SIZE OF THE MISSION

Article 11

1. In the absence of specific agreement as to the size of the mission, the receiving State may require that the size of a mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission.
2. The receiving State may equally, within similar bounds and on a non-discriminatory basis, refuse to accept officials of a particular category.

Article 11 created new international law. In the seventeenth century in particular—when the prestige of an embassy was determined by the numbers and magnificence of the ambassador's suite—a number of receiving States suffered difficulties from the presence on their territory of inordinately large numbers of staff belonging to certain diplomatic missions who on occasion abused their privileges and immunities. Measures to control the problem in earlier times usually took the form of reducing the privileges and immunities given to subordinate staff. Even when preparation of the Vienna Convention began it was apparent that large numbers were again causing problems in some capitals. The Rapporteur's draft was the first attempt to address the problem by giving the receiving State a power to control the size of a mission. The power has been used more frequently in recent years to address concerns over terrorism and other forms of abuse of immunity.

Negotiating history

The debates in the International Law Commission showed that almost all members agreed that it would be helpful to formulate some rule rather than leave the size of the mission to be settled by negotiation between conflicting interests. There was also general agreement in the Commission that a balance must be struck between the interests of the sending and the receiving State.

Beyond this there was a fundamental difference of approach to the formulation of a new rule. Some members—in particular Mr Ago—started from the customary law principle (now reflected in Article 7 of the Convention) that once consent had been given to the establishment of diplomatic relations, the number sent to staff the mission and its internal organization were *prima facie* within the discretion of the sending State. The receiving State had, of course, the power to declare *persona non grata* any member of the mission, but it was accepted that excessive numbers in a mission was not an appropriate justification for such a step. Other members—notably Sir Gerald Fitzmaurice—believed that the basic principle was the need for the receiving State to consent to any mission at all, and that control over existence must logically imply control over numbers.

The Rapporteur's original draft provision: 'The receiving State may limit the size of the staff composing the mission. It may refuse to receive officials of a particular category' followed this second approach, but was weighted too heavily in favour of the receiving State to be acceptable. The compromise produced by the International Law Commission in 1957 shifted the emphasis towards the sending State, emphasizing that agreement was the normal method of effecting limitation of numbers of mission staff and giving the receiving State power to limit only 'within the bounds of what is reasonable and customary, having regard to the circumstances and conditions in the receiving State and to the needs of the particular mission'. This wording provided an objective standard.[1]

At the Vienna Conference, however, the balance swung back in favour of the receiving State. The Conference by a narrow majority accepted an Argentine amendment replacing the objective test of 'what is reasonable and normal' by the subjective test of what the receiving State 'considers reasonable and normal'. The question of normality in the size of a particular mission thus became one which in the absence of agreement could be determined unilaterally, subject to prescribed constraints, by the receiving State.[2]

'and on a non-discriminatory basis'

The specific prohibition of discrimination in paragraph 2 of Article 11 had its origins in a reformulation of the text by Sir Gerald Fitzmaurice in the International Law Commission. He explained that they appeared in paragraph

[1] UN Doc A/CN 4/91, Art 5; *ILC Yearbook* 1957 vol I pp 21–6, 30–3; 1957 vol II p 134.
[2] UN Docs A/Conf. 20/C 1/L 119; A/Conf. 20/14 pp 106–8.

2 only, because in the context of paragraph 1 which dealt with numerical limits they might be construed as requiring absolute numerical equality of all missions in a given capital, which would obviously be absurd. It was, however, pointed out by The Netherlands in commenting on the Commission's text that this isolated reference to non-discrimination could create the false impression that the principle of non-discrimination did not also apply to the other Articles.[3] The United States was also unhappy with the Commission's text because it omitted any mention of the principle of reciprocity.[4] One result of these criticisms was the formulation by the Rapporteur of a general provision on non-discrimination and reciprocity which ultimately became Article 47 of the Convention.

It would have been more satisfactory if the words 'and on a non-discriminatory basis' had thereupon been deleted from Article 11, leaving Article 47 to determine the application of non-discrimination and reciprocity, but no amendment for this purpose was proposed. It seems fairly clear, however, that Article 47 is sufficiently general to apply to Article 11 paragraph 2, with the result that refusal by State A to accept military attachés from State B only, for example, would not be unlawful if it was a response to the refusal of State B to admit military attachés from State A.[5]

Subsequent practice

Ceilings are most usually imposed when diplomatic missions have been found to be involved in espionage or terrorism. A ceiling was imposed by the United Kingdom on the diplomatic mission and other agencies of the Soviet Union in 1971 following the expulsion of 105 Soviet diplomatic and other officials for 'inadmissible activities'. The decision to reduce the ceiling by one on each subsequent occasion when a Soviet official was required to leave the country as a result of having been detected in intelligence activities was justified under Article 11 of the Vienna Convention on the basis that the 'needs of the particular mission' did not include those 'diplomats' whose activities were not properly diplomatic.[6] The Soviet Union, which during the Vienna Conference had

[3] *ILC Yearbook* 1957 vol I pp 22, 32; UN Docs A/CN 4/L 75 p 8; A/CN 4/114/Add. 1 pp 12, 14; A/CN 4/116 p 24.

[4] UN Docs A/CN 4/L 75 p 8; A/CN 4/114 p 56; A/CN 4 116 p 23.

[5] UN Docs A/4164 p 17; A/Conf. 20/14 pp 107, 108; A/Conf. 20/C 1/L80; Kerley (1962) pp 98–9.

[6] Satow (5th edn 1979) para 21.23; Dickie (1992) ch IX 'Spies and Diplomacy'; Review of the Vienna Convention, Cmnd 9497, para 31.

opposed giving receiving States a right unilaterally to require reduction in the size of diplomatic missions, on ratifying the Convention made a 'reservation' to the effect that it 'considers that any difference of opinion regarding the size of a diplomatic mission should be settled by agreement between the sending State and the receiving State'. Several other Communist States made similar declarations on ratifying. Most other States appear to have taken the view that these amounted to statements of interpretation rather than reservations, and there were very few objections to them.[7] The Soviet Union, however, did impose a ceiling on the UK Embassy in Moscow.

Practice indicates that the imposition of a ceiling on a diplomatic mission is normally followed by reciprocal or retaliatory action in the capital of the State whose mission has been capped. This is explicitly stated in the United Kingdom Government's 1985 Review of the Vienna Convention. The Government in their Review considered and rejected a general policy of restricting the size of all missions. They commented that: 'the level of unacceptable activities would not necessarily be reduced by imposing overall limits. Such a policy could make us vulnerable to reciprocal action, and retaliation against British missions overseas would almost certainly follow.'[8]

In addition to cases of involvement in espionage or terrorism the United Kingdom also have regard to 'the pattern of behaviour of certain missions, or Governments, which suggest possible future involvement in unacceptable activities'—which might justify imposing or agreeing ceilings before any incident occurred. Thirdly, they compare the size of a mission in London with that of the UK mission in the relevant State, bearing in mind the reasons for any significant discrepancy. Missions in London may be larger than the corresponding UK mission overseas because of the importance of London and because it is used by some States as a base for missions also covering other countries in addition. The UK Government accepted in their 1985 Review of the Vienna Convention the need to be 'significantly readier than in the past to use the power to limit the size of a mission in cases where there is cause for concern about the overall nature of the mission's activities'. They would, however, do so only on a case by case basis and would have regard to the state of relations with the country concerned and the likelihood of retaliation. As a general rule they would not publicize the imposition or the details of specific ceilings since this would further damage relations and be more likely to attract retaliation.

[7] Belgium, Luxembourg, and the Federal Republic of Germany objected. See Bowett (1976) at p 68; Salmon (1994) para 248.

[8] Cmnd 9497, para 29.

'In some cases however the reasons for it can serve a useful purpose by showing up a particular type of activity as unacceptable or to deter others from practising it. We shall be ready to use it in any case where it is appropriate to do so.'[9]

Readiness to impose ceilings on diplomatic missions involved in terrorist activities was shared by the other Summit Seven States. The United States had in 1979 made use of its powers to reduce the numbers in the Embassy of Iran in Washington to fifteen persons in an early response to the seizure of the US Embassy in Tehran and the holding of members of the mission as hostages against fulfilment of Iranian 'demands'. At the London Economic Summit in 1984 the Heads of State and Government, expressing their serious concern at abuse of diplomatic immunity, supported proposals for 'use of the powers of the receiving State under the Vienna Convention in such matters as the size of diplomatic missions and the number of buildings enjoying diplomatic immunity'. Two years later a stronger statement at the Tokyo Economic Summit on 5 May 1986 listed among measures which the Seven would apply 'in respect of any State which is clearly involved in sponsoring or supporting international terrorism' strict limits on the size of the diplomatic and consular missions and 'where appropriate, radical reductions in, or even the closure of, such missions'.[10] There appear, however, to be few subsequent examples of the imposition of ceilings by the Summit Seven States—at least few that have been publicly disclosed.

The United States' application of Article 11 of the Convention was considered in 1984 by the US Court of Appeals in *US v Kostadinov*. This was an appeal from the District Court for the Southern District of New York which had dismissed an indictment for espionage against Kostadinov, Assistant Commercial Counsellor in the Bulgarian Trade Office in New York. The United States had recognized the New York Office as premises of the Bulgarian Embassy in Washington and had accepted the Commercial Counsellor who headed the office as a member of the mission. From 1963 onwards the United States had consistently made clear that only the Commercial Counsellor would be entitled to diplomatic immunity. This reflected longstanding US policy that all members of diplomatic missions, with the sole exception of the senior financial, economic, or commercial officer of each mission maintaining a New York office, must reside in Washington. The District Court held that Kostadinov was a member of the Bulgarian diplomatic mission and that

[9] Cmnd 9497, paras 28–32.

[10] 1979 DUSPIL 574. Text of the Declarations in Levitt (1988) pp 113, 116. The Tokyo Declaration is in 1986 AJIL 951.

the United States was not under the Vienna Convention entitled to withhold diplomatic immunity. On appeal this was reversed and the Court of Appeals held that Kostadinov had never been regarded as a member of the mission. The court carefully considered the background of the Convention and Article 11 and concluded:

> The United States did precisely what Article 11 permits. It limited the size of the Bulgarian mission by refusing to accept as members of that mission officials of a certain category, namely assistant commercial counsellors based in New York. Furthermore, it did so on a nondiscriminatory basis.[11]

In 1985 the US Congress decided that over a period of three years parity of numbers should be achieved between the Soviet diplomatic mission in Washington and the US mission in Moscow. The ceiling to be achieved was 225 members of the diplomatic, administrative, and technical staff. In October 1985 there were 263 members of the Soviet Embassy in the relevant categories of staff, and fifty were expelled in order to meet the requirements of Congress. The Soviet Union retaliated by ordering the withdrawal of a large number of US Embassy employees who were Soviet nationals, so forcing the United States to use its staff entitlement to supply chauffeurs and cleaners rather than diplomats from the United States.[12] This experience appears to have dampened United States' enthusiasm for the imposition of ceilings on diplomatic missions. The United States, however, also rely on Article 11 in order to limit the size of diplomatic missions which are heavily in debt—arguing that sending States which cannot afford their current level of diplomatic representation should reduce it. The reduction is brought about by refusing to accept replacement appointments rather than by imposition of a rigid numerical ceiling.[13] This is an unusual application of Article 11, but it can be argued that it is not 'reasonable and normal' that the financial shortfall of a lavish diplomatic mission should in effect be financed by private creditors in the receiving State.

The imposition of ceilings on a basis of numerical equality across all diplomatic missions in a particular capital is very rare. In 1973, however, Gabon determined that missions in Libreville should not exceed a ceiling of ten diplomatic, administrative, and technical staff.[14]

Article 11—in spite of the new powers which it gave to the receiving State—has proved a much less effective weapon for controlling abuse of diplomatic

[11] USCA 2nd Cir 1133, Judgment of 10 May 1984; 99 ILR 103.

[12] 1981–8 DUSPIL 910; 1987 RGDIP 618.

[13] Information supplied by State Department.

[14] 1974 RGDIP 509.

immunity than Article 9. As the United Kingdom were well aware when they conducted their Review of the Convention in 1985, it is not possible to make use of Article 11 without provoking strong diplomatic hostility and—almost certainly—some form of retaliation. This is in part because it cannot be targeted even approximately at those individuals who have offended and it is therefore seen as an unfriendly act towards the sending State calling for countermeasures.

OFFICES AWAY FROM THE SEAT OF THE MISSION

Article 12

The sending State may not, without the prior express consent of the receiving State, establish offices forming part of the mission in localities other than those in which the mission itself is established.

Background

No previously established rule of customary law required the sending State to base its diplomatic mission at the capital or seat of government of the receiving State. Nor was the sending State required by international law to seek permission in order to acquire offices in a part of the country other than that where the principal seat of the mission was established. The general practice was for missions to be established in the city or town which was the seat of government of the receiving State and to follow that government if it moved either permanently or to a summer residence. This was, however, a matter of convenience reflecting the need for the mission to conduct business with the government, and there were exceptions.

In China, for example, between 1927 and 1937 many of the diplomatic missions were permitted to remain in Peking although the Government had moved to Nanking. In Saudi Arabia the Foreign Office was in Jedda and missions were required to reside there rather than in Riyadh, the seat of government. In Israel most diplomatic missions remained in Tel Aviv because a move to Jerusalem would imply acceptance of Israel's establishment there of its seat of government.[1] The US Congress has sought to place pressure on the President to move the US Embassy to Jerusalem by passing a Jerusalem Embassy Act,

[1] UN Doc A/Conf. 20/14 p 109 (representative of Saudi Arabia); Lecaros (1984) p 93.

but the Act permitted a waiver by the executive 'to protect national security interests' and such a move has never taken place.[2]

The Holy See, because of the very small size of the Vatican City State, is unable to accommodate the premises of all the missions accredited to it. Missions are therefore established in Rome, outside the territory of the receiving State. Under Article 12 of the Lateran Treaty Italy guarantees their privileges and immunities, rights of access and communication, even where the sending States do not have diplomatic relations with Italy, 'and their residences can continue to remain in Italian territory'.[3] The Holy See, however, (as already explained in the context of Article 2 above) will not accept co-location of a mission to itself with the diplomatic mission of the relevant State to Italy even where the sending State tries to justify such a move on grounds of security or economy.

