FIRST REPORT OF THE FOREIGN AFFAIRS COMMITTEE OF THE HOUSE OF COMMONS*

The First Report of the Foreign Affairs Committee of the House of Commons examines the abuse of diplomatic immunities and privileges in the light of the Libyan Bureau shooting in April 1984 and the attempted kidnap of the former Nigerian Transport Minister, Mr Dikko, in July. This short article will examine the incidents in question, the response of the United Kingdom Government and the Committee's conclusions and recommendations.

A. The Libyan Bureau Shooting

On 18 February 1984, the Libyan People's Bureau in London was taken over, with the approval of the Libyan Government, by a group of revolutionary students. The UK Government was notified two days later that the Ambassador, Mr Kuwiri, had been relieved of his post, but was not informed who the new head of mission was to be. The takeover was apparently the signal for an intensification of the Libyan Government campaign against anti-government Libyan exiles in Britain. At a demonstration by an anti-government group outside the Bureau in St James's Square on 17 April, shots were fired from the building into the crowd, wounding a number of demonstrators and killing a woman police officer on duty in the square. The Bureau was quickly surrounded by armed police, and peaceful attempts were made for five days to persuade the occupants to permit the entry of police into the premises to question suspects and search for evidence. When such attempts failed, the UK Government severed diplomatic relations with Libya and gave the occupants seven days to leave the country. On departure from the building, the occupants were questioned and searched, but the diplomatic bags of the Bureau were not. British police entered the premises on the day diplomatic relations ceased, 1 May, and discovered spent cartridges from a submachine gun and seven handguns.

The first issue raised by the incident concerned the inviolability of the premises in St James's Square—were they diplomatic premises at all in the absence of an accredited ambassador or chargé d'affaires ad interim as required by Article 19 of the Vienna Convention? No formal notification of appointment was

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1. See The Guardian, 13 March 1985. Evidence that the shooting itself was prearranged is circumstantial. See The Times, 21 April 1984.

2. Libyan authorities searched the British Embassy in Tripoli after the departure of embassy staff, and claimed to have discovered a cache of firearms: The Times, 4 May 1984.

3. The person who it appears was informally in charge of the mission, Dr Sodani, was not in the building at the time of the shooting, because he had been arrested (in ignorance of his diplomatic status) for obstruction when he went out to complain to the police about the presence of the demonstration: The Observer, 29 April 1984.

4. Oral communication of the name of the new Head of Mission was given to the British Embassy in Libya. Written confirmation was requested but was not forthcoming: Oral Evidence, Minute 4.
made despite repeated requests. This led the UK Government to adopt a policy of “freezing out” the People’s Bureau from normal diplomatic intercourse until the position was regularised. Necessary contacts were made with the Libyan Ministry of Foreign Affairs through the British Embassy in Tripoli. Nonetheless, the Bureau continued to be treated as “the premises of the mission” within the meaning of Article 19, because the UK Government “had no indication that it was not being used for the purposes of the mission”. The Foreign Affairs Committee considered that, as a matter of policy, it was undesirable to have treated the Bureau as a mission, and that the few contacts that there were with the Foreign and Commonwealth Office (FCO) should not have occurred. The Committee came to the conclusion, albeit with the benefit of hindsight, that the Libyan Government should have been told unequivocally that the diplomatic status of the Bureau would be withdrawn within a stated period of time unless the requisite notification were obtained.

If the Bureau was diplomatic premises on 17 April, then was this status lost by the breach of the obligation under Article 41(1) to respect the laws of the receiving State, or was the inviolability granted by Article 22(1) itself subject to an implied exception in time of grave public emergency? Article 22(1) of the Convention is on the face of it clear: “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 . . .” although the original International Law Commission formulation provided for a power of entry “in an extreme emergency in order to eliminate a grave and imminent danger to human life, public health or property, or to safeguard the security of the State”.

This exception was, however, deleted because it would inevitably allow the receiving State a certain power of appreciation in determining whether a specific situation fell within the permitted exception of an “extreme emergency”. It would appear, however, that the drafting committee never contemplated the possibility of terrorist attacks emanating from an embassy and so it could be argued that, this possibility not having been canvassed, the article need not be read as “expressly regulating” such a situation. According to the preamble of the Convention, the rules of custom are to continue to govern questions not “expressly regulated” by the Convention. Nonetheless, as Denza points out, “it is difficult to find an actual precedent to support the theory that there was under

5. Oral Evidence, Minute 10. The importance that the ILC attached to the inviolability of the premises would suggest that this should continue to exist notwithstanding the violation of Art.19: E. Denza, *Diplomatic Law* (1976), pp.81–83.

