

# Diplomatic and Consular Immunities in Republic of Korea

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## Introduction

The Vienna Convention on Diplomatic Relations (VCDR)<sup>1</sup> and the Vienna Convention on Consular Relations (VCCR)<sup>2</sup> provide a comprehensive framework for the establishment, maintenance and termination of diplomatic and consular relations. These conventions are one of the most universally accepted sources of international law, and the starting point for any discussion of contemporary diplomatic and consular relations.

This article attempts to shed light on statutory law and judicial practice involving Diplomatic and Consular Immunity in Korea. For this purpose, it aims to determine the status of international law in the legal order of Korea. This will be followed by an examination of specific aspects of Diplomatic and Consular relations in Korea.<sup>3</sup> The focus will be on the law of diplomatic immunities and privileges, which has a clear legal base on the VCDR and VCCR.

The paper is divided into three sections. In the first section, the status of international law in the domestic legal order will be outlined in general. It also presents a snapshot of the treaty-making process in Korea. The second section will explain the multilateral and bilateral treaties concluded by Korea with regards to diplomatic and consular immunities. The third section will analyze the various categories of privileges and immunities, such as inviolability of property, the premises of missions, personal inviolability, freedom of communications, and tax exemption.<sup>4</sup>

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<sup>1</sup> The Vienna Convention on Diplomatic Relations, April 18, 1961, 500 U.N.T.S. 95 [VCDR].

<sup>2</sup> The Vienna Convention on Consular Relations, April 24, 1963, 596 U.N.T.S. 261 [VCCR].

<sup>3</sup> The English translation of excerpts from all Korean resources cited in this paper is designated exclusively for the purposes of the present work.

<sup>4</sup> This paper only deals with the practices of diplomatic and consular relations, not with those of foreign State officials, including armed forces or international organisations.

## 1. The Status of International Law in the Domestic Legal System

This chapter is intended as an introduction to the following chapters, which set out the rules and practices of the immunities applicable to diplomatic missions in Korea. At the outset, it is useful to review a brief explanation regarding the status of treaties and customary international law in the domestic legal system and treaty-making process in Korea.

### 1.1. International Law in the Domestic Legal System

Article 6 (1) of the Constitution of Korea<sup>5</sup> stipulates that “treaties duly concluded and promulgated under the Constitution and generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea.” In accordance with this provision, international law has been accepted as domