnaire to the governments of members of the League. It was however taken off that agenda by the Assembly of the League of Nations. The Committee of Experts also discussed a possible revision of the classification of diplomatic agents by the Congresses of Vienna and Aix-la-Chapelle, but regarded the topic as not realizable after receiving the answers to a questionnaire sent to governments.

6 Several institutions and scholars wrote draft codes that were to influence the work on the Vienna Convention on Diplomatic Relations. Of particular importance are the 1895 'Règlement de Cambridge' (Règlement sur les immunités diplomatiques) and the 1929 resolutions of the Institut de Droit international, the 1925 Project of the American Institute of International Law, the 1926 Draft Code of the Japanese Branch of the International Law Association (ILA) and the Kokusaiho Gakkwai, the 1927 Project of the International Commission of American Jurists and the draft codes by Bluntschli (1868), Fiore (1890), Pessoa (1911), Phillimore (1926), and Strupp (1926). The probably most influential project on the topic preceding the VCDR, the 1932 Draft Convention on Diplomatic Privileges and Immunities by the Harvard Law School Project 'Research in International Law', took into account these works and republished them in its appendices ((1932) 26 AJIL Supp).

2. The Drafting of the Vienna Convention on Diplomatic Relations

7 At its first session in 1949 the ILC included 'diplomatic intercourse and immunities' in its list of 14 topics provisionally selected for codification, albeit not as a priority matter. Given the importance of the topic for international relations, however, the United Nations General Assembly requested the ILC to prioritize it and undertake its codification as soon as possible (UNGA Res 685 [VII] [5 December 1952] GAOR 7th Session Supp 20, 62).

8 During its sixth session the ILC decided to take up work on the topic and appointed AEF Sandström as Special Rapporteur. Sandström submitted his report in the Seventh Session in 1955. However, consideration of the topic was postponed. At the Eighth Session the Secretariat submitted a substantial memorandum on existing principles, rules, and practice in the area in response to a request by the Special Rapporteur. Nevertheless the topic was not discussed by the ILC until the Ninth Session in 1957 when the ILC adopted a provisional draft with commentaries and transmitted it, through the Secretary-General, to governments for their observations. 21 Member States submitted comments. Having considered these, the Special Rapporteur submitted revised draft articles in 1958. That same year the Secretariat published a comprehensive collection of national laws and regulations documenting State practice in the field. The draft articles were discussed by the ILC in the 10th Session. The ILC revised the articles and forwarded the Draft Articles on Diplomatic Intercourse and Immunities to the General Assembly with a view to their recommendation to Member States for the conclusion of a convention. The General Assembly decided to convoke a conference on the issue in Vienna (UNGA Res 1450 [XIV] [7 December 1959] GAOR 14th Session Supp 16, 55).

9 The United Nations Conference on Diplomatic Intercourse and Immunities, at which 81 States were represented, met at the Neue Hofburg in Vienna from 2 March–14 April 1961. It was presided over by Alfred Verdross. The conference used the ILC's draft articles as the basis for its considerations and modified them. Given that States could not agree about the settlement of disputes by the International Court of Justice (ICJ) as provided by the ILC draft, participants instead agreed on an Optional Protocol concerning the Compulsory Settlement of Disputes (see also Peaceful Settlement of International Disputes). The ILC had also envisioned a provision preventing

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the automatic acquisition of the nationality of the receiving State by members of permanent missions and their families—covering, eg, children born in a receiving State with a *ius soli* regime. However, the divergence of States' municipal law in that respect prevented the provision from being accepted. Instead, it was incorporated in another optional protocol.

C. Content of the Convention

1. Scope

10 While the Vienna Convention on Diplomatic Relations is one of the most important treaties in the field of diplomacy, it is not a comprehensive document regulating all questions arising in the area of diplomatic relations. States and the ILC early on decided to limit the project and cover other issues separately. Numerous further ILC topics have resulted in treaties that are closely related to the Vienna Convention on Diplomatic Relations, such as the Vienna Convention on Consular Relations (1963) ([done 24 April 1963, entered into force 19 March 1967] 596 UNTS 261), the Convention on Special Missions ([done 8 December 1969, entered into force 21 June 1985] 1400 UNTS 231; Special Missions), the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (1975) ([done 14 March 1975, not yet entered into force] UN Doc A/CONF.67/16), and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (Protected Persons). The ILC's Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag Not Accompanied by Diplomatic Courier have not been incorporated into a treaty (Diplomatic Courier and Bag).

