

The Abuse of Diplomatic Privileges and Countermeasures not Covered by the Vienna Convention on Diplomatic Relations

Some Observations in the Light of Recent British Experience

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Survey

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I. Introduction

The arsenal of justifiable countermeasures against the abuse of diplomatic immunities and privileges, especially the use of force purporting

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Abbreviations: AJIL = American Journal of International Law; Cmnd. = Paper presented to Parliament by Command of Her Majesty; EPIL = Encyclopedia of Public International Law; ed. by R. Bernhardt; F.Supp. = Federal Supplement; ICLQ = International and Comparative Law Quarterly; NYIL = Netherlands Yearbook of International Law; RGDIP = Revue Générale de Droit International Public; YILC = Yearbook of the International Law Commission.

to safeguard elementary interests of the receiving State or to protect human lives, has always been the object of legal controversy. The approach adopted by the Vienna Convention on Diplomatic Relations of 1961, i.e., to define diplomatic immunities and privileges such as the inviolability of the premises of a diplomatic mission or of the diplomatic bag in absolute terms rather than to provide for exceptions in the case of certain abuses, has certainly checked possible temptations to infringe and undermine these guarantees by relying indiscriminately on alleged abuses. The rigidity of the Vienna Convention as well as the obvious reciprocal benefits for the sending and the receiving States have substantially contributed to preserve the respect for the immunities and privileges under the Convention. On the other hand, the Vienna Convention fails to take cognizance of elementary interests of the receiving State and individual values which might be put into jeopardy if diplomatic privileges, e.g., the inviolability of diplomatic premises, are conceived as precluding even measures against acts which aim at the safety of the receiving State or threaten human life. It seems hardly acceptable that in extreme situations the receiving State is left with the option either to grant protection to individuals or, even more dramatically, to ensure its own self-preservation, or to comply with international law. From this perspective, the recognition of certain limitations on the immunities and privileges laid down in the Vienna Convention does not necessarily weaken the adequate protection of diplomatic missions – provided that those exceptions are formulated in sufficiently narrow terms.

Although the concern underlying the foregoing considerations is, fortunately enough, corroborated historically only by scant material, two recent incidents in the United Kingdom have raised the question to what extent abuse of the diplomatic immunities and privileges may justify countermeasures not covered by the Convention: the events surrounding the mission of Libya ("Peoples Bureau") in London on 17 April 1984, culminating in the fatal shooting of a police officer; and the attempted abduction of Umaru Dikko in London on 5 July 1984 (possibly implicating members of the Nigerian High Commission). In the light of these incidents and their handling by the British Government, the Foreign Affairs Committee of the House of Commons has presented a "Report on the Abuse of Diplomatic Immunities and Privileges"¹. Both the subsequent Government "Report

¹ First Report from the Foreign Affairs Committee in the Session 1984/85, published on 23 January 1985.

on Diplomatic Immunities and Privileges"² and the Committee's careful analysis of the operation of the Vienna Convention, together with its well-balanced recommendations on reactions to abuses, deserve great attention³.

The Foreign Affairs Committee and the British Government reports both list a number of preventive measures apt to limit the risk of public disturbances and the need for massive interference with diplomatic privileges *ex post facto*. These recommendations and guidelines refer above all to the size of diplomatic missions, to limitations on the number, location or management of diplomatic premises and to the maintenance of a firm line in reacting to criminal offences with a declaration of *persona non grata*⁴. Both reports take the – probably correct, albeit rather controversial – view that the scanning of diplomatic bags, though calling for judicious restraint, is not excluded by Art.27 (3) of the Vienna Convention⁵.

² Government Report on Review of the Vienna Convention on Diplomatic Relations and Reply to "The Abuse of Diplomatic Immunities and Privileges", Cmnd.9497, April 1985.

³ See I. Cameron, First Report of the Foreign Affairs Committee of the House of Commons, ICLQ Vol.34 (1985), p.610 *et seq.*; R. Higgins, The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience, AJIL Vol.79 (1985), p.641 *et seq.*; R. Higgins, UK Foreign Affairs Committee Report on the Abuse of Diplomatic Immunities and Privileges: Government Response and Report, AJIL Vol.80 (1986), p.135 *et seq.*

⁴ Foreign Affairs Committee (note 1), para.127; Government Report (note 2), para.18 *et seq.*

⁵ Foreign Affairs Committee, paras.26–33; Government Report, para.50. The concern about abuses of the diplomatic bag as expressed both by the Committee and the British Government is reflected in the International Law Commission's recent discussion of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (see UN Doc.A/CN.4/L.404/Add.1, p.18 *et seq.*). Art.28 of the draft provisionally adopted on first reading by the Commission at its thirty-eighth session (*ibid.*, p.15) reads as follows (with the controversial portions set out in brackets):

"Protection of the diplomatic bag

1. The diplomatic bag shall [be inviolable wherever it may be, it shall] not be opened or detained [and shall be exempt from examination directly or through electronic or other technical devices].

2. Nevertheless, if the competent authorities of the receiving [or the transit] State have serious reasons to believe that the [consular] bag contains something other than the correspondence, documents or articles referred to in article 25, they may request [that the bag be subjected to examination through electronic or other technical devices. If such examination does not satisfy the competent authorities of the receiving [or transit] State, they may further request] that the bag be opened in their presence by an authorized representative of the sending State. If [either] [this] request is refused by the authorities of the sending State, the competent authorities of the receiving [or the transit] State may require that the bag be returned to its place of origin".

It is suggested that, to the extent that the finally adopted text contains no express provi-