6. Report, para.87. This, apparently, was the course of action adopted by the governments of Bahrain and Saudi Arabia: Oral Evidence, Minute 9. Interestingly, this problem would not have occurred if the Vienna Conference had accepted the original draft of Art.19, which provided for the next senior diplomat in the mission to be regarded as chargé d’affaires ad interim where the receiving State was not notified of the new head within a reasonable time. Amongst the delegations which objected to this was that of the United Kingdom: Denza, *op. cit. supra* n.5., at pp.69–70.

7. Denza, *op. cit. supra* n.5., at pp.82–83.

8. Oral Evidence, Minute 85.

9. Ireland and Japan expressed the concern that entry might be necessitated to prevent the spread of fire or epidemic: Oral Evidence, Minute 82.
customary law such an implied exception to the inviolability of mission premises”. 10

Similarly, it is difficult to prove that breach of Article 22(1) is justified because of a prior breach of Article 41(1) and (3). Inviolability is not conditional on observance of this latter article, although using diplomatic premises as an arsenal as happened with the Iraqi Embassy in Islamabad in 1973, 11 or as a vantage point to shoot passers by, could certainly be seen as “violation of a provision essential to the accomplishment of the object and purpose of the treaty”. 12 The possibility of applying the customary rules on reprisals and suspension on material breach was raised by the FCO, 13 but the Committee itself tended towards a view of diplomatic law as a closed system, 14 such application being considered “inappropriate” in the context of the Convention, “especially as a ‘remedy’ for violation is provided in the form of severing of diplomatic relations”. 15

It is in fact clear that the decision not to enter the Bureau was “judged largely on legal grounds”. 16 It would indeed be difficult to justify forcible entry but strong arguments can be made on the basis of self-defence that, had firing continued from the Bureau, counter-fire would have been justified. 17 Certainly, the personal inviolability of a diplomat under Article 29—even if the perpetrator was a diplomat—was never intended to preclude self-defence. 18 Self-defence was not in fact relied upon as forming a basis for forcible entry but, curiously, it was submitted that the search of the Libyans that took place when they emerged from the Bureau was justified by the doctrine. Logically, it is difficult to argue that a right of self-defence existed five days after the shooting, but not at the time of the shooting itself. 19

The Committee in any event accepted that the premises were inviolable and remained so until diplomatic relations formally ceased. 20 With regard to the search of the occupants that occurred under the supervision of Turkish, Syrian and Saudi Arabian diplomats, the Committee referred to the fact that the


11. When Pakistani police eventually raided the embassy, they uncovered 300 sub-machine guns, 40 grenades and 60,000 rounds of ammunition: Keesing’s Contemporary Archives (1973), p.25893.

12. Art.60(3)(b), Vienna Convention on the Law of Treaties 1970 (if this article was seen as reflecting custom).

13. FCO Memorandum, Minute 44.


17. See Memorandum submitted by Professor Draper (Appendix 6), p.72.

18. Denza, op. cit. supra. n.5, at p.180. This point is academic, though, as the firing lasted only a few seconds and armed police officers, even if they were present, had no time in which to respond. See in this regard the similar incident in France in 1978 when an Iraqi diplomat shot and killed a French police officer and was deported rather than prosecuted: The Times, 3 Aug. 1978.

19. Oral Evidence, Minutes 48 and 76. Cuban diplomats and diplomatic bags were searched by US troops in Grenada in December 1983, prior to their deportation. This was justified on the grounds of self-defence: The Times, 10 Nov. 1983.

Libyans had been previously informed that this would take place and that no protests were received from either Libya or the supervising powers. The Committee considered the search justified.

Although the occupants were searched, no attempt was made to detain those who were not accredited diplomats or administrative and technical staff, presumably because by that time the police considered it impossible to obtain enough evidence to identify the killer and because detention would almost certainly have entailed retaliatory action against UK nationals and diplomats in Libya. The crucial issue, however, connected to the departure of the Libyans was the decision not to search or scan the Libyan diplomatic bags. It is clear that, like the inviolability of diplomatic premises, the inviolability of the bag stipulated by Article 27(3) is not conditional on it being used only for lawful purposes. In the case of the Libyan bags, however, the UK Government did have the power to challenge the bag because the Libyan Government, on accession to the Convention in 1977, had made a reservation to the effect that, where strong doubts were entertained that the bag contained items not permitted under Article 27(4), a request could be made that the bag be opened in the presence of an official representative of the mission concerned. If the request was denied, the bag could be sent back to its place of origin.

Although Libya had never relied upon this reservation, the UK Government could still have challenged the bag on the principle of reciprocity.

There was no doubt that firearms were not “articles intended for official use” under Article 27(4). The UK Government had made this clear in a series of FCO circulars to embassies; all firearms have to be licensed under the Firearms Act 1968, but licences would only be issued for sporting purposes. Protection of premises and diplomats was a matter solely for the British authorities. In this case, “returning the bag to its place of origin” would mean obliging the Libyans to keep it in the Bureau, where it would, arguably, have lost its strict inviolability along with the premises when diplomatic relations ceased. Practically speaking anyway, surreptitious search would have become a simple matter. The decision not to challenge the bags was in fact made on policy grounds. Little could have been gained from finding the actual murder weapon, and British bags in Libya would also have been searched. The Committee did not dissent from this decision.

23. The claim that the Home Secretary made that the police considered that one of two Libyans fired the fatal shots was later retracted. The information apparently came from the intelligence services rather than the police; see Sunday Times, 13 May 1984.
24. Art.27(3) provides that “the diplomatic bag shall not be opened or detained”, while Art.27(4) stipulates that it “may contain only diplomatic documents or articles intended for official use”.
25. The text of the reservation is reproduced at para.78 of the Report.
26. Oral Evidence, Minute 15. Britain had not objected to this reservation (Report, para.98), although France apparently challenged a similar reservation made by Kuwait: see Denza, op. cit. supra n. 5, at p.128.
27. FCO circulars reproduced in Appendix 9. The murder weapon, being a submachine gun, was in any event a “prohibited weapon” under s.5 of this Act and a licence could only be issued by the Defence Council.
Nor did the Committee criticise the decision to search the premises of the Bureau on 30 April. The Committee agreed with the opinion expressed by the FCO that the inviolability of the premises ended on the break of diplomatic relations and that the continuing duty under Article 45 to "protect the premises of the mission together with its property and archives" did not preclude the search of the building by explosives and forensic experts which was carried out in the presence of a diplomat from the Saudi Arabian Embassy. No objections were received except from Libya itself. The UK Government still, however, regards the Bureau as diplomatic premises.  

B. The Dikko Affair

Two issues were raised by the kidnapping of Mr Umaru Dikko—the inviolability of the diplomatic bag and the process of accreditation of diplomats. The facts of the case were simple. Mr Dikko, a minister in the deposed Shagari government, was wanted by the present government on charges of embezzlement of government funds. On 5 July 1984 he was kidnapped outside his home in London, drugged and placed together with one of his kidnappers in a large crate. The other two kidnappers were placed in a similar crate. The crates, accompanied by two diplomats from the Nigerian High Commission, were then delivered to Stansted Airport to be loaded on to a Nigerian Airways aircraft. A customs official at Stansted suspected that the crates contained human beings and opened them. The case is similar to a notorious incident in 1964 when an Egyptian diplomatic bag at Rome Airport bound for Cairo was found to contain an Israeli national. It differs in that the Nigerian crates were not, in fact, part of the diplomatic bag under Article 27(3) because, although the sender was labelled as the Nigerian High Commission, there was (not surprisingly) no label identifying the contents, and they lacked an official mission or government seal in wax or lead.

Nonetheless, even if the crates had been properly marked, the Foreign Secretary made clear in his evidence to the Committee that the overriding concern was to protect human life; where there was suspicion that the bag contained a person, orders would be given to open it. The Committee welcomed this view.

The other issue raised by the kidnapping concerned accreditation. Two diplomats at the High Commission were declared persona non grata and the High Commissioner, Major-General Halidu Hananiya, who had returned to Lagos for urgent consultations, was officially informed that he would not be welcomed back, but the plea of diplomatic immunity which was put forward on behalf of

29. Report, paras. 104, 105. The Times reported on 7 Feb. 1985 that the Libyan interests section, currently operating out of the Saudi Arabian embassy, will soon be permitted to move back to part of the Bureau.
31. Letter from FCO additional to Oral Evidence, Minute 139. Inventories and sealing are "general international practice". Art.27(3) requires only "visible external marks". Denza states that an official seal is not legally required, although many countries make such a requirement as an administrative requirement: op. cit. supra n.5, at p.128.
32. Report, para. 111. The Committee did, however, point out that such a concern had implications for other areas of diplomatic practice. For an account of the Dikko incident, see A. Akinsanya, "The Dikko Affair and Anglo-Nigerian Relations", supra p.602.
the Nigerian arrested at Stansted, Major Mohammed Yusufu, was not accepted. He possessed a diplomatic passport but the protocol department of the FCO was not officially informed that he was on the staff of the High Commission.\textsuperscript{33}

C. General Recommendations

The first of these concerned the feasibility, and desirability, of seeking amendments to the Vienna Convention itself. The Committee considered, on the basis of evidence from the FCO, that support for restrictive amendment of the Convention was most unlikely to be forthcoming. On the contrary, the trend appeared to be towards an increase in immunities in certain fields.\textsuperscript{34} Nor would such changes, even if they could be made, necessarily be for the long-term benefit of the UK.\textsuperscript{35}

This being the case, the Committee considered that a firmer policy of enforcing the existing safeguards in the Convention against abuse ought to be adopted by the government.\textsuperscript{36} It stated that the government should be "significantly readier than in the past" to exercise its power under Article 11(1) to limit the size of a mission where there is cause for "significant concern about the overall nature of the mission's activities".\textsuperscript{37}

It also recommended that the FCO should, in the future, "take all steps, at as early a stage as possible, to inform themselves about those arriving to take up posts as mission staff".\textsuperscript{38} The Committee was unconvinced that it would be incompatible with Article 7 of the Convention, which provides that the sending State may "freely appoint" its representatives, to seek, where necessary, the submission of a \textit{curriculum vitae} for new appointees to the diplomatic staff of a mission, either prior to arrival in the country or soon after.\textsuperscript{39} It was not persuaded by the statements by Sir Antony Acland, Permanent Secretary at the FCO, that this would involve extensive checking and reveal little\textsuperscript{40} nor by the concern expressed by the trade union side of the diplomatic service that reciprocal application of this could lead to staff being rejected because they had served in a country of which the host government did not approve.\textsuperscript{41}

\textsuperscript{33} Major Yusufu was sentenced in February 1985 to 12 years' imprisonment for his part in the kidnap attempt: \textit{The Times} 13 Feb. 1985.

\textsuperscript{34} Report, para.115. The draft articles currently under consideration at the ILC would, if adopted, extend the inviolability of the diplomatic bag by excluding any remote examination of it; see Appendix 8.

\textsuperscript{35} \textit{Ibid.} See also the submissions of the trade union side of the diplomatic service (Appendix 3). The option of concluding a treaty modifying the application of the Convention provisions between the contracting parties was rejected by the Committee (Report, para.54), although the government's efforts to seek closer co-operation with western governments against terrorism were welcomed (Report, para.119).

\textsuperscript{36} Report, para.123.

\textsuperscript{37} Report, para.59.

\textsuperscript{38} Report, para.63. Under Arts.4 and 10 of the Convention, the \textit{agrément} of the receiving State is required only for the Head of Mission and for defence attaches. Various proposals at the drafting conference to extend this requirement, in some form, to junior staff met with no success: Denza, \textit{op. cit. supra} n.5, at p.34.

\textsuperscript{39} Report, para.62. Sir Francis Vallat stated that other States had agreed to do this reciprocally (Minute 117).

\textsuperscript{40} Minute 56.

\textsuperscript{41} Appendix 3, para.4:
The Committee was, in fact, disturbed at the "very low degree of scrutiny of mission staff arriving in this country", and was unhappy with the reluctance of the FCO to declare a person persona non grata, under Article 9, unless there was "watertight evidence" of activities incompatible with diplomatic status. The Committee noted that Article 9 required only the existence of simple suspicion and stated that, while use of this power was a matter of discretion for the government, it should be made clear to all diplomats that, should they commit an offence punishable by imprisonment, the result would be expulsion. It pointed out that, although the fear of unjustified reciprocal action against UK diplomats overseas was a valid consideration in determining whether to exercise this power, it should not render the government excessively reluctant to use it where informal remonstrations with the head of mission have failed.

The abuses the Committee investigated in its Report were those committed by foreign missions in the United Kingdom. However, during the proceedings of the Committee the question arose as to whether, by allowing the demonstration to take place outside the Bureau, the police, and therefore the UK Government, had failed in their duty under Article 22(2) to prevent any disturbance of the peace of the mission or the impairment of its dignity.

The Committee considered that "the receiving State's duty to protect the peace of the mission cannot be given so wide an interpretation as to require the mission to be insulated from expressions of public opinion within the receiving State. Provided always that work at the mission can continue normally, that there is untrammelled access and egress, and that those in the mission are never in fear that the mission might be damaged or its staff injured, the requirements of Article 22 are met". The Committee accordingly saw no need for the introduction of special legislation to protect diplomatic missions.

42. Para.63. Apparently, it is British practice not even to require the prior submission of the names of prospective defence attachés: Denza, op. cit. supra n.5, at p.33.
43. Para.64. See the memoranda submitted by the National Union of Students and the Anti-Apartheid Movement: Appendices 1 and 5.
44. Para.44. There were 546 occasions between 1974 and mid-1984 when members of the diplomatic community (around 15,000, including families) escaped prosecution for serious offences.
45. In the same period "about half a dozen" British diplomats escaped prosecution for serious offences (Oral Evidence, Minute 65). No evidence was given on prosecutions instituted in this country under the Criminal Justice Acts 1802 and 1946 against the people concerned.
46. The Committee did, however, recognise the utility of less drastic measures to secure compliance with the Convention—e.g. the distribution of circulars, or personal, informal calls by the Vice Marshall of the Diplomatic Corps. This latter power is not, however, to be found in the Convention: Report, para.67 and Minute 45.
47. Professor Draper, in evidence to the Committee, asserted that there was a gap in English law in this regard and pointed out the inadequacy of s.2(1) of the Diplomatic Privileges Act 1964 which merely purports to grant "force of law" to the scheduled provisions.
49. At its meeting on 26 Nov. 1984, the Committee rejected an attempt by Mr Lawrence to insert a recommendation into its Report to the effect that the Home Secretary should have powers under the Public Order Acts to prevent demonstrations in the close vicinity of diplomatic premises. The Committee did, however, consider that the matter called for much closer liaison between the Home and Foreign Offices.
Probably the most important recommendation the Committee made to prevent abuse of diplomatic privileges in the future was that diplomatic bags could and should be electronically scanned when on specific occasions, in the government’s judgment, the need arises.

Abuse of the diplomatic bag is no new phenomenon, but, with the growth of international terrorism in recent years, the opinion of the UK Government appears to have hardened that measures which fall short of the physical “opening or detention” of the bag are not in violation of Article 27(3). Nonetheless, it has hitherto been the practice of the UK Government not to scan or permit other countries to scan British bags.

It is also clear from the travaux préparatoires that the inviolability of the bag was not intended to be dependent on observance of the requirement in Article 27(4) not to use the bag for transport of articles not intended for official use. The real issue, however, is whether scanning would work. The shielding of a “prohibited” object is a simple matter and, even if a suspicious object, or blank, came up on the screen, it would not be possible (except with Bahrain or Kuwait) to send the bag back.

Screening, as Sir Francis Vallat put it, merely “... puts you in that tantalising position of having suspicions raised without solving the problem”. The courier could, of course, be requested to open the bag, because the obligation not to open it is placed on the receiving State, but such a request would almost certainly be denied out of principle. The only way, in fact, to find out if diplomatic bags contain prohibited items would be to drop them while unloading them from the aircraft in the hope that they would split open. The sending State would be unlikely to accept such a practice without objection. In any event, this desperate measure would only work with large, unaccompanied bags, and firearms can easily be dismantled and carried in hand baggage. Nonetheless, the Committee appeared to consider that the mere existence of screening capability, and the will to use it, might deter a potential law-breaker.