Negotiating history

There were both practical and political obstacles to formulating a rule which would require diplomatic missions to follow the seat of the government of the receiving State. The International Law Commission text therefore dealt solely with prohibiting the establishment of offices 'in towns other than those in which the mission itself is established'. Discussion, however, made clear that the members of the Commission were concerned at the difficulty for the receiving State in ensuring privileges and immunities if missions were set up away from the seat of government, and also at preventing abuses. Mr Bartos, for example, commented that: 'Ambassadors with little diplomatic business to transact in Yugoslavia had even been known to establish themselves in watering places, arguing that if they had been accredited to two countries, they might have had to operate from Rome or Vienna, so there could be no objection to their operating from a Yugoslav watering place.' The Commission's Commentary stated that the Article had been included 'to forestall the awkward situation which would result for the receiving Government if mission premises were established in towns other than that which is the seat of the Government'.[4]

At the Vienna Conference Switzerland and Mexico proposed amendments to require missions to be established at the seat of government of the receiving

[2] 2003 AJIL 179. [3] Cardinale (1976) pp 216–17.

[4] UN Docs A/CN 4/L 75 p 8; A/CN 4/114/Add. 1 p 14; A/CN 14/116 p 25 and Add. 1, Art 7 para 3; *ILC Yearbook* 1958 vol I p 113, vol II p 92.

State. Although the representative of Switzerland argued that such a provision would reflect a recognized principle of international law, the amendments met with general opposition and were withdrawn.[5] The customary position was thus left unchanged on the question of establishing missions at the seat of government.

Article 12 was thus confined to requiring prior express consent of the receiving State before offices forming part of the mission can be set up in towns other than that of the seat of the mission. The addition, by UK amendment, of the words 'forming part of the mission' brought out clearly that the object was not to prevent a State from setting up, for example, an embassy library, information centre, or commercial office separate from the mission itself. Establishments of this kind would not be entitled to privileges or immunities and would need only those building or operating consents necessary under the general law of the receiving State. The objective was to ensure that premises which were entitled to privileges and immunities were adequately known to and subject to the control as well as the protection of the receiving State.

The United Kingdom also proposed an amendment to replace the word 'towns' in the International Law Commission's draft by 'localities', on the basis that the word 'towns' had a restrictive connotation. This amendment was accepted, but in fact it introduces some ambiguity in that it could be argued to apply to offices in a different area of the same town or city, or to a summer residence outside but close to the capital city. It is, however, clear from the negotiating history, and appears to have been accepted in practice, that Article 11 does not apply to these situations. Mission premises in several buildings situated in different parts within or around a city may indeed give rise to questions which are considered under Article 1(i) of the Convention. They are not, however, subject to prior express consent of the receiving State under Article 12.[6]

Subsequent practice

Although neither customary international law nor Article 12 requires that diplomatic missions should be established at the seat of government of the receiving State, such a requirement is sometimes imposed by national law or by administrative decree. The Government of Switzerland, for example, have made it a condition for granting privileges and immunities that diplomatic

[5] UN Docs A/Conf. 20/C 1/L 56 (Mexico), L 107 (Switzerland); A/Conf. 20/14 pp 108–10.

[6] UN Docs A/Conf. 20/C 1/L 53 paras 1 and 2; A/Conf. 20/14 pp 108–12.

missions should be based at Berne, the Federal capital. Their particular concern was that other States might wish to accredit their representative to the United Nations in Geneva to the Government of Switzerland, which would not accept such an arrangement.[7] Also, The Netherlands require diplomatic missions to be based in The Hague, the centre of public administration, rather than in Amsterdam.

In 1972, when Brazil moved her capital from Rio de Janeiro to Brasilia, she imposed a time limit for diplomatic missions to move to the new capital. Despite the practical difficulties of incomplete buildings and high rents for temporary premises in Brasilia, it was made clear that missions which had not moved to Brasilia would be struck off the Diplomatic List and would lose their entitlement to privileges and immunities.[8] But in other cases where a capital is moved, for example when the capital of Germany was moved to Berlin, diplomatic missions have been left to make their own decisions on the basis that political and practical considerations will in any event dictate a move to the new seat of government. The move of the German capital from Bonn to Berlin was completed in mid-1999, and a year later a new British Embassy building was formally opened by the Queen in Berlin.[9]

The United States has since 1816 expected foreign missions to reside in Washington. The Secretary of State commented in 1828:

> If the President has, in one or two instances, acquiesced in the residence of foreign ministers in a distant city of the Union, it has been because they have but little business to transact with this government, and because their residence there has given rise to no complaint of breach of privileges on the one hand or of personal injury to American citizens on the other.

The State Department also expected US envoys to maintain their normal post of duty at the seat of government of the receiving State, even in times of physical danger.[10] In 1939 the Chief of Protocol of the State Department formally stated that 'the only foreign diplomatic officers… permitted to reside and maintain offices in New York City will be the ranking commercial or financial officer'. Circular Notes confirming this policy were sent to all diplomatic missions in Washington in 1974, 1977, and 1978. The policy was considered and endorsed by the US Court of Appeals in the case of *US v Kostadinov*,[11] discussed above under Article 11. In holding that Kostadinov, Assistant Commercial Counsellor in the Bulgarian Trade Office in New York, was not a member of the Bulgarian mission, the Court of Appeals relied mainly on Article 11 entitling the United States to limit the size of the Bulgarian mission. The same result could, however, have been based on application of Article 12. Since the United States could have refused permission for trade offices in New York to form part of diplomatic mission premises, it followed that they were entitled to grant permission limited to a single officer.

[7] 1961 ASDI 127.
[8] Do Nascimento e Silva (1973) p 51; 1973 RGDIP 793.
[9] Richtsteig (1994) pp 36–7; *The Times*, 19 July 2000.
[10] Moore (1905) vol IV para 645.

[11] USCA 2nd Cir 1133, Judgment of 10 May 1984; 99 ILR 103.

EXEMPTION OF MISSION PREMISES FROM TAXATION

Article 23

1. The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.
2. The exemption from taxation referred to in this Article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the mission.

Historical background

Prior to the Vienna Convention, state practice on the imposition of national and local taxes on premises of a diplomatic mission was variable, and where exemption from liability was granted it was based on courtesy, on general usage, or on reciprocity rather than on binding custom.

The subject is not mentioned in the early authorities, probably because the raising of revenue by means of taxation of real property was not at that time general. Nineteenth-century authors consistently stated that the ambassador's residence would in practice not be taxed, but that the practice was based not on diplomatic immunity but on courtesy.[1] Many States concluded bilateral agreements or arrangements providing exemption—a practice which would have been unnecessary if customary international law had required it. Exemption 'from all land taxes on the building of the mission, when it belongs to the respective Government' was also required under the 1928 Havana Convention on Diplomatic Officers.[2]

[1] Martens-Geffcken (1866) pp 110–11; Pradier-Fodéré (1899) vol II pp 65–6; Genet (1931) vol I pp 426–7.

In many States national legislation provided for exemption, but in the majority of these the privilege was expressly made subject to reciprocity—a further indication that the privilege did not have a clear basis in customary international law.[3]

In the United Kingdom tax levied by central and by local authorities was treated separately. Under section 111 of the Income Tax Act 1952[4] tax on property occupied by a foreign embassy was 'charged on and paid by the landlord or other person immediately entitled to the rent of the house or tenement'. If the foreign State or a diplomatic agent owned the mission premises he was in practice treated as exempt from taxes levied on owners and on profits of occupation. But if the landlord was not entitled to diplomatic immunity he could be charged.

Taxes levied by local authorities to meet expenses such as road maintenance and lighting, water supply, rubbish collection, and policing were known in the United Kingdom as rates. Local legislation provided that in respect of the land or house of an ambassador, rates should be imposed on the landlord or proprietor. The case of *Parkinson v Potter*[5] arose because a Portuguese diplomat, who on assignment of a lease had covenanted to pay the rates on his premises, declined to pay on the ground that he was exempt. The landlord was compelled to pay, and sued the original lessee, who argued that the landlord should not have had to pay. The court held that the diplomat was within the Act, the landlord had to pay, and the defendant was liable under his covenant. The decision was followed in *Macartney v Garbutt*.[6] Following these cases, and other demands in cases not covered by local legislation imposing liability on landlords, the diplomatic corps made collective representations to the Secretary of State, claiming that under international law mission premises and diplomatic residences should be exempt. The Foreign Office consulted their posts abroad, and on the basis of the responses replied that 'in several countries besides England, rates which are not paid by a Diplomatic Representative

[3] See UN Laws and Regulations. States requiring reciprocity included Argentina (p 3); Austria (p 17, see also *In Re Khan* 1931–2 AD No 182); Denmark (p 97); UAR (p 111); Finland (p 115); Hungary (p 163); Israel (pp 184–5); Korea (p 190); Luxembourg (p 192); Netherlands (p 204); Nicaragua (p 222); Norway (p 225); Poland (pp 254–5); Portugal (p 280); Romania (p 289); Sweden (p 297); Soviet Union (p 340); Yugoslavia (pp 409–10). States not expressly requiring reciprocity were Belgium (p 25); Colombia (p 66); Cuba (p 73); Peru (p 232); Vietnam (pp 404, 406–7). See also 26 AJIL (1932 Supp) pp 58–61.

[4] 15 and 16 Geo 6 and 1 Eliz 2 c 10. Earlier provision was in the Land Tax Acts 1692 and 1789, cited in Feller and Hudson (1933) vol I p 213 and in 26 AJIL (1932 Supp) 58–61. See also Lyons (1953) at pp 138–40.

are recovered from his landlord, and that it is not therefore possible, under existing circumstances, to invoke any universal principle of reciprocity in favour of a change in the English law and practice'. Following consultation with the Law Officers, the United Kingdom maintained their view of international law, and declined to seek repeal of the Acts imposing liability on landlords. They did, however, propose by way of compromise arrangements under which the 'beneficial' element of the rates, covering such matters as drainage, street maintenance, and lighting should be borne by diplomatic missions, while on the basis of reciprocal agreements the Foreign Office would pay the 'non-beneficial' element covering such matters as poor relief, policing, baths, and libraries.[7]

This distinction between the general rate or local tax and that portion which represented 'payment for specific services rendered' had already appeared in the practice of other capitals.[8] Following the circular letter from the British Foreign Secretary in 1892,[9] agreements were concluded with most States represented in London whereby the non-beneficial element of local rates—amounting to about two-thirds of the total—was paid by the Foreign Office on condition of reciprocity for British missions in the relevant foreign capital.

During the twentieth century, general practice based on courtesy or on reciprocity began to harden into a customary rule requiring exemption from central and local taxes on mission property. The Supreme Court of Canada in 1943 in the *Rockcliffe Park Case*[10] by a majority of three to two held that premises occupied by foreign legations were exempt from rates levied for general purposes, though not from those 'which constitute payment for services rendered for the beneficial enjoyment of the particular property in respect of which they are assessed'. The majority held that imposition of liability would amount to a subtraction from the property of a foreign sovereign, inconsistent with the principle of *par in parem non habet imperium*. Their view rested, however, mainly on the proposition that the rates were not recoverable from the missions and that to assess taxes which could not be enforced would be a useless procedure. The minority in the Supreme Court distinguished between

[7] VII BDIL 823; Lyons (1953) pp 140–7; Satow (4th edn 1957) p 232; Wheaton (1816) § 242; Ryde (1950) p 97; Konstam (1927) p 84; McNair (1956) vol I p 207. See also FO 83/1661 and Jones (1948) at pp 274–5.

[8] eg Paris: see draft of letter from Marquis of Salisbury, 1891, in McNair (1956) vol I p 209; Washington: 26 AJIL (1932 Supp) 61.

[9] Letter from Marquis of Salisbury, 19 July 1892, FO 1233 (18864).

[10] *In the Matter of a Reference as to the Powers of the Corporation of the City of Ottawa and the Corporation of the Village of Rockcliffe Park to Levy Rates on Foreign Legations and High Commissioners' Residences*, 1943 SCR 208, 1941–2 AD No 106. See also *ILC Yearbook* 1956 vol II p 169.

liability and enforcement against a foreign State, and would have applied th same legal principles as UK courts.

In the United States a circular instruction by the State Department in 193 stated that:

Property in the District of Columbia owned by foreign governments for Embassy an Legation purposes is exempt from general and special taxes or assessments. Propert owned by an Ambassador or Minister and used for Embassy or Legation purposes i exempt from general taxes but not from special assessments or improvements. Th payment of water rent is required in all cases, as this is not regarded as a tax but th sale of a commodity.

The United States did not insist on reciprocity, but sometimes relied on th position in Washington in order to secure reciprocity abroad.[11] In 1969, in th case of *Republic of Argentina v City of New York*,[12] which involved an attemp by New York City to collect taxes in respect of consular premises at a tim when the United States was not party to either of the Vienna Convention the United States submitted an *amicus curiae* brief to the court stating tha 'A controlling rule of customary international law exempts from taxation rea property owned by a foreign government and used exclusively for governmen tal purposes.' This was accepted by the court.[13]

Negotiating history

There was no controversy within the International Law Commission ove the proposal that the sending State and the head of the mission should b accorded exemption from all national and local dues and taxes in respect o mission premises, other than those which reflected services from which th mission derived benefit. In 1958 the Commission accepted the suggestion o Luxembourg that the term 'such as represent payment for specific service rendered' was more suitable to describe the beneficial element than the previ ous wording 'compensation for services actually rendered'. The change wa intended to make it clear that rates could be levied in respect of fire services, fo example, although it might be the case that in any particular year no service had been 'actually rendered' by the fire brigade to the particular mission.[1

[11] Moore (1905) vol IV pp 669–73; Hackworth, *Digest of International Law* vol IV pp 576–81.

[12] Court of Appeals of New York, 1 July 1969, 25 NY 2d 252, 303 NYS 2d 644.

[13] 1978 DUSPIL 611.

[14] UN Docs A/CN 4/L 75 p 15; A/CN 4/114 p 26; A/CN 4/116 p 41; *ILC Yearbook* 1958 vol p 135, vol II p 96.

Neither the Commission nor the Vienna Conference attempted to clarify this wording in terms of which elements of a local assessment would be covered. Mr Bartos, representing Yugoslavia at the Conference, did however, specify that the Commission had not intended 'dues... for specific services rendered' to cover such administrative charges as registration fees or transfer duties.[15] Article 34(f) of the Vienna Convention provides that a diplomatic agent is not exempt from 'registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 23'. If the head of mission or another diplomatic agent holds the premises of the mission in his own name he will therefore be exempt from registration and transfer duties.

Paragraph 2 of Article 23 was added at the Vienna Conference by an amendment proposed by Mexico in order to put it beyond doubt that the exemption from rates, taxes, and transfer duties did not apply to persons who leased or sold embassy premises to the sending State.[16] This reflected general international practice and the intentions of the International Law Commission. Landlords may, of course, specify in a lease that rates or taxes which would normally fall on them should instead be defrayed by the mission. In this case, as the Commission stated in its Commentary on the 1958 draft articles, the liability 'becomes part of the consideration given for the use of the premises and usually involves, in effect, not the payment of taxes as such, but an increase in the rental payable'.[17] If, however, the effect of an agreement between landlord and a State or diplomat renting mission premises is that under national law, liability for the rates or taxes would fall directly on the State or on the diplomat, the sending State may take advantage in those circumstances of its exemption under Article 23.

Subsequent practice

The United States in 1973, shortly after it had become a Contracting Party to the Vienna Convention, relied on Article 23 to resist payment by its embassy in Vienna of a new Austrian tax relating to rental income. Under the law the lessor was obliged to pay the tax, but was authorized to collect it from the lessee. The US Embassy lease required the lessor to accept full responsibility for payment of all taxes assessed against the leased property. The State

[15] A/Conf. 14 p 147.
[16] UN Docs A/Conf. 20/C 1/L 131; A/Conf. 20/14 p 146–7.
[17] *ILC Yearbook* 1958 vol II p 96.

Department took the position that the provision enabling the lessor to collect the tax did not impose liability on the lessee, and that under Article 23 the US Government was exempt.[18] In Washington, however, refund of real estate tax levied by the District of Columbia on embassy premises of Romania between 1967 and 1972 was refused because the taxes had been 'properly assessed and collected' in earlier years and the State Department had no power to make reimbursement after the expiry of the relevant fiscal year.[19] In general, however, foreign governments are now given exemption from real estate taxes on mission premises and the Office of Foreign Missions verifies claims to exemption and submits them directly to the appropriate taxing authority.[20]

In a similar sense was a memorandum in 1975 by the Legal Bureau of the Department of External Affairs in Canada:

> Article 23(2) removes the exemption from Missions for taxes which the landlord may be required to pay and which are passed on to the Diplomatic Mission by inclusion in a leasehold agreement as part of the rent payable. Taxes which are not in the first instance payable by lessors and not capable of being included in the leasehold agreement are not required to be paid by a Mission under Article 23(1).[21]

Taxes which 'represent payment for specific services rendered'

The interpretation of these words in the context of a local system of taxation may cause difficulty. Neither the previous international practice nor the negotiating history provide clear guidance, though they do make clear that it is not necessary for liability that the mission should actually have used or benefited directly from the services rendered. Lecaros explains that national interpretations of the exception vary and that it is necessary to take account of local customs.[22] Satow also says that:

> It is for each State party to give a precise interpretation of this exception in terms of its own local taxation system, but the general effect is that the embassy, in addition to being obliged to pay for commodities or utilities actually supplied, where charges are levied for these, is expected to pay any tax, or element of a tax, which relates to a supply or a service from which the embassy benefits.[23]

[18] 1973 DUSPIL 151.
[19] Ibid p 152.
[20] Department of State Circular Note of 1 January 1993 to chiefs of mission.
[21] 1976 Can YIL 326.
[22] (1984) p 154.
[23] (5th edn 1979) para 14.24.

The European Court of Justice, interpreting the Protocol on the Privileges and Immunities of the Communities in the case of *Van Leeuwen v Rotterdam*[24] said that: 'it is proper to distinguish between a tax intended to provide for the general expenses of public authorities and a due constituting a given service. The national law of various Member States recognize this distinction in different forms and under various names.'

The United Nations has argued that it is liable only for charges made at a fixed rate, according to the amount of supplies or services rendered, and for services which could be specifically identified and calculated—but under the General Convention on the Privileges and Immunities of the United Nations, the liability of the United Nations is limited to charges which are 'no more than charges for public utility services'. This wording gives a wider exemption than that given to diplomatic missions by Article 23 of the Vienna Convention.[25]

The United Kingdom, after ratification of the Vienna Convention, continued to apply the practice originally based on the reciprocal rating arrangements of 1892, including the division between beneficial and non-beneficial elements. The criterion applied was to grant exemption in respect of local expenditure on services from which the mission was 'deemed to derive no direct benefit'. Under the arrangements set out in the 1996 version of the Memorandum on Diplomatic Privileges and Immunities:[26] 'The non-beneficial portion includes such services as education, police, housing and welfare services while the beneficial portion covers street cleaning, lighting and maintenance, fire services, parks, public libraries and museums.' The beneficial portion in 1996 was 14 per cent, and this percentage was subject to review every five years. This break-down between 'beneficial' and 'non-beneficial' elements attempts to take account of the usual circumstances of diplomatic missions—for example, children of staff of a mission are not normally educated at schools maintained by local taxes. Police services were, however, placed in the 'non-beneficial' category not because the mission was deemed to derive no direct benefit from them but because of the duty imposed on the receiving State under Article 22 to protect mission premises.

Salmon argues, however, that the exception requiring payment by diplomatic missions of dues and taxes in respect of specific services rendered should cover only services which are particular rather than general, which are not required by a specific obligation on the receiving State (such as police

[24] Case 32/67 [1968] ECR 43 at 48.

[25] Muller (1995) pp 240–4.

[26] Notes about the council tax sent to all diplomatic missions in London are reproduced in 1993 BYIL at 624 and 625.

protection), which are voluntarily requested, and which are charged for on a proportionate basis (so that the tax element is excluded).[27] Such a narrow construction of the exception would, however, reflect the wording used in the General Convention on the Privileges and Immunities of the United Nations, which was discussed above. The exception to the exemption in Article 23 of the Vienna Convention is not limited to 'charges for services actually requested and rendered', but covers '*dues and taxes... which represent* payment for specific services rendered' (emphasis added).

The position taken in the United States by the State Department is that 'charges for specific services rendered' are limited to charges which are related in value to the cost of a distinct commodity or service provided to and directly benefiting the mission.[28] This test is closer to that proposed by Salmon, but does not require that the service should have been voluntarily requested. It would exclude such items as fire services (which cannot in any event be provided to premises of a diplomatic mission without specific consent), parks, public libraries, and museums. It may be argued that these services are 'offered' to members of the mission rather than 'rendered' to the mission. In 1996, following a comprehensive review of their practice in applying Article 23 to non-domestic rates charged by local authorities, the UK Foreign and Commonwealth Office informed diplomatic missions 'that henceforth beneficial services will comprise only lighting, maintenance and cleaning of local highways and streets and the provision of fire services'. In consequence diplomatic missions would be liable to only 6 per cent instead of 14 per cent of normal rates.[29] The test applied was one of direct benefit to the mission from the service in question—parks, museums, and libraries being of benefit to individuals rather than to the mission. This narrower interpretation of the words 'such as represent payment for specific services rendered' brings UK practice very close to that applied by the United States.

The records of the Vienna Conference indicate an intention that sending States and diplomatic missions should be exempt from duties and charges levied on them in connection with acquisition, whether by way of freehold or leasehold, of mission premises. In the United Kingdom relief is given from stamp duty (by free stamping of the relevant documents). No exemption is given in respect of the counterparts of the documents concerned, and there

[27] (1994) paras 361–5, especially 363. Salmon also sets out Belgian practice.

[28] State Department information.

[29] Note to all Diplomatic and Consular Missions in London of 16 September 1996 supplied by Protocol Department of the Foreign and Commonwealth Office.

is no exemption from Land Registry fees for services in registering title.[30] A similar exemption is granted under German practice.[31] In the United States exemption is given from recordation taxes on purchase of mission premises and also from transfer tax on sale of property.[32]

[30] Memorandum on Diplomatic Privileges and Immunities para 28.
[31] Richtsteig (1994) p 51.
[32] State Department Circular Note to chiefs of mission, 1 January 1993.

INVIOLABILITY OF THE ARCHIVES

Article 24

The archives and documents of the mission shall be inviolable at any time and wherever they may be.

The inviolability of diplomatic archives on the premises of the mission followed from the inviolability of those premises, and those in normal transit were protected by the—more limited—inviolability of the diplomatic bag and courier. Only in the twentieth century have courts and governments addressed the question of the status of diplomatic documents not on the premises of the mission nor in the custody of a courier or member of a mission—and perhaps not easily identifiable as diplomatic archives. Only with Article 24 of the Vienna Convention has inviolability in all these circumstances been clearly established.

The first writer to mention inviolability of an ambassador's papers along with that of dispatches sent or received by him was Vattel. In *Le Droit des Gens* he pointed out that without such protection the ambassador would be unable to perform his duties in security. But where the ambassador conspired against the receiving State, Vattel acknowledged that since he himself might be arrested and interrogated, his papers also might be seized in order to expose the conspiracy.[1] State practice supported this approach—for example, when in 1718 Count Cellamare, Spanish Ambassador to France, was discovered by interception of his dispatches to be conspiring against the French Regent, the disregard for the inviolability of his archives and dispatches contrasted with the respect which was shown towards the person of the ambassador who was merely expelled.[2] In 1906, two years after France had broken diplomatic relations with the Holy See, the archives of the former nuncio were seized by the French authorities. This was, however, justified by the Minister of Foreign Affairs on the basis that the archives had not been placed under seal nor entrusted to a protecting power but were found in the apartment of a

[1] (1758) IV.IX para 123. [2] Martens (1827) vol I p 149.

priest who had no official position and was himself under suspicion.[3] In 1918, following the looting of the British Embassy in Petrograd during the Russian revolution, the diplomatic archives were destroyed.[4]

In all these cases there were immediate protests from the sending States, but it is notable that they all resulted from extreme situations in which diplomatic relations were broken either before or immediately after. It was in fact normal practice on discontinuance of diplomatic relations for the archives either to be destroyed or entrusted to a protecting power on the basis that any protection to which they might be entitled would otherwise lapse along with the inviolability of the mission premises. There was also the risk, if a change of government took place in the sending State, of dispute between the outgoing and incoming heads of mission about the archives and documents. In 1830, for example, the newly recognized representative of the King of Portugal in the United States brought proceedings against the chargé d'affaires who had represented the previous Government of Portugal for delivery of the archives and documents which the defendant was taking with him on leaving the United States. The court in *Torlade v Barrozo*[5] did not distinguish between the immunity from arrest and suit of the outgoing chargé d'affaires and the property in the archives and so the suit failed.

In 1928 Article 14 of the Havana Convention on Diplomatic Officers extended inviolability to the 'papers, archives and correspondence of the mission'.[6] The draft Convention drawn up in 1930 by the Harvard Research in Article 5 gave a somewhat more limited protection of archives 'from any violation' and required their confidential character to be safeguarded 'wherever such archives may be located within the territory of the receiving state, provided that notification of their location has been previously given to the receiving state'. The Commentary noted that:

> When in earlier centuries an important part of the business of a diplomat was acquisition of information, to which he was not properly entitled, by methods not admitted or proper if used by one other than a state agent, a receiving state might have been regarded as to some extent excused if it sought by dubious means to gain information from the correspondence of a foreign mission.

The Harvard Research Article was, however, drafted on the basis 'that the normal functioning of modern international intercourse requires a clearer

[3] 1907 RGDIP 175 and 1966 416–17; Sfez (1966).
[4] Ullman (1961) p 289; *The Times*, 24 October 1918.
[5] 1 Miles 366 (Phila D Ct 1830); 9 AILC 181.
[6] 26 AJIL (1932 Supp) 176.

acknowledgment of the confidential character of diplomatic correspondence'. Although it did not go so far as to establish a duty on the receiving State to prevent publication, it 'did however imply a duty to protect more than the mere property rights in and to the archives of a sending state'.[7]

Acceptance of this approach was demonstrated by the inclusion in national legislation of a number of States of specific provisions for the inviolability of diplomatic archives.[8]

In the case of *Rose v The King*[9] in 1946, the Quebec Court of King's Bench, Appeal Side, had to consider the admissibility in criminal proceedings for conspiracy and espionage against a member of the Canadian House of Commons of documents stolen from the Soviet Embassy. Gouzenko, a cipher clerk in the Embassy of the Soviet Union in Ottawa, on defecting to the West took with him and handed to the Canadian Government a large number of secret documents incriminating Canadian private citizens and public servants in espionage. The Soviet Government did not waive the immunity of members of its mission, but a number of prosecutions were brought against others implicated, and the admissibility of the documents taken by Gouzenko was crucial to conviction. Neither the Soviet nor the Canadian Government made any claim to the courts that the documents were inadmissible as diplomatic papers—this argument was put forward by the defence.

On appeal by Rose against conviction, Bissonnette J gave careful consideration against the background of customary international law to the status of the stolen documents. He held that: 'International law creates a presumption of law that documents coming from an Embassy have a diplomatic character and that every Court of Justice must refuse to acknowledge jurisdiction or competence in regard to them.' But this presumption was subject to the overriding right of the State to assure its own security. Competence to repress the abuses of a diplomatic agent rested exclusively on the executive, and if the executive turned over documents to a court for prosecution, the courts could not regard them as entitled to immunity, since otherwise 'the conflict of powers

[7] 26 AJIL (1932 Supp) 61–2; Denza, 'Diplomatic Privileges and Immunities' in Grant and Barker (eds), *The Harvard Research in International Law: Contemporary Analysis and Appraisal* (WS Hein, 2007) at pp 164–6.
[8] eg Australia: UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations') p 9; Burma: ibid p 52; Canada: ibid p 57; New Zealand: ibid p 218; UK: Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act 1952, 15 & 16 Geo 6 & 1 Eliz 2, c 18, s 1.
[9] [1947] 3 DLR 618; 1946 AD No 76. See background and comment by Maxwell Cohen in 'Espionage and Immunity: Some Recent Problems and Developments', 1948 BYIL 404. The decision is strongly criticized by Salmon (1994) para 318.

between the executive and the judiciary would lead to an absurdity and juridical anarchy'. Although diplomatic immunity must be accorded to diplomatic agents who claimed it, 'to impose, through a judicial decision, immunity upon a State which does not claim any, would be casting a slur upon its dignity, its sovereignty, and, through a gesture as ungracious as unexpected, would elevate a simple suit to a degree of international importance'. Gagne J supported these arguments and maintained further that the documents, though physically originating within the Embassy of the Soviet Union, were documents of an espionage Bureau not under the control of the ambassador and therefore not embassy documents.

Negotiating history

The International Law Commission and the Vienna Conference extended the protection to be accorded to diplomatic archives in some respects beyond what had been established under the previous international law. In the first place, the expression 'inviolable' was deliberately chosen by the International Law Commission to convey both that the receiving State must abstain from any interference through its own authorities and that it owes a duty of protection of the archives in respect of unauthorized interference by others.[10] Secondly, the Vienna Conference added the words 'at any time' in order to make clear that inviolability continued without interruption on the breaking of diplomatic relations or in the event of armed conflict.[11] Article 45 requires the receiving State to 'respect and protect' these archives, and entitles the sending State to entrust their custody to a third State, the protecting power. It should, however, be noted that whereas 'premises of the mission' by virtue of Article 1(i) of the Convention lose their status as such once they are no longer 'used for the purposes of the mission', diplomatic archives and documents do not lose their status and retain their inviolability under Article 24 on an indefinite basis.

The third way in which the customary international law rule was extended by Article 24 was that the International Law Commission and the Conference, by adding the words 'wherever they may be', made it clear beyond argument that archives not on the premises of the mission and not in the custody of a

[10] *ILC Yearbook* 1957 vol II p 137, Commentary on draft Art 18.

[11] UN Docs A/Conf. 20/C 1/L 149 (amendment of France and Italy); A/Conf. 20/14 p 149 (representative of France).

member of the mission are entitled to inviolability.[12] The Conference expressly rejected that part of the amendment of France and Italy which would have required archives and documents outside mission premises to be identified by visible official signs. A US amendment which would have defined 'archives and documents' to mean 'the official records and reference collections belonging to or in the possession of the mission' was withdrawn.[13] The position of archives is thus different from other property of the mission which under Article 22(3) is not generally given inviolability unless it is on the premises of the mission. If archives fall into the hands of the receiving State after being lost or stolen they must therefore be returned forthwith and may not be used in legal proceedings or for any other purpose of the receiving State.

Subsequent practice

States Parties have generally given full effect to the wide protection provided under Article 24 of the Convention. In 1965, when the United States was not yet a Party, the State Department in response to an attempt to secure access to personnel records of the Cambodian Embassy, whose diplomatic staff had all been withdrawn, said that: 'Although the Embassy is closed, it remains inviolable, and any records which may be stored therein are not subject to subpoena.'[14]

In 1987 the UK Court of Appeal in *Fayed v Al-Tajir*[15] referred to the *Rose* judgment as well as to Article 24 in holding that a document already disclosed voluntarily to the court during discovery should nevertheless be treated as absolutely privileged. The plaintiff claimed that the document in question libelled him and the defendant, who had been and was later reappointed as Ambassador of the United Arab Emirates, accepted responsibility for it, and waived his own diplomatic immunity while arguing that the document itself was entitled to privilege. The Court of Appeal held that although the resulting situation was extraordinary, 'there is no inconsistency in principle between a waiver of the diplomatic immunity of a defendant and the assertion of a claim for immunity of a diplomatic or embassy document whose contents are sought to be introduced into the proceedings against him'.[16]

[12] *ILC Yearbook* 1958 vol II p 96, Commentary on draft Art 22; UN Docs A/Conf. 20/C 1/L 149 (amendment of France and Italy); L 126 (Bulgaria); A/Conf. 20/14 pp 148–50.

[13] A/Conf. 20/C 1/L 153; A/Conf. 20/14 p 149. See also report of US Delegation on this point, in Whiteman, *Digest of International Law* vol VII p 391.

[14] Whiteman, *Digest of International Law* vol VII p 392.

[15] [1988] 1 QB 712; [1987] 2 All ER 396; [1987] 3 WLR 102; 86 ILR 131.

[16] Per Kerr LJ.

The same approach to the inviolability of diplomatic archives was taken by the US State Department in the context of a case where they were not prepared to support a claim to state immunity—*Renchard v Humphreys & Harding Inc.*[17] In a letter to the court, the State Department said that in declining to recognize and allow sovereign immunity in a suit for damage to neighbouring property caused by excavations and construction on the Embassy of Brazil, they did not intend to imply that Article 24 could not be used to resist discovery of relevant documents:

> Thus, while it is the position of the Department of State that the Government of Brazil does not enjoy immunity from suit in the courts of the United States in the subject litigation, involving the construction of the chancery building in Washington, it is also the position of the Department of State that the documents and archives of the Embassy are inviolable under the Vienna Convention as against any order of a United States court.

The same distinction was upheld in the case of *Mission of Saudi Arabia to the United Nations v Kirkwood Ltd*[18] in which a US court confirmed that the Saudi Mission did not lose the separate inviolability of its archives (conferred under the Host State Agreement between the United States and the United Nations) by instituting legal proceedings.

The International Court of Justice in the *Hostages Case*[19] stated in their judgment that: 'Those archives and documents of the United States Embassy which were not destroyed by the staff during the attack on 4 November have been ransacked by the militants. Documents purporting to come from this source have been disseminated by the militants and by the Government-controlled media.' The ICJ emphasized the separate nature of the breach of the inviolability of diplomatic archives in stating that: 'This particular violation has been made manifest to the world by repeated statements by the militants occupying the Embassy, who claim to be in possession of documents from the archives, and by various government authorities, purporting to specify the contents thereof.'

The separate character of the inviolability of diplomatic archives was also underlined by the Eritrea Ethiopia Claims Commission in their Partial Award of 19 December 2005. Ethiopia claimed that Eritrean customs officials at

[17] Civil Action No 2128–72 US District Court, District of Columbia, 381 F Supp 382 (DDC 1974). See 1975 AJIL 182 and 889.

[18] Index No 112122/01, summarized in 2003 DUSPIL 573.

[19] *Case concerning United States Diplomatic and Consular Staff in Tehran* 1980 ICJ Reports 3, at paras 24 and 77.

Asmara airport intercepted and retained a diplomatic bag containing blank passports, invoices, and receipts. The Commission found that the package in question was not appropriately labelled and so did not constitute a diplomatic bag, but that the nature of the official Ethiopian correspondence inside was apparent, so that Eritrea by retaining it violated Article 24 of the Convention.[20]

What are the 'archives and documents of the mission'?

The terms 'archives and documents' were not defined in the Convention. Their inviolability is not conditional on their being identifiable, and there is no obligation to identify them when they are outside mission premises (in contrast, for example, to the diplomatic bag). It is clear that the negotiators intended a wide definition to be given to the term, and the words 'and documents' were added to the text in order to cover, for example, negotiating documents and memoranda in draft—which are strictly not archives in the ordinary sense of the word.[21] The Vienna Convention on Consular Relations provided in Article 1(1)(k) that '"consular archives" includes all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safekeeping'. In practice this extensive definition has been applied by analogy to the Vienna Diplomatic Convention, on the basis that given the wider immunities generally given to diplomatic missions, it would be absurd for a narrower construction of the term 'archives' to be applied to diplomatic archives than to consular archives. Given that the underlying purpose is the protection of the confidentiality of information stored, it is clearly right that the words 'archives and documents' should be regarded as covering modern methods of storage such as computer disks. Modern international agreements giving broadly a diplomatic level of inviolability and immunity to international organizations have also adopted a more detailed description of what storage methods are to be covered. The Headquarters Agreement between the Government of the United Kingdom and the International Maritime Organization regarding the Headquarters of the Organization, for

[20] Eritrea Ethiopia Claims Commission, Partial Award on Ethiopia's Claim, The Hague, 19 December 2005. See also ICJ Judgment of 19 December 2005 in *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* para 343 dealing with Uganda's counterclaim.

[21] *ILC Yearbook* 1958 vol I pp 135–6 (Mr Liang, Mr Zourek).

example, extends inviolability to 'all archives, correspondence, documents, manuscripts, photographs, films and recordings belonging to or held by the Organization and to all information contained therein'.[22] There is, however, the danger that in attempting to list modern methods of information storage, any detailed definition may fail to keep pace with the increasing proliferation of techniques. It is probably better simply to rely on the clear intention of Article 24 to cover all physical items storing information.

The UK House of Lords addressed the meaning of the expression 'archives and documents of the mission' in the case of *Shearson Lehman Bros Inc v Maclaine Watson & Co Ltd and others (International Tin Council Intervening)*.[23] The case was one of those which arose following the collapse of the International Tin Council in 1985, leaving huge liabilities on its trading and loan contracts. It was intended to place in evidence documents originating (through means which were never clearly determined) from the Tin Council, which was entitled under UK legislation giving effect to its Headquarters Agreement to 'the like inviolability of official archives as was accorded in respect of those of a diplomatic mission'. The International Tin Council intervened in the case claiming that these documents were inadmissible. Lord Bridge, giving the leading judgment of the House of Lords, said that 'it would seem to me perfectly natural to interpret the phrase "the archives and documents of the mission" in Article 24 of the Vienna Convention as referring to the archives and documents belonging to or held by the mission'. One particular difficulty arising in that case—the status of documents communicated by the Tin Council to one of its member governments or a representative of a government—was not relevant to the case of archives or documents of a diplomatic mission. The House of Lords, however, also held that letters or documents communicated to a third party by an officer or employee of the Tin Council with actual or ostensible authority no longer belonged to the Council and thus no longer enjoyed inviolability as part of its archives. This finding is equally relevant to the case of archives and documents of a diplomatic mission.

The House of Lords in the same judgment rejected the argument that the inviolability of archives gave only protection from executive or judicial action of the receiving State, so that a document which was stolen or otherwise obtained by improper means from a diplomatic mission was not necessarily

[22] UKTS No. 18 (1969), Art 3(3). See also Lee (1991) pp 427–8, and Satow (5th edn 1979) para 14.26.

[23] [1988] 1 All ER 116; [1988] 1 WLR 16; 77 ILR 145. The judgments at first instance and in the Court of Appeal, which are also of interest on the question of 'archives and documents' are in 77 ILR 107 and 124.

inadmissible in evidence. Of this submission Lord Bridge said:

> The underlying purpose of the inviolability is to protect the privacy of diplomatic communications. If that privacy is violated by a citizen, it would be wholly inimical to the underlying purpose that the judicial authorities of the host State should countenance the violation by permitting the violator, or anyone who receives the document from the violator, to make use of the document in judicial proceedings.[24]

It should be noted that since 'the mission' does not have legal personality, archives belong strictly to the sending State. If a change of government takes place in the sending State, the archives retain their inviolability, but the recognition by the receiving State of a new government of the sending State will normally have the effect of transferring title to the archives and documents to the new government. The new government, or its newly appointed representative, would, however, be entitled to enforce its title in the courts of the receiving State only if they were prepared to accept that they would not be immune in respect of any directly connected counterclaim.

The status of archives and documents held by professional consultants to a diplomatic mission was considered in 2002 by the US House of Representatives Committee on Government Reform and by the State Department. For the purposes of an investigation into abductions of children of dual US and Saudi Arabian nationality in which the Embassy of Saudi Arabia was alleged to be complicit, the House Committee issued subpoenas seeking relevant documents to three US firms which were lobbyists or public relations advisers to the Embassy. The documents in question were records relating to professional services performed for the Embassy, but it was not claimed that they were in the ownership or possession of the Embassy. The lobbyists and the Saudi Arabian Embassy refused to comply with the subpoenas on the ground that the documents requested were 'archives and documents of the mission', but the Committee was not persuaded. Their stance was backed in an opinion and by oral testimony submitted to the Committee by the present author. The basis of these submissions was that the statement by Lord Bridge in the English House of Lords case of *Shearson Lehman Brothers Inc and another v Maclaine Watson*

[24] Contrast the position taken by the House of Lords in the later case of *R v Khan (Sultan)* [1996] 3 WLR 162, where evidence obtained through an electronic listening device attached by the police to a private house without the knowledge of the owners or occupiers was held admissible in the absence of unfairness. Although the European Court of Human Rights later held in *Khan v United Kingdom*, Application No. 35394/97, ECHR 2000 V, 12.5.00, that the United Kingdom was in breach of Art 8 (right to respect for private life) and Art 13 (duty to provide an effective remedy) of the European Convention on Human Rights, that court did not accept that the unlawfully obtained evidence should necessarily have been excluded.

&Co Ltd and another, described above, although not binding, would be a persuasive authority in US courts on the interpretation of Article 24 of the Vienna Convention, and that Lord Bridge had held that a document communicated to a third party with actual authority, express or implied, or with ostensible authority, was no longer entitled to inviolability. It would follow that correspondence to or documents supplied to a third party not being a member of the diplomatic mission or in any other capacity an employee of the sending State would normally become the property of the recipient and so would no longer form part of the archives and documents of the mission.

The Committee on Government Reform also invited the US State Department to appear before them or to indicate their views, and on the date of the oral hearing, the State Department responded in writing. They pointed out that this was the first time that a legislature had attempted to compel production of records from contractors for an embassy in that country, and that they did not have firm views on the correct interpretation of the Vienna Convention in that context. They pointed out that the State Department contracted overseas with local nationals to fill some embassy positions and that in a number of instances the Department had asserted that information in the possession of such local nationals was 'archival' under the Vienna Convention and thus inviolable. They also used outside US contractors for embassy construction in sensitive posts and would want to argue that information provided to such contractors was protected. The letter pointed out that the analysis of Lord Bridge in the *Shearson Lehman* case referred to above had noted the absence in that case of 'any relationship of lender and borrower, bailor and bailee or principal and agent'. While it is true that it is unusual for a national legislature to use compulsory means to secure attendance of witnesses or production of documents, the question of the limits of inviolability of mission archives are of application to the executive and judicial as well as the legislative branch of a State. The subpoenas issued were, however, never tested in a US court since shortly after the oral hearings described the Committee on Government Reform was reconstituted. The State Department made clear that their written statement reflected only their own views and not those of other interested agencies or Departments. The exchanges in the context of the enquiry into the possible involvement of Saudi Arabia in child abduction cases therefore illustrate the issues and the practical difficulties which are likely to arise elsewhere, but do not resolve them. Where it is desired to protect sensitive documents to be supplied to persons who are not members of the diplomatic mission, such as building contractors, it would be safer to make special arrangements to ring-fence them in order to guarantee their continued inviolability. This

could be done either by ensuring that the documents did not physically leave the mission premises or that if they do they are clearly marked as property of the State or Government entitled to inviolability for its diplomatic archives.[25] Perhaps in response to these events, the Agreement concluded between the United States and the People's Republic of China in 2003 for the construction of embassies in Beijing and Washington makes specific provision for papers on the construction and design of the premises to be treated as archives of the mission.[26]

[25] Information about the enquiry, correspondence and hearings was available from the Committee website www.house.gov/reform. The State Department response to the Committee is printed in 2002 DUSPIL 567.

[26] Extracts from the Agreement of 17 November 2003 are in 2003 DUSPIL 256.

FACILITIES FOR THE MISSION

Article 25

The receiving State shall accord full facilities for the performance of the functions of the mission.

It was the modern practice in virtually all States that the government of a receiving State would if requested provide administrative assistance to a diplomatic mission on such matters as securing suitable accommodation and parking facilities and would refrain from imposing obstacles to its legitimate activities. This was, however, regarded as a matter of comity or of effective diplomacy rather than a specific rule of customary international law. The question of premises and accommodation is now dealt with by Article 21 of the Convention.

Article 25 originated as the introduction to a redraft by the Special Rapporteur of the Article on communications, which the International Law Commission believed would be more appropriate as a separate provision.[1] In commenting on the 1957 draft articles of the Commission, the US Government observed that some indication should be given as to the scope and meaning of the words 'full facilities'. In response the Special Rapporteur listed examples of assistance which a receiving State might be expected to give—arranging for permits or licences for building work or for installation of telephones if new premises were being built for a mission, assisting the mission in obtaining access to sources of information or in organizing study trips. He emphasized that the list was subject to the reasonableness of the request, and the International Law Commission in its Commentary on the 1958 draft articles also said: 'It is assumed that requests for assistance will be kept within reasonable limits.'[2] The article was adopted without comment by the Vienna Conference.

[1] *ILC Yearbook* 1957 vol I pp 74–5.
[2] UN Docs A/CN 4/114 p 62 (comment on Art 19); A/CN 4/116 p 43; *ILC Yearbook* 1958 vol II p 96 (Commentary on draft Art 23).

Subsequent practice

A clear analysis of the obligation under Article 25 was given by the German Federal Administrative Court in 1971 in the *Parking Privileges for Diplomats Case*.[3] Proceedings were brought against a local road traffic authority challenging the legal basis for a parking prohibition sign outside a diplomatic mission. The prohibition could not be justified under domestic traffic control legislation and the issue for the court was therefore whether Article 25 of the Convention or customary international law imposed an obligation to give special parking privileges on the public highway to diplomatic missions and their staff. The Federal Administrative Court held that they did not. Of Article 25 the court said:

> This provision enshrines the fundamental and old-established basic norm for diplomatic missions of *ne impediatur legatio*. It is not, however, a 'blanket' norm requiring the receiving State to take all those measures which it considers to be opportune, but merely requires that State to grant to diplomatic missions all facilities that are possible and permissible within the framework of its legal system. If Article 25 were given the meaning assigned to it by the defendant and the representative of the public interest, it could lead to a far-reaching suspension of the municipal legal system for the benefit of diplomatic missions.

The Federal Administrative Court went on to consider, in the light of a letter from the Foreign Ministry and evidence of practice in a number of other capitals, whether independently of Article 25 there might be a rule of customary international law requiring provision of parking places for diplomatic missions on the public highway. That court was not entitled to make a final determination that such a rule existed or to decide whether it directly created rights and duties for the individual, since the Basic Law of the Federal Republic required a decision from the Federal Constitutional Court in the event of doubt. The Federal Administrative Court held, however, that there was 'no serious doubt' that provision of parking facilities for diplomatic missions was a matter of courtesy only and was not required by customary international law.

The Legal Counsel to the United Nations, on the other hand, expressed the opinion that Article 25 did impose an obligation on the host State to attempt to resolve problems for diplomatic and UN missions arising from the Parking Programme administered by the authorities in New York. Non-renewal of the

[3] 70 ILR 396.

diplomatic number plates of persistent parking offenders (leaving each mission with at least one vehicle with diplomatic number plates) was, however, a permissible measure.[4]

In the case of *Alcom v Republic of Colombia*,[5] already discussed in the context of Article 22, the House of Lords drew some support from Article 25 in deciding that international law required immunity from execution to be accorded to the current account of a diplomatic mission used to defray running expenses of the mission. Having cited Article 25, Lord Diplock commented: 'Transposed into its negative form: neither the executive nor the legal branch of government in the receiving State, and enforcement of judgments of courts of law is a combined operation of both these branches, must act in such manner as to obstruct the mission in carrying out its functions.' Article 25 was not, however, among those scheduled to the UK Diplomatic Privileges Act, on the basis that it required no specific derogation from the ordinary law of the United Kingdom, and so it was not on its own sufficient to compel the House of Lords in the *Alcom* case to the conclusion that the State Immunity Act 1978 must be construed in such a way as to except embassy bank accounts from its provisions on execution of judgments. When a similar issue arose in the United States in 1987 in the case of *Liberian Eastern Timber Corporation (LETCO) v Liberia*, the District Court, District of Columbia, placed greater reliance on Article 25, saying that:

If the 'full facilities' to which the United States agreed to 'accord' diplomatic immunity did not include bank accounts off the premises of the mission, the Liberian Embassy either would have to take grossly inconvenient measures, such as issuing only checks drawn on a Liberian bank, or would have to run the risk that judgment creditors of Liberia would cause the accounts the embassy holds at banks located in the United States to be seized for an indefinite period of time, severely hampering the performance of the Embassy's diplomatic functions.[6]

Article 25 therefore is usually invoked in order to lend additional weight to a diplomatic claim or protest based on a more specific provision. It does not entitle a mission to any specific privilege not otherwise granted by the Convention, by international law or by the national law of the receiving State. It confers no automatic exemption from local laws on planning control or licensing—and this is reinforced by the duty imposed by Article 41 of the

[4] 2003 AJIL 190.
[5] [1984] AC 580; [1984] 2 All ER 6; [1984] 2 WLR 750; 74 ILR 170.
[6] 89 ILR 360 at 363.

Convention on all persons enjoying privileges and immunities to respect the laws and regulations of the receiving State. Nor does Article 25 entitle the mission to provision of any services free of charge. If, for example, the mission fails to pay bills for water or for telephone services, provision of these services may be withheld on the same basis as is permitted in regard to other customers. In some capitals there has been reluctance to cut a diplomatic mission's last telephone line so that it cannot receive incoming calls—but such courtesy is not required by Article 25.

The United States have not regarded Article 25 as precluding them from making a determination that persistent violations of traffic laws and regulations by a member of a mission may 'indicate a flagrant disregard for the laws of the United States' and that the culprit should no longer be entitled to the privilege of driving an automobile within that country. In the most recent Diplomatic Note circulated on 24 February 2004 to heads of mission, the Secretary of State said:

The Chiefs of Mission are reminded that the Department's traffic violations policy is based on the principle that persons enjoying privileges and immunities in the United States are nevertheless obliged to respect United States laws and regulations. The policy further rests on the principle that the operation of a motor vehicle in the United States is not a right, but a privilege that may be withdrawn in cases of abuse.

Tickets issued for violations of parking or driving laws are recorded by the Diplomatic Motor Vehicle Office under an elaborate points system which may in the most serious cases lead to suspension of the driver's licence. Where there is a suspension, the embassy is asked to guarantee that the alleged offender will not drive for the duration of the suspension. Members of mission and family members are expected to secure necessary waivers and to contest citations which they believe were issued unjustly. In the case of serious violations such as reckless driving and driving under the influence of alcohol or drugs, the State Department will formally request waiver of immunity. If a waiver is declined, it is State Department policy to require the alleged offender to be withdrawn from the United States.[7]

[7] State Department Circular Notes to chiefs of mission at Washington of 2 July 1984 and 17 December 1984, described in 1985 AJIL 1048, and of 22 December 1993; *Handbook for Foreign Diplomatic and Career Consular Personnel in the United States* 6.4; Diplomatic Note No 04–38 of 24 February 2004.

Article 25 is therefore of little use to a sending State if the receiving State is determined to be obstructive or unfriendly, and where relations between the two States are good the existence of this obligation is hardly necessary. As can be seen from the measures taken by the United States in particular, it does not present an obstacle to requiring members of diplomatic mission to enjoy their facilities in conformity with local laws and regulations.

FREEDOM OF MOVEMENT

Article 26

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement and travel in its territory.

Freedom to travel throughout the territory of the receiving State is an essential facility to enable diplomatic agents to exercise two of their most important functions—protection of the nationals of the sending State and reporting to their government on conditions and developments in the receiving State. It has not, however, been a privilege readily accorded by closed societies. In the eleventh century, when systematic diplomacy was carried out only by Byzantium, envoys received there were met at the frontier, escorted to the capital by a route chosen to impress them with Byzantine military might and on arrival immured in a special fortress where their entertainment was confined to watching endless military reviews.[1] In the sixteenth century, the State of Muscovy followed this style of receiving diplomats—envoys were lodged under armed guard outside Moscow, their food and other necessities were supplied in order to prevent contact with the outside world, and they were supervised when travelling through the Tsar's dominions.[2] China from the period of the Manchu dynasty required all aliens to obtain permits in order to travel within the country, and no exceptions were made for diplomats.[3]

Among those European States where the laws and practices of modern diplomacy were developed, however, freedom of movement for diplomats was generally accepted. This may have resulted from the fact that few restrictions of any sort were placed on the movement of aliens until the twentieth century and that States did not in general have sufficient police resources to supervise

[1] Hill (1905) vol I p 39; Nicolson (1954) p 25; Nys (1884) p 31; Young (1964) at p 144.
[2] Grzybowski (1981) at p 47.
[3] Lee (1991) p 429.

Specific provision has also been made in subsequent UK statutes dealing with social security.[14] The effect of this statutory exception is that participation on a voluntary basis by exempt members of diplomatic missions in London is no longer possible.

The Federal Tribunal of Switzerland held in 1984 in *Rastello and Permanent Delegation of Commission of European Community to International Organizations in Geneva v Caisse Cantonale Genevoise de Compensation and Another*[15] that Swiss law giving effect to Article 33 did not permit the making of voluntary contributions. But where a Commission employee entitled to the privilege of Article 33 mistakenly made contributions, she was entitled, in order to protect her good faith, not only to reimbursement of her contributions but also to the income which they had earned under the Swiss social security scheme.

[14] eg Redundancy Payments Act 1965 c 62, s 16(5); Employers' Liability (Compulsory Insurance) Act 1969 c 57, s 2(2)(b).

[15] 102 ILR 183.

EXEMPTION FROM TAXATION

Article 34

A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(a) indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(c) estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of Article 39;

(d) dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State;

(e) charges levied for specific services rendered;

(f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23.

General background

Prior to the Vienna Convention certain broad principles could be deduced from state practice on personal taxation of diplomats, though there was uncertainty about the legal basis and the theoretical justification for these principles. In general diplomats were whether by custom, by specific domestic legislation, or (as in the United Kingdom) by a combination of the two, exempted from taxation. Some writers described this as customary international law,[1] while

[1] eg Oppenheim (8th edn 1955) vol I pp 802–3; *ILC Yearbook* 1958 vol II p 100: 'it may be regarded as a rule of international law that such exemptions exist, subject to certain exceptions'. Salmon (1994) paras 470, 472, and 473, says that the Belgian position before the Convention was that exemption was a matter of international law, but subject to the condition of reciprocity.

others said that it was a matter of courtesy or comity only,[2] that it depended on reciprocity or that it followed from the fact that no enforcement measures could be taken if the diplomat declined to pay the tax. In none of the leading English cases dealing with the position of a member of a diplomatic mission in regard to rates is a clear distinction drawn between immunity from legal process or seizure of goods and exemption from liability. Both in *Parkinson v Potter*[3] and in *Macartney v Garbutt*[4] it was assumed that if it was shown that the diplomat was entitled to immunity by virtue of the Diplomatic Privileges Act 1708[5] he was a 'person not liable by law to pay such rate'. Tax privileges were also justified on varying, though not incompatible grounds; first, that they derived from the principle that one sovereign does not tax another; secondly, that it was necessary to enable the diplomat to carry out his duties independently of the receiving State that he should be exempt from tax at least on goods and income connected with his work and residence in that State; and thirdly, that as a matter of administrative convenience—for revenue authorities as well as for diplomatic services—diplomats should be subject on a continuing basis to the tax regime of the sending State rather than to a succession of varying tax regimes in the States where they serve.[6] All of these justifications were and remain sound reasons for tax exemption—and the second and third are helpful in explaining the exceptions to the general rule of exemption.

In considering the justification for the general exemption granted under Article 34 it is important to note that the diplomat continues to be liable to taxation by the sending State. If the sending State levies tax at a high rate he may therefore be financially disadvantaged in comparison with non-privileged residents of the receiving State. He is not in an absolute sense 'privileged'. The position is, of course, different for staff of international organizations who, though they may well pay tax to the organization which employs them, are usually exempt from being taxed on their emoluments by their State of nationality or origin (assuming that it is a Contracting Party to the relevant agreement on privileges and immunities). An important consideration in determining the tax treatment of officials of international organizations is the need for parity of take-home pay among staff of equal rank. This is not a relevant consideration in the case of members of diplomatic missions.

[2] eg Genet (1931) vol I p 425; 26 AJIL (1932 Supp) 115 (comment on Art 22 of Harvard Draft); Lyons (1954) at pp 305 and 338–9.

[3] (1885) 16 QBD 152.

[4] (1890) 24 QBD 368.

[5] 7 Anne c 12.

[6] Hardy (1968) p 71. Pradier-Fodéré (1899) vol II p 45 also suggests 'hospitality' and the diplomat's foreign nationality as justifications. Neither is on its own adequate.

Exceptions to the rule

The precise taxes in each State from which diplomats are exempt or not exempt pursuant to the implementation of Article 34 are, of course, very varied.[7] But the exceptions to the general exemption which are listed in Article 34 fall into three broad classes which are justified on different grounds. In applying the provisions of Article 34—which are of necessity cast in broad terms—to a particular national tax it is often helpful to look to the purpose of the national tax and the reasons for which an exception might be justified.

The first class comprises impositions which may under the relevant national revenue law be taxes, but which in substance are charges for services actually rendered. Examples in this class are road or bridge tolls and dues, charges or rates levied, usually by local authorities, in respect of such matters as water supply, road improvements, and street lighting. In a sense all taxation may be described as a charge for services rendered by the State, and there are considerable differences between States in the detailed application of this principle. But there does from examination of national provisions seem to be broad agreement that diplomats should not be required to contribute to such matters as national defence, public education, social security benefits, or the general expenses of central government. This exception for charges is reflected in Article 34(e) and to some extent in Article 34(f).

The second class of exception comprises indirect taxes, and this is reflected in Article 34(a). The main reason for this exception is the administrative inconvenience of establishing within each State a system for ensuring that diplomats do not pay the tax element of the price of goods or services or that the tax element is refunded to them, and the difficulty of ensuring that such a system is not abused. Arrangements have been made in some States to relieve diplomats from indirect taxes—but these arrangements are normally applicable only to substantial purchases in a context where the receiving State is eager to promote purchase of a local product over the alternative option of duty-free import of a foreign product. As a general rule it has been concluded that the amounts of tax at issue do not justify the administrative complications.

The third class of exception comprises taxes levied on property or activities strictly personal to the diplomat and unrelated to his duties or ordinary living

[7] For practice in a number of States prior to the Vienna Convention, see Genet (1931) vol I pp 423–50; Satow (4th edn 1957) pp 230–41; 26 AJIL (1932 Supp) 117–18; UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations'), *passim*.

in the receiving State.[8] This exception flows from the functional approach under which privileges are granted 'not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions'. The principle was set out in the English case of *Novello v Toogood*[9] where the court said: 'Whatever is necessary to the convenience of an ambassador, as connected with his rank, his duties or his religion, ought to be granted.' But where the servant of the ambassador carried on the business of a lodging-house keeper it did not follow that he was entitled to exemption from rates on the premises which he used for that purpose. The French Court of Cassation applied the exception in *Thams v Minister of Finance*[10] in 1930, deciding that a diplomat in the Monaco Legation should be exempt from a capitation tax assessed on a fixed basis and on the annual value of his residence, but should not be exempt from an assessment relating to his professional licence (enabling him to act as agent for business firms) and to rates on the business premises used for that purpose.

This third exception may be subdivided into three categories, which correspond broadly to the three categories of exception to the general rule of immunity from civil jurisdiction now set out in Article 31.1 of the Convention. The first category consists of taxes on real property held in the receiving State (Article 34(b) corresponding to Article 31.1(a)). The second category comprises inheritance duties (other than duties on property which was in the receiving State solely on account of the presence of the diplomat). This is reflected in Article 34(c) corresponding to Article 31.1(b). The third category consists of taxes on private profit-making activities in the receiving State (Article 34(d) corresponding to Article 31.1(c)).

The general exemption

The wording of the basic exemption contained in Article 34 is very wide. Although there are several specific exceptions to the exemption, it is probable that in cases of ambiguity, national revenue authorities and courts should in construing them lean in favour of the general exemption. None of the terms used in Article 34 are defined in the Convention, and difficulty is sometimes encountered, given the diversity of national systems of raising revenue, in

[8] cp Vattel (1758) IV.VII para 105: 'A quelque point que s'étende leur exemption, il est bien manifeste qu'elle ne regarde que les choses véritablement à leur usage.'

[9] [1823] 1 B & C 554.

[10] 1929–30 AD 300.

distinguishing between a tax, a social security contribution, and a charge. The Organization for Economic Co-operation and Development has given the following definition of a tax: 'The term taxes is confined to compulsory, unrequited payments to general government; unrequited in the sense that benefits provided by government to tax payers are not normally in proportion to their payments.'[11] Payments for licences required under national law in respect of vehicles, radio and television, dogs, hunting, firearms, and so on are generally regarded as 'dues and taxes' within the general exemption. It must be noted that the diplomatic agent is not thereby relieved from the obligation to obtain a licence as required by local laws and regulations, or from demonstrating that he is fit to hold the licence in question.

The general exemption in Article 34 is not limited to direct taxes. It applies to indirect taxes unless these come within the terms of the exception in Article 34(a). It follows that exempt income cannot be taken into account by the tax authorities in the receiving State in the context of determining the appropriate rate of tax to be applied to non-exempt income—for example in taxing a non-exempt spouse, or in giving effect to the exceptions permitting tax on private immovable property (Article 34(b)) or on private income having its source in the receiving State (Article 34(d)). This point is not dealt with expressly in Article 34, but as it has often caused difficulty in the context of the taxation of officials of international organizations, it has become common in drafting agreements conferring privileges on international organizations and persons connected with them, to make express provision. There was no express provision on the point in the Protocol on the Privileges and Immunities of the European Coal and Steel Community, which provided in Article 11 that officials of the Community were 'exempt from any tax on salaries and emoluments paid by the Community'. The European Court of Justice in *Humblet v Belgian State*[12] in 1960 held that:

> the imposition of taxes 'on' a category of income while taking account of other income to calculate the rate of tax has the effect, at least in substance, of taxing the latter income directly. In fact there exists a common fundamental element in taxing income directly and taxing it indirectly by aggregating it since in both cases there is a causal link between that link and the total amount for which the person concerned is liable.

Although the case is of course not authority for the construction of the Vienna Convention, the reasoning of the European Court of Justice appears to be

[11] 1967/1987 *OECD Report on Revenue Statistics of OECD Member-Countries* p 37. See also Muller (1995) ch 8, 'Fiscal, Customs and Financial Immunities'.

[12] Case 6/60 [1960] ECR 559 at 579.

applicable. It has always been the practice of the UK revenue authorities and of the US revenue authorities to disregard exempt income of a diplomat in calculating tax due on non-exempt income.

The position in regard to income tax and capital gains tax generally as it results in the United Kingdom from application of the general exemption in Article 34 is set out in Annex B to the Memorandum on Diplomatic Privileges and Immunities circulated to diplomatic missions in London by the Foreign and Commonwealth Office. Extracts from the version of this Memorandum issued in April 1996 are reproduced at the end of this Commentary on Article 34. Broadly speaking, diplomats are exempt from tax on their official emoluments, on private income from sources outside the United Kingdom whether or not the income is payable in or remitted to the United Kingdom, and—with exceptions which reflect Article 34(b) and Article 34(d)—from capital gains tax. As regards local taxation, diplomats are regarded as exempt from the 'non-beneficial portion' of the council tax, and collection of the beneficial portion has been suspended. Since 1997 a dwelling of a person enjoying privileges and immunities under the Diplomatic Privileges Act (implementing the Convention) is treated as an exempt dwelling for which no council tax is payable.[13]

It is usual for double taxation agreements between States to make provision reflecting the exemption given under Article 34 and ensuring that members of diplomatic missions and their families, unless they are nationals or permanent residents of the receiving State, remain liable to tax in the sending State. For example, Article 26 of the Double Taxation Convention between the United Kingdom and Switzerland of 1977[14] provides that:

(1) Nothing in this Convention shall affect the fiscal privileges of diplomatic agents or consular officers under the general rules of international law or under the provisions of special agreements.
(2) Notwithstanding the provisions of Article 4 [determining residence] an individual who is a member of a diplomatic mission, consular post or permanent mission of a Contracting State which is situated in the other Contracting State or in a third State may be deemed for the purpose of the Convention to be a resident of the sending State if:
  (a) in accordance with international law he is not liable to tax in the receiving State in respect of income from sources outside that State, and
  (b) he is liable in the sending State to the same obligation in relation to tax on his total income as are residents of that State.

[13] SI 1997/656 and 657.
[14] UKTS No 102 (1978), Cmnd 7400.

In the *Dutch Diplomat Taxation Case*[15] in 1980 the Supreme Court of The Netherlands confirmed that the Double Taxation Convention between Belgium and The Netherlands, as well as Articles 34 and 37 of the Vienna Convention in the case of Belgium (The Netherlands had not then ratified), operated so as to make the wife of a Dutch diplomat serving in the Netherlands Embassy in Brussels exempt from tax in the receiving State, Belgium. Her income could thus be taken into account in assessing her husband to income tax in his home State, The Netherlands. When The Netherlands ratified the Vienna Convention in 1984 it was explained to its Parliament that the effect of Article 34 was generally that the diplomat should be treated as if he remained in his own State.

Exception (a): 'indirect taxes of a kind which are normally incorporated in the price of goods or services'

This exception was originally worded simply 'indirect taxes' in the International Law Commission's draft articles. In response to an observation by Luxembourg on the 1957 draft articles it was changed to 'indirect taxes incorporated in the price of goods'. The Commission then added the words 'or services' in response to a suggestion by Mr Yokota, who pointed out that such Japanese taxes as travel tax and entertainment tax should appropriately be included within the exception.[16] The more flexible wording 'of a kind which are normally incorporated in the price of goods or services' resulted from a UK amendment at the Vienna Conference and was intended to make clear that the exception included taxes which were normally included in the price of goods or services in that they formed part of the consideration given by the buyer to the seller, but which might in some circumstances be separately identified or separately payable.[17] For reasons of accounting to the revenue authorities, or because these indirect taxes may be passed on, taxes such as purchase tax or value added tax are often separately identified and may sometimes be separately payable. If, however, they are payable not to the provider of the goods or services but directly to the revenue authorities of the receiving State, there is a strong argument that they fall within the general exemption and not within the exception in Article 34(a).[18]

[15] 87 ILR 76. Belgian practice is the same—Salmon (1994) para 475.
[16] UN Docs A/CN 4/91 p 5 (Art 22); A/CN 4/114 p 29; A/CN 4/116 p 64; *ILC Yearbook* 1957 vol II p 140 (Art 26), 1958 vol I p 157.
[17] UN Docs A/Conf. 20/C 1/L 202; A/Conf. 20/14 pp 184–5.
[18] See Muller (1993) at pp 52–4.

The United Kingdom have always treated value added tax and excise duties levied on goods sold in the United Kingdom as 'indirect taxes of a kind which are normally incorporated in the price of goods or services', with the result that, subject to what is said below, these taxes are payable by diplomats in the United Kingdom. Sales tax in the United States on the other hand, which is always separately identified, is treated by revenue authorities there as a direct tax, and exemption is granted through a system of sales tax exemption cards. A new system of credit cards and debit cards for entitled personnel is being devised. The new cards will bear the photograph of the holder and must be personally presented to secure the benefit of tax-free purchases. Where this is not possible (as with Internet purchases) exemption will not be available.[19] In Belgium, relief from tax on petrol is also granted through a system of cards for entitled holders.[20]

For the United States, giving effect to tax reliefs due under Article 34 raises the particular problem of ensuring compliance by each of the individual states as well as by the Federal Government. Hawaii for some time resisted giving exemption from excise and hotel taxes to diplomats even when the remaining forty-nine states did so. In a Memorandum to the Senate of Hawaii, which was considering altering its practice, Gilda Brancato of the State Department explained that for a sales tax to fall within the general exemption accorded under Article 34 it should be separately stated, readily identifiable, assessed on the value of the goods and uniformly borne by the buyer. Pointing out the obligation on the Federal Government to ensure uniform grant of tax reliefs due under the Vienna Convention, she noted:

> Treaties are binding on the States under the Supremacy Clause of the Constitution. The United States Supreme Court has recognized that 'although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight'.

These arguments were accepted by Hawaii which fell into line with practice elsewhere in the United States.[21]

In some States there exist *ex gratia* arrangements for relieving diplomatic agents from excise duty and value added tax on specific high-value purchases. In the United Kingdom these arrangements apply to purchase by diplomatic agents from bonded warehouses of alcoholic liquor and tobacco products and

[19] See Office of Foreign Missions Circular Notices to diplomatic missions, available at www.state.gov/ofm/31311.htm, in particular Notice of 14 February 2003 on Internet Purchases.
[20] 2002 RBDI 158.
[21] Memorandum of 4 February 2000 in 2000 DUSPIL 594.

from value added tax and duty on cars. Refund of value added tax paid on substantial purchases of high-grade British furniture and on furnishings for equipment of the premises of the mission is also available under detailed conditions set out by the Protocol Department of the Foreign and Commonwealth Office. Such arrangements are intended as an incentive to the purchase by diplomatic missions of local goods in preference to the duty-free import of foreign goods, and they do not affect the legal position under which the amounts in question fall within Article 34(a). Arrangements may also be made on a basis of reciprocity, in reliance on the permissive provision in Article 47.2(b), as for example by Germany.[22]

Exception (b): 'dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission'

These words conceal what is perhaps the most difficult and complex ambiguity in the text of the Convention. Is the effect of the proviso 'unless he holds it on behalf of the sending State for the purposes of the mission' merely to exclude from the exception the common case where the premises of the mission, in order to comply with the law of the receiving State, are held in the name of the head of the mission or a member of the diplomatic staff of the mission? This interpretation is consistent with the related provisions Article 1(i) and Article 31.1(a), and it is supported, though not beyond argument, by the *travaux préparatoires* of the Convention. On the basis of this narrow construction a diplomat is liable to local tax on his principal private residence unless he is exempted on a basis of courtesy or reciprocity. A second possible interpretation would extend the exception wider to include the principal private residence of a diplomatic agent in all circumstances, whether owned or leased by the sending State or by himself. His principal private residence is clearly necessary to enable him to do his job in the receiving State and it can therefore easily be maintained that he 'holds it on behalf of the sending State for the purposes of the mission' and should be exempt from tax on it. A third possible interpretation, which would also lead to exemption for the diplomat's own residence, is that the term 'private immovable property' is not intended to include the diplomat's own residence. To allow exemption is probably more in line with the underlying principles justifying the tax privileges given to

[22] For details see Richtsteig (1994) pp 80–1. For similar provisions in Belgium see Salmon (1994) para 477.

members of diplomatic missions, and it is this practice of exemption which has been adopted by the majority of States Parties to the Vienna Convention.

The unsatisfactory formulation of Article 34(b) results mainly from the fact that at several stages of its preparation it was brought into line with what is now Article 31.1(a) without consideration being given to the question of whether on grounds of principle this was a correct approach. As pointed out in the context of Article 31.1(a) there are two possible justifications for the exception to immunity from jurisdiction in the case of real property. The first is that ownership of real property in the receiving State is not necessary to the functions of the diplomat in the receiving State. The principal private residence is, however, necessary to enable the diplomat to do his job, and on this approach he should therefore be immune from all actions in regard to it. The second justification is that if the diplomat is immune in respect of real property, a plaintiff will have no possible forum in which actions relating to that property can be determined. On this second approach the exception to immunity should cover the diplomat's own residence (given the safeguard that execution would not be permitted where it would infringe the inviolability of that residence). This second approach appears in fact to have been used by the International Law Commission in drafting Article 31. But it has no application to the question of tax on the diplomat's residence. The principles underlying the taxation of diplomats are that they should be exempt from all taxes proper in the receiving State except in regard to activities having no connection with their functions and in regard to cases where arrangements for exemption would be administratively impractical. Neither of these two exceptions applies to the case of property tax on a diplomat's private residence. General principles therefore support taxes or rates on such residences coming within the general exemption accorded by Article 34.

Little support for either interpretation emerges from previous State practice, which was extremely varied. In some States exemption was accorded only if the sending State was owner or lessee of the residence, so that exemption depended on sovereign rather than diplomatic immunity. The United States accorded no exemption from property tax on residences,[23] but some of the constituent states allowed exemption on a basis of reciprocity. The United Kingdom took the position that customary international law did not require exemption, but instead they concluded an extensive number of reciprocal arrangements under which exemption or refunds were accorded in respect of that portion of rates from which the residences were deemed not to derive direct benefit.[24]

[23] Moore (1905) vol IV pp 669–72.

[24] See draft letter from the Marquis of Salisbury in McNair (1956) vol I p 207; Lyons (1953) pp 140–7.

The original draft of the Special Rapporteur to the International Law Commission accorded specific tax exemption in respect of mission premises to the sending State and the head of the mission (the provision which became Article 23.1). The exemption from tax accorded to the diplomatic agent had an exception relating to '(b) dues and taxes on immovable property in his private ownership on the territory of the receiving State'. It was not entirely clear whether the term 'immovable property' comprised residences at all, or whether official residences would be entitled to exemption because they were not regarded as being in 'private ownership'. In the Article which became Article 31 of the Convention there was an exception to the diplomat's immunity from jurisdiction which was expressed in similar terms. During the Commission debates in 1957 on the immunity from jurisdiction provision, Mr Tunkin proposed adding to the exception the words 'and representing a source of income'. He explained that his amendment was designed to cover cases where immovable property was held in the name of the head or a member of the mission because local law did not permit it to be held by the sending State. Several delegates agreed with Mr Tunkin's objective but had doubts about the language. Sir Gerald Fitzmaurice, endorsing Mr Tunkin's proposal, suggested adding instead, after the words 'immovable property': 'held by the agent in his private capacity and not on behalf of his government for the purposes of a mission'. It is clear that the object of these words when originally introduced was not to distinguish between a principal and a secondary residence—but it is not clear whether residences were understood as coming within the term 'property' at all. There is some slight evidence that Mr Tunkin did not regard residences as being 'property' whereas Sir Gerald Fitzmaurice did. The draft at this stage contained no definition of 'premises of the mission' and the provision which became Article 30 of the Convention distinguished between the 'private residence' of a diplomat and his 'property'. Shortly afterwards Mr Tunkin proposed during discussion of the provision which became Article 34 that an addition in similar terms to that in the immunity from jurisdiction Article should be made in exception (b), and this was agreed.[25]

Japan pointed out in commenting on the 1957 draft articles that the extent of the term 'mission premises' was unclear, and so was the effect of the exceptions from immunity and from tax exemption on the private dwelling of a diplomatic agent. Japan wished the position to be that the exception from immunity would not apply to the diplomat's private dwelling. The Rapporteur, in adopting a rewording of the exception suggested by The Netherlands, observed that

[25] UN Doc A/CN 4/91, Art 22(1)(b); *ILC Yearbook* 1957 vol I pp 94–5, 119.

this seemed to satisfy the wishes of the Japanese Government. The words 'in his private capacity' were omitted from this redraft.[26] During the 1958 debates of the Commission a similar change was, at the request of the Japanese member, made to the taxation article.[27] The effect of the Commission's 1958 draft was thus probably to exclude all residences from the scope of the two exceptions in regard to immovable property.

The discussion at the Vienna Conference is not conclusive as to whether delegates intended residences of diplomats to be caught by the exception in regard to private immovable property. In debate on the taxation article France introduced two amendments—one designed to replace in paragraph (b) the proviso 'unless he holds it on behalf of the sending State for the purposes of the mission' by the words 'subject, however, to the application of the provisions of Article 21 to immovable property owned by the diplomatic agent on behalf of the sending State for the purposes of the mission'; and the other to introduce a new exception for 'dues and taxes payable by reason of occupation in the territory of the receiving State of residences other than the official residence'. The second of these amendments might have suggested an intention to exempt the principal residence of the diplomat, but the representative of France in introducing the first amendment made clear the intention that 'all buildings held privately... even by the sending State in cases where that State had acquired or rented premises for the exclusive purpose of housing the members of the mission' should be subject to the tax legislation of the receiving State. The Soviet Union representative Mr Tunkin made clear that he believed that the intention of the Commission had been to exempt all residences occupied by diplomats. Both French amendments were rejected, and it is highly probable that there was among delegates no common understanding of the resulting position.[28]

Japan did not regard the position in regard to residences as at all clear, and later it moved an amendment[29] to extend the definition of premises of the mission by adding to the test of 'used for the purposes of the mission' the words 'including the residence of the head of the mission'. The object was to make clear that the residence of the head of the mission at least would be exempt from dues and stamp duty, and from property taxes. The definition of mission premises thus assumed its final form: 'buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the

[26] UN Docs A/CN 4/114 pp 20–1, A/CN 4/116 p 55.
[27] *ILC Yearbook* 1958 vol I p 157.
[28] UN Docs A/Conf. 20/C 1/L 219; A/Conf. 20/14 pp 185–7.
[29] UN Docs A/Conf. 20/C 1/L 305; A/Conf. 20/14 p 225.

mission including the residence of the head of the mission'. It thus became clear that residences of members of the mission other than the head could not be regarded as '*used* for the purposes of the mission' and it therefore became very difficult to argue that such residences were, under Articles 31.1(a) and 34(b) '*held* for the purposes of the mission'. It is possible to argue that it was not the intention of the Conference to include residences in the expression 'private immovable property', though it cannot be denied that this argument does a certain violence to the language used in the Convention. If this argument is adopted it is perhaps defensible to impose taxes on a diplomat's weekend cottage on the ground that it would be administratively impractical to exempt it only for the short periods when it was actually used as his residence. (In the context of Article 30 it is suggested that an occasional residence *should* be accorded inviolability for the relevant period of occupation, but the problem of administrative complexity does not arise under Article 30.)

Not surprisingly, in view of the tortuous history of Article 34(b) States have tended to interpret it as they found convenient—usually continuing their previous practice in regard to taxation of diplomatic residences. Where exemption or relief was previously accorded, as in the United Kingdom, it continues to be accorded, though the United Kingdom regards exemption as now dependent on the Convention instead of the earlier reciprocal arrangements. Where it was not previously accorded, as in Canada, the position also continued unchanged, and some authors have supported this view of the position.[30] The United Kingdom receives reciprocity from the great majority of other States Parties to the Convention. This need not mean that all these States regard themselves as obliged to accord relief under Article 34, for no formal steps were taken by the United Kingdom to terminate the old reciprocal arrangements, and Article 47.2(b) permits States to extend to each other by custom or agreement more favourable treatment than is required by the Convention. It may, however, be said that there has emerged among States a 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'[31] and that this practice supports exempting a diplomat from taxes imposed on his residence. This result may not have been intended by the Vienna Conference, but it is fully in accordance with the underlying principles regarding the taxation of diplomatic agents.

The United States which in 1986 stated that it would grant tax exemption on property used for diplomatic residences, subject to confirmation of reciprocal

[30] 1966 Can YIL 278. Cahier (1962) p 285 says that diplomats other than the head of mission are not exempt from tax on their residences.
[31] Vienna Convention on the Law of Treaties, Art 31.3(b).

treatment, also receives almost universal reciprocity. A survey conducted in 1997 found that in 97 per cent of missions abroad, tax relief was accorded to the US Government in respect of diplomatic residential property. The State Department in a Note to Sweden maintained that this showed:

> That the nearly uniform custom and practice of States have ripened into a customary law obligation to provide tax exemption to Government owned residences housing members of the diplomatic mission, subject to reciprocity.[32]

In *US v County of Arlington, Virginia*[33] in 1982 the US Court of Appeals had to consider the effect of an Agreement of 4 May 1979 between the United States and the German Democratic Republic which provided for reciprocal tax exemption from real estate taxes for property owned by either State when such property was used exclusively for the purpose of their diplomatic missions, including residences for diplomatic staff and members of their families. When the 1979 Agreement was concluded, both the United States and the German Democratic Republic were already Parties to the Vienna Convention, and it was said to be a supplementary agreement, under the authority in Article 47.2(b) of the Convention permitting the grant of more favourable treatment than that required by the Convention. The conclusion of this Agreement does not, however, necessarily indicate that the United States and the German Democratic Republic took the view that Article 34(b) did not require the grant of tax exemption in respect of diplomatic residences, since Article 34 deals only with the diplomat's own privilege while the 1979 Agreement in issue gave exemption to the two States. The Court of Appeal held that the United States was constitutionally entitled to conclude the 1979 Agreement and to enforce its provisions against the wishes of the County of Arlington. As regards the period before entry into force of the 1979 Agreement the position depended on construction of the Foreign Sovereign Immunities Act 1976,[34] which permitted execution against immovable property situated in the United States provided 'that such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission'. The State Department took the position that this expression covered a building used exclusively for the housing of members of the mission and their families, and the wording of the 1979 Agreement followed this interpretation. The court held that the State Department view was reasonable and entitled to great weight, and they concluded that the German Democratic Republic was

[32] 2001 DUSPIL 545.
[33] 702 F 2d 485 (1983); 72 ILR 652.
[34] 28 USC §§ 1609 and 1610.

immune from enforcement of a tax lien in respect of the period before the 1979 Agreement. Although this case did not expressly turn on the construction of Article 34(b) it does support the conclusions suggested above.

Exception (c): 'estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of Article 39'

Article 39.4 deals *inter alia* with the question of exemption from estate, succession, and inheritance duties in the event of the death of a diplomat or other privileged member of a diplomatic mission or a member of his family. It is discussed in the context of Article 39.

Exception (d): 'dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State'

The justification for this exception is discussed above in the context of the general exemption. Also discussed above is the question whether, in determining the applicable rate of tax to be applied to non-exempt income such as that caught by Article 34(d), the receiving State is required to disregard exempt income.

Exception (e): 'charges levied for specific services rendered'

The interpretation of these words in regard to property taxes is discussed above, in the context of the identical exception in Article 23 which confers a general exemption on the sending State and the head of the mission from tax in respect of the premises of the mission. At the Vienna Conference, the Austrian representative stated his understanding that this exception included 'charges for permission to install and operate a wireless or television receiver'.[35] The United Kingdom, however, does not require members of diplomatic missions to purchase television or radio licences. In view of the inviolability of the premises where radios and television sets are operated, it would be impossible to enforce a national requirement to obtain or pay for such licences. Generally speaking, however, as pointed out above, a distinction should be made between a requirement to obtain a licence, which may involve a demonstration of fitness to hold or to operate, and payment for the licence, which is normally regarded as a tax and not as a charge for any 'specific service rendered'.

[35] A/Conf. 20/14 p 186.