In their reports, the Committee and the Government did not confine their analyses to measures within the scope of the Convention. In a memorandum submitted to the Foreign Affairs Committee, the Foreign and Commonwealth Office referred to the customary rules of international law "which allow for the possibility of countermeasures in response to a material breach of a treaty by another party"⁶. The Committee, however, favoured a more restrictive position as to the suspension of the receiving State's obligations in the case of manifest abuse. In the light of the drafting history of the Vienna Convention, the Committee held that the general rules governing the suspension of treaty obligations occasioned by a fundamental breach of another party were probably "inappropriate", "especially as a 'remedy' for violation is provided in the form of a severing of diplomatic relations"⁷. Even more delicate is the question to what extent the concepts of self-help or self-defence can provide a basis for the forcible entry into the premises of a diplomatic mission or for other forms of force used against a mission, e.g., the searching of persons with diplomatic status or the opening of diplomatic bags. The Foreign and Commonwealth Office, in the memorandum submitted to the Committee, argued that the rules of the Vienna Convention "do not prejudice the fundamental right of self-defence either in international law or in domestic law"⁸. In this context it pointed out that the British Government had relied on self-defence in conducting a search of all those leaving the Libyan People's Bureau before it was established whether or not these individuals enjoyed diplomatic status. This search for weapons and explosives was deemed justified by the necessity to protect police officers handling the evacuation⁹. Draper suggested in a memorandum that self-defence might have covered counter-fire directed at the Libyan embassy in immediate response to the shooting of a British police officer from its premises and, furthermore, a forcible entry into the mission immediately after or during continued gunfire¹⁰. Giving oral evidence before the Committee, Sir John Freeland, Legal Adviser to the Foreign and Commonwealth Office, could see a justification for the forcible entry "quite clearly in a case where there is continuing violence from embassy premises" on the basis of necessity and proportion-

sion governing the permission of scanning by electronic or other technical devices, the rules of customary law remain unaffected.

⁶ *Op. cit.* (note 1), Minutes of Evidence, p.8, para.44.

⁷ *Ibid.*, para.92.

⁸ *Ibid.*, Minutes of Evidence, p.9, para.45.

⁹ *Ibid.*, Minutes of Evidence, p.9, para.45.

¹⁰ *Ibid.*, Appendix 6, p.71 *et seq.*

ality¹¹. The Committee itself, while refraining from stating a clear opinion on the applicability of the concept of self-defence to the Libyan incident, did not consider it to be a lawful basis for the forcible entry on the premises of the mission¹². On the other hand, it accepted, not quite convincingly, the Government's position that the searching of those leaving the Libyan Bureau ten days after the shooting was justified¹³.

The abduction of Dikko and his subsequent liberation did not immediately raise the question of exceptions to the inviolability of the diplomatic bag under Art.27 (3) of the Vienna Convention, as the bag which contained him did not bear any official seal and was only attended by a member of the Nigerian Administration who, though holding a diplomatic passport, did not enjoy diplomatic status in the United Kingdom¹⁴. However, the Secretary of State for Foreign and Commonwealth Affairs stated in a letter to the Committee that if the bag had qualified for inviolability under Art.27 of the Vienna Convention, the Government would have given priority to the "overriding duty to preserve and protect human life"¹⁵. The Committee welcomed "this acceptance that the inviolability of the bag cannot take precedence over human life"¹⁶. The Committee was also aware of possible implications of this approach for actions purporting to protect human life which are directed at the premises of a diplomatic mission¹⁷. The material contained in the report and the position adopted by the Foreign Affairs Committee suggest that despite the guarantees of inviolability for diplomatic premises and diplomatic bags under Art.22 (1) and Art.27 (3) of the Vienna Convention, in certain extreme circumstances a strong case can be made for measures infringing those guarantees, either on the basis of self-defence or on the grounds of the priority accorded to human life. On the other hand, distinguished writers such as Rosalyn Higgins have voiced doubts "as to the applicability at all of the international law concept of self-defence to violent acts by the representatives of one state within the territory of another, directed against the latter's citizens"¹⁸. This uncertainty on rather sensitive questions may justify a few, by no means exhaustive observations on the Vienna Convention on Di-

¹¹ Ibid., Minutes of Evidence, p.28 *et seq.*, questions 49, 50, 53.

¹² Ibid., para.95.

¹³ Ibid., para.102; see the comment by Cameron (note 3), ICLQ Vol.34, p.612.

¹⁴ Foreign Affairs Committee (note 1), paras.106-110.

¹⁵ Ibid., Minutes of Evidence, p.50.

¹⁶ Ibid., para.111.

¹⁷ Ibid., para.111, n.156.

¹⁸ Higgins (note 3), AJIL Vol.79, p.647.

plomatic Relations and the operation of customary rules justifying otherwise illegal countermeasures *vis-à-vis* another State's organs.

II. The Vienna Convention on Diplomatic Relations as a Closed System

1. The Drafting History

The Vienna Convention defines the inviolability of diplomatic premises as well as of the diplomatic bag in strict and absolute terms. Art.22 (1) clearly provides: "The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission". By contrast, the original draft formulated by Special Rapporteur of the International Law Commission Sandström admitted entry also "in an extreme emergency in order to eliminate a grave and eminent danger to human life, public health or property, or to safeguard the security of the State"¹⁹. The Commission arrived, however, at the conclusion that the formulation of any exceptions might bring about more controversies than it purported to resolve and that the listing of exceptions might easily lead to an erosion of the principle of inviolability²⁰. Only a few members of the International Law Commission expressed the view that the principle of inviolability of diplomatic premises was absolute and not subject to any limitations and qualifications²¹. By contrast, quite a number of members of the International Law Commission assumed that the principle of inviolability of diplomatic premises is subject to certain, albeit very few, generally recognized exceptions²².

In fact, many of those members who favoured the finally adopted version took the view that the formulation on any exceptions was not only impracticable but also unnecessary, as certain limitations pertaining to the protection of human life or the security of the receiving State continued to be covered by customary rules²³. In its tenth session, the International

¹⁹ Art.12 (1), UN Doc.A/CN.4/91.

²⁰ YILC 1957 I, pp.54-60.

²¹ Tunkin, *ibid.*, p.54, paras.37-39; Amado, p.56, paras.64 and 65; Pal, p.56, para.67; Žourek, p.60, para.37; see also Sir Gerald Fitzmaurice, p.55, paras.46 and 47.

²² Sandström, YILC 1957 I, p.54, para.36; Edmonds, p.56, para.61; Scelle, p.57, para.71; Khoman, p.57, para.7; François, p.58, paras.8-10; Liang (Secretary to the Commission), p.58, para.14; García Amador, p.58, para.15; Ago, p.58, para.18; Padilla Nervo, p.59, para.22; Yokota, p.60, para.36; El-Erian, p.60, para.39.

²³ E.g. Scelle, YILC 1957 I, p.57, para.71 ("There were cases in which the local authorities would have no choice but to enter diplomatic premises, but such cases were very

Law Commission confirmed the consensus reached in the previous session²⁴. Although some members expressed the view that the rule of inviolability should remain unimpaired even in cases of extreme urgency²⁵, other opinions suggest that the framing of the inviolability rule in absolute terms does not cover all possible emergency situations²⁶. The prevailing attitude within the Commission is probably best reflected by Amado's view that it was impossible to provide for every contingency in the draft of the Convention and that it was hardly conceivable that a head of mission would fail to co-operate with the authorities in an emergency; further he submitted that a body of international lawyers would be ill-advised to tell heads of missions solemnly what their elementary duties as human beings are²⁷. The exclusive view of the Convention can, however, draw considerable support from the proceedings in the United Nations Conference on Diplomatic Intercourse and Immunities held in Vienna, in March and April 1961²⁸. The vast majority of the Conference was in favour of stating the rule of inviolability of diplomatic premises in absolute terms, unqualified by specific exceptions for the event of manifest abuse. An amendment proposed by Ireland and Japan to the effect that the provisions on the inviolability of a diplomatic mission should "not prevent the receiving

few and far between, and to attempt to enumerate them ... would open the door to countless disagreements and might well undermine the very principle of inviolability. The right to enter diplomatic premises should be confined to exceptional cases of extreme urgency, and should be exercised subject to the expressed approval of the receiving Government and on its responsibility. It was just not possible to enumerate the cases in point. It was for courts of arbitration and the International Court of Justice to build up gradually a relevant body of case law"); François, p.58, paras.8-10 ("... it was unnecessary to say that the local authorities had the right to enter mission premises in order to avoid an eminent danger to human life. If someone were shooting at passers-by from an embassy window, or if the building were on fire, surely no one would deny the right of the police or firemen to enter it. There was ... no need whatsoever to mention special cases, which were already covered by other universally recognized principles of law").

²⁴ YILC 1958 I, pp.127-130.

²⁵ E.g. Tunkin, *ibid.*, p.128, para.65. Bartoš considered that the rule of inviolability should take precedence over any possible threat to property and even to human life; on the other hand, he suggested that it would be better not to deal with the question of emergencies in the draft at all, but "to leave it to the good sense of heads of mission and local authorities", *ibid.*, p.128, para.72.

²⁶ E.g. Verdross, *op. cit.* (note 24), p.127, para.60; François, p.127, para.62, and p.129, para.2; Amado, p.129, para.8; Sandström, p.130, para.10.

²⁷ *Ibid.*, pp.129-130, para.8; see also L. Kerley, *Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities*, AJIL Vol.56 (1962), pp.102-103.

²⁸ United Nations Conference on Diplomatic Intercourse and Immunities, Vienna, 2 March-14 April 1961, Official Records, Vol.I (UN Doc.A/CONF.20/14), pp.135-143; see Kerley, AJIL Vol.56, pp.102-103.

State from taking such measures as are essential for the protection of life and property in exceptional circumstances of public emergency or danger"²⁹ was withdrawn³⁰. As Sir Francis Vallat explained before the Foreign Affairs Committee of the House of Commons³¹, the view prevailing at the Conference was primarily determined by the fear that the listing of specific exceptions in the Convention would lead to doubts and uncertainties and, furthermore, that such an approach might provide the receiving State with an undesirable power of unilateral appreciation. In the light of these (rather summary) considerations, the drafting history of the Vienna Convention leaves it open to argument that Art.22 does not purport to exclude entirely any exceptions to the principle of inviolability to the extent that exceptions are covered by customary rules of public international law. This construction is corroborated by Switzerland's interpretation of the draft adopted by the International Law Commission: "It is of course understood that inviolability of mission premises does not preclude the taking of appropriate steps to extinguish a fire likely to endanger the neighbourhood or to prevent the commission of a crime or an offence on the premises. This accords with the principle that personal inviolability does not exclude either self-defence or measures to prevent the diplomatic agent from committing crimes or offences ..."³². Along similar lines, the Canadian representative to the Vienna Conference of the United Nations stated that, according to the understanding of his delegation, the principle of inviolability should be construed by the sending State in such a way that its mission would not unduly prevent legitimate remedial measures in a genuine public emergency³³. However, a strong current in international legal doctrine follows a strict interpretation of the Vienna Convention to the effect that the inviolability of diplomatic premises is absolute and suffers no qualification in emergencies³⁴. As will be seen, the two opposed views are not quite as far apart as it may seem; for even on the basis of a less rigid construction of the Vienna Convention, exceptions to the principle of inviolability are subject to important qualifications.

²⁹ UN Doc.A/CONF.20/C.1/L.163 (United Nations Conference on Diplomatic Intercourse and Immunities, Official Records, Vol. II [UN Doc.A/CONF.20/14/Add.1], p.24).

³⁰ *Op. cit.* (note 28), p.138, para.9.

³¹ *Op. cit.* (note 1), Minutes of Evidence, p.35, question 85.

³² YILC 1958 II, p.130.

³³ See note 28, p.139, para.17.

³⁴ E. Denza, *Diplomatic Law* (1976), pp.82-84; similarly P. Cahier, *Le droit diplomatique contemporain* (1962), pp.201-206 (with severe criticism of the solution adopted by the Vienna Conference *de lege ferenda*).

Just as the privileges which attach to diplomatic premises, the inviolability of the diplomatic bag and its possible limitations were a subject of strong controversy³⁵. Special Rapporteur Sandström had abandoned his original draft as far as it provided for inspection with the consent of the Ministry of Foreign Affairs of the receiving State and in the presence of an authorized representative of the mission on the basis of "very serious grounds for presuming that it contains illicit articles"³⁶. The International Law Commission decided in favour of an unconditional immunity from inspection. Padilla Nervo, it seems, expressed the prevailing view within the Commission when he stated that even the non-observance of the duty owed by the sending State to use the diplomatic bag only for the proper functions of the mission did not create a right to inspect the diplomatic pouch³⁷. In its commentary on the provisions on the inviolability of the diplomatic bag, the International Law Commission referred to incidents in which the diplomatic bag has been opened in the presence of a representative of the mission concerned and stated: "While recognizing that States have been led to take such measures in exceptional cases where there were serious grounds for suspecting that the diplomatic bag was being used in a manner contrary to paragraph 4 of the article [draft article 25], and with detriment to the interests of the receiving State, the Commission wishes nevertheless to emphasize the overriding importance which it attaches to the observance of the principle of the inviolability of the diplomatic bag"³⁸. The Vienna Conference rejected a number of amendments purporting to restrict the rule of unconditional inviolability of the diplomatic bag³⁹. In the light of the proceedings before the International Law Commission and the Vienna Conference, it is very difficult to argue against the clear wording of the Convention for implied qualifications to the inviolability of the diplomatic bag. In this context it should be noted that even the Vienna Convention on Consular Relations provides for inspection of the consular bag only if the sending State decides to submit to such a measure rather than to put up with the rejection of the bag (Art.35 [3]).

³⁵ See Denza, pp.125-128; Kerley (note 27), AJIL Vol.56, pp.116-118.

³⁶ Art.16 (2), UN Doc.A/CN.4/91; see YILC 1957 I, p.74, para.27 *et seq.*

³⁷ YILC 1957 I, p.78, para.99.

³⁸ Commentary on Art.25, para.5, YILC 1958 II, p.97.

³⁹ See Denza (note 34), p.127; Kerley (note 27), AJIL Vol.56, p.117.

2. The Pre-Convention State of the Law

The ambiguities presented by the drafting history of the Vienna Convention support the view that the inviolability accorded to diplomatic premises does not rule out any conceivable limitations, also because the prevailing pre-convention opinion understood the inviolability as being subject to certain exceptions⁴⁰. The more restrictive perception of the pre-convention state of the law, i.e., that the opinion allowing for exceptions is without foundation in State practice⁴¹, does not bear close examination. The Harvard Draft Convention on Diplomatic Privileges and Immunities made the lawful entry of agents of the receiving State on the premises of a diplomatic mission subject to the consent of the mission's head, without expressly providing for exceptions⁴². However, the commentary states: "The draft does not undertake to provide for well known exceptions in practice, as when the premises are on fire or where there is eminent danger that a crime of violence is about to be perpetrated on the premises. In such cases it would be absurd to wait for the consent of a chief of mission in order to obtain entry upon the premises. Like acts of God and *force majeure* these are necessarily implied as exceptions to the specific requirement of prior consent to entry ... Other ill-defined exceptions to the principles set forth in this article, based on the right of self-defence or conservation, must be admitted"⁴³. The view that the inviolability of diplomatic missions has not been understood as taking precedence over any other consideration is corroborated by the British Government's position in the classic *Sun Yat-sen* case⁴⁴. When in 1896, the Republican Sun Yat-sen was kidnapped and held prisoner in the Chinese Legation in London, the British Government exerted diplomatic pressure upon the Chinese Government and secured Sun's release. Although the British authorities did not take any physical action to rescue the prisoner, Her Majesty's Government did not entertain any doubts about the justification of coercive measures necessary to cope with abuses of the present kind: "... the detention within the Legation house of any person, even though such person should be an undoubted subject of China, is a serious abuse of the privileges and immunities which

⁴⁰ See Cahier (note 34), p.201 *et seq.*; R. Genet, *Traité de diplomatie et de droit diplomatique*, Vol.1 (1931), p.542 *et seq.*

⁴¹ Tunkin, YILC 1957 I, p.59, para.28; Denza (note 34), p.83.

⁴² Art.3 (1), AJIL Vol.26 (1932), *supp.*, p.19 *et seq.*

⁴³ *Ibid.*, pp.52-53.

⁴⁴ See McNair, *International Law Opinions*, Vol.I (1956), p.85 *et seq.*; RGDIP Vol.3 (1896), p.693 *et seq.*

are granted to foreign Representatives ... Her Majesty's Government are convinced that in no other European capital would such an act have been tolerated, and they consider that if persisted in or repeated, it would justify the use of whatever measures might be necessary for the liberation of the captive, and a demand for the immediate departure from this country of any persons responsible for his imprisonment"⁴⁵. In 1929, the French police entered the Soviet mission against the expressed will of the staff⁴⁶. The first secretary of the Soviet Embassy had defected leaving his family on the mission premises, where their lives were thought to be in danger. Despite resistance by the mission staff, the French authorities secured their liberation.

3. General Rules on the Suspension of Treaty Obligations ("Material Breach")

Whatever the correct construction of Art.22 (1) and Art.27 (3) of the Vienna Convention may be, the mere fact of abuse of those privileges does not automatically suspend the receiving State's obligations under these provisions. For the inviolability of diplomatic premises, this results quite clearly from the commentary of the International Law Commission on the clause that the premises of a diplomatic mission may be used only for the legitimate functions of the mission as laid down in the Convention (Art.41 [3])⁴⁷. Therefore, the (by no means clear-cut) general rules on "material" or "fundamental" breach of a treaty as a basis for the suspension of treaty obligations⁴⁸ cannot be invoked by the receiving State, as the Foreign Affairs Committee of the British House of Commons has correctly concluded⁴⁹.

4. The Exclusion of "Implied" Limitations on the Guarantees under the Vienna Convention

The drafting history of the Vienna Convention supports the view that not all interests of the receiving State or rights of individuals, however vital, must necessarily yield to a mission's claim to inviolability of its

⁴⁵ Draft of Dispatch to the British Minister at Peking, McNair, *ibid.*, p.87.

⁴⁶ Genet (note 40), p.547, para.509; A.-C. Kiss, *Répertoire de la pratique française en matière de droit international public*, Vol. III (1965), p.357, no.636.

⁴⁷ Commentary on draft Art.40, para.4, YILC 1958 II, p.104.

⁴⁸ See Art.60 of the Vienna Convention on the Law of Treaties.

⁴⁹ See also Higgins (note 3), AJIL Vol.79, p.646.

premises. On the other hand, a restriction of Art.22 (1) of the Convention which merely refers to an "emergency situation" is ruled out by its unambiguous wording. If the receiving State were allowed to invoke mere disturbances of the public order or if the risk of public or private property being destroyed were sufficient to dispense from the requirement that consent of the head of the mission be obtained, the fears which have motivated the strict formulation of the Convention could easily materialize. It is, therefore, suggested that the Convention rules out all "implied" limitations and exceptions, i.e., all those exceptions that are not covered by a separate set of customary rules with a general scope of application.

5. The Vienna Rules on Diplomatic Relations as a "Self-Contained Régime"

A more rigid perspective of the Vienna rules, i.e. their interpretation as an entirely closed system, has received considerable support in the International Court of Justice's dicta in the *Tehran Hostages Case*⁵⁰ qualifying the rules governing diplomatic relations as a "self-contained régime". The Court rejected the Iranian defence based on alleged criminal activities of the US mission on the grounds that "diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions"⁵¹. Having regard to the provisions of the Vienna Conventions of 1961 and 1963 on declaring a diplomatic or consular representative *persona non grata* and on the severing diplomatic relations, the Court stated that:

"[t]he rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are by their nature, entirely efficacious ..."⁵².

Ripha gen, the Special Rapporteur of the International Law Commission on State Responsibility, has extended the International Court's approach rather liberally to immunities under international law in general:

"Actually one might say that in every set of rules of international law, providing

⁵⁰ Judgment of 24 May 1980, ICJ Reports 1980, p.3 *et seq.*

⁵¹ *Ibid.*, p.40.

⁵² *Ibid.*, p.40.

for immunity is of necessity a 'self-contained régime' inasmuch as it deals with the separation of sovereignties of states in cases where those states, so to speak, share the same environment. The conditions under which such sharing may take place, the scope of the resulting immunities, and the conditions under which the sharing may be terminated form an indivisible régime, within which there is no place for countermeasures against an 'internationally wrongful act'. Indeed immunity has no meaning unless, within its scope, the state enjoying it, whatever it does, is free from interference by the state granting it"⁵³.

In his fifth report on the content, forms and degrees of international State responsibility, Riphagen proposes a rule which provides that the general principles governing the right of an injured State to take countermeasures by way of reciprocity or reprisal do not apply to the suspension of obligations of the receiving State regarding the immunities to be accorded to diplomatic and consular missions and staff⁵⁴. This extensive application of the International Court's concept does not, however, stand up to scrutiny⁵⁵. The International Court itself has taken care to make clear that the rules on the inviolability of diplomatic persons and premises do not entirely preclude preventive measures and do not mean, e.g., "that a diplomatic agent caught in the act of committing an assault or other offence may not, on occasion, be briefly arrested by the police of the receiving State in order to prevent the commission of the particular crime"⁵⁶. Moreover, it is quite obvious that the receiving State may, at least, react to acts of terrorism under the cover of diplomatic privileges by resorting to otherwise illegal countermeasures which do not directly affect its compliance with its obligations under the Vienna rules⁵⁷. Finally, the grant of the diplomatic immunities and privileges does not amount to an absolute limitation on the receiving State's territorial sovereignty and can hardly be conceived as a "separation of sovereignties" in a common environment "shared by two States". Even without challenging the wisdom of the International Court and its perception of the rules on diplomatic immunities as a self-contained régime, it seems fairly safe to assume that, in the present context, this concept yields no more than a rather limited conclusion: i.e.,

⁵³ W. Riphagen, *State Responsibility: New Theories of Obligation in Interstate Relations*, in: R. St. J. Macdonald/D. M. Johnston (eds.), *The Structure and Process of International Law* (1983), p. 606 *et seq.*, para. 57.

⁵⁴ Art. 12 *lit. a* (Part 2 of the Draft), YILC 1984 II, pp. 1 *et seq.* (4).

⁵⁵ See B. Simma, *Self-contained Régimes*, NYIL Vol. 46 (1985), p. 118 *et seq.*

⁵⁶ ICJ Reports 1980, p. 40.

⁵⁷ C. Dominicé, *Représailles et droit diplomatique*, in: *Recht als Prozeß und Gefüge*, Festschrift für Hans Huber zum 80. Geburtstag (1981), p. 551 *et seq.*, para. 16; Simma (note 55), NYIL Vol. 46, p. 120.

that some remedies otherwise available to the receiving State to cope with violations of diplomatic law by a foreign mission, especially the *exceptio non adimpleti contractus* or the resort to reprisals penetrating the cover of certain privileges are restricted or entirely precluded, whilst the rules on other countermeasures continue to apply⁵⁸. This view is above all corroborated by the preamble to the Vienna Convention which affirms "that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention".

The recourse to the rules on "material breach" being precluded, the principles governing reprisals, the state of necessity, self-defence, the protection of human rights and forfeiture of the mission status must be considered when the receiving State seeks to establish a legal basis for countermeasures infringing the inviolability of diplomatic premises or of the diplomatic bag.

III. Reprisals

A possible right of reprisal as the basis for the forcible entry on diplomatic premises, the opening of a diplomatic bag or other actions involving the use of force cannot simply be discarded on the grounds that reprisals involving the use of force are only permissible in an armed conflict⁵⁹. To the extent that the right to reprisals suspends obligations under the Vienna Convention, the territorial sovereignty of the receiving State provides a sufficient basis for the use of physical force. It is, however, suggested that the proper construction of Arts.22 (1) and 27 (3) of the Vienna Convention, in the light of the drafting history as well as the unambiguous wording of the provisions themselves, rules out any right to reprisals directed against the mission.

If the inviolability provided by those guarantees takes precedence even over the general rules on the permanent derogation of treaty obligations in the case of grave abuses entailing a "material" breach of Art.41 (1) and (3) of the Convention, the receiving State must be precluded from resorting to the "lesser" remedy of reprisal, which yields only the temporary suspension of a treaty obligation⁶⁰. Therefore the mere fact that the sending State

⁵⁸ See also Simma, *ibid.*, p.121.

⁵⁹ See on the use of force in self-help B.-O. Bryde, Self-help, in: EPIL, Instalment 4 (1982), pp.216-217; P. Malanczuk, Countermeasures and Self-defence as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility, ZaöRV Vol.43 (1983), p.727 *et seq.*

⁶⁰ Cf. for the opposite view Simma (note 55), NYIL Vol.46, p.121.

has acted in violation of the Vienna rules on diplomatic relations provides for the resort to reprisals directed against the mission just as little justification as for the *exceptio non adimpleti contractus*.

IV. State of Necessity

The state of necessity as a basis for countermeasures deserves discussion in cases where the receiving State resorts to measures without invoking the prior breach of an international obligation by the sending State. According to the classical formulation for the state of necessity as well as for self-defence found in the *Caroline* incident⁶¹, there must be a "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation"; the measures taken must not be "unreasonable or excessive" and must be "limited by that necessity and kept clearly within it". The International Law Commission's Draft Articles on State Responsibility (Part 1)⁶² provide that a state of necessity may only be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation if "the act was the only means of safeguarding an essential interest of the State against a grave and eminent peril"; furthermore, the act must not "seriously impair an essential interest of the State towards which the obligation existed" (Art.33 (1)). Here again everything depends on the precise scope of the guarantees under the Vienna Convention. According to the draft adopted by the International Law Commission, the State may not rely on necessity, "if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation" (Art.33 (2) *lit. b*). On the basis of the proposed construction, the Convention does not deprive the receiving State of the possibility to invoke a state of necessity. The concept of necessity has a far narrower scope of application than the exceptions proposed by Special Rapporteur of the International Law Commission Sandström in his original draft which referred to serious dangers to human life, public health or property and to the security of the receiving State. This view is supported by the Vienna Convention itself. Under Art.22 (2), the receiving State has a special duty to take all appropriate steps to protect the premises of the mission against intrusion or damage

⁶¹ See Malanczuk (note 59), *ZaöRV* Vol.43, p.754 *et seq.*; W. Meng, *The Caroline*, in: *EPIL*, Instalment 3 (1982), pp.81-82.

⁶² *YILC* 1980 II (Part 2), p.30 *et seq.*

and to prevent any disturbance of the peace of the mission. This duty can only be fulfilled properly if the receiving State is not prevented from maintaining the means necessary for the required protection in a state of necessity. Although the sending State may dispose of its own claim of protection under Art.22 (2) of the Convention, different considerations must apply when the protected interests of third States and their missions are at stake. The instances in which the receiving State might rely upon the concept of necessity are rather rare; depending on the gravity of the emergency situation, measures purporting to check the spread of fatal diseases may under this heading qualify as justification for countermeasures⁶³. In this context it should be pointed out that the comment on the Harvard Draft Convention on Diplomatic Privileges and Immunities lists "acts of God" and "*force majeure*" among the "necessarily implied" exceptions to the requirement of prior consent for entry upon diplomatic premises⁶⁴. Within the International Law Commission, reference to "*force majeure*" as a generally recognized concept was made to the effect that the explicit formulation of exceptions was unnecessary⁶⁵.

V. Self-defence

The position adopted by the British Government and Sir John Freeland before the Foreign Affairs Committee of the House of Commons that the provisions of the Vienna Convention do not preclude a right of self-defence is supported by some academic opinions⁶⁶. The commentary on the Harvard Draft Convention stated that the right of self-defence or self-preservation takes precedence over the inviolability accorded to diplomatic premises⁶⁷. In the International Law Commission, François argued that the right of the receiving State to take appropriate measures to protect its own security did not flow from any specific exceptions to the inviolability of diplomatic premises (necessary to be stated explicitly) but rather from the generally recognized right of legitimate self-defence unimpaired by the

⁶³ It is disputed whether on one occasion the Brazilian authorities, when faced with a yellow fever epidemic, could have entered a certain mission's premises to trace a suspected source of infection without the consent of the head of the mission, see Amador, YILC 1957 I, p.56, para.64; Cahier (note 34), p.203.

⁶⁴ AJIL Vol.26 (1932), supp., pp.52-53.

⁶⁵ García Amador, YILC 1957 I, p.58, para.15.

⁶⁶ See Cameron (note 3), ICLQ Vol.34, p.612; Simma (note 55), NYIL Vol.46, p.120.

⁶⁷ AJIL Vol.26 (1932), supp., p.53.

privilege of inviolability⁶⁸. A strong argument in favour of the applicability of this concept is provided by the International Law Commission's understanding that the personal inviolability enjoyed by a diplomatic agent does not rule out measures of self-defence: "Being inviolable, the diplomatic agent is exempted from measures that would amount to direct coercion. This principle does not exclude in respect of the diplomatic agent either measures of self-defence or, in exceptional circumstances, measures to prevent him from committing crimes or offences"⁶⁹. Although in this context the Commission's commentary refers to self-defence as a concept of domestic law, the essential point lies in the general admission of preventive measures and therefore permits an analogous reasoning. For the discussion of self-defence in the given context, international practice provides little guidance. In 1927, the Chinese Government sent army and police troops into the diplomatic quarter of Peking to search buildings used by the Soviet mission for the storage of arms and other materials. This action was not fully covered by the required permission of the doyen of the diplomatic corps as required under the Protocol of 1901⁷⁰. The incident is here of little relevance, as the Chinese Government relied upon the argument that the searched buildings did not belong to the premises of the mission itself⁷¹. In 1973, Pakistani police forces undertook a raid on the embassy of Iraq in the presence of the ambassador and found huge consignments of arms. The Pakistani Government protested in strong terms to the Government of Iraq and declared the Iraqi ambassador and another member of the mission *persona non grata*⁷².

The main barrier to applying the concept of self-defence as a basis for countermeasures infringing diplomatic privileges is, apparently, presented by the traditional view which refers to self-defence within the context of force and of acts on foreign territory. The scope of justification provided by this concept is, however, by no means limited to acts involving the use of force which aim at the territorial integrity of another State within the context of Art.2 (4) of the UN Charter. As B o w e t t has pointed out, "it is neither a necessary nor an accurate conclusion that the right of self-defence applies only to measures involving the use of force"; the function of the

⁶⁸ YILC 1957 I, p.58, paras.8, 10; see also G a r c í a A m a d o r, *ibid.*, p.58, para.15.

⁶⁹ Commentary on Art.27, para.1, YILC 1958 II, p.97.

⁷⁰ See M. Y o s h i t o m i, *L'affaire de la perquisition de l'ambassade soviétique à Pékin par les autorités chinoises*, RGDIP Vol.35 (1928), p.184 *et seq.*

⁷¹ *Ibid.*, p.186

⁷² D e n z a (note 34), p.84. In Denza's view the raid could be justified on the basis of the clear breach by Iraq of the duty laid down in Art.41 (3) of the Vienna Convention.

right of self-defence is "to justify action, otherwise illegal, which is necessary to protect certain essential rights of the state against violation by other states"⁷³.

Scepticism regarding the applicability of the general rules on self-defence to diplomatic actions of the sending State which threaten the receiving State's security, human lives or individual property is nourished mainly by the common approach which deals with self-defence only within the scope of Arts.2 (4) and 51 of the UN Charter⁷⁴. It is submitted that the factors underlying the discussion to what extent Art.51 of the UN Charter curtails the "inherent right of individual or collective self-defence"⁷⁵ are only relevant within the context of Art.2 (4) of the Charter and have no bearing on countermeasures not affecting territorial integrity. Bowett's view that the right of self-defence has an "internal" scope of application and may very well cover countermeasures taking effect within the jurisdiction of the acting State⁷⁶ is sufficiently corroborated by State practice as well as by strong legal opinion. It seems to be generally recognized that a State may resort to coercive measures against the violation of its air space by single, non-military planes⁷⁷. The permission of coercive countermeasures against foreign warships or military airplanes which enjoy immunity in principle presents an even closer parallel to the cases discussed in the present context. According to the prevailing opinion, a coastal State whose territorial sovereignty has been violated by a foreign warship making an unauthorized entry into its internal waters or otherwise exceeding the limits of permitted passage may, ultimately, take military action to enforce its request that the vessel clear its territorial waters⁷⁸. The right of the injured coastal State to take any "necessary" and "proportional" measures against a warship which has unlawfully penetrated its internal waters does not flow from any "implied" limitation on the immunity enjoyed by the foreign

⁷³ D. W. Bowett, *Self-Defence in International Law* (1958), p.270.

⁷⁴ See Bryde (note 59), pp.212-214.

⁷⁵ See Bowett (note 73), p.182 *et seq.*; K. Hailbronner, *Die Grenzen des völkerrechtlichen Gewaltverbots - Limitations of the Prohibition of the Use of Force in International Law* (Berichte der Deutschen Gesellschaft für Völkerrecht, Vol.25) (1986), p.49 *et seq.*; Malanczuk (note 59), *ZaöRV* Vol.43, p.757 *et seq.*; D.P. O'Connell, *International Law*, Vol.1 (2nd ed. 1970), p.316 *et seq.*; A. Verdross/B. Simma, *Universelles Völkerrecht* (3rd ed.1984), para.469 *et seq.*

⁷⁶ Bowett (note 73), p.23.

⁷⁷ Hailbronner (note 75), p.67 *et seq.*

⁷⁸ A. Berg, *Das sowjetische U-Boot 137 in schwedischen Küstengewässern*, *ZaöRV* Vol.42 (1982), p.313; L. Oppenheim/H. Lauterpacht, *International Law*, Vol.1 (8th ed.1955), p.855.

vessel, as the immunity accorded to foreign warships and military planes is defined in absolute terms⁷⁹; this right is, even though there is no "armed attack" in the sense of Art.51 of the UN Charter, covered by the concept of self-defence⁸⁰.

As in those cases, countermeasures directed against premises or assets of a diplomatic mission which are covered by inviolability under the Vienna Convention do not amount to an encroachment on foreign territorial integrity; in this context, the permission of countermeasures is merely related to the removal of restrictions on the otherwise lawful exercise of sovereign rights by the receiving State. As soon as those restrictions are – temporarily – removed in a specific situation, the territorial sovereignty of the receiving State provides a sufficient basis for coercive measures, including the use of armed force. Under this aspect, the resort to self-defence can be reconciled with the view that nowadays this concept is "unavoidably" related to the protection of territorial rights⁸¹. This "territorial" perspective is also corroborated by the principle that, inversely, in the absence of a sufficient territorial link, the receiving State may not resort to acts of self-defence in order to protect its own diplomatic missions with force from violations of their immunities and privileges⁸².

The receiving State is thus entitled to rely in certain emergency situations on self-defence in derogation of its duties under the Vienna Convention, when diplomatic agents of a foreign State perpetrate or cover acts threatening the security of the receiving State, human life or assets situated within its territorial jurisdiction. This approach is also in harmony with the International Law Commission's draft on State responsibility⁸³; Art.34 on self-defence contains, unlike the draft proposed by Special Rapporteur Ago⁸⁴, no reference to an "armed attack"⁸⁵.

⁷⁹ See Oppenheim/Lauterpacht, *ibid.*, p.855.

⁸⁰ I. Delupis, *Foreign Warships and Immunity for Espionage*, AJIL Vol.78 (1984), p.72.

⁸¹ See O'Connell (note 75), p.318.

⁸² See Hailbronner (note 75), p.69.

⁸³ See note 62.

⁸⁴ YILC 1980 I, p.184.

⁸⁵ The Commission's draft provides in Art.34: "The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations". In the commentary on Art.34, the Commission left open the question to what extent self-defence can be relied on to justify countermeasures to "an action which is wrongful and injurious, but undertaken without the use of force", YILC 1980 II (Part 2), p.59, para.21; see Malanczuk (note 59), ZaöRV Vol.43, p.795.

On the basis of the suggested view, the concept of self-defence would clearly justify preventive measures when acts violating public international law and attributable to the sending State take effect outside the diplomatic premises and threaten the internal security of the State or human life. Depending on the duration of the threat, shooting from the premises of a diplomatic mission may justify coercive countermeasures, including the unconsented entry into the premises, provided that those countermeasures are the only means available to cope with the danger and that the other requirements for the lawful exercise of self-defence, such as proportionality, are fulfilled. It is more difficult to justify coercive action under the heading of self-defence, when acts subject to activities violating public international law take effect only within the diplomatic premises. It is at least arguable that acts threatening life or liberty of individuals within the premises of a mission, e.g. forcible detention or even torture, occur in an area removed from the jurisdiction of the receiving State and that, therefore, countermeasures infringing the Vienna Convention guarantees cannot be justified by invoking self-defence. On the basis of this reasoning, countermeasures directed against diplomatic missions present, in terms of justification, strong parallels to measures in a State's protection of its own nationals in a foreign country or, when the receiving State intervenes to protect a national of the sending State, to the so-called "humanitarian intervention" (*lato sensu*). If those parallels stand up to scrutiny, countermeasures in protection of the receiving State's own nationals would be subject to the same controversy as the use of force for the protection of nationals abroad⁸⁶. Similar actions in protection of foreign nationals could be opposed on the same grounds as "humanitarian intervention"⁸⁷. These parallels do not, however, bear closer examination.

The mere "local" consideration whether the immediate effects of a public international law violation attributable to the sending State are confined to the premises of its mission cannot provide a valid criterion for barring the exercise of self-defence. Even less convincing is the idea of the diplomatic

⁸⁶ See M. Akehurst, *The Use of Force to Protect Nationals Abroad*, *International Relations*, Vol.5 (1977), p.3 *et seq.*; Bryde (note 59), p.214; Hailbronner (note 75), p.100 *et seq.*; Malanczuk (note 59), *ZaöRV* Vol.43, p.730 *et seq.*

⁸⁷ See J.A. Frowein, *Die Verpflichtungen erga omnes im Völkerrecht und ihre Durchsetzung*, in: *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte*, Festschrift für Hermann Mosler, ed. by R. Bernhardt [et al.] (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Vol.81) (1983), pp.241 *et seq.* (257 *et seq.*); Hailbronner (note 75), p.97 *et seq.*; Malanczuk (note 59), *ZaöRV* Vol.43, p.742 *et seq.*

bag as a "wandering enclave" entirely exempt from the territorial jurisdiction of the receiving State. None of the countermeasures discussed with respect to the abuse of diplomatic privileges affects the territorial integrity of the sending State in any way whatsoever. If, in accordance with the opinion expressed by the International Law Commission, even the personal immunity enjoyed by diplomatic agents does not preclude measures of self-defence under public international law, it is rather difficult to accept the view that the inviolability of diplomatic premises provides an impenetrable cover against preventive measures if only any possible violations of an individual's life or physical integrity do not reach beyond the premises of the mission. As soon as the concept of self-defence is allowed to pierce, on a temporary basis, the veil of inviolability accorded to diplomatic premises, there is no longer ground for a valid "local" distinction (according to the effects of unlawful acts or the location of victims for the purpose of justifying countermeasures). To the extent that the restrictions imposed on the receiving State by diplomatic immunities and privileges are removed, its territorial sovereignty is "revived", subject only to the general limitations on the lawful exercise of the right of self-defence. It is also suggested that there is no justification for the distinction between the protection of nationals and of other individuals (though this view is not absolutely conclusive as to acts protecting foreign nationals staying within the diplomatic premises).

The proposed concept to cope with grave abuses embodies the uncertainty and vagueness inherent in the very notion of self-defence. In the interest of safeguarding the privileges under the Vienna Convention, the right of self-defence should only apply to acts aimed directly at the overthrow of the Government of the receiving State or the provocation of serious civil disturbances and to activities which threaten lives or the physical integrity of individuals. The basis for this restriction can be found in the condition already enunciated in the *Caroline* formula: that self-defence must rest on the protection of vital interests and, furthermore, on the requirement that its exercise must be proportional, thereby having regard to the paramount value attached to the privileges under the Vienna Convention.

VI. *The Protection of Human Life and other Fundamental Individual Values as an Autonomous Concept*

Any considerations to the effect that the protection of human life (or other fundamental individual values) may operate as an autonomous basis for justifying countermeasures leave the path of orthodox reasoning. It is, perhaps, not unfair to interpret along those lines the position taken by the British Government, i.e. that the duty to protect human life takes absolute precedence over claims to inviolability of the diplomatic bag⁸⁸; it is, however, equally plausible to understand the Government's view as a reference to a general "implied" exception.

The rather innovative concept of an overriding duty *vis-à-vis* human life might draw some support from the gradual crystallization of peremptory rules on human rights and their balancing against the *jus dispositivum* governing diplomatic immunities and privileges. This approach can, of course, be easily challenged on the grounds that the preremptory or dispositive character of a rule does not provide conclusive guidance in assessing the "value" of the respective norms in public international law. Moreover, the high degree of caution which the resort to reprisals based on the violation of obligations *erga omnes* requires is also indicated in the present context when countermeasures are severed from the protection of nationals or territorial sovereignty. However, the idea that the violation of human rights may operate as a general concept suspending the restrictions imposed on territorial jurisdiction by immunity rules is not wholly devoid of support. In *Van Dardel v. USSR*⁸⁹, a US District Court rejected the Soviet plea of immunity *vis-à-vis* an action brought for the abduction of the Swedish diplomat Raoul Wallenberg on the grounds that the defence of State immunity does not cover certain violations of public international law. In the light of the present state of international legal doctrine, this rather bold reasoning is hardly apt for generalization in the light of the prevailing doctrine⁹⁰. *De lege ferenda*, however, this approach is not wholly unattractive as providing an adequate protection of human life to the extent that the concept of self-defence does not clearly come into operation (above all when foreign nationals unlawfully detained within the mission premises are concerned).

⁸⁸ See note 15.

⁸⁹ 623 F.Supp.246, 253 *et seq.* (1985).

⁹⁰ See *Siderman de Blake v. Republic of Argentina*, No.CV 82-1772-RMT (MCx) (United States District Court for the Central District of California, March 7, 1985).

VII. Forfeiture of the Mission Status

In very extreme cases the receiving State may be induced to claim that a diplomatic mission has degenerated into a body engaged primarily in criminal activities and has therefore, *eo ipso*, forfeited its status as a diplomatic mission. This approach must be strictly distinguished from the concept of abuse of rights; it aims at the very nature and substance of the diplomatic mission. The underlying idea refers to certain basic functional and phenomenological standards which a body of diplomatic representatives must meet in order to qualify for recognition as a diplomatic mission. The rather formal mechanisms provided for by the Vienna Convention for the termination of a mission's privileged status call for a high degree of restraint before even considering a forfeiture of this status. There are, however, parallels in the actual legal discussion on the prohibition of the use of force under the UN Charter: the view that a State may finally forfeit its status as a beneficiary under Art.2 (4) of the Charter by gross and permanent violations of international law has gained considerable support⁹¹. Irrespective of the applicability at all of the concept, it is suggested that the receiving State may not invoke a forfeiture of the privileged mission status, when it has failed to react by a timely severance of diplomatic relations to serious and repeated violations of international law affecting the "diplomatic" character of the mission.

VIII. Conclusion

This proposed concept of justifiable reactions to grave abuses of diplomatic privileges and immunities endorses the view that the receiving State may invoke neither implied exceptions to the inviolability of diplomatic premises or diplomatic bags nor the defence of "material breach" or resort to reprisals directed against the mission. It admits, however, coercive countermeasures covered by necessity or self-defence, whilst the protection of human life does not seem to provide an autonomous ground of justification.

It is, of course, conceivable to reach a fair balance between the interests of the sending and the receiving States without relying upon the right of self-defence, e.g., by assuming certain implied limitations on the privileges of inviolability under the Vienna Convention or by fully admitting the

⁹¹ See Chr. Tomuschat, *Gewalt und Gewaltverbot als Bestimmungsfaktoren der Weltordnung*, Europa-Archiv, Vol.36 (1981), pp.325 *et seq.* (332).

resort to reprisals. Such approaches present no less ambiguity or uncertainty than the proposed view and are more difficult to reconcile with the drafting history and the wording of the Vienna Convention.

Under the proposed view, the receiving State may claim self-defence only in cases when even the proponents of a rather narrow view consider coercive countermeasures to be legitimate, albeit possibly in breach of the Vienna Convention⁹². To the extent that States are driven to opt between either their own vital interests or the protection of human lives and the rigid observance of diplomatic privileges, public international law lends itself to erosion. Conversely, by providing the receiving States with adequate remedies in extreme emergencies, international law strengthens its own authority.

⁹² Denza (note 34), p.84; see also Cahier (note 34), p.205 *et seq.*