11 The Convention codifies the diplomatic law concerning permanent missions in other States. Special missions are the subject of a separate convention and permanent missions to international organizations are regulated by the headquarters agreements of those organizations (International Organizations or Institutions, Headquarters). In recognition of the abundance of customary international law in the area and the vagueness of some of its provisions, the Convention explicitly states in its preamble that customary rules continue to govern questions not expressly regulated by it. As the ICJ held in the United States Diplomatic and Consular Staff in Tehran Case (United States of America v Iran) ([1980] ICJ Rep 3), however, there is no room for applying additional rules of general international law in the area of defences against, and sanctions for, abuses of privileges and immunities of members of diplomatic missions. In that respect diplomatic law itself provides the necessary tools, such as declaring a member of the diplomatic staff persona non grata or breaking off diplomatic relations (Diplomatic Relations, Establishment and Severance; Self-Contained Regime).

2. Summary of Contents

12 The Convention consists of a preamble and 53 articles. The division of the Convention into sections and the article headings originally contained in the ILC draft were later deleted, but they can still serve as a rough point of orientation for the content of the agreement. Following and adapting that structure to the later changes, the Convention contains eight parts: the preamble, a first article containing definitions, a section on diplomatic relations in general (Arts 2–20 VCDR), the important second section on diplomatic privileges and immunities (Arts 21–40 VCDR), sub-divided into a subsection on premises of diplomatic missions and archives (Arts 21–24 VCDR), one on facilitation of the work of the mission, freedom of movement and communication (Arts 25–28 VCDR), and one on personal privileges and immunities (Arts 29–40 VCDR), a third section on the conduct of the mission and of its members towards the receiving State (Arts 41–42 VCDR), a fourth section on the end of the functions of a diplomatic agent (Arts 43–46 VCDR), a fifth on non-discrimination and reciprocity (Art. 47 VCDR; States, Equal Treatment and Non-Discrimination), and the final clauses (Arts 48–53 VCDR). The content of the Convention will be presented in more detail below, albeit with the necessary limitation to the most important issues under the Convention.

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3. Specific Legal Problems

(a) Preamble

13 Apart from the already mentioned clarification of the relationship of the Convention to customary international law, the preamble also takes a stance concerning the rationale of diplomatic privileges and immunities. The ILC had refrained from taking sides in that long-standing debate, with many members regarding the issue as one of mere theory. However, the Vienna Conference included a passage stating that the purpose of diplomatic privileges and immunities 'is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States'. Thus, it followed the theory of 'functional necessity' justifying privileges and immunities as necessary for the mission to fulfil its purpose. That theory guided the ILC in its drafting work. The statement also refers to a second theory according to which the mission represents the sending State. The long-cherished theory of extraterritoriality, however, is not mentioned and can be regarded as outdated.

(b) Definitions

14 The first article of the Convention defines the different categories of embassy staff, distinguishing between the heads of diplomatic missions, the diplomatic staff, the administrative and technical staff, and the service staff (Members of the Staff of Diplomatic Missions). It also contains definitions of private servants and the premises of the mission. Whereas for the first few years after the Convention's coming into force receiving States mostly relied on the sending States' classification of embassy staff, there is now a tendency for closer scrutiny to prevent abuse of diplomatic privileges and immunities.

15 The Convention fails to define the term 'members of the family of a diplomatic agent forming part of his household' (Art. 37 VCDR). Family members have long been granted privileges and immunities by States, but the Vienna Conference could not settle on a definition due to different concepts of family. In practice, a core family is universally accepted (such as a spouse not legally separated and minor children). Beyond that receiving States apply their own rules and settle disputed cases by negotiation.

(c) Diplomatic Relations in General

16 The section on diplomatic relations in general contains, inter alia, provisions on the establishment of diplomatic relations and missions. States establish diplomatic relations and permanent missions by consent of the sending and receiving State (Art. 2 VCDR). The 'right of legation', ie the right to send and receive diplomatic envoys, generally follows from recognition as a State (see also Sovereignty). It should be noted that there is no corresponding duty of the receiving State to receive envoys from any particular State. The close connection between the two legally distinct issues of recognition of a State and the establishment of diplomatic relations can be observed in a number of cases, such as the dissolution of the Soviet Union, the treatment of Palestine or States' refusal to close their missions in Kuwait after the Iraq–Kuwait War (1990–91). A number of other entities also enjoy the right of legation, such as the Holy See.

