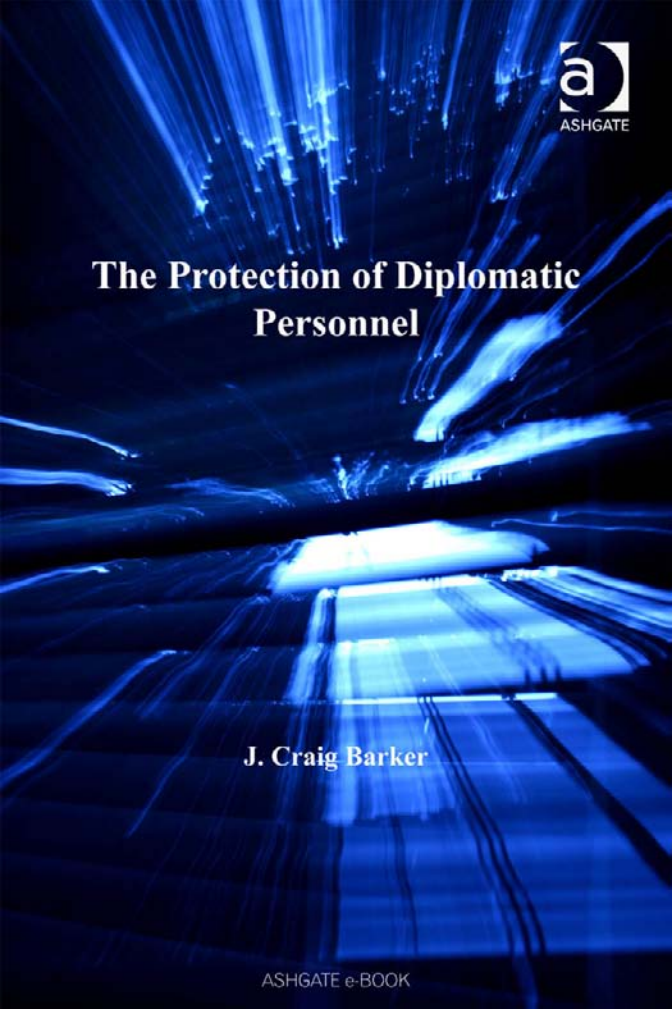
ASHGATE
The Protection of Diplomatic Personnel
J. Craig Barker
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THE PROTECTION OF DIPLOMATIC PERSONNEL

To John P. Grant
"Outstanding"

The Protection of Diplomatic Personnel

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ASHGATE

Published by
Ashgate Publishing Limited
Gower House
Croft Road
Aldershot
Hampshire GU11 3HR
England

Ashgate Publishing Company
Suite 420
101 Cherry Street
Burlington, VT 05401-4405
USA

Ashgate website: http://www.ashgate.com

British Library Cataloguing in Publication Data
Barker, J. Craig, 1966-
The protection of diplomatic personnel
1. Diplomats - Legal status, laws, etc. 2. Diplomats - Protection 3. Political crimes and offenses 4. Diplomatic privileges and immunities 5. Diplomats - Violence against
I. Title
341.3'3

Library of Congress Control Number: 2005938628

ISBN-10: 0 7546 2352 1

Printed and bound in Great Britain by Antony Rowe Ltd, Chippenham, Wiltshire.

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Preface

The near simultaneous terrorist bomb attacks on the United States Embassies in Kenya and Tanzania on 7 August 1998, which resulted in the deaths of over 220 persons and the wounding of 4,000 others, constituted the most devastating assaults ever perpetrated against diplomatic establishments. The targeting of diplomatic establishments and personnel by terrorist organisations is certainly not a new phenomenon. A conference in the wake of the Tehran Hostage Crisis on the subject of "International Terrorism: The Protection of Diplomatic Premises and Personnel" drew attention to the vulnerable position of diplomatic representatives. It noted that "[t]he protection of diplomats merits special attention because diplomats are especially vulnerable symbolic targets of political violence."[1] As one British former diplomat, himself the subject of a failed kidnapping attempt, has noted, "it is the special status of the diplomatic agent which renders him unsafe."[2]

The events of 11 September 2001 witnessed a change in terrorist tactics. There has been an apparent shift away from the targeting of "symbolic" targets (although the symbolism of the attacks on the World Trade Centre on 9/11 should certainly not be underestimated) to a focus on perpetrating attacks against the ordinary citizenry and infrastructure of target countries. The recent attacks in Madrid and in London have targeted the transport infrastructure while attacks in Bali and in Egypt targeted the tourism industry. Perhaps most chillingly, the perpetrators of the terrorist attack in Beslan identified children as legitimate targets of political violence.

Why then should diplomatic personnel merit any particular protection over and above other individuals? The mere fact that diplomatic personnel are serving abroad will not suffice as an explanation. In today's globalised economy, many foreign nationals live and work abroad. Often they do so in dangerous situations supporting the foreign policy ambitions of their national states. Thus, for example, many British and American citizens are working in Iraq, either on behalf of their governments or, more commonly, of private enterprises. Many of these individuals have been targeted by militant organisations operating within Iraq. While such individuals are often provided with extra security by their employers, there is certainly no rule of international law which provides for their special protection.

Accordingly, it would appear to be the specific function that diplomats are called upon to perform that makes them symbolic targets. The institution of diplomacy has always been regarded as of fundamental importance to the proper functioning of international relations. In spite of the overwhelming advances in

[1] Hevener (1986), *Diplomacy in a Dangerous World* (Westview Press, New York), p. 5.
[2] Jackson (1981), *Concorde Diplomacy* (Hamish Hamilton, London), pp. 92-3.

technology which have, in the last century, changed the whole landscape of international relations, states remain firm in their belief that the exchange of diplomatic representatives is the most effective and, perhaps, the only way to conduct modern inter-state relations. This assertion has been criticised and it is certainly true that the privileged status of diplomatic personnel, at least in relation to the question of the granting of diplomatic privileges and immunities, has become a highly controversial topic.

However, it remains the case in practice that diplomatic personnel are specifically charged with the process of developing, formulating and implementing of states' foreign policy. In this role, they stand on the front line of the so-called war on terror. Where terrorist attacks take place on ordinary citizens, diplomatic establishments play an essential role in securing the interests of their nationals in foreign states. Furthermore, the role of diplomatic missions in gathering and interpreting security information should not be underestimated.

Attacks on diplomatic establishments have not ceased since 9/11. Rather, they have been overshadowed by more random and deadly attacks such as those referred to above. To this extent it is certainly true to regard terrorism as a multi-faceted problem requiring multi-faceted solutions.[3] Thus, the fact that terrorist groups have chosen to widen their targeting so as to move away from diplomatic establishments should not be regarded as a reason to believe that the position of diplomatic personnel is somehow safer.

Chapter 1 of this book will consider the nature of the problem of attacks on diplomatic personnel before Chapter 2 delimits the scope of the present study. In particular it will seek to identify the individuals falling within the concept of "diplomatic personnel". Chapter 3 contains a detailed analysis of historic and theoretical issues relating to the question of protection of diplomatic personnel. The current state of the law is considered in Chapters 4and 5. Chapter 4 will examine the Vienna Convention on Diplomatic Relations 1961 and the Vienna Convention on Consular Relations 1963. The analysis will focus in particular on the concepts of inviolability and the so-called special duty of protection. The chapter will also examine in detail the Tehran Hostage Case of the International Court of Justice and will consider the implementation of the special duty of protection in practice. Chapter 5 examines the problem of the prevention and prosecution of attacks against diplomatic personnel. Specific focus is given in this chapter to the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents. The chapter will also examine the prosecution of four of the suspects in the East African bombings in New York in 2001. Chapter 6 develops the multi-faceted approach to the problem of dealing with terrorism in general and the protection of diplomatic personnel in particular. This chapter will examine developments in international law which have occurred since 11 September 2001 and the impact of these developments on the question of the protection of diplomatic personnel.

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[3] See John P. Grant (2004), "Beyond the Montreal Convention" 36 *Case Western Reserve Journal of International Law* 453, at p. 472.

This book has been a long time in the writing. The original idea for the book arose out of my previous work on the question of the abuse of diplomatic privileges and immunities which was published in 1996, also by Ashgate.[4] The events of 7 August 1998 provided further impetus for the work. While undertaking research for the book I was scheduled to fly to New York on 14 September 2001 to interview a member of the UN Department of Legal Affairs about the UN reporting procedure on the question of measures to enhance the protection of diplomatic and consular officials. This trip was sadly cancelled and the events of 11 September 2001 provided both a major difficulty and opportunity for the further development of the work.

I am hugely indebted to many people for their assistance in the completion of this work. It could certainly not have been completed without the financial assistance of the Leverhulme Trust which granted me a Fellowship in 2001 for which I am extremely grateful. I have received research assistance from three extremely talented individuals. Adam Packer helped me greatly in developing some of the early ideas for the work. Yitiha Simbeye and Graham Melling were both doctoral students whom I had the pleasure to supervise and who have both successfully completed their doctoral theses. Yitiha, who has herself published a book with Ashgate,[5] helped greatly with interviews in Tanzania. Graham's assistance towards the end of the project was incredibly helpful and provided the necessary impetus for me to get the work finished. I am grateful to my many colleagues in the School of Law at the University of Reading where I taught until the summer of 2004. Particular thanks must go to Sandy Ghandhi, Jennifer James, Patricia Leopold, Chris Hilson, Chris Waters and the members of the administrative staff, all of whom helped with their support and encouragement. I have been extremely fortunate to have had the opportunity to move to Sussex Law School at the University of Sussex where I have found a vibrant research culture and further encouragement and friendship from colleagues. Special mention should be made of Malcolm Ross, Jo Bridgeman, Marie Dembour and Paul Eden, as well as the redoubtable Tom and James. I am also extremely grateful to Rachael Bigwood who took on the thankless task of proof reading the entire manuscript and did so with patience, care and an impressive eye for detail.

Eileen Denza is a constant inspiration and a thoughtful and critical commentator on my work. Although she has not seen the text of this monograph prior to publication, she helped considerably during our discussions of the early ideas for this work.

Particular thanks must go to John Grant, my mentor and friend. John has supported me throughout my work on this project. He has read and commented on numerous drafts and has kept me on track on more occasions than I care to consider. His support and friendship have gone a considerable way to get me to where I am today and it is with gratitude and pride that I have dedicated this book to him.

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[4] Barker (1996), *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* Dartmouth, Aldershot).

[5] Simbeye (2004), *Immunity and International Criminal Law* (Ashgate, Aldershot).

Last but by no means least, I am eternally grateful to my family. My parents have, as ever, been a constant source of love and support. My wife Kim has been patient and understanding – a perfect partner whose love and support I deeply cherish. Megan and Mackenzie have had to put up with their dad spending much too much time in front of the computer but have been, as ever, a source of inspiration and a grounding force. Finally, I must thank Buster for all our walks together which enabled me to think.

Chapter 1

The Nature of the Problem

The institution of diplomacy has always been regarded as of fundamental importance to the proper functioning of international relations. In spite of the overwhelming advances in technology, which have, in the last century, changed the whole landscape of international relations, states remain firm in their belief that the exchange of diplomatic representatives is critical to the methodology of inter-state relations. Similarly, international institutions rely heavily on the sending and receiving of representatives, many of whom benefit from diplomatic status. Indeed, the emergence of many new states and the creation of a large number of international institutions in the last fifty or sixty years has resulted in a considerable growth in the volume of diplomatic activity and, consequently, the number of persons endowed with diplomatic status.

While states may regard embassies and diplomatic personnel as essential, they are often regarded with suspicion and, on occasion, outright hostility by members of the public. It is rare for ordinary citizens in receiving states to encounter diplomats on a regular basis. The work of embassies is, more often than not, conducted behind closed doors, many of which are heavily guarded. Accordingly, what little knowledge a local population has of the work of embassies and their staff is coloured by media-led portrayals of opulence and abuse leading many to regard diplomats as being above the law. Nevertheless, diplomatic law has evolved over many centuries so as to provide for the inviolability of diplomatic personnel. Diplomatic law also places a special duty on receiving states to ensure that diplomatic personnel are protected against all forms of attack.

1.1 Inviolability and the Special Duty of Protection

Although conducted for many centuries on an *ad hoc* basis, the process of exchange of diplomatic representatives between states is now a permanent one with states routinely establishing permanent diplomatic missions on one another's territory. It has always been recognised that, in order for this process to be effective, there has to be some special status accorded to those individuals who undertake such exchanges. As will be explained in Chapter 3 of this book, the earliest civilisations recognised the sanctity of messengers and provided them with the privilege of personal inviolability, the right never to be infringed or dishonoured. Throughout the ensuing centuries, this right has been maintained and developed. As the infrastructures of permanent diplomatic relations in the form of permanent diplomatic missions were established, this inviolability came to be

accorded to those infrastructures as well as to diplomatic agents personally. To this extent, it is true to say that diplomatic inviolability is the cornerstone of modern diplomatic privileges and immunities.

The Vienna Convention on Diplomatic Relations 1961,[1] which codified the law of diplomatic privileges and immunities, reflects this truism. Accordingly, Article 22 of the Convention, which deals with the premises of the mission, asserts in paragraph one that they shall be inviolable. Similarly, Article 29 of the Convention confirms the inviolability of the person of the diplomatic agent. The archives and documents of the mission,[2] its official correspondence[3] and the private residence, private correspondence and property of the diplomatic agent[4] are also declared by the terms of the Convention to be inviolable.

Insofar as the concept of inviolability is considered to be a right not to be interfered with, it is constituted as a negative obligation on the receiving state. Thus, with respect to the premises of the mission, it is specifically provided that: "The agents of the receiving state may not enter them, except with the consent of the head of the mission". Similarly, in relation to the inviolability of the diplomatic agent, Article 29 further provides that: "He shall not be liable to any form of arrest or detention". However, diplomatic law recognises a further, positive, obligation on receiving states in relation to the protection of the premises of the diplomatic mission and the person of the diplomatic agent. Thus Article 22(2) of the Convention imposes a "special" duty on the receiving state "to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity".

In the same way, Article 29 of the Convention, having established the inviolability of the person of the diplomatic agent and his right not to be arrested or detained, continues in the following terms: "The receiving state shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity".

The protection to be accorded to diplomatic missions and diplomatic agents is, accordingly, two-fold. First, there is an obligation on the state itself not to interfere with the mission premises or the person of the diplomatic agent. Secondly, there is an obligation placed on the receiving state to seek to ensure that no one else within its territory interferes with the mission premises or the person of the diplomatic agent.

In spite of these clearly stated rules of diplomatic law, a multiplicity of factors including, but not limited to, the continuation of the Cold War, the emergence of a number of revolutionary regimes and the development of international terrorism, have contributed to what has been referred to as "the new barbarism".[5] As will be illustrated in this chapter, one of the first victims of the new barbarism in

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[1] 500 *UNTS* 95 (hereinafter, the VCDR).
[2] VCDR, Article 24.
[3] VCDR, Article 27(2).
[4] VCDR, Article 30.
[5] Frey and Frey (1999), *The History of Diplomatic Immunity* (Ohio State University Press, Columbus, Ohio) p. 479.

international relations was international diplomacy and, more particularly, the persons called upon to conduct international diplomacy on the ground. Thus, while it may be unusual for diplomatic personnel to find themselves the victims of what might be described as ordinary criminal activity, it is undoubtedly the case that systematic and organised attacks against diplomats have been regular occurrences during the last thirty to forty years.

1.2 Attacks on Diplomatic Personnel 1961-1979

The first major attack on a diplomatic premises after the conclusion of the Vienna Convention on Diplomatic Relations 1961 was the 1965 attack on the US Embassy in Saigon, in which three Embassy employees were killed.[6] However, it was in Latin America that the most serious threat against diplomatic personnel was beginning to develop. It was in that part of the world that a new revolutionary tactic of kidnapping diplomatic personnel began to emerge. According to one commentator, "guerrillas of all political ideologies, and Marxists in particular … realized that abducting diplomatic representatives can be a highly effective weapon in their war against usually superior military and police forces".[7]

The assassination of John Gordon Mein, United States Ambassador to Guatemala, on 28 August 1968 was the first such incident. Ambassador Mein was killed during a failed kidnapping attempt by a leftist guerrilla organisation, commonly believed to be the Rebel Armed Forces (FAR). The event took place in the context of a near civil conflict in Guatemala and was one of a number of attacks against leading figures in Guatemala City.

The apparent benefits of targeting diplomatic personnel in this way were quickly identified from the "successful" outcome of the kidnapping of another American Ambassador the following year. Charles Burke Elbrick, the American Ambassador to Brazil, was abducted on 3 September 1969 in Rio de Janeiro by members of the October 8th Revolutionary Movement (MR-8), a Marxist revolutionary group.[8] The US Administration put pressure on the Brazilian government to accede to the demands of the kidnappers. The Brazilian government bowed to US pressure and Ambassador Elbrick was released.[9] However, the apparent success of the tactic of kidnapping diplomatic personnel led to several more such incidents, and Brazil was forced to continue to give in to the demands of

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[6] Loeffler (1998), *The Architecture of Diplomacy: Building America's Embassies* (Princeton Architectural Press, New York) pp. 239-240.

[7] Stechel (1972), "Terrorist Kidnapping of Diplomatic Personnel" 5 *Cornell International Law Journal* 189, pp. 202-3.

[8] The event and four-day ordeal of Ambassador Elbrick was the subject of a book entitled *O Que É Isso, Companheiro? (What's Up, Comrade?)* by Fernando Gabeira, an undercover journalist who took part in the kidnapping. The book was itself adapted in the film *Four Days in September* (Dir Bruno Barreto, 1998).

[9] See Sullivan (1995), "Embassies at Risk: Learning From Experience" in Sullivan (ed.), *Embassies Under Siege* (Brassey's, Washington and London), pp. 2-3.

the kidnappers. This resulted in 129 political prisoners being released in return for kidnapped diplomats in Brazil in 1979 and 1980.[10]

The kidnapping and murder of Count Karl von Spreti, the West German Ambassador to Guatemala, signalled a new approach to the problem of the kidnapping of diplomats. Von Spreti was abducted on 30 March 1970 and his body was recovered on 5 April of that year. A week before von Spreti's abduction, the Paraguayan Ambassador to Argentina had been abducted and subsequently released after the Argentinian government had refused to give in to the demands of the hostage takers. On this occasion, however, the hard line adopted by Guatemala in the face of a demand for the release of 25 prisoners and a $700,000 ransom resulted in the ambassador's death.[11] Apparently seeking to avoid the possibility of a right wing coup d'état, the Guatemalan government chose not to deal with the FAR, taking the decision to risk the life of von Spreti in order to secure vital national interests.[12] The response of the West German government was an immediate and forceful condemnation of the failure of Guatemala to face up to its responsibility under international law. In particular, the West German government condemned Guatemala's failure to provide for von Spreti's protection before the kidnapping and in respect of its failure subsequently to secure the release of von Spreti.[13] West Germany then recalled its staff from its embassy in Guatemala and requested the removal of the Guatemalan Ambassador from Bonn.[14]

The Organisation of American States (OAS) sought to respond directly to the problem of diplomatic kidnappings in the form of the OAS Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance 1971.[15] The Convention is concerned with kidnappings and extortions that rise above purely domestic acts to cover acts "against persons entitled to special protection".[16] The Convention identifies the proscribed acts, describing them as "common crimes of international significance, regardless of motive".[17] The significance of this is to bring such acts within the remit of the Inter-American Convention on Diplomatic Asylum 1954 which denies the right of asylum to persons convicted or accused of common crimes, as opposed to political crimes.[18] The Convention adds the proscribed acts to existing extradition treaties,[19] and requires their inclusion in future extradition

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[10] *Infra*.
[11] For details of this case see the BBC archive for 5 April 1970, available at http://news.bbc.co.uk/onthisday/hi/dates/stories/april/5/newsid_2522000/2522703.stm.
[12] *Ibid.*
[13] Przetacznik (1983), *Protection of Officials of Foreign States According to International Law* (Brill, New York), p. 42.
[14] *Ibid.* See also Stechel, *op cit*, pp. 205-206.
[15] *OASTS* No. 37; 10 *ILM* 255 (1971) (hereinafter, the OAS Convention).
[16] OAS Convention, Preamble, Articles 1-2.
[17] OAS Convention, Article 2.
[18] See Stechel, *op cit*, p. 211.
[19] OAS Convention, Article 3.

treaties.[20] A variant of the *aut dedere aut judicare* principle is contained in Article 5 of the Convention. The OAS Convention will be further analysed in Chapter 5 below.

Other responses to the problem of diplomatic kidnappings in Latin America included the implementation of measures to improve security. As the primary target of this spate of diplomatic kidnappings, the American government sought to reduce manpower in their missions to essential staff and issued directions to remaining staff in the region to reduce travel and to travel in convoys. The US also sought to increase cooperation with local security staff, which included the provision of training, and to require tighter embassy guards.[21] The obligation on the receiving state to cooperate with these measures is enshrined in Article 29 of the VCDR which, as has been noted above, requires the receiving state to take "all appropriate steps to prevent any attack on his person, freedom or dignity".

The final response of the OAS states was to continue to take a hard-line approach to the question of dealing with groups who kidnapped diplomatic personnel. Some concern was expressed as to the legality of such an approach. For example, the response of the West German government to the kidnapping and murder of Ambassador von Spreti was to allege that Guatemala had breached international law by not negotiating with the kidnappers. On the other hand, it has been suggested by one commentator that the obligation of the receiving state is to secure the proper functioning of diplomatic relations rather than the security of the individual diplomat.[22] According to this approach: "[I]f a kidnapping unavoidably occurs after [all appropriate] steps have been taken, the state need not jeopardize its internal security or the safety of future victims by negotiating with the revolutionaries or complying with their demands."[23] This is clearly a highly controversial claim and the extent of what is required by the concept of "all appropriate steps" will be considered more fully later in this work.[24] However, for present purposes, it is suggested that such an approach can only work where both

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[20] OAS Convention, Article 7.

[21] Stechel, *op cit*, p. 213. However, even such increased security was not as extensive as it might have been. It is interesting to read the accounts of the wife of Neil Ruge, who was in charge of the American Consulate in Guatemala City at the time of the murder of Ambassador Mein. She notes that: "While we were in the process of making up our minds [on whether to leave Guatemala], we received police protection at home twenty-four hours a day. We fed the men on duty, two at a time, around the clock to stay in their good graces, we even supplied one deck chair for the night shift so one could rest while the other stood guard. We felt it would not hurt to humor them a bit, since they were not excused from their regular police work after they were through with us. They were very appreciative. They washed our car voluntarily and scouted the street before either of us drove out through the gate." Ruge (2003), "Assignment Guatemala 1968: An Early Encounter with Terrorism" *American Diplomacy* Vol 8. Available at www.unc.edu/depts/diplomat/archives_roll/2003_01-03/ruge_guatemala/ruge_guatemala.html.

[22] Stechel, *op cit*, p. 217.

[23] *Infra*.

[24] See Chapter 4.1.2 below.

sending and receiving states are agreed that a hard-line approach is the correct one.[25]

The impact of the implementation of this range of measures went someway to limit the number of attacks on diplomatic personnel in Latin America. However, the problem of diplomatic kidnappings and the targeting of diplomatic personnel by terrorists had already spread to other parts of the world. In 1970 and 1971, diplomatic kidnappings occurred in Spain, where the West German Consul was kidnapped and subsequently released by Basque separatists, and to Canada, where the British Trade Commissioner was kidnapped by members of the Quebec Liberation Front and released after 59 days. A third major incident occurred in Turkey, where, in contrast to the incidents in Spain and Canada, the kidnappers killed the abductee. The kidnapping, which occurred on 17 May 1971, involved Ephriam Elrom, the Israeli Consul-General in Turkey, who was shot dead by his kidnappers when their demands were not met.[26]

The response of the broader international community to the events in Latin America and those in the rest of the world came primarily in the form of the UN Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents 1973.[27] This is a central instrument in the international legal mechanisms created to ensure the protection of diplomatic personnel and, accordingly, its development and its provisions will be considered at length below.[28] However, for present purposes, it is necessary to outline the key provision of the Convention. The 1973 Convention defines an internationally protected person as "(a) a Head of State, including any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned, a Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign State, as well as members of his family who accompany him; and (b) any representative or official of a State or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household."[29] The Convention builds on the inviolability of diplomatic personnel by providing not only for their protection but also by requiring parties to make punishable, by appropriate penalties, the intentional commission of a "murder, kidnapping or other attack on the person or liberty of an internationally protected person".[30] Each state party is required to take such measures as may be necessary

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[25] See, for example, in relation to the Lima Hostage Crisis discussed at p. 13 above.
[26] Stechel, *op cit*, p. 203.
[27] Internationally Protected Persons Convention, 1035 *UNTS* 167; 13 *ILM* 43 (1974) (hereinafter the 1973 Convention).
[28] See Chapter 5.
[29] 1973 Convention, Article 1(1).
[30] 1973 Convention, Article 2(1)(a). Similar provisions exist in relation to "b. a violent attack upon the official premises, the private accommodation or the means of transport of an

to establish its jurisdiction over such crimes[31] as well as to take all practicable measures to prevent the commission of such crimes.[32] In terms of Article 7 of the Convention:

> The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.[33]

In spite of the apparent will of the international community to deal with the problem of attacks on diplomatic personnel, in the years immediately following the signing of the 1973 Convention, the situation gradually worsened. Subsequent murders of diplomatic envoys occurred with regular frequency. One of the worst examples occurred on 1 March 1973 when members of the Palestinian terrorist group Black September,[34] stormed the Saudi Arabian Embassy in the Sudan and took hostage a number of prominent diplomats. Some hours later, Cleo Noel Jr, the United States Ambassador to the Sudan, George Curtis Moore, his deputy, and Guy Eid, the Belgian chargé d'affaires, were murdered. The siege of the Embassy ended 60 hours after it had begun with the release of the remaining hostages and the surrender of the eight gunmen involved. The gunmen were later sentenced to life imprisonment by a Sudanese court but the sentences were commuted to seven years. Other fatalities among diplomatic staff during this period were Roger P. Davies, American Ambassador to Cyprus in 1974; Francis E. Meloy, American Ambassador to Lebanon in 1976; Sir Richard Sykes, British Ambassador to the Netherlands in 1978; Adolph Dubbs, American Ambassador to Afghanistan in 1979; and several Spanish diplomats in Guatemala in 1980.

Based primarily on an analysis of statistical evidence provided by the US Department of State, two leading commentators on the history of diplomacy, Linda and Marsha Frey, have provided a very useful, if chilling, summary of terrorist attacks on diplomatic personnel between 1968 and 1983 as follows:

> In 1970 terrorists launched 213 attacks against diplomats from 31 countries; in 1978, 281 attacks against diplomats from 59 countries; and

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internationally protected person likely to endanger his person or liberty; c. a threat to commit any such attack and; d. an attempt to commit any such attack. Sub-paragraph e imposes an obligation on signatory states to make a crime under its internal law any act constituting participation as an accomplice in any such act." Article 2(1).

[31] 1973 Convention, Article 3.

[32] 1973 Convention, Article 4.

[33] 1973 Convention, Article 7.

[34] This group was responsible for the seizure of nine Israeli athletes at the Munich Olympics in 1972. An ensuing gunfight with West German authorities resulted in the deaths of the athletes and five gunmen. The organisation had also previously occupied the Israeli embassy in Bangkok, Thailand in December 1973. See www.bbc.co.uk/onthisday/hi/dates/stories /march/1.

> in 1980, 409 attacks against diplomats from 60 countries. From 1968 to 1981 diplomats from 108 countries were the victims of international terrorism. From January 1968 to December 1980, approximately 2,688 attacks against diplomats occurred. Between 1968 and 1982, 381 diplomats were killed and 824 wounded. In 1975, 30 percent of all terrorist assaults were directed against envoys, but by 1980 this had escalated to 54 percent. Of the 409 terrorist attacks in 1980 and the 368 in 1981, more than half of all victims were diplomats. In 1982 diplomats were also the primary target (54%) of the 794 terrorists incidents. From 1973 to 1982 diplomats were the cumulative target of 34.9 percent of the 6,473 terrorist incidents. Of the terrorist incidents from 1979 to 1983, 43.5 percent of the victims were diplomats.[35]

Frey and Frey also note the problems faced by embassy premises during the same period, arguing that "[E]ven more symptomatic of the rending of the international fabric were the attacks against embassy premises. The assaults on embassies, like those on envoys were a worldwide problem. From 1971 to 1980, 48 embassies were taken over."[36] The most notable such occurrence was in relation to the United States Embassy in Tehran in 1979.

1.3 The Tehran Hostage Crisis 1979

Undoubtedly, the most significant failure to protect diplomats in history concerned the seizure and subsequent occupation of the US Embassy in Tehran, Iran in 1979. Although the seizure of the Embassy took place on 4 November of that year, this was not the first time the Embassy had come under attack. On 14 February 1979, the day that United States Ambassador Adolph Dubbs was kidnapped and murdered in Afghanistan, an armed group of radical militants attacked and seized the Embassy in Tehran.[37] Six individuals were killed and a further 70 individuals, including the US Ambassador, were held hostage. The incursion lasted only a few hours and was ended when the Iranian Deputy Prime Minister came to the Embassy accompanied by members of the Revolutionary Guard. The Iranian authorities returned the Embassy to the Americans and shortly thereafter apologised in writing to the US Ambassador.[38]

Relations between the two states deteriorated again in October of 1979 when the United States announced that it was contemplating allowing the former Shah of Iran to enter the United States in order to receive medical treatment. During that month the Americans repeatedly sought assurances from the Iranian authorities that their diplomatic premises would be properly protected and repeatedly the Iranian

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[35] Frey and Frey, *op cit*, p. 510.
[36] *Infra.*
[37] Tromseth, "Crisis After Crisis: Embassy Tehran, 1979" in Sullivan (ed.), *op cit*, pp 37-8.
[38] See *Case Concerning United States Diplomatic and Consular Staff in Tehran*, 1980 *ICJ Reports* 3, para. 14.

authorities gave those assurances.[39] On 1 November, during a demonstration in another part of Tehran, officials at the US Embassy reported that they were happy with the level of security being provided by the Iranians in the form of between ten and fifteen uniformed guards together with a contingent of Revolutionary Guards nearby. In spite of radio broadcasts by the authorities and calls by speakers at the demonstration not to go to the Embassy, a crowd of around 5,000 individuals made their way there. On this occasion, the security was maintained and the crowd dispersed peacefully.[40]

However, on 4 November 1979, during a further demonstration by around 3,000 protestors, the Embassy was stormed by a large group of armed individuals who described themselves as "Muslim Student Followers of the Imam's Policy" (hereinafter the students).[41] According to the International Court of Justice, in its recounting of the events of the day, "the Iranian security personnel are reported to have simply disappeared from the scene; at all events it is established that they made no apparent effort to deter or prevent the demonstrators from seizing the Embassy's premises."[42] Direct appeals were made to the Iranian authorities to bring an end to the occupation. However, no effort was made to do so.[43] The following day, the US Consulates in Tabiz and Shiraz were also seized. Again, no protection was provided to these establishments.[44] In the following days and months, similar attacks took place on the British Embassy, the Iraq Consulate and the Embassy of the USSR. However, none of these attacks resulted in a prolonged occupation.[45] Ultimately 52 hostages were held for a period of 444 days in the Embassy in Tehran until their eventual release on 20 January 1981. The legal implications of the Tehran Hostages Case will be analysed in depth in Chapter 4 below.

1.4 The Beirut Embassy Bombings and the Inman Report

The early 1980s was witness to a new spate of terrorist attacks on diplomatic premises, this time in the Middle East. The principal target was the United States of America. On 18 April 1983, 63 people, including 18 Americans, were killed and 120 were injured in an attack by Islamic Jihad on the US Embassy in Beirut. The attack was carried out by a suicide bomber who drove a truck filled with 20,000 pounds of explosives into the front of the Embassy building. Later that year, on 12 December, attacks took place against the United States and French Embassies in Kuwait City, Kuwait which resulted in five deaths. Seventeen months after the first attack on the US Embassy in Beirut, a further attack took place on 20 September 1984. On that occasion a truck bomb was exploded outside an annex of the US

[39] *Ibid*, para. 15.
[40] *Ibid*, para. 16.
[41] *Ibid*, para. 17.
[42] *Infra*.
[43] *Ibid*, para. 18.
[44] *Ibid*, para 19.
[45] *Ibid*, para 20.

Embassy in Beirut and resulted in the deaths of 24, including two Americans. A further 21 were injured. Beirut was the focus of a number of other attacks against American interests. The worst such attack was not against a diplomatic establishment but took the form of an attack on the US military barracks at Beirut airport. This attack resulted in the deaths of 241 US Marines.

These attacks marked a new development in terrorism and prompted a new approach by the United States of America to the problem of protection of diplomatic premises. In response to the events noted above, the US Secretary of State created an Advisory Panel on Overseas Security under the chairmanship of Admiral Bobby Ray Inman. The Panel reported in June 1985 in a document which has come to be referred to as the "Inman Report". [46] Although considered by some to represent the first attempt to analyse the United States' ability to deal with the terrorist threat generally, the Inman Report was focused more specifically on the issue of the United States' diplomatic business. Thus, the remit of the Advisory Panel was to consider "the scope and dimension of the security problems that confront the United States in continuing to do diplomatic business overseas as well as in providing adequate reciprocal protection for foreigners stationed in or visiting the United States on diplomatic business".[47] Noting that "Security has not traditionally been given a high priority by diplomatic establishments",[48] the Report went on to address a range of key issues including: "organization within the Department [of State], professionalism of those executing security responsibilities, international diplomacy to thwart terrorism, the protection of foreign dignitaries and missions, certain intelligence and alerting processes, physical security standards and the substantial building program that is required."[49] The Inman report will be analysed in depth in Chapter 4 below.

1.5 Attacks on Diplomatic Personnel Since 1980

Although the United States was the primary target of terrorist attacks on diplomatic premises at this time, it is clear that the problem was not unique to the United States. In the years following the publication of the Inman Report in 1985, a number of significant bombings of other states' embassy premises occurred around the world. These included, most notably, the bombing of the Israeli Embassy in Buenos Aires, Argentina which resulted in 29 deaths and 242 injuries, and the attack on the Egyptian Embassy in Islamabad, Pakistan which killed 16 and injured 60. Nevertheless, these were only two of a number of attacks on diplomatic establishments and personnel which have occurred since 1980.

In the aftermath of the Tehran Hostage Crisis, the United Nations sought to create a reporting mechanism which was designed, at the very least, to highlight

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[46] The full report of the Secretary of State's Advisory Panel on Overseas Security is available on the United States Department of State website at www.fas.org/irp/threat/inman/index.html. (Hereinafter "the Inman Report").
[47] Inman Report, *op cit*, Introduction.
[48] *Infra*.
[49] *Infra*.

the problem of attacks on diplomatic personnel. The General Assembly had, for a number of years, been calling upon states to ratify the Vienna Convention on Diplomatic Relations 1961, and to observe and implement its provisions.[50] These calls had arisen out of concern at "violations of the generally recognized rules of diplomatic law and at instances of violations of security of diplomatic missions and safety of their personnel".[51] The reporting process was initiated by Denmark, Finland, Iceland, Norway and Sweden who requested that an item entitled "Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives" be placed on the agenda of the General Assembly for 1980. After consideration of the item by the General Assembly,[52] it passed Resolution 35/168 on 15 December 1980 under the same title. The Resolution noted in its Preamble the importance of the inviolability of, not only diplomatic and consular missions and representatives, but also of missions and representatives of states to international intergovernmental organisations, as "a basic prerequisite for the normal conduct of relations among States and for the fulfilment of the purposes and principles of the United Nations Charter".[53] The Preamble then highlighted the increasing number of attacks on diplomatic personnel while also drawing attention to the problem of abuse of diplomatic privileges and immunities by such individuals.[54] In the operative part of the Resolution, the General Assembly deplored all violations of diplomatic and consular law and strongly condemned all acts of violence against diplomatic and consular missions and representatives.[55] More specifically, the Resolution:

> *[Urged]* all States to take necessary measures with a view to effectively ensuring, in conformity with their international obligations, the protection, security and safety of diplomatic and consular missions and representatives in territory under their jurisdiction, including practicable measures to prohibit in their territories, illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the preparation of acts against the security and safety of such missions and representatives.[56]

The reporting procedure was introduced by virtue of paragraph 7 of the Resolution. The procedure was two-fold. First, states were invited to report to the Secretary-General serious violations of the protection, security and safety of diplomatic and consular missions and representatives. The second part of the procedure was to invite states where the violation took place to submit reports "on measures taken to

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[50] See, for example, GA Resolutions 3501 (XXX) (1975); 31/76 (1976) and 33/140 (1978).
[51] GA Resolution 33/140 (1978), Preamble.
[52] See *Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives*, UN. Doc. A/35/679 (1980).
[53] *Ibid*, Preamble.
[54] *Infra.*
[55] *Ibid*, paragraphs 1 and 2.
[56] *Ibid*, paragraph 4.

bring to justice the offenders and to prevent a repetition of such violations and to eventually communicate, in accordance with its laws, the final outcome of the proceedings against the offenders".[57] The Secretary-General was called upon to report annually to the General Assembly and express his views. Furthermore, other states were to be given the opportunity to comment on violations and measures taken. This was done annually until 1988 and has continued biannually ever since. The content of all of the Secretary-General's reports since 1980 are summarised in Annex 1 below.

A number of notable incidents of serious attacks against diplomatic personnel, revealed by the various reports of states to the Secretary-General under this procedure, should be highlighted at this time. Turkish diplomats and consuls have been the subject of serious attacks on a number of occasions in the last 25 years. For example, in 1981, Turkey reported that two of its diplomats had been murdered in Paris, and a third was murdered in Geneva. It also reported the murder of its Consul-General in Sydney.[58] In 1982, it reported that two other Turkish Consuls had been killed in Los Angeles and Boston and that an attempt had been made to assassinate one of its diplomats in Rome. In the same year France reported the murder of the US military attaché in Paris. As well as the bombing of the US Embassy in Beirut in 1983, gunmen seriously injured the Israeli Ambassador to the United Kingdom and a Turkish diplomat was killed in Portugal. The United Kingdom also reported the arrest of two individuals on charges of conspiracy to murder the Turkish Ambassador. The 1985 report highlights the deaths of a Jordanian diplomat in Turkey and an Indian diplomat in the United Kingdom. No diplomats were reported to have been killed in 1986 while in 1987, Pakistan reported on the death sentence handed down to the perpetrator of the murder of the Soviet military attaché. In 1988 Greece reported the murder of the US naval attaché by members of the 'November 17' terrorist organisation, a group which has been responsible for a number of fatal and non-fatal attacks on diplomatic personnel in recent years.

The 1990s witnessed continued attacks on diplomatic personnel and premises. During this period five diplomatic personnel were killed, including two Turks, the press attaché of the Turkish Embassy in Athens in 1991, and the counsellor of the Turkish Embassy in Athens in 1994. These deaths, and other attacks on Turkish diplomatic premises in Greece, prompted the Turkish government in 1999 to condemn "the failure of the Greek Authorities to provide adequate protection, security and safety" to Turkish interests.[59] The other three deaths related to a Saudi diplomat in Belgium and a Peruvian diplomat in Bolivia, both in 1990 as well as an Israeli diplomat in Turkey in 1993. The Secretary-General's reports during this period also highlighted an increased number of incursions into diplomatic premises worldwide by a variety of demonstrators. Three serious incidents of attacks on diplomatic premises were also reported. These included a bomb attack on the Israeli Embassy in Buenos Aires in 1992, which resulted in 29 deaths; a bomb

[57] *Ibid*, paragraph 7.
[58] UN Doc. A/36/445.
[59] UN Doc A/INF/54/5/Add.1, p. 1.

attack on the Israeli Embassy in London, which did not result in fatalities; and a bomb attack on the Egyptian Embassy in Islamabad which resulted in 18 deaths and 60 injuries.

A number of other serious attacks on diplomatic establishments do not appear to have been reported to the Secretary-General under the UN's reporting mechanism. The first of these concerns the Lima Hostage Crisis in 1996-97. At 8.35 p.m. on Tuesday 17 December 1996, 25 rebels belonging to the Tupac Amaru Revolutionary Movement in Peru broke into a party being held at the residential compound of Mirihisa Aoki, the Japanese Ambassador to Peru, in Lima, thereby launching what has been described by one commentator as "possibly the single most audacious act in the history of terrorist hostage taking."[60] The hostages originally numbered around 300. However, the majority were released leaving around 72 captives, including a number of diplomatic personnel. After repeated attempts at peaceful negotiation to bring an end to the crisis, members of the Peruvian army stormed the Embassy compound on 22 April 1997. They killed 14 rebels and released all bar one of the hostages unharmed.

The second unreported incident relates to the single most deadly attack on the diplomatic infrastructure in a single day, that is, the near simultaneous bombing of the United States Embassies in Dar es Salaam, Tanzania and Nairobi, Kenya on 7 August 1998.

1.6 The East African Bombings and the Crowe Report

Official figures provided by the United States confirm that the Tanzanian bomb resulted in the deaths of 11 individuals and caused 85 injuries.[61] Far more destructive was the Kenyan bomb which killed 213 individuals including 44 Embassy employees. An estimated 200 Kenyan citizens were killed and 4,000 were believed to have been injured in the attack.[62] Both explosions were caused by bombs hidden in trucks driven by suicide bombers. In the case of Nairobi, the truck was allowed into a parking area to the rear of the Embassy. In Dar es Salaam, the truck was unable to gain access beyond the perimeter fencing but was detonated at a distance of approximately 35 ft from the building itself.

In Nairobi the occupants of the truck bomb demanded that Embassy guards open the security gates to the rear of the Embassy premises to allow the truck bomb into the compound. On refusal, the guards were fired upon and attacked by a flash grenade. The guards were unarmed and sought to alert the Marine Security Guards (MSG) who were stationed at the Embassy's command post. They were unable to do so because the radio and telephone lines to the post were busy. A number of occupants of the Embassy approached the windows to see what was

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[60] Fedarko, "Gala at Gunpoint", *Time*, December 30, 1996, p. 86.

[61] Report of the Accountability Review Boards, Bombings of the United States Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania on August 7 1998 available at www.state.gov/www/regions/africa/accountability_report.html, (Hereinafter the Crowe Report) Dar es Salaam Discussion and Findings.

[62] Crowe Report, *op cit* Nairobi Discussion and Findings.

happening. At that point the truck bomb was detonated. In Dar es Salaam, a very similar scene was played out, but the truck bomb was unable to penetrate the perimeter of the compound as it was blocked by a water tanker. It is likely that the truck would not have been able to enter the compound even if it had not been blocked.

The circumstances of the bombings were considered by two Accountability Review Boards convened by the Secretary of State on 5 October 1998, under the joint chairmanship of Admiral William Crowe, which issued a joint report in January 1999 (the Crowe Report).[63] According to the findings of the Crowe Report: "Had the Kenyan Government granted the embassy's long-standing request to have more than one radio frequency, the perimeter guards would have had a dedicated frequency to communicate with the MSG ... who could have triggered the embassy's internal alarm system giving personnel time to take cover."[64] The report also suggests that the location of an alarm trigger in the guard booth would have had the same effect. This is speculation at best and it would have had limited impact upon persons passing the Embassy and those in surrounding buildings, who made up the vast majority of those killed in the explosion. The report did not make any findings as to the existence or otherwise of such mechanisms in Dar es Salaam. The report and its findings are analysed in detail in Chapter 4 below.

1.7 The Threat to Diplomatic Personnel – An Overview

According to figures provided by the US Department of State, a staggering 2,345 terrorist incidents have been directed against diplomats or diplomatic establishments since 1980. The statistics behind this stark figure reveal that diplomats and diplomatic establishments have, in fact, been less and less frequently targeted by terrorist organisations in recent years. Thus, although more than half of terrorist assaults in the early 1980s were directed against diplomatic personnel, that percentage dropped significantly in subsequent years. The position began to change somewhat in 1984. In that year, of the 685 terrorist incidents, 134 were directed against diplomatic establishments. This represents approximately 19.6 percent of the total compared to an average of 33.4 percent in the preceding four years. A further significant drop was registered in the following year when 87 of the 806 terrorist attacks were directed against diplomats or diplomatic establishments, constituting 10.7 percent of the total.[65]

Table 1 below sets out the total number of terrorist incidents in each year from 1994-2003 alongside the number of attacks directed against diplomatic establishments which are represented both numerically and as a percentage of the total. This table does not provide information on the number of victims of such attacks whether of diplomatic rank or among ordinary citizens.

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[63] The Crowe Report, *op cit*.
[64] *Ibid*, Introduction.
[65] US Department of State, Office of the Coordinator for Counterterrorism. Set out in full in Frey and Frey, *op cit*, p. 509.

Table 1 Attacks against diplomatic establishments 1994-2003

Year	Total number of terrorist attacks	Terrorist attacks against diplomatic establishments	Percentage
1994	322	24	7.4%
1995	440	22	5.0%
1996	296	24	8.1%
1997	304	30	9.9%
1998	274	35	12.8%
1999	395	59	14.9%
2000	426	29	6.8%
2001	355	18	5.0%
2002	205	14	6.8%
2003	208	15	7.2%

Source: US Department of State, Office of Counterterrorism
See http://www.state.gov/s/ct/rls/c14813.htm

1.8 Diplomatic Personnel as Targets – A Continuing Problem

As symbolic figures, diplomatic representatives have become the targets for all types of organised political violence, most often by those objecting to the policies of the state of which the diplomat is a representative. However, they can also be targeted by those protesting against the policies of the receiving state.

As has been noted, in 1985, in the aftermath of the bombing of the American Embassy in Beirut, the United States government set up a review of "the security problems that confront the United States in continuing to do diplomatic business overseas as well as in providing adequate reciprocal protection for foreigners stationed or visiting the United States on diplomatic business". The review led to the publication of the Inman Report of the Secretary of State's Advisory Panel on Overseas Security.[66] The Inman Report highlighted the change in circumstances which had begun in the 1970s concluding that "although American officials and premises abroad suffered occasional violence of one sort or another, there was not until recently any real pattern of politically inspired violence".[67] According to Inman, the emerging threat to American officials abroad was terrorism:

> The assaults have become bloodier and the casualty toll higher. The fabric of international consensus has been strained as rogue states have entered the conflict, waging undeclared war by sponsoring and supporting terrorism against the diplomats of nations whose policies they oppose. In sum, what we have seen in recent years is an expansion of the threat from

[66] The full text of the Report is available at www.fas.org/irp/threat/inman/index.html. Last visited 31 January 2005.
[67] *Ibid.*

> physical violence against diplomats – often private, incidental, even furtive – to the beginnings of calculated terror campaigns, psychological conflict waged by nation or sub-group against nation, with an ever-broadening range of targets, weapons and tactics.[68]

These words have proved to be rather prophetic. Unfortunately most, if not all, states, have had to face up to the problem of international terrorism at the beginning of the twenty-first century. Terrorist attacks now involve not only officials but also the ordinary citizenry of states, as witnessed by the tragic events of 11 September 2001.

It has been acknowledged in this chapter that as terrorists have widened their range of "legitimate" targets, fewer attacks have been perpetrated on diplomatic personnel. Nevertheless, it is submitted that the declaration of the so-called war on terror has served to place diplomatic personnel around the world on the frontline of that war. No more symbolic illustration of that fact can be given than the abduction and murder of Ihab Al-Sherif, the Egyptian Ambassador-Designate to Iraq and the targeting of two more high-level Muslim diplomats from Bahrain and Pakistan in Iraq in early July 2005. Since then, on 21 July 2005, two Algerian diplomats, including Ali Balarousi, the top Algerian diplomat in Iraq, were abducted. According to press reports, the diplomats were targeted because of the support of their governments for the activities of Western states in Iraq.

Diplomats remain essential for the provision of information and detailed analysis of on-going situations in all parts of the world. The role of diplomatic missions in gathering and interpreting security information should not be underestimated. Diplomatic personnel are specifically charged with the process of developing, formulating, and implementing states' foreign policy. Where terrorist attacks take place on ordinary citizens, diplomatic establishments play an essential role in securing the interests of their nationals in foreign states. In places like Iraq, it is diplomats who will be most heavily involved in the regime-building exercises, which are critical if the armed intervention is to become more than simply a display of power by the strong against the weak. Paradoxically, however, it is the importance of diplomats to the success of the war against terrorism, coupled with their symbolic identity and their representative character, which ensures that they are not only at the frontline of the political battle but also directly in the firing line of terrorists seeking to undermine or derail the process itself. It is in this context that the need to reassess the special protection given to diplomats by international law arises.

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[68] *Ibid.*

Chapter 2

The Scope of the Work

2.1 The Concept of Diplomatic Personnel

The focus of this book is on the protection of *diplomatic* personnel. The phrase diplomatic personnel is not a term of art. At its most basic, the term diplomatic personnel simply denotes diplomatic agents. Such individuals are defined in the Vienna Convention on Diplomatic Relations 1961[1] as the head of the mission or a member of the diplomatic staff of the mission,[2] which latter category includes members of the staff of a diplomatic mission having diplomatic rank.[3] According to Wilson, the category of diplomatic agents, as well as including "ambassadors, ministers and counsellors",[4] would include the secretary to the mission[5] (although not secretaries working within the mission who would come under the category of members of the administrative and technical staff), attachés,[6] and "part-time" diplomats,[7] such as legal advisers, insofar as they are "performing diplomatic functions as a principal, and not an incidental part of their duties".[8] However, the concept of diplomatic personnel covers a broader range of individuals than merely diplomatic agents.

Indeed, it is clear from the terms of the Vienna Convention itself that this limited definition of what constitutes diplomatic personnel is rather too narrow, as the range of privileges and immunities accorded to diplomatic agents in the Convention are provided also to a broader variety of individuals. Thus, while diplomatic privileges and immunities are expressed in the Vienna Convention as applying to diplomatic agents, Article 37(1) of the Convention provides that: "The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving state, enjoy the privileges and immunities

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[1] 500 *UNTS* 95 (hereinafter VCDR).
[2] VCDR, Article 1(e).
[3] VCDR, Article 1(d).
[4] Wilson (1967), *Diplomatic Privileges and Immunities* (University of Arizona Press, Tucson, Arizona), p. 147.
[5] *Ibid*, pp. 148-9.
[6] *Ibid*, pp. 150-5.
[7] *Ibid*, pp. 155-7
[8] *Ibid*, p. 157.

specified in Articles 29 to 36."[9] Similarly, in terms of Article 37(2) of the Vienna Convention: "Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households shall, if they are not nationals of or permanently resident in the receiving state, enjoy the privileges and immunities specified in Articles 29 to 35."[10] It is not intended at this time to consider in depth these categories of individuals entitled to diplomatic privileges and immunities. A detailed analysis of all persons entitled to diplomatic privileges and immunities is provided by Professor Denza in her excellent study of the Vienna Convention. However, for the purposes of the present discussion, it is worth noting that in the case of both members of the family of the diplomatic agent and members of the administrative and technical staff of a mission, including their families, the privileges and immunities specifically include those provided for in Article 29 of the Convention. Thus, such individuals are entitled not only to the privilege of inviolability but are also entitled to benefit from the special duty of protection. Accordingly, such individuals can properly be counted as falling within the concept of diplomatic personnel for the purposes of the present discussion.

2.2 Other Diplomatic Representatives of States

The use of *ad hoc* diplomatic missions did not disappear in the middle of the fifteenth century with the advent of the institution of permanent diplomatic relations.[11] While permanent diplomatic relations are concerned with the day-to-day relations between states, regular use is made of special missions. A special mission "is a temporary mission, representing the state, which is sent by one State to another 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".[12] The legal status of special missions and, more specifically, the privileges and immunities to be accorded to members of the mission, are dealt with by the Convention on Special Missions 1969, which came into force on 21 June 1985.[13] However, there are currently only 35 states parties to that Convention and it is not clear the extent

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[9] It has long been recognised that the granting of privileges and immunities to the families of diplomatic agents is as important to the independence of the mission and the ability of diplomatic agents to perform their functions as the granting of the same to the diplomatic agents themselves. See, generally, Denza (1998), *Diplomatic Law* (2nd Ed., Clarendon Press, Oxford), pp. 321-8.

[10] Members of the administrative and technical staff of the mission are defined in the Vienna Convention as "the members of the staff of the mission employed in the administrative and technical service of the mission." (VCDR, Article 1). It is worth noting that, although members of the administrative and technical staff of a mission are entitled to inviolability, the protection of the receiving state and absolute immunity from the criminal jurisdiction of the receiving state, their immunity from civil jurisdiction applies only in relation to acts performed by them outside the course of their duties (VCDR, Article 37(2)).

[11] See further below, Chapter 3.

[12] Article 1(a) of the Convention on Special Missions 1969 (1400 *UNTS* 231).

[13] 9 *ILM* 129 (1970) (hereinafter, the 1969 Convention).

to which the Convention reflects customary international law.[14] Thus, in the majority of cases where such special missions do take place, the extent of the privileges and immunities to be accorded to members of the mission depend on the agreement of the receiving state. For the most part, the privileges and immunities of special missions are analogous to those of diplomatic missions, with appropriate modifications. In terms of the 1969 Convention, the premises of a special mission are inviolable. Members of a special mission are accorded personal inviolability and immunity from the criminal jurisdiction and, to a limited extent, the civil and administrative jurisdiction of the receiving state. To the extent, therefore, that special missions are governed by the 1969 Convention, or are subject to a separate agreement between the sending and receiving states which reflect the terms of the 1969 Convention, then members of special missions may be considered to be diplomatic personnel.

Diplomatic privileges and immunities are also accorded to representatives of states to international organisations. The Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character 1975 currently has 31 states parties but is not yet in force.[15] It envisages the full range of diplomatic privileges and immunities, including the privilege of inviolability,[16] being accorded to members of the staff of a mission. According to Shaw: "The Convention has received an unenthusiastic welcome, primarily because of the high level of immunities it provides for on the basis of a controversial analogy with diplomatic agents …"[17] Even if the Convention eventually enters into force, it is unlikely that it will have much impact. Most of the states which host international organisations of a universal character are uninterested in the Convention for the reasons set out above. Accordingly, it would seem that the privileges and immunities to be accorded to state representatives to such organisations will continue to be regulated as they presently are, that is by means of specific treaty or, more commonly, by Headquarters Agreements between the relevant organisation and the host state.

The model for such agreements is the Convention on the Privileges and Immunities of the United Nations 1946.[18] This treaty, as the name suggests, deals

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[14] See, for example, *United States v Sissoko* 999 F. Supp. 1469 (1997) in which the Convention, to which the United States is not a party, did not reflect customary international law.

[15] The text of the Convention is reprinted in 69 *AJIL* 730 (1975).

[16] See Articles 23 and 29 of the 1975 Convention.

[17] Shaw (2003), *International Law* (5th Ed., Cambridge University Press, Cambridge), p. 692. See also Fennessy (1976), "The 1975 Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character", 70 *AJIL* 62, p. 65.

[18] 1 *UNTS* 15. In its request to the International Court of Justice for an Advisory Opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ECOSOC noted that the provisions of the 1946 Convention "have been incorporated by reference into many hundreds of agreements relating to the headquarters or seats of the United Nations and its organs". ICJ Reports, 1999, p. 62, para. 10.

with the privileges and immunities of the United Nations itself as well as those of its many subsidiary bodies and officials.[19] However, the Convention also makes provision for privileges and immunities to be accorded to the representatives of members to the principal and subsidiary organs of the United Nations. This Convention certainly provides more limited privileges and immunities to state representatives than is envisaged in the 1975 Vienna Convention. Thus, the only mention of inviolability in the relevant provision of the Convention is in relation to all papers and documents of the mission.[20] However, members of the mission are provided with immunity from personal arrest and detention.[21] Furthermore, Article IV, Section 11(g) provides that representatives of members are entitled to "such other privileges, immunities, not inconsistent with the foregoing as diplomatic envoys". It is possible to argue that this residual provision ensures that the special duty of protection is applicable to state representatives to the United Nations in the same way as it applies to diplomatic agents; however, such an interpretation is not without controversy.[22] Accordingly it is submitted that insofar as provision exists for the granting of diplomatic privileges and immunities to representatives of states to the United Nations and, indeed, to other international organisations, then such persons would be included within the ambit of this book. However, where these agreements do not provide for the inviolability of such persons, then the discussions in this book will be irrelevant to those individuals.

2.3 Consular Representatives of States

Consular officers perform a crucial role in the diplomatic relations of states. Consular functions are broadly defined in the Vienna Convention on Consular Relations 1963.[23] Indeed, Satow has noted that "so various are the functions of a consul that there can be no precise and at the same time acceptable definition of the term".[24] However, the overriding function, as with diplomatic missions, is one of "protecting in the receiving state the interests of the sending state and of its nationals, both individuals and bodies corporate, within the limits permitted by international law".[25] According to Satow:

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[19] The question of the inviolability of officials of the UN and other international organisations will be considered below.

[20] Convention on the Privileges and Immunities of the United Nations, Article IV, Section 11(b).

[21] *Ibid*, Article IV, Section 11(a).

[22] Given that the Convention pre-dates the 1961 Vienna Convention on Diplomatic Relations, it is not surprising that its terms do not mirror those of the 1961 Convention. However, were it the case that such individuals were to be entitled to inviolability and special protection, then one might have expected particular mention to be made of this fact.

[23] 596 *UNTS* 261 (hereinafter, the VCCR).

[24] Satow (1979), *Guide to Diplomatic Practice* (5th Ed. Lord Gore-Booth ed., Longman, London and New York), p. 256.

[25] VCCR, Article 5(a).

> The essential difference between diplomatic and consular work is that whereas the diplomat does business with and through the central government of the receiving state, the consul for the most part conducts official business with local or municipal authorities … Overall, however, it is the function of protection, in its broadest sense, which is the most important consular function.[26]

Customary international law has, for many centuries, bestowed consular officers with a range of privileges and immunities. That customary international law was codified into the VCCR in 1963. As with diplomatic privileges and immunities, it is specifically declared in the Preamble to the Convention that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective states".[27]

On the face of it, the privileges and immunities accorded to consular officials are similar to those bestowed on diplomatic agents. In relation to the premises of the consular mission, Article 31 provides in paragraph 1 for their inviolability. Paragraph 3 of the article invokes the special duty of protection in almost identical terms to Article 22 of the VCDR. Thus:

> [T]he receiving state is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity.

That both of these provisions are declared to be subject to the right of the receiving state to enter the premises of the mission in case of fire or other disaster does not take away from the overriding principle of inviolability and the duty of special protection.[28]

The position concerning the personal inviolability of consular officials is, however, rather more complicated. The fact that the Convention provides separately for the "protection of consular officers" in Article 40 and the "personal inviolability of consular officers" in Article 41 appears to suggest greater protection be afforded to such individuals. However, this perception is misplaced. Although Article 40 imposes an obligation on the receiving state to "treat consular officers with due respect and [to] take all appropriate steps to prevent any attack on

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[26] Satow, *op cit*, p. 256. Satow further notes that: "From an examination of a list of traditional consular functions, such as is contained in Article 5 of the Vienna Convention … it can be seen that, apart from assisting of persons in trouble and the promotion of commercial interests, most are basically administrative. Amongst the more important of these are the issue of passports and visas …, the notarising of documents …, assistance with succession matters …, death …, the transmission of … legal documents …, and the registration of births and marriages." *Infra*.

[27] VCCR, Preamble, paragraph 5.

[28] *Ibid*, Article 31 (2).

their person, freedom or dignity", neither Article 40 nor Article 41 declares the person of the consular official to be inviolable. What inviolability there is comes in the form of the right not to be liable to arrest or detention pending trial, "except in the case of a grave crime and pursuant to a decision by the competent judicial authority".[29] Furthermore, with regard to the immunity of consular officials in relation to both civil and criminal jurisdiction, a consular official has immunity only in respect of his official acts.

Given the considerable difference between the two regimes concerning diplomatic and consular relations, it may seem strange to include consular officials within the classification of "diplomatic personnel" which forms the focus of this book. However, it is submitted that to exclude consular officials from this category would be to focus too much on where the two regimes differ and ignore the similarities not only between the two regimes but also between the practical realities of the context in which diplomatic agents and consular officials undertake their work. Both sets of individuals live and work in the territory of the receiving state. Both sets of individuals and the establishments in which they undertake their work have been, and will continue to be, the targets of politically motivated attacks. Indeed, when it comes to the question of protection, potential attackers are unlikely to concern themselves with the legal niceties of whether the target is performing diplomatic or consular functions. Rather diplomatic missions and diplomatic agents as well as consular posts and consular officials will be targeted because of what they represent. Thus, although the focus of this book is primarily on diplomatic agents, the position of their consular cousins will not be ignored.

2.4 High-ranking State Officials

Up to this point, the discussion has centred on a narrow conception of diplomatic personnel as including diplomatic agents and associated individuals as well as other representatives of states located in the territory of foreign states including consular officers. However, in its broadest sense, the term diplomatic personnel ought to include all persons involved in the process of international diplomacy. This category of persons is potentially extremely large and might include all state officials involved in the conduct of foreign relations at whatever level. Thus, as well as those within the categories identified above, the term might include all officials of states involved in foreign relations. At the highest level, this would involve Heads of State and Governments, Foreign Ministers, and other high-ranking state officials whose role involves regular international negotiations with their counterparts in other states requiring regular travel abroad. To the extent that their functions require it, such high-ranking governmental officials are entitled to a form of privileges and immunities analogous to those of diplomatic agents.

The question of the privileges and immunities to be accorded to high-ranking government officials, specifically those of a Minister for Foreign Affairs, was considered by the International Court of Justice in the *Case Concerning the Arrest*

[29] *Ibid*, Article 41(1).

Warrant of 11 April 2000 (Democratic Republic of The Congo v Belgium). The Court noted that certain international treaties, including the Vienna Convention on Diplomatic Relations 1961, the Vienna Convention on Consular Relations 1963 and the New York Convention on Special Missions 1969, "provide useful guidance on certain aspects of the question of immunities".[30] The Court went on to observe that the Conventions "do not, however, contain any provision specifically defining the immunities enjoyed by a Minister for Foreign Affairs".[31] According to the Court, customary international law provides Ministers for Foreign Affairs with full immunity from criminal jurisdiction and inviolability throughout the duration of his or her office. The existence of such immunity and inviolability exists because of the role of the Minister for Foreign Affairs and, in particular, the nature of the functions performed by such individuals:

> He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts may bind the State represented and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office has full powers to act on behalf of the State.

The Court continued:

> In the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States. The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office.[32]

The Court specifically limited its decision to cases involving the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs. Accordingly, the extent to which other high-ranking government officials are entitled to the same privileges and immunities remains moot.[33] It is

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[30] *ICJ Reports* 3 (2002), paragraph 52.
[31] *Ibid*, paragraph 54.
[32] *Ibid*, paragraph 53.
[33] The question of the extent of the privileges and immunities of a serving Minister of the Interior, as well as those of a serving Head of State and Minister for Foreign Affairs are the subject of a case currently before the International Court of Justice dealing with the question

true to say that such individuals are not responsible for the conduct of a state's international relations to the same extent as Ministers for Foreign Affairs. Furthermore, they do not direct the state's diplomatic activities. Nevertheless, such individuals do, increasingly, represent the state in international negotiations and intergovernmental meetings, and are ever more frequently required to travel abroad in the course of their duties. They too, in such circumstances, require to be in constant communication with their government and with its diplomatic establishments. Accordingly, by extension of the reasoning of the Court in the *Arrest Warrant Case*, it is possible to argue that other Ministers of Government, who represent the state in this way, are entitled to the same privileges and immunities accorded to Heads of State and Governments and to Ministers for Foreign Affairs.

With regard to the question of protection, it is certainly the case that high-ranking officials fall within the category of individuals classified by international law as internationally protected persons. Thus, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents 1973[34] defines such persons as including "a Head of State, including any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned or a Head of Government or a Minister of Foreign Affairs, whenever such person is in a foreign state, as well as members of his family who accompany him".[35] The Convention also covers "any representative or official of a State … who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his mode of transport is committed, is entitled, pursuant to international law, to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household".[36] While the first part of this provision is specified to apply only to Heads of State, Heads of Government and Ministers of Foreign Affairs, it is likely that other high-ranking representatives of states are covered by the second part of the provision in light of the developments in international law referred to above. Although this Convention builds upon the inviolability of the individuals to which it applies, the Convention itself does not provide for such inviolability. Rather it is the pre-existing inviolability of such individuals, whether arising out of customary international law or treaty, which brings them within the scope of the Convention, which is itself focussed upon the prevention and punishment of crimes rather than upon the requirement of protection.

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of *Certain Criminal Proceedings in France (Republic of The Congo v France)*. Commenced by the Republic of The Congo on 9 December 2002, the Court refused an order for the indication of provisional measures on 17 June 2003. On 13 July 2005, the Court extended the time limits for the submission of a Reply by the Republic of The Congo to 11 January 2006 and the Rejoinder by France to 10 August 2007. It is unlikely, therefore, that the case will proceed to a full hearing until 2008 at the very earliest.

[34] 1035 *UNTS* 167. (Hereinafter, the Internationally Protected Persons Convention.)

[35] *Ibid*, Article 1(1)(a).

[36] *Ibid*, Article 1(1)(b).

Although based in customary international law, the protection to be accorded to high-ranking government officials is analogous to that provided to diplomatic agents. Indeed, as will be discussed in Chapter 3 below, the protection accorded to diplomatic agents was developed, during the sixteenth to eighteenth centuries at least, as a result of the fact that they represented independent sovereigns. Thus, in the words of Vattel: "The respect which is due to sovereigns should reflect upon their representatives and particularly upon an ambassador, as representing the person of his master in the highest degree."[37] It would seem therefore that, although the law on the protection of diplomatic agents was codified in the VCDR, that codification reflected a long-standing rule of customary international law which in itself was based on the protection to be accorded to sovereigns themselves. Accordingly, it is possible to argue that at the very least, such individuals would be entitled to the same protection as is accorded to diplomatic agents.

While similar from a theoretical standpoint, the practical difference between the protection to be accorded to high-level representatives of foreign states and that accorded to diplomatic agents is considerable. The requirement on a receiving state in relation to the protection of diplomatic agents is to provide "all appropriate steps to prevent any attack on his person, freedom or dignity".[38] If the requirement is the same in relation to high-ranking representatives of foreign states, then the question of what constitutes "appropriate steps" will, it is submitted, be significantly different. Thus, in practice, the representative of a foreign state, in particular a foreign Head of State or Head of Government, would be entitled to considerably more protection than that accorded to diplomatic agents. This will be the case not only as a result of the seniority of the high-ranking representative but also because such an individual will, by definition, only be staying for a short time in the receiving state in order to undertake negotiations or to attend a meeting. Diplomatic agents, on the other hand, are stationed permanently in the receiving state. Whereas a high-level representative will have a carefully structured itinerary, organised in such a way as to ensure minimal interference and in order to minimise the potential for attack, a diplomatic agent will wish to undertake normal day-to-day activities while stationed in the receiving state. As a result, diplomatic agents are required to undertake considerable efforts on their own behalf to ensure their own protection. The same will not be true of a visiting high-level representative.

The effect of this practical difference is to reduce the relevance of an analysis of the protection accorded to high-level representatives in terms of the focus of this book. That is not to say that the question of protection is not an important topic. As has been pointed out above, there is considerable commonality between many of the laws relating to both sets of individuals. Where these legal provisions are the subject of discussion in this book, specific observations may be relevant both to diplomatic agents and to high-ranking officials. Similarly, developments in relation to high-ranking officials may be relevant to the discussion of the protection of

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[37] Vattel (1916), *Le Droit Des Gens* (Classic of International Law, Ed. Scott), Vol. III, Ch VII, p. 371.

[38] VCDR, Article 29. For a fuller discussion of this requirement, see Chapter 4 below.

diplomatic personnel. Where this is the case, then the necessary analysis will be undertaken. Nevertheless, the primary focus of this book will limit the direct analysis and discussion of the protection of high-level officials of foreign states. Thus, for the purposes of this book, high-ranking state officials, although engaged in the wider process of diplomacy, are not considered as diplomatic personnel.

2.5 Other Representatives of States

Where an individual acts as the representative of a state, international law provides to them immunity from civil jurisdiction in respect of their official acts. This long-standing rule of customary international law has recently been confirmed in the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004,[39] which defines a state for the purposes of state immunity as including "representatives of the State acting in that capacity".[40] It is unlikely that there exists in international law a commensurate immunity from criminal jurisdiction for such individuals. The negative reactions to the Conventions on Special Missions and on the Representation of States in their Relations with International Organisations of a Universal Character[41] would suggest a lack of willingness among states to extend immunity from criminal jurisdiction beyond what has historically been acceptable to include all state officials regardless of their rank. What is certain, however, is that customary international law does not recognise a general right of inviolability or special protection for all state officials. It is only those individuals of a certain status who have such rights.

The distinction between immunity *rationae personae* and immunity *rationae materiae* is a useful distinction for the present purposes. International law provides privileges and immunities as well as inviolability to certain categories of individuals based upon their status. Although often declared not to be for the benefit of the individual but rather to ensure the efficient performance of international relations,[42] these are personal immunities *rationae personae*, which cover both the individual's private and official acts and subsist as long as the individual remains in the relevant post. When such individuals leave office, they are able to claim residual immunity in respect of their official acts undertaken while in office, that is, immunity *rationae materiae*. Effectively such immunity exists as a form of state immunity applying to the official acts of a state undertaken through the person of the individual concerned. By way of contrast, lower-ranking state officials are entitled only to immunity *rationae materiae* in respect of their official acts. They have no personal immunity and no right to inviolability.

Clearly where such representatives are diplomatic agents they are entitled to diplomatic privileges and immunities, and to inviolability and special protection. In the case of immunity from jurisdiction, the diplomatic immunity of such

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[39] Adopted by the United Nations General Assembly in Resolution 59/38 on 2 December 2004. The Convention is open for signature until 12 January 2007.
[40] *Ibid*, Article 2(1)(b)(iv).
[41] See above, pp. 18-19.
[42] See, for example, paragraph 4 of the Preamble to the VCDR.

individuals takes precedence over any other form of immunity, at least until they cease to be entitled to diplomatic immunity *per* se at which point their immunity *rationae materiae*, or their entitlement to state immunity becomes operative. In relation to the question of inviolability and special protection, there is no residual entitlement. Thus, when a diplomatic agent ceases to be a diplomatic agent, his or her inviolability and right to special protection ceases at the same time.

However, as regards "ordinary" representatives of states, they are not entitled to any form of immunity other than the requisite state immunity in respect of their official acts, which they are entitled to rely on in civil proceedings before foreign courts. Furthermore, there is no entitlement whatsoever to any form of inviolability or special protection. Accordingly such persons, although engaged in the process of international diplomacy more generally, are not entitled to be considered as diplomatic personnel. Whatever protection these individuals may claim under international law, that protection is not akin to the protection of diplomatic personnel.

2.6 Officials of International Organisations

As the complexity of international relations has increased, states have found themselves increasingly involved in the creation of international regimes taking the form of international institutions. Many of these institutions themselves, as creatures of their member states, have been provided with privileges and immunities. These privileges and immunities do not assimilate directly with state or sovereign privileges and immunities which are dependent on the sovereignty of the state. Rather, the privileges and immunities of international organisations are only those which are necessary for the fulfilment of the purposes of those organisations. Furthermore, the privileges and immunities are limited to the territories of member states. Thus, for example, the UN Charter provides that "[t]he Organisation shall enjoy in the territory of each of its Members such privileges and immunities as are necessary in the fulfilment of its purposes".[43] Similar provisions exist in respect of many other international organisations, both global and regional.

The Convention on the Privileges and Immunities of the United Nations 1946[44] enumerates the privileges and immunities to be accorded to the officials of the United Nations. The Secretary-General and Assistant Secretaries-General are to be accorded "in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law".[45] Certain experts, acting on behalf of the United Nations, are entitled to immunity from personal arrest and detention and immunity from legal suit in respect of anything done by them in the course of

[43] UN Charter, Article 105(1).
[44] 1 *UNTS* 15.
[45] Convention on the Privileges and Immunities of the United Nations, Article V, Section 19.

their official function on behalf of the mission.[46] Lesser United Nations officials are entitled only to the issuance of United Nations laissez-passer in order to ensure speedy passage.[47]

Although the privileges and immunities of the Secretary-General and the Assistant Secretaries-General are declared to be directly comparable to diplomatic privileges and immunities, it would seem that the regimes bear more resemblance to those governing Heads of State and Government rather than to diplomatic officials. Accordingly, on the same basis and for the same reasons that high-ranking state officials fall outside the coverage of this book, high-ranking officials of international organisations who are accorded "diplomatic" status will not fall within the remit of this present discussion.

Carol Crosswell has argued that, in relation to "ordinary" officials of international organisations, as their "privileges and immunities differ in important respects from those accorded sovereign states and their transactions under international law and practice, it is convenient to distinguish them by using the term 'international privileges and immunities' rather than the term diplomatic privileges and immunities".[48] Crosswell developed this distinction specifically to deal with the difference between permanent representatives of member states to international organisations who are essentially diplomats and, as such, entitled to diplomatic privileges and immunities,[49] and representatives of the organisations themselves whose privileges and immunities are generally limited to their official functions.[50] This distinction is somewhat tenuous insofar as it suggests that all state officials are entitled to diplomatic privileges and immunities. It has been argued above that this is not the case. It is not necessary at this stage to enter into a wider discussion of the difference, if any, between "ordinary" state officials and "ordinary" officials of international organisations. This is because, for the reasons stated above in the discussion of lower-ranking state officials, neither of these groups of individuals fall within the concept of diplomatic personnel for the purposes of the present discussion.[51]

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[46] *Ibid*, Article VI, Section 22.
[47] *Ibid*, Article VII, Section 24.
[48] Crosswell (1952), *Protection of International Personnel Abroad* (Oceana, Dobbs Ferry, NY), p. v.
[49] See Rozakis (1974), p. 38, who notes that this status has been accorded to members of the permanent missions of state-members by agreements between the host country and the international organisation.
[50] See the discussion of the case of Valentin A. Gubitchev, a Russian member of the UN Secretariat who was entitled only to privileges and immunities in respect of his official functions and so was not immune from the charge of espionage. Crosswell (1952), pp. 57-63.
[51] This is not to say that the question of the protection of United Nations staff is not important. Indeed, the United Nations has promulgated the Convention on the Safety of United Nations and Associated Personnel 1994 specifically to deal with this issue of the protection of UN personnel. See further Bouvier (1995), "Convention on the Safety of United Nations and Associated Personnel: Presentation and Analysis" 309 *International Review of the Red Cross* 638.

Chapter 3

Historical and Theoretical Perspectives on the Protection of Diplomatic Personnel

3.1 Antiquity to the Middle Ages

Attacks on diplomatic personnel are certainly not a new phenomenon in international relations. Historically, however, the relatively small number of such attacks is confirmation of the importance placed, since the earliest of times, on the inviolability of the diplomatic agent. Some have speculated that a form of diplomatic inviolability existed before history itself.[1] However, the first documentary evidence of early diplomatic relations and diplomatic inviolability can be traced back to the times of the ancient civilisations.[2] Frey and Frey, in their excellent book chronicling *The History of Diplomatic Immunity*,[3] provide detailed evidence of the fact that envoys have enjoyed a "powerful protected position"[4] since the time of the Ancient Greeks. For example, referring to Herodotus, they tell of the wrath that befell Athens and Sparta in 491 B.C. as a consequence of their killing the envoys of Darius.[5] The inviolability of Greek envoys was signified by the carrying of a staff, which "symbolized the sacrosanctity of his person or served as a badge or insignia of office".[6] Such inviolability was closely linked to religious beliefs. Writing in 1585, Gentilis, one of the foremost of the classical writers who codified and developed diplomatic law during the sixteenth and seventeenth centuries, cited earlier Greek writers who commented upon the importance of

[1] See, for example, the work of Harold Nicolson, who opined that tribes of cave-dwelling anthropoid apes would probably have had dealings with one another in such matters as bringing to an end a day's battle. Nicolson (1969), *Diplomacy* (2nd Ed., Oxford University Press, Oxford), p. 6. See also Nicolson (1954), *The Evolution of Diplomatic Method* (hereinafter, *Evolution*) (Constable & Co. Ltd, London), p. 2.

[2] These civilisations include not only the Greeks and Romans but also the Ancient Chinese and the Ancient Indians. See Ogdon (1936), *Juridical Bases of Diplomatic Immunity* (John Byrne & Co., Washington D.C.), pp. 10-14. See also Viswanatha (1925), *International Law in Ancient India*, (Bombay).

[3] Frey and Frey (1999), *The History of Diplomatic Immunity* (Ohio State University Press, Columbus, Ohio).

[4] *Ibid*, p. 16.

[5] *Infra*.

[6] *Infra*.

religious ceremony to the early ambassadors. For example, according to Gentilis, Alexander declared that no one could "perform the functions of an embassy unless he had first washed his hands in water poured over them by heralds, and had made a libation to Zeus from goblets wreathed with garlands".[7] As a result, it was believed that the consequences of interfering with ambassadors would be severe. Thus, according to Frey and Frey, "[h]arming a herald violated divine law, for all power and all authority emanated from the gods. Sanctions would inevitably follow."[8]

Similarly, the Romans placed considerable importance on the inviolability of envoys. The external relations of the early Romans were conducted by the College of Fetials, "a semi religious, semi political board which from time immemorial supervised the rites peculiar to the swearing of treaties and declaration of war, and which formed, as it were, a court of first instance in such questions of international disputes as the proper treatment of envoys and the execution of extradition".[9] The College of Fetials, as an institution, was most active during the period when Rome was one of a number of similar city-states.[10] Some authors have questioned the importance of the College.[11] However, others have asserted that the College was one of the most remarkable institutions of early international law and was certainly the principal source of diplomatic activity in Rome at the time.[12] The College developed a primitive form of international law known as fetial law and one of the basic principles of that law was the inviolability of envoys.

Religion played a central role in the making and application of fetial law. Thus, according to Frank, fetial law was based upon "the oath of good faith that was spoken upon the making of the treaties as well as the oath of innocence taken when war was declared".[13] Such oaths were made to gods such as Jupiter. Crucially Jupiter was worshiped by a number of different tribes.[14] Accordingly, it was as a result of shared belief systems, rather than as a result of any sense of obligation contained in the treaties themselves, that the various tribes or city-states came to adhere to their external obligations.

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[7] Gentilis, *De Legationibus Libri Tres*, Vol II, p. 58.

[8] Frey and Frey, *op cit*, p. 16. On Greek diplomacy generally, see Nicolson, *op cit*; Coleman Phillipson (1911), *The International Law and Custom of Ancient Greece and Rome* (Macmillan & Co. Ltd.); Hill (1905), *A History of Diplomacy in the International Development of Europe* (Longmans, Green & Co., London), Vol I; Young (1964), "The Development of the Law of Diplomatic Relations" 40 *British Yearbook of International Law* 141.

[9] Frank (1912), "The Import of the Fetial Institution", 7 *Classical Philology* 335, at p. 335.

[10] Nicolson, *Evolution, op cit*, p. 15.

[11] Nicolson, for one, regarded the College as merely a remnant functioning mainly as a repository for treaty documents. He compares the role of the College with that of the Treaty Department in the United Kingdom Foreign Office. See also Laurent, *Histoire du Droit des Gens III* cited by Frank, *op cit*, p. 336.

[12] See, for example, Hill, *op cit*, Vol. I, p. 8. See also Frank, *op cit*, pp. 335 and 342.

[13] *Ibid*, p. 337.

[14] *Ibid*, p. 340.

The influence of the fetial law in relation to the inviolability of envoys continued even during the expansion of the Roman Empire. Thus, according to Frey and Frey:

> The rights of legates, earlier intermingled with the *ius fetiale*, were subsequently based on the *ius gentium*. Religious sanctions were superseded by secular ones. Rome did not possess an international law in the literal sense of the term, but it did have regulations that governed its relations with others … The Romans consistently maintained that an infraction of ambassadorial rights violated 'the law of nations'.[15]

Nevertheless, it certainly cannot be denied that as the Roman Empire grew, "the sending of envoys between independent people was replaced by the sending of provincial deputies from the *municipia*".[16] Thus, the further development of Roman law in this area was rather limited.[17]

In summarising why the Ancients granted diplomatic immunity, Ogdon notes that "[r]ules and regulations governing the sanctity of public diplomatic agents and recognizing some kind of immunity are found among remotely located peoples". He continues: "The similarity of these rules and the unlikelihood in some instances of common origin indicate that they must have sprung from deep-seated social necessity." For Ogdon, these rules and regulations could be justified only on the basis of the necessity of diplomatic intercourse. He concludes:

> These practices of ancient peoples in different periods and under peculiar circumstances exhibit a fundamental relationship between the function of the embassy and the reason why diplomatic immunity was allowed to thrive. Embassies were dispatched upon missions of the greatest import in the life of the receiving as well as the sending political organism. The importance of the embassy seems in itself to have been reason enough for receiving an ambassador, for communicating with him, and for allowing him freedom to return with a message to his native camp.[18]

Nevertheless, it was not until the emergence of the Byzantine Empire that the first example of what might be considered professional diplomacy emerged. Byzantine diplomacy, unlike that of Greece and Rome, was well organised and

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[15] Frey and Frey, *op cit*, pp. 44-5.
[16] Young, *op cit*, p. 143.
[17] Frey and Frey note that: "In the *Digest*, a compilation of the opinions and arguments of various jurists spanning seven centuries, only one passage unequivocally refers to legates in the sense of foreign ambassadors [*Digest* 50.7.17]." Frey and Frey, *op cit*, p. 45. Nevertheless, it is worth noting that: "This provision stated that harming an ambassador violated the *ius gentium*, which protected envoys." *Infra*.
[18] Ogdon, *op cit*, pp. 19-20.

effective.[19] The Emperor in Constantinople was the first to create a department of state dealing exclusively with external relations. The Byzantines conducted their diplomacy with considerable pomp and ceremony, while at the same time keeping visiting envoys under strict surveillance.[20] Although they developed their diplomacy in a way unimagined by previous civilisations, the Byzantines were, nevertheless, considerably influenced by Roman diplomatic practice, mainly in relation to the privileges of envoys.[21] In particular, although regarding envoys as spies, the Byzantines were meticulous in their observance of the sanctity of those envoys.[22]

At much the same time, the papacy was beginning to develop its own system of diplomatic representation in the form of papal legates who were despatched by the popes from as early as the fourth century. As one might expect, the religious sanctity of these representatives was again the foremost consideration, which led to their being accorded special treatment. Indeed, the position of these papal representatives was one of considerable authority. They were regarded as the personal representatives of the pope and were authorised to "carry out direct papal government through the length and breadth of the *societas*".[23] This early manifestation of the "representative character" theory allowed the popes to insist on the sacred status of their legates. Furthermore, the extra protection which was accorded to these individuals, as a result of their association with the pope, was also extended to envoys visiting the papal court.[24]

It is certainly the case that there were exchanges of representatives between the papacy and Byzantium from the fifth century onwards. This was a period of considerable development in diplomatic method, although the era of permanent diplomatic relations remained a long way off. As noted above, Byzantium quickly developed a more professional form of diplomacy than had previously existed. Similarly, the popes increasingly sent and received representatives and, over time, established a professionalism to mirror that of Constantinople. Thus, between the fifth and the eleventh centuries, "reforms transformed the papal diplomatic corps into a specialized cadre with greatly increased legatine powers".[25] At around the same time, Pope Alexander III established a specific hierarchy within his diplomatic corps.[26]

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[19] See generally Frey and Frey, *op cit*, pp. 76-8; Ganshoff (1970), *The Middle Ages, A History of International Relations*, (Harper & Rowe, London, English Translation), p. 126-51.

[20] According to Nicolson, "[The reception of foreign envoys] was organised with ceremony and fraud". Nicolson, *Evolution*, *op cit*, p. 26.

[21] Frey and Frey, *op cit*, p. 76.

[22] *Infra*.

[23] Ullmann (1970), *The Growth of Papal Government in the Middle Ages* (Methuen & Co. Ltd., London, 3rd Ed.), p. 292.

[24] Frey and Frey, *op cit*, p. 78.

[25] Frey and Frey, *op cit*, p. 79.

[26] "Foremost were the *legati a latere* (literally, 'sent from the side of the pope') who held the rank of cardinal. Other legates held the title *legati misse* (literally 'those sent'). The popes also empowered judge delegates to act as representatives of the papal court. From the

These early exchanges undoubtedly influenced the way in which diplomats were treated and a form of customary law was developed which ensured the inviolability of diplomatic representatives. This law, in its earliest conceptions, although influenced by religion, was not dominated by it. Indeed, it is worth noting that the concept of diplomatic inviolability was apparent not only in the West and in the Eastern Christian worlds but also in the Moslem world and in the Far East.[27] Thus, it can be argued that, although religion provides an explanation for the inviolability of ambassadors within certain groups of people sharing a common religious background, it does not fully explain the inviolability [of diplomatic representatives] between such groups. A better explanation of the role of religion in early diplomatic relations is that the cloak of religious sanctity was utilised as a form of guarantee against harm being done to persons who were regarded as fulfilling an essential role in society.[28]

At first sight, the inviolability of ambassadors, in Europe at least, appeared absolute. Reference can be made to the work of the earliest writers on the role of ambassadors. These writers, beginning with Bernard du Rosier in 1436, used a combination of legalistic approaches relying on past precedents, as well as more literary and religious approaches to develop their work. Garrett Mattingly, in his authoritative study of *Renaissance Diplomacy*,[29] analysed the work of du Rosier who appeared to be clearly of the view that ambassadors were both immune from legal suit and personally inviolable. Mattingly notes that:

> Ambassadors, [Rosier] says, are immune for the period of their embassies, in their persons and in their property, both from actions in courts of law and from all other forms of interference. Among all peoples, in all kingdoms and lands, they are guaranteed complete freedom in access, transit and egress, and perfect safety from any hindrance or violence.[30]

According to Mattingly, in respect of the issue of attacks on ambassadors, Rosier was even more unequivocal:

> Those who injure ambassadors, or imprison them, or rob them, who impede their passage, or even abet or approve such acts are properly regarded as enemies of mankind, worthy of universal execration. For

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thirteenth century on, the popes also relied on agents called *nuncii*, who, though subordinate in rank and authority to the legates, had by about 1460 replaced the noncardinal legates. *Nuncii* typically conveyed messages and collected information, but unlike the legates they could not act on their own cognisance." *Ibid*, p. 79.

[27] Ganshoff, *op cit*, p. 134.

[28] Barker (1996), *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?*, (Dartmouth, Aldershot), p. 34

[29] Mattingly (1955), *Renaissance Diplomacy*, (Jonathan Cape, London).

[30] *Ibid*, p. 45.

> whoever interferes with ambassadors in their public function injures the peace and tranquillity of all.[31]

Mattingly notes that "the legists, from Bartolus on, supplement Rosier with more specific rules"[32] such as those providing a punishment of the death penalty for those who strike or injure an ambassador, the fact that no writ could be served on an ambassador for a debt contracted before the start of his mission, the exemption from taxes and customs duties, and the right to freedom from interference even in transit states.[33] As Mattingly correctly notes: "All this seems as emphatic and unambiguous as the best modern doctrine, and as useful in providing ambassadors with every necessary safety and facility."[34] Although apparently establishing a theoretical justification for the inviolability of ambassadors, many of these writers had personally served in embassies and drew on that personal experience. As a result, these individuals were concerned more with matters of practical interest and the necessities of life as an envoy than with theory. Thus, as Behrens makes clear: "diplomatic procedure was clearly developed far more under the pressure of necessity than under the influence of theoretical principles."[35]

As if to illustrate this, Mattingly quickly introduces his reader to some of the "illogic" of medieval practice which seemed to undermine the apparent certainty with which the early writers asserted the inviolability of ambassadors. He notes that conduct during the course of an embassy, but not before the embassy, might "expose him to the full penalties of the law in the land where he was serving".[36] Furthermore, according to Mattingly:

> For certain kinds of debt contracted while he was on mission he might be sued and his goods distrained. From punishment for crimes of fraud and violence committed while ambassador, his status gave him no immunity. And for a whole list of political crimes, espionage, conspiracy, treason and the like, he might be tried and sentenced by the prince to whom he was accredited, just as if he were one of that prince's subjects.[37]

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[31] *Infra*.
[32] *Ibid*, p. 46.
[33] *Infra*.
[34] *Infra*.
[35] Behrens (1936), "Treatises on the Ambassador Written in the Fifteenth and Early Sixteenth Centuries" 51 *English Historical Review* 616.
[36] Mattingly, *op cit*, p. 47. See also Frey and Frey who note that "In the medieval world … a diplomat was not accountable for crimes of whatever nature, political, civil, spiritual – committed *before* his mission. Yet he was clearly answerable for crimes committed *during* his embassy as were members of his suite." Frey and Frey, *op cit*, p. 76.
[37] Mattingly, *op cit*, p. 47.

By modern standards, and, indeed, to a large extent by the standards of the ancients, this level of immunity, or lack thereof, seems quite inexplicable. As Mattingly himself makes clear:

> This is so alien to our modern notions of diplomatic immunity that it is not surprising to find scholars describing this aspect of late medieval jurisprudence as 'formless', 'chaotic' and 'absurd'. If an ambassador is to be subject to the courts of the country where he is serving, if his political acts are to be judged by the government to which he is accredited, how can he be said to enjoy any effective immunity whatsoever?[38]

On the face of it, the lack of logic in the medieval position is absolute. How is it possible in one situation to assert the inviolability of an ambassador by declaring an attack on his person to be an injury to the peace and tranquillity of all, and yet, at the same time, to permit the possibility of an ambassador being tried for murder and, if found guilty, executed? However, to the medieval mind, no inconsistency existed. This depended on a rather sophisticated distinction being drawn between inviolability on the one hand and diplomatic immunity on the other. Inviolability was regarded as an assertion of the right of the ambassador not to be *unjustly* interfered with. Diplomatic immunity was a mechanism by which the inviolability of an ambassador could be secured, if necessary. Crucially, to jurists in the medieval period, the inviolability of ambassadors could be secured without reference to immunities from jurisdiction. Indeed, those immunities which were permitted were immunities in respect of lesser acts rather than serious civil wrongs or serious criminal acts such as violence, fraud and even espionage, conspiracy and treason. Thus, where individual ambassadors committed such acts, they were made subject to the local jurisdiction. This was done not as the result of some grand theory but because it was accepted amongst different rulers and governments. Thus, the international law of the time set the standards through an accomplished system of custom and convention, and an early manifestation of natural law, specifically, "the instinctive respect of rulers and governments for what all men recognised as the law".[39] However, central to this early conception of international law and to its apparent homogeneity was a commonality and shared experience based essentially upon a shared religion. Thus, according to Mattingly:

> In the commonwealth of Christendom, secular authority was divided among a number of princes. Each was expected to enforce not merely the municipal law of his own realm but the common law of the whole community.[40]

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[38] *Infra*.
[39] *Infra*.
[40] *Ibid*, pp. 47-8.

Similarly, according to Frey and Frey: "A Christian cosmology dominated an age in which cannon law underscored both the inviolability and accountability of the envoy."[41]

With respect to diplomatic privileges and immunities, the rationale was clear and simple: "The law was intended to give the ambassador every privilege and immunity necessary for the performance of his office. It was not intended to protect him in the abuse of those privileges and immunities for other ends …"[42] Central to this understanding of the law is the question: What is required by an ambassador in the performance of his functions? For the medieval jurists, the ambassador was a public official whose business was peace and the public good.[43] Notably, "[w]hen they said that peace, which is an ambassador's business, is a public good, they did not mean the good of a particular state or pair of states. At the very least, the public good of which they spoke was that of the Roman Republic or the Commonwealth of Christendom."[44] Intriguingly, Mattingly argues that the medieval theorists saw the influence of these ideas as extending even beyond the confines of Europe noting that "since some of [the Medieval jurists] … were quite specific in insisting that the privileges of ambassadors extended equally to infidels, we may not be exaggerating if we take it that they meant not just the Commonwealth of Christendom, but of the Commonwealth of Man".[45] Thus, if this understanding is correct, far from being the "Dark Ages", in this respect at least, the enlightened perspective of fifteenth century theorists on diplomacy and diplomatic law matches some of the more influential writings of the late twentieth and early twenty-first century critical theorists.

Crucially, as Mattingly notes, during this period, "diplomats did actually enjoy to a remarkable extent, the privileges and immunities prescribed for them by the jurists".[46] Frey and Frey make clear the hazards faced by envoys during the medieval period. They point out that as representatives of sovereigns they were expected to bring with them on their missions expensive gifts making them targets for robbers. Furthermore, ambassadors were open to interference from a wide variety of individuals or groups both during their travel to their post and after having arrived there.[47] However, they too agree that the exceptions to which they refer in their work "prove the rule that diplomats were generally well treated".[48]

One way in which this was made possible was through the use of safe-conducts which were letters issued by the sovereign to whom they were sent, detailing the name of the bearer and the purpose of the mission. The effect of the letters was to bring the ambassador within the protection of the sovereign. "The

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[41] Frey and Frey, *op cit*, p. 76.
[42] Mattingly, *op cit*, p. 48.
[43] *Ibid*, pp. 48-9. Here Mattingly refers again to the work of Bernard Du Rosier and other medieval jurists.
[44] *Infra*.
[45] *Infra*.
[46] *Ibid*, p. 50.
[47] Frey and Frey, *op cit*, pp. 101-6.
[48] *Ibid*, p. 106.

envoys could then rely on the king's promise; they were under the king's protection. Anyone who injured or molested or impeded an envoy or one of his party then damaged the honour of the king and committed treason, just as did anyone who killed an ambassador."[49]

3.2 The Renaissance

It is clear that this age of understanding, in which ambassadors, for the most part, acted within the limits of their powers, and princes provided to them the necessary protection, was not to last. A number of factors contrived to undermine the apparent equilibrium between the interests of sending and receiving entities. The first of these was the considerable increase in diplomatic activity which occurred during the fifteenth century. There was undoubtedly at the time a "web of diplomatic relations",[50] particularly between the city-states of Italy. A recent study has suggested that even as late as the middle of the sixteenth century, there was considerable diversity in terms of legitimacy, power and representativeness of the entities which conducted "supra-state" relations, particularly in Italy.[51] Nevertheless, as the modern diplomatic method moved beyond the confines of the Italian Peninsula, it is clear that a second factor emerged which undermined the apparent balance of the earlier diplomacy: the emergence of the territorial state. This process, which, it is argued, began in Spain in 1469 with the unification of the Kingdoms of Castille and Aragon,[52] continued throughout the rest of Europe and led to the emergence of a number of strong independent states, including England, France, the Netherlands and Sweden in the West, as well as China and Japan in the East.[53] These territorial states, led by strong central governments, began to develop a sense of national unity and concerned themselves much more with matters of international rather than internal concern.[54] In conjunction with this, the so-called *droit d'ambassade*, the right to send and receive diplomatic representatives, came to be regarded as "a litmus test of sovereignty".[55] The combination of these factors led to a more "cynical"[56] approach to diplomatic law that came to dominate diplomatic relations even to the present day. Ambassadors came to be more closely linked to the interest of the sending state and the interest of that state came to

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[49] *Ibid*, pp. 94-5.
[50] Frigo (2000), "Introduction" in Frigo (ed.) *Politics and Diplomacy in Early Modern Italy* (trans. Belton) (Cambridge University Press, Cambridge), p. 8.
[51] According to Frigo: "These actors were so numerous because of the numerous and diverse networks of contact and exchange in operation, not only among the great and small potentates of Europe at that time but also among factions, court parties, aristocratic groups, large mercantile companies and so on. The term 'international relations' or 'foreign relations' are of little use for description of the phenomenon and its features." *Ibid*.
[52] Grewe (2000), *The Epochs of International Law* (trans. Byers) (Walter de Gruyter Gmbh, Berlin and New York), p. 137.
[53] Cassese (1986), *International Law in a Divided World* (Clarendon, Oxford), p. 36.
[54] Behrens, *op cit*, p. 616.
[55] Frey and Frey, *op cit*, p. 126.
[56] Mattingly, *op cit*, p. 51.

dominate over the interests of the receiving state.[57] In practice, this cynical approach manifested itself in a variety of ways. For example, envoys increasingly began to breach their diplomatic immunity, while safe conducts, the guarantors of protection for medieval envoys, began to be ignored, leading to the conclusion that there was "limited protection accorded to diplomats during the renaissance period".[58]

Arguably the most significant factor which led to the deterioration of the apparent stability of fifteenth century diplomacy was the emergence of the resident ambassador. According to Mattingly, this development signified "a revolutionary change in practice which finally forced so complete a shift in theory that the medieval law of diplomacy was almost forgotten".[59] It is generally accepted that this process began in the middle of the fifteenth century in renaissance Italy where the establishment of permanent diplomatic relations between all of the principal states of the peninsula developed quickly over a period of one or two decades.[60] The process then spread throughout the rest of Europe. However, this process took considerably longer and it is clear that for some time, the sending of ad hoc missions continued alongside the sending of permanent representatives. Indeed, as one commentator makes clear, "resident ambassadors … tended at first to be looked on by their governments as persons of little account to be superseded by special embassies on all important occasions".[61] Nevertheless, although introduced "spasmodically and at a different pace at different times and in different countries",[62] the institution of the permanent representative came to dominate the dipoimatic method of the renaissance period.

The emergence of resident ambassadors can, to a large extent, be ascribed to the political developments in relation to the territorial state referred to above and the need for states to be kept up to date with the intentions of their rivals. [63] Thus, according to Behrens:

> All recent writers on the subject are agreed that the practice [of employing resident ambassadors] must be ascribed to the emergence of the leading states from conditions of political chaos to comparative unity under the rule of princes anxious to earn personal glory by territorial conquest, and to the consequent development of international rivalries which imposed upon governments the necessity of acquiring more extensive and accurate information of their neighbours' doings and intentions than could be obtained from the sources hitherto available. The resident ambassador, designed to meet this need, was in consequence a person who, while

[57] *Ibid*, p. 51.
[58] Frey and Frey, *op cit*, pp. 133-6.
[59] Mattingly, *op cit*, p. 51.
[60] Nicolson, *Evolution*, *op cit*, p. 33; Ganshoff, *op cit*, p. 293.
[61] Behrens, *op cit*, p. 620-1.
[62] *Ibid.*
[63] Behrens (1934), "Origins of the Office of English Resident Ambassador in Rome" 49 *English Historical Review* 640, p. 640.

> serving to foster friendly relations, found his primary and essential function in supplying news.[64]

This process not only revolutionised diplomacy but it also served to create many of the new rivalries which resulted in the apparent diminution in protection afforded to diplomatic representatives. Nevertheless, it was as a result of these rivalries and the fact that resident ambassadors were now living among the subjects and within the territories of those to whom they had been sent, that the need for a more comprehensive enumeration of diplomatic privileges and immunities arose.

Academic writers began increasingly to focus on the topic of diplomatic law in their work. Among the leading writers during the early period of post-permanent diplomatic relations, the most influential were Ayrault, Gentilis and Hotman. Unlike their predecessors such as du Rosier these writers were less concerned with practicalities and more with theory. Consequently, they came to rely to a large extent on the work of Roman jurists in their enumeration of diplomatic law. Perhaps the most influential of the so-called classical writers on the subject of diplomatic law, as with international law more generally, was Grotius. He too relied to a considerable extent on Roman doctrines and the work of Roman jurists such as Cicero, Livy Tacitus and Virgil. This reliance is particularly apparent from his discussion of diplomatic privileges and immunities in Book II, Chapter XVIII of his seminal work *De Jure Belli ac Pacis*, which was first published in 1625. Entitled "On the Right of Embassies", the chapter examines "the inviolable rights of ambassadors, and the security of their persons, a security sanctioned by every clause and precept of human and revealed law".[65]

Having declared at the beginning of his analysis that: "There are two points on which the privileges granted by the law of nations to ambassadors turn. In the first place, they have a right to be admitted into any country, and secondly, to be protected from all personal violence."[66] Grotius went on to explain that in relation to the obligation to admit ambassadors, the rule was certainly not unqualified. He noted that international law prohibited the refusal of admission only where the grounds for refusal were insufficient. Thus, an objection to the sovereign sending the ambassador would suffice, as would an objection to the person of the ambassador or the object of the mission. Accordingly, it would appear that the "right to be admitted" was at best subjective, and at worst non-existent.

Similar confusion is highlighted by Grotius in relation to his second key principle, that of protection from personal violence:

> As to the personal exemption of ambassadors from arrest, constraint or violence of any kind, it is a subject of some difficulty to determine, owing

[64] *Infra.*
[65] Grotius, *De Jure Belli ac Pacis*, published 1625 (Classics of International Law Series, Ed. Scott, 1925), Book II, Chapter XVIII.
[66] *Ibid*, at section II.

> to the varieties of opinion entertained by the most celebrated writers on the question.[67]

Grotius identified five different views apparent in the work of earlier writers. These included those who believed that ambassadors were protected from "unjust violence and illegal constraint" on the basis of a belief in a common system of law as highlighted by the work of Mattingly referred to above. However, according to Grotius, the relevant law here was the law of nature. A second group of writers argued that ambassadors were punishable but only in respect of "transgressions of the law of nations". For Grotius, the law of nations included the law of nature, leading him to conclude that "there can be no offence for which an ambassador is not punishable, except for those actions that are made such by the positive rules of municipal or civil law".[68] A third group of writers were of the view that ambassadors, who were representatives of states and foreign sovereigns, could only be tried for offences which insulted the dignity of the sovereign or state to whom they had been sent. A fourth group considered that it was extremely dangerous to punish an ambassador for any crime whatsoever and that they ought to be left to be dealt with by the legal authorities of the sending state. Finally, some writers suggested that, where ambassadors committed offences, reference should be made to independent and disinterested third parties in order to secure punishment. In summarising the various arguments, Grotius concludes:

> The argument is supported on one side by the urgent necessity of heinous crimes being punished, and on the other, the utmost latitude of exemption is favoured on the account of the utility of embassies, the facility of sending which ought to be encouraged by every possible privilege, and security.[69]

Crucially, although apparently discussing the protection of ambassadors from personal violence, the focus of Grotius' discussion is directed almost exclusively on the issue of punishment for crimes committed. There are a number of possible reasons for this. First, it would seem likely that a major concern of writers on diplomatic law at the time was the issue of the criminal liability of ambassadors for illegal acts carried out while on mission abroad. Thus, for example, Gentilis was inspired to write his 1585 treatise entitled *De Legationibus Libri Tres* having been consulted by the English government in the case of Bernardino de Mendoza, the Spanish Ambassador to England, who was accused of having the chief role in the Throckmorton Plot, a plot which involved a plan to invade England and place Mary Stuart on the throne.[70]

A second reason for the focus on the issue of punishment may have been that the writers were concerned much more with the issue of non-interference by the

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[67] *Ibid*, at Section IV.
[68] *Infra*.
[69] *Infra*.
[70] See Mattingly, *op cit*, p. 277.

authorities of the receiving state rather than by individuals within that state. It would seem from the work of Grotius that the protection from violence and illegal constraint was simply a matter of natural law. This led him to conclude that "if ambassadors were protected against nothing more than violence and illegal constraint, their privileges would confer no extraordinary advantage". Accordingly, for Grotius it was the immunity of the ambassador from arrest and prosecution that defined the difference between the natural protection which arose from the law of nature, and the greater extension of privileges to ambassadors provided for by the law of nations. He concluded:

> Equity and natural justice require punishment to be inflicted on all offenders, whereas the law of nations makes an exception in favour of ambassadors, and those who have the public faith for their protection. Wherefore to try or punish ambassadors is contrary to the law of nations which prohibits many things that are permitted by the law of nature … the security of ambassadors is a matter of much greater moment to the public welfare than the punishment of offences.[71]

Effectively therefore, Grotius moved away from the "sophisticated" analysis of the medieval jurists and developed new rules of the law of nations which went beyond the law of nature. That these rules were evidenced in and supported by Roman law doctrines is problematic insofar as these doctrines were developed in the context of the broader Roman Empire and the sending of provincial deputies to the remoter parts of the empire, rather than in relation to the sending and receiving of ambassadors properly so-called. Nevertheless, Grotius' work, and that of other writers of the time, was highly influential and began to influence the practice of states. Thus, if the law of nations did not previously recognise the absolute immunity of ambassadors from criminal jurisdiction, it was not long before such a rule was firmly established. What must be remembered, however, is that the inviolability of ambassadors, which has existed since time immemorial, found its justification in the law of nature rather than the law of nations. In effect, the law of nations, under the influence of the classical writers, developed a body of rules which were intended to secure and support the fundamental principle of inviolability.

3.3 The Development of a Theoretical Framework: Representative Character and Exterritoriality

As we have seen, the law of diplomatic privileges and immunities was the topic of considerable discussion from as early as the fifteenth century with the work of Bernard du Rosier. Arguably the most influential discussion of the topic was undertaken by Grotius in 1625. Frey and Frey have noted that between the years 1648 and 1700, "at least ninety-four new authors joined the on-going debate over

[71] Grotius, *op cit*, Section IV.

ambassadorial privilege",[72] indicating the importance of diplomatic law to the international lawyers of the time. Much of this work has been lost over time. However, the work of a number of writers on diplomatic law during the sixteenth, seventeenth and eighteenth centuries remains relevant to the study of diplomatic law today, particularly in relation to the development of the theoretical framework for the discussion of diplomatic privileges and immunities. As well as Grotius, these writers include Ayrault,[73] Gentilis,[74] Zouche,[75] Wicquefort,[76] Bynkershoek[77] and Vattel.[78] While the earliest writers were concerned more with the practical realities of diplomatic intercourse, these later authors began to theorise as to the juridical basis for the granting of privileges and immunities to ambassadors and are commonly credited with developing the three primary theories of diplomatic law; that is, "representative character", "exterritoriality", and "functional necessity". Undoubtedly, the dominant theories in the early development of diplomatic privileges and immunities were representative character and exterritoriality.

Although drawn from the two conflicting schools of natural law and legal positivism, there was common agreement amongst these writers that the primary reason for the granting of diplomatic privileges and immunities was the so-called "representative character" theory. Thus, from the natural law perspective, Grotius opined that:

> … the right of ambassadors would rest upon a very slippery foundation if they were accountable, for their actions, to any one but their own sovereigns. For as the interests of powers sending, and of those receiving ambassadors are in general different, and some times even opposite, if a public minister were obliged to consult the inclinations of both, there would be no part of his conduct, to which they might not impute some degree of blame. Besides although some points are so clear as to admit of no doubt, yet universal danger is sufficient to establish the equity and utility of a general law. For this reason it is natural to suppose, that nations have agreed, in the case of ambassadors, to dispense with that obedience, which every one, by general custom, owes to the laws of that foreign country, in which, at any time, he resides. The character, which they sustain, is not that of ordinary individuals, but they represent the

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[72] Frey and Frey, *op cit*, p. 261.
[73] Ayrault, *L'ordre, Formalité et Instruction Judiciaire*, published in 1576.
[74] Gentilis, *De Legationibus Libri Tres*, published in 1585, (trans. by G.J. Laing, Classics of International Law, Ed. Scott, 1924).
[75] Zouche, *Iuris et Judicii feciales sive juris inter gentes*, published in 1650 (Classics of International Law, Ed Holland, 1911).
[76] Wicquefort, *L'Ambassadeur et ses fonctions*, published in 1681.
[77] Bynkershoek, *De Foro Legatorum Liber Singularis*, published in 1721 (Clarendon Press, Oxford, 1946).
[78] Vattel, *Le Droit des Gens*, published in 1758 (Classics of International Law, Ed. Scott, 1916).

> Majesty of the Sovereigns, by whom they are sent, whose power is limited to no local jurisdiction.[79]

Similarly, from the perspective of the positivist school, Bynkershoek, although conscious of the developing role of functionalism, argued that:

> The sole reason why ambassadors are exempted from the power of those to whom they have been sent is that they should not, while performing the duty of their office, change their status and become subject to another while they are acting as the representatives of their prince who is generally a rival. This reason is the strongest and easily prevails over the others which I have already mentioned.[80]

It was during this time that international law witnessed the greatest expansion in the granting of diplomatic privileges and immunities to ambassadors and their retinue. This expansion was driven not only by adherence to the representative character theory but also as a result of the increasing adherence to the theory of "exterritoriality". This theory asserted that not only was an ambassador and his retinue considered to be outside the jurisdiction of the receiving state but also, by some fiction, they were considered actually to be outside the territory of that state. The development of the theory can be traced to the work of Pierre Ayrault who was the first to declare of the ambassador: "Il y sera tenu pour absent, et pour present en son pays."[81] However, it is Grotius who is most often attributed with the creation of the theory, an attribution which is based on a fundamental misinterpretation of Grotius' work. Thus, while he does in his work refer to the fiction that "ambassadors were held to be outside the country to which they were accredited",[82] that reference is merely descriptive. Grotius, in fact, relied primarily on the representative character theory in his description of the extent of diplomatic law. Subsequent writers adopted a similar approach. Thus, although it is possible to cite examples of adherence to the theory by other classical writers,[83] it is likely that the majority of these theorists, like Grotius, used the fiction of "exterritoriality" in an essentially descriptive manner.

Nevertheless, it was adherence to the exterritoriality theory by states in their practice that confirmed the extension of diplomatic privileges and immunities not only to ambassadors but also to their family and staff, including private servants, and, ultimately, to all unofficial members of the ambassador's household and to all hangers-on. Paradoxically, although greatly increasing the number of persons

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[79] Grotius, *op cit*, Section 4.
[80] Bynkershoek, *op cit*, Chapter VIII, p. 44.
[81] Ayrault, *op cit*, Liv. V, Pt. IV, s. 13.
[82] Grotius, *op cit*, Section 4.
[83] See, for example, Bynkershoek, *op cit*, Ch VIII, p. 43, who referred to the fact that ambassadors, as well as being "regarded by a sort of fiction as identical with the person sending them, they should also, by a similar fiction be declared outside the territory and so not liable to the civil law of the people among whom they are living".

recognised as being entitled to diplomatic privileges and immunities, the exterritoriality theory probably did little to advance the protection of ambassadors and their retinue. The development of the so-called *franchise du quartier* in the sixteenth and seventeenth centuries came about as a result of reciprocal claims by states that not only their embassies but also the areas around their embassies were outside the jurisdiction of the receiving state. These areas quickly became dens for outlaws and criminals.[84] Although many on the ambassadorial staff may have used this to their advantage,[85] there can be little doubt that the result was near anarchy and a reduction in the protection that could be accorded to ambassadors and their staff by the authorities of the receiving state.[86] Indeed, Adair has noted: "Such was the lawlessness that almost daily conflict took place between the ambassadors' servants and the lower police officials."[87]

Although the protection of ambassadors had become increasingly difficult as a result of the development of the *franchise du quartier*, the classical writers were in general agreement that ambassadors were entitled not only to inviolability but also to personal protection. In the natural law school, both Ayrault and Pufendorf argued that ambassadors were necessary for the preservation of peace and, as such, were inviolable. It is clear from the writings of Grotius that not only was the inviolability and protection of ambassadors supported by the doctrines of natural law, it was supported also by the practice of states. Thus, according to Grotius, ambassadors were "protected from all personal violence".[88] Focussing primarily on the issue of the protection of ambassadors from arrest, Grotius referred to writers who argued that ambassadors need only be protected from unjust violence and illegal constraint, and others who suggested an ambassador should be protected from arrest in respect of violations by them of the law of nations. He referred also to writers who suggested that ambassadors should have complete protection and immunity from arrest. Grotius concluded that the work of the various writers to which he referred was not conclusive on the matter of protection. Grotius saw, however, within the practice of states, a general consistency pointing towards complete protection. This led Grotius to conclude that, although principles of equity and justice require all offenders to be punished, "the law of nations makes an exception in favor of ambassadors and those who have the public faith for their protection … to try or punish ambassadors is contrary to the law of nations".[89] Ultimately, Grotius concluded that the inviolability of ambassadors and their

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[84] See Adair (1929), *The Exterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries* (Longman, London), pp. 220-23.

[85] Frey and Frey, *op cit*, p. 224 note that "The ambassadorial staff, not slow to grasp the possibilities, expanded the area [of the *franchise du quartier*] where they sold wine and other goods".

[86] Anderson (1993), *The Rise of Modern Diplomacy* (Longman, London, p. 56 notes that: "By the eighteenth century, the position in Rome had become so impossible … that the papal police had to be equipped with special maps to show them which streets they were permitted to pass through."

[87] Adair, *op cit*, p. 223.

[88] Grotius, *op cit*, Book II, Chapter XVIII, Section 3.

[89] Grotius, *op cit*, Book II, Chapter XVIII, Section 4.

personal protection was, even in 1625, "sanctioned by every clause and precept of human and revealed law".[90]

Scholars of the positivist school later supported this general assertion. Wicquefort and Bynkershoek, although opposed to each other's views on the question of the immunity to be extended to an ambassador who was a national of the receiving state,[91] nevertheless agreed on the central tenet of diplomatic law, that is, the inviolability and right of protection of the ambassador. For these writers, as with Grotius, inviolability was secured by absolute immunity from the local jurisdiction. Thus Wicquefort, in his treatise *L'Ambassadeur et ses fonctions* written in 1681,[92] was of the view that "if a representative were not immune from local jurisdiction, no public minister would be safe and no sovereign could protect a minister or assure his fidelity".[93] Bynkershoek opined similarly that diplomatic immunity was necessary in order to protect the whole good of the embassy. Thus he was able to declare:

> But if you should imprison an ambassador and subject him to punishment at the hands of him in whose realm he is sojourning, then with the fall of the delinquent ambassador down comes also the whole good of the embassy, and even if he has not been guilty of any crime, you expose him in unlimited degree to accusations of all sorts.[94]

A primary example of the state practice on which many of the positivists relied was the Diplomatic Privileges Act 1708 in the United Kingdom, which was based essentially on the "representative character" theory. The Act, which was passed in response to the arrest of Andrei Artemonovich Matveev, the Russian Ambassador to England for non-payment of debts,[95] declared all writs and processes against ambassadors and their servants null and void and provided for punishment of all persons initiating such proceedings. Interestingly, however, the Act of Anne, as it is known, which remained in force until the enactment of the Diplomatic Privileges Act in 1964, did not provide for the punishment of persons accused of physically assaulting ambassadors or their servants.

3.4 The Development of the Special Duty of Protection

Although the general inviolability of ambassadors and their right to protection was well established in both theory and practice by the end of the seventeenth century, the extent to which the receiving state was under a special duty to provide for the protection of diplomats remained unclear. The particular consideration in this regard concerns the extent to which a receiving state was required to protect the

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[90] Grotius, *op cit*, Book II, Chapter XVIII, Section 1.
[91] See Frey and Frey, *op cit*, pp. 240-41.
[92] Wicquefort, *op cit*, Liv 1 Section XXVIII.
[93] Quoted in Frey and Frey, *op cit*, p. 240.
[94] Bynkershoek, *op cit*, Ch XVII, p. 93.
[95] For a fuller discussion of this case see Frey and Frey, *op cit*, pp. 227-30.

ambassador, not only from the exercise of jurisdiction by the public authorities of the receiving state, but also from actions, both legal and illegal, committed by the ordinary citizenry of that state. A close examination of the work of the classical writers reveals that it was Vattel, writing in 1758, who first suggested that a special duty of protection existed. Having established that the necessity of embassies required, as a consequence, "the perfect security and inviolability of ambassadors and other ministers",[96] he continued: "if their persons be not protected from violence of every kind, the right of embassy becomes precarious, and the success very uncertain."[97] For Vattel, the reason why such a duty should exist was clear: that the ambassador represents the sovereign who sends him and any attack on an ambassador was an attack on that sovereign. Thus, according to Vattel, "the respect which is due to sovereigns should rebound to their representatives, and especially their ambassadors as representing their master's person in the first degree".[98] Ultimately he concluded that:

> This safety is particularly due to the minister, from the sovereign to whom he is sent. To admit a minister, to acknowledge him in such character, is engaging to grant him the most particular protection and that he shall enjoy all possible safety … An act of violence … if done to a public minister is a crime of state, it is an offence against the law of nations.[99]

The influence of Vattel's views was quickly apparent in judicial dicta of the time, particularly in the jurisprudence of the early American courts. For example, the Court of Oyer and Terminer, at Philadelphia, relied heavily on the work of Vattel in the celebrated case of R*espublica v De Longchamps*[100] in 1784. The case concerned a French citizen, Charles De Longchamps, who was accused of assault and battery against the Secretary to the French Legation in Pennsylvania. The evidence indicates that De Longchamps did little more than strike the cane of the representative who then proceeded to use the cane "with great severity"[101] against De Longchamps. Nevertheless, De Longchamps was indicted with a violation of the law of nations. Chief Justice McKean outlined the severity of De Longchamps' actions in the following terms:

> The person of a public minister is sacred and inviolable. Whosoever offers any violence against him, not only affronts the Sovereign he represents, but also hurts the common safety and well being of all nations; he is guilty of a crime against the whole world.[102]

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[96] Vattel, *op cit*, Book IV, Chapter VI, Section 81.
[97] *Infra.*
[98] Vattel, *op cit*, Book IV, Chapter VI, Section 80.
[99] Vattel, *op cit*, Book IV, Chapter VI, Section 82.
[100] 1 U.S. 111.
[101] *Ibid*, p. 112.
[102] *Ibid*, p. 116. De Longchamps was ordered to pay a fine of one hundred French francs and sentenced to two years imprisonment.

Shortly after the *De Longchamps* case, US Congress enacted the Punishment of Crimes Act 1790.[103] This Act provided, in s.255, that "Every person who assaults, strikes, wounds, imprisons, or in any other manner offers violence to the person of an ambassador or a public minister, in violation of the law of nations, shall be imprisoned for not more than three years, and fined, at the discretion of the court."[104] In interpreting this provision, the US courts continued to rely closely on the work of Vattel. Thus, in *United States v Hand*[105] decided in 1810, Circuit Justice Washington noted that with regard to offences against ambassadors, "the views of Vattel are very strong".[106] Having quoted from Vattel, he went on to note that "all this is a legal fiction, for the purposes of rendering the protection to which the minister is entitled full and complete, and to guard him, as well against insults, as real personal injury".[107]

What is apparent from Washington CJ's words is that by the beginning of the nineteenth century ambassadors were, both in practice and in theory, endowed with significant privileges and immunities which went well beyond the basic requirements of the concept of inviolability. Thus, during the seventeenth and eighteenth century, states, which were asserting the absolute character of their newly found sovereignty, had progressively permitted the expansion of both personal privileges as well as territorial privileges.[108] It was, in particular, the territorial privileges, which included the right of asylum and the *franchise du quartier*, that caused the greatest amount of controversy during the two centuries. The overall effect of these developments was to create a class of diplomatic elite. Thus, according to Frey and Frey: "Like the duel, which asserted a superior right and a claim to immunity from the law, diplomatic privileges enshrined the philosophy of a dominant class. The diplomatic elite always expected and generally received preferential treatment from each other and other states."[109]

A significant challenge to the elite position of diplomats was mounted in the aftermath of the French Revolution in 1789. The revolutionaries "equated diplomatic immunity with the two now discredited pillars of the ancien régime: aristocracy and privilege".[110] This position accorded squarely with the overriding purposes of the revolution: "If all nations and peoples were equal and lived together as brothers, they concluded, privilege would no longer be tolerated and diplomats no longer necessary."[111] However, it was not foreign envoys in France who were in the greatest danger. Rather it was French envoys abroad whose

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[103] Act of the First Congress of the United States, April 30th, 1790.
[104] *Infra*.
[105] 26 F.Cas 103 (1810). See also *US v Liddle*, 26 F. Cas. 936 (1808) and *US v Ortega* 27 F. Cas 359 (1925).
[106] *Ibid*, p. 104.
[107] *Ibid*, p. 105.
[108] This useful distinction between personal and territorial immunities is made by Frey and Frey, *op cit*. See, in particular, pp. 217-30.
[109] Frey and Frey, *op cit*, p. 212.
[110] Frey and Frey, *op cit*, p. 298.
[111] *Infra*.

position was the more perilous as a result of their own fervour and their desire to spread the revolution throughout Europe.[112] By far the most serious such offence took place at Rastatt, Germany, on 28 April 1799. On that day, three French representatives to the international congress that was taking place in the town were attacked. Two of the representatives were killed and the third was left for dead. [113]

As a result of such occurrences the French revolutionaries came to realise the importance of diplomatic privileges and immunities. Accordingly, the old system survived and it survived out of necessity. Thus:

> Even in years of revolutionary fervour or imperialistic aggrandizement the French revolutionaries, so determined to tear down the ancien régime, found themselves compelled in part by Realpolitik considerations to shore up one of its hallmarks, diplomatic immunity.[114]

However, the excesses, which had been apparent in the privileges and immunities accorded to diplomats in the preceding two centuries, could not continue. As has been noted above, these excesses were due, in part at least, to the theoretical justifications of exterritoriality and, to a lesser extent, representative character. Writers began to turn away from such theories and focus their attention more precisely on an analysis of the functions of the ambassadors as a basis for the granting of diplomatic privileges and immunities.

3.5 Emergence of the Functional Necessity Theory as the Dominant Theoretical Justification

Elements of the so-called functional necessity theory had been developed from an early stage by the classical writers but only as an alternative to the primary theory of representative character. Thus, reference can be found in the work of many of these writers to the need for ambassadors to be free to carry out the functions with which they had been entrusted. Grotius, for example, was concerned in his writings with ensuring that "an ambassador ought to be free from all compulsion – in order that he may have full security".[115] Wicquefort was concerned more with the necessity of maintaining free communication between states, noting that no judge could exercise jurisdiction over ambassadors "because he would thereby disturb a

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[112] *Infra*. Frey and Frey inform us in considerable detail of five serious violations of diplomatic immunity against French envoys. These included the murder of Nicolas Jean Hugo de Bassville, the French secretary in Rome in January 1793, the kidnapping of French representatives Charles-Louis Huguet, Marquis de Semonville, Ambassador to Constantinople and Huges-Bernard Maret, Duc de Bassano, Minister Plenipotentiary to Naples on 25 July 1793, the storming of the French Embassy in Vienna on 13 April 1798, and the killing of General Leonard Duphot, aide to the French Ambassador on 28 December 1797.

[113] *Ibid*, pp. 303-11.

[114] *Infra*.

[115] Grotius, *op cit*, Vol II, Book II Ch XVIII, p. 448.

commerce, the freedom whereof is founded on indispensable necessity, and he would deprive mankind of the means of maintaining society, which could not subsist without this principle".[116] Bynkershoek, in his turn, was concerned about the need to protect the good of the whole embassy. Thus, he declared:

> But if you should imprison the ambassador and subject him to punishment at the hands of him in whose realm he is sojourning, then with the fall of the delinquent ambassador comes down also the whole good of the embassy, and even though he has not been guilty of any crime, you expose him in unlimited degree to accusations of all sorts.[117]

In many cases, the development of the "new" theory of functional necessity was simply an extension of the old natural law concept focussing on the necessity of diplomatic intercourse and the consequent need to protect those individuals charged with performing that function. However, it was Vattel who appeared to place greatest emphasis on the natural law concept of the necessity of the diplomatic function. He argued that:

> [T]he natural law at the same time imposes upon all sovereigns the obligation of consenting to those things, without which it would be impossible for nations to cultivate the society that nature has established among them, to keep up a mutual correspondence, to treat of their affairs, or to adjust their differences. Now, ambassadors, and other public ministers, are necessary instruments in the maintenance of that general society of nations and of that mutual correspondence between nations. But their ministry cannot effect the intended purpose, unless it be invested with all the prerogatives which are capable of insuring its legitimate success, and of enabling the minister freely and faithfully to discharge his duty in perfect security.[118]

This reasoning was quickly adopted by domestic tribunals when dealing with the privileges and immunities to be granted to ambassadors and members of their staff. As early as 1735, in *Barbuit's Case*, the Lord Chancellor declared that: "The privileges of a public minister is to have his person sacred and free from arrest, not on his account, but on account of those he represents, and this arises from the necessity of the thing, that nations may have intercourse with one another in the same manner as private persons, by agents, when they cannot meet themselves."[119] Similarly, the New York Supreme Court relied on the work of Vattel in *Holbrook v Henderson* in 1839.[120] According to the Court:

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[116] Wicquefort, *op cit*, Liv I, s. XXVII, p. 383.
[117] Bynkershoek, *op cit*, Ch XVII, p. 93.
[118] Vattel, *op cit*, Book IV, Chapter VII, Section 92.
[119] *Cases T. Talbot, 281*; 25 *Eng Reports (Full Reprint)* 777.
[120] 4 *Sandf.* 619, Dec. 2, 1839 at p. 628.

> It is necessary for nations to treat with each other for the good of their affairs – that each has a right of free communication with others for that purpose – that such communication must, of necessity, be carried on by ministers or agents who are the representatives of their sovereign, and that each State has, therefore a right to send and receive public ministers; that such being the right of nations, a sovereign attempting to hinder another from sending or receiving a minister, does him an injury and offends against the law of nations.

While the functional necessity theory was, at first, used to support the contemporary extent of diplomatic privileges and immunities, its use by theorists in the nineteenth century was directed at challenging not only the extent of diplomatic privileges and immunities but, ultimately, their very existence. According to Frey and Frey, it was the members of the Italian and Belgian schools who dominated diplomatic writings during the nineteenth century and who "became famous for their attack on diplomatic privilege".[121] The focus of the work of these jurists was functionalist, "arguing that an envoy's privilege should be restricted to what he needed to accomplish his mission".[122] Key among the theorists of the Belgian school was Francois Laurent, while leading members of the Italian school were Silvestre Pinheiro-Ferreira, Pasquale Fiore, Pietro Esperson and Giuseppe Carnazza-Amari.[123]

Many of these jurists came to reflect the new juridical priorities of the primacy of justice and the inherent rights of the individual, which had found their roots in the French Revolution. Laurent, in particular, was critical of the need for diplomats whose immunity, he argued, was based on "the fetishism of royalty and the arrogance of the prince".[124] Indeed, Laurent went so far as to say that diplomatic privileges and immunities were no longer necessary as they were incompatible with justice. In so doing, he rejected the positivist reliance on past precedents. Laurent's thesis is summarised by Frey and Frey in the following terms: "Laurent concluded by reiterating that the most sacred right of all was justice and that the first duty of the state was to assure that its citizens receive justice. 'The contrary doctrine subordinates and sacrifices all the rights to politics; it is the doctrine of Machiavelli'."[125]

Similar views were maintained by members of the Italian school, although these scholars were less willing to abandon diplomatic privileges and immunities altogether. Thus, Pinheiro-Ferreira considered that there were benefits in diplomatic privileges and immunities, but that "diplomats could demand only that nothing impede their missions".[126] Ultimately, Pinheiro-Ferreira "contended that

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[121] Frey and Frey, *op cit*, p. 337.
[122] *Infra*.
[123] *Ibid*, pp. 339-45.
[124] Laurent, *Droit civil international*, 5 vols. Paris (1850), 3: 14. Quoted in Frey and Frey, *op cit*, p. 339.
[125] *Ibid*, p. 341.
[126] *Ibid*, p. 342.

the basic question should be, not whether laws exempting an envoy from the state existed, but whether these laws were just".[127] A common position maintained by members of the Italian school was to challenge the exterritoriality and representative character theories. Thus, Fiore argued that "Jurists who favoured the 'arrogant pretensions' of kings had invented the 'strange' theory of exterritoriality".[128] Similarly, in relation to representative character, these theorists pointed towards the increased willingness of sovereigns to submit themselves to local jurisdiction as reason for the removal of diplomatic immunity. Members of the Italian school drew a distinction between the public and private acts of diplomats, arguing that immunity should only be available in respect of official acts. Nevertheless, there was general acceptance that diplomats "could not be bodily restrained".[129] The not insubstantial achievements of the Belgian and Italian schools in reducing the excessive privileges and immunities of the seventeenth and eighteenth centuries are summarised by Frey and Frey in the following terms:

> All these theorists advocated the restriction, if not the abolition, of basic diplomatic privileges and the adoption of a more functionalist approach in assessing the extent of an envoy's immunities. Although they did not succeed in eliminating diplomatic immunities, they did succeed in restricting diplomatic rights, eliminating flagrant abuses, and forcing a reconsideration of the rationale for such privileges.[130]

Needless to say the positivists reacted against the "artificial standards" of the Belgian and Italian Schools.[131] Positivist writers, including the Italians, Donati and Anzilotti, who was later to become a judge of the Permanent Court of International Justice, pointed out the difference between the law as it was and the law as it ought to be. Furthermore, according to Frey and Frey, "Most jurists condemned the views of Laurent and his followers as subversive and underscored what they regarded as the irrefutable principle behind immunities, that is that the envoy should be free to exercise his mandate and should be free of local authorities".[132]

Similarly, the idea that diplomatic privileges and immunities should be abandoned was not reflected in state practice. Indeed, it would appear that states were keen to hold on to the prestige associated with such rights. Thus, the primary preoccupation amongst states at the beginning of the nineteenth century at least, was the question of precedence. The problem, which had begun in the Middle Ages, came to dominate the diplomatic relations of the period. It was only finally brought under control in the Congress of Vienna, the first multilateral agreement purporting to regulate any aspect of diplomatic relations. The Congress established

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[127] *Infra*.
[128] Fiore, *Nouveau droit international public* (1869), Vol 2, p. 561. Quoted in Frey and Frey, *op cit*, p. 343.
[129] *Infra*.
[130] *Ibid*, pp. 344-5.
[131] *Ibid*, p. 371.
[132] *Ibid*, p. 370.

three categories of diplomatic representative: ambassadors and certain agents of equivalent rank; ministers in the strict sense; and charges d'affairs.[133] The Congress also put an end to all disputes over precedence by declaring that all diplomatic officials were to "rank in each class according to the date on which their arrival was officially noted".[134] However, when it came to the question of diplomatic privileges and immunities, receiving states, in particular, became more and more concerned about the excessive privileges and immunities that continued to be claimed for a wide range of officials and hangers-on, ostensibly based on the exterritoriality theory. Gradually states began to refuse such broad privileges and immunities and accepted, in turn, reduced privileges and immunities for their own representatives abroad. The excesses of exterritoriality, which included the much-maligned right to asylum, were abandoned in favour of the much more functionalist approach to diplomatic privileges and immunities, but perhaps not to the extent envisaged by Laurent and his followers.

It is important not to dismiss too quickly the relevance and influence of the exterritoriality and representative character theories in this regard, particularly on the question of the protection of diplomatic personnel. The necessity of the diplomatic function has always been a necessary element in the juridical justification for diplomatic inviolability. Nevertheless, in relation to the granting of diplomatic privileges and immunities, particularly at the time of the evolution of permanent diplomatic relations, at least until the French Revolution, the necessity of the diplomatic function did not provide a firm enough basis on which to develop those privileges and immunities which went on to secure the inviolability of resident ambassadors. As has been noted above, it was, for example, the representative character theory that gave substance to the duty incumbent on the receiving state to provide protection to visiting diplomats. As with the concept of inviolability, it is apparent that since the time of Vattel, of the many writers who sought to challenge the extent of diplomatic privileges and immunities, few, if any, challenged the existence of the duty of protection in spite of the purported abandonment of the representative character theory. Similarly, in respect of the *franchise de l'hôtel*, or the inviolability of the premises of the diplomatic mission, it may be that it was only as a result of the exterritoriality theory that the full extent of this inviolability was secured in the minds of both the theorists and the local authorities. One is therefore able to conclude that:

> The "representative character" theories and the "exterritoriality" theory were creatures of their time, a fact witnessed by the demise of both theories in modern diplomatic law. Nevertheless, it is clear that the

[133] Annex XVIII of the Acts of the Congress of Vienna. Quoted in Memorandum by the Secretariat of the International Law Commission on "Diplomatic Intercourse and Immunities", UN Doc A/CN/4.98, 1956 *Yearbook of the International Law Commission*, Vol II, 129, (hereinafter ILC Memorandum) at p. 133. A fourth category of diplomatic official, the minister resident, was added by the Protocol of the Conference of Aix-la-Chappelle (1818), see *infra*.

[134] Annex XVII, Acts of Congress of Vienna, Article IV, *infra*.

> emergence of modern diplomatic privileges and immunities into the settled regime apparent in modern diplomatic law would not have been possible without the developments which took place during the renaissance and classical periods.[135]

Having highlighted the importance of the representative character and exterritoriality theories to the development of the law of diplomatic relations and, indeed, to the continued adherence of states to the fundamental principle of inviolability of the diplomatic agent, it is clear that the influence of these theories waned around the turn of the twentieth century. The process of the questioning of these theories and, particularly in the case of the "exterritoriality" theory, its ultimate rejection, was hastened by moves towards the end of the nineteenth century to codify the law of diplomatic privileges and immunities. Up until that time, diplomatic law found its expression in the form of customary international law which was based upon state practice and, as we have seen, was fundamentally influenced by theoretical writings and, before that, reliance on natural law doctrines. So much so that by the end of the eighteenth century, it could properly be said that, within Europe and North America at least, there existed a comprehensive body of rules and principles dealing with almost every aspect of the diplomat's life, both public and private. By this time, many Western states had passed domestic laws giving effect to these principles of international law within their own domestic sphere.

With respect to the specific question of protection of ambassadors, reference has already been made to the Act of Anne 1708 in the United Kingdom and the United States Act of 30 April 1790. Mention can also be made of the "French Decree of 13 *Ventôse*, year II, concerning the representatives of foreign Governments",[136] the Belgian Law of March 1858 which "provides a penalty for acts, words, gestures, menaces uttered against diplomatic agents",[137] and the German Penal Code 1871 which prohibits "any offence against a foreign minister".[138] According to Lyons, "provisions more or less similar exist in the Codes of Austria, Italy, Holland, Russia, Sweden and Switzerland".[139] Nevertheless, there was no international agreement providing for diplomatic privileges and immunities even among the European states.

3.6 The Codification of Diplomatic Privileges and Immunities

The period from 1860 to 1930 witnessed a number of privately initiated attempts to codify the law of diplomatic privileges and immunities. These attempts included a

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[135] Barker (1995), "The Theory and Practice of Diplomatic Law in the Renaissance and Classical Periods" 6 *Diplomacy and Statecraft* 593, at p. 610.
[136] See ILC Memorandum, *op cit*, p. 134.
[137] Lyons (1954), "Personal Immunities of Diplomatic Agents" 31 *British Yearbook of International Law*, 368, p. 303.
[138] *Infra*.
[139] *Infra*.

number by private individuals including Bluntchi's Draft Code (1868), Fiore's Draft Code (1890), Pessôa's Draft Code (1911), Phillimore's Draft Code (1926), and Strupp's Draft Code (1926).[140] Six attempts to codify the law during this period were made by non-governmental organisations. These included, the Resolution of the Institute of International Law, Cambridge (1895), the Project of the American Institute of International Law (1925), the Draft Code of the International Law Association of Japan (1926), the Project of the International Commission of American Jurists (1927), the Resolution of the Institute of International Law, New York (1929)[141] and the Harvard Draft Convention on Diplomatic Privileges and Immunities (1932).[142] The League of Nations also created a Sub-Committee to its Committee of Experts for the Progressive Codification of International Law dealing specifically with the question of Diplomatic Immunities.[143]

That this period witnessed the final abandonment of the "exterritoriality" theory can be seen in the contrast between the approach taken in the earlier codes with that taken in the latter drafts. Thus, the theoretical approach taken by Bluntchi in his Draft Code of 1868 was unashamedly based on the theory of exterritoriality. Bluntchi declared that:

> La personne qui jouit de l'exterritorialité, n'est, dans la règle, pas soumie aux lois de l'état sur le territoire duquelle elle reside. Cet état cependent le droit d'exigerque la personne juissant de l'exterritorialité ne porte aucune atteinte à son independence, à sa sûreté et à son honneur; il pourra prendre dans ce but toutes les measures des sûreté qu'il jugera necessaries.[144]

Similarly in Fiore's Draft Code, the concept of exterritoriality was to the fore. Thus, although asserting that "Diplomats who criminally violate the rights of private parties are subject to the criminal jurisdiction of the state to which they are accredited, save for such concessions as are necessary to protect the dignity of the represented state",[145] Fiore went on to provide in his Draft Code for the "privilege of exterritoriality" to be assigned to "the offices of foreign legations and to the consular archives" as well as to "the buildings intended as the usual residence of

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[140] The full text of these codes is contained in Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), 26 *AJIL* 15 (Supp. 1932) (hereinafter Harvard Research). Appendices 1, 2, 4, 8 and 9 respectively.

[141] The full text of these instruments is contained in Harvard Research, *op cit*, Appendices 3, 5, 10, 6 and 11 respectively.

[142] For the full text of the Harvard Draft Convention, see Harvard Draft, *op cit*, pp. 19-25. For full text and commentaries, see further, pp. 26-143.

[143] See the Report of the Committee of Experts, 20 *AJIL* 149 (Supp. 1926). See also report of Special Rapporteur Diena, League of Nations Document C.45.M.22.1926, 20 *AJIL* 153 (Supp. 1926) (hereinafter, Diena Report).

[144] Harvard Research, *op cit*, p. 144.

[145] *Ibid*, p. 154.

the ministers and diplomatic agents accredited to the sovereign of the state". The effect of this exterritoriality is explained in the following terms:

> The sovereign of the state has no right to exercise any jurisdictional act over the places which enjoy exterritoriality. Consequently he cannot proceed to search a dwelling, or examine any papers, documents or records, or undertake any other act of investigation in such place.[146]

Nevertheless, Fiore's uncertainty about the doctrine of exterritoriality was apparent from the immediately following paragraph of his Draft Code in which he noted that the "territorial state cannot … be considered as completely deprived of eminent domain over the places possessing the privileges of exterritoriality".[147]

Such uncertainty was reflected in later drafts. Thus, the Institute of International Law in its 1891 Resolution referred to the privilege of "exterritoriality" alongside the privilege of "inviolability". However, it would seem that the term was included only for descriptive purposes. According to Professor Lehr, the Institute's rapporteur, the word "could not be interpreted literally" and "did not furnish the basis for diplomatic immunity … He felt justified, however in retaining the text of the Institute Draft on the ground that it was short and expressive."[148] However, by the time the various non-governmental organisations came to consider the issue of the theoretical basis of diplomatic law, the theory had been all but abandoned. The work of the American Institute of International Law and the International Commission of American Jurists and that of the Japanese Branch of the International Law Association did not refer to the concept of exterritoriality in the text of their draft Conventions, while the 1929 Resolution of the Institute of International Law specifically removed the reference to the privilege of exterritoriality, which had caused such controversy in its 1891 Resolution. The Harvard Draft Convention on Diplomatic Privileges and Immunities contains in its introductory comments the declaration that "the theory of exterritoriality has not been used in formulating this present draft convention".[149] Most importantly and conclusively on this point reference can be made to the work of Monsieur Diena, the Special Rapporteur to the Sub-Committee on Diplomatic Immunities to the League of Nation's Committee of Experts for the Progressive Codification of International Law, according to whom:

> It is perfectly clear that exterritoriality is a fiction which has no foundation either in law or in fact, and no effort of legal construction will ever succeed in proving that the person and the legation buildings of a diplomatic agent situated in the capital of State X are on territory which is foreign from the point of view of the State in question. There are sound practical reasons for abandoning the unfortunate term "exterritoriality",

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[146] *Ibid.*
[147] *Ibid.*
[148] See Ogdon, *op cit*, p. 94.
[149] Harvard Research, *op cit*, 26.

> for the mere employment of this unfortunate expression is liable to lead to errors and to legal consequences which are absolutely inadmissible.[150]

Bearing in mind the work of notable individuals, non-governmental organisations and the major governmental organisation of the time, Ogdon, writing in 1936, was able to declare that "[A]ll groups which have recently worked on the codification of diplomatic privileges and immunities have concluded in favour of abandoning the term altogether".[151] Nevertheless, it is perhaps not surprising, if a little disappointing, to find that references to diplomatic privileges and immunities in contemporary culture continue to use the fiction of exterritoriality if only within the realms of artistic licence.[152]

The demise of the representative character theory was not quite as dramatic as that of the exterritoriality theory. Ogdon links that demise with the declining influence of the doctrine of sovereignty. He points to five sources of evidence pointing towards the decline of the representative character theory in 1936. The first of these concerned: "Pronouncements of learned jurists, and certain draft codes indicate a changing attitude toward the theory of 'representative character'."[153] Among the draft codes referred to above, many, as noted, specifically rejected the "exterritoriality" theory. However, with regard to the "representative character" theory they all remained silent. Nevertheless, as Ogdon points out, many of these draft conventions "violate the spirit of the theories of 'representative character' in their intent to bring about a greatly restricted privilege".[154] Ogdon suggests a number of other factors which support this thesis. Thus, having first indicated the evidence referred to above, Ogdon continued:

> *Second*. There were many important exceptions to the principle of general immunity as based on respect for the representative of an independent and sovereign state, even during the eighteenth and nineteenth centuries when wide immunity was most firmly established, and when the theory of "representative character" was most generously applied by municipal courts. *Third*. The last century produced continually increasing numbers of cases in which the courts strictly construed the privilege of diplomatic immunity. *Fourth.* Sending states have exhibited a willingness to be satisfied with less immunity for their own agents than a broader interpretation of the theory of "representative character" clearly affords.

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[150] Diena Report, *op cit*, p. 153.
[151] Ogdon, *op cit*, p. 95.
[152] See, for example, the international bestseller, *The Da Vinci Code*, (Dan Brown, Corgi Books, 2003), p. 162 where Brown asserts, wrongly, that: "The [US Embassy in Paris] is considered US soil, meaning all those who stand on it are subject to the same laws and protections as they would encounter standing in the United States."
[153] Ogdon, *op cit*, p. 150.
[154] *Ibid*, p. 153.

> *Fifth*. Recent statutory enactments actually conflict with the essential attributes of the doctrine of "representative character".[155]

Nevertheless, the "representative character" theory continued to hold sway in the practice of states alongside the theory of "functional necessity". Thus, as far as the League of Nations was concerned, the opinion of its Committee of Experts for the Progressive Codification of International Law was that "the one solid basis for dealing with the subject is the necessity of permitting free and unhampered exercise of the diplomatic function and of maintaining the dignity of the diplomatic representative and the state which he represents and the respect properly due to secular traditions".[156]

3.7 The Creation of a Universal Diplomatic Law

One of the primary difficulties faced in relation to the successful codification of international law was that, while there was apparent agreement as to the key provisions of that law in the West, the position in the rest of the world was perhaps not quite so clear-cut. What has been discussed to date is the existence of an essentially Euro-centric based system of diplomatic privileges and immunities. Although reference has been made to the acceptance of the concept of inviolability among the ancient civilisations outside Europe, many of the developments referred to above in relation to the development of diplomatic method and law within Europe were not reflected among other civilisations. The process of establishing permanent diplomatic relations, which occurred in Europe during the fifteenth and sixteenth centuries, for example, did not immediately catch on in other civilisations. Thus, with respect to the Ottoman Empire, the receiving of ambassadors from European states was reluctantly accepted but rarely reciprocated.[157] When Ottoman envoys were sent, they were usually ad hoc. It was not until the late eighteenth century that a more permanent system of diplomatic representation was established by the Ottomans.[158] With regard to the question of protection of diplomats, Frey and Frey suggest that the Ottomans regarded envoys as hostages and often resorted to physical abuse of envoys as well as internment, isolation and other mistreatment.[159] On the other hand, Bassiouni makes clear that according to Muslim Law, the inviolability and duty to protect diplomats is absolute:

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[155] *Ibid*, pp. 150-51.

[156] 20 *AJIL* 149 (Supp. 126). See also Preuss (1932), "Capacity for Legation and the Theoretical Bases of Diplomatic Immunities" 10 *New York University Law Quarterly Review* 170, at p. 181: "The two theories – of representations and of *ne impediatur legatio* – together form the theoretical basis of the special position of the envoy in the territory of the sending state."

[157] Frey and Frey, *op cit*, p. 396.

[158] *Infra*.

[159] For a full discussion of the "Ottoman Mistreatment of Ambassadors", see Frey and Frey, *op cit*, pp. 398-401.

> The Koran contains several references to the concept of *Aman*, or safe conduct, which is part of the basis of diplomatic immunity. The diplomat is the beneficiary of *Aman*, a legally binding privilege that obligates the state to protect the beneficiary until his departure from its territory. The state may revoke the *Aman* and expel the beneficiary, but not violate it … while in the view of some commentators there is an exception to the concept of absolute immunity of diplomats for their commission of *Hudud* crimes, there is no specific statement in the Koran or Sunna of that exception.[160]

A different position existed also in the case of the Chinese Empire whose foreign policy, such as it was, was premised upon Chinese hegemony and envisaged other states as inferior barbarians, in much the same way that the Europeans regarded non-Europeans.[161] It was only through the use of force against the Chinese in the nineteenth century that Western states were able to establish permanent embassies in Beijing.[162] Unsurprisingly, the imposition of Western methods in this way was resented by the local populace, in particular by the Boxers, "an antiforeign secret society, who targeted, in particular, the diplomatic corps".[163] The ensuing Boxer Rebellion resulted in the deaths of a number of foreign diplomats, including a number of murders committed by members of the Chinese army under direct orders of the Chinese government. Ultimately, if somewhat ironically, the imposition of Western standards of diplomacy on non-European states during the nineteenth century was achieved by superior military power. Thus, quoting the views of Hedley Bull, Frey and Frey conclude that:

> The dominance in the nineteenth century of positivism entailed in its wake the interpretation that "international society was a European association, to which non-European states could be admitted only when they met a standard of civilisation laid down by Europeans." When these mutually incompatible systems clashed, weaker powers inevitably were forced to abandon indigenous conceptions. Where non-European states, such as Japan, China, Turkey, Burma or Siam demanded that they be treated as equals of the Europeans, they relied on the European system for the rationale, not on their own systems, which were predicated on the

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[160] Bassiouni (1980), "Protection of Diplomats Under Islamic Law" 74 *American Journal of International Law* 609, p. 610. *Hudud* crimes are described by Bassiouni as crimes punishable by a *Had*, which means that the penalty for them is established in accordance with " God's rights and is prescribed by the Koran. Prosecution and punishment of such crimes is mandatory." Bassiouni, *op cit*, p. 623. However, with respect to the particular situation of the Ottomans, see the view of Frey and Frey who note that: "Although in theory Islamic law respected the inviolability of an ambassador, as seen in the maxim 'No evil shall await the ambassador', the Turks interpreted that injunction rather loosely." Frey and Frey, *op cit*, p. 398.

[161] Frey and Frey, *op cit*, p. 403.

[162] *Ibid*, p. 406.

[163] *Infra*.

> inequality between peoples. Only then did the basic privileges and immunities become truly universal.[164]

As a result of this acceptance of Western values, a number of states had entered into bilateral agreements dealing with questions of diplomatic privileges and immunities. According to the *Harvard Research in International Law*, the bilateral treaties mostly involved dealings between Western states and states from other parts of the world. Thus:

> Out of approximately one hundred treaties containing articles on diplomatic agents, Latin American states were party to about one-half, Near and Middle Eastern States to one-fourth and States of the Far East to the remainder. These treaties were in nearly every case with the United States or with European nations. Only a very few conventions between European states contained any provisions as to the privileges and immunities to be enjoyed by a diplomatic agent.[165]

The combination of the expansion of European influence into Africa, the Middle East and the Far East, in particular, together with the fostering of rivalries such expansion created, put immeasurable strains on the European states and upon their diplomatic method. In spite of the apparent creation of a universal diplomatic law through the creation of a network of bilateral treaties on diplomatic privileges and immunities, the system was on the verge of a catastrophic breakdown. The outbreak of World War I was as clear an indictment of the prevailing diplomatic method as there could have been. The Balance of Power system and the Concert of Europe, which had successfully held the competing European powers apart in a form of uneasy détente, gave way to a period of secret pacts which served only to fan the flames of an increasingly complicated world. Diplomats, who had been in a pre-eminent position, found themselves increasingly scrutinised and challenged. Such challenges came not only from outside but also from within the traditional European fellowship. Thus, from within, Woodrow Wilson challenged the old diplomacy declaring that henceforth there should be nothing but "open covenants of peace openly arrived at" and that "diplomacy should always proceed frankly and in the public view".[166] External threats came from "newly independent nations and revolutionary regimes on both the left and the right".[167] The Soviets, in particular, as one might imagine, challenged the elitism of the old diplomacy which, according to Trotsky, "the 'propertied minority' had relied on 'to deceive the majority in order to subject it to their interests'".[168]

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[164] Frey and Frey, *op cit*, p. 415, quoting Hedley Bull (1977), *The Anarchical Society: A Study of Order in World Politics*, (Macmillan, London), p. 34.
[165] Harvard Research, *op cit*, p. 26. For a more detailed analysis of such treaties see ILC Memorandum, *op cit*, pp. 134-5.
[166] Nicolson, *Evolution*, *op cit*, p. 85. See also Frey and Frey, *op cit*, pp. 425-6.
[167] Frey and Frey, *op cit*, p. 426.
[168] Quoted in Frey and Frey, *op cit*, p. 427.

Nevertheless, in spite of the changes to diplomatic method which took place in the aftermath of World War I, the basic principles of diplomatic law, including the concept of diplomatic inviolability, remained essentially intact. As noted above, considerable efforts had been made to codify the law of diplomatic privileges and immunities prior to 1914. That codification project continued virtually unabated after 1918. In practice, states seeking to challenge the old legal order found it difficult to do so. Even the Soviets, as the French revolutionaries before them, found that when it came to the question of diplomatic inviolability they had to work within the existing system. According to Frey and Frey, three serious incidents convinced the Soviets that they had to conform to the existing order. The three incidents all involved attacks on diplomats either by functionaries of the state or by the local populace.[169] The most notorious incident involved the assassination of Count Wilhelm von Mirbach-Harff, German Ambassador to Russia, by two socialist revolutionaries. Realising the impact the assassination had on international sentiment, Lenin himself went to the German Embassy to apologise.[170] According to Frey and Frey: "The assassination of Mirbach-Harff had proven the need for accommodation to the 'old diplomacy' and adherence to that most fundamental of international laws, the inviolability of envoys."[171]

There can be little doubt, however, that ambassadors were in a more precarious position under the new diplomacy than they ever had been under the old. According to Nicolson, "the new theory of reason proved incapable of controlling the unreasonable; in place of old methods of stability, a new method of utmost instability was introduced".[172] At no time was this instability more apparent than during times of conflict. Thus, during the Spanish Civil War and, especially, during World War II, while some states adhered to rules of customary international law in relation to the protection of diplomatic personnel, the majority did not.[173] Many envoys were killed or interned during this time. Diplomats in Russia were imprisoned and many were not released until a number of years after the war ended.[174] Diplomats in Japan were particularly severely treated and diplomats in Germany did not fare much better.[175]

In the aftermath of World War II, diplomats still faced dangers to their physical well-being, not least in Communist China where the regime "routinely flouted international law and disregarded the basic guarantees of diplomatic inviolability".[176] Other factors continued to influence the development of

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[169] Frey and Frey, *op cit*, pp. 427-8.
[170] *Infra*.
[171] *Infra*.
[172] Nicolson, *Evolution*, *op cit*, p. 88.
[173] Frey and Frey, *op cit*, pp. 423-33. Frey and Frey note that the United States of America in particular insisted on respecting customary international law, "even to the extent of granting customs exemptions for departing envoys".
[174] *Infra*. According to Frey and Frey, one envoy, Wallenberg, has yet to be released and his current whereabouts, or indeed the question of whether he is still alive, remains unknown.
[175] *Infra*.
[176] *Ibid*, p. 435.

diplomatic law, not least the considerable growth in the number of persons entitled to diplomatic privileges and immunities as a result of the exponential growth in the number of states that occurred in the aftermath of World War II. This expansion brought into sharp focus the perennial problem as to who was and who was not entitled to the full extent of diplomatic privileges and immunities, including the basic protection of diplomatic inviolability. Other problems included the perceived increase in the problem of abuse of diplomatic privileges and immunities by diplomats. These problems, together with the new-found desire emanating from the United Nations to proceed with the continued codification of international law, primarily through the work of the International Law Commission, resulted in the drafting and entry into force of the Vienna Convention on Diplomatic Relations 1961. This Convention, together with its sister convention dealing with consular relations, will be discussed in the following chapter.

Chapter 4

The Law Providing for the Protection of Diplomatic Personnel

The first substantive area of international law dealing with the protection of diplomatic personnel concerns the question of inviolability and the special duty of protection. In relation to diplomatic agents and associated personnel, the relevant law is to be found in the Vienna Convention on Diplomatic Relations 1961.[1] The position of consular officials is governed by the terms of the Vienna Convention on Consular Relations 1963.[2] The analysis of these conventions will focus only on those provisions relevant to the question of the protection of diplomatic personnel. However, the discussion will be placed in its proper context and the opportunity will be taken not only to examine the relevant law but also to highlight the difficulties and problems which the law gives rise to. In particular, this chapter includes an analysis of the decision of the International Court of Justice in the Tehran Hostages Case and will also consider questions relating to the practical implementation of the special duty of protection.

4.1 The Vienna Convention on Diplomatic Relations 1961

The Vienna Convention on Diplomatic Relations was signed on 18 April 1961 and entered into force on 24 April 1964.[3] Described as a "landmark of the highest significance in the codification of international law",[4] the Convention can rightly be considered to be one of the most successful multilateral treaties of the modern age. Many modern writers on diplomatic law have highlighted the significance and near-universality of the Convention. Thus, Lewis has noted that the "scope and success [of the Vienna Convention] are impressive. It is almost universally regarded as embodying binding international legal rules on diplomatic intercourse between states."[5] Similarly, Denza, the foremost contemporary writer on

[1] 500 *UNTS* 95 (hereinafter the VCDR).
[2] 596 *UNTS* 261 (hereinafter the VCCR).
[3] The entry into force of the Convention is governed by Article 51 and occurred "on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations".
[4] Do Nascimento E Silva (1972), *Diplomacy in International Law* (A.W. Sijthoff, Leiden), at p. 30.
[5] Lewis (1985), *State and Diplomatic Immunity* (2nd Ed., Stevens & Sons Ltd., London) p. 161.

diplomatic privileges and immunities, considered in 1998 that the Convention "has become a universal Convention, and its provisions, even where at the time of their adoption they clearly marked progressive development of custom or resolved points of practice conflicted, are now regarded as settled law".[6] There are currently 191 state parties to the Convention, making it one of the most widely supported conventions of all time.

The Convention was drafted by the International Law Commission (ILC) in a process which began at the Commission's first session in 1949 when it selected the topic of "Diplomatic Intercourse and Immunities" as one of fourteen topics of international law considered ripe for codification.[7] The topic was given priority at the insistence of the United Nations General Assembly which passed a resolution requesting the ILC "as soon as it considers it possible, to undertake the codification of the topic of 'diplomatic intercourse and immunities' and to treat it as a priority topic".[8] It is apparent that one factor behind the decision to push forward the topic was the perceived increase in abuse of diplomatic privileges and immunities by diplomatic personnel.[9] When the matter was considered by the General Assembly's Sixth (Legal) Committee in 1951, a number of delegations, including those of Yugoslavia and the United States of America, complained about "flagrant violations of privileges and immunities".[10] However, many others considered the topic sufficiently important in and of itself to justify speedy codification.[11]

In spite of the General Assembly's call for priority consideration of the topic, it was not until 1955 that the ILC began its work on "Diplomatic Intercourse and Immunities". This began with the appointment of Mr A.E.F Sandström as Special Rapporteur. The first stage of the ILC's work on this topic was the presentation by the Special Rapporteur of a set of draft articles with commentaries.[12] In the meantime, the ILC Secretariat prepared a Memorandum entitled "Diplomatic Intercourse and Immunities".[13] This Memorandum provided a detailed summary of state practice on matters of diplomatic law since the Congress of Vienna in 1815. Specific reference can be made to the excellent summary of the various attempts to codify international law relating to diplomatic intercourse and immunities, some of which have been considered in Chapter 3.

At an early stage of its analysis, the Memorandum noted that some of the immunities covered in the early codification attempts were undisputed, referring in particular to the inviolability of the agent's person and residence. It is certainly the

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[6] Denza (1998), *Diplomatic Law*, (2nd Ed., Clarendon Press, Oxford), p. 1.
[7] UN General Assembly Official Records, 4th Sess., Supp No. 10 (A/925).
[8] UNGA Resolution 685 (VII).
[9] Liang (1953), "Diplomatic Intercourse and Immunities as a Subject for Codification" 47 *American Journal of International Law* 439, at p. 442.
[10] *Infra*.
[11] See in particular the view of the Danish delegation. *Infra*.
[12] UN Doc A/CN.4/91, 1955 *Yearbook of the International Law Commission* Vol. II
[13] UN Doc A/CN.4/98, 1956 *Yearbook of the International Law Commission* Vol. II 129-172.

case that numerous bilateral treaties,[14] multilateral treaties, such as the Havana Convention regarding Diplomatic Officers 1928,[15] and private attempts at codification emphasised the centrality of the concept of inviolability.[16] The Memorandum focussed specifically on the attempts by the League of Nations to codify diplomatic law, including a summary of responses by states to a questionnaire prepared by the Committee of Expert's Sub-Committee on Diplomatic Intercourse and Immunities.[17] On this summary of state practice and attempts at codification, the Memorandum concluded: "There was substantial measure of agreement regarding the nature of the immunities necessary to the performance of diplomatic duties. These immunities comprise inviolability of the agent's person, inviolability of his private and official residences, and exemption from the criminal jurisdiction of the country to which he is accredited."[18] A further conclusion was to the effect that "neither the Sub-Committee's report nor the replies of governments suggest any juridical criterion to be applied in distinguishing between official and non-official acts".[19]

The Memorandum then proceeded to consider diplomatic intercourse and the theoretical basis of diplomatic immunities.[20] With regard to the question of theory, the Memorandum specifically rejected the "exterritoriality" theory noting that "if this fiction were carried to its logical conclusion, the consequences might well be disastrous".[21] The Memorandum favoured a combination of the "representative character" and "functional necessity" theories, noting that the latter theory might on its own "serve as a basis for an international convention designed to lay down the irreducible minimum of immunities which diplomatic representatives must enjoy wherever they exercise their difficult functions".[22]

Finally the Memorandum considered academic and judicial perspectives on the topic of diplomatic intercourse and immunities. In relation to inviolability, the views were again unequivocal. The Memorandum cited Calvo who opined that: "Inviolability is a quality, or status, which renders any person vested with it immune against any form of constraint or proceedings. The right of public ministers to enjoy this privilege is indisputable; it is based not merely on

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[14] *Ibid*, pp. 134-5.
[15] *Ibid*, pp. 135-6.
[16] *Ibid*, pp. 146-52.
[17] *Ibid*, pp. 136-46.
[18] *Ibid*, p. 145. It is interesting to note that the Memorandum appears to consider that the overriding concept is one of immunity and that inviolability and the exemption from jurisdiction are mere examples of immunities. This is different to the approach taken in this book which identifies inviolability as the key concept, with privileges and immunities existing as mechanisms in order to secure diplomatic inviolability. See above, Chapter 1.
[19] *Infra*.
[20] *Ibid*, Chapter II, pp. 152-71.
[21] *Ibid*, p. 158.
[22] *Ibid*, p. 160. For a fuller discussion of the theoretical bases of diplomatic law, see above, Chapter 2.

convenience, but on necessity."[23] Similarly, Fauchille was of the opinion that: "The whole subject is dominated by the principle of inviolability … This is the fundamental principle …"[24] As to judicial authority, the Memorandum restricted itself to a citation of the following opinion of Chief Justice McKean in *Respublica v De Longchamps*:

> The person of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the sovereign he represents, but also hurts the common safety and well-being of nations; he is guilty of a crime against the whole world.[25]

These authorities led the authors of the Memorandum to conclude that "inviolability is a principle of law recognised by most authorities and by the practice of states".[26] It is notable that in its discussion not only of inviolability, but also of diplomatic intercourse and immunities more generally, the Memorandum did not consider directly the question of protection. However, given the reference to *Respublica v De Longchamps* referred to above, together with many of the other references to state practice and academic opinion which seem to encompass the question of protection, it would be fair to assume that the authors of the Memorandum intended the question of protection to be covered by the concept of inviolability.

This assumption is supported by the Harvard Research from 1932. The Harvard Draft included, in Article 17, a specific provision dealing with personal protection and security of the member of a mission and members of his family.[27] According to the Harvard Research: "The right to protection provided by this article is commonly considered as supporting personal 'inviolability' which has long been regarded as the fundamental principle from which have been derived all diplomatic privileges and immunities."[28]

4.1.1 The Protection of Mission Premises

As has previously been noted, the protection of diplomatic premises is dealt with in Article 22 of the VCDR. According to Article 22:

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[23] Calvo (1896), *Le droit international théoretique et pratique*, 5th Ed. (Paris, Arthur Rousseau), Vol. III, p. 296. Quoted in *ibid*, p. 161.
[24] Fauchille, *Traité de Droit International Public*, 63. Quoted in *ibid*, p. 161.
[25] 1 Dall. 111 (1784).
[26] UN doc A/CN. 4/98, *op cit*, p. 161.
[27] Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932) 26 *American Journal of International Law* 26 (Supp. 1932) (hereinafter, Harvard Research) at p. 90, Article 17, which reads: "A receiving state shall protect a member of a mission and the members of his family from any interference with their security, peace or dignity.".
[28] *Ibid*, pp. 90-91.

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

Having postponed its consideration of the topic at both its 1955 and 1956 sessions, the ILC began its substantive deliberation on the codification of diplomatic intercourse and immunities in 1957. The issue of the inviolability of the premises of the diplomatic mission was discussed first. There was general satisfaction among the Commissioners with the concept of inviolability and the special duty of protection. Accordingly, the 1957 Draft was unchanged in the 1958 Draft and at the Vienna Conference. Considerable debate ensued, however, concerning the question of what would happen in an emergency necessitating the entry of the authorities of the receiving state onto the premises of the mission. The Special Rapporteur had originally proposed that the authorities of the receiving state should have a power of entry: "in an extreme emergency, in order to eliminate a grave and imminent danger to human life, public health or property, or to safeguard the security of the state. In such emergencies the authorization of the Ministry of Foreign Affairs should, if possible, be obtained."[29] A "milder formulation"[30] was proposed in 1958 which "would have referred to the duty of the sending state to cooperate with the agents of the receiving state in case of emergency".[31] However, as Denza points out, the ILC "concluded that such an addition was inappropriate and unnecessary".[32] Finally, the view of the Vienna Conference on this matter was that "under Article 22 the inviolability of the mission premises should be unqualified".[33] This position appears to have been maintained in the practice of states since 1961.[34] However, it is worth noting that several writers maintain that states are allowed to enter the premises of a diplomatic mission on the grounds of self-defence.[35]

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[29] *ILC Yearbook 1957*, Vol II, p. 137.
[30] Denza, *op cit*, p. 121.
[31] *Infra*.
[32] *ILC Yearbook 1957*, Vol I, pp. 55-6, 1958, Vol I, p. 129. Cited in Denza, *op cit*, p. 121.
[33] *Infra*.
[34] For a summary of relevant state practice, see Denza, *op cit*, pp. 123-6.
[35] See, for example, Denza, *op cit*, p. 126 who cites authors such as Mann, "'Inviolability' and the Vienna Convention", *Further Studies in International Law* (Clarendon Press) 326, Bowett, *Self-Defence in International Law* (Manchester University Press, Manchester) p. 270 and Vicuna, "Diplomatic and Consular Immunities and Human Rights" 40 *ICLQ* 34, at p. 48 in support of this position.

The question of the special duty of protection imposed on the receiving state in relation to the premises of the diplomatic missions of foreign states received very little attention in the negotiation phases of the Vienna Convention,[36] highlighting, it is suggested, the deep-rooted understanding of the requirement as a matter of customary international law. However, it is worth noting that the specific wording of Article 22(2) obligates the receiving state to take "all appropriate steps" to protect the premises of foreign missions. According to the ILC's commentary on its 1958 Draft, the requirement is that: "The receiving state must, in order to fulfil this obligation, take special measures – over and above those it takes to discharge its general duty of ensuring order."[37] What these special measures consist of is not defined. Denza suggests that:

> The duty is not an absolute one, and what is appropriate depends on the degree of threat to a particular mission and on whether the receiving state has been made aware of any unusual threat.[38]

4.1.2 The Protection of the Diplomatic Agent

The protection of diplomatic agents is dealt with in article 29 of the VCDR. Article 29 provides:

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

It will be recalled that the provisions of Article 29 apply directly to the "members of the family of the diplomatic agent forming part of his household"[39] and to "members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households".[40]

The question of the personal inviolability and protection of the diplomatic agent was considered at the ILC's 401st meeting on 21 May 1957.[41] Members of the Commission were concerned about three particular issues, none of which relate

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[36] For example, the only substantive change to article 22(2) suggested at the Vienna Conference came from Malaya which suggested a change of the wording of the article to: "The receiving state is under a special duty and shall take all appropriate steps to protect the premises …" (UN Doc A/CONF.20/C.1/L.114 (1961)). The purpose of this suggested amendment was: "to make clear that the duty of protection imposed by this paragraph was one of result and not of means." (Kerley (1962), "Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities", 56 *AJIL* 88 at p. 104). The proposed amendment was not adopted in the final text.

[37] *ILC Yearbook 1958*, Vol II, p. 95.

[38] Denza, *op cit*, p. 139.

[39] VCDR, Article 37(1).

[40] VCDR, Article 37(2).

[41] *ILC Yearbook 1957*, Vol I, pp. 89-90.

directly to the issue of protection but which require to be briefly mentioned. The first related to the question as to who was entitled to personal inviolability, the second question related to what measures of constraint were covered by the concept of inviolability and the third related to the thorny question of self-defence.[42]

With regard to the first concern, the Special Rapporteur had referred in his draft to the inviolability of the diplomatic agent. Some members of the Commission preferred specific reference to heads of mission as well as to the other staff of the mission.[43] However, others considered that this would be rather clumsy and require a similar division between heads of mission and other staff of mission to be made throughout the draft articles.[44] The Special Rapporteur explained that he had chosen the words "diplomatic agent" because of their more general sense.[45]

On the issue of what specifically was encompassed within the concept of inviolability, the Special Rapporteur had indicated that he "had been in two minds whether to include a provision that diplomatic agents should not be subject to constraint, arrest, extradition or expulsion".[46] He had decided not to do so as these measures were covered by measures of immunity which were dealt with elsewhere in the draft articles. This explanation is quite correct and emphasises the fact that immunities exist as a mechanism to facilitate the operation of the concept of inviolability. On the other hand, the members of the Commission were not convinced that mere reference to inviolability was sufficient and voted to insert the sentence "He shall not be liable to any constraint, arrest, extradition or expulsion" in the relevant draft article.[47]

Finally on the question of self-defence, the Special Rapporteur had included a provision providing for the legitimate exercise of self-defence. Some Commissioners were unclear as to whether this included the legitimate defence of the receiving state or that of individuals within the state.[48] Others considered self-defence to be insufficient and envisaged coercive action being taken by the police "in order to prevent the commission of an offence by the diplomatic agent".[49] Still others considered it would be better to say nothing at all on the subject as the right of self-defence went without saying. The Special Rapporteur conceded that the reference to self-defence was not absolutely necessary and that it could be dealt with in the commentary. Accordingly, the ILC Commentary to the 1958 Draft includes the following text:

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[42] *ILC Yearbook 1957*, Vol I, pp. 89-90.
[43] *Ibid*, p. 89.
[44] *Infra*.
[45] *Infra*.
[46] *Infra*.
[47] *Ibid*, p. 90.
[48] *Infra*.
[49] Mr Verdross in particular considered that: "The police had the right to take coercive action to prevent diplomatic agents from committing illegal acts, such as entering prohibited areas or photographing fortifications." *Infra*.

> Being inviolable, the diplomatic agent is exempted from measures that would amount to direct coercion. This principle does not exclude in respect of the diplomatic agent either measures of self-defence, or, in exceptional circumstances, measures to prevent him from committing crimes or offences.[50]

The concept of personal inviolability itself was not challenged during the ILC debates, reflecting the importance of the principle as a long-established rule of customary international law.[51] However, a significant difference exists between the wording of the obligation in Article 29 of the Vienna Convention and that of previous enumerations of the principle of personal inviolability, particularly that of the Harvard Research Draft. Article 17 of the Harvard Draft states, quite simply, that: "A receiving state shall protect a member of a mission and members of his family from any interference with their security, peace or dignity."[52] The commentary to the Harvard Draft does include the phrase "reasonable means". However, this refers to the requirement to bring offenders to justice, leaving the requirement to protect absolute. Thus, according to the commentary:

> Although no state is legally obliged to augment the punishment for offences committed against foreign diplomats, states are held to be under a duty to afford them a "special protection," that is, to protect them against crime and to employ all means reasonably necessary to bring offenders against them to justice.[53]

It would seem that the wording of the Harvard Draft went somewhat beyond what was required by state practice at the time, particularly in relation to attacks on diplomatic agents by private individuals. Thus, the commentary itself acknowledges that "the obligation imposed upon the receiving state is also variously interpreted by states"[54] citing the view of the Swiss government that "practice varies as to the special protection to be given to the official against the acts of private persons".[55] Ultimately, the commentary on the Harvard Draft accepts that the duty involves some element of "due diligence" and "good faith":

> Nevertheless, states have undertaken to exercise greater vigilance over these persons than they do over private individuals. They are also bound to take special steps to forestall any assault against the persons of foreign representatives and to display particular energy in pursuing the criminals and in assuring the proper course of justice. Only if a state neglects these

[50] *ILC Yearbook 1958*, Vol II, p. 97.
[51] Denza, *op cit*, p. 211.
[52] Harvard Research, p. 90.
[53] *Ibid*, pp. 95-6.
[54] *Ibid*, p. 93.
[55] Memorandum of the Swiss Federal Council, *L of N*, C.196.M.70.1972.V.p. 242, cited in Harvard Research, *op cit*, p. 93.

> duties, or fails to act with all due diligence and sincerity, will its conduct involve international responsibility.[56]

The draft text before the ILC in 1957 diluted the apparently absolute nature of the obligation as stated in the text of Article 17 of the Harvard Draft itself, perhaps better reflecting the nature of the obligation as it existed in customary international law. This was done by the insertion of the requirement that the receiving state only take "all reasonable steps" to prevent any attack on the diplomatic agent's person, freedom and dignity. Having noted previously that the ILC Memorandum did not specifically deal with the question of protection, it would seem that the decision by the Special Rapporteur to draft the provision in this way was not considered to be controversial. Indeed, the only comment made on this issue at the meeting was by Mr Amado who stated that "he would have preferred the wording 'all necessary steps' to 'all reasonable steps', which was rather subjective".[57]

The lack of controversy relating to Article 29 was again reflected at the Vienna Conference where there was minimal discussion of the draft article. A proposal by China to incorporate into the text of the article the wording relating to self-defence and exceptional measures in the ILC commentary was rejected without discussion.[58] More importantly for the present discussion, Belgium proposed that the words "all reasonable steps" be replaced by the words "all steps".[59] Interestingly, this proposed amendment was originally accepted by the Conference. However, it was later withdrawn by Belgium after the United Kingdom delegation, supported by Ireland and Nigeria, had argued that "removal of the word 'reasonable' would give the article unlimited scope, and impose an impossible task on receiving states".[60]

The ILC explained its interpretation of what was required in terms of this article in its commentary as follows:

> This article confirms the principle of the personal inviolability of the diplomatic agent. From the receiving state's point of view, this inviolability implies, as in the case of the mission's premises, the obligation to respect, and to ensure respect for, the person of the diplomatic agent. The receiving state must take all reasonable steps to that end, possibly including the provision of a special guard where circumstances so required.[61]

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[56] Harvard Research, *op cit*, p. 96.
[57] *ILC Yearbook 1957*, Vol. I, p. 89.
[58] See Denza, *op cit*, p. 211 who noted that this was probably because the wording "was thought to be unnecessary and liable to give rise to uncertainty as to whether the principle of self-defence applied in the case of other Articles of the Convention".
[59] UN Doc A/Conf.20/C.1/L.214.
[60] A/Conf.20/14, p. 160. See also Denza, *op cit*, p. 212.
[61] *ILC Yearbook 1958*, Vol. II, p. 97.

4.2 The Vienna Convention on Consular Relations 1963

The Vienna Convention on Consular Relations was adopted on 24 April 1963 and entered into force on 19 March 1967.[62] The UN Secretary-General had made a recommendation to the General Assembly in 1949 to the effect that "in view of the continual expansion of international trade, the legal position and functions of consuls should be regulated on as universal a basis as possible".[63] As with its work on the topic of diplomatic intercourse and immunities, the International Law Commission had, also in 1949, included the topic of "Consular Intercourse and Immunities" as one of fourteen areas of international law considered ripe for codification.[64] The work on this topic was not given the priority ostensibly afforded to the work of the ILC on diplomatic intercourse and immunities in relation to which the UN General Assembly had passed a resolution calling upon the ILC to treat it as a priority topic. However, in spite of this, the ILC began its work on consular intercourse and immunities in 1955, the same year as it began its work on diplomatic intercourse and immunities. The first task undertaken by the ILC was the appointment of a Special Rapporteur, Mr Jaroslav Zourek, who presented his first report on the topic in 1957.[65] This report was divided into two parts, the first part dealing with the historical development of the law; the codification of consular law; the general nature of the consular mission; the position of honorary consuls; and questions of method and terminology, while the second part included draft provisional articles together with commentaries.[66] This report was briefly discussed by the ILC in plenary in 1958 but further consideration was deferred until the next session in 1959. The draft Convention continued to be discussed by the ILC in its 1960 and 1961sessions.

4.2.1 The Protection of the Premises of the Consular Mission

The question of the inviolability of consular premises is dealt with in Article 31 of the VCCR. The provision reads as follows:

1. Consular premises shall be inviolable to the extent provided in this article.
2. The authorities of the receiving state shall not enter that part of the consular premises which is used exclusively for the purposes of the work of the consular post except with the consent of the head of the

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[62] The entry into force of the Convention is governed by Article 77 and occurred "on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations".

[63] Lie, *Survey of International Law in Relation to the Work Of Codification of the International Law Commission* (1949), pp. 54-6. Quoted in Lee (1966), *Vienna Convention on Consular Relations* A.W. Sijthoff-Leyden/Rule of Law Press, Durham N.C., p. 16.

[64] UN General Assembly Official Records, 4th Sess., Supp No. 10 (A/925).

[65] UN Document A/CN.4/108. See *ILC Yearbook 1957*, Vol. II, p. 71.

[66] *Infra*.

consular post or of his designee or of the head of the diplomatic mission of the sending state. The consent of the head of the consular post may, however, be assumed in the case of fire or other disaster requiring prompt protective action.

3. Subject to the provisions of paragraph 2 of this article, the receiving state is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity.
4. The consular premises, their furnishings, the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defence or public utility. If expropriation is necessary for such purposes, all possible steps shall be taken to avoid impeding the performance of consular functions, and prompt, adequate and effective compensation shall be paid to the sending state.

In relation to the protection of consular premises, Article 25 of the Special Rapporteur's provisional draft provided that: "The correspondence and archives of consular offices and the premises used as consular offices shall be inviolable."[67] With respect to this provision, the Special Rapporteur simply noted that "the principle stated in this article is to be regarded as reflecting the existing state of law", citing in support of this assertion the provisions of a number of bilateral treaties on consular relations.[68] Considerable disquiet was expressed in the ILC about the extent of this provision. A number of Commissioners highlighted the difference between diplomatic missions, which are entitled to full inviolability and protection, and consular missions, which ought not to be.[69] In particular, Mr Sandstrom "observed that the Special Rapporteur had cited an imposing number of conventions in support of his views [as to the absolute inviolability of consular missions]; but other conventions existed which did not accord consular premises the same degree of inviolability as mission premises".[70] The Commissioners were essentially divided between those who believed that consular premises should be inviolable only in so far as was required by performance of the diplomatic function,[71] and those who considered that consular premises ought to be placed on the same footing as diplomatic missions.[72] The Chairman took the view that the matter should be referred to the Drafting Committee to take account of the differing views of the Commissioners.

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[67] *Ibid*, p. 98.
[68] *Ibid*, p. 99.
[69] See in particular the discussion of this issue during the 530th meeting of the ILC on 2 May 1960. *ILC Yearbook 1960*, Vol. I, pp. 16-22.
[70] *Ibid*, p. 18.
[71] See, for example, Mr Francois, Mr Matine-Daftary and Mr Erim, *ibid*, pp. 16-20.
[72] See, for example, Mr Ago, Mr Bartos and Sir Gerald Fitzmaurice, *infra.*

The Drafting Committee submitted its revised draft to the plenary session of the committee which considered the draft at its 619th meeting on 27 June 1961.[73] The Drafting Committee appeared to come down in favour of the wider approach to inviolability. This is perhaps not surprising as the Drafting Committee had been chaired by Mr Ago, one of the foremost proponents of the wider approach in the ILC. Paragraph 1 of the revised draft stated: "The consular premises shall be inviolable. The agents of the receiving state may not enter them, save with the consent of the head of post."[74] What is particularly noticeable about the revised draft, however, was its inclusion, for the first time, of a paragraph relating directly to the special duty of protection in terms identical to those in Article 22(2) of the VCDR. This relationship between the terms of the draft article and Article 22 of the VCDR proved decisive and the ILC adopted the draft article without further discussion.

Lee notes that: "During the Vienna Conference, the battle between the absolute and conditional immunity schools of thought was once again drawn, with the former having the edge over the latter initially in view of the ILC Draft's adherence to it."[75] Many of the same arguments that had dominated the discussions at the ILC were again mooted.[76] Ultimately, states appeared less willing to accept a concept of absolute inviolability which could not be illustrated with any certainty in state practice. A four-power compromise submitted by Nigeria, Japan, Greece and the United Kingdom[77] was ultimately adopted and includes some limitations on the principle of absolute inviolability which had not been apparent in the final ILC draft. With regard to the special duty of protection, there was minimal discussion of this obligation at the Vienna Conference and the ILC draft of the relevant paragraph was adopted without change.

4.2.2 The Protection of Consular Officers

Article 40 of the VCCR provides as follows:

> The receiving state shall treat consular officers with due respect and dignity and shall take all appropriate steps to prevent any attack on their person, freedom or dignity.

The Convention includes a further provision in Article 41 which provides for the limited inviolability of consular officers. In particular, this article provides that "consular officers shall not be liable to arrest or detention, except in the case of a grave crime and pursuant to a decision by the competent judicial authority".[78]

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[73] *ILC Yearbook 1962*, Vol. I, pp. 240-41.
[74] *Ibid*, p. 241.
[75] Lee, *op cit*, p. 89.
[76] For a summary of these arguments see *ibid*, pp. 89-93.
[77] UN Doc. A/CONF.25/C.2/L.71.
[78] VCCR Article 41(1).

Article 20 of the Special Rapporteur's provisional draft from 1957 provided simply that: "The State of residence is bound … (b) to ensure protection of consular representatives and consular staff, and safeguard consular officers from attack."[79] In his commentary Zourek noted that "the admission of consular representatives involves the obligation on the state of residence to protect them and their consular staff in the discharge of their official functions. That obligation includes the duty to ensure their personal safety and to protect consular officers from attack."[80] One immediate problem relates to the apparent distinction between consular representatives, consular staff and consular officers, with only the latter category entitled to any form of special protection.

However, the importance of the question of the personal inviolability of consuls and their immunity from criminal jurisdiction was reflected by the fact that the Special Rapporteur was asked to prepare a second report specifically on that topic which was submitted in 1960.[81] In this report, Zourek examined the development of international custom on the question at issue. In particular, Zourek drew attention to "the profound transformation which had occurred in the consular institution in the countries of Europe after the second half of the seventeenth century in consequence of the change in international economic relations"[82] as well as the increasing use of permanent diplomatic relations which resulted in the fact that consuls ceased to be regarded as public ministers.[83] Zourek referred to the opinion of Vattel who, having admitted that a consul is not a public minister, considered, nevertheless, that:

> Since … he is entrusted with a commission by his sovereign and is received in that capacity by the Sovereign in whose territory he resides, he should, to a certain extent, enjoy the protection of the *jus gentium*. The Sovereign, by the very act of receiving him, tacitly engages to allow him all the liberty and safety necessary for the proper performance of his functions. [84]

The remainder of Zourek's Second Report comprised an analysis of state practice in relation to the question of inviolability. However, the majority of this work focussed on the question of immunity from jurisdiction, which Zourek clearly regarded as the key consideration in relation to the question of inviolability. Zourek concluded his discussion of this issue by presenting a new article. Although titled "Personal inviolability" this rather complicated proposed article focussed exclusively on the question of the institution of criminal proceedings against

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[79] Lee, *op cit*, p. 96.
[80] *Infra*.
[81] UN DocumentA/CN.4/131, *ILC Yearbook 1960*, Vol. II, p. 2.
[82] *Ibid*, p. 4.
[83] *Ibid*.
[84] Vattel, *Le Droit des Gens*, *op cit*, Book II, Chapter II, section 34, p. 282. Quoted in Special Rapporteur's report, *op cit*, p. 5.

consular officers. The terms of Zourek's proposal generally reflect the provisions of Article 41 of the VCCR.

With respect to the special duty of protection contained in Article 40 of the 1963 Convention, Zourek had made no mention of such a duty in his provisional draft but the inclusion of a duty of special protection was, in fact, proposed by Mr Sandstrom.[85] Discussions of this proposal at the ILC focussed on the question of what would be included in such a provision. According to Mr Lliang, "the term 'special' protection as used in the context could only mean a greater measure of protection than that given to foreign nationals".[86] Mr Verdross was of the opinion that "the special protection covered such matters as the special guard and police patrols which protected not only diplomatic missions and consulates but even the private residences of diplomatic agents and consuls".[87] Ultimately the ILC adopted a draft provision in the following terms:

> The receiving state is under a duty to accord special protection to consular officials by reason of their official position and to treat them with due respect. It shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.

What is particularly interesting about this proposal is its difference to the similar provision in the VCDR referred to above. In particular, the ILC's draft included specific reference to the existence of a special protection to be accorded to consular officials by virtue of their official position. It was suggested by some states at the Vienna Conference in 1963 that the effect of this was to grant to consuls greater protection than was accorded to diplomatic agents. Whether or not this is the case is highly debatable. Although specific reference is made to a special duty of protection, this reference does not add much to the subsequent phrase of the draft article in which the details of the obligation, specifically "to take all appropriate steps to prevent any attack on their persons, freedom or dignity" is enumerated.[88] In fact, on a proposal by the United States of America at the Conference,[89] the initial phrase was removed in order to bring the provision in line with the terms of Article 29 of the Vienna Convention on Diplomatic Relations.

Lee argues that the reluctance of states specifically to include a provision providing for the special protection of consuls existed as a result of "the existence of different interpretations which might attach to such a term".[90] He cites in support of this the view of the United States-Mexican General Claims Commission which had, in 1927, identified two possible meanings:

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[85] *ILC Yearbook 1960*, Vol. I, p. 64.
[86] *Ibid*, p. 67.
[87] *Ibid*, p. 68.
[88] See Lee, *op cit*, p. 83.
[89] UN Doc. A/CONF.25/C.2/L.5.
[90] Lee, *op cit*, p. 83.

> The question has been raised whether consuls are entitled to a "special protection" for their persons. The answer depends upon the meaning given to these two words. If they should indicate that, apart from prerogatives extended to consuls either by treaty or by unwritten law, the Government of their temporary residence is bound to grant them other prerogatives not enjoyed by common residents (be it citizens or aliens), the answer is in the negative. But if "special protection" means that in executing the laws of the country, especially those concerning police and penal law, the Government should realise that foreign Governments are sensitive regarding the treatment accorded their representatives, and that therefore, the Government of the consul's residence should exercise greater vigilance in respect of their security and safety, the answer as evidently shall be in the affirmative.[91]

Lee concludes that "the second meaning seems to prevail in consular usage".[92] However, it must be noted that the provision of special protection to consuls as a result of Article 40 of the 1963 Convention, does not depend upon the sensitivities of governments regarding the treatment of their representatives but rather, on the necessity of the proper conduct of consular relations.[93]

In conclusion, it is clear from the foregoing analysis that, although some differences exist in relation to the question of inviolability between the regimes governing diplomats and consuls in the Vienna Conventions on Diplomatic Relations 1961 and the Vienna Convention on Consular Relations 1963, the provisions in relation to the special duty of protection are identical. Before proceeding to examine the practical implementation of the duty of protection, it would seem apposite to examine the only major judicial discussion to date of the question by an international court, specifically the Tehran Hostages Case of the International Court of Justice.

4.3 Case Study of Protection under the Vienna Conventions: The Tehran Hostage Case

It will be recalled that the Tehran Hostage Crisis began on 4 November 1979 when a large group of students stormed the compound of the Embassy of the United States of America in Tehran, Iran.[94] The US Consulates in Tabiz and Shiraz were also seized. A number of hostages were taken at all three establishments and a total of 52 hostages were held for a total of 444 days. The matter was referred by the United States to the International Court of Justice (ICJ) on 29 November 1979.

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[91] *Mexico (Francisco Mallén Claim) v United States*, cited in Lee, *op cit*, p. 83.
[92] *Infra*.
[93] VCCR, Preamble, paragraph 5: "Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective states."
[94] For a discussion of the background to the attack and the events of 4 November 1979, see above Chapter 1.

Given the on-going nature of the crisis and the potential implications for diplomacy worldwide, the ICJ expedited the hearing of the case. It made an order in relation to provisional measures on 15 December 1979 and gave final judgement on the merits of the case on 24 May 1980, a mere six months after the start of the crisis. Before moving to consider the judgements of the ICJ, it is first necessary to consider two issues which go to the heart of the present study. The first concerns the motivation of the students who carried out the seizure. The second relates to the level of security which was apparent at the Embassy on 4 November 1979.

Victor Tromseth, who was political counsellor in the US Embassy at the time of the seizure, has noted that the motivations of the students who seized the Embassy on 4 November 1979 were not directed against the United States. "Rather, they hoped that by seizing the embassy and holding the staff hostage for a few days, they could seriously embarrass the [Provisional Revolutionary Government] and, perhaps, bring it down."[95] Accordingly, the primary target of the students was their own government, which did indeed succumb to the pressure and collapsed within forty-eight hours of the seizure of the Embassy.

With regard to the security of the Embassy, Tromseth notes that "an ambitious program to consolidate operations in the embassy compound and to harden the physical facilities"[96] was put in place after the incursion into the Embassy on 14 February 1979. Nevertheless, Tromseth highlights the fact that security measures on their own are not enough. The support of the authorities of the receiving state are essential. Thus, according to Tromseth, "in the absence of will and capacity on the part of the Provisional Revolutionary Government to live up to its obligation to protect foreign diplomatic missions, the post-February 14 physical security measures proved meaningless".[97]

The reaction of the international community to the seizure of the American Embassy was overwhelming. Of particular note was the Security Council Resolution 457 (1979) of 4 December by which the Security Council "reaffirmed the solemn obligations of all states parties to both the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations 1963 to respect the inviolability of diplomatic personnel and the premises of their missions".[98] In the body of the resolution, the Security Council called for the release of the hostages and for their protection and safe departure from Iran.[99] The resolution was passed unanimously, highlighting the importance placed on the

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[95] Tromseth, "Crisis After Crisis: Embassy Tehran, 1979" in Sullivan (ed.), *Embassies Under Siege* (Brassey's, Washington and London), p. 48. The Provisional Revolutionary Government came to power on 1 February 1979, sweeping aside the government of Shapour Bakhtiar, the Prime Minister of the Shah's last government, after a brief armed uprising. In spite of its name and although supported by Ayatollah Khomeini, the Provisional Revolutionary Government "contained elements willing to work with the United States, but they were constrained by the widespread suspicion of US motives that characterized the Iranian revolution". *Ibid*, p. 37.

[96] *Ibid*, p. 50.

[97] *Infra*.

[98] SC Resolution 457 (1979), Preamble.

[99] *Ibid*, para. 1.

security and protection of diplomatic personnel even during the height of the Cold War. A further Security Council Resolution (461) on 31 December 1979 noted the view of the UN Secretary-General that the crisis between the US and Iran constituted a threat to international peace and security.[100] The resolution "reaffirmed Resolution 457 (1979) in all its respects".[101] However, the resolution stopped short of declaring the situation to be a threat to international peace and security. Paragraph 6 of the resolution indicated the agreement of the Security Council to meet on 7 January 1980 "in order to review the situation and, in the event of non-compliance with the present resolution, to adopt effective measures under Articles 39 and 41 of the Charter of the United Nations".[102] It is notable, however, that this resolution was not unanimously adopted. Four states, including the USSR, chose to abstain from voting for the resolution, indicating a move away from the unanimity of Resolution 457. However, it is apparent that the lack of unanimity was caused by disagreement as to how to proceed against Iran rather than a failure to condemn the continuing detention of the American hostages. Indeed, this political disagreement as to how to deal with Iran, in particular in relation to the imposition of sanctions, resulted in the fact that the Security Council failed to adopt any further resolutions on the crisis throughout its continuation.

The legal position relating to the seizure of the Embassy and the continued detention of Embassy staff and other individuals was considered at length by the ICJ. The United States of America moved quickly after the seizure of the Embassy to bring the matter before the ICJ. On 29 November 1979, the US submitted an Application instituting proceedings against Iran. On the same day the US filed a request for the indication of provisional measures by the Court.[103] Iran was informed of the Application by telegram and chose to respond by telegram dated 9 December 1979. In its response, the government of Iran indicated its view that the matter should not be considered by the Court. Iran argued that the question of the seizure of the Embassy "only represents a marginal and secondary aspect of an overall problem … which involves, *inter alia*, more than 25 years of continual interference by the United States in the internal affairs of Iran …"[104] Iran did not attend the oral hearings of the provisional measures phase on 10 December 1979.

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[100] SC Resolution 461 (1979), Preamble.

[101] *Ibid*, para. 1.

[102] *Ibid*, para. 6. Article 39 of the UN Charter is the operative provision of Chapter VII of the UN Charter and allows the Security Council to identify the existence of a threat to the peace, a breach of the peace or an act of aggression. Having made such a determination, the Security Council is entitled, in terms of Article 41 of the Charter, to impose sanctions.

[103] According to Article 41 of the ICJ Statute "[t]he Court shall have the power to indicate, if it considers that the circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party". The Court can utilise its power under Article 41 in cases where it considers that it has *prima facie* jurisdiction to determine the merits of the claim. Concerning the question as to the legal effect of such measures, the Court has recently found in favour of their legally binding effect. See the *LaGrand Case, (Germany v United States)1999 I.C.J. Rep* 9.

[104] *Case Concerning United States Diplomatic and Consular Staff in Tehran (Request for the Indication of Provisional Measures)* (1979) *ICJ Reports* 7, para. 8.

However, the Court considered that it had had an opportunity to present its observations.[105] The Court found it had *prima facie* jurisdiction to order provisional measures on the basis of Article I of each of the Optional Protocols Concerning the Compulsory Settlement of Disputes to the Vienna Conventions on Diplomatic Relations 1961 and Consular Relations 1963 respectively to which both Iran and the United States were parties.[106]

In response to the allegations contained in the Iranian telegram of 9 December 1979, the Court noted that "the seizure of the United States Embassy and Consulates and detention of internationally protected persons as hostages cannot, in the view of the Court, be regarded as something 'secondary' or 'marginal', having regard to the importance of the legal principles involved".[107] The Court invited Iran to submit a defence in a Counter-Memorial or to file a counter-claim[108] but ultimately found that the objections of Iran could not constitute an objection to the Court taking jurisdiction to order provisional measures.[109]

In considering the substance of the request, the Court was unequivocal as to the importance of the inviolability of diplomatic agents and embassies:

> 38. Whereas there is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose; and whereas the obligations thus assumed, notably those for assuring the personal safety of diplomats and their freedom from prosecution are essential, unqualified, and inherent in their representative character and their diplomatic function.
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> 39. Whereas the institution of diplomacy, with its concomitant privileges and immunities, has withstood the test of centuries and proved to be an instrument essential for effective co-operation in the international community, and for enabling States, irrespective of their differing

[105] *Ibid*, para. 9.
[106] *Ibid*, para. 16. According to Article I of the two Protocols, "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol". The Court further considered that it was not necessary for it to consider the alternative bases of jurisdiction submitted by the United States in respect of Article 41 of the Statute of the ICJ under Article XXI of the 1955 Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States and Article 13 (1) of the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents. *Ibid*, para. 21.
[107] *Ibid*, para. 23.
[108] *Ibid*, para. 24.
[109] *Ibid*, para. 26. The Court rejected two further arguments by Iran to the effect that the US was calling on the ICJ to make a final decision and that the request for provisional measures could not be unilateral. *Ibid*, paras. 27-30.

> constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means.[110]

The Court was equally clear on the question of the inviolability of consular premises and the privileges and immunities of consular personnel:

> 40. Whereas the unimpeded conduct of consular relations which have also been established between peoples since ancient times, is no less important in the context of present-day international law, in promoting the development of friendly relations among nations, and ensuring protection and assistance for aliens resident in the territories of other States; and whereas therefore the privileges and immunities of consular officers and consular employees, and the inviolability of consular premises and archives, are similarly principles deep-rooted in international law.[111]

The Court unanimously agreed to indicate provisional measures against Iran, calling upon it immediately to ensure that the Embassy, its attendant buildings and the Consulates were returned to US control; to facilitate the immediate release of all US nationals; and to "afford to all the diplomatic and consular personnel of the United States the full protection, privileges and immunities to which they are entitled under the treaties in force between the two States, and general international law. Including immunity from any form of criminal jurisdiction and freedom and facilities to leave the territory of Iran."[112]

The next phase of the judicial testing of the legality of the seizure of the US diplomatic and consular premises in Iran was to move to a full hearing. In light of the on-going incarceration of the US personnel in the Embassy, the Consulates and on the premises of the Iranian Foreign Ministry, the Court once again moved quickly to expedite the proceedings. The case became ready for hearing on 19 February 1980 after both sides had been given an opportunity to file Memorials and Counter-Memorials.[113] However, no Counter-Memorial was filed by Iran and Iran again took no part in the oral proceedings before the Court. Iran relied instead on its letter dated 9 December 1979 referred to above, and a further letter dated 16 March 1980, "the text of which followed closely that of the letter of 9 December 1979".[114] The absence of Iran from the proceedings of the Court brought into operation Article 53 of the Statute of the Court, paragraph 2 of which required the

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[110] *Ibid*, paras 38-9.
[111] *Ibid*, para. 40.
[112] *Ibid*, para. 47. For a detailed analysis of the Court's decision on provisional measures in this case, see Gross (1980), "The Case Concerning United States Diplomatic and Consular Staff in Tehran: Phase of Provisional Measures" 74 *AJIL* 395.
[113] *Case Concerning United States Diplomatic and Consular Staff in Tehran* (1980) *ICJ Reports* 3, paras 4 and 5.
[114] *Ibid*, para. 10.

Court to satisfy itself that the US claim was well founded in fact and law.[115] The Court determined that it had available to it "a massive body of information from various sources concerning the facts and circumstances of the present case, including numerous official statements of both Iranian and United States authorities".[116] The Court concluded that it was satisfied that "the allegations of fact on which the United States bases its claim in the present case are well founded".[117] It then proceeded to set forth, in detail, the facts of the case.[118]

The Court echoed its own earlier findings as to the objections raised by Iraq in its letter of 9 December 1979 and 16 March 1980, noting that the political context of the dispute did not prevent it from hearing the case.[119] The Court also found that the admissibility of the proceedings was not affected by the existence of a Commission of Inquiry set up by the UN Secretary-General with the support of the Security Council. According to the Court, unlike the position in relation to the General Assembly,[120] there was no restriction on the Court exercising its functions alongside the Security Council.[121]

With respect to the question of the jurisdiction of the Court over the matter, the Court again followed its earlier position by maintaining that it had jurisdiction to hear the case by virtue of Article 1 of the Protocols to the 1961 and 1963 Vienna Conventions. However, it went on to consider a further claim by the United States that the Court had jurisdiction by virtue of Article XXI, paragraph 2 of the Treaty of Amity, Economic Relations, and Consular Rights of 1955 between Iran and the United States. Although overlapping considerably with the provisions of the 1963 Vienna Convention on Consular Relations, the Treaty also provided for the

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[115] According to Article 53 of the ICJ Statute: "(1) Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim. (2) The Court must, before doing so, satisfy itself not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law."

[116] *Case Concerning United States Diplomatic and Consular Staff in Tehran*, *supra*, para. 13.

[117] *Infra*.

[118] See above, Chapter 1.

[119] The Court noted that "legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the States concerned. Yet never has the view been put forward that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal issues at issue between them … If the Court were to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes." *Case Concerning United States Diplomatic and Consular Staff in Tehran*, *supra*, para. 20.

[120] See UN Charter, Article 12.

[121] The Court was firmly of the view that: "It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive factor in promoting the peaceful settlement of the dispute." *Case Concerning United States Diplomatic and Consular Staff in Tehran*, *supra*, para. 40.

protection and security of nationals of either party in the territories of the other.[122] Accordingly, the Treaty was of importance in relation to the two private individuals who were being held in the Embassy in Tehran. Article XXI, paragraph 2 provided that any dispute that could not be solved by diplomatic means was to be referred to the ICJ. The Court held that the effect of this provision was to allow for the unilateral referral of the dispute to the Court by the United States.[123] Finally, the United States also sought to invoke Article 13 of the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents.[124] However, having established jurisdiction in respect of all of the various matters before it, the Court chose not to consider the question as to whether Article 13 provided a further basis for the exercise of jurisdiction.[125]

The Court then proceeded to consider the merits of the case. In particular, it examined two specific questions. The first of these concerned the question of the imputability of the seizure and subsequent detention of the hostages to the government of Iran. The second question concerned the compatibility of these acts with the obligations of Iran under international law.[126] In answering the first question, the Court accepted that the acts of the students in seizing the Embassy and the consulates in Tabriz and Shiraz were not acts of the government of Iran. The students had no official status nor were they acting as agents for the government.[127]

Nevertheless, the fact that these acts were not considered to be acts of the government did not exonerate the government from responsibility in respect of them. The Court highlighted the "most categorical obligations" on Iran arising out of the Vienna Conventions of 1961 and 1963 to which it was party, "to take appropriate steps to ensure the protection of the United States Embassy and Consulates, their staffs, their archives, their means of communications and the freedom of movement of the members of their staffs".[128] The Court concluded that

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[122] Treaty of Amity, Economic Relations, and Consular Rights of 1955 between Iran and the United States, Article II, paragraph 4.

[123] *Case Concerning United States Diplomatic and Consular Staff in Tehran*, *supra*, paras 50-54.

[124] According to Article 13 of the 1973 Convention: "Any dispute between two or more States Parties concerning the interpretation or application of this Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

[125] *Case Concerning United States Diplomatic and Consular Staff in Tehran*, *supra*,para. 55. Given the fact that Article 13 of the 1973 Convention requires states parties to submit their disputes first to arbitration, it is unlikely that the Court would have found, had it chosen to consider the effects of this provision, that it had jurisdiction to hear the case on the basis of that Convention because of the failure by the United States to go down the arbitration route.

[126] *Ibid*, para. 56.

[127] *Ibid*, paras 57-60.

[128] *Ibid*, para. 61.

"on 4 November 1979 the Iranian Government failed altogether to take any 'appropriate steps' to protect the premises, staff and archives of the United States' mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its conclusion".[129] The Court found a similar failure in respect of the consulates in Tabriz and Shiraz. The Court concluded that "the failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means".[130] Finally, the Court determined that the inaction of the Iranian government with respect to the events of 4 November 1979 constituted a breach of obligations owed by it to the United States in terms of Articles 22(2), 24, 25, 26, 27 and 29 of the Vienna Convention on Diplomatic Relations 1961 and Articles 5 and 39 of the Vienna Convention on Consular Relations 1963 in respect of the attacks on the Embassy and several more provisions of the 1963 Convention, including Article 31 and 40 in respect of the seizure of the two consulates.[131]

In the circumstances of the present discussion, it is disappointing that, having found the Iranian government to be in breach of Articles 22(2) and 29 of the 1961 Convention and Articles 31(3) and 40 of the 1963 Convention, the Court did not find itself able to consider in depth the question of what constitutes "all appropriate steps" in the context of the protection to be afforded by the receiving state. Undoubtedly, the Court considered that the breach of these articles was manifest and the resultant failure to consider the issue of "appropriate steps" is, therefore, not surprising. Nevertheless, the Court did not ignore the issue altogether. In its judgement, the Court highlighted the way in which the failure of the Iranian authorities to act on 4 November 1979 contrasted with their reactions to previous actions against the US Embassy in Tehran, in particular, the brief seizure of the Embassy on 14 February 1979 and the mass demonstration which occurred outside the Embassy on 1 November 1979, a mere three days before the events currently under discussion took place.[132] The Court highlighted the quick response of the Iranian authorities on both occasions. For example, the Court drew attention to the fact that on 14 February 1979 the response of the Iranian authorities included the prompt detachment of Revolutionary Guards to deal with the situation as well as political intervention at the highest level.[133] The Court also noted that on 1 November 1979, the police intervened quickly and effectively to break up the

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[129] *Ibid*, para. 63. See also para. 66: "As to the actual conduct of the Iranian authorities when faced with the events of 4 November 1979, the information before the Court establishes that, despite assurances previously given by them to the United States Government and despite repeated and urgent calls for help, they took no apparent steps either to prevent the militants from invading the Embassy or to persuade or to compel them to withdraw. Furthermore after the militants had forced an entry into the premises of the Embassy, the Iranian authorities made no effort to compel or even to persuade them to withdraw from the Embassy and to free the diplomatic and consular staff whom they had made prisoner."

[130] *Infra*.

[131] *Ibid*, para. 67.

[132] *Ibid*, para. 64.

[133] *Infra*.

demonstration.[134] The suggestion of the Court is that the responsibility of Iran might have been avoided had similar actions been apparent in the present case. Accordingly, it is possible that the phrase "appropriate steps" is one which the Court would be willing to interpret broadly, giving the benefit of the doubt to the receiving state. Nevertheless, it is also clear that the need for local policing authorities to intervene, at least in an attempt to avoid the seizure of an embassy, is a *de minimis* requirement.

Having considered the "first phase" of the events of the seizure of the Embassy, the Court moved to consider the "second phase" which comprises "the whole series of events which occurred following the completion of the occupation of the United States Embassy by the militants, and seizure of the Consulates at Tabriz and Shiraz".[135] The Court made clear the obligations on Iran:

> The occupation having taken place and the diplomatic and consular personnel of the United States' mission having been taken hostage, the action required of the Iranian Government by the Vienna Conventions and by general international law was manifest. Its plain duty was at once to make every effort to take every appropriate step, to bring these flagrant infringements of the inviolability of the premises, archives and diplomatic and consular staff of the United States Embassy to a speedy end, to restore the Consulates at Tabriz and Shiraz to United States control, and in general to re-establish the status quo and to offer reparation for the damage.[136]

Rather than fulfilling their obligations to end the siege, Iranian authorities issued a number of statements in support of the action of the militants. As the Court noted in its judgement, such approval came from a range of sources, "including religious, judicial, executive, police and broadcasting authorities".[137] The Court referred, in particular, to the decree issued on 17 November 1979 by the Ayatollah Khomeini, which provided "the seal of official governmental approval".[138] The legal effect of these statements and decrees was "fundamentally to transform the legal nature of the situation".[139] Thus, according to the Court, "[t]he approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decisions to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible."[140]

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[134] *Infra*.
[135] *Ibid*, para. 69.
[136] *Infra*.
[137] *Ibid*, para. 71.
[138] *Ibid*, para. 73.
[139] *Ibid*, para. 74.
[140] *Infra*.

The Court proceeded to condemn the "repeated and multiple breaches of the Vienna Conventions" which it described as "more serious than those which arose from their failure to take any steps to prevent attacks on the inviolability of these premises and staff".[141] The Court also referred to the Iranian breach of Article II, paragraph 4 of the bilateral Treaty of Amity, Economic Relations, and Consular Rights 1955 between the US and Iran which had occurred by virtue of the continued detention of the two private individuals within the Embassy premises.[142] In response to the Iranian claim that US diplomatic personnel had engaged in criminal activities directed against Iran, the Court was unequivocal in its rejection of this justification for Iranian actions against the Embassy. Thus according to the Court "diplomatic law itself provides the necessary defence against, and sanctions for, illicit activities by members of diplomatic or consular missions".[143]

In the final part of its judgement, the Court, having confirmed the self-contained nature of diplomatic law,[144] undertook to restate the fundamental nature of the principle of inviolability:

> [T]he principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established régime to the evolution of which the traditions of Islam made a substantial contribution. The fundamental character of the principle of inviolability is, moreover, strongly underlined by the provisions of Articles 44 and 45 of the Convention of 1961 (cf. also Articles 26 and 27 of the Convention of 1963). Even in the case of armed conflict or in the case of a breach in diplomatic relations those provisions require that both the inviolability of the members of a diplomatic mission and of the premises, property and archives of the missions must be respected by the receiving State.[145]

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[141] *Ibid*, para. 76. According to the Court, these breaches included breaches of all three paragraphs of Article 22 of the 1961 Diplomatic Convention as well as Articles 25, 26, 27 and 29 thereof, together with Articles 24 and 33 of the 1963 Consular Convention. *Ibid*, para.77.

[142] *Infra*.

[143] *Ibid*, para. 83. According to the Court the defences are provided for in Article 41(1) and (3) of the 1961 Convention and Article 55(1) and (2) of the 1963 Convention while the sanction of *persona non grata* is available by virtue of Article 9 of the 1961 Convention and Article 23 (1) and (4) of the 1963 Convention. The Court further noted that the ultimate power of sanction available to a receiving state is "to break off diplomatic relations … and to call for the immediate closure of the offending mission". (*Ibid*, para. 86).

[144] According to the Court: "[t]he rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees the possible abuse by members of the missions and specifies the means at the disposal of the receiving State to counter any such abuse." *Ibid*, para. 86.

[145] *Infra*.

Ultimately, the Court found by a majority of thirteen votes to two that Iran had violated obligations owed by it to the United States under treaties in force and the established rules of general international law for which it bore international responsibility and, by twelve votes to three, that Iran was under an obligation to make reparations to the United States of America. The Court also decided unanimously that Iran should take steps immediately to end the occupation of the Embassy and allow all hostages to leave Iran.

It is worth briefly noting at this point the Separate Opinion of Judge Lachs. Judge Lachs had voted against the finding of the obligation to make reparations but only for the technical reason that he considered it unnecessary to make such a finding explicit as the responsibility of Iran had already been established.[146] With regard to the substance of the Court's findings in relation to the breaches of the Vienna Conventions, Judge Lachs was even more certain of the importance of the regime of diplomatic law which he considered to be "one of the main pillars of the international community".[147] Thus according to Judge Lachs:

> The principles and rules of diplomatic privileges and immunities are not – and this cannot be over-stressed – the invention or device of one group of nations, of one continent or one circle of culture, but have been established for centuries and are shared by nations of all races and all civilizations … It is clear that [the Vienna Conventions] reflect the law as approved by all regions of the globe and by peoples belonging to both North and South, East and West alike. The laws in question are the common property of the international community and were confirmed in the interests of all.[148]

Even those judges who dissented from the judgement of the Court agreed with the Court as to the importance of diplomatic privileges and immunities in general and the concept of inviolability in particular. Thus, Judge Morov, who objected to the jurisdiction of the Court being allowed in the case, declared nevertheless, that:

> [T]he long-established rules of general international law relating to the privileges, inviolabilities and immunities of diplomatic and consular personnel are among those which are particularly important for the implementation of such basic principles of contemporary international law

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[146] According to Judge Lachs: "[I]t is not that there can be any doubts as to the principle involved for that the breach of an undertaking, resulting in injury, entails an obligation to make reparations is a point which international courts have made on several occasions. Indeed the point is implict, it can go without saying … There was thus no necessity for the operative paragraph of the present Judgment to decide the obligation, when the responsibility from which it might be deduced had been clearly spelt out …" Separate Opinion of Judge Lachs in *Case Concerning United States Diplomatic and Consular Staff in Tehran, supra*, at p. 47.

[147] *Infra*.

[148] *Ibid*, pp. 47-8.

> as the peaceful coexistence of countries with different political, social and economic structures.[149]

Similarly Judge Tarazi, who based his decision to dissent from the Court's judgement on the failure of the Court fully to consider the circumstances of the case, in particular, the activities of the United States in Iran prior to the seizure of the Embassy and after the institution of proceedings, "fully agreed" with the judgement of the Court as to the inviolability of diplomatic and consular missions and the immunity enjoyed by their members to be essential.[150] Indeed, he noted with pleasure the emphasis of the Court on the influence of Islamic law in the development of diplomatic law. Having made this assertion, Judge Tarazi was unable to disagree with the Court as to the breach by Iran of its obligations under the two Vienna Conventions but he "could not support the idea that the Iranian Government should be declared responsible unless the Court also found that the responsibility is relative and not absolute … and that the Government of the United States … has equally incurred responsibility".[151]

The *Case Concerning United States Diplomatic and Consular Staff in Tehran* provides an overwhelming endorsement of the principles of the protection of diplomatic personnel. In relation to both diplomatic and consular officials, the Court unconditionally confirmed the special duty of protection incumbent upon the receiving state in cases of attacks on diplomatic and consular establishments. And yet, the fact that the Iranian authorities were so flagrant in their breaches of the relevant rules of international law somewhat undermines the wider implications of the decision. For example, as noted above, there was minimal discussion by the Court as to what the nature of the obligation to provide protection entails. All that can be said for certain as a result of the decision in the Tehran Hostages Case is that the obligation incumbent on the receiving state to take all appropriate steps to ensure the protection of diplomatic and consular missions and diplomatic and consular personnel involves an effort on the part of the receiving state to intervene on the part of a mission or individual when that mission or individual is under attack or when such an attack is threatened and the threat is imminent.

State practice on this matter since 1980 has done little to clarify the nature of the obligation. The remainder of this chapter will seek to examine that state practice with a view to determining whether states are, in fact, required to do more than simply react to on-going attacks or threats.

4.4 The Implementation of the Special Duty of Protection in Practice

The suggestion that, in normal circumstances, where no threat exists, the duty to provide protection is minimal, appears to be supported in state practice. The

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[149] Dissenting Opinion of Judge Morov in *Case Concerning United States Diplomatic and Consular Staff in Tehran*, *supra*, at p. 51.
[150] Dissenting Opinion of Judge Tarazi in *Case Concerning United States Diplomatic and Consular Staff in Tehran*, *supra*, at pp. 58-9.
[151] *Ibid*, p. 65.

position of the Australian government, for example, is that: "Static guards are only provided to missions or posts where there is a need for this level of protection. Static guards are provided where there is a specific threat and where it has been decided that static guards, as opposed to other protective arrangements such as alarms or mobile patrols, are required by the nature of the particular threat."[152] Similarly, a review of protection provided to South African embassies by the South African Department of Foreign Affairs, which consisted of questionnaires to South African missions abroad, is particularly revealing on this point. Having noted that "there is not always official permanent protection",[153] a recent analysis of the review suggests that "in most cases special protection is available to South African missions, but only on request (this is usually only for special occasions like diplomatic dinners, functions or visits on a once-off basis, or for a specific perceived threat)".[154] The analysis then highlights the situations in specific countries:

> For instance, the Swedish authorities will only provide security measures if specifically requested by a foreign mission, whereas *ad hoc* safety measures are provided in Hungary where the political circumstances of the mission's country require such protection. In the case of Israel, the authorities provide armed protection to a specific mission on the basis of risk as perceived by the Israeli authorities themselves, although protection will also be provided on request to any mission.[155]

The obligation to provide minimal protection again appears to be reflected in current state practice in relation to the provision of personal security to diplomatic personnel. Denza cites the example of Colombia which is "regarded as a highly dangerous posting by diplomats" where "the government provide armed guards for all ambassadors and first secretaries as well as special security advice".[156] However, the position in Colombia can be contrasted with that in France where, in common with the position in many countries, a risk assessment is undertaken examining such matters as "the position of the diplomats, the risks which they run, threats made against them, and political circumstances in France and in the sending state".[157] Reference can again be made to the review of the protection of foreign missions in South Africa in which it was concluded that "very few countries provide police protection on a permanent basis … unless there is evidence of a

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[152] Australian Government, Department of Foreign Affairs and Trade, Protocol Guidelines, June 2005, Chapter 11, Protective Security. Available at www.dfat.gov.au/protocol/Protocol_Guidelines/11.html.
[153] Minnaar (2000), "Protection of Foreign Missions in South Africa" 9 *African Security Review* 67, at p. 72.
[154] *Infra*.
[155] *Ibid*, pp. 72-3.
[156] Denza, *op cit*, p. 216.
[157] *Infra*.

threat to the safety of a diplomat … and then only if requested by the head of the mission".[158]

On the other hand, this does not imply that states do not take seriously their obligations under the two Vienna Conventions. Many states have created specialist divisions of their domestic police forces or other security personnel to deal with the protection of diplomatic personnel as a group, including consular officials and missions. In the United Kingdom, this task is undertaken by the Royalty and Diplomatic Protection Department of the Metropolitan Police Force which liaises directly with the Security Section of the Protocol Department in the Foreign and Commonwealth Office. Within the Royal and Diplomatic Protection Department, specific matters relating to the protection of diplomatic personnel are carried out by members of SO16.[159] In Australia, responsibility for the protection of diplomatic personnel is undertaken by the Protective Security Coordination Centre within the Attorney-General's Department,[160] while in Canada responsibility falls on the Diplomatic Corp Services Division which is part of the Canadian Department of Foreign Affairs and International Trade.[161] Similar provision is made in many other countries.[162]

Having been severely criticised in the Report of the Secretary of State's Advisory Panel on Overseas Security (the Inman Report)[163] in 1985 for its "diffusion of protective responsibility within [the] government of the United States]",[164] the protection of foreign missions in the United States of America has been significantly strengthened. The immediate response to the Inman Report came in the form of the creation of the Bureau of Diplomatic Security as part of the Department of State. The Bureau's Diplomatic Security Service has primary responsibility for the protection of all foreign officials and their missions across the United States, including consular missions.[165] Policies are implemented by the Protective Liaison Division which provides security assistance and guidance to foreign diplomats in the United States.[166] Decisions on when and where to provide protection is based on an analysis of the threat that exists against a particular diplomatic mission:

> The level and measure of protective security provided by the U.S. Government to any resident foreign official or diplomatic or consular mission is based primarily on the threat that exists to the mission or the

[158] Minnaar, *op cit*, p.73.
[159] See www.met.police.uk/so/dpg/history.htm.
[160] See http://152.91.15.12/www/protectivesecurityhome.nsf.
[161] See http://www.dfait-maeci.gc.ca/protocol/services-en.asp#2.
[162] For a summary of some of these provisions, see Minnaar, *op cit*, p 76.
[163] Report of the Secretary of State's Advisory Panel on Overseas Security, available at www.fas.org/irp/threat/inman/index.html.
[164] Inman Report, *op cit*, Protection of Foreign Dignitaries and Missions in the United States.
[165] On the legal position relating to the protection of consular missions and consular officers, see Chapter 4.2.
[166] See http://www.state.gov/m/ds/rls/rpt/19774.htm.

> individual while in the United States. The threat level is determined by compiling all available information into a threat assessment that is continuously updated for each mission in the United States. These assessments are of vital importance to the Protective Liaison Division in determining the need for any extraordinary protective security measures.[167]

As well as utilising its own agents, the United States also utilises private security organisations, which often employ former secret service agents and receive training to the level of secret service agents.[168]

However, the level of sophistication apparent in many Western states is not always evident in developing states which find themselves less able on financial grounds and in terms of their lack of security infrastructure to provide anything other than a basic minimum level of protection. Thus, even where specialist security is provided, the level of professionalism and training in many developing states is, at best, mixed. Minnaar cites the example of Egypt which has established within their security forces a special protection unit dealing with diplomats and foreign missions. Minnaar points out that "the bigger missions themselves pay these special guards extra monies to ensure that a better calibre and more professional personnel are assigned to their missions. Those missions that decline to do this merely receive local police officers seconded from the nearest police station."[169]

In spite of the obligation for the security of diplomatic personnel falling in legal terms on the receiving state, it is particularly apparent that there is a need for diplomatic missions to provide for their own security in the receiving state. Thus, according to the Australian Protocol Guidelines: "An important part of any security package must be the level of primary security that individual missions themselves provide, such as perimeter security, entry controls, duress and intruder alarms and so on."[170] However, beyond these basic security measures, many states find themselves obliged to employ their own security personnel either from amongst their own nationals or from the local population. The United States of America, for example, will regularly seek to deploy members of the US Marines at foreign diplomatic establishments. However, this depends upon the agreement of the local government. Marines will often work in conjunction with local security guards. The United States and other countries also invest heavily in the training of local security staff to maintain the day-to-day measures, such as patrolling the perimeter of the embassy premises. Other states, including the United Kingdom, rely heavily

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[167] *Infra*.

[168] Leading organisations in the field of protective security include Diplomatic Solutions, Vance International Inc. and the Control Risks Group. Many of these organisations are members of the International Association of Protective Security Agents. See www.iappa.org.

[169] Minnaar, *op cit*, p. 74.

[170] Australian Protocol Guidelines, *op cit*.

on private organisations to provide relevant security in high-risk countries such as Iraq.

4.5 Case Study: The United States of America

For many diverse reasons, the United States of America finds itself as one of the most targeted states in terms of attacks against diplomatic personnel. Annex 2 includes a table of attacks on US diplomatic establishments between 1987 and 1997.[171] This table was prepared as part of the review conducted by the US State Department in the aftermath of the East African bombings in 1998. The attacks listed are not all attacks on diplomatic and consular premises, which are the focus of this book. The Review Panel identified a broader range of installations as falling within the definition of diplomatic. However, it is worth highlighting the fact that an astonishing 234 attacks took place on diplomatic installations, as defined, during this ten-year period. It should also be highlighted that the apparent reduction in attacks against such establishments since the end of the 1980s, which is evident from the figures provided by the UN reporting mechanism, are also reflected in these figures.

However, it cannot be denied that the United States has suffered a number of catastrophic attacks on their diplomatic premises in recent years. Most noticeable have been the two attacks on the United States Embassy in Beirut in 1983 and 1984 and, of course, the attacks on the East African embassies in 1998. These events have occasioned two separate reviews by the Department of State into the question of protection of diplomatic personnel abroad. As was noted in Chapter 1, the first of these took the form of the Advisory Panel on Overseas Security which reported in June 1985 (the Inman Report). The East African bombings led to the appointment of two Accountability Review Boards under the chairmanship of Admiral William Crowe. The two Boards submitted a joint report in January 1999 (the Crowe Report).

4.5.1 The Inman Report

The most important structural recommendation of the Inman Report was the creation of a new Bureau for Diplomatic Security and the creation of a Diplomatic Security Service. According to the Report, the Diplomatic Security Service "must incorporate the best features and attributes of professional law enforcement in order that it will become capable of providing the level of competence that will be required in United States diplomatic and consular missions around the world in the face of the expected terrorist threat environment".[172] The particular hope was that the new professionalism introduced by the United States would encourage similar developments in other countries on a reciprocal basis with the United States, in

[171] Report of the Accountability Review Boards on the Embassy Bombings Nairobi and Dar es Salaam on August 7 1998, January 1999, "Attacks against US Diplomatic Installations 1987-97". Available at http://www.state.gov/www/regions/africa/accountability_report.html.
[172] Inman Report, *op cit*, Organization and Personnel.

particular, sharing best practice in a multilateral framework. In terms of the practicalities of diplomatic security, the Panel recommended "a substantial relocation and rebuilding program".

In a chapter of the Report entitled Organization and Personnel, the Panel summarised the measures which had been taken by the United States since the late 1960s directed at ensuring protection for its diplomatic establishments abroad. These included the Public Access Control programme, approved by Congress in 1973, which was "intended to counter the increasing threat of Embassy takeovers … it was designed initially to improve public access controls at entrances, lobbies and areas where large numbers of the public transacted business at [US] missions".[173] The sum of $136.3 million had been allocated to the programme at that time. However, as attacks continued on US embassies, the United States government was concerned about the failure of foreign states to provide adequate protection to its missions abroad. The government established the Security Enhancement Program. This programme envisaged better protection being provided to US missions, primarily through the use of US experts, as opposed to local operatives. A further $136.3 million was appropriated over five years for this programme.

The early 1980s had been witness to a series of kidnappings and attempted assassinations against US military and diplomatic officials in Europe. The US response was the 1982 Security Supplemental. This programme provided a further $48.9 million for the existing projects and additional physical security equipment.[174] A further Security Supplemental programme was introduced in 1985 as an immediate response to the Beirut bombing. On this occasion, as one might suspect, the financial package was substantially increased and amounted to $366 million in two stages. The funds were directed at three specific areas: "strengthening existing programs, construction of new embassies to replace those that cannot be adequately strengthened, and necessary research and development".[175]

According to the Inman Report, the State Department's security organisation in 1985 consisted of: "almost 800 employees assigned to half a dozen different units plus an additional 1,200 Marines and 115 US Navy Seabees".[176] The total security budget of the State Department in 1984 was $129 million which, according to the Report, was "expected to triple in the next year or so".[177] The report was critical of the "somewhat haphazard growth in the Department's response to terrorism",[178] noting that responsibility was divided between a number of agencies including the Office of Security, the Office for Counter-Terrorism and Emergency Planning, the Office of Communications and the Office of Foreign

[173] *Infra*.
[174] *Infra*.
[175] *Infra*.
[176] *Infra*.
[177] *Infra*.
[178] *Infra*.

Buildings. The Report highlighted a number of damning criticisms in relation to the issue of security of diplomatic establishments including:

> Perceptions by posts abroad, by others within the Department of State and by outside agencies that there is confusion in (1) the organizational structure intended to carry out the Department's security and counter-terrorism responsibilities, (2) funding for security needs, (3) security standards, especially when successive survey teams visiting posts abroad make contradictory recommendations, and (4) the whole intelligence analysis and alerting procedure.[179]

As a result of these and other criticisms, the Inman Report made 91 recommendations. The practicalities of providing physical security for United States' diplomatic premises abroad are dealt with at length in the Inman Report but will not be considered in detail in this book, which is focussed primarily on the legal issues relevant to the protection of diplomatic personnel. It would suffice for the purposes of the present discussion to highlight some of the criticisms of the Report in relation to the question of physical security and to consider briefly some of the recommendations for dealing with these criticisms. The Report was quick to point out the fact that "of the major foreign affairs agencies [in the United States], only the Department of State has published a set of standards".[180] The Report continued:

> These standards were developed several years ago to impede forced entry into the Department's buildings and to protect personnel against acts of terrorism and mob violence. The standards do not address security measures for ancillary buildings.
>
> The format, limited distribution, and apparent need for revision dilute the potential effectiveness of the Department of State standards. The standards are distributed to security officers and specialists. Posts without security officers may not have the standards available. Furthermore, the standards are subject to interpretation.[181]

The Panel recommended, as vital ingredients of the protection of diplomatic establishments abroad, the "acquisition of new buildings, installation of sophisticated and expensive security systems, and the publication of physical security standards".[182] It also recommended the instigation of "an efficient and effective program of security inspections and surveys".[183]

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[179] *Infra.*
[180] Inman Report, *op cit*, Physical Security.
[181] *Infra*.
[182] *Infra*.
[183] *Infra*.

The most far-reaching and expensive element of the Inman Report concerned the Building Program.[184] According to the Panel, this required a balancing of priorities:

> Unlike most US Government organizations, the foreign affairs agencies are required by the nature of their missions to locate their facilities in overseas environments over which the US can exert only limited control and which thus make our presence highly vulnerable to a number of potential threats. Non-Americans must also be granted a substantial measure of access to these facilities to transact legitimate business encompassing the entire range of US foreign policy interests, including such areas as consular and travel matters, business and commercial affairs, cultural and information exchange and foreign assistance programs. Thus, circumstances dictate that only limited options exist in selecting sites for, and establishing access to, our offices in foreign countries.[185]

The Report noted that the Department of State's Office of Foreign Buildings, together with the Central Intelligence Agency, had undertaken a survey of the Department's 262 overseas posts. While it is not clear how many of these were diplomatic establishments, it would seem to be the case that the majority, if not all, performed a diplomatic or consular function. The review had considered three questions: first, whether the post met the minimum standards for physical security including construction and external perimeter barriers; secondly, whether it shared a common wall with other structures; and thirdly, whether the structure was shared with non-US government tenants. Using these criteria the Panel concluded that 126 posts required replacement but noted also that: "the process of obtaining new buildings abroad or renovating exiting ones is excessively complex, time consuming and has been inadequately funded".[186] According to the Inman Report, the cost of undertaking the necessary renovations was put at $3.5 billion, a substantial increase on the previous funding initiatives detailed above.

The Inman Report made a number of further recommendations concerning the protection of foreign dignitaries and missions in the United States. These have been referred to above. For present purposes it is worth noting that the Inman Report was focussed squarely on the domestic institutional structures of the diplomatic process and on enhancing the United States' own efforts in protecting its diplomatic establishments abroad. Reference is made in the chapter dealing with "Protection of Foreign Dignitaries and Missions in the United States" to the United States' "responsibility under international law to protect visiting dignitaries and resident foreign diplomats in this country".[187] Similarly, it is noted in a chapter on

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[184] Inman Report, *op cit*, Building Program.
[185] *Infra*.
[186] *Infra*.
[187] Inman Report, *op cit*, Protection of Foreign Dignitaries and Missions in the United States.

"Guard Forces" that: "International law and custom hold the host government responsible for the protection of diplomatic missions."[188] Nevertheless, little comment is made on the content of these international legal obligations.

4.5.2 The Omnibus Diplomatic and Anti-Terrorism Act 1986

The United States legislature moved quickly to implement the findings of the Inman Report by enacting the Omnibus Diplomatic and Anti-Terrorism Act of 1986 (hereinafter the 1986 Act).[189] In setting out the purposes of the Act, Congress declared that:

> (1) the United States has a crucial stake in the presence of United States Government personnel representing United States interests abroad;
> (2) conditions confronting United States Government personnel and missions abroad are fraught with security concerns which will continue for the foreseeable future; and
> (3) the resources now available to counter acts of terrorism and protect and secure United States Government personnel and missions abroad, as well as foreign officials and missions in the United States, are inadequate to meet the mounting threat to such personnel and facilities.[190]

Title 2 of the 1986 Act then proceeded to authorise the Secretary of State to establish the Diplomatic Security Service as recommended by the Inman Report.[191] Title 3 provided for the establishment of Accountability Review Boards to "any case of serious injury, loss of life, or significant destruction of property at, or related to, a United States Government mission abroad, and in any case of a serious breach of security involving intelligence activities of a foreign government directed at a United States Government mission abroad".[192] Finally, Title 4 provided for the establishment of a Diplomatic Security Program which envisaged expenditure for fiscal years 1986 and 1987 in excess of $1 billion, including the amount of $857,806,000 to be spent on "acquisition and maintenance of buildings abroad".[193] Specific improvements in security measures at US embassies were envisaged in the Act, including further training to improve perimeter security;[194] the implementation of measures to protect public entrances, including the use of metal detectors or other advanced screening system;[195] and provision for increased participation of United States contractors in local guard contracts.[196]

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[188] Inman Report, *op cit*, Guard Forces.
[189] PL99-399; 22 U.S.C.
[190] 22 U.S.C. § 4801.
[191] 22 U.S.C. § 4821.
[192] 22 U.S.C. § 4831.
[193] 22 U.S.C. § 4851.
[194] 22 U.S.C. § 4858.
[195] 22 U.S.C. § 4859.
[196] 22 U.S.C. § 4864.

§ 4865 of U.S.C. 22 details security requirements for United States diplomatic facilities abroad. The section is produced in its entirety in Annex 3 to this book. For present purposes it is worth noting that the section envisages the establishment of an Emergency Action Plan for all US diplomatic facilities, including both embassies and consulates, and specified personnel. Where new diplomatic facilities are proposed, all diplomatic personnel are to live within the relevant compound and all buildings are to be located at least 100 ft from the property perimeter. The section envisages crisis management training for all relevant personnel and specific diplomatic security training for all diplomatic security agents. State Department support in the case of emergencies is envisaged in the form of a Foreign Emergency Support Team and rapid response procedures are to be created.

4.5.3 The Crowe Report

The facts surrounding the attacks on the US Embassies in Nairobi and Dar es Salaam have been outlined in Chapter 1 of this book. As required by the terms of the Omnibus Diplomatic and Anti-Terrorism Act 1986, the Secretary of State convened two Accountability Review Boards on 5 October 1998 to review the circumstances regarding the events of 7 August 1998. It was decided that the links between the two bombings and the common security issues raised by the two events merited joint chairmanship of the Boards and joint submissions of findings.[197]Accordingly, as has been noted above, the two Boards issued a joint report, which has become known as the Crowe Report.

The first point to note is that it is not clear from the Report what protection was provided specifically by the Kenyan and Tanzanian governments in the performance of their responsibilities under Articles 22(2) and 29 of the VCDR. Based on an interview with the Regional Police Commissioner in Dar es Salaam, it would appear that this protection was minimal.[198] Parts of the Vienna Convention are incorporated into Tanzanian law by the Diplomatic and Consular Immunities and Privileges Act 1986, including Articles 22(2) and 29.[199] However, Tanzania, in common with most other countries, does not include provisions within its law providing an obligation on the authorities of the state to provide physical protection for diplomatic personnel.[200] According to the Regional Police Commissioner, where an embassy requests special protection they are provided with guards from the Field Force Unit (FFU), a special unit within the Tanzanian police force deployed in special circumstances such as riots. Requests for assistance are made through the Ministry of Foreign Affairs and the Office of the Inspector-General. Apart from the FFU, most embassies, high commissions and consulates, as well as their personnel, are protected by private security companies, the biggest being Securicor and Group 4. There is no evidence of the FFU having been deployed on

[197] Crowe Report, *op cit*, Introduction, p. 1 of 3.
[198] Interview between Mr Tibigana, Regional Police Commissioner and Dr Yitiha Simbeye, April 2004. Copy of summary of interview on file with author.
[199] Act No. 5/86.
[200] For example, no such law exists within the United Kingdom.

7 August 1998. Indeed, given the fact that the Crowe Report specifically found that: "There was no information or intelligence to warn of the actual attack",[201] it would be unreasonable to expect the Tanzanian government to have done more than it did on the day in question. It is worth noting that since the events of 7 August 1998, the United States Embassy in Dar es Salaam has a permanent FFU presence working alongside Securicor guards and members of the Marine Security Guard. A similar permanent presence is now provided to the embassies of France, the United Kingdom, Japan and Russia. Accordingly, it is clear that, in relation to both the Nairobi and Dar es Salaam attacks, frontline protection was provided by locally hired guards, paid for by the Embassy itself.

It would appear that both of the facilities targeted on 7 August 1998 had been completed prior to the implementation of the Inman standards referred to above. Furthermore, both were regarded as medium risk. Nevertheless, the Boards were of the opinion that "the security systems and procedures relating to actions undertaken at Embassies in Nairobi and Dar es Salaam were, for the most part, properly implemented".[202] Accordingly both Embassies had instituted an Emergency Action Plan. They were both overseen by a Regional Security Officer and both had Marine Security Guards on site. The relevant ambassadors had undertaken regular risk assessments although it is worth noting that the ambassador in Nairobi had, on 24 December 1997, indicated serious concern about "terrorist threats aimed at the mission, as well as threats of crime and political violence, and emphasized the embassy's extreme vulnerability due to lack of standoff".[203] The Department of State responded "saying that after a review of the threat, the post's current security rating for political violence and terrorism of 'medium' was appropriate and that no new office building was contemplated".[204]

The fault for the East African bombings, according to the Boards, lay squarely with the Department of State. Thus, the Boards indicated their dissatisfaction with "the collective failure of the US government over the past decade to provide adequate resources to reduce the vulnerability of US diplomatic missions to terrorist attack in most countries around the world".[205] The Boards acknowledged that "the Department of State and other US government organizations had focused quickly on the lessons learned. They immediately reviewed the vulnerabilities of our embassies and missions abroad and took steps to strengthen perimeter security at all posts, to re-prioritize the construction and upgrades necessary to bring our overseas US facilities to what are referred to as Inman standards, and Congress appropriated over $1 billion in supplemental funds."[206] However, the Boards considered that this was only "the first step" and recommended the appropriation of a further "$1.4 billion per year maintained over an approximate ten-year

[201] Crowe Report, *op cit*, Dar es Salaam Discussion and Findings, p. 4.
[202] Crowe Report, *op cit*, Executive Overview, p. 2 of 7.
[203] *Ibid*, Nairobi: Discussion and Findings, p. 3 of 8.
[204] *Infra*.
[205] *Ibid*, Executive Overview, p. 3 of 7.
[206] *Infra*.

period".[207] This money was to be used to provide "sustained funding for enhanced security measures, for long-term costs for increased security personnel, and for a capital building program based on an assessment of requirements to meet the new range of terrorist threats".[208] It is difficult not to see the considerable overlap between these recommendations and those of the Inman Report 14 years earlier. The Boards then proceeded to make 24 key recommendations. These recommendations are contained in Annex 4 to this book.

4.6 Chapter Summary

This analysis has illustrated that the so-called duty of protection incumbent on receiving states by virtue of the relevant provisions of the Vienna Conventions on Diplomatic and Consular Relations provides, at best, an illusion of protection. Nevertheless, the imposition of an obligation on the receiving state to provide for the protection of diplomatic personnel of foreign states remains an important element in the legal framework providing for the protection of diplomatic personnel. Were these provisions to exist as the only measures of protection, the position of diplomatic personnel would, indeed, be extremely precarious. However, international law has developed a range of further measures which supplement and enhance the basic requirements provided for in the Vienna Conventions. The following two chapters will examine the most important of these provisions and will highlight the importance of a multi-faceted approach to the problem of protecting diplomatic personnel, particularly in an age of increasing terrorist attacks against such individuals.

[207] *Infra*.
[208] *Infra.*

Chapter 5

The Prevention and Punishment of Crimes Against Diplomatic Personnel

In spite of the success of the Vienna Convention of Diplomatic Relations 1961[1] and the Vienna Convention on Consular Relations 1963[2] in terms of the number of states participating in these Conventions and the fact that they rapidly became recognised as the primary sources of diplomatic and consular law as between states, it quickly became apparent that these Conventions would not in and of themselves solve the problem of attacks against diplomatic personnel. The problem of revolutionary regimes and their lack of willingness to engage with Western conceptions of diplomatic privileges and immunities has already been referred to in Chapter 3 above. The notorious Tehran Hostage Crisis and the responsibility of the state of Iran for the siege of the American Embassy in Tehran in 1979-1980 were discussed at length in Chapter 4. However, since the early 1970s, it was a threat from another source which proved to be of most concern to international lawyers and policy makers, that is the threat of terrorist attacks on diplomatic personnel. Chapter 1 detailed the growth in terrorist attacks since the early 1960s. In particular, reference has already been made to the specific problem of the kidnapping of diplomatic personnel. The problem occasioned the drafting of two major instruments directed at the prevention and punishment of such crimes. These were the 1971 OAS Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance and the 1973 United Nations Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents.

5.1 The OAS Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance 1971

It has already been noted that Latin America was a hotbed of terrorist activity during the 1960s, and it was here that the revolutionary tactic of kidnapping diplomatic personnel was most in evidence at that time. Concerned with the impact that this problem was having not just on other states in the region but also

[1] 500 *UNTS* 95 (hereinafter the VCDR).
[2] 596 *UNTS* 261 (hereinafter the VCCR).

internationally, the General Assembly of the Organization of American States on 30 June 1970 directed the Inter-American Juridical Committee to prepare a draft convention focussing on "acts of terrorism and especially the kidnapping of persons and extortion in connection with that crime".[3] The Juridical Committee moved quickly to produce a Draft Convention on Terrorism and Kidnapping of Persons for the Purposes of Extortion which was sent to the OAS General Assembly in January 1971.[4]

When a conference of foreign ministers was convened to consider the draft convention, it was immediately apparent that even within the organisation itself states had different perspectives on what such a convention should cover. Some envisaged a wide-ranging convention dealing generally with the problem of international terrorism. Others preferred a convention which focussed specifically on the kidnapping of diplomats. When the conference opted for the narrower approach, six governments walked out in protest and a further three states abstained or voted against the convention. Accordingly, of the 22 states that attended the conference, only 13 signed the resulting convention.[5]

Article 1 of the 1971 Convention requires states to "cooperate among themselves by taking all the measures that they may consider effective under their own laws, and especially those established in [the] convention to prevent and punish acts of terrorism, especially kidnapping, murder, and other assaults against the life or physical integrity of those persons to whom the state has the duty according to international law to give special protection, as well as extortion in connection with those crimes". The crimes are declared to be "common crimes of international significance, regardless of motive" by virtue of Article 2. Individuals charged with or convicted of these crimes are to be subject to the possibility of extradition (Article 3). Where the accused or convicted person is a national of the requested state or where some other legal or constitutional impediment exists to extradition, the requested state is under a duty to "submit the case to its competent authorities for prosecution, as if the act had been committed in its territory" (Article 5). Article 7 requires that states include the Convention crimes in any extradition treaty between themselves. In all cases the accused or convicted person is to "enjoy the legal guarantees of due process" (Article 4). Article 6, somewhat controversially, provides that the Convention is not to impair the right of asylum.

Article 8, which is the final substantive provision of the Convention, deals with the matter of cooperation by requiring all state parties:

> a. To take all measures within their power, and in conformity with their own laws, to prevent and impede the preparation in their respective

[3] OAS Res. AG/Res. 4 (I-E/70) (1970).

[4] See Murphy (1978), "Protected Persons and Diplomatic Facilities" in Evans and Murphy, *Legal Aspects of International Terrorism* (Lexington Books, Lexington, Massachusetts), 277 at p. 300.

[5] These were Colombia, Costa Rica, Dominican Republic, El Salvador, Honduras, Jamaica, Mexico, Nicaragua, Panama, Trinidad and Tobago, the United States of America, Uruguay and Venezuela. See http://www.oas.org/juridico/english/Sigs/a-49.html.

> territories of the crimes mentioned in Article 2 that are to be carried out in the territory of another contracting state.
> b. To exchange information and consider effective administrative measures for the purpose of protecting the persons to whom Article 2 of this convention refers.
> c. To guarantee to every person deprived of his freedom through the application of this convention every right to defend himself.
> d. To endeavor to have the criminal acts contemplated in this convention included in their penal laws, if not already so included.
> e. To comply most expeditiously with the requests for extradition concerning the criminal acts contemplated in this convention.

The Convention has been criticised on a number of grounds. In particular, Murphy raises a number of deficiencies with the Convention regime which, according to him, "does little to clarify ambiguities in traditional law and practice".[6] For example, in relation to the question of the *rationae personae* extent of the Convention, he asserts that: "Precisely how far the convention's scope of protection does extend is a matter of conjecture."[7] For present purposes, however, the fact that the Convention is intended to deal with the protection of diplomatic personnel is undeniable. Murphy is also critical of the fact that a state which refuses to extradite an accused or convicted person is merely required to submit that person to their national prosecuting authorities. He points out that "once in the hands of government attorneys, they retain complete discretion as to whether to bring a case to trial".[8] He further questions the extent of the measures envisaged for the protection of diplomats, noting that the Convention envisages only "cooperation" but "[does] not set forth any guidelines for such cooperation or the parameters of an ultimate agreement among states parties on security measures".[9]

Murphy reserves his primary criticism for the way in which the Convention deals with the question of extradition and, in particular, the "political offence" exception. Murphy notes that the apparent effect of the Article 2 designation of relevant offences as "common crimes … regardless of motive" ought to have the effect of removing such crimes from the political offence exception.[10] In support of this conclusion, he cites the opinion of the Inter-American Juridical Committee that: "The political and ideological pretexts utilized as justification for these crimes in no way mitigate their cruelty and irrationality or the ignoble nature of the means employed, and in no way remove their character as acts in violation of essential human rights."[11] Nevertheless, the combination of Article 3 which provides that "it

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[6] Murphy, *op cit*, p. 300.
[7] *Ibid*, p. 301.
[8] *Ibid*, p. 302.
[9] *Infra*.
[10] *Ibid*, p. 301.
[11] Opinion of the Inter-American Juridical Committee accompanying the Draft Convention on Terrorism and Kidnapping of Persons for Extortion, OAS Off. Records/Ser. G, CP/Doc. 54/70 Rev 1 at 10. Quoted in Murphy, *infra*.

is the exclusive responsibility of the state under whose jurisdiction or protection [the accused or convicted person is] located to determine the nature of the acts and decide whether the standards of this convention are applicable", with Article 6 which, as has already been noted, ensures that the right of asylum is left undisturbed, could be interpreted as introducing the political offence exception by the back door. Thus, according to Murphy: "At a minimum, this apparent conflict of provisions creates a major ambiguity as to the continued viability of the political offence exception under the convention."[12]

It is difficult to assess the practical impact of the 1971 Convention. It was suggested in 1971 that the internationalisation of the problem of diplomatic kidnappings certainly diverted attention away from the regional developments in Latin America onto the international stage. This author is not aware of any successful prosecutions having been brought on the basis of any domestic measures introduced as a result of the 1971 Convention. Certainly the lack of participation in the Convention has been a fundamental problem. Murphy notes that by 1978, there were only six state parties to the Convention.[13] Since then, a number of other states have become party to the Convention;[14] however, of the current 34 members of the Organization, 17 remain non-parties.[15] The relative lack of participation in the Convention would seem to support Murphy's conclusion that: "In view of this lack of support, it is immediately apparent that the convention has not been an effective international legal instrument for the protection of diplomats."[16] Nevertheless, Murphy's later assertion that the terms of the Convention are worthy of consideration "if only because the convention was the first international legal instrument to deal directly with the protection of diplomats, and because it served as a primary model for the United Nations Convention"[17] is equally true.

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[12] *Ibid*, p. 302. This view should be contrasted with that of Przetacznik, who notes that: "Although the Convention … does not contain the precise provision prohibiting the grant of asylum … it arises from its article 2 and other provisions that perpetrators should not enjoy any kind of asylum." Przetacznik (1973), "Convention on the Special Protection of Officials of Foreign States and International Organizations" IX *Revue belge de droit international* 455 at p. 466.

[13] These were Costa Rica, Dominican Republic, Mexico, Nicaragua, Venezuela and the United States. Murphy, *op cit*, p. 333 n. 94.

[14] These include Uruguay (1978), El Salvador (1980), Guatemala (1980), Panama (1988), Peru (1988), Colombia (1996), Brazil (1999), Bolivia (2002), Grenada (2002), Honduras (2004) and Paraguay (2004).

[15] The 17 non-parties are Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Canada, Chile, Dominica, Ecuador, Grenada, Guyana, Haiti, Jamaica, St Kitts and Nevis, St Lucia, Suriname, and Trinidad and Tobago. It is worth noting that all but four of the member states of the OAS are currently party to the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents.

[16] Murphy, *op cit*, p. 300.

[17] *Infra*.

5.2 The UN Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents 1973

The idea for a United Nations convention on the topic came originally from the International Law Commission, which made a decision in 1971 that, if the General Assembly requested it to do so, it would prepare a set of draft articles on the subject. The ILC included this decision in its 1971 report to the General Assembly.[18] The General Assembly considered the Report of the ILC and, on 3 December 1971, passed a resolution requesting the Secretary-General to invite comments from member states before 1 April 1972 on the question of the protection of diplomats. These views were to be immediately transmitted to the ILC.[19] The urgency of the situation is reflected in the remarkably short time scales in which member states were requested to submit their views and by the decision of the ILC to use a so-called short-cut method to draft its articles by dispensing with the appointment of a Special Rapporteur.[20] The ILC undertook a general discussion of the topic in its 1150th – 1153rd meetings between 3 and 8 May 1972.[21] Having concluded this initial discussion, the ILC proceeded to appoint a Working Group, chaired by Mr Tsuruoka, to produce a set of draft articles. The Working Group met on seven occasions between 24 May and 17 June 1972 and reported on three occasions between 20 June and 3 July 1972.[22]

It is not intended here to undertake an in-depth examination of the debates at the ILC on each and every article of the draft convention. This is a task which has been expertly undertaken elsewhere.[23] However, it is apparent both from the initial debate of the topic and the ensuing discussions of the individual draft articles that there were considerable misgivings among many of the Commissioners not only

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[18] *Official Records of the General Assembly, Twenty-sixth Session, Supplement No 10* (A/8410/Rev.1).

[19] GA Resolution 2780 (XXVI).

[20] This decision was criticised by a number of commissioners at the first debate on the topic at the ILC. For example, Mr Nagendra Singh believed that the controversial character of the topic of protection of diplomats required that it be treated in the traditional way. *ILC Yearbook 1972,* Vol. I, p. 19. See also Mr Castañda, *infra*; Mr Sette Cãmara, *ibid*, p. 20. But *cf*. Mr Ushakov, *infra*, who pointed out that the Commission had unanimously agreed to an undertaking to the General Assembly to complete the work in its current session and Mr Alcīvar who was concerned that the matter was all the more urgent because many governments were unable or unwilling to negotiate with revolutionary groups. *Ibid*, p. 21.

[21] *ILC Yearbook 1972*, Vol. I, pp. 5-22.

[22] *ILC Yearbook 1972*, Vol. I. For First Report see UN Document A/CN.4/L.186, considered at 1182nd mtg. (20 June 1972), 1185th and 1186th mtgs. (22 and 23 June 1972), 1188th and 1189th mtgs. (27 June 1972). For Second Report see UN Document A/CN.4/L.188 considered at 1191st and 1192nd mtgs. (29 and 30 June 1972). For Third Report see UN Document A/CN.4/189 considered at 1193rd mtg. (3 July 1972).

[23] See, in particular, Rozakis (1974), "Terrorism and the Internationally Protected Person in Light of the ILC's Draft Articles" 23 *ICLQ* 32 and Wood (1974), "The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents" 23 *ICLQ* 791.

about the content of the draft articles but also about the draft as a whole. The primary misgivings related to the question of who was to be protected by the draft articles, in other words the scope of the draft *rationae personae* and the impact of the draft on the question of political asylum. These issues require some discussion.

In relation to the first issue, although the original intention of the ILC was to focus on diplomatic agents, the United Nations General Assembly in Resolution 2780 (XXVI) requested the ILC to consider the question of the protection and inviolability of diplomatic agents and other persons entitled to protection under international law. Accordingly, the Commission Chairman, Richard Kearney prepared a set of draft articles for consideration by the Commission in advance of its first meeting under the heading of "Draft articles concerning crimes against persons entitled to special protection under international law".[24] Specific reference to diplomatic agents was avoided by Mr Kearney.

At the first debate on the topic there was general agreement with this approach. Indeed, a number of Commissioners considered that the draft articles did not go far enough. For example, Mr Sette Cãmara considered that the focus of the draft articles should not be only individuals entitled to special protection at all, as such persons already had sufficient protection under international law. He was concerned that other innocent individuals were the subject of terrorist attacks and were also victims of kidnappings and murder in respect of which the international community was unable to take any action.[25] This view attracted some sympathy.[26] However, it was pointed out that there were sound reasons for limiting the scope of the draft articles to persons entitled to special protection under international law. Thus, according to Mr Rossides, "the free use of diplomats, and of such persons as emissaries of the United Nations, was essential to the progress of international understanding" and that "such persons had unfortunately become a special target of terrorist attacks".[27] Sir Humphrey Waldock stated quite simply that "to extend the scope of the draft articles to include acts of terrorism in general would be going beyond the Commission's terms of reference".[28] He believed that internationally protected persons were worthy of particular consideration because such persons "were acting in the general interests of international relations and were in a special position in which they were unable to defend themselves".[29] He was also of the opinion that the inclusion of other persons including Heads of State and high-ranking public officials was logical "since today Heads of State and foreign

[24] UN Document A/CN.4/L.182, *ILC Yearbook 1972*, Vol II, pp. 201-203.
[25] *ILC Yearbook 1972*, Vol. I, pp. 5-6.
[26] See, for example, the views of Mr Rossides who "agreed with the view that all victims of terrorism should be afforded protection", *ibid*, p. 6, and Mr Bilge, who suggested that the draft articles could be extended to "privileged foreigners, in other words, foreigners enjoying a special status under a treaty", *ibid*, p. 7.
[27] *Ibid*, p. 6. See also the comments of Mr Tsuruoka, *infra.*
[28] *Ibid*, p. 7. This perspective was specifically supported by the Chairman, *infra*.
[29] *Ibid*, p. 18.

ministers frequently travel about the world and do much of the work which was formerly done by diplomats".[30]

As noted above, a second major concern evidenced at the ILC's debates was the impact of the draft articles on the question of political asylum. A number of Commissioners were concerned at the requirement to extradite persons accused of relevant crimes. Mr Castañda, in particular, was concerned that offences of this type had always been considered as political crimes which had traditionally invoked the doctrine of political asylum, particularly in the states of Latin America.[31] He asserted that a proposal to make certain political offences expressly extraditable "would constitute a departure from what was virtually a general principle of law; indeed the law of a great many countries recognised the non-extraditable character of political offences".[32] However, the majority of Commissioners favoured excluding attacks against internationally protected persons from offences to which the right of political asylum could apply. Thus Mr Ago pointed out that "there could be no doubt that the acts in question were political offences. But that was precisely where the value of the proposed convention lay; it must affirm that the fact that the acts in question were political offences was no obstacle to extradition, and that the principle prevailed not only over the provisions of internal criminal law, but also over those of existing bilateral extradition treaties between states."[33] Mr Rossides agreed that, while the threat to political asylum was real, so too was the threat to diplomatic agents "who were entirely unconnected with the political struggle that had engendered the violence against them".[34] Similarly, according to Mr Quentin-Baxter, "diplomats, by the very nature of their calling, had no role to play in the internal politics of the countries in which they served; there could therefore be no excuse for criminally misusing diplomats in pursuit of local political aims".[35]

The ILC's draft articles were submitted to the United Nations General Assembly's Sixth Committee in 1972. After a brief debate, the Sixth Committee recommended to the General Assembly that it should include on its provisional agenda for its twenty-eighth session in 1973, an item entitled "Draft Convention on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons". The General Assembly did so in resolution 2926 (XXVII) of 28 November 1972.[36] The Sixth Committee worked on the elaboration of the convention throughout its twenty-eighth session. This was done primarily on the basis of the ILC's draft articles. However, a number of other documents were also made available to the Committee. These included the 1971

[30] *Infra*.
[31] *Ibid*, p. 10 and 19.
[32] *Ibid*, p. 10.
[33] *Ibid*, p. 11.
[34] *Ibid*, p. 21.
[35] *Ibid*, p. 17.
[36] See http://www.un.org/law/ilc/guide/gfra.htm; Wood, *op cit*, at pp. 792-3.

OAS Convention, as well as the so-called Rome draft,[37] a working paper presented by Uruguay,[38] and the original draft articles prepared by Mr Kearney, the ILC Chairman. The first reading of the articles of the draft convention produced agreement on only three articles and the remainder of the articles, including all texts and amendments, were referred to a Drafting Committee composed of 15 states. After a second reading of the articles before the Sixth Committee as a whole, the adopted texts were sent back to the Drafting Committee for final review. The final text was approved by the Sixth Committee on 6 December 1973 and adopted without change by the United Nations General Assembly in Resolution 3166 (XXVIII) of 14 December 1973.[39]

Before turning to consider the terms of the 1973 Convention itself, it is worth highlighting one issue raised by Wood in his analysis of the proceedings at the Sixth Committee. For Wood, the greatest problem at the Sixth Committee concerned the attempt made, during the second reading of the draft articles, to "make the Convention inapplicable to peoples struggling against colonialism, foreign occupation, racial discrimination and apartheid".[40] A new article was introduced in the following terms:

> No provision of the present articles shall be applicable to peoples struggling against colonialism, alien domination, foreign occupation, racial discrimination and apartheid in the exercise of their legitimate rights to self-determination and independence. [41]

That such an article should have been introduced should not have been a surprise given the time at which the draft articles were being considered. The 1970s was a period during which the international community was acutely concerned with the problem of both colonialism[42] and the struggle against apartheid.[43] The proposed

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[37] "A draft Convention concerning crimes against diplomats elaborated by representatives of a group of states meeting in Rome in February 1971." Wood, *op cit*, p. 794.

[38] "A draft Convention concerning crimes against diplomats submitted to the twenty-sixth session of the General Assembly by the delegation of Uruguay." *Infra*.

[39] Wood, *op cit*, pp. 794-5.

[40] *Ibid*, p. 795.

[41] A/C.6/L.951/Rev.1.

[42] The decolonisation process had begun with the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples 1960 (UNGA Resolution 1514 (XV)) and had been supplemented in 1966 by the adoption by the General Assembly of the International Covenants on Civil and Political Rights (999 UNTS 171) and on Economic and Social Rights (993 *UNTS* 3) which asserted the right of all peoples to self-determination (Common Article 1). The 1970 United Nations General Assembly Declaration on Principles of International Law Concerning Friendly Relations (UNGA Resolution 2625 (XXV)) further entrenched the right of self-determination.

[43] The process of apartheid was condemned by the international community in the International Convention on All Forms of Racial Discrimination 1966 (660 *UNTS* 195) while apartheid was established as an international crime in the International Convention on the Suppression and Punishment of the Crime of Apartheid 1973 (1015 *UNTS* 243). See

new article was not intended to excuse the motivations for attacks against internationally protected persons but was intended to ensure that the Convention "did not serve as a pretext for the suppression of the right of peoples to self-determination and independence".[44] However, the practical impact of the article would undoubtedly have been to allow motive to excuse attacks against such persons. Unsurprisingly, the proposal did not meet with widespread support. Some further attempt was made in the Sixth Committee and in the Drafting Committee to find a compromise.[45] There was agreement that reference to the decolonisation process and the struggle against apartheid would be included in the General Assembly resolution which adopted the Convention and that the possibility of reservations in accordance with international law would be included in the Report of the Sixth Committee. However, all further attempts to amend the text of the draft convention itself were rejected.[46]

The resulting Convention consists of twenty articles. Article 1 defines the term "internationally protected person". For the purposes of the present discussion it is worth noting that the Convention undoubtedly envisages diplomatic agents and their families as falling within this category of individuals.[47] This is confirmed by the title of the Convention which refers specifically to diplomatic agents. That the Convention also applies to the protection of consular officials is supported by the negotiating history of the Convention,[48] by academic opinion[49] and by subsequent state practice.[50] In light of the scope of this work, it is unnecessary to consider further the meaning and application of article 1(1).

The operative part of the Convention is to be found in Articles 2 to 11. Article 2 requires state parties to make the intentional commission of a murder, kidnapping or other attack on the person or liberty of an internationally protected person, or a violent attack on the official premises, private accommodation or means of transport of an internationally protected person, an offence within their domestic

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further Grant and Barker (2003), *EncyclopaedicDictionary of International Law* (2nd Ed.) (Oceana, Dobbs Ferry, New York), sub-nom apartheid, p. 30.

[44] Wood, *op cit*, p. 795.

[45] *Ibid*, pp. 795-7.

[46] *Infra*.

[47] Article 1(1)(b) refers specifically to " any representative or official of a state … who … is entitled to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household".

[48] Wood notes the view of the UK representative in the General Assembly who noted that persons specified within sub-paragraph 1(1)(b) as falling within the category of internationally protected persons included "persons who are entitled to the benefit of Article 29 of the Vienna Convention on Diplomatic Relations, article 40 of the Vienna Convention on Consular Relations or article 29 of the New York Convention on Special Missions". (A/PV.2202, p. 112) cited in Wood, *op cit*, p. 801.

[49] See, for example, Wood, *op cit*, p. 801 and Rozakis, *op cit*, pp. 37-8.

[50] See, for example, the Australian case of *R v Donyadideh* 114 *FLR* 43 (1993) in which an attack on an Iranian consul was held to be within the ambit of the Crimes (Internationally Protected Persons) Act 1976 which had incorporated the 1973 Convention into Australian law.

law. The offences are also to include threats, attempts and conspiracy to commit such attacks. The state party is to make such offences "punishable by appropriate penalties, taking into account their grave nature".[51] Article 2(3) makes clear that the obligation on states to provide special protection to diplomatic personnel and other internationally protected persons is in no way affected by the terms of the Convention, in particular, Article 2 itself.

Reference to the "intentional commission" of a relevant act ensures that the offender must know that the victim is an internationally protected person. Given that the crime of murder, at least, cannot be committed unintentionally, use of the word "intentionally" cannot have been intended to have any other effect. However, it is notable that the ILC draft articles had included the additional phrase "regardless of motive". Reference has already been made to the lengthy debates at the ILC concerning the availability of political asylum and the political offence exception to extradition. Inclusion of this phrase suggests that those in favour of eliminating the possibility of political asylum won the day at the ILC. It is surprising, therefore, that these words are not included in the final Convention. Murphy suggests that the deletion of the words raises a question as to the availability of the political offence exception, particularly in light of the fact that Article 12 of the Convention allows for the application of treaties on asylum in force at the date of the adoption of the Convention.[52] Murphy compares Article 12 of the present Convention with Article 6 of the OAS Convention which states that the Convention shall not impair the right of asylum and which had given rise to considerable disquiet.[53] However, Article 12, although problematic to those concerned with the operation of political asylum, is much more circumscribed and is considerably narrower in both its scope and potential effect than its OAS counterpart.[54]

The ILC draft articles had originally defined the principal crime as "a violent attack upon the person or liberty of an internationally protected person". Rozakis had been concerned that the description of the *rationae materiae* extent of the Convention in this way had the scope to seriously threaten the effect of any resulting convention given that different states would be in a position to incorporate the phrase "violent attack" in different ways within their domestic legislation.[55] This was addressed, at least in the case of attacks on the person of the internationally protected person, by an enumeration of the specific acts covered by the Convention, that is, murder, kidnapping or other attack. In relation to these "other attacks", the fact that the crimes are to be "punishable by appropriate penalties, taking into account their grave nature", ensures that they should be of a sufficiently serious nature commensurate to murder and kidnapping. Thus, according to Wood: "The crimes set forth in Article 2 are serious attacks and do

[51] 1973 Convention, Article 2(2).
[52] Murphy, *op cit*, p. 306.
[53] OAS Convention, Article 6.
[54] See Wood, *op cit*, pp. 813-5 for a discussion of the purpose and effect of Article 12 of the Convention.
[55] Rozakis, *op cit*, p. 51.

not include other attacks on their person or freedom or attacks on their dignity, for which the measures provided for in the Convention would not be appropriate."[56] In other words, the severity of the punishment should reflect the grave nature of the offence, as opposed to reflecting the protected status of the victim.[57]

By Article 3, each state party is required to take "such measures as may be necessary to establish its jurisdiction over the crimes set forth in Article 2". Primary jurisdiction arises by virtue of the crime having been committed on the territory of the state party, including where it is committed on board a ship or aircraft registered in that state,[58] or when the alleged offender is a national of the state party.[59] Article 3(1)(c) also allows a state to assert jurisdiction on the basis of the passive personality principle "when the crime is committed against an internationally protected person … who enjoys his status as such by virtue of functions which he exercises on behalf of that state". According to Wood, this provision goes beyond what is permitted by customary international law.[60] Use of the principle has been envisaged as a secondary basis of jurisdiction in subsequent international treaties dealing with international crimes.[61] However, these provisions, including Article 3(1)(c) of the present Convention remain applicable only to state parties. More controversially, the Convention provides for universal jurisdiction "where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 of the Convention".[62] Although identical to comparable provisions in other international penal treaties,[63] the provision is regarded by the majority of writers as a secondary basis of jurisdiction that only applies where extradition is not possible and is a further extension of what would normally be permitted by customary international law.[64]

In spite of the apparent focus of the Convention on the prevention as well as the punishment of crimes against internationally protected persons, the only

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[56] Wood, *op cit*, pp. 806-7.

[57] Wood contrasts the wording of Article 2(2) with the ILC draft which would have made the crimes "punishable by severe penalties which take into account the aggravated nature of the offence". This wording, Wood notes, had been criticised "in so far as it suggested that the punishment should be greater merely because the victim was an internationally protected person". (*Infra*). For a critique of the position adopted by the ILC in favour of providing for more severe punishment of crimes against internationally protected persons, see Rozakis, *op cit*, pp. 53-4.

[58] 1973 Convention, Article 3(1)(a).

[59] 1973 Convention, Article 3(1)(b).

[60] Wood, *op cit*, p. 808.

[61] See, for example, Article 9 of the International Convention Against the Taking of Hostages 1979 (1316 UNTS 205) and Article 5(1)(c) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (1465 *UNTS* 85).

[62] 1973 Convention, Article 3(2).

[63] See, for example, Article 4(2) of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970 (860 *UNTS* 105) and Article 5(2) of the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971 (974 *UNTS* 177).

[64] Wood, *op cit*, p. 809. See also Murphy, *op cit*, p. 307.

provision of the Convention which deals with prevention is Article 4. Article 4 requires state parties to take "all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories".[65] The Article further provides for the exchange of information and the coordination of administrative and other measures to prevent the commission of crimes under the Convention.[66] Article 5 provides for the sharing of information between states after an offence has been committed, in particular, where an alleged offender has fled and where any state party has relevant information. Article 6 requires the state on whose territory the alleged offender is present to take "appropriate measures under its internal law so as to ensure his presence for the purposes of prosecution or extradition", and to communicate these measures to a range of parties including the UN Secretary-General, the state of which the alleged offender is a national, the state of which the internationally protected person is a national, and all other concerned states.[67] Normal consular rights apply to an accused person in such circumstances.[68] Article 10 requires states parties to afford on another "the greatest measure of assistance in connection with criminal proceedings brought in connection with the Convention".

Article 7 provides for the operation of the *aut dedere aut judicare* principle. It obliges the state party in whose territory the alleged offender is present either to extradite him, in accordance with Article 8, or submit him "without exception whatsoever and without undue delay … to its competent authorities for the purposes of prosecution, through proceedings in accordance with the laws of that state". This provision has been described as the key provision of the Convention and is similar, though not identical, to corresponding provisions in the Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970[69] and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971.[70] Murphy raises a concern that, as with the OAS Convention, the absence of a limitation on prosecutorial discretion might allow offenders to go free through lack of evidence. He prefers the wording of the Hague and Montreal

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[65] 1973 Convention, Article 4(1).
[66] 1973 Convention, Article 4(2).
[67] 1973 Convention, Article 6(1). Where the internationally protected person is an official or agent of an international organisation, that organisation should also be informed of the relevant measures (Article 6(1)(e)).
[68] 1973 Convention, Article 6(2).
[69] 860 *UNTS* 105.
[70] 974 *UNTS* 177. Wood points out that "The words 'whether or not the offence was committed in its territory' which occur in the Hague and Montreal Conventions, were omitted by the Commission because it had provided for universal jurisdiction in draft article 2(1), but they would appear to have been superfluous in any event. The words 'without undue delay' do not appear in the Hague or Montreal Conventions and do not add anything to the content of the obligation since if there were undue delay there would certainly not be a good faith performance of the obligation. The Hague and Montreal Conventions contain a second sentence: 'Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that state.' This is replaced by 'through proceedings in accordance with the laws of that state.'" Wood, *op cit*, p. 811.

Conventions to the effect that: "Those authorities shall take their decisions in the same manner as in the case of any ordinary offence of a serious nature under the law of that state." It is difficult to see, however, how that wording imposes any greater obligation on the prosecuting authorities than the words used in Article 7. If Murphy's proposal is that an accused should be prosecuted regardless of lack of evidence or other factors which prosecutors take into account in deciding whether or not to prosecute, then the potential for a breach of Article 9 of the Convention which guarantees fair treatment to accused persons at all stages of the proceedings would immediately arise.

Finally for the present purposes,[71] Article 8 of the Convention deals with extradition and deems all offences under the Convention to be extraditable offences if they are not already so listed in extradition treaties between states parties. Offences under the Convention are to be included as extraditable offences in all future treaties between states parties.[72] Where no extradition treaty exists between relevant states parties, the Convention may be utilised as the legal basis for extradition.[73] A provision in the ILC draft articles providing for priority to be given to an extradition request from the state in which the crimes were committed if received within six months of the apprehension of the alleged offender was rejected at the Sixth Committee and replaced by the following provision:

> Each of the crimes shall be treated, for the purposes of extradition between states parties, as if it had been committed not only in the place in which it occurred but also in the territories of the states required to establish their jurisdiction in accordance with paragraph 1 of article 3.

The question of prioritising extradition requests is, accordingly, left to the authorities of the requested state.

The Convention was opened for signature from 14 December 1973 to 31 December 1974. The United States of America was the first state to sign the Convention on 28 December 1973. However, a total of only 26 states signed the Convention by the end of the signing period.[74] The Convention entered into force relatively quickly, on 20 February 1977, after ratification by the twenty-second

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[71] Provision not specifically discussed in this analysis includes Article 11 which provides for the communication of the final outcome of a prosecution to the Secretary-General of the United Nations who is to transmit the information to the other states parties; Article 13 dealing with the settlement of disputes and Articles 14-20 (excluding Article 17) which are the final clauses dealing with matters such as signature, ratification, accession and denunciation. Article 17 deals with the entry into force of the Convention and will be referred to below.

[72] 1973 Convention, Article 8(1).

[73] 1973 Convention, Article 8(2).

[74] The 1973 Convention was signed by Australia, Belarus, Bulgaria, Canada, Denmark, Ecuador, Finland, West Germany, Guatemala, Hungary, Iceland, Italy, Mongolia, Nicaragua, Norway, Paraguay, Poland, Romania, Russian Federation, Rwanda, Sweden, Tunisia, Ukraine, United Kingdom, United States of America and Yugoslavia.

state.[75] However, although the General Assembly Resolution approving the Convention was adopted by consensus, states appeared reluctant to become parties to the Convention. Thus, by 1980 there were only 41 states parties to the Convention and only another 33 states joined the regime between 1980 and 1990. Given the significant increase in the number of attacks against diplomatic personnel during this decade, it is somewhat surprising and disappointing that the Convention did not garner greater support. The lack of support was of particular concern because of the type of convention under discussion. As with other penal conventions, the success or failure of the regime is rather dependent upon the number of states parties. The purpose of a regime based upon the principle of *aut dedere aut judicare* is to ensure that there exists no safe haven for perpetrators of the relevant crimes. Without widespread participation, therefore, the overall effect of the convention regime was minimal. Why then were states reluctant to sign up to the Convention?

One problem might have been the perception that the Convention did little to enhance the existing provisions of international law relating to the protection of diplomatic personnel. Thus, for example, although referring to the 1973 Convention, the International Court of Justice in the Tehran Hostages Case did not feel the need to examine its provisions in any depth. However, the Court clearly endorsed the position that even non-states parties to the 1973 Convention remained bound by their obligation under the two Vienna Conventions and under customary international law to provide for the special protection of diplomatic personnel. That this included the right, and indeed the duty, to prosecute persons who carried out attacks against diplomatic personnel on their territory goes without saying. Nevertheless, the need for a convention dealing specifically with the problem of attacks on diplomatic personnel as well as other "internationally protected persons" had been widely recognised. Accordingly, the apparent lack of willingness among states to sign up to the convention must have been for other reasons.

It is interesting to note that of the 26 original signatories to the Convention, 17 were European states and three others were major developed states, including Australia, Canada and the United States of America. Of the 17 European states, seven were East European states, including the former Soviet Union, and ten were West European states, indicating that the Convention did not fall prey to the Cold War ideological battles which had blighted much of international law and international relations during the period in question. However, only four Latin American states signed the Convention, echoing the conflict apparent during the negotiating of the OAS Convention surrounding the question of asylum and the political offence exception to extradition. What is most apparent, however, is that only one African state and one Asian state signed the Convention in 1974, indicating an ideological difference not only between developed and developing states but also between older, more traditional states, which depended to a large extent on the existing diplomatic processes, and the newer states, whose allegiance to the traditional methods of international relations were minimal. Murphy goes as

[75] 1973 Convention, Article 17.

far as to suggest that many states resisted becoming party to the Convention because they sympathised with terrorist causes.[76]

Accordingly the reasons for the reluctance of states to sign up to the Convention apparently went deeper than the simple argument that the matter was already sufficiently dealt with in international law. It is suggested that there were two, more systemic issues, which can explain the reluctance of states to become party to the 1973 Convention. The first of these concerns the political nature of the offence in question and its relationship to the vexed question of how to deal with terrorism. The second, related, issue was the relative novelty of the system introduced by the Convention based upon a development of international criminal law which was yet to receive widespread support among the majority of states. A particular aspect of this problem was the fact that the Convention imposed an obligation on states to legislate internally to bring the duty to prosecute or extradite into their domestic law.

Nevertheless, by 1990, a considerable number of international conventions, both regional and global, had developed to deal with the increasingly widespread problem of terrorism. The ubiquitous phrase "one man's terrorist is another man's freedom fighter" was never more often relied on than in the 1970s and 1980s. Accordingly, one might argue that the fact that, by 1990, 74 states were party to the 1973 Convention, and that similar numbers had signed and ratified the other terrorism conventions, is evidence of the success of the tactic of focussing on the prosecution and extradition of certain designated acts rather than directly on the problem of terrorism.[77] A further 28 states had joined the Convention regime by the turn of the century. A further significant increase in the number of states parties to the Convention was occasioned by the events of 11 September 2001. Nevertheless, while states have apparently been willing to sign up to the Convention, its relevance and effect in the prosecution of major terrorist attacks against diplomatic establishments and personnel has recently been called into question.

5.3 Case Study: The Prosecution of the East African Embassy Bombings

Reference has already been made to the bombings of the US Embassies in Kenya and Tanzania on 7 August 1998. The circumstances of the bombings were detailed in Chapter 1, and Chapter 4 included a detailed analysis of the two Accountability Review Boards conducted by the US State Department which reported in January 1999 (the Crowe Report). As well as this formal review of matters relating to the security of diplomatic establishments abroad, the United States undertook more practical action in reaction to the East African attacks. The first of these involved two missile attacks on 20 August 1998 against a terrorist training camp in Afghanistan and against a pharmaceutical plant in Sudan, which was said to be a chemical weapons factory supplying weapons to terrorist organisations. The United States justified its actions on the grounds of self-defence and reported its actions to

[76] Murphy, *op cit*, p. 317.
[77] *Infra.*

the United Nations Security Council under Article 51 of the UN Charter arguing that its actions were both necessary and proportionate.[78] The response of the international community to military action by the US in this case was muted and the matter was only briefly discussed by the Security Council. The legality of this action is beyond the scope of this work and will not be considered further.[79]

5.3.1 United States v Bin Laden

The second practical response of the United States to the Embassy bombings was to initiate criminal proceedings against those it considered responsible for the bombings. On 4 November 1998, a federal grand jury in New York returned a 238-count indictment against Osama bin Laden and 17 others, charging them with the bombings and several other acts of terrorism against US citizens abroad, including attacks on American military facilities in the Gulf Region and the Horn of Africa and attacks against members of the American military stationed in Saudi Arabia, Yemen, Somalia and elsewhere.[80] The indictment also alleged that the defendants were involved with the Al-Qaeda terrorist organisation which provided military training, intelligence and weapons to operatives around the world as well as providing religious authority for the attacks in the form of a number of fatwahs against the United States and its nationals.[81]

The original indictment[82] included broad allegations relating to the conspiracy to kill United States nationals (count 1), the bombing of the United States Embassy in Nairobi, Kenya (count 2), and the bombing of the United States Embassy in Dar es Salaam (count 3). Counts 4 to 227 related directly to the East African bombings. Counts 4-216 indicted the accused in respect of each of the murders in Nairobi, and counts 217-227 indicted them in respect of each of the murders in Dar es Salaam. The remaining counts related to perjury before federal grand juries (counts 228-235), and false statements (counts 236-238).

It is rather surprising that the original 238-count indictment against Bin Laden and his associates did not refer to the 1973 Convention which had been incorporated into US law.[83] The indictment was later amended so as to include the murder and attempted murder of internationally protected persons in Kenya and the

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[78] S/1998/780; 1998 UNYB 1218. See "Contemporary Practice of the United States" 93 *AJIL* 161 (1999).

[79] For a detailed discussion of opposing views in relation to the legality of the use of force by the United States in response to the East African bombings, see Lobel (1999), "The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan 24 *YJIL* 537 and Wedgewood (1999), "Responding to Terrorism: The Strikes Against Bin Laden" 24 *YJIL* 559. See also Gray (2004), *International Law and the Use of Force*, (2nd Ed.) (OUP, Oxford), at p. 163.

[80] See *U.S. v Bin* Laden 92 F. Supp.2d 225.

[81] *U.S. v Bin Laden*, *op cit*, pp. 227-31.

[82] See http://www.fas.org/irp/news/1998/11/98110602_nlt.html.

[83] 18 U.S.C. § 1116.

attempted murder of internationally protected persons in Tanzania.[84] However, the fact that these indictments related only to the murder of two individuals in Kenya and attempted murders in Kenya and Tanzania indicates that the US prosecutors believed that the provisions of the 1973 Convention were wholly inadequate as the basis for the prosecution of all of the consequences of the two attacks on the US Embassies.

By early 2000, six of the individuals named in the indictment were in the custody of the United States in New York, three others were in custody of the United Kingdom, awaiting extradition. The remaining individuals named in the indictment remained at large. A further four individuals were added to the indictment in December 2000. Of the six held in the United States, one, Ali Mohammed, a former US army sergeant, pleaded guilty and another, Mamdouh Mahmud Salim, was severed from the trial after attacking and seriously wounding a guard while attempting to escape from prison. The trial of the remaining four

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[84] The final indictment included 316 counts as follows: Count 1 – Conspiracy to kill US nationals (18 U.S.C. § 2332(b)); Count 2 – Conspiracy to murder, kidnap and maim at places outside the United States (18 U.S.C. §956(a)(1) and (a)(2)(A)); Count 3 – Conspiracy to Murder (18 U.S.C. § 1114, 1116 and 1117); Count 4 – Conspiracy to use weapons of mass destruction against nationals of the United States (18 U.S.C. § 2332(a)(1) and (a)(3)); Count 5 – Conspiracy to destroy buildings and property of the United States (18 U.S.C. § 844(n)); Count 6 – Conspiracy to attack national defense utilities (18 U.S.C. § 2155(a) and (b)); Count 7 – Bombing of the United States Embassy in Nairobi, Kenya (18 U.S.C. §844(f)(1), (f)(2) and 2); Count 8 – Bombing of the United States Embassy in Dar es Salaam, Tanzania (18 U.S.C. §844(f)(1), (f)(2) and 2); Count 9 – Use and attempted use of weapons of mass destruction against nationals of the United States in Nairobi, Kenya (18 U.S.C. §2332a (a)(1), (a)(2) and 2); Count 10 – Use and attempted use of weapons of mass destruction against nationals of the United States in Dar es Salaam, Tanzania (18 U.S.C. §2332a (a)(1), (a)(2) and 2); Counts 11-223 – Murders in Nairobi, Kenya (18 U.S.C. § 930(c), 1111, and 2); Counts 224-234 – Murders in Dar es Salaam, Tanzania (18 U.S.C. § 930(c), 1111, and 2); Counts 235-275 – Murders of Employees of the United States in Nairobi, Kenya (18 U.S.C. § 1111, 1114 and 2); Count 276 – Attempted Murder of Employees of the United States in Nairobi, Kenya (18 U.S.C. § 1111, 1114 and 2); Counts 277 & 278 – Murders of Employees of the United States in Dar es Salaam, Tanzania (18 U.S.C. § 1111, 1114 and 2); Count 279 – Attempted Murder of employees of the United States in Dar es Salaam, Tanzania (18 U.S.C. § 1111, 1114 and 2); Counts 280 & 281 – Murder of internationally protected persons in Nairobi, Kenya (18 U.S.C. § 1111, 1116 and 2); Count 282 – Attempted Murder of internationally protected persons in Nairobi, Kenya (18 U.S.C. § 1111, 1116 and 2); Count 283 – Attempted Murder of internationally protected persons in Dar es Salaam, Tanzania (18 U.S.C. § 1111, 1116 and 2); Count 284 – Using and carrying an explosive during commission of a felony (18 U.S.C. § 884(h)(1), 884(h)(2) and 2); Count 285 – Using and carrying a dangerous device during the bombing of the United States Embassy in Nairobi, Kenya (18 U.S.C. § 924(c) and 2); Count 286 – Using and carrying a dangerous device during the bombing of the United States Embassy in Dar es Salaam, Tanzania (18 U.S.C. § 924(c) and 2); Counts 287-308 – Perjury before Federal Grand juries and False Statements (18 U.S.C. § 1632); Count 309 – Conspiracy to take Hostages (18 U.S.C. § 1203(a)); Count 310 – Attempted Hostage Taking (18 U.S.C. § 1203(a) and 2); Count 311 – Conspiracy to Murder a Federal Official (18 U.S.C. § 1117). See http://cns.miis.edu/pubs/reports/pdfs/binladen/indict.pdf.

defendants, Khalfan Khamis Mohamed, Mohamed Rashid Dhaoud al Owhali, Wadih el Hage and Mohamed Sadeek Odeh, began on 3 January 2001.

The resulting case was highly complex. The practical complexities of the case was summarised by Sand J in the United States District Court in March 2000:

> The process of preparing for a trial in this case has been unusually protracted. The complexity of the charges, the voluminous discovery that needs to be exchanged, the location of many relevant documents and witnesses in various countries around the world, special procedures for handling classified material, the need to translate literally thousands of documents, and the potential availability of capital punishment for some of the Defendants have combined to require an extraordinary amount of work on the part of all parties involved.[85]

Prior to the commencement of the trial, the defendants filed a number of motions challenging aspects of the trail proceedings. These challenges led ultimately to 15 separate hearings and decision before and during the trial.[86] A number of these proceedings relate to technical matters of United States criminal law and procedure and will not be discussed at length in this section.[87] However, other challenges do require some comment.

The first challenge concerned a request by the defendants that the government be required to file a bill of particulars relating to the indictment. This request was granted in relation to the substantive charges which were recognised as being unduly complex and therefore a bill of particulars was necessary in order to permit the defendants to prepare a defence and to prevent prejudicial surprise at trial.[88] However, the motion was denied in relation to "background" matters concerning

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[85] *U.S. v Bin* Laden 92 F. Supp.2d 225, at p. 232.

[86] See *U.S. v Bin Laden* 92 F.Supp.2d 189, S.D.N.Y., Mar 13 2000; *U.S. v Bin Laden* 92 F.Supp.2d 225, S.D.N.Y., Mar 15, 2000; *U.S. v Bin Laden* 91 F.Supp.2d 600, S.D.N.Y. Mar 30, 2000; *U.S. v Bin Laden* 93 F.Supp.2d 484, S.D.N.Y. Apr 20, 2000; *U.S. v Bin Laden* 109 F.Supp.2d 211, S.D.N.Y. Aug 17, 2000; *U.S. v Bin Laden* 116 F.Supp.2d 489, S.D.N.Y. Oct 5, 2000; *U.S. v Bin Laden* 126 F.Supp.2d 264, S.D.N.Y. Dec 5, 2000; *U.S. v Bin Laden* 126 F.Supp.2d 256, S.D.N.Y. Dec 11, 2000; *U.S. v Bin Laden* (Unreported) 2001 WL 30061, S.D.N.Y. Jan 02, 2001; *U.S. v Bin Laden* 126 F.Supp.2d 290, S.D.N.Y. Jan 02, 2001; *U.S. v Bin Laden* (Unreported) 2001 WL 66393, S.D.N.Y. Jan 25, 2001; *U.S. v Bin Laden* (Unreported) 2001 WL 66314, S.D.N.Y. Jan 26, 2001; *U.S. v Bin Laden* (Unreported) 2001 WL 102338, S.D.N.Y. Feb 06, 2001; *U.S. v Bin Laden* 132 F.Supp.2d 198, S.D.N.Y. Feb 16, 2001; *U.S. v Bin Laden* 132 F.Supp.2d 168, S.D.N.Y. Feb 16, 2001.

[87] See, in particular, *U.S. v Bin Laden* 109 F.Supp.2d 211, S.D.N.Y. Aug 17, 2000 relating to an attempt by three of the defendants to have their trial severed from the other defendants who were charged with capital offences; *U.S. v Bin Laden* 116 F.Supp.2d 489, S.D.N.Y. Oct 5, 2000 relating to the quashing of outstanding grand jury subpoenas; and *U.S. v Bin Laden* (Unreported) 2001 WL 66393, S.D.N.Y. Jan 25, 2001; *U.S. v Bin Laden* (Unreported) 2001 WL 66314, S.D.N.Y. Jan 26, 2001; and *U.S. v Bin Laden* (Unreported) 2001 WL 102338, S.D.N.Y. Feb 06, 2001, all of which related to the question of discovery.

[88] *U.S. v Bin Laden* 92 F.Supp.2d 225, S.D.N.Y., Mar 15, 2000, p. 235.

the alleged conspiracies.[89] In this context it was held that the complexity of the case meant that to require the government to present evidence in a bill of particulars as to how each defendant had furthered the conspiracies' overall objectives would be unduly burdensome.[90]

The complexity of the case encouraged another motion, by Al-Owhali, to dismiss the indictment on due process grounds. It was argued by Al-Owhali that the conspiracies alleged in the indictment were "so enormous in scope, vague in detail and various in objectives" that they amounted to a violation of his rights under the Sixth Amendment to be adequately informed of the nature of the charges against him and his Fifth Amendment rights to due process of law.[91] The Court held that the indictment included background sections and a list of 144 overt acts allegedly committed by the defendants. These included several specific allegations against Al-Owhali which "more than adequately satisfied the requirements of … the Sixth Amendment".[92] With regard to the due process point, the Court found that the dangers of a lengthy trial and the problem of multiple defendants could be dealt with in ways other than a dismissal of the indictment in its entirety.

In the same proceedings, Odeh challenged the indictment on the basis of lack of venue. Essentially his claim was that because the offences had not taken place in New York, the New York courts were unable to try him.[93] In relation to the conspiracy charges, the Court found that at least three of the acts committed in furtherance of the conspiracy had been carried out in the Southern District of New York and that the venue was adequately established.[94] In relation to the substantive charges, the Court found that the question of appropriate venue would have to be addressed at the trial through the provision of evidence by the government that there was sufficient linkage with the venue.[95]

The defendants then sought to have certain counts dismissed from the indictment on the grounds that they were multiplicitous.[96] Such situations occur where a single offence is charged as an offence multiple times, giving rise to the possibility of double jeopardy. The Court examined the various counts alleged by the defendants to be multiplicitous and found against the defendants in respect of each count.[97] Salim further sought to have certain references to "terrorist groups and affiliated terrorist groups" struck from the indictment as surplusage. His motion was denied.[98] Finally, a motion to partially disqualify certain assistant District Attorneys on the ground that they had participated in post-arrest interviews

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[89] *Ibid,* p. 242
[90] *Infra*.
[91] *U.S. v Bin Laden* 91 F.Supp.2d 600 S.D.N.Y. Mar 30, 2000, at p. 607.
[92] *Ibid*, pp. 609-10.
[93] *Ibid*, p. 612.
[94] *Ibid*, p. 613.
[95] *Ibid*, p. 614.
[96] *Ibid*, p. 614.
[97] *Ibid*, pp. 614-21.
[98] *Ibid*, pp. 621-2.

with two of the defendants was dismissed,[99] as was a motion to exclude United States citizens from serving on the jury in the trial.[100]

A number of further challenges to the indictments were made later in 2000 and in early 2001.[101] The first such challenge was brought by El-Hage, a naturalised US citizen who claimed that electronic eavesdropping and a search of his residence violated his rights under the US Constitution's Fourth Amendment.[102] The Court held that El-Hage was entitled to bring the claim but that the activities of the US government fell within the "foreign intelligence collection" exception to the Fourth Amendment. According to the Court: "the power of the Executive to conduct foreign intelligence collection would be significantly frustrated by the imposition of a warrant requirement in this context."[103] The Court held that the exception could only apply where the accused was an agent of a foreign power and that the searches were authorised by the President or the Attorney General.[104] In the view of the Court, both requirements were satisfied in the present case.[105]

El-Hage also sought to suppress statements he had made to US officials while detained by Kenyan authorities at Kenyatta International Airport on the basis that the statements infringed his Fifth Amendment rights.[106] El-Hage suggested that the statements had been made involuntarily and that he had been "compliant because he did not want to risk being detained by the Kenyan police who have a well-known and well-deserved reputation for mistreating persons in custody".[107] However, the Court found that: "The mere suggestion of coercion based on the alleged bad reputation of the Kenyan officers and without any claim of a specific threat being made is insufficient to meet the requisite standard of involuntariness."[108]

On 27 and 28 June 2000, the US government filed notices of intent to seek the death penalty against Mohamed and Al-Owhali.[109] The two defendants made four challenges against this stated intention. The first challenged the death penalty as cruel and unusual punishment in violation of the Eighth Amendment. The Court summarily rejected this challenge on the grounds that the matter had already been settled by the Supreme Court.[110] The second claim, that international law

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[99] *Ibid*, pp. 622-5.
[100] *Ibid,* pp. 625-6.
[101] These are helpfully summarised in the "Contemporary Practice of the United States" section of the *American Journal of International Law* in 2001. "Contemporary Practice of the United States" 95 *AJIL* 637-641 (2001).
[102] *U.S. v Bin Laden* 126 F.Supp.2d 264, S.D.N.Y. 5 Dec, 2000.
[103] *Ibid*, p. 277.
[104] *Ibid*, pp. 277-87.
[105] *Ibid*, p. 287.
[106] *U.S. v Bin Laden* 2001 WL 30061, S.D.N.Y. Jan 02, 2001.
[107] *Ibid*, p. 4.
[108] *Infra*.
[109] Notices of intention submitted pursuant to 18 U.S.C. § 3593(a). See *U.S. v Bin Laden* 126 F.Supp.2d 290, S.D.N.Y. Jan 02, 2001, at p. 293.
[110] *Ibid*, p. 294. See *Gregg v Georgia* 428 U.S. 13, 168-187, 96 S.Ct. 2909, 49 L.Ed.2d. 859 (1976).

completely bars the use of the death penalty, was again summarily dismissed on the grounds that the United States is not a party to any treaty which bars the use of the death penalty and that the prohibition had not yet risen to the status of customary international law.[111] A third claim, that the application of the death penalty was wholly arbitrary and, accordingly, in breach of Article 6(1) of the International Covenant on Civil and Political Rights 1966 was also dismissed due to the lack of evidence of an arbitrary factor in the decision to seek capital punishment.[112]

Mohamed further claimed that, at the time of his arrest in South Africa, he had been denied the right to consular access pursuant to Article 36 of the Vienna Convention on Consular Relations 1963. The Court accepted that he had such a right and that that right was denied.[113] However, the Court denied Mohamed's motion to dismiss the death penalty notice, holding that the right to consular access was not a fundamental right and that Mohamed had been unable to show any prejudice which would have been required for a non-fundamental right to give rise to judicial relief.[114] The Court also held that even if there had been prejudice, the remedy of dismissal of the notice would not have been appropriate to redress a violation of the Vienna Convention.[115] The question of consular access in death penalty cases has recently been tested before the International Court of Justice in the cases of *Breard (Paraguay v United States of America)*,[116] *LaGrand (Germany v United States of America)*,[117] and *Avena (Mexico v United States of America)*.[118] The ICJ has repeatedly held against the position of the United States in routinely denying access to consular functions. However, the issue remains a moot point in the present case as none of the defendants was ultimately sentenced to death.

Having explored a number of the more important challenges in the *Bin Laden v United States* case, the first, and most important challenge for the purposes of the present discussion remains to be considered, that is, the challenge as to jurisdiction.[119] Early in the proceedings, the defendants, and Odeh in particular, challenged the application of various US statutes under which they had been charged. It has already been noted that the indictment included three counts under 18 U.S.C. § 1116 relating to the murder or manslaughter of foreign officials, official guests or internationally protected persons. The jurisdiction of the Court in

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[111] *Infra*.
[112] *Infra*.
[113] *Ibid*, p. 295.
[114] *Infra*.
[115] *Infra*.
[116] *Breard Case*, 1998 *ICJ Rep* 248 (Order for Provisional Measures). See "Agora, *Breard*" 92 *AJIL* 666-712 (1998).
[117] *LaGrand Case*, 1999 *ICJ Rep* 9; 1999 *ICJ Rep* 28 (Orders for Provisional Measures); 2001 *ICJ Rep*(forthcoming) (Judgement of 27 June 2001).
[118] *Avena Case*, 2003 *ICJ Rep* (forthcoming) (Order for Provisional Measures) 2004 *ICJ Rep* (forthcoming) (Judgement of 31 March 2004). See Ghandhi (2005), "Avena and other Mexican Nationals (*Mexico v United States of America*) Judgement of 31 March 2004" 54 *ICLQ* 779.
[119] *United States v Bin Laden* 92 F.Supp.2d. 189 SDNY 13 Mar, 2000.

respect of these counts was not challenged. Indeed, the Court made clear that the extraterritoriality of 18 U.S.C. § 1116 is based on the universality principle.[120] The provision provides for jurisdiction as follows:

> c) If the victim of an offense under subsection (a) is an internationally protected person outside the United States, the United States may exercise jurisdiction over the offense if (1) the victim is a representative, officer, employee, or agent of the United States, (2) an offender is a national of the United States, or (3) an offender is afterwards found in the United States.

However, as has been noted above, these counts related to only two of the deaths in Kenya and no deaths in Tanzania. In essence, the way that the 1973 Convention was incorporated into US law focussed entirely on the character of the victim as an internationally protected person and so did not provide jurisdiction over other offences even where they related to an attack on an embassy premises. Accordingly, in order to ensure that the accused were tried in respect of all of the consequences arising out of the attacks, it was necessary to charge them under "normal" provisions of US law.

Odeh argued that the majority of counts, including, in particular, the counts alleging murder in Kenya and Tanzania, should be dismissed because they concerned acts allegedly committed outside United States territory and were "based on statutes that were not intended by Congress to regulate conduct outside United States territory".[121] The defendants specifically alleged that the following statutes fell into this category: 18 U.S.C. § 930 ("Possession of firearms and dangerous weapons in Federal facilities); 18 U.S.C. § 844 (Penalties for importation, manufacture, distribution and storage of explosive material); 18 U.S.C. § 1111 (Murder); 18 U.S.C. § 2155 (Destruction of national defense materials, premises or utilities); 18 U.S.C. § 1114 (Protection of officers and employees of the United States); 18 U.S.C. § 924(c) (Enhanced punishment for use of firearm); 18 U.S.C. § 114 (Maiming within maritime and territorial jurisdiction).

In assessing the applicability of the relevant statutes, the Court began by considering general principles of extraterritorial application of US law. The Court noted that it is well established that Congress has the power to regulate conduct performed outside US territory,[122] but that Congress is required to manifest a clear intent to do so.[123] Clear manifestation is apparent from "all available evidence about the meaning of the statute" including the text, structure and legislative

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[120] *Ibid*, p. 215. The Court relied on the case of *U.S. v Layton* 509 F.Supp. 212 (N.D.Cal. 1981).
[121] *Ibid*, p. 192.
[122] *Ibid*, p. 193. The Court cited *EEOC v Arabian American Oil Co.* 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d. 274 (1991) in support of this assertion.
[123] *Infra.* See *Sale v Haitian Ctrs. Council Inc.*, 509 U.S. 155,188, 113 S.Ct. 2549, 125 L.Ed.2d. 128 (1993).

history of the statute.[124] The Court also noted the 1922 precedent of *US v Bowman*[125] in which the Supreme Court had provided for an exception to the territoriality of US criminal law in the case of "criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against an obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents".

Odeh argued that *Bowman* was not a controlling precedent because it did not apply to foreign nationals. However, the Court found first that the underlying rationale is not dependent on the nationality of the offender.[126] Secondly, the Court found that the Court of Appeals had previously found the *Bowman* rule to apply so as to reach the conduct of foreign nationals on foreign soil,[127] including in particular the murder or attempted murder of officers and employees of the United States under 18 U.S.C. § 1114.[128]

Finally, on this point, the Court considered the question of jurisdiction over extraterritorial crimes under international law. The Court recognised that international law permits the exercise of extraterritorial jurisdiction on the basis of five principles: (1) the objective territorial principle; (2) the protective principle; (3) the nationality principle; (4) the passive personality principle; and (5) the universality principle. Although asserting that these principles do not limit the power of Congress to override international law and reach extraterritorial conduct,[129] the Court noted that US courts would "typically pause to note that [a finding of exterritoriality] is consistent with one or more of the five principles of jurisdiction under international law".[130] The Court, in pausing to consider this matter in the present case, concluded:

> The *Bowman* rule would appear to be most directly related to the protective principle, which as noted, explicitly authorizes a state's

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[124] *Infra*. See *Smith v United States*, 507 U.S. 197, 201-203, 113 S.Ct. 1178, 122 L.Ed.2d. 548 (1993).

[125] *U.S. v Bowman* 260 U.S. 94, 43 S. Ct. 39.

[126] *Bin Laden*, 92 F.Supp.2d. 189 at p. 194. The Court paraphrased the position of the Supreme Court in *Bowman*, *op cit*, at p. 98 as follows: "to limit [a statute's coverage to United States national] would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed [by foreign national] as [by United States nationals]."

[127] See *United States v Pizzarusso*, 338 F.2d. 8, 9 (2nd Cir) *cert denied*, 392 U.S. 936, 88 S.Ct. 2306, 20 L.Ed.2d. 1395 (1968); *United States v Larsen* 952 F.2d. 1099, 1101 (9th Cir. 1991); *United States v Wright-Barker*, 784 F.2d. 161, 167 (3rd Cir. 1986); *United States v Orozco-Prada*, 732 F.2d. 1076, 1088 (2nd Cir), *cert denied* 469 U.S. 845, 105 S. Ct. 154, 83 L.Ed.2d. 92 (1984); *United States v Benitez*, 741 F.2d. 1312, 1317 (11th Cir. 1984), *cert denied* 471 U.S. 1137, 105 S.Ct. 2679, 86 L.Ed.2d. 698 (1985); *United States v Zehe*, 601 F. Supp. 196, 200 (D. Mass. 1985).

[128] See *Benitez*, 741 F.2d. at p. 1317.

[129] See, for example, *United States v Younis*, 924 F.2d. 1086, 1091 (D.C.Cir. 1991).

[130] *Bin Laden*, 92 F.Supp.2d. 189 at p. 196.

> exercise of jurisdiction over "conduct outside its territory *by persons not its nationals*." (Restatement [(Third) of the Foreign Relations Law of the United States] § 402(3)). Hence an application of the *Bowman* rule that results in the exterritorial application of a statute to the conduct of foreign nationals is consistent with international law. Therefore, it is not surprising that the lower courts have shown no hesitation to apply the *Bowman* rule in cases involving foreign defendants.[131]

It is rather surprising that the Court did not consider more fully the limitations on the exercise of the protective principle that the Restatement included in its enunciation of the principle. In particular, the American Law Institute, which drafted the Restatement, expressed the commonly held view that the principle was limited to matters "directed against the security of the state or other offenses threatening the integrity of governmental functions that are generally recognised as crimes by developed legal systems".[132] The American Law Institute envisaged acts such as "espionage, counterfeiting of the state's seal or currency, falsification of official documents as well as perjury before consular officials, and conspiracy to violate the immigration or customs law",[133] as falling within the protective principle. However, the Court appeared to take the view that because the severity of the crimes of which Odeh was accused were more serious than those listed in the Restatement, the protective principle should apply simply because they occurred in the course of an attack against a US diplomatic mission.

This point is illustrated by the Court's discussion of two of the provisions on which the accusations against Odeh and his co-accused were predicated. The first concerns 18 U.S.C. 844(f)(1) which provides that "whoever maliciously damages or destroys, or attempts to damage or destroy by means of fire or an explosive, any building, vehicle, or other personal or real property in whole or in part owned or possessed by, or leased to the United States, or any department or agency thereof, shall be imprisoned for not less than 5 years, and not more than 20 years, fined under this title or both". Odeh argued that this provision, along with the others he challenged, were "inherently domestic, bereft of any reference to extraterritorial acts and lacking any connection to international activities".[134] However, the Court found to the contrary, holding that: "Given (i) that this provision is explicitly intended to protect United States property, (ii) that a significant amount of United States property is located outside the United States, and (iii) that accordingly, foreign nationals are in at least as good a position as are United States nationals to damage such property, we find under *Bowman* that Congress intended Section 844(f)(1) to apply exterritorialy – irrespective of the nationality of the perpetrator."[135]

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[131] *Infra*.
[132] Restatement § 402, Comment (f) at p. 240.
[133] *Infra*.
[134] *Bin Laden* 92 F.Supp.2d. 189 at p. 197.
[135] *Ibid*, at p. 198.

The majority of the charges against Odeh and his co-accused, which related to the murders of 244 individuals in Kenya and 11 individuals in Tanzania, were predicated on 18 U.S.C. § 930(c). Section 930(c) provides that "[a] person who kills or attempts to kill any person in the course of a violation of subsection (a) and (b), or in the course of an attack on a Federal facility involving the use of a firearm or other dangerous weapon shall be punished [as further provided]". Using the same reasoning as it had used in relation to section 844(f)(1), the Court concluded as follows:

> Given (i) that this provision is explicitly intended to protect vital United States interests, (ii) that a significant number of Federal facilities are located outside the United States, and (iii) that accordingly, foreign nationals are in at least as good a position as are United States nationals to attack Federal facilities, we find under *Bowman* that Congress intended this provision to apply exterritorialy – irrespective of the nationality of the perpetrator.[136]

The Court ultimately found, in reliance on the *Bowman* rule, that "Congress intended each of the following provisions to reach conduct by foreign nationals on foreign soil: 18 U.S.C. § 844 (f)(1), (f)(3), (h) and (n); 18 U.S.C.§ 924(c); 18 U.S.C. § 930(c); 18 U.S.C. § 1114; and 18 U.S.C. § 2155".[137]

It is interesting to note that, although the Court was able to find that the accused could be tried for murders committed in the attack against the US Embassies, it held that the charges indicting Odeh and others for murders and maiming on the Embassy premises themselves should be dismissed. These charges, which were premised on 18 U.S.C. § 1111 and § 114 respectively are limited to acts "committed within the special maritime and territorial jurisdiction of the United States". In a lengthy section of its judgement, the Court found that United States embassies did not constitute places falling within the special maritime and territorial jurisdiction of the United States as defined in 18 U.S.C. § 7(3). In reaching its decision, the Court disagreed with the decision of the Fourth Circuit in *United States v Erdos*[138] in which the Court had allowed jurisdiction in respect of the murder by an American citizen of another American citizen on the premises of the United States Embassy in Equatorial Guinea.[139] This must be a correct conclusion given the demise of the "exterritoriality" theory as a juridical basis of diplomatic law as discussed in Chapter 3.

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[136] *Ibid*, pp. 201-2.
[137] *Ibid*, p. 198.
[138] *U.S. v Erdos* 474 F.2d. 157 (4th Cir.) *cert denied* 414, U.S. 876 , 94 S.Ct. 42, 38 L.Ed.2d. 122 (1973).
[139] For a critique of the decisions of the Fourth Circuit in *Erdos*, see Paust (1999), "Non-Extraterritoriality of 'Special Territorial Jurisdiction' of the United States: Forgotten History and the Errors of *Erdos*" 24 *Yale Journal of International Law* 305. It is worth noting that this aspect of the decision in *Bin Laden* has itself been called into question in a subsequent decision in *U.S. v Gatlin* 216 F.3d. 217 C.A.2 (N.Y.), 2000.

In arguing in favour of the application of Section 1111, the US government had contended that the inviolability of a diplomatic mission allowed for concurrent jurisdiction between the sending and receiving states over mission premises. In support of this argument, the government quoted the American Law Institute's Restatement to the effect that: "Inviolability and the sovereign immunity of the sending state from adjudication and judicial enforcement, largely immunize the premises from the exercise of jurisdiction by the receiving state to adjudicate or enforce law without the consent of the sending state."[140] However, the Court pointed out that the point was undermined by the rest of the Restatement on this matter which declares: "That premises are inviolable does not mean that they are extraterritorial. Acts committed on those premises are within the territorial jurisdiction of the receiving state, and the mission is required to observe local law."[141]

The irony of this situation was apparently lost on the Court which was quite happy to hold that the dismissal of these counts of the indictment "will not significantly diminish the Government's ability to prosecute the conduct alleged in this case … the exterritorial application [of other statutes] is justified by the protective principle – to reach all of the deaths caused by the two embassy bombings".[142] It is submitted, however, that the pre-eminent territorial jurisdiction of the receiving state, which the Court was willing to accept had the effect of overruling the attempted exercise of territorial jurisdiction of the sending state in relation to Section 1111, should have at least the same effect in relation to the purported exercise of extraterritorial jurisdiction of the sending state in relation to territory which could not even remotely be considered to be within the territorial jurisdiction of that state. The protective principle has traditionally been regarded as a subsidiary basis for the exercise of jurisdiction, one which is secondary to the territoriality of the state in which the offence is committed. In the present case, it is unclear whether Kenya and Tanzania objected to the exercise of jurisdiction by the United States. This matter was certainly not considered by the Court in *Bin Laden* which was clearly persuaded by the considerable, and increasing, acceptance by US courts of the exercise of extraterritorial jurisdiction based on the *Bowman* principle. Nevertheless, it cannot be denied that *Bin Laden* concerned a wide range of statutes, only one or two of which had previously been considered in relation to their extraterritorial effect. States have not been slow in the past to protest at attempts by the United States to extend the extraterritorial application of their domestic law, particularly in relation to civil law matters.[143] Nevertheless, the fact that few states protested against the exercise of US jurisdiction in the present case is evidence of the fact that states understand the difficulties faced by receiving states in prosecuting criminal acts committed against foreign establishments on

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[140] Restatement § 466. Quoted in *Bin Laden*, 92 F.Supp.2d. 189 at p. 213.
[141] *Infra*.
[142] *Ibid*, p. 215.
[143] For a detailed examination of the response of states to the exercise of extraterritorial jurisdiction by the United States in economic matters, see Shaw (2003), *International Law* (5th Ed.) (Cambridge University Press, Cambridge), pp. 611-20.

their territory, particularly in relation to the problem of terrorism. Thus, according to Shaw, "[the protective principle] exists partly in view of the insufficiency of most municipal laws as far as offences against the security and integrity of foreign states are concerned".[144]

The four defendants in *Bin Laden* were found guilty on all counts on 29 May 2001. All four were sentenced to life imprisonment without parole. Two of the defendants who had faced the death penalty were spared that particular sentence, but all will spend the rest of their lives in prison in the United States.

5.3.2 The British Extradition Cases

In July 1999, two of the suspects in the Embassy bombings, Ibrahim Hussein Abdel Hadi Eidarous and Adel Mohammed Abdel Almagid Bary, were arrested in London at the request of the United States on a charge of conspiracy to murder. They were subjected to extradition proceedings on 12 July 1999 and were committed to prison pending extradition. A third suspect, Khalid Al-Fawwaz, was arrested in September 1999. He too was committed to prison awaiting extradition. Al-Fawwaz immediately applied for writ of habeas corpus which would have brought about his release from prison. The Divisional Court refused the application on 30 November 2000.[145] Eidarous and Abdel Bary both subsequently had their applications for habeas corpus refused by the Divisional Court on 2 May 2001[146] relying on the decision in the Al-Fawwaz case. The three made further appeals to the House of Lords which heard the cases together. The House of Lords dismissed the appeals on 17 December 2001.[147]

In light of the examination of the question of extraterritorial jurisdiction in the *Bin Laden* case above, it is worth briefly examining both the decision of the Divisional Court in *Al-Fawwaz* and that of the House of Lords. In the Divisional Court, Al-Fawwaz complained that the alleged acts of which he was accused had not been committed within the jurisdiction of the United States and so were not subject to extradition in terms of the Extradition Act 1989. The Divisional Court undertook a lengthy examination of the meaning of jurisdiction within the terms of Schedule I of the 1989 Act. Ultimately, the Court held that "in cases governed by Schedule 1 to the 1989 Act the extradition crime has to be committed within the territory of the requesting state so that it would, as transposed, be committed within the territory of England and Wales".[148] The Court did recognise the difficulty of adhering to such a position in modern circumstances, but it was not prepared to

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[144] Shaw, *op cit*, p. 592.
[145] *Regina (Al-Fawwaz) v Governor of Brixton Prison and another* [2001] 1 WLR 1234.
[146] *Eidarous v Governor of Brixton Prison; Abdel Bary v Governor of Brixton Prison,* unreported. See 2001 WL 415460.
[147] *Regina (Al-Fawwaz) v Governor of Brixton Prison and another; Regina (Eidarous) v Governor of Brixton Prison and another; Regina (Abdel Bary) v Governor of Brixton Prison and another* [2002] 1 A.C. 556, [2002] 1 All E.R. 545, [2002] 2 W.L.R. 101.
[148] *Regina (Al-Fawwaz) v Governor of Brixton Prison and another* [2001] 1 WLR 1234, at p. 1244.

question its understanding of the current state of the law. Thus, according to the Court: "Whether this is a sensible rule in a world of major international crime and of the regular passage of persons involved in such crime between different jurisdictions is no doubt not for us to say." On the other hand, almost as if to make up for the effect of its decision on the question of jurisdiction, the Court did find that certain of the acts alleged in the conspiracy to murder had in fact taken place in the United States.[149] On this basis, the Divisional Court allowed the extradition to proceed.