The Committee also recommended that records should be kept of the size, shape and frequency of bags entering the country. The Committee recognised that a bag cannot be rejected merely on the grounds of its size or shape, but considered that the information would nonetheless be useful. Certainly such a practice might deter massive traffic in prohibited items, such as occurred in Pakistan in 1973 or the Scandinavian countries in 1980, but it is unlikely to yield

50. FCO Memorandum, para.22; Denza, op. cit. supra n.5, at p.127.
51. FCO Memo, para.17; HO Memo, para.10 (Appendix 2). Airlines routinely scan all baggage and freight. This is not unlawful because the obligation under Art.27 on governments falls short of requiring them to ensure unrestricted and speedy access of the bag: Denza, op. cit. supra n.5, at p.128.
52. Denza expresses the view, however, that the inviolability is not absolute; it would not inevitably prevail over other international obligations, e.g. to prevent drug smuggling: op. cit. supra n.5, at p.127.
54. This happened once in 1980 when, accidentally or deliberately, a Moroccan bag split open to reveal £500,000-worth of cannabis. The Home Office alluded to the possibility that the contents of the bag might be “fortuitously disclosed”: Appendix 2, para.10.
55. Para.35.
much useful information on the normal pattern of traffic. The Committee was not persuaded by the concern expressed by the trade union side of the diplomatic service that counter-measures adopted by aggrieved States might extend to blanket challenges and return of British bags with resulting disruption to (vital) security communications.

D. Conclusion

The recommendations made in the Committee's Report reflect the careful, detached study it made of FCO policy and the evidence of expert witnesses. The Report, together with the Minutes of Evidence and Appendices, contains a wealth of information on this important subject. As such, its publication can only be welcomed.

IAIN CAMERON

APPENDIX

The Foreign Affairs Committee, in paragraph 89 of the Report, asked the question: "Would the concept of self defence have justified forcible entry into the [Libyan People's] Bureau premises?"

Its conclusion is given in paras. 93-95 (footnotes omitted):

"93. We considered whether there was customary international law, or indeed provisions of English law, existing outside the Convention, which might have justified entry into the Bureau. It would seem that there is some difference of view among international lawyers as to whether the international law concept of self defence can apply to allow a State forcibly to enter the diplomatic premises of another. Some lawyers apparently take the view that an abuse by the mission staff (such as shooting from the premises) does not constitute the prohibited use of force ('threat to the territorial integrity and political independence of a State') which gives rise to self defence as specified in Articles 2(4) and 51 of the United Nations Charter. Professor Draper, in his evidence to us, asserts that self defence 'comes into play when acts of force are committed by States although it is not limited to such contingencies'.

94. Sir John Freeland told the Committee that 'I think self defence applies not only to action taken directly against a State but also to action directed against members of that State'. However, neither Sir John nor Professor Draper felt that reliance on self defence in the particular circumstances that faced the police after the shooting of WPC Fletcher would have been appropriate. Reminding the Committee of the classic requirements of self defence, Sir John thought they would be met where there was continued firing of weapons from the premises of an embassy, and where every other method has been tried and has failed to stop the shooting.

95. The Committee accepts that, whatever answer is given to the question of whether self defence is a concept applicable to the circumstances of St. James's Square, it could not have acted as a lawful basis for the forcible entry of the Bureau premises."

[The "classic requirements of self defence", referred to by Sir John Freeland were defined by him as: "A necessity of self defence, instant, overwhelming, leaving no choice of means and no moment for deliberation". He went on (Minutes of Evidence, para. 49): "In more modern parlance, we would take the view that the right to resort to self defence arises where there is a serious threat or actual danger, where there is no other means of averting it or bringing it to an end, and that action taken in self defence must be limited to what is necessary and what is proportionate."

In his memorandum to the Committee, Colonel Professor G. I. A. D. Draper said:

"The question of customary law limitations upon the inviolability of the person of a dip-
lomatic agent, and his freedom from arrest or detention is one of some difficulty. It received some, but not much, attention from the Commission in its Commentary upon the Convention. The original draft text of the relevant article, 29, as framed by the Commission had provided:

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

This became Article 29 of the Convention with one alteration. The word 'reasonable' was removed and replaced by the word 'appropriate'. The precise significance of this change may be matter for debate, but it may not have extended the ambit of any qualification of the inviolability of the person of the diplomatic agent. It is at this point that some limitations derived from reason and existing customary law may be ingested, e.g. the principle of self-defence and the impact of exceptional circumstances. What, for instance, is the right of the receiving State or of a member of the public if a diplomatic agent embarks on a course of criminal conduct such as discharging firearms at all and sundry from within the diplomatic premises? The Commission had this to say on the subject:

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.

This appeared in the Commission's Commentary on the draft article. It thus represents the collective opinion of 'persons of recognised competence in international law of the main forms of civilization', as provided in the Statute of the Commission. As such it can properly be considered as 'a subsidiary means for the determination of rules of [international] law; for the purposes of Article 38(1)(d) of the Statute of the International Court of Justice. It is therefore entitled to considerable weight in considering the law on the matter in hand.