17 The sending State freely chooses the staff of its missions (Art. 7 VCDR), a right that applies both to the appointment and the dismissal of mission staff. However, the appointment of the head of the mission requires the consent of the receiving State (*agrément*), which can be refused without giving reasons (Art. 4 VCDR). Receiving States may also require approval for the appointment of military, naval, or air attachés (Art. 7 VCDR). Limitations are imposed on diplomatic staff not having the nationality of the sending State and/or having the nationality of the receiving State (Art. 8 VCDR). The Convention allows sending States to resort to multiple accreditations. The more common form of multiple accreditation is to accredit a head of mission or members of the diplomatic staff to more than one State or a State and an international organization (Art. 5 VCDR). Given the

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increased number of sovereign States, particularly following the dismemberment of States, as well as pressures on national budgets, even large States occasionally accredit heads of mission to several States at a time. The accreditation of one person as head of mission by several sending States permitted by Art. 6 VCDR is less common.

18 Article 3 VCDR contains a non-exhaustive list of functions of a diplomatic mission. It left open the disputed question of the performance of consular functions by a diplomatic mission. The Vienna Convention on Consular Relations regulates that issue. The mission and its head may use the flag and emblem of the sending State on the mission premises and on the head of mission's means of transport (Art. 20 VCDR).

19 The sending State has to notify the receiving State of the appointment, arrival, and departure or termination of functions of members of the mission and some other categories of persons (Art. 10 VCDR). Procedures for notification vary from country to country. Scrutiny has increased since the early years of the Convention and acceptance of notifications has in some cases been denied; which might imply that acceptance of the notification is required. That suggestion however finds no confirmation in the law. In the United Kingdom, correcting earlier cases stating that diplomatic agents must be accepted by the receiving State, the Court of Appeal in 1990 held that notification was not a condition precedent to the acquisition of the status of members of a mission (*Regina v Secretary of State for the Home Department, ex parte Bagga* England and Wales Court of Appeal [11 April 1990] [1991] 1 AllER 777). In contrast, the US District Court for the Southern District of New York held in 1979 that the notification was constitutive in all cases, but that the State Department did not possess unlimited discretion to accept or deny notification (*Vulcan Iran Works Inc v Polish American Machinery Corp* US District Court for the Southern District of New York [14 November 1979] 479 F Supp 1060).

20 At any time and without an explanation the receiving State may declare the head of the mission or a member of the diplomatic staff *persona non grata* or other members of the staff as unacceptable. In such a case the sending State has to recall the person or terminate his or her functions in the mission. If it does not do so within a reasonable time, the receiving State may refuse to recognize the person as a member of the mission (Art. 9 VCDR). Declaration of members of the mission *personae non gratae* or unacceptable is the appropriate remedy provided in the Convention for the abuse of diplomatic privileges and immunities. In the early years of the Convention such requests for recall were mostly issued for espionage in the receiving State (Spies). Since the end of the Cold War (1947–91) there has been a steep decline in such requests, even though such cases continue to reoccur—as evinced by Russia's insistence on the withdrawal of four British diplomats in 1996 or the US' expulsion of 50 Russian diplomats in 2001. In recent years an increasing number of diplomats have been declared *personae non gratae* for involvement in terrorist or subversive activities (Terrorism). Thus, eg Argentina expelled Iranian diplomats linked to the bombing of the Argentine Jewish Mutual Aid Association in 1994 and Spain expelled six Iraqi diplomats after an illicit arms cache was revealed in the Iraqi embassy in 2003. Commonly, diplomats are also declared *personae non gratae* if they have committed serious criminal offences and the sending State does not waive immunity. In the face of significant and highly publicized abuse of diplomatic privileges with respect to parking offences, the Government of the United Kingdom demanded the recall of a few offenders, but withdrew the request upon payment of the fines.

21 The receiving State may also restrict the size of the mission within limits it considers as reasonable and normal and, on a non-discriminatory basis, refuse to accept officials of a particular category (Art. 11 VCDR). While States at times resort to imposing such limits, the imposition usually provokes retaliation. The establishment of offices in locations away from the mission requires the prior express consent of the receiving State (Art. 12 VCDR), which—*a maiore ad minus*—implies that the receiving State may also impose strict limits on the size of such offices, as the US does with respect to New York offices of foreign missions.

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22 Finally, the section contains an overhaul of the rules on heads of diplomatic missions settled on in Vienna and Aix-la-Chapelle in the 19th century. The Convention distinguishes between three classes of heads of mission—it being a matter of agreement between States which class the heads of their missions are to be assigned to (Art. 15 VCDR): ambassadors, nuncios, and heads of mission of equivalent rank are in the first; envoys, ministers, and internuncios in the second; and chargés d'affaires (not to be confused with provisional heads of mission in case of a vacancy or when the head of the mission is unable to perform his function, so called chargés d'affaires ad interim regulated in Art. 19 VCDR) in the third class. The Convention points out that the distinction only matters as to precedence and etiquette (Art. 14 VCDR). Precedence within the classes is determined by the date and time the heads of mission took up their function except for the possibility of giving automatic preference, as is done in several States, to the representative of the Holy See (Art. 16 VCDR). Rules on the commencement of functions of heads of mission, contained in Arts 13, 17, and 18 VCDR, complement these rules on precedence and etiquette. The distinction between different classes of heads of mission stems from a time when only monarchies and the most important republics were regarded as having the right to send ambassadors and States struggled to gain precedence for their representatives over others. Today, given the principle of sovereign equality of States enshrined in the United Nations Charter, all States can and do name ambassadors (States, Sovereign Equality). Heads of missions in other classes have disappeared almost entirely.

(d) Diplomatic Privileges and Immunities

23 The most significant contribution of the Convention to the development of international law is in the area of diplomatic privileges and immunities. The Convention only covers diplomatic privileges and immunities and not for example privileges and immunities of ministers for foreign affairs (Heads of Governments and Other Senior Officials). However, the ICJ held in the Arrest Warrant Case (Democratic Republic of the Congo v Belgium) ([2002] ICJ Rep 3) that the Convention provides 'useful guidance on certain aspects of the question of immunities' (at para. 52).

(i) Assistance by Receiving State

24 The section starts with a provision on the receiving State's obligation to assist the sending State in obtaining premises for its mission and accommodation for the members of the mission where necessary (Art. 21 VCDR), an obligation complemented by Art. 25 VCDR requiring the receiving State to accord full facilities for the performance of the functions of the mission.

(ii) Inviolability of Mission Premises

25 Article 22 VCDR contains the central rule of the inviolability of the premises of the mission—a prohibition for agents of the receiving State to enter the premises without consent of the head of the mission, a special duty to take all appropriate steps to protect the mission, and immunity of the premises of the mission, their furnishings, other property thereon, and the means of transport from search, requisitions, attachment, or execution. The provision prevents service of process. Suggestions made during the ILC discussions and the Vienna Conference to provide for exceptions allowing the receiving State to enter in emergencies were defeated. The Convention also provides for the inviolability of the archives and documents of the mission at any time and wherever they may be (Art. 24 VCDR) and of the private residence of a diplomatic agent, his papers, correspondence, and (with exceptions) his property (Art. 30 VCDR). The question of diplomatic asylum (Asylum, Diplomatic) was not covered by the ILC, as States had made clear that they did not intend the topic to be treated. The question thus remains subject to customary law, with the clear understanding that there is no exception to the inviolability of the premises of the mission. The inviolability of the mission is most stringently confirmed in practice, despite a number of violations in the decades since the adoption of the Convention. Entry to the premises by law enforcement officers, eg the entry to the Dutch mission in South Africa in 1985 to arrest a Dutch national who had been detained for assisting the African National Congress, has commonly been

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followed by protests of the sending State and no attempt at justification by the receiving State. Nevertheless, there have been many instances of forcible entry by State agents, such as the entry by South Yemen troops of the Iraqi embassy in South Yemen in 1979, or the US search of the residence of the Nicaraguan Ambassador in Panama in 1989. In the worst cases States have occupied the mission or even taken the staff hostage (Hostages), as in the facts described in the Armed Activities on the Territory of the Congo Cases ([2005] ICJ Rep 168) and the United States Diplomatic and Consular Staff in Tehran Case (United States of America v Iran) ([1980] ICJ Rep 3), leading to forceful protests or a break in diplomatic relations. In 1984 when a policewoman protecting the Libyan mission in London during a demonstration by dissidents was shot from the premises of the mission, the House of Commons Foreign Affairs Committee discussed whether inviolability could be lost because of terrorist acts committed from the premises or because of self-defence. Another significant threat to mission premises originates from non-State actors, in particular from terrorists. In that respect, the obligation to protect the mission is pertinent. While embassy sieges by revolutionaries or protesters peaked in 1980, attacks continue to occur, as evinced by the 1996–97 takeover of the residence of the Japanese Ambassador by the Tupac Amaru Revolutionary Movement, with the Movement taking 480 hostages, the 1998 attacks on the US Embassies in Kenya and Tanzania by Al Qaeda and the 2002 six-hour siege of the Iraqi embassy in Berlin by Iraqi dissidents. The 1996–97 takeover was ended by Peruvian troops without prior information of the Japanese Government, for which the Japanese Government expressed gratitude, but also regret for not having been informed. The German police in 2002 entered the premises after having been granted permission by the Iraqi Government. Where receiving States are unable to protect mission premises, sending States at times hire security companies or, as a last resort, reduce staff or close missions (Private Military Companies).

(iii) Taxes, Customs, Social Security

26 In a successful exercise of progressive development of the law the Convention regulates the hitherto controversial matter of tax and customs duty and inspection exceptions (see also Customs Law, International; Taxation, International). Much of the practice in that area had been regarded as based on courtesy rather than law. Article 23 VCDR exempts the sending State and the head of the mission from all taxes in respect of the premises of the mission other than those representing payment for services rendered. Equally exempt from dues and taxes are fees and charges levied by the mission in the course of its official duties (Art. 28 VCDR). Diplomatic agents (and other persons under Art. 37 VCDR) are exempt from all dues and taxes with six exceptions enumerated in Art. 34 VCDR—the application of which might, at times, be controversial, such as the application of the 'charges levied for specific services rendered' (Art. 34 (e) VCDR) exception to London's congestion charge. Article 36 VCDR permits the entry of articles for the official use of the mission and the personal use of a diplomatic agent and exempts these articles from customs duties, taxes, and related charges 'in accordance with such laws and regulations as [the receiving State] may adopt'. The latter phrase permits regulations to prevent abuse of the privilege, such as restrictions on the quantity of goods imported or the indication of a period within which resale is prohibited. According to Art. 37 (2) VCDR, administrative and technical staff enjoy this privilege only for articles imported at the time of first installation. The provision on the border treatment of articles of diplomatic agents is completed by a limited exemption of the personal baggage of a diplomatic agent from inspections (Art. 36 (2) VCDR). As with the diplomatic bag, airlines may nevertheless refuse to carry persons who do not agree to submit their baggage to examination. Finally, Art. 33 VCDR contains an exemption for diplomatic agents (and other persons according to Arts 33 (2), 37 VCDR) from social security provisions with the goal of integrating diplomats in the sending State's rather than the receiving State's social security system.

(iv) Freedom of Movement

27 Article 26 VCDR, providing for freedom of movement of members of the mission subject to a national security exception, resulted from a compromise between Communist and Western States.

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While the latter favoured freedom of movement, many of the former restricted travel by members of diplomatic missions, eg to a radius of 50km from the capital and required them to demand permission for travel beyond this limit. In retorsion, other States had adopted identical limitations for diplomats from these States. After the adoption of the Convention, Communist States continued their practice without protest and with continuing retorsion. With the end of the Cold War, however, restrictions have largely disappeared.

(v) Freedom of Communication, Diplomatic Courier, and Bag

28 The Convention protects the freedom of communication of the mission for all official purposes (Art. 27 VCDR)—including communication with the home government and the sending State's other missions and consulates by all appropriate means and in code or cipher (Coded Communications [Encryption]; Diplomatic Communications, Forms of), and also granting inviolability to official correspondence of the mission. The flexible language allows for the inclusion of modern means of communication such as email (Internet). It should be mentioned that interception of the missions' communications by listening devices is a clear violation of Art. 27 VCDR. While this statement does not seem to be contested, even after the Cold War and even at times among friendly nations, States with the technological and administrative capacity have engaged and continue to engage in surveillance operations of diplomatic communication.

29 The use of wireless transmitters had caused much debate in the negotiation of the Convention. Some developed countries regarded their use as part of the right to free communication, while most other States insisted on the need for a permission of the receiving State with a view to their national law and international rules and regulations (see also Telecommunications, International Regulation). The ILC draft did not mention wireless transmitters in the text of the provision, but noted in the comments that missions must apply for permission and, if the applicable national and international regulations are observed, should not be refused such permission. The compromise achieved during the Conference provides for the need of the consent of the receiving State for installation and use of a wireless transmitter.

30 Art. 27 VCDR also provides protection for the diplomatic courier and bag. The provision had been controversial during the negotiations because of the possibility of abuse. Alternatives would have permitted inspections of the bag in case of serious grounds for suspicion and after communication with the mission concerned or allowed challenge and return of the bag. Some States formulated reservations to the protection of the diplomatic bag, provoking the objection of other States. Since the Convention came into force the diplomatic bag, as expected, has been the subject of abuse—including its use for the transport of weapons, narcotic drugs and psychotropic substances, or even persons. Use of scanning technology has been controversial, given its ability to determine or damage the contents of the bag. However, it is essential in case of air transport. The topic remained sufficiently unsettled for the ILC to take it up as the 'Status of the Diplomatic Courier and the Diplomatic Bag not Accompanied by Diplomatic Courier' ([1989] GAOR 44th Session Supp 10, 26). The ILC adopted draft articles on the topic, but the divergence of views on issues such as the inviolability of the bag and, indeed, the desirability of the project as a whole prevented their transformation into an agreement.

(vi) Beneficiaries of Personal Privileges and Immunities

31 While the principle of the immunity of diplomats has always been at the heart of diplomatic law, it had been far from settled who was entitled to it before the adoption of the Convention; this particularly concerned junior staff, service staff, private servants, and family members. Some States had accorded full privileges and immunities to the entire 'suite' of the ambassador while others had not. Accordingly, the provision was controversial from the start. Special Rapporteur Sandström's first draft extended full privileges and immunities to the whole mission staff, including administrative and service staff, as well as families and domestic servants if foreigners. The ILC rejected this approach as too sweeping and favoured extending full privileges and immunities only

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to the head of the mission, diplomatic staff, and administrative and technical staff and their families. After much controversy the Vienna Conference further reduced the scope of the privileges and immunities of administrative and technical staff (Art. 37 VCDR). Now, diplomatic agents and members of their family forming part of their household enjoy all the privileges and immunities of Arts 29–36 VCDR. Administrative and technical staff and their family members are granted the same protection with some exceptions: their immunity from civil and administrative jurisdiction does not extend to acts performed outside the course of their duties; they only benefit from an exemption from customs duties under Art. 36 (1) VCDR in respect of articles imported at the time of first installation; and their personal baggage is not exempt from inspection under Art. 36 (2) VCDR. Service staff members' privileges and immunities are much more limited—their immunity only applies to acts performed in the course of their duties and they only benefit from very limited exemptions from dues and taxes as well as from social security provisions as provided for in Art. 33 VCDR. Private servants receive very limited privileges only and no immunities. The much debated provision on privileges and immunities of administrative and technical staff garnered some reservations, four of which remain in effect, in turn provoking objections to the reservations.

32 Nationals and permanent residents of the receiving State generally do not enjoy full privileges and immunities. According to Art. 38 VCDR, diplomatic agents who are nationals or permanent residents of the receiving State are only entitled to immunity from jurisdiction and inviolability in respect of official acts performed in the exercise of their functions. The receiving State may, at its discretion, grant privileges and immunities to its nationals or permanent residents working as other mission staff members and private servants and additional privileges and immunities to those working as diplomatic agents.

(vii) Commencement and Termination of Privileges and Immunities

33 The Convention contains rules on the duration of privileges and immunities in Art. 39 VCDR. According to that provision diplomatic immunity starts when the person enters the territory of the receiving State on proceeding to take up their post or, if already in the territory, from the moment when his or her appointment is notified. The provision opens the possibility of abuse of immunity by appointing a person against whom proceedings are pending. Courts have at times tried to avoid this consequence by requiring acceptance of the notification of the appointment by the receiving State, even though (as discussed above) the Convention does not require such acceptance.

34 The privileges and immunities end—besides by death (Art. 39 (3) and (4) VCDR)—when the person leaves the country (meaning final departure) after his or her functions have ended or on expiry of a reasonable period after the end of the functions. However, immunity continues for acts performed in the exercise of the person's functions as a member of the mission, as these acts are acts of the sending State. The continuation of immunity for official acts not only raises intricate questions of the interplay of diplomatic immunity with State immunity, it also poses the issue of which acts can be held to be official. This includes both somewhat technical distinctions such as whether transportation to and from official functions are official acts (see *Knab v Republic of Georgia* United States District Court Washington DC [29 May 1998]) and the question to what extent human rights violations and crimes can be official acts. The German Constitutional Court ruled on the issue in 1997: in 1983 Syria had instructed its then ambassador to the German Democratic Republic to lend assistance to a terrorist group. A member of that group deposited a bag in the embassy and later asked whether the embassy could transport the bag to West Berlin, disclosing that it contained explosives. Even though the ambassador did not organize the transport of the bag, he allowed the terrorist to remove the bag. The explosives were later used in a terrorist attack in West Berlin. The Constitutional Court held that acts are official if the diplomatic agent acts as an organ for the sending State and the action thus is attributable to that State, irrespective of the act violating the law of the receiving State and not being part of the functions of a diplomatic mission under Art. 3 VCDR. It nevertheless ruled against the former ambassador on the basis that the Federal Republic of Germany was not bound by the residual immunity of the ambassador in the

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former German Democratic Republic (Bundesverfassungsgericht [German Federal Constitutional Court 2nd Senate] [10 June 1997] 96 BVerfGE 68). Recent cases, however, clearly moved in a different direction. The Pinochet Cases (*Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Nos 1–3)* United Kingdom House of Lords [25 November 1998] 119 ILR 51; [15 January 1999] 119 ILR 112; [24 March 1999] 119 ILR 137), which are of some persuasive authority given that they turned on British law granting the same immunities to former heads of States and to former heads of missions, indicate a trend towards denying residual immunity at least for serious international crimes; a trend clearly confirmed by the joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal in the *Arrest Warrant Case (Democratic Republic of the Congo v Belgium)*.

(viii) Personal Inviolability and Immunity

35 Article 29 VCDR provides for the inviolability of diplomatic agents, including both a duty of the receiving State to abstain from certain actions (arrest, detention, disrespectful treatment) and an obligation to take all appropriate steps to prevent attacks on the person, freedom, or dignity of the protected persons. After a number of kidnappings of diplomats in 1969 and 1970, the obligation to protect was elaborated further in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. It must be noted that the inviolability of diplomatic agents does not prevent certain measures taken for the protection of human life, out of self-defence, or to prevent the commission of a particular crime—eg preventing a clearly drunk diplomatic agent from driving. According to Art. 31 VCDR diplomatic agents additionally enjoy immunity from criminal and civil jurisdiction of the receiving State, the latter, however, subject to three enumerated exceptions relating roughly to private immovable property in the receiving State, succession, and professional or commercial activity outside the official function. Subject to the same exceptions and the inviolability of the person and residence of diplomatic agents, diplomatic agents are also immune from the execution of judgments. Finally, they are not obliged to give evidence as witnesses. While immunity is procedural in nature and thus does not change the position under substantive law, immunity still bars prosecution or suits and is thus subject to abuse, most commonly regarding traffic offences. To some extent the situation is remedied by the fact that diplomatic agents are not exempt from the jurisdiction of the sending State (Art. 31 (4) VCDR). More importantly, the sending State, not the diplomatic agent, may waive the immunity of diplomatic agents under Art. 32 VCDR, an action now more commonly granted by the sending, and sought for by the receiving, State. Such a waiver must be express. However, the initiation of proceedings by a diplomatic agent precludes the invocation of immunity from jurisdiction with respect to counter-claims directly connected with the principal claim. At times, under modern and more restrictive rules on State immunity it is also possible to sue the sending State.

(ix) Personal and Public Services

36 Diplomatic agents are exempt from personal and public services, such as military service or jury duty (Art. 35 VCDR).

(x) Duties of Third States

37 Diplomatic privileges and immunities arise in the relationship between sending and receiving State. Article 40 VCDR contains a number of obligations for third States. While it grants diplomatic agents and their family members in transit to or from their post through a third State inviolability and other immunities as may be required to ensure transit, it does not grant a right to transit. Instead, the benefits apply only if the third State has granted a passport visa if such visa was necessary. Benefits of administrative and technical or service staff and their families are even more limited. However, official correspondence and other official communications in transit are granted the same freedom and protection as are accorded by the receiving State.

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(e) Conduct of the Mission and of its Members towards the Receiving State

38 The grant of diplomatic privileges and immunities does not imply that the persons benefiting from them live in lawless space. They are obliged to respect the laws and regulations of the receiving State (Art. 41 VCDR). Also, they may not interfere in the internal affairs of that State, which requires a distinction between the (permitted) promotion of human rights and the (forbidden) meddling with internal politics. Similarly, the mission premises must not be used in a manner incompatible with the functions of the mission. Finally, all official business with the receiving State must be channelled through the ministry for foreign affairs if practice or agreement does not determine otherwise. Adding to these rules that were already customary before the Convention was adopted, the Convention also provides that diplomatic agents shall not exercise professional or commercial activities for personal profit in the receiving State (Art. 42 VCDR).

(f) End of the Function of a Diplomatic Agent

39 Article 43 VCDR contains an incomplete enumeration of when the function of a diplomatic agent ends. The safe departure of persons enjoying privileges and immunities other than nationals of the receiving State and the families of such persons is guaranteed by Art. 44 VCDR. The receiving State must grant facilities for such departure even in case of armed conflict.

40 The Convention also regulates some of the consequences of a breach of diplomatic relations or the permanent or temporary recall of a mission. Breaking off diplomatic relations has become rarer and they are nowadays sometimes even maintained in times of armed conflict. However, a State is free to break off diplomatic relations unilaterally. The temporary or permanent recall of a mission is used more frequently and is resorted to in case of security issues or serious crises in diplomatic relations. If these measures are resorted to, the receiving State must respect and protect the premises of the mission including its property and archives and the sending State may entrust custody of the premises and the protection of its interests to a third State acceptable to the receiving State (Art. 45 VCDR). The receiving State does not need to accept the third State. Commonly a neutral State such as Switzerland is chosen as protecting State. In contrast, if a State undertakes the temporary protection of the interests of a third State not formerly represented in the receiving State, the prior consent of the receiving State is required (Art. 46 VCDR). This procedure is often used by very small States.

(g) Non-Discrimination and Reciprocity

41 The Convention contains an obligation of non-discrimination between States in Art. 47 VCDR. However, it explicitly permits the reciprocal 'restrictive application' of provisions of the Convention and the grant of more favourable treatment between States by custom or agreement. The permission of a restrictive application does not allow the breach of provisions of the Convention, but refers to the adoption of a restrictive rather than a broad interpretation of provisions of the Convention.

(h) Final Clauses

42 Articles 48–53 VCDR contain the final clauses of the Convention. According to them, the depositary of the Convention is the Secretary-General of the United Nations and the Convention is authentic in Chinese, English, French, Russian, and Spanish. The Convention adopted the so-called 'Vienna formula' to define the States eligible to become a party—not 'all States', but 'all States Members of the United Nations or of any of the specialized agencies or Parties to the Statute of the International Court of Justice' (Art. 48 VCDR) and any State invited by the General Assembly. That formula excluded North Korea and North Vietnam and was accordingly much criticized by Communist States.

4. New Developments

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43 Modern means of communication and transportation have led to significant changes in the conduct of diplomatic relations. Nowadays, governments discuss many bilateral issues directly between the two capitals without recourse to their permanent missions. The increasing significance of multilateral diplomacy in international organizations and conferences has also had an important impact, in particular because States are often represented not only by members of their diplomatic service, but also by specialists. Given the constant pressure to cut costs it can hardly be surprising that these developments have led to administrative changes, in some cases forcing a reduction in the number of personnel or overseas posts maintained. Communication via internet using encryption has also reduced the need of States to rely on diplomatic couriers and the diplomatic bag for communication purposes.

44 Diplomatic law is not unaffected by developments in international law and politics in general. Thus, the development of the European Union has provoked some new approaches in diplomacy: EU Member States have agreed to grant citizens of the EU the protection of another Member State's mission under certain conditions without resorting to multiple accreditation. Increasing insistence on human rights has caused complaints of interference with internal affairs. Finally, the rise of non-State actors has highlighted both the threat for diplomats who serve as symbolic targets for terrorists and the need to interact with civil society also in other countries.

D. Evaluation

45 The Convention has clearly been one of the great successes of the codification of international law. It has stabilized and developed the area of diplomatic law and has thus become a cornerstone of international relations. Compliance with the Convention is high, with very few exceptions such as electronic surveillance of diplomatic communication. One of the reasons for the excellent compliance record of the Convention is that States are both receiving and sending States and thus comply with the Convention to induce compliance in return. While new developments have at times shifted the emphasis between different provisions of the Convention, the Convention has proved sufficiently flexible to keep up with these developments.

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