In the House of Lords, the issue of extraterritorial jurisdiction was again argued. The House of Lords overturned the decision of the Divisional Court in this respect holding ultimately that that the term "jurisdiction" in the definition of "fugitive criminal" in paragraph 20 of Schedule 1 to the Extradition Act 1989 referred to territorial and extraterritorial jurisdiction rather than the territory of the requesting state. In its pleadings before the House, the United States had referred specifically to the Internationally Protected Persons Act 1978 which had incorporated the 1973 Convention into UK law, declaring that: "The Internationally Protected Persons Act 1978 and article 8 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons are in identical terms. The clear purpose of the Internationally Protected Persons Act in its long title would be frustrated on the applicants' interpretation."[150] This argument, and the argument relating to the impact of transnational crime which had concerned the Divisional Court, appeared to persuade their lordships. Thus, Lord Slynn, who noted that the wording of the relevant section of the 1989 Act was identical to the wording of an earlier statute, the Extradition Act 1870 which it had replaced, was of the opinion that:

> When the 1870 Act was passed crimes were no doubt largely committed in the territory of the state trying the alleged criminal but that fact does not, and should not, mean that the reference to the jurisdiction is to be so limited. It does not as a matter of the ordinary meaning of the words used. It should not because in present conditions it would make it impossible to extradite for some of the most serious crimes now committed globally or at any rate across frontiers. Drug smuggling, money laundering, the abduction of children, acts of terrorism, would to a considerable extent be excluded from the extradition process. It is essential that that process should be available to them. To ignore modern methods of communication and travel as aids to criminal activities is unreal. It is no less unreal to ignore the fact that there are now many crimes where states

[149] The acts relied on by the United States government, and accepted by the Divisional Court, as establishing a conspiracy were the setting up of a secure telephone line in the United States and purchasing a satellite telephone system there, and concurrence in the issuing in various countries including the United States of fatwahs or rulings exhorting the pursuit of jihad or holy war.

[150] *Regina (Al-Fawwaz) v Governor of Brixton Prison and another* [2002] 2 W.L.R. 101, at p. 564.

> assert extraterritorial jurisdiction, often as a result of international conventions.[151]

Lord Slynn ultimately took the view that extradition was permissible in respect of the extraterritorial crime of conspiracy to commit murder: "There is no doubt that conspiracy to murder is a crime within the jurisdiction of the United States and that if the acts were done here it would constitute the crime of conspiracy to murder under English law. In my opinion it was not necessary to show that the acts relied on for the conspiracy were all done in the United States of America, or that enough of them were done to ground jurisdiction."[152]

Although not directly referring to the *Bin Laden* case, the decision in that case was endorsed by Lord Hutton who noted that: "It is not in dispute that the court in the United States of America has extraterritorial jurisdiction under United States law to try the charge of conspiracy against the applicants notwithstanding that the conspiracy to murder was entered into outside the United States of America and that no overt acts by the applicants in pursuance of conspiracy may have been committed within the territory of the United States of America."[153] Lord Hutton, as with Lord Slynn, was persuaded by the problem of dealing with international terrorism:

> My Lords, I consider that the submissions advanced on behalf of the applicants should not be accepted. My principal reason for forming this opinion is that in the modern world of international terrorism and crime proper effect would not be given to the extradition procedures agreed upon between states if a person accused in a requesting state of an offence over which that state had extraterritorial jurisdiction (it also being an offence over which the requested state would have extraterritorial jurisdiction) could avoid extradition on the ground that the offence was not committed within the territory of the requesting state. In my opinion a court should not construe a statute or a treaty to have such an effect unless the wording compels it to do so.[154]

The three remaining lordships all agreed with the reasoning of Lords Slynn and Hutton.[155]

It is, of course, worth pointing out that the accused were charged with the crime of conspiracy to murder. Had they been charged with the crime of murder itself, the House of Lords would have had considerably more difficulty in permitting the extradition to proceed. The point, however, is that the House of Lords was able to accept that conspiracy to murder committed abroad was subject

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[151] *Ibid*, p. 573.
[152] *Ibid*, pp. 574-5.
[153] *Ibid,* pp. 578-9.
[154] *Ibid*, pp. 580-1.
[155] See Lord Millett, *ibid*, pp. 592-7; Lord Scott of Foscote, *ibid,* pp. 597-9; Lord Rodger of Earslferry, *ibid*, pp. 599-614.

not only to US jurisdiction but also to UK jurisdiction. Operation of the speciality rule will ensure that the three accused will not be triable for many of the crimes of which the four accused in *Bin Laden* were convicted without the consent of the British government.

Two of the accused who were the subject of the extradition proceedings referred to above remain in custody in the United Kingdom while legal challenges to their extradition continue. One of the accused, Eidarous, was diagnosed with advanced leukaemia in July 2004 and was released and allowed to return home.

5.4 The Relevance and Effect of the 1973 Convention

The successful prosecution of four defendants for the attacks on the East African Embassies is undoubtedly to be welcomed. The possible future extradition from the United Kingdom of two more defendants to stand trial in the United States on charges of conspiracy to murder is, again, a positive development in the fight against terrorism generally and the protection of diplomats more specifically. A number of other indictees remain at large, including Bin Laden himself. Accordingly, future prosecutions may well follow in due course. However, it has been highlighted in this discussion that the current law relating to the protection of diplomatic personnel played only a very small part in the proceedings. Kenya and Tanzania were, unsurprisingly, unable to fulfil their stated obligations under the 1961 Vienna Convention to provide for the special protection of US diplomatic personnel within their borders. The 1973 Convention, although referred to in both the proceedings in the United States and the United Kingdom, did not provide the immediate and necessary jurisdiction in respect of the crimes that the drafters of the Convention might have expected. While the Convention may well prove useful in terms of attacks on individual diplomats, its relevance and effect in relation to major attacks of the type seen in East Africa is, at best, peripheral.

Chapter 6

Protecting Diplomatic Personnel in an Age of Terror – The Necessity of a Multi-faceted Approach

This analysis has so far focussed on the specific rules of international law providing for the protection of diplomatic personnel, most notably in the form of the Vienna Convention on Diplomatic Relations 1961, the Vienna Convention on Consular Relations 1963 and the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents. While these measures are well intentioned and, in the case of the two Vienna Conventions at least, based on long-established and well-observed rules of international law, they have proved to be insufficient, in and of themselves, as a means of providing protection to diplomatic personnel against terrorist attacks. The problem of terrorism has in the past been approached by international lawyers on the basis of specific anti-terrorism regimes, of which the 1973 Convention is an example. However, as highlighted in the previous chapter, such regimes have met with limited success. John Grant has recently pointed out that terrorism is a multi-faceted problem which needs to be tackled through a multi-faceted approach.[1] Grant's analysis related specifically to the Montreal Convention on the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971.[2] He argues that the difficulty of dealing with the destruction on Pan Am 103 over Lockerbie in 1988 was alleviated not simply by relying on the Convention but also as a result of initiatives of the UN's Sixth Legal Committee, the UN Security Council and the work of the British and Dutch governments in bringing about the establishment of a Scottish Criminal Court in The Hague. A similar multi-faceted approach is apparent in the recent attempts to deal with the problem of attacks on diplomatic personnel. As with the problem of the destruction of civilian aircraft, this approach has been occasioned through the development of a broader approach to the problem of international terrorism rather then through focus on the specific problem.

[1] See John P. Grant (2004), "Beyond the Montreal Convention" 36 *Case Western Reserve Journal of International Law* 453, at p. 472.
[2] 974 *UNTS* 177.

6.1 International Measures Dealing with the Problem of Terrorism

The problem of terrorism and how to deal with it has been of concern to international lawyers since the early 1970s. Although the League of Nations had attempted to draft a Convention for the Prevention and Punishment of Terrorism in 1937, the treaty received only one ratification and its progress was halted by the approach of the war.[3] The 1960s saw the start of a process focussing on the criminalisation of designated acts of terrorism, beginning with acts directed against civilian aircraft.[4] Indeed, the 1973 Convention was the fourth "terrorism" convention. The drafters of the early conventions had eschewed direct reference to the word terrorism in light of the chequered history of the international community in dealing with the problem and the ideological problems inherent in the use of the term.[5] However, at the same time as dealing with the problem of attacks on internationally protected persons, the Sixth Committee of the United Nations General Assembly was asked to consider "measures to prevent terrorist and other forms of violence which endanger or take innocent human lives or jeopardize fundamental freedoms". The Sixth Committee had before it a Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism prepared by the United States,[6] as well as a study on international terrorism prepared by the Secretariat.[7] The terms of the Draft Convention were debated at the Sixth Committee in 1972.[8] However, progress on the matter was frustrated by ideological differences between Western states that wished for a wide-ranging and comprehensive convention and developing states that wished "to resist any international restrictions on the methods of violence open to liberation movements

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[3] Article 1 of the Draft Convention defined acts of terrorism as "criminal acts directed against a state and intended to create a state of terror in the minds of particular persons or a group of persons or the general public". Article 2 then required each contracting party to make unlawful in their own territory the following acts if directed against another contracting party: "(1) Any wilful act causing death or grievous bodily harm or loss of liberty to heads of state, their spouses, or persons holding a public position when the act is directed against them in their public capacity …" Although not as precise as the 1973 Convention in terms of its focus, the Draft Terrorism Convention was clearly intended to cover attacks on diplomatic personnel who would have come within the category of persons holding a public position. Dugard (1974), "International Terrorism: Problems of Definition" 50 *International Affairs* 67. See also Franck and Lockwood (1974), "Preliminary Thoughts Towards an International Convention on Terrorism" 68 *AJIL* 69, pp. 69-70.

[4] See the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963, *op cit*, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970, *op cit*, and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971, *op cit*.

[5] For a brief discussion of the development of terrorism during the twentieth century, see Guillaume (2004), "Terrorism and International Law" 53 *ICLQ* 537, p. 538.

[6] (1972) 67 *Dept of State Bulletin* 431.

[7] GAOR, 27th Session, 6th Committee, A/C 6/418 of 2 November 1972.

[8] GAOR, 27th Session, 6th Committee, A/C 6/SR 1355-1374.

in the guise of an anti-terrorism convention".[9] Furthermore, it has been asserted that the Arab nations, in particular, insisted "that terrorism was to be seen as a response to governmental terror and injustice".[10] Instead of moving to enact a draft convention, the Sixth Committee recommended that the General Assembly should establish an Ad Hoc Terrorism Committee, which it did on 18 December 1972, comprising 35 members.[11] The Ad Hoc Committee met in July and August 1973 but was unable to agree a common position.

Accordingly, those states seeking to deal with terrorism through international measures were forced to continue to enact specific conventions dealing with acts around which they were able to develop a consensus. The first such convention to be enacted after 1973 was the 1979 Convention Against the Taking of Hostages.[12] The Convention provides in Article 1 as follows:

> Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention.

The Convention provides also for the attempted hostage-taking and participation as an accomplice to be offences under the Convention.[13] However, according to Article 13 of the Convention the offence must be of an international character. Thus, Article 13 specifically provides that the Convention "shall not apply where the offence is committed within a single state, the hostage and alleged offender are nationals of that state and the offender is found on the territory of that state". In respect of international "hostage-taking", as defined in the Convention, the mechanism of the Convention is similar to the 1973 Convention in that it requires states parties to make the offences punishable under their own laws by appropriate penalties. Each state party must assume jurisdiction over the offence of "hostage-taking" committed in its territory or on board its ships and aircraft; by its residents or habitually resident stateless persons; done in order to compel that state to do or abstain from doing any act; and with respect to a hostage who is a national of that state, if considered appropriate.[14] Any state party may take into custody an alleged offender present in its territory and if it does, it must investigate the facts and notify the Secretary-General of the UN and a representative of the state of which

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[9] Dugard (2005), "The Problem of the Definition of Terrorism in International Law" in Eden and O'Donnell (eds) *September 11 2001: A Turning Point in International and Domestic Law?* (Transnational Publishers, Inc, Ardsley, NY, 2005) at p. 192.
[10] *Infra.*
[11] UNGA Resolution 3034 (XXVIII).
[12] 1316 *UNTS* 205.
[13] *Ibid*, Article 1(2).
[14] *Ibid*, Article 5.

the alleged offender is a national.[15] In terms of Article 8 of the Convention, the state in which the alleged offender is found is required, if it does not extradite him, to submit the case to its competent authorities for the purpose of prosecution. Although the problem of kidnapping of diplomatic personnel remained rife at the time of the negotiation of the 1979 Convention, it adds little to the 1973 Convention and, accordingly, requires no further analysis.

Other anti-terrorism conventions followed but these too related to specific problems, none of which were directly relevant to the problem of the protection of diplomatic personnel.[16] In 1994 the UN General Assembly adopted a Declaration on Measures to Eliminate International Terrorism.[17] The Declaration, which was adopted without a vote, reaffirmed the "unequivocal condemnation" by all members of the UN "of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among states and peoples and threaten the territorial integrity and security of states".[18] It would seem likely that specific reference in paragraph 1 of the resolution to acts "which jeopardize the friendly relations among states and peoples" would encompass attacks against diplomatic personnel. The Declaration went on to provide that "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or

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[15] *Ibid*, Article 6.

[16] The twelve conventions which make up the UN's so-called anti-terrorism regime are the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963 (704 *UNTS* 219); the Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970 (860 *UNTS* 105); the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971 (974 *UNTS* 177); the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents 1973 (1035 *UNTS* 167); the International Convention against the Taking of Hostages 1979 (1316 *UNTS* 205); the Convention on the Physical Protection of Nuclear Material 1980 (1456 *UNTS* 246); the Protocol to the Montreal Convention for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation 1988 (1589 *UNTS* 474); the Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988 (1678 *UNTS* 221); the Protocol to the Rome Convention for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf 1988 (1678 *UNTS* 304); the Convention on the Marking of Plastic Explosives for the Purpose of Detection 1991 (30 *ILM* 721 (1991)); the International Convention for the Suppression of Terrorist Bombings 1997 (37 *ILM* 249 (1998)) and the International Convention for the Suppression of the Financing of Terrorism 1999 (39 *ILM* 268 (2000)). A further convention, the International Convention for the Suppression of Nuclear Terrorism 2005 was adopted by the General Assembly in Resolution 59/290 on 13 April 2005. The treaty will be open for signature between 14 September 2005 and 31 December 2006 and will enter into force 30 days after being ratified by the twenty-second party (Article 25). All thirteen conventions appear at http://untreaty.un.org/English/Terrorism.asp. See also Grant and Barker (2004), *Parry & Grant Encyclopaedic Dictionary of International Law* (2nd Ed.) (Oceana Publications, Dobbs Ferry, NY) sub-nom terrorism, pp. 502-3.

[17] UNGA Resolution 49/60.

[18] *Ibid*, paragraph 1.

particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them".[19] It also called upon states to "review urgently the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism in all its forms and manifestations, with the aim of ensuring that there is a comprehensive legal framework covering all aspects of the matter;" and "urged states that had not yet done so to consider, as a matter of priority, becoming parties to the international conventions and protocols relating to various aspects of international terrorism referred to in the preamble to the present Declaration". That the conventions referred to in the Preamble included the 1973 Internationally Protected Persons Convention goes without saying. Clearly the Declaration went well beyond any previous attempt to deal with the problem of terrorism at a general and global level. However, the Declaration was adopted by a resolution of the UN General Assembly, and it, together with subsequent resolutions calling upon states to ratify the various anti-terror conventions, cannot be considered to be legally binding.[20]

Nevertheless, the Declaration appeared to mark a turning point in the attitude of states towards the question of how to deal with the problem of terrorism. As states began increasingly to ratify the specific terrorism conventions, the possibility of developing a more generalised approach to the problem solidified. In 1996, the General Assembly reacted to this new consensus by passing resolution 51/210 entitled Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism.[21] The resolution recalled the 1994 Declaration and again called upon states to ratify the various anti-terrorism conventions, including the 1973 Convention. The most important provision in the resolution is to be found in paragraph 9 by virtue of which the General Assembly indicated its decision to establish an Ad Hoc Committee on Terrorism "to elaborate an international convention for the suppression of terrorist bombings and, subsequently, an international convention for the suppression of acts of nuclear terrorism, to supplement existing international instruments, and thereafter to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism".[22]

The work of the Ad Hoc Committee produced quick results with the promulgation in 1997 of a Draft International Convention for the Suppression of Terrorist Bombings which was adopted by the General Assembly in Resolution

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[19] *Ibid*, paragraph 3.

[20] The UN General Assembly regularly calls in its biannual resolution on the topic of the "Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives" for states to ratify the two Vienna Conventions on Diplomatic Relations and Consular Relations and the 1973 Internationally Protected Persons Convention. See discussion of UN Reporting Mechanism below.

[21] See Dugard (2005), "The Problem of the Definition of Terrorism in International Law", *op cit*, p. 195.

[22] UNGA Resolution 51/210, paragraph 9.

52/164 on 15 December 1997. Unlike the majority of the more specialist anti-terrorism conventions, the Terrorist Bombings Convention has the potential of impacting upon the question of the protection of diplomatic personnel and requires some further analysis at this point.

6.2 The International Convention for the Suppression of Terrorist Bombings 1997

Article 2(1) of the Convention provides as follows:

> Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a state or governmental facility, a public transportation system or an infrastructure facility:
> (a) With the intent to cause death or serious bodily injury; or
> (b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.

Attempts to commit such an offence and complicity in the commission of such an offence are covered in Articles 2(2) and 2(3) respectively. A state or governmental facility is defined in Article 1(1) as including "any permanent or temporary facility or conveyance that is used or occupied by representatives of a state, members of government, the legislature or the judiciary or by officials or employees of a state or any other public authority or entity or by employees or officials of an intergovernmental organisation in connection with their official duties". Offences are required to be international in character to fall within the scope of the Convention (Article 3) and Article 4 requires that states parties are to establish the offences as criminal offences under their domestic law and are required to provide for appropriate penalties. Article 5 provides that offences under the Convention "are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature".

States parties are required to take jurisdiction within their domestic law over relevant offences when the offence is committed in the territory of that state or on board one of its vessels or aircraft or where the offence is committed by a national of that state (Article 6(1)). A state may also establish its jurisdiction over offences under the Convention where the offence is committed against a national of that state or is committed by a stateless person who has habitual residence in that state; or where the offence is committed to compel that state to do or abstain from doing any act or where the offence is committed on board an aircraft which is operated by that state (Article 6(2)). Article 6(2)(b) is of particular relevance to the present discussion and provides that a state may establish jurisdiction where "the offence is committed against a state or governmental facility of that state abroad, including an embassy or other diplomatic or consular premises of that State". Article 6(4)

requires a state party to establish its jurisdiction over relevant offences where the offender is present in its territory and the state does not extradite the alleged offender to any of the states parties who have established jurisdiction in accordance with Articles 6(1) and 6(2).

Article 7 requires a state party on whose territory an alleged offender is found to take such measures as may be necessary to investigate the facts of the offence and to secure the alleged offender for the purposes of prosecution or extradition. Article 8 provides that a state party on whose territory the alleged offender is found, where it does not extradite that person is required "without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that state". It can be seen from this brief survey of the provisions of the Convention that they mirror the relevant provisions of the existing anti-terrorism conventions, some of which were discussed above.

That the Convention covers terrorist bombings against diplomatic and consular premises is established in Article 1(1) and in Article 6(2)(b). To that extent the Convention may well have proved useful to the United States prosecuting authorities in the *Bin Laden* case. However, the Convention did not enter into force until 23 May 2001. Furthermore, the Convention was not ratified by the United States until 26 June 2002. Ratification of the Convention by the United States was achieved as a result of the enactment of the Terrorist Bombings Implementation Act 2002.[23] The Act amended U.S.C. Chapter 18 and introduced a number of new sections including section 2332f which provides in part that: "Whoever unlawfully delivers, places, discharges, or detonates an explosive or other lethal device in, into, or against a place of public use, a state or government facility, a public transportation system, or an infrastructure facility-- (A) with the intent to cause death or serious bodily injury, or (B) with the intent to cause extensive destruction of such a place, facility, or system, where such destruction results in or is likely to result in major economic loss, shall be punished as prescribed in subsection (c)."[24] Paragraph (b)(2) of section 2332f specifically provides jurisdiction "where the offence takes place outside the United States and the offence is directed against a state or governmental facility of the United States, *including an embassy or other diplomatic or consular premises of the United States*".[25] It seems clear that this new provision, had it been in effect at the time of the East African bombings, would have avoided the need for the lengthy discussions undertaken in the *Bin Laden* jurisdiction case. To that extent, it may well be correct to say that the 1997

[23] An Act to implement the International Convention for the Suppression of Terrorist Bombings to strengthen criminal laws relating to attacks on places of public use, to implement the International Convention for the Suppression of the Financing of Terrorism, to combat terrorism and defend the Nation against terrorist acts and for other purposes, Public Law 107-197.

[24] 18 U.S.C. 2332f(a).

[25] 18 U.S.C. 2332f(b)(2)(E) (italics added).

Convention is of considerably more importance to the question of the protection of diplomatic personnel than the 1973 Convention ever was.

The United Nations General Assembly's Ad Hoc Committee on Terrorism has successfully promulgated two further conventions, on the Financing of Terrorism in 1999 and on Nuclear Terrorism in 2005.[26] The 1999 International Convention for the Suppression of the Financing of Terrorism[27] may well prove to have the most significant impact of all of the terrorism conventions on the problem of the protection of diplomatic personnel. However, given that the Convention does not deal directly with the problem of the protection of diplomatic personnel or related matters, it will not be considered at length in this work.[28]

6.3 The Proposed Comprehensive Terrorism Convention

The UN General Assembly's Ad Hoc Committee on Terrorism[29] has more recently been working on the drafting of a comprehensive terrorism convention. India submitted a working document to the Committee in 2000,[30] which has formed the basis of a draft of the proposed convention. Offences under the convention are defined in proposed Article 2(1) as follows:

> Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally causes:
> (a) Death or serious bodily injury to any person; or
> (b) Serious damage to public or private property, including a place of public use, a state or governmental facility, a public transportation system, an infrastructure facility or the environment; or
> (c) Damage to property; places, facilities, or systems referred to in paragraph 1(b) of this article, resulting or likely to result in major economic loss,
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> when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a government or international organization to do or abstain from doing any act.

The rest of the proposed convention then follows the now familiar pattern of requiring offences to be criminalised within the domestic law of states parties and providing for the taking of jurisdiction by states parties on the same basis as under

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[26] The International Convention for the Suppression of Nuclear Terrorism was adopted in GA Resolution 59/290 of 13 April 2005. It was opened for signature on 14 September 2005.
[27] 39 *ILM* 268 (2000).
[28] For a detailed and up-to-date discussion of the Convention and the impact of subsequent measures such as the financial aspects of Security Council Resolution 1373 and the role of the Financial Action Task Force, see Eden "International Measures to Prevent and Suppress the Financing of Terrorism" in Eden and O'Donnell (eds), *op cit*, p. 647.
[29] The Ad Hoc Committee on Terrorism wesite can be found at http://www.un.org/law/terrorism/index.html.
[30] UN Doc A/C.6/55.1.

the 1997 Terrorist Bombings Convention. As with the 1997 Convention, the proposed comprehensive terrorism convention provides that states may establish jurisdiction in respect of offences "against a state or governmental facility of that state abroad, including an embassy or other diplomatic or consular premises of that state".[31] Insofar as the proposed convention is not limited to terrorist bombings, it will cover other forms of attacks against diplomatic personnel and will facilitate the prosecution of offenders who commit a single act of violence against a diplomat or consular officer where such an attack falls within the definition of a terrorist offence. The relationship between the proposed convention and existing terrorist conventions is governed by proposed article 2 *bis* which provides as follows:

> Where this Convention and a treaty dealing with a specific category of terrorist offence would be applicable in relation to the same act as between states that are parties to both treaties, the provisions of the latter shall prevail.

Accordingly, in any conflict between the proposed new conventions and the 1973 Convention, the 1973 Convention will apply. However, given the limitations of the 1973 Convention referred to above, it is likely that the proposed conventions will serve to fill in some of the gaps in that convention which have not already been filled by the 1997 Terrorist Bombings Convention.

The Ad Hoc Committee has been working on the draft articles for a number of years but a final set of articles has yet to be agreed. The reasons for this failure to agree a comprehensive terrorism convention are many. It is commonly asserted that the problem remains the definition of terrorism. However, given the similarity between the wording of proposed Article 2(1) and earlier conventions such as the 1997 Terrorist Bombings Convention, this reason may be somewhat overstated. The relationship between the proposed convention and the earlier anti-terrorism conventions remains problematic in spite of proposed Article 2 *bis* quoted above. Dugard has suggested that the main problem lies with proposed Article 18 of the draft conventions which excludes from its operations the activities of armed forces of states. Whatever the reason for the delay in agreeing a final text, it is probably simply a matter of time before a comprehensive terrorism convention becomes a reality.

As and when the comprehensive terrorism convention is enacted, the combination of the 1973 Convention, the 1997 Convention and the new convention will provide a broad framework for the prosecution of offences against diplomatic personnel in domestic courts, at least insofar as such offences can be designated as terrorist acts. "Ordinary" attacks against diplomatic personnel will continue to fall within the jurisdiction of the receiving state which is required to provide for the special protection of diplomatic personnel in terms of the Vienna Convention on

[31] Proposed Article 6(2)(d).

Diplomatic Relations 1961 and the Vienna Convention on Consular Relations 1963.

6.4 The Role of the United Nations Security Council

The events of 11 September 2001 occasioned another major development in the United Nations' efforts to deal with the problem of terrorism. On 28 September 2001, the United Nations Security Council passed Resolution 1373. By virtue of paragraph 6 of the resolution, the Security Council established a Counter-Terrorism Committee (CTC) which was charged with monitoring the implementation of the resolution. The Security Council then called upon all states to report to the CTC on the steps they had taken to implement the resolution. To date the Committee has received in excess of 750 reports from 191 states[32] leading the UN Secretary-General to observe that: "The work of the Counter-Terrorism Committee and the cooperation it has received from Member States has been unprecedented and exemplary."[33]

Resolution 1373 is of particular importance in relation to the prevention of terrorist attacks. As opposed to General Assembly resolutions, resolutions of the Security Council are legally binding. Resolution 1373 requires member states to deny all forms of financial support to terrorists, even those which are not party to the 1999 Financing of Terrorism Convention.[34] It also requires states to suppress the provision of safe haven, sustenance or support for terrorists;[35] to share information on terrorist activities with other states;[36] to cooperate with other governments in the investigation, detection, arrest and prosecution of those involved in terrorist acts;[37] and to criminalise in domestic law active and inactive assistance for terrorism.[38] Perhaps most importantly for present purposes, the Resolution requires all member states to become party as soon as possible to the relevant international conventions and protocols relating to terrorism, including the 1973 and the 1997 Conventions discussed above.

It is difficult to assess the impact of Resolution 1373 on the question of the protection of diplomatic personnel. It might be possible to attribute the recent reduction in attacks against diplomatic personnel to the developments resulting from Resolution 1373. However, to do so would be little more than speculation. It is submitted, however, that the CTC could take a more active role in the protection of diplomatic personnel through more direct involvement in the monitoring and implementation of the 1973 Convention. To do this, the CTC, with the authority of the Security Council, could take over the monitoring of effective measures to enhance the protection, security and safety of diplomatic and consular missions and

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[32] See Reports by Member States. Available at http://www.un.org/Docs/sc/committees/1373.
[33] Quoted on the Counter-Terrorism website, *ibid*.
[34] SC Resolution 1373, paragraph 1.
[35] *Ibid*, paragraphs 2(a), (c), (d), (g), 3(f) and (g).
[36] *Ibid*, paragraphs 2(b), 3(a), (b) and (c).
[37] *Ibid*, paragraphs 2(b), (f), 3(a), (b) and (c).
[38] *Ibid*, paragraph 2(e).

representatives from the United Nations General Assembly. Some consideration of the work of the General Assembly in this regard would seem appropriate before turning to consider how this process might be strengthened.

6.4.1 The UN Reporting Mechanism on Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives

It has been noted in Chapter 1 that the UN reporting mechanism was introduced by virtue of General Assembly Resolution 35/168 on 15 December 1980. The Resolution invited states to report to the Secretary-General serious violations of the protection, security and safety of diplomatic and consular missions and representatives and to report on measures taken to bring offenders to justice. The UN Secretary-General was then called upon to report annually to the General Assembly detailing reports from states and expressing his views. As was noted above, the Secretary-General reported annually until 1988 and the process has continued biannually since then.

It is apparent from the analysis of the reporting mechanism in Chapter 1 and from the summary of the Secretary-General's Reports since 1980 contained in Annex 1, that the process provides useful information on the problem of attacks on diplomatic personnel. However, the information contained in these reports is rather limited. As a General Assembly initiative, the UN reporting mechanism has no legal authority. Thus, states are merely invited rather than required to report to the Secretary-General on both aspects of the reporting mechanism. It is this aspect of the process which has proved to be the most problematic.

In 1985, the United Nations undertook a detailed survey of the use of the reporting system between 1980 and 1985. This was carried out by the UN Secretariat and was attached as an annex to the Secretary-General's 1986 Report.[39] The Survey reveals that this initial period of operation of the reporting mechanism was a period in which the process was considerably under-utilised. A total of 108 incidents were reported by states. By far the worst affected state during this period was Turkey which reported a number of murders of its diplomatic personnel as well as various attempted assassinations, assaults and other serious attacks in various countries around the world. The period also saw the reporting by the United States of the bombing of the United States Embassy in Beirut in 1983, but not the bombing that occurred in 1984.

The Survey indicates that the reporting procedure had been strengthened by the General Assembly in order to develop its effectiveness. Thus, according to the Survey:

> In the successive resolutions that it has adopted on the subject since 1980, namely, resolutions 36/33 of 13 November 1981, 37/108 of 16 December 1982, 38/136 of 19 December 1983, 39/83 of 13 December 1984 and

[39] *Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives* UN Doc. A/41457 (1986), pp. 35-39 (hereinafter, the Survey).

> 40/73, the Assembly has gradually strengthened the reporting procedures as originally established by (a) inviting not only the State in which the violation took place, but also, where applicable, the State where the alleged offender is present to report on measures taken to bring the offender to justice; (b) requesting the Secretary-General, when a serious violation has been reported to him, to draw the attention of the States directly concerned to the reporting procedures; and (c) requesting reporting states to act as promptly as possible.[40]

As a result of these changes, the Survey indicates that the number of reports increased from 1981 to 1984 but decreased in 1985 and that the number of states reporting to the Secretary-General was increasingly diversified. The Survey provides statistical evidence as to the severity of the problem of attacks against diplomatic personnel and diplomatic establishments during the period. These included 44 assassinations and attempted assassinations and six attacks against diplomatic premises resulting in casualties, including the attack on the United States' Beirut Embassy which, as has already been noted, resulted in 163 casualties. However, the Survey indicates that the decline in reporting in 1985 was of particular concern and accepted that: "There is … no question that many violations remain unreported and the picture that one derives from the reports of the Secretary-General is a fragmentary one."[41]

Of further concern is the Survey's evidence relating to the prosecution and punishment of attacks on diplomatic establishments and personnel. What is apparent from the reports and the Survey is that few of the states that made reports ever provided any follow-up information on prosecution and punishment. The figures provided by the survey indicate that of the 108 reported violations in the period, in only 42 cases were measures taken to bring the offenders to justice. These figures are, in fact, exaggerated as is indicated by the Survey authors' own admission that "a mere statement that a search for the offender is under way has been treated as a full-fledged report".[42] What is of considerably more concern is the figures reporting the final outcome of the proceedings which indicate that during the period, only 13 reports were made.[43] As with the initial reporting, it is likely that a number of measures simply have not been reported, perhaps because of an oversight. However, it would seem unlikely that states which had made an initial report of an incident would be unwilling to provide information about a successful conclusion to an investigation. Accordingly, it is suggested that the low number of reported final outcomes does, in fact, generally reflect a failure among states successfully to track down the offenders and mount a successful prosecution.

In an attempt to resolve the problems identified in the 1985 Survey, the General Assembly, in its 1986 Resolution on the topic, introduced a number of further obligations on the Secretary-General. In respect of the problem of lack of

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[40] According to the Survey: *Ibid*, p. 35.
[41] *Ibid*, p. 36.
[42] *Ibid*, p. 38.
[43] *Infra*.

participation, the General Assembly requested the Secretary-General to send reminders to states before the completion of his annual report requesting them to report violations of the relevant law.[44] The second problem was addressed by the introduction of an obligation on the Secretary-General to remind states of the need to provide follow-up reports.[45] Finally, the Secretary-General was asked to prepare guidelines which states could use in the preparation of their reports.[46]

Although some increase in participation in the procedure was apparent in the years immediately following the publication of the Report, that number dropped sharply in the 1990s but has recovered somewhat in the last four reports. The problem of a lack of follow-up reports remains. It is not intended here to provide a detailed analysis of each of the reports since 1986. However, it is worth drawing attention to a number of incidents in order to illustrate the nature of the problem.

In 1990 a Saudi diplomat was murdered in Belgium and the Report indicates that no arrests were made.[47] Similarly, the same year saw a Peruvian diplomat killed in Bolivia and again no arrests or progress was reported by Bolivian officials.[48] The Report made in 1992 notes a similar disparity between the reporting of incidents and the provision of further information on the progress of the investigation. That year saw the murder of a Turkish diplomat in Athens[49] and the bombing of the Israeli Embassy in Buenos Aires, Argentina;[50] again no arrests were reported in either case.

More recent reports, however, indicate a growing trend towards the reporting of the status and conclusion of cases. In 1994, for instance, a Jordanian diplomat was murdered in Beirut, Lebanon, and Lebanese authorities reported that 14 individuals had been arrested in connection with the attack.[51] But unfortunately no further details on the ultimate resolution of these cases were sent to the United Nations. Two years later a terrorist bombing at the Egyptian Embassy in Islamabad, Pakistan killed 18 and injured 60.[52] While Pakistan said suspects had been identified, they had apparently fled the country and had thus escaped arrest.[53] A better outcome was reported in Australia, where eleven people were successfully prosecuted in connection with an attack on the Iranian Embassy in Canberra.[54] Mauritius[55] and Uganda[56] also submitted reports on the disposition of cases.

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[44] UN GA Resolution 41/78, paragraph 10(d).
[45] *Ibid*, paragraph 10(c).
[46] *Ibid*, paragraph 11.
[47] U.N. Doc. A/47/325 (1992).
[48] U.N. Doc. A/45/455 (1990) at p. 9.
[49] U.N. Doc. A/45/455 (1990) at pp. 9-10.
[50] U.N. Doc. A/47/325 (1992) at p. 17.
[51] *Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives*, at p. 7, U.N. Doc. A/49/295 (1994).
[52] *Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives*, at p. 12, U.N. Doc. A/51/257 (1996).
[53] *Ibid* at p. 13.
[54] *Ibid* at pp. 8-9.
[55] *Ibid* at p. 12.

These cases are really exceptions that prove the rule, for while the number of states reporting attacks on diplomats and diplomatic installations has increased since 1980, the number of states that have reported the outcome of investigations has remained small. This points out one of the fundamental weaknesses of the reporting system. The purpose of the reporting system was to increase awareness of attacks on diplomats and provide a means by which states could share information. But this cataloguing of attacks and incidents has largely lacked a preventative or curative aspect. The reports thus seem to be informational rather than proactive or purposeful.

The 1985 Survey by the United Nations was the last formal review of its reporting procedure. This is both surprising and disappointing, not least because the instances of attacks on diplomatic personnel continued to increase year on year until at least 1990. However, perhaps the most disappointing aspect of the UN reporting mechanism in its current form is that the process consistently leads to resolutions of the General Assembly which repeatedly condemn attacks against diplomatic personnel but which do little to address the problem. The General Assembly has, at every opportunity open to it, expressed its alarm at the increase in violent attacks against diplomatic personnel. Thus, in Resolution 41/78 of 3 December 1986, the General Assembly noted that it was:

> Deeply concerned at the continued large number of failures to respect the inviolability of diplomatic and consular missions and representatives, and at the threat presented by such violations to the maintenance of normal and peaceful international relations, which are necessary for co-operation among States; and
>
> Alarmed by the increase of acts of violence against diplomatic and consular representatives, as well as against representatives to international intergovernmental organizations and officials of such organizations, which endanger or take innocent lives and seriously impede the normal work of such representatives and officials.

Similar expressions of concern were noted in General Assembly Resolutions 42/154 of 7 December 1987, 43/167 of 9 December 1988, 45/39 of 28 November 1990, 47/31 of 25 November 1992, 49/49 of 9 December 1994, 51/156 of 16 December 1996, 53/97 of 8 December 1998, 55/149 of 12 December 2000, 57/15 of 19 November 2002 and 59/37 of 2 December 2004. However, it is difficult to see what effect, if any, these repeated condemnations have had on the problem.

One possible development in relation to the UN reporting mechanism in order to avoid the difficulties with the system highlighted above would be a re-orientation of the reports away from a purely informational role towards a more prescriptive one. The only body which would be in a position to do this is the United Nations Security Council.

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[56] *Ibid* at p. 14.

The position of the Security Council in relation to terrorist acts generally, and in relation to attacks on diplomatic personnel in particular, has changed somewhat in the course of the last decade. For example, in 1998, in the aftermath of the East African bombings, the Security Council passed Resolution 1189 in which it "strongly condemned" the attacks. In Resolution 1269 (1999) the Security Council expressed the view that terrorist acts could be regarded as threats to international peace and security. The significance of declaring a terrorist act to be a threat to international peace and security is to bring into play the operation of Chapter VII of the UN Charter, which permits the Security Council to require states to undertake a variety of measures, including in particular "measures not involving the use of force" under Article 41 of the Charter and ultimately "such action by air, sea or land forces as may be necessary" under Article 42.

The first declaration of a terrorist act as a threat to international peace and security occurred in Resolution 1368 of 12 September 2001 which "unequivocally condemned in the strongest terms",[57] the attacks on New York and Washington on 11 September 2001. Resolution 1373 reiterated this declaration[58] and numerous similar declarations have made since 2001.[59] Of particular interest to the present discussion are Resolutions 1516 (2003) which concerned the bombing of the British Consulate in Turkey on 20 November 2003 and Resolution 1618 (2005) concerning the murder and kidnapping of diplomats in Baghdad, Iraq in July 2005.

This new found willingness of the Security Council to declare terrorist attacks and, in particular, attacks on diplomatic personnel as threats to peace and security should be developed a stage further to include the administration and implementation of the UN reporting procedure in relation to attacks on diplomatic personnel. This would clearly fit within the current activities of the CTC. Furthermore, were the Security Council and, in particular, the CTC to take on the role of administering and implementing the reporting procedure in relation to attacks on diplomatic personnel, states would be required, rather than invited, to provide details of such attacks, as well as details on the measures they have taken to apprehend and prosecute suspects. Where there are suspects or where arrests have been made, states should be required to make complete follow-up reports so that other states know the outcome of the relevant cases. This requirement would fit well with the requirement to either extradite or submit to prosecution suspects wanted in connection with attacks on internationally protected persons under the

[57] SC Resolution 1368, paragraph 1.
[58] SC Resolution 1373, Preamble.
[59] See Resolution 1377 (2001) (on the events of 11 September 2001); Resolution 1438 (2002) (in relation to the attacks in Bali, Indonesia on 12 October 2002); Resolution 1440 (2002) (in relation to the taking of hostages in Moscow, Russia on 23 October 2002); Resolution 1450 (2002) (in relation to attacks in Kenya in November 2002); Resolution 1465 (2003) (in relation to an attack in Bogotá, Colombia); Resolution 1530 (2004) (in relation to the attacks in Madrid, Spain on 11 March 2004); Resolution 1611 (2005) (in relation to the attacks in London, UK on 7 July 2005). See also more general resolutions on threats to international peace and security caused by terrorist acts including 1390 (2002); 1452 (2002); 1455 (2003); 1526 (2004); 1535 (2004); 1566 (2004); 1617 (2005).

1973 Convention. By necessitating the reporting of the status of investigations, states would be placed under more pressure to conduct those same investigations in a competent and open manner. This increased transparency would hopefully decrease or at least make apparent any possible politicisation of the investigative process.

A potentially more far-reaching effect of bringing the reporting process within the remit of the CTC is the possibility of attaching greater weight to the failure of states to provide complete information, not only on any attacks on diplomats or diplomatic installations but also on the resolution of any investigation into these incidents. Sanctions so-called could range from increased pressure by the United Nations on recalcitrant states to more coercive measures. For instance, states that failed to send in the required information could have their name and status as offenders noted on subsequent reports. States could also be barred from participating in debates on the subject and prevented from receiving relevant reports. The key to these measures is in the negative publicity that they would generate for the offending state. Terrorism, and especially terrorist attacks on diplomatic personnel, are clearly issues of universal concern and few states will wish to be seen as unconcerned or uninterested in the sharing of information and the mounting of prosecutions.

It is worth noting that an important requirement, in order to increase the efficiency of the current UN reporting system, is an increased emphasis on the transparency of that system; that is the implementation and enforcement of new reporting standards. Abram and Antonia Chayes have demonstrated the key role that transparency plays in regime management, noting that, "Transparency influences strategic interaction among parties to the treaty in the direction of compliance".[60] For transparency, by highlighting those that have complied with regime norms and those that have not, becomes a key determinative of a state's relative standing in the wider international system. This is especially important if, as the Chayes argue, sovereignty is constituted, "in membership in reasonably good standing in the regimes that make up the substance of international life...The need to be an accepted member in this complex web of international arrangements is itself the critical factor in ensuring acceptable compliance with regulatory agreements."[61]

6.5 Is There a Role for the International Criminal Court?

Before leaving this discussion of the impact of recent developments in relation to the legal control of terrorism on the question of the protection of diplomatic personnel, it is worth considering one further potential element in the required multi-faceted approach, that is whether there is a role for the International Criminal Court (ICC) in the prosecution of attacks against diplomatic personnel. The ICC was created by the Rome Statute of the International Criminal Court 1998 (the ICC

[60] Chayes and Chayes (1995), *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, Cambridge, Mass.) p. 22.
[61] *Ibid*, p. 27.

Statute),[62] and came formally into existence on 1 July 2002. Article 5(1) of the ICC Statute limits the jurisdiction of the Court "to the most serious crimes of concern to the international community as a whole". These include, specifically, the crime of genocide,[63] crimes against humanity,[64] war crimes,[65] and the crime of aggression (which is, as yet, undefined).[66] The obvious question is whether attacks against diplomatic personnel fall within the jurisdiction of the Court.

The immediate answer to this question must be no. It is worth recalling that attempts were made at the Rome Conference to include terrorism as a specific crime within the jurisdiction of the Court.[67] This proposal was opposed on a number of grounds. According to Antonio Cassese, these included the fact that the crime was not well defined, that its inclusion would politicise the Court, that many terrorist attacks were not sufficiently serious to merit prosecution by the ICC and that prosecution and punishment was available and, arguably, more efficient in domestic courts.[68] Writing in the immediate aftermath of the 9/11 attacks, Cassese concluded that: "It may happen that states gradually come to … consider serious crimes of terrorism as falling under crimes against humanity (in particular, under the subcategories of 'murder' or 'extermination' or 'other inhumane acts' included in Article 7 of the ICC Statute). If this occurs, the notion of crimes against humanity would be broadened."[69] Some writers have taken this suggestion a stage further to suggest that terrorism, in all its manifestations, does indeed fall within the category of crimes against humanity.[70] Indeed, the International Bar Association has asserted that terrorism falls within the crime of genocide,[71] while another author has recently asserted that terrorism may also fall within the category of war crimes.[72] These latter suggestions seem considerably out of line with the current understanding of the concepts of genocide and war crimes. Nevertheless, it is worth considering whether, in light of developments since 9/11, terrorist attacks, and, in particular, terrorist attacks against diplomatic personnel, can be considered as crimes against humanity.

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[62] UN Doc A/CONF.183/9; 37 *ILM* 999 (1998).
[63] ICC Statute, Article 6.
[64] ICC Statute, Article 7.
[65] ICC Statute, Article 8.
[66] ICC Statute, Article 5(2).
[67] A specific proposal was made to this effect by Algeria, India, Sri Lanka and Turkey. See A/CONF.183/C.1/L.27.
[68] Cassese (2001), "Terrorism is also Disrupting Some Crucial Legal Categories of International Law" 12 *European Journal of International Law* 993, at p. 994.
[69] *Ibid*, p. 995.
[70] For a useful discussion of recent academic works on terrorism, some of which assert the existence of terrorism as a crime against humanity, see Quénivet (2005), "The World After September 11: Has it Really Changed?" 16 *European Journal of International Law* 561.
[71] International Bar Association, *International Terrorism Legal Challenges and Responses*, cited in Quénivet, *op cit*.
[72] Arnold (2005), *The ICC as a New Instrument for Repressing Terrorism*, (Transnational Publishers Inc., Aldersley, New York).

It has been pointed out above that the Security Council has increasingly been willing to declare serious terrorist attacks as threats to international peace and security since 9/11. However, the declaration of a threat to peace and security is very different from the classification of an act as a crime against humanity. The essential problem with defining terrorism as a crime against humanity is that it requires to be shown that the attack was committed "as part of a widespread and systematic attack directed against any civilian population".[73] It is not intended here to enter into a detailed discussion of the meaning and effect of these words, as to do so would be beyond the scope of this work. However, it is clear from the jurisprudence of both the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, as well as that of numerous domestic courts, that the hurdle imposed by these words is a significant one. It has been asserted that the attacks of September 11 "were multiple and coordinated, causing the deaths of thousands of people, in furtherance of Al-Qaeda's terrorist policy against the United States",[74] and that as such they constitute a crime against humanity. However, even if this were accepted, it would be limited to acts involving Al-Qaeda and directed against the United States. Accordingly, it is asserted that prosecutors would have considerable difficulty in bringing terrorist acts, particularly those directed against diplomatic personnel, within the concept of Article 7 so as to make them subject to the jurisdiction of the ICC.

Finally, in relation to the specific problem of attacks on diplomatic personnel, it is clear to the present writer that states would be unwilling to allow attacks against diplomatic personnel to come within the jurisdiction of the ICC. This is not simply as a result of the antithesis of certain states, including the United States, to the ICC. Rather, it is related to the nature of the crime itself. It has been illustrated in this and in the previous chapter that states have been working hard in recent years to develop jurisdiction over crimes against diplomatic personnel committed abroad. This has been done primarily on the basis of the protective principle of international jurisdiction, that is the assertion of jurisdiction over crimes that affect the vital interests of the state. Reference can again be made to the *Bin Laden* case and to the various treaties discussed in this chapter as evidence of this understanding. It should be remembered also that the jurisdiction of the ICC is complementary to that of domestic courts.[75] It seems unlikely that a state which is able to exercise domestic jurisdiction over a crime directed against its diplomatic personnel would be unwilling to prosecute such an attack in their domestic courts.

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[73] ICC Statute, Article 7(1).

[74] Arnold, *op cit*, p. 263, citing Fry (2002), "Terrorism as a Crime Against Humanity and Genocide: The Backdoor to Universal Jurisdiction" 7 *UCLA Journal of International Law and Foreign Affairs* 169, 190.

[75] See ICC Statute, Article 17(1) which denies the ICC jurisdiction in cases under investigation or prosecution in a national court unless the state is "unwilling or unable genuinely to carry out the investigation or prosecution".

Chapter 7

Conclusions

The law relating to the protection of diplomatic personnel, as with diplomatic law more generally, has evolved over many centuries. The drafting of the Vienna Conventions on Diplomatic Relations 1961 and Consular Relations 1963 was essentially a process of codification with some element of progressive development. The relative lack of controversy surrounding the provisions dealing directly with the question of protection, in particular those relating to inviolability and the special duty of protection, is evidence of the longevity of these provisions and the general level of satisfaction with their terms, giving support to the argument that these were essentially examples of codification rather than progressive development.

This does not mean that the early development of these concepts was not without controversy. The analysis in Chapter 3 highlighted that the special position of diplomatic personnel was hard won. Nevertheless, the shifting of the conceptual basis of diplomatic law from "representative character" and "exterritoriality" to "functional necessity" did not herald a move away from inviolability and special protection. Indeed, it is possible to argue that, while the genesis of the special duty of protection can be traced to the writings of theorists supporting the "representative character" theory, the advent of the more justifiable theory of "functional necessity" provides a more rational justification for the imposition of that duty and of the requirement of inviolability. Thus, the inviolability and special protection of diplomatic personnel is necessary in order to allow such personnel to fulfil their functions and essential to the proper functioning of diplomatic relations more generally. Indeed, as was noted in Chapter 4, the centrality of the concepts of inviolability and the special duty of protection to the proper functioning of diplomatic relations was unequivocally reaffirmed by the International Court of Justice in 1980 in the Tehran Hostage Case. More recently, the General Assembly has repeatedly classified the inviolability of diplomatic and consular missions and representatives as "necessary for cooperation among states".

However, in spite of the considerable provenance of the concepts of inviolability and the special duty of protection, a number of difficulties arise in relation to their continued relevance to present-day circumstances. In particular, the obligation on the receiving state to provide for the protection of diplomatic personnel fails to take account of the financial costs involved in the fulfilment of such an obligation, particularly for developing states. The evidence analysed in Chapter 4 shows that while many of the richer, more developed states have developed sophisticated mechanisms to provide for the safety of diplomatic

personnel on their territory, many developing states are unable to provide even the basic requirements such as perimeter guards and some form of rapid reaction force. This was certainly the case in Tanzania and most probably in Kenya in the run-up to the 1998 attacks. As a result, it is increasingly the case that sending states have to rely on locally employed security personnel or even their own security forces to provide the necessary security.

The United States of America is unique in terms of the amount of money and effort spent on providing for the protection of their diplomatic personnel abroad. Undoubtedly the United States considers its expenditure well-spent and it is difficult to construct an argument against that view. However, the American approach brings with it many difficulties. For example, it is unlikely that any other state will be able to match the expenditure of the United States in this field, even if it was inclined to do so. However, of more concern is the impact of these measures on the conduct of diplomacy. The United States' policies envisage the creation of diplomatic fortresses. All diplomatic personnel are required to live and work in these compounds, which are heavily guarded and rarely open to public access. The process of diplomacy requires engagement, not only with local officials, but also with the local population. This is even more so in the case of consulates than it is in the case of diplomatic missions. At the risk of sounding overly dramatic, the policies of the United States in this area serve only to enhance the reputation of the United States as superior, aloof and interventionist.

It is worth noting one of the conclusions of the Crowe Report that: "As we work to upgrade the physical security of our missions, we should also consider reducing the size and number of our embassies through the use of modern technology and by moving, in some cases, to regional posts in less threatened and vulnerable countries."[1] This policy would seem to have considerable merit. Certainly, advances in modern technology give greater opportunities for diplomacy to be conducted at arms length. However, it is difficult to see how a state such as the United States could afford to disengage from vulnerable countries such as, for example, Iraq.