There are, inevitably, a number of lacunae and uncertainties on a number of matters in the Convention. This is not unusual when one considers that a large number of States are negotiating a text of law to be binding upon all of them. The price of agreement being reached is frequently an element of reticence on some points and obscurity on others. This being said, the experience of the operation of the Convention since it came into force has, in general, been satisfactory as between the majority of States most of the time. Incidents such as those which occurred on 17 April 1984 at the Libyan Embassy are rare and, in that instance, unprecedented. Nevertheless, it exposed a number of defects in the Convention where the balance of interest between the receiving and the sending State had not been achieved.

Self defence is an important principle of customary international law, exemplified, but not exhausted, by Article 51 of the UN Charter. From the nature of self defence it derives from the law of nature from which international law derived its being. It comes into play when acts of force are committed by States, although it is not limited to such contingencies. Thus, in the incident of the shooting of Woman Police Officer Fletcher on 17 April 1984 by an inmate within the Libyan Embassy whose status and identity was unknown, it can properly be contended that, in immediate response, counter-fire might have been directed at the Libyan Embassy windows by the police. Further, in the period immediately after the firing from the embassy, entry might have been carried out by the police, with firearms, if available, and sufficient force used within the embassy to overpower the assailant or any person armed and remove all weapons found inside. Such acts would, in exercise of the right of self defence, probably have been required immediately after the firing from within or during continued firing. Even then, assuming entry and overpowering of the assailant had been achieved by the police, the police were precluded from arresting or removing, in arrest, the assailant. Had it been possible to identify at that time that the assailant was not a member of the mission, a difficult question would have arisen had the police, after entry, arrested the offender and sought to remove him in custody from the embassy. The question is close, but such arrest and removal would undoubtedly have aggravated the situation and led to excessive and probably illegal counteractions by the
Libyan Government against the UK mission in Libya or UK nationals present in that territory.

Had the assailant been established at the time of entry and overpowering by the police as a member of the mission, it would not have been lawful to detain him in custody in order to bring him to trial before the criminal courts of this country. That is precluded by Article 31 of the Convention which confers immunity, in the absence of waiver by the Government of the receiving State. This immunity is complete. In the absence of waiver HMG could have declared the offender non grata or demanded his recall or termination of mission. In the last resort HMG could, and did, sever diplomatic relations with Libya, in that no State is required by international law to have diplomatic relations with another State.

In its Commentary the Commission made no reference to the principle of self defence or emergency situations in relation to the inviolability of mission premises. However, it is probably a valid contention in law that an immediate and forcible entry into diplomatic premises of Libya, after the firing incident, was a measure designed to prevent the offender repeating the offence, and the overpowering of him within the embassy precincts would have been a legitimate exercise of the inherent right of self defence enjoyed by the UK. These matters have not been formulated in the Convention and it is more than doubtful whether any attempt to re-negotiate the relevant article, 22, would succeed at the present time; the position will thus have to remain governed by the general principles of international and customary international law.

In its Commentary upon Article 22 the Commission made mention of the moral duty of the mission to co-operate in local road works and the like. It was expressly anxious not to 'convey the erroneous impression that the Commentary was concerned with an exception to the principle of inviolability [of mission premises]'. If, for example, it were known to the British authorities that a major armoury or weapon installation was located inside mission premises, and all entry was denied by the head of mission, then in the last resort the receiving State might well consider a severance of diplomatic relations with the sending State. Whereupon, Article 45 of the Convention comes into play. Thereby, the receiving State must 'respect and protect the premises of the mission together with its property and archives'. This probably does not preclude a search for weaponry, in the circumstances envisaged, being objects incompatible with the functions of the mission. Should a Protecting State have been appointed by the sending State and accepted by the receiving State, then any such search and removal of objects would, and probably should, be carried out in the presence of a representative of the Protecting State, having regard to the terms of Article 45.

On balance, therefore, it may be said that it would not be desirable or practicable to attempt to re-negotiate the Convention as accepted now by 143 States, the overwhelming majority of the international community of States, and in general terms working fairly well most of the time for most of those States, for the insertion of limitations upon the privileges and immunities at present to be found in the Convention" (Appendix 6 to the Report, pp. 71–72).

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