One imposition which has caused controversy, particularly in London, are 'surtaxes' or 'charges' imposed on users of particular kinds of vehicle or on users of specified roads such as motorways or roads in central city areas. Road or bridge tolls, where the proceeds of the toll are used to pay for the past construction or for the future upkeep of a particular road or bridge, would clearly be within the exception. The driver can choose whether to purchase the 'specific service' of travel on the restricted road or bridge or to use an alternative route. But in 1985 there was considerable controversy as to whether privileged diplomats were liable to pay a Swiss 'surtax' imposed on users of motorways and on heavy vehicles. The Canton of Geneva was unwilling to grant relief, but diplomats collectively refused to pay on the ground that the surtax was not a 'charge for a specific service rendered'.[36] Under German practice, the exception has been applied only where there is a reasonable relationship between the charge and the value of the service rendered.[37]

The congestion charge imposed and administered by Transport for London is different in a number of respects from a road toll. It is a flat rate imposition on any vehicle driven within the central London congestion charge zone. It applies even where the driving is inadvertent, for example, where the driver approaching the boundary road discovers too late that a right or left turn is prohibited and trespasses within the zone for only a few seconds in order to return lawfully to the boundary road. There are discounts for residents within the zone who have in many cases no real choice as to whether to drive within it, as well as for disabled drivers and drivers of alternative fuel vehicles. The revenue raised by the scheme must be used for improvements to public transport, which may provide an alternative or a benefit for some drivers but not for all who contribute. The primary purpose of the scheme, whose priorities are described in the transport strategy of the Mayor of London published on 10 July 2001, is to deter drivers from using the zone and so reduce congestion.[38] Transport for London take the position that the central London congestion charge is analogous to a road toll or a parking fee and that the 'specific service rendered' to those who pay it is a quicker journey by car or better public transport. The UK Government have supported this position, while suggesting that the issue should be resolved between Transport for London and foreign diplomatic missions. In November 2005 the Government told Parliament:

We informed all missions by Note Verbale in March 2002 of our sustained view that there were no legal grounds to exempt diplomatic missions from payment of the

[36] 1985 RGDIP 177 and 807. [37] Richtsteig (1994) p 81.
[38] Available at www.tfl.gov.uk.

congestion charge. Since then, in formal and informal exchanges, we have informed missions of our view that the congestion charge does not constitute a form of direct taxation under the Vienna Convention, but is a charge analogous to a motorway toll, and that they are expected to pay.[39]

The US Embassy, supported by a large number of other diplomatic missions, maintains that the congestion charge is not a charge for a specific service rendered and so falls within the general tax exemption granted to diplomatic agents by Article 34 of the Convention. There are a number of reasons justifying the position that the congestion charge in its present form is an imposition from which diplomats should be exempt:

1. On the basis of the Organisation for Economic Co-operation and Development's definition of a tax as set out above, the charge is 'unrequited in the sense that benefits provided by government to tax payers are not normally in proportion to their payments'. There is little proportionality in the way that the congestion charge operates—the driver is liable for a flat amount regardless of whether his use of the zone lasts for one minute or for the entire eleven hour period in a day.
2. It is arguable whether any 'specific service' is being rendered by Transport for London. Many drivers have no alternative but to use the zone because they live within it or must use it for their work. The 'service rendered' in the form of a quicker journey by car has been delivered to only a limited extent and 'improved' public transport may in many cases not be a realistic alternative. This is particularly true for diplomats given that they are obliged to work in embassies which in practice must be located in central London and to transact their business with the Foreign and Commonwealth Office which is also located within the zone. For many ambassadors and senior diplomats, travel by public transport is for reasons of security not a realistic alternative. The main purpose of the congestion charge is to regulate driving conduct and choice of vehicle, which is a perfectly proper objective for a tax but not a normal factor in a charge for a service.
3. Diplomats are on a general basis not required to pay for police protection either of their premises or their persons. Although it is obvious that diplomats do derive direct benefit from police services, the receiving State is required to provide protection under Articles 22 and 29 of the Vienna Convention in particular and so the general practice in all countries is to

[39] Hansard HC Debs 10 November 2005 vol 439 W col 745, cited in 2005 BYIL 848; Notes to Diplomatic Missions No A102/02 of 18 March 2002 and No A330/02 of 18 June 2002.

treat embassies and diplomats as exempt from paying for police protection. As explained above in the context of Article 22, this position may be altered by agreement between sending and receiving States, but this does not affect the underlying rule. Diplomats must be accorded freedom of movement and travel within the United Kingdom under Article 26 of the Convention, they are required by Article 41 to conduct official business with the Foreign and Commonwealth Office, and the location of diplomatic missions in London is in practice controlled under the Diplomatic and Consular Premises Act 1987. The security of diplomats must be protected under Article 29 and they must under Article 25 be given full facilities for the performance of their functions. By analogy with the position in regard to police protection they should be treated as exempt from payment for driving in central London, a facility which is in practice indispensable for the normal performance of their functions.

The fact that diplomats have apparently paid congestion charges imposed in other cities is not in itself conclusive. Schemes imposed in Singapore, in Trondheim, Norway, and in Melbourne are closer to road tolls. The Trondheim scheme was originally designed to fund construction of ring roads rather than explicitly as a congestion charge. The Melbourne scheme is limited to a specific 'Citylink' toll road. Other schemes, apart from those in Singapore, Oslo, and now Stockholm, do not operate in capital cities and so do not pose for diplomats the special problems described above. The London scheme in terms of size and scope is unparalleled elsewhere in the world, and that is why it has become a test case for the distinction between a tax and a charge for a specific service rendered.[40]

When the London congestion charge was originally introduced, most diplomats appear to have accepted, though with some reservation, statements by the UK authorities that they were required to pay it. In 2005, however, when the charge was raised from £5 to £8, the US Government announced that they regarded it as a tax from which their diplomats were exempt and would no longer pay.[41] In a Diplomatic Note of 11 July 2005 to the Foreign and Commonwealth Office, the US Embassy set out the legal reasons for their position. As regards the reliance by the UK Government on Article 34(e) of the Vienna Convention they commented:

This reliance is misplaced because no specific service is rendered in exchange for payment; the revenue raised is used to provide services to those other than those paying

[40] See www.tfl.gov.uk.
[41] *The Times*, 18 October 2005, Timesonline, 20 October 2005.

the charge; and the charge bears no reasonable relationship to the cost of the service supposedly rendered to the payer. Like the tax on petrol from which diplomats and diplomatic missions are exempt, the Congestion Charge is a tax imposed to discourage driving and to encourage the use of public transport.[42]

Germany, following legal analysis in Berlin, followed suit, as did over fifty other diplomatic missions. In February 2007 the congestion charge area was extended to the west, bringing within the zone a number of embassies previously outside it. At that point a survey showed that about half the embassies in London, including those of France, Russia, Belgium, and Saudi Arabia, said that their diplomats were exempt from the charge.[43] The Mayor of London Ken Livingstone has accused the recalcitrant embassies of exploiting diplomatic immunity (which is not the case), has stated that the UK Government has the legal right unilaterally to classify the imposition as a 'charge for a specific service rendered' (which is a highly dubious proposition), and has described the US Ambassador in London as a 'chiselling little crook' (which led to his being reported to the Standards Board for England).[44] So far there is no indication in public of any proposals to submit the dispute to any of the formal settlement procedures available under the Optional Protocol to the Vienna Convention concerning the Compulsory Settlement of Disputes.

Exception (f): 'registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23'

The words 'with respect to immovable property' appear to qualify all the previous words in Article 34(f). The United States' amendment, intended to clarify the exception in this way, was adopted by the Conference. In principle therefore other kinds of registration fees and duties fall within the general exemption, unless they can properly be described as 'charges levied for specific services rendered'.[45] Stamp duties on documents having no relation to immovable property, such as share transfers, also fall within the general exemption.

[42] Extracts from this Note are in 2005 DUSPIL at 570. The full text of the Note is at www.state.gov/s/l/c8183.htm.
[43] *The Times*, 21 February 2007.
[44] *The Times*, 29 March 2006.
[45] UN Docs A/Conf. 20/C 1/L 263; A/Conf. 20/14 p 186. See also statement by Austrian representative on exception (e). For Canadian practice see 1966 Can YIL 279.

ANNEX B
to Memorandum on United Kingdom practice, April 1996
Income tax and capital gains tax

1. Schedule 1 of the Diplomatic Privileges Act 1964 sets out the immunities from income tax and capital gains tax of the members of a diplomatic mission. The effect of the Act, so far as United Kingdom income tax and capital gains tax are concerned, is summarised in the following paragraphs.

Official emoluments of members of the mission

2. All members of the mission, as defined in Article 1 of Schedule 1 of the Act who are not British Citizens, British Dependent Territories Citizens, British Overseas Citizens or British Nationals (Overseas), or permanently resident in the United Kingdom, are exempt from United Kingdom income tax on the official emoluments they receive by reason of their employment. For the purposes of this Annex, a person who is a member of a mission of certain Commonwealth countries or is a private servant of a member and is a Commonwealth citizen and in addition to being a British national is to be regarded as if he were a citizen of the Commonwealth country only.

Emoluments of private servants

3. Private servants of members of the mission as defined in Article 1 of Schedule 1 of the Act, if not British Citizens, British Dependent Territories Citizens, British Overseas Citizens or British Nationals (Overseas), or permanently resident in the United Kingdom, are exempt from United Kingdom income tax on the emoluments they receive by reason of their employment.

Private income from sources outside the United Kingdom

4. Diplomatic agents who are not British Citizens, British Dependent Territories Citizens, British Overseas Citizens, British Nationals (Overseas), or permanently resident in the United Kingdom, are exempt from United Kingdom income tax on private income from sources outside the United Kingdom, whether or not the income is payable in, or remitted to, the United Kingdom. The members of the family of a diplomatic agent forming part of his household, if they are not British Citizens, British Dependent Territories Citizens, British Overseas Citizens, or British Nationals (Overseas), are also exempt from United Kingdom income tax on private income from sources outside the United Kingdom.

5. Similarly, members of the administrative and technical staff of the mission, together with members of their families forming part of their respective house-holds are, if they are not British Citizens, British Dependent Territories Citizens, British Overseas Citizens, British Nationals (Overseas), or permanently resident in the United Kingdom, exempt from United Kingdom income tax on private income from sources outside the United Kingdom.

6. The Inland Revenue will repay any United Kingdom income tax which has been deducted from exempt income before it is received. The Diplomatic Privileges Act 1964 does not provide any exemption from United Kingdom income tax in respect of income from sources outside the United Kingdom which accrues to members of the service staff of the mission or to private servants of members of the mission.

Income liable to united kingdom income tax

7. In no case does the Diplomatic Privileges Act 1964 provide for exemption from United Kingdom income tax of income arising from sources within the United Kingdom. A member of a mission or those forming part of his household who has received non-exempt income should apply for, and submit, a return relating to this income.

8. Where there is income liable to assessment to United Kingdom income tax, the Inland Revenue will take into account personal allowances and any of the other usual reliefs which are applicable when calculating any tax payable. They will then issue a notice of assessment in the usual way. Details are in Inland Revenue booklet sent to all missions in 1995.

Capital gains

9. Members of diplomatic missions (except service staff) who are not British Citizens, British Dependent Territories Citizens, British Overseas Citizens,

British Nationals (Overseas), or permanently resident in the United Kingdom, are exempt from United Kingdom capital gains tax except where it arises on the disposal of private immovable property not held on behalf of the sending State for the purposes of the mission, or of investment in commercial undertakings in the United Kingdom. Those forming part of the household of a member of a diplomatic mission are, if they are not British Citizens, British Dependent Territories Citizens, British Overseas Citizens, or British Nationals (Overseas), also exempt from United Kingdom capital gains tax except in relation to private immovable property in the United Kingdom, and investments in commercial undertakings in the United Kingdom.

10. Members of diplomatic missions should include any capital gains liable to United Kingdom capital gains tax in the return of income referred to in paragraph 7. The Inland Revenue will issue a notice of assessment and application for payment in due course.

Income and Corporation Taxes Act 1988, Section 321

11. In certain circumstances, income arising from employment as a consul, or an official agent, for a foreign State may be exempt from income tax, provided that the nationality requirements in that section are satisfied. Advice on this aspect can be obtained from International Division 1/1, Inland Revenue, Somerset House, London, WC2R.

EXEMPTION FROM PERSONAL SERVICES

Article 35

The receiving State shall exempt diplomatic agents from all personal services, from all public services of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

It was well established in international practice that diplomats were treated as exempt from such obligations imposed on the general public as compulsory military service and jury service. Many States made explicit provision for this in their domestic laws.[1] Curiously, however, there was little mention of such an exemption in the textbooks on diplomatic law—perhaps because diplomats as foreign nationals would in any event not usually be subject to civic obligations and in the rare cases where they were liable would be protected by their inviolability.

The proposal to include special provision for personal and public services came from the Soviet Union in its comments on the International Law Commission's 1957 draft articles. The Rapporteur prepared a new draft article and this was discussed by the Commission in 1958.[2] Acceptance of the principle of exemption was uncontroversial, and it was agreed that its scope would cover not only the obvious cases of military and jury service but also obligations to help in public emergencies such as forest fires, though details were not set out in the text.

At the Vienna Conference Belgium proposed an amendment[3] which after minor drafting changes became the final text of Article 35. The object was to

[1] eg Belgium: Salmon (1994) 493; Czechoslovakia: UN Legislative Series vol VIII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* ('UN Laws and Regulations') pp 83–5; Denmark: ibid p 101; Greece: ibid pp 136–7; Israel: ibid p 184; The Netherlands: ibid p 199; Poland: ibid pp 269–75; Portugal: ibid p 288; United Kingdom: VII BDIL VII 808.

[2] UN Doc A/CN 4/114/Add. 1 p 20 (comment on Art 26); *ILC Yearbook* 1958 vol I p 157.

[3] UN Docs A/Conf. 20/C 1/L 266; A/Conf. 20/14 pp 187–8.