A second major concern about the current policy of the United States in creating such fortresses is that there is no guarantee that such measures will stop future attacks. What will happen in such cases is that these attacks will have a greater impact on the local population than it has on the embassy staff. The attack on the US Embassy in Kenya is a prime case in point: in that incident, of the 220 persons killed, over 200 were Kenyan citizens, the majority of whom had no involvement with the US Embassy. The effect of events such as these will be de-stabilising to the region and to the relationship between the United States and the host country.

Moving beyond the most obvious solutions to the problem of protecting diplomatic personnel through the building of stronger and more heavily guarded embassies, this analysis has highlighted a number of attempts to deal with the continuing problem of attacks against diplomatic personnel at both the national

[1] Crowe Report, *op cit*, Introduction, p. 2 of 3.

level and internationally. Examples of national measures include the Inman and Crowe Reports in the United States. At the international level, reference can be made to the UN reporting mechanism. However, as indicated in Chapters 5 and 6, these measures have provided, at best, only partial solutions to the problem.

Chapter 6 highlighted the need for a multi-faceted approach to dealing with the problem of attacks on diplomatic personnel. The 1961 and 1963 Vienna Conventions remain central to this approach. The primary obligation for the protection of diplomatic personnel must remain with the receiving state which is best placed to provide such protection, albeit often with support from the sending state and the international community more generally. The 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents is also a central pillar in this approach. It seems likely that a new comprehensive terrorism convention will be adopted in the present session of the United Nations General Assembly. However, that convention will not come into force immediately. Furthermore, as detailed in Chapter 6 above, the comprehensive terrorism convention is not envisaged as a replacement for the existing terrorism conventions. Rather it is intended to supplement those conventions and to provide for their easier implementation and enforcement. It is in respect of implementation and enforcement that the 1973 Convention has been most lacking and it is to be hoped that the enactment of the comprehensive terrorism convention will assist greatly in this regard.

However, the multi-faceted approach requires measures to be taken at all levels of international relations. Thus, it is necessary for domestic authorities to enact the necessary legislation to bring the relevant treaties within their domestic law. The *Bin Laden* cases in the United States have illustrated that it is possible to prosecute terrorists in domestic courts. Indeed, as has been argued in Chapter 6, continued developments in international law in the form of more recent treaties dealing with the problem of terrorism will have the effect of making such prosecutions easier and will avoid troublesome challenges to the extraterritorial jurisdiction of domestic courts such as were witnessed in the *Bin Laden* cases.

Whether by accident or design, the international community has moved towards a multi-faceted approach to the problem of the protection of diplomatic personnel. It cannot be denied that the recent focus of bodies such as the UN Security Council has not been on this specific issue. Rather the focus has been on dealing with the problem of terrorism more generally. The creation of the new comprehensive terrorism convention will end this generalised process. Thereafter, it will be necessary to refocus attention on specific problems in order to ensure continued development of the law. In relation to the protection of diplomatic personnel, this refocus could be done in a number of ways. Two possibilities are offered here.

First, in the short term, the Security Council is now in a position to continue to develop its "executive" role in the implementation and enforcement of international law. The continued work of the Counter-Terrorism Committee is essential to this role. With regard specifically to the problem of the protection of diplomatic personnel, the adoption by the Security Council of the operation of the UN reporting mechanism would not be out of line with its current activities and

would have a significant impact upon encouraging the implementation and enforcement by states of their existing obligations under international law in relation to the protection of diplomatic personnel.

Secondly, as the International Criminal Court moves beyond its infancy, hopefully overcoming the resistance of a number of key states to its jurisdiction, and develops a sophisticated jurisprudence, the possibility of prosecuting terrorists before an international tribunal may well become a reality. The problem of defining terrorism is regarded by some as a major stumbling block to such a development. To date, the international community has got round this definitional problem through the enacting of specific anti-terrorism conventions intended to deal with specific offences. The evolution of these conventions, from the Hague Convention to the Nuclear Terrorism Convention, has brought with them an increased sophistication in relation to the question of extraterritorial jurisdiction and in relation to the institutional aspects of the problem. This latter aspect is most apparent in the Financing of Terrorism Convention. The next logical step would be for some terrorist offences, including attacks against diplomatic personnel, to be included in the jurisdiction of the International Criminal Court.

Annex 1

Summary of United Nations Reports on the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives

1981 Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives (UN Doc. A/36/445)

Countries Represented — Australia, Denmark, France, Italy, Sweden, Turkey (5).

Notable Incidents -— Turkey reported the murder of its Consul General in Sydney (page 5); the serious attack on a Turkish diplomat in Copenhagen (page 7); the murder of two Turkish diplomats in Paris (page 7 as amended by A/36/445/Corr 1); the murder of a Turkish diplomat in Geneva, a suspect was in custody (page 9).

1982 Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives (UN Doc. A/37/404)

Countries Represented — Canada, Denmark, Federal Republic of Germany, France, Turkey (4).

Notable Incidents — There were several serious incidents regarding Turkish diplomats: (1) attempted assassination of a Turkish diplomat in Rome (page 7), (2) the assassination of the Turkish Consulate-General in Los Angeles (page 8), (3) the serious attack on a Turkish diplomat in Ottawa (page 9), (4) the assassination of the Turkish Consul-General in Boston (page 10); France also reported numerous attacks on diplomats, including the murder of the US Military Attaché (page 2, Addendum Two).

1983 Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives (UN Doc. A/38/379)

Countries Represented — Austria, Denmark, El Salvador, Finland, Federal Republic of Germany, France, Kenya, Kuwait, Lebanon, Luxembourg, Netherlands, Nicaragua, Portugal, Sudan, Tunisia, Turkey (2), United Kingdom (2), United States, Uruguay.

Notable Incidents — Bombing of the US Embassy in Beirut which killed 63 and injured 100, no suspects arrested (page 8); the Turkish Counsel-General in Amsterdam was assaulted and one of the assailants was wounded by the police and sentenced to five years in jail (page 9); the Israeli Ambassador to the United Kingdom was seriously wounded by a gunman who was captured after a shoot-out, two other suspects were detained: Al-Rosan was sentenced to 35 years imprisonment for attempted murder, Al-Banna was sentenced to 30 years imprisonment for attempted murder and Said was sentenced to 30 years imprisonment for attempted murder (page 11-13); Austria notes that 474 police officers were assigned to guard foreign diplomats and embassies (page 14); Uruguay states that Article 138 of its penal code provides for stiffer sentences for offences against diplomats; Portugal and Turkey both describe an attack on the Turkish Embassy in Lisbon which killed one Turkish diplomat and one Portuguese police officer (page 4-5, Addendum Two); the United Kingdom arrested two men on charges of conspiracy to murder the Turkish Ambassador: one was found guilty of possessing firearms and explosives and sentenced to eight years imprisonment, one was found not guilty (page 6, Addendum Two).

1985 Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives (A/40/453)

Countries Represented — Australia, Austria, Belgium, Canada, Denmark, Dominican Republic, Federal Republic of Germany, Kuwait, Malawi, Philippines, Portugal, Rwanda, Spain, Turkey, United Kingdom.

Notable Incidents — Canada reports on a series of incidents against Turkish personnel and notes that six individuals have been arrested and charged with crimes ranging from murder to possession of illegal firearms (page 8-9); the Philippines complained of the rough treatment received by the son of a diplomat at the hands of NYC Transit Police Officers (page 12-13); Turkey reported several incidents in Iran and also said that its police were investigating the murder of a Jordanian diplomat in Ankara (page 16); the United Kingdom reported the murder of an Indian diplomat and the arrest and trial of six individuals: Raja was sentenced to life imprisonment for murder, Riaz to life imprisonment for murder, Bhatti to 20 years imprisonment for kidnapping and three others to shorter terms for concealing evidence and trying to obtain false passports; Portugal details the

relevant portions of its penal code, noting that sentences are increased by one-third where diplomatic personnel are concerned (page 17).

1986 Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives (A/41/457)

Countries Represented — Australia, Belgium, Canada, Denmark, Federal Republic of Germany, Greece, Israel, Jordan, Lesotho, Luxembourg, Pakistan, Portugal, Turkey, United Kingdom.

Notable Incidents — Canada reports on the disposition of several incidents: (1) Subject held the Vice-Counsel of the Bahamas hostage for several hours = five years imprisonment, (2) Three subjects and attempted assassination of Turkish diplomat = nine years, six years and two years imprisonment, (3) Four subjects assaulted Indian High Commissioner = thirty days imprisonment (page 6); Jordanian diplomat was killed in Ankara (page 9), the Turkish police arrested four suspects (page 2, Addendum Three); in a Cold War exchange the United Kingdom both responds to complaints by the USSR and makes its own complaints regarding treatment of its personnel in Moscow (page 2-3, Addendum Three).

1987 Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives (A/42/485)

Countries Represented — Austria, Belgium, Burkina Faso, Canada, Chile (2), Cyprus, Czechoslovakia, Denmark, Ecuador, Federal Republic of Germany, Hungary, Israel, Lesotho, Mexico, Netherlands (2), New Zealand, Pakistan, Poland, Qatar, Sierra Leone, Sweden, Turkey, United Kingdom.

Notable Incidents — Pakistan sentenced the murderer of the Soviet Military Attaché to death (page 4, Addendum One); Chile submitted a lengthy, 52-page, report on a series of incidents ranging from occupations of embassies to the spray-painting of graffiti (page 2-54 Addendum Two); one response to these incidents is catalogued on Addendum Five where Chile reports that the United Kingdom had arrested the person responsible for daubed paint on the Embassy door and paid the cost of repair (page 2, Addendum Five).

1988 Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives (A/43/574 and 527)

Countries Represented — Argentina, Australia, Belgium, Botswana, Chile (2), Cyprus, Democratic Yemen, Denmark, Finland, Federal Republic of Germany, Greece, Israel, Lebanon, Malawi, Mexico, New Zealand, Norway, Poland, Republic of Korea, Sierra Leone, Yugoslavia, USSR.

Notable Incidents — Greece reports the murder of the US Naval Attaché by terrorists of 'November 17'; no suspects arrested (page 9-10, Addendum Three). Australia reported that a suspect guilty of attempting to bomb the Turkish Consulate had been sentenced to life imprisonment (page 6); an interesting case concerning Chile was the issue of the immunity of two German diplomats (page 8-11); the response of the German government is on page 2 of A/43/574 and the initial complaint on pages 12-13 of A/43/527. Mexico complains of the failure of US authorities to stop one individual from harassing staff in Los Angeles (page 14). On pages 17-18 Mexico and Korea detail the provisions for the protection of diplomats in their domestic criminal codes.

1990 Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives (A/45/455)

Countries Represented — Albania, Argentina, Austria, Bahamas, Belgium, Bolivia, Brunei, Bulgaria, Belarus, Chad, Chile, Colombia, Denmark, Dominican Republic, Finland, Federal Republic of Germany, Greece, Holy See, Iceland, Indonesia, Iran, Israel, Italy, Jordan, Kuwait, Malawi, Mexico, Netherlands, Norway, Poland, Qatar, Singapore, Suriname, Sweden, Switzerland, Turkey, Uruguay, USSR, Yugoslavia.

Notable Incidents — A Saudi diplomat was murdered in Belgium; no arrests were made (page 9); a Peruvian diplomat was killed in Bolivia; no arrests were made (page 9). Greek officials complained that Albanian police invaded the Greek Embassy and dragged away an asylum seeker (page 16). Attacks against Turkish consulates continued (page 25).

1992 Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives (A/47/325)

Countries Represented — Australia, Austria, Brazil, Bulgaria, Finland, Germany, Greece, Hungary, Iran, Iraq, Israel, Ivory Coast, Netherlands, Norway, Sweden, Turkey, United Kingdom.

Notable Incidents — The Israeli Embassy in Buenos Aires was the subject of a bomb attack that killed 29 people. No suspects were arrested (page 24). Iraq, during its occupation of Kuwait, prevented the Swedish Embassy from carrying out its operations. Once again, Turkey suffered the most complaints, with its Embassy in London being occupied and numerous other consulates and embassies coming under attack (pages 31-37). Also, 'November 17' murdered another Turkish diplomat in Athens (page 17). The Ivory Coast describes measures taken to respond to a series of attacks on diplomatic premises (page 13-14).

1993 Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives (A/INF/48/4)

Countries Represented — Australia, China, Cyprus, Czechoslovakia, Denmark, Finland, Germany, Hungary, Islamic Republic of Iran, Iraq, Libyan Arab Jamahiriya, Luxembourg, Mexico, Norway, Romania, Tunisia, Turkey, United Kingdom, United States.

Notable Incidents — A number of violations of consular premises were reported in the period by Mexico (2), Germany, Romania and Iraq. Also a number of violent attacks against diplomatic and consular staff were reported. In particular, Turkey reported three incidents involving car bombs in Ankara, Turkey. The respective bombings resulted in serious injury to an Egyptian diplomat and relative, the death of an Israeli diplomat and the damage to the car of an Iranian diplomat (page 21). Turkey also reported an attack against the Consular-General of Yugoslavia (page 22). Germany reported coordinated attacks against a number of Turkish installations in Germany (page 13). Germany also reported the occupation of the Turkish Consulate-General in Munich by activists of the Kurdish Workers Party (PKK) – taking several members of staff hostage (page 14). Libya reported attacks made upon the Venezuelan Embassy, which caused extensive material damage (page 18).

1994 Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives (A/49/736)

Countries Represented — Belgium, Denmark, Egypt, France, Germany, Greece, Holy See, Islamic Republic of Iran (2), Japan, Peru (2), Sudan, Ukraine, United Kingdom.

Notable Incidents — France reported that its Consulate in Perth had been set on fire (page 12). Greece reported the assassination of a Turkish diplomat by the terrorist organisation ‘17 November’ (page 14). Japan reported a threat to the security of the Embassy of the former USSR by a member of an extreme rightist group (page 16). Peru reported a number of incidents involving threats to its diplomatic staff in Ecuador, by members of the Ecuador military (page 17). Sudan reported assaults on its diplomats by Egyptian security services in Cairo. The allegations included incidents of severe beatings of Sudanese Embassy staff (pages 21-2). In its report, Egypt denied allegations that its security forces were involved in any attack on members of the Sudanese Embassy in Cairo (page 11). The UK reported a bomb attack on the Israeli Embassy (page 23). Twenty-five kilos of high explosives were exploded in a car outside the Embassy. Extensive physical damage to property was caused and personal injury to three members of the Embassy staff. No deaths were caused (page 23).

1996 Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives (A/51/257)

Countries Represented — Australia (2), Ecuador, Mauritius, Pakistan, Swaziland, Uganda, Yugoslavia.

Notable Incidents — Terrorist bomb attack on the Egyptian Embassy in Islamabad, killing 18 and injuring 60. Suspects identified but no arrests as they had fled Pakistan (page 12). Australia reports the prosecution and sentencing of eleven persons in connection with attacks on the Iranian Embassy (pages 8-9). Mauritius (page 12) and Uganda (page 14) also reported on the disposition of cases.

1997 Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives (A/INF/52/6)

Countries Represented — Belgium, Denmark, Holy See (2), Israel, Kuwait, Panama, United Kingdom, Venezuela.

Notable Incidents — No notable incidents were reported. Those countries that did report, reported on largely minor disturbances or incidents.

1998 Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives (A/53/628)

Countries Represented — Islamic Republic of Iran.

Notable Incidents — Iran reported the violent intrusion into its diplomatic mission in Freetown, Sierra Leone by military forces of the coup d'etat government of Sierra Leone.

1999 Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives (A/INF/54/5)

Countries Represented — Austria, Belarus, Denmark, Estonia, Finland, Germany, Greece, Israel, Sweden, Switzerland, Turkey.

Notable Incidents — Sweden reported an attack on the Embassy of Greece by persons, all of Kurdish origin. Sweden also reported an attack on the Office of the UNHCR by sympathisers of the Kurdish organisation PKK. Estonia reported bomb threats made against the Embassies of Latvia, Sweden and the UK (page 3). Israel reported a hand grenade discovered in front of its Embassy in Brussels. The device

was made safe, with no damage to property or personal injury (page 3). Switzerland reported the invasion and occupation of the Greek Embassy in Berne and the Greek Consulate in Zurich and the headquarters of the UNHCR by Kurdish demonstrators. All occupations ended without major incident (page 4). Denmark reported Molotov Cocktails were thrown onto the grounds of the UK and US Embassies. A number of arrests were made (page 4). Germany reported on its on-going investigation into attacks upon the Israeli Embassy (Addendum 1, page 2). Turkey submitted a report cataloguing a number of incidents over a period of years, which it felt demonstrated the failure of the Greek authorities to guarantee the security and safety of its diplomatic and consular staff. The report cited incidents of assassinations, through shootings and bombings causing death, severe personal injury and extensive damage to diplomatic property and the property of its staff (Addendum 1, page 1). In response to this report Greece stated its commitment to the security of Turkish diplomatic and consular staff and its condemnation of terrorism. It also stated that investigations into incidents were still ongoing (Addendum 2, page 1).

2000 Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives (A/55/606)

Countries Represented — Austria, Bulgaria (2), Burkina Faso, Denmark, Estonia, Germany, Greece (2), Holy See (2), Hungary, Kuwait, Mexico, Philippines (2), Russian Federation, , Saudi Arabia (2), Sweden (2), Turkey, Ukraine, Uruguay.

Notable Incidents — Turkey reported a bomb exploding opposite its Consulate-General in Komotini, Greece (page 2). The Greek government in response to the same incident reported its competent authorities had taken all necessary measures to defuse the bomb (page 3). Russia reported flammable liquid thrown through a window of its Embassy in Copenhagen, Denmark which caused a fire, injuring one of its diplomats. The assailant was detained by Embassy staff. According to the report, his action was in response to the Russian Federation's actions in Chechnya (Addendum 2, page 1). Russia also reported that its Embassy in Beirut came under terrorist attack involving grenades and small arms fire. The Palestinian group Osbat al-Ansar was suspected (Addendum 2, page 2). All other incidents reported were low-level in nature.

2001 Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives (A/INF/56/6)

Countries Represented — Austria, Belarus, Denmark, Finland, Germany (2), Greece, Holy See, Hungary, Italy (2), Malaysia, Norway, Qatar, Romania, Sweden, Syrian Arab Republic, Turkey (4), Ukraine, Uzbekistan.

Notable Incidents — Turkey reported a bomb detonated at the entrance of its Consulate-General in Dusseldorf, Germany. In addition Turkey reported on a number of incidents involving its staff in Greece. Denmark reported a Russian citizen of Chechen origin throwing a Molotov Cocktail at the Russian Embassy in Copenhagen. Other incidents reported were largely reporting on-going investigations of earlier incidents and additional lower-level violations, such as demonstrations, theft and damage to property.

2002 Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives (A/57/560)

Countries Represented — Austria, Belarus, Colombia, Czech Republic, El Salvador, Finland, Germany, Hungary, Monaco, Morocco, Norway, Oman, Sweden, Tunisia, Ukraine, Uruguay.

Notable Incidents — Belarus reported that an explosive device was thrown onto the premises of the Russian Federation Embassy (page 3). Germany reported that five Iraqi citizens armed with a pistol, tear gas and electric shock device entered and occupied the Iraqi Embassy in Berlin. They took diplomatic staff hostage and attacked them with tear gas. The occupation was ended by special police after five hours (Addendum 1, page 2). Ukraine reported three armed perpetrators entered its Embassy in Brazil. One diplomat was injured and property was damaged and stolen (Addendum 2, page 1).

2004 Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives (A/59/507)

Countries Represented — Burkina Faso, Cote d'Ivoire, Finland, Germany, Kuwait, Lebanon, Mali, Mexico, Norway, Qatar, Slovenia, Switzerland, United Arab Emirates.

Notable Incidents — Burkina Faso reported numerous violations of its Embassies throughout the Cote d'Ivoire, during the on-going crisis there. This included subjecting diplomatic staff to 'physical and psychological' violence (page 3). Kuwait reported on violations of its Embassy in Tripoli, Libya that caused damage to its property and financial loss. Switzerland reported upon the events of demonstrations against the annual meeting of the G-8 summit (Addendum 1, page 1).

Annex 2

Attacks Against US Diplomatic Installations 1987-1997[1]

1987

DATE	TARGET/LOCATION	TYPE OF ATTACK
02/18/87	U.S. Embassy-Madrid, Spain	Rocket
04/14/87	U.S. Embassy-La Paz, Bolivia	Bombing
04/15/87	U.S. Embassy-Madrid, Spain	Rocket
04/15/87	USIS Facility-Madrid, Spain	Rocket
04/15/87	U.S. Embassy-Madrid, Spain	Attempted Rocket
04/28/87	U.S. Embassy-San Jose, Costa Rica	Bombing
04/30/87	Peace Corps Offices-Santo Domingo, Dominican Republic	Bombing
05/10/87	USAID Residence-Cochabamba, Bolivia	Bombing
06/02/87	U.S. NAS Facility-Cochabamba, Bolivia	Bombing
06/09/87	U.S. Embassy-Rome, Italy	Car Bombing
06/09/87	U.S. Embassy-Rome, Italy	Rocket
06/09/87	USIS Library-Calcutta, India	Bombing
06/25/87	USIS Binational Center-Trujillo, Peru	Attempted Bombing

[1] Report of the Accountability Review Boards on the Embassy Bombings Nairobi and Dar es Salaam on August 7 1998, January 1999, available at http://www.state.gov/www/regions/africa/accountability_report.html.

07/04/87	U.S. Cultural Center-Manila, Philippines	Bombing
07/22/87	U.S. Consulate-Santiago, Chile	Firebombing
08/09/87	USIS Library-Calcutta, India	Bombing
10/08/87	U.S. Consulate-Lima, Peru	Bombing
10/14/87	U.S. Consulate-Barcelona, Spain	Bombing
10/23/87	USIS Binational Center-Trujillo, Peru	Firebombing
11/19/87	U.S. Embassy-Lima, Peru	Bombing
12/13/87	U.S. Consulate-Jerusalem, Israel	Firebombing

1988

DATE	TARGET/LOCATION	TYPE OF ATTACK
01/08/88	U.S. Consulate-Alexandria, Egypt	Attempted Bombing
01/22/88	U.S. Emb. Residence-Athens, Greece	Attempted Murder
01/31/88	U.S. Charge d'Affaire Residence- Kabul, Afghanistan	Bombing
02/20/88	U.S. Consulate-Jerusalem, Israel	Firebombing
02/24/88	USIS Library-Seoul, South Korea	Firebombing
02/26/88	USIS Library-Kwangju, South Korea	Attempted Bombing
03/01/88	American Cultural Center-Dhaka, Bangladesh	Bombing
03/18/88	U.S. Embassy-La Paz, Bolivia	Bombing
03/22/88	USIS Binational Center-Rancagua, Chile	Firebombing

03/22/88	U.S. Embassy-Quito, Ecuador	Firebombing
03/23/88	U.S. Embassy-Bogota, Colombia	Rocket
04/02/88	U.S. Embassy-Caracas, Venezuela	Grenade
04/07/88	U.S. Emb. Annex-Tegucigalpa, Honduras	Arson
04/14/88	USIS Binational Center-Medeffin, Colombia	Bombing
04/16/88	USIS Binational Center-Lima, Peru	Bombing
04/17/88	USIS Binational Center-San Jose, Costa Rica	Bombing
04/20/88	U.S. Embassy Consular Section-Singapore	Attempted Bombing
05/04/88	USIS Binational Center-Santiago, Dominican Republic	Bombing
05/10/88	U.S. Embassy-Sanaa, Yemen	Rocket
05/19/88	USIS Library-Seoul, South Korea	Firebombing
05/20/88	U.S. Embassy-Seoul, South Korea	Firebombing
05/23/88	U.S. Cultural Center-Kwangju, South Korea	Firebombing
06/09/88	U.S. Amb. Residence-Lima, Peru	Rocket
06/13/88	U.S. Cultural Center-Taegu, South Korea	Firebombing
06/27/88	DEA Base Camp-Villa Tunari, Bolivia	Strafing
07/03/88	U.S. Embassy-Madrid, Spain	Attempted Rocket Attack
07/03/88	U.S. Amb. Residence-Madrid, Spain	Bombing

07/04/88	U.S. Embassy-Manila, Philippines	Bombing
08/05/88	U.S. Embassy-Manila, Philippines	Bombing
08/06/88	U.S. Cultural Center-Kwangju, South Korea	Firebombing
08/08/88	U.S. Emb. Commissary-La Paz, Bolivia	Bombing
09/23/88	U.S. Consulate-Bucharest, Romania	Firebombing
10/14/88	U.S. Cultural Center-Kwangju, South Korea	Firebombing
10/26/88	U.S. Cultural Center-Taegu, South Korea	Firebombing
10/28/88	USAID Facility-San Salvador, El Salvador	Rocket
11/06/88	U.S. Cultural Center-Kwangju, South Korea	Firebombing
11/07/88	U.S. Cultural Center-Kwangju, South Korea	Firebombing
11/21/88	USIS Library-Seoul, South Korea	Bombing
11/26/88	DCM Residence-San Salvador, El Salvador	Grenade
11/30/88	U.S. Consulate-Jerusalem, Israel	Firebombing
12/19/88	Peace Corps Hqs.-Tegucigalpa, Honduras	Bombing

1989

DATE	TARGET/LOCATION	TYPE OF ATTACK
01/18/89	U.S. Cultural Center-Kwangju, South Korea	Firebombing
01/31/89	U.S. Cultural Center-Kwangju, South Korea	Firebombing
02/03/89	U.S. Cultural Center-Kwangju, South Korea	Firebombing
02/12/89	USIS Cultural Center-Islamabad, Pakistan	Arson
02/15/89	USIS Binational Center-Santiago, Dominican Republic	Attempted Bombing
02/16/89	U.S. Cultural Center-Kwangju, South Korea	Firebombing
02/27/89	U.S. Embassy-Lima, Peru	Bombing
03/07/89	USIS Binational Center-Santiago, Dominican Republic	Bombing
03/16/89	U.S. Embassy-La Paz, Bolivia	Firebombing
03/28/89	U.S. Consulate-Sao Paulo, Brazil	Bombing
04/06/89	USIS Binational Center-Santiago, Chile	Bombing
04/16/89	U.S. Emb. Warehouse-Tegucigalpa, Honduras	Bombing
04/17/89	USIS Binational Center-Lima, Peru	Bombing
04/27/89	USIS Binational Center-Santo Domingo Dominican Republic	Bombing
05/02/89	U.S. Emb. Warehouse-San Salvador, El Salvador	Bombing

05/18/89	U.S. Consulate-Guayaquil, Ecuador	Firebombing
06/03/89	U.S. Cultural Center-Cairo, Egypt	Attempted Bombing
06/12/89	U.S. Emb. Warehouse-San Salvador, El Salvador	Strafing
07/24/89	USIS Library-Seoul, South Korea	Attempted Bombing
08/05/89	USIS Binational Center-Santiago, Chile	Attempted Bombing
09/11/89	U.S. Consulate-Istanbul, Turkey	Bombing
09/14/89	U.S. Embassy-Caracas, Venezuela	Attempted Bombing
09/17/89	U.S. Embassy-Bogota, Colombia	Rocket
09/26/89	U.S. Embassy-Santiago, Chile	Bombing
10/13/89	U.S Amb. Residence-Seoul, South Korea	Takeover
10/25/89	Marine House-Lima, Peru	Car Bombing
10/26/89	U.S. Embassy-Quito, Ecuador	Strafing
11/10/89	USIS Binational Center-Manizales, Colombia	Bombing
11/11/89	U.S. Amb. Residence-San Salvador, El Salvador	Strafing
12/14/89	U.S. Embassy Annex-Manila, Philippines	Armed Attack
12/20/89	U.S. Embassy-La Paz, Bolivia	Bombing
12/21/89	USIS Binational Center-Temuco, Chile	Bombing
12/23/89	USIS Binational Center-Arequipa, Peru	Bombing
12/23/89	USIS Binational Center-Talca, Chile	Bombing
12/23/89	USIS Binational Center-Vina del Mar, Chile	Bombing

12/24/89	USIS Library-Davao, Philippines	Armed Attack
12/25/89	USIS Binational Center-Chiclayo, Peru	Bombing
12/28/89	USIS Binational Center-Santiago, Chile	Bombing
12/31/89	U.S. Emb. Motorpool-Quito, Ecuador	Bombing
12/31/89	U.S. Emb. Residence-Quito, Ecuador	Attempted Bombing

1990

DATE	TARGET/LOCATION	TYPE OF ATTACK
01/15/90	Marine House-Lima, Peru	Bombing
01/25/90	USIS Library-Davao, Philippines	Bombing
02/14/90	U.S. Emb. Warehouse-Lima, Peru	Attempted Bombing
03/11/90	USIS Binational Center-Mlan, Chile	Attempted Bombing
03/21/90	U.S. Embassy Annex-Manila, Philippines	Grenade
05/01/90	U.S. Embassy-La Paz, Bolivia	Firebombing
05/09/90	U.S. Cultural Center-Seoul, South Korea	Firebombing
05/14/90	U.S. Consulate-Santiago, Chile	Bombing
05/15/90	USIS Binational Center-Chillan, Chile	Bombing
05/18/90	U.S. Cultural Center-Manila, Philippines	Grenade
05/28/90	U.S. Embassy-Mogadishu, Somalia	Grenade
06/06/90	U.S. Consulate-Jerusalem, Israel	Attempted Firebombing
06/12/90	U.S. Cultural Center-Kwangju, South Korea	Firebombing

06/25/90	USIS Binational Center-Arequipa, Peru	Attempting Bombing
06/29/90	U.S. Embassy-Panama City, Panama	Strafing
06/29/90	Marine House-Panama City, Panama	Strafing
07/02/90	USIS Library-Davao, Philippines	Armed Attack
07/18/90	USIS Binational Center-Cuzco, Peru	Bombing
09/02/90	DCM Residence-Guatemala City, Guatemala	Strafing
09/27/90	U.S. Cultural Center-Kwangju, South Korea	Firebombing
10/03/90	U.S. Emb. Rec. Center-Pretoria, S. Africa	Bombing
10/10/90	Marine House-La Paz, Bolivia	Bombing
10/18/90	U.S. Embassy-Seoul, South Korea	Firebombing
11/04/90	U.S. Embassy-Lima, Peru	Rocket
11/07/90	USIS Binational Center-Lima, Peru	Bombing
11/07/90	U.S. Amb. Residence-Lima, Peru	Bombing/Strafing
11/10/90	U.S. Embassy-Manila, Philippines	Grenade
11/11/90	U.S. ConGen Res.-Nishinomiya City, Japan	Firebombing
12/05/90	U.S. Consulate-Santiago, Chile	Bombing
12/10/90	U.S. Embassy-Lima, Peru	Car Bombing

1991

DATE	TARGET/LOCATION	TYPE OF ATTACK
01/15/91	U.S. Embassy-Panama City, Panama	Grenade
01/15/91	U.S. Embassy-Quito, Ecuador	Bombing
01/16/91	U.S. Consulate-Guayaquil, Ecuador	Grenade
01/16/91	U.S. Consulate-Jerusalem, Israel	Attempted Firebombing
01/18/91	U.S. Amb. Residence-Jakarta, Indonesia	Attempted Bombing
01/19/91	U.S. Cultural Center-Manila, Philippines	Bombing
01/23/91	USIS Binational Center-Chiclayo, Peru	Bombing
01/24/91	U.S. Emb. Rec. Center-Kampala, Uganda	Bombing
01/25/91	U.S. Embassy-Lima, Peru	Rocket/Strafing
01/26/91	U.S. Consulate-Istanbul, Turkey	Bombing
01/30/91	USIS Binational Center-Lima, Peru	Bombing
01/30/91	U.S. Emb. Warehouse-Lima, Peru	Bombing
01/31/91	U.S. Embassy-Lima, Peru	Rocket
02/02/91	USIS Binational Center-Talca, Chile	Bombing
02/02/91	American School Housing-Karachi, Pakistan	Firebombing
02/13/91	USIS Binational Center-Cuzco, Peru	Bombing
02/13/91	U.S. Embassy-Bonn, Germany	Strafing
02/14/91	USIS Binational Center-Huancayo, Peru	Bombing

02/16/91	Marine House-Santiago, Chile	Rocket/Strafing
02/19/91	USIS Facility-Sarajevo, Yugoslavia	Firebombing
02/26/91	USIS Binational Center-Huancayo, Peru	Bombing
03/06/91	U.S. Embassy-Kuwait City, Kuwait	Bombing
03/10/91	U.S Cultural Center-Jerusalem, Israel	Arson
03/20/91	U.S. Cultural Center-Kwangju, South Korea	Firebombing
03/26/91	U.S. Consulate-Izmir, Turkey	Bombing
05/24/91	USIS Binational Center-Lima, Peru	Bombing
06/15/91	DEA Base Camp-Santa Lucia, Peru	Strafing
06/16/91	DEA Base Camp-Santa Lucia, Peru	Strafing
06/18/91	U.S. Emb. Residence-Lima, Peru	Attempted Bombing
06/28/91	U.S. Cultural Center-Kwangju, South Korea	Takeover
07/07/91	U.S. Embassy-Kuwait City, Kuwait	Attempted Mine Attack
08/08/91	U.S. Consulate-Kingston, Jamaica	Firebombing
08/22/91	USIS Binational Center-Lima, Peru	Bombing
09/30/91	U.S. Embassy-Amman, Jordan	Attempted Firebombing
10/27/91	U.S. Consulate-Jerusalem, Israel	Arson
10/29/91	U.S. Embassy-Beirut, Lebanon	Rocket
11/01/91	U.S. Cultural Center-Taegu, South Korea	Firebombing

11/15/91	USIS Binational Center-Huancayo, Peru	Bombing
11/21/91	U.S. Cultural Center-Taegu, South Korea	Firebombing
11/29/91	U.S. Cultural Center-Kwangju, South Korea	Firebombing
11/30/91	U.S. Cultural Center-Seoul, South Korea	Firebombing
12/20/91	U.S. Embassy-Panama City, Panama	Bombing
12/25/91	USIS Binational Center-Trujillo, Peru	Bombing

1992

DATE	TARGET/LOCATION	TYPE OF ATTACK
01/02/92	U.S. Embassy-Addis Ababa, Ethiopia	Bombing
01/08/92	U.S. Embassy Housing-Tokyo, Japan	Attempted Bombing
01/11/92	U.S. Consulate-Brisbane, Australia	Firebombing
01/30/92	U.S. Embassy-Algiers, Algeria	Bombing
02/11/92	U.S. Amb. Residence-Lima, Peru	Car Bombing
03/13/92	U.S. Consulate-Istanbul, Turkey	Attempted Car Bombing
04/16/92	U.S. Consulate-Istanbul, Turkey	Rocket
04/19/92	U.S. Cultural Center-Seoul, South Korea	Firebombing
04/26/92	USIS Binational Center-Santiago, Dominican Republic	Bombing
07/11/92	U.S. Consulate-Istanbul, Turkey	Rocket
07/30/92	USIS Facility-Belgrade, Serbia	Firebombing

08/03/92	USIS Facility-Belgrade, Serbia	Firebombing
08/12/92	U.S. Cultural Center-Taegu, South Korea	Firebombing
09/23/92	U.S. Embassy-Quito, Ecuador	Firebombing
09/23/92	U.S. Embassy-Sanaa, Yemen	Attempted Bombing
10/11/92	U.S. Amb. Residence-Lima, Peru	Rocket
11/09/92	U.S. Embassy-Sanaa, Yemen	Attempted Bombing
11/17/92	U.S. Emb. Warehouse-Lima, Peru	Bombing
11/18/92	U.S. Embassy-Montevideo, Uruguay	Grenade
11/25/92	USIS Binational Center-Bogota, Colombia	Attempted Bombing
12/14/92	USIS Binational Center-Antofagasta, Chile	Bombing
12/20/92	U.S. Embassy-Ankara, Turkey	Bombing

1993

DATE	TARGET/LOCATION	TYPE OF ATTACK
01/11/93	USAID Motorpool-La Paz, Bolivia	Bombing
01/14/93	U.S. Consulate-Hamburg, Germany	Arson
01/15/93	U.S. Embassy-Sanaa, Yemen	Attempted Rocket Attack
01/16/93	USIS Binational Center-Lima, Peru	Rocket
01/25/93	U.S. Embassy-Sanaa, Yemen	Attempted Bombing
02/18/93	USIS Facility-Belgrade, Serbia	Vandalism

03/03/93	U.S. Embassy-Belgrade, Serbia	Grenade
06/20/93	U.S. Embassy-Caracas, Venezuela	Strafing
07/27/93	U.S. Embassy-Lima, Peru	Car Bombing
08/14/93	U.S. Embassy-Caracas, Venezuela	Strafing
08/21/93	U.S. Embassy-Caracas, Venezuela	Strafing
11/02/93	U.S. Cultural Center-Kwangju, South Korea	Firebombing
11/20/93	USIS Binational Center-Lima, Peru	Bombing

1994

DATE	TARGET/LOCATION	TYPE OF ATTACK
02/17/94	U.S. Cultural Center-Taegu, South Korea	Firebombing
03/30/94	U.S. Amb. Residence-Montevideo, Uruguay	Strafing
11/21/94	USIS Facility-Podgorica, Serbia	Vandalism
11/23/94	USIS Facility-Podgorica, Serbia	Vandalism

1995

DATE	TARGET/LOCATION	TYPE OF ATTACK
02/26/95	USAID-Addis Ababa, Ethiopia	Grenade
02/28/95	U.S. Embassy-Lima, Peru	Bombing
05/29/95	U.S. Embassy-Belgrade, Serbia	Strafing

07/25/95	USAID-Vilnius, Lithuania	Bombing
08/04/95	U.S. Emb. Residence-Bujumbura, Burundi	Grenade
09/13/95	U.S. Embassy-Moscow, Russia	Rocket
11/11/95	U.S. Embassy Warehouse-Algiers, Algeria	Arson
11/30/95	AIT-Taipei,Taiwan	Firebombing

1996

DATE	TARGET/LOCATION	TYPE OF ATTACK
02/15/96	U.S. Embassy-Athens, Greece	Rocket
02/25/96	American School-Karachi, Pakistan	Shooting
03/22/96	U.S. Consulate-Chengdu, China	Firebombing
04/11/96	U.S. Consulate-Monterrey, Mexico	Strafing
05/11/96	U.S. Cultural Center-Taegu, South Korea	Firebombing
08/27/96	U.S. Consulate-Surabaya, Indonesia	Firebombing

1997

DATE	TARGET/LOCATION	TYPE OF ATTACK
03/25/97	U.S. Embassy-Manila, Philippines	Attempted Firebombing
04/01/97	U.S. Embassy-Manila, Philippines	Firebombing
08/11/97	American School-Chennai, India	Bombing

11/27/97	U.S. FCS - Katowice, Poland	Firebombing
12/23/97	American School-Karachi, Pakistan	Shooting

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Annex 3

Security Requirements for United States Diplomatic Facilities U.S.C. § 4865

a) In general
The following security requirements shall apply with respect to United States diplomatic facilities and specified personnel:

(1) Threat assessment

(A) Emergency Action Plan
The Emergency Action Plan (EAP) of each United States mission shall address the threat of large explosive attacks from vehicles and the safety of employees during such an explosive attack. Such plan shall be reviewed and updated annually.

(B) Security Environment Threat List
The Security Environment Threat List shall contain a section that addresses potential acts of international terrorism against United States diplomatic facilities based on threat identification criteria that emphasize the threat of transnational terrorism and include the local security environment, host government support, and other relevant factors such as cultural realities. Such plan shall be reviewed and updated every six months.

(2) Site selection

(A) In general
In selecting a site for any new United States diplomatic facility abroad, the Secretary shall ensure that all United States Government personnel at the post (except those under the command of an area military commander) will be located on the site.

(B) Waiver authority
(i) In general

Subject to clause (ii), the Secretary of State may waive subparagraph (A) if the Secretary, together with the head of each agency employing personnel that would not be located at the site, determine that security considerations permit and it is in the national interest of the United States.

(ii) Chancery or consulate building

(I) Authority not delegable

The Secretary may not delegate the waiver authority under clause (i) with respect to a chancery or consulate building.

(II) Congressional notification

Not less than 15 days prior to implementing the waiver authority under clause (i) with respect to a chancery or consulate building, the Secretary shall notify the appropriate congressional committees in writing of the waiver and the reasons for the determination.

(iii) Report to Congress

The Secretary shall submit to the appropriate congressional committees an annual report of all waivers under this subparagraph.

(3) Perimeter distance

(A) Requirement

Each newly acquired United States diplomatic facility shall be sited not less than 100 feet from the perimeter of the property on which the facility is to be situated.

(B) Waiver authority

(i) In general

Subject to clause (ii), the Secretary of State may waive subparagraph (A) if the Secretary determines that security considerations permit and it is in the national interest of the United States.

(ii) Chancery or consulate building

(I) Authority not delegable

The Secretary may not delegate the waiver authority under clause (i) with respect to a chancery or consulate building.

(II) Congressional notification

Not less than 15 days prior to implementing the waiver authority under subparagraph (A) with respect to a chancery or consulate building, the Secretary shall notify the appropriate congressional committees in writing of the waiver and the reasons for the determination.

(iii) Report to Congress

The Secretary shall submit to the appropriate congressional committees an annual report of all waivers under this subparagraph.

(4) Crisis management training

(A) Training of headquarters staff
The appropriate personnel of the Department of State headquarters staff shall undertake crisis management training for mass casualty and mass destruction incidents relating to diplomatic facilities for the purpose of bringing about a rapid response to such incidents from Department of State headquarters in Washington, D.C.

(B) Training of personnel abroad
A program of appropriate instruction in crisis management shall be provided to personnel at United States diplomatic facilities abroad at least on an annual basis.

(5) Diplomatic security training

Not later than six months after November 29, 1999, the Secretary of State shall -

(A) develop annual physical fitness standards for all diplomatic security agents to ensure that the agents are prepared to carry out all of their official responsibilities; and

(B) provide for an independent evaluation by an outside entity of the overall adequacy of current new agent, in-service, and management training programs to prepare agents to carry out the full scope of diplomatic security responsibilities, including preventing attacks on United States personnel and facilities.

(6) State Department support

(A) Foreign Emergency Support Team
The Foreign Emergency Support Team (FEST) of the Department of State shall receive sufficient support from the Department, including -
(i) conducting routine training exercises of the FEST;
(ii) providing personnel identified to serve on the FEST as a collateral duty;
(iii) providing personnel to assist in activities such as security, medical relief, public affairs, engineering, and building safety; and
(iv) providing such additional support as may be necessary to enable the FEST to provide support in a post-crisis environment involving mass casualties and physical damage.

(B) FEST aircraft
(i) Replacement aircraft
The President shall develop a plan to replace on a priority basis the current FEST aircraft funded by the Department of Defense with a

dedicated, capable, and reliable replacement aircraft and backup aircraft to be operated and maintained by the Department of Defense.

(ii) Report

Not later than 60 days after November 29, 1999, the President shall submit a report to the appropriate congressional committees describing the aircraft selected pursuant to clause (i) and the arrangements for the funding, operation, and maintenance of such aircraft.

(iii) Authority to lease aircraft to respond to a terrorist attack abroad

Subject to the availability of appropriations, when the Attorney General of the Department of Justice exercises the Attorney General's authority to lease commercial aircraft to transport equipment and personnel in response to a terrorist attack abroad if there have been reasonable efforts to obtain appropriate Department of Defense aircraft and such aircraft are unavailable, the Attorney General shall have the authority to obtain indemnification insurance or guarantees if necessary and appropriate.

(7) Rapid response procedures

The Secretary of State shall enter into a memorandum of understanding with the Secretary of Defense setting out rapid response procedures for mobilization of personnel and equipment of their respective departments to provide more effective assistance in times of emergency with respect to United States diplomatic facilities.

(8) Storage of emergency equipment and records

All United States diplomatic facilities shall have emergency equipment and records required in case of an emergency situation stored at an off-site facility.

(b) Statutory construction

Nothing in this section alters or amends existing security requirements not addressed by this section.

Annex 4

Report of the Accountability Review Boards on the Bombings of the US Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania on August 7 1998[1]

Key Recommendations

The 1986 Omnibus Diplomatic and Anti-Terrorism Act established the legal basis for the Accountability Review Board and specifically requires that acts of terrorism against US diplomatic installations abroad, wherein the loss of life or significant property damage occurs, be investigated with a view, among other factors, toward determining whether security systems and procedures were adequate and were implemented. After addressing these issues in this report, the Boards will propose and elaborate on a number of recommendations aimed at improving security systems and procedures. We provide a listing of the recommendations below. The bulk of them are necessitated by the use of large vehicular bombs, a threat that has not been fully appreciated in recent years. The first 15 recommendations deal with adjustments in systems and procedures to enhance security of the work place. The final six recommendations address how to improve crisis management systems and procedures. All are directed toward achieving the objective of saving lives. They are urgent and need to be acted upon immediately. No single measure will accomplish the objective but, taken together, they should substantially improve the security for US personnel serving abroad.

Three additional recommendations deal with intelligence and information availability, matters the Boards are also enjoined to address under the law. (Details and rationale for all of the recommendations are contained in the classified version of the report.)

I. Improving Security Systems and Procedures

A. Work Place Security Enhancements

1. Emergency Action Plans for all posts should be revised to provide a “special

[1] Available at http://www.state.gov/www/regions/africa/accountability_report.html.

alarm signal" for large exterior bombs and duck-and-cover practice drills in order to reduce casualties from vehicular bombs. Special equipment should be provided to perimeter guards.

2. Given the worldwide threat of transnational terrorism which uses a wide range of lethal weapons, including vehicle bombs, every post should be treated as a potential target and the Department of State's Physical Security Standards and policies should be revised to reflect this new reality.

3. For those US diplomatic buildings abroad not meeting Inman standards, essential physical security upgrades should be made immediately and should include a number of specific measures involving perimeters and counter-surveillance.

4. The Secretary of State should personally review the security situation of embassy chanceries and other official premises, closing those which are highly vulnerable and threatened but for which adequate security enhancements cannot be provided, and seek new secure premises for permanent use, or temporary occupancy, pending construction of new buildings.

5. Demarches to all governments with whom we have relations should be made regularly to remind them of their obligation to provide security support for our embassies. For those governments whose police forces need additional training to enable them to provide more adequate protection, the Department should provide training under the Anti-Terrorism Assistance (ATA) program. The Department should also explore ways to provide any necessary equipment to host governments to upgrade their ability to provide adequate protection. Failure by a host government to honor its obligations should trigger an immediate review of whether a post should be closed.

6. The Department of State should radically reformulate and revise the "Composite Threat List" and, as a part of this effort, should create a category exclusively for terrorism with criteria that places more weight on transnational terrorism. Rating the vulnerability of facilities must include factors relating to the physical security environment, as well as certain host governmental and cultural realities. These criteria need to be reviewed frequently and all elements of the intelligence community should play an active role in formulating the list. The list's name should be changed to reflect its dual purpose of prioritizing resource allocation and establishing security readiness postures.

7. The Department of State should increase the number of posts with full time Regional Security Officers, seeking coverage of as many chanceries as possible. The Department should also work with the Marine Corps to augment the number of Marine Security Guard Detachments to provide coverage to a larger number of US diplomatic missions.

8. The Department of State should provide all Regional Security Officers comprehensive training on terrorism, terrorist methods of operation, explosive devices, explosive effects, and other terrorist weapons to include weapons of mass destruction such as truck bombs, nuclear devices and chemical/biological weapons.

9. The Department of State should define the role and functions of each of the US embassies abroad for the coming decade with a view toward exploiting technology more fully, improving their efficiency, ensuring their security, and reducing their overall cost. The Department should look specifically at reducing the number of diplomatic missions by establishing regional embassies located in less threatened and vulnerable countries with Ambassadors accredited to several governments.

10. The physical security standards specified in the State Department's Security Standards and Policy Handbook should be reviewed on a priority basis and revised as necessary in light of the August 7 and other large bombings against US installations.

11. When building new chanceries abroad, all US government agencies, with rare exceptions, should be located in the same compound.

12. The Department of State should work within the Administration and with Congress to obtain sufficient funding for capital building programs and for security operations and personnel over the coming decade (estimated at $1.4 billion per year for the next 10 years), while ensuring that this funding should not come at the expense of other critical foreign affairs programs and operations. A failure to do so will jeopardize the security of US personnel abroad and inhibit America's ability to protect and promote its interests around the world.

13. First and foremost, the Secretary of State should take a personal and active role in carrying out the responsibility of ensuring the security of US diplomatic personnel abroad. It is essential to convey to the entire Department that security is one of the highest priorities. In the process, the Secretary should reexamine the present organizational structure with the objective of clarifying responsibilities, encouraging better coordination, and assuring that a single high-ranking officer is accountable for all protective security matters and has the authority necessary to coordinate on the Secretary's behalf such activities within the Department of State and with all foreign affairs USG agencies.

14. The Department of State should expand its effort to build public support for increased resources for foreign affairs, and to add emphasis on the need to protect US representatives abroad from terrorism, without sacrificing other important foreign policy programs.

15. The Department of State, in coordination with the intelligence community, should advise all posts concerning potential threats of terrorist attacks from the use of chemical, biological or nuclear materials, should establish means of defending

against and minimizing the effect of such attacks through security measures and the revision of EAP procedures and exercises, and should provide appropriate equipment, medical supplies, and first responder training.

B. Better Crisis Management Systems and Procedures

1. Crisis management training for mass casualty and mass destruction incidents should be provided to Department of State personnel in Washington to improve Task Force operations to assure a cadre of crisis managers.

2. A revitalized program for on-site crisis management training at posts abroad should be funded, developed, expanded, and maintained.

3. The FEST should create and exercise a team and equipment package configured to assist in post blast crises involving major casualties and physical damage (while maintaining the package now deployed for differing counter terrorism missions). Such a new configuration should include personnel to assist in medical relief, public affairs, engineering and building safety.

4. A modern, reliable, air-refuelable FEST aircraft with enhanced seating and cargo capacity to respond to a variety of counter terrorism and emergency missions should be acquired urgently for the Department of State. Clearly defined arrangements for a backup aircraft are also needed.

5. The Department of State should work closely with the Department of Defense to improve procedures in mobilizing aircraft and adequate crews to provide more rapid, effective assistance in times of emergency, especially in medical evacuations resulting from mass casualty situations. The Department of State should explore as well, chartering commercial aircraft to transport personnel and equipment to emergency sites, if necessary to supplement Department of Defense aircraft.

6. The Department of State should ensure that all posts have emergency communications equipment, basic excavation tools, medical supplies, emergency documents, next of kin records, and other safety equipment stored at secure off-site locations in anticipation of mass destruction of embassy facilities and heavy US casualties.

II. Intelligence and Information

1. In order to enhance the flow of intelligence that relates to terrorism and security, all such intelligence should normally be disseminated to concerned levels of the policy and analytic community; compartmentalization of such information should be limited to extraordinary situations where there is a clear national security need for limited dissemination.

2. The Department of State should assign a qualified official to the DCI's Counter Terrorism Center; and

3. The FBI and the Department of State should consult on ways to improve information sharing on international terrorism to ensure that all relevant information that might have some bearing on threats against or security for US missions or personnel abroad is made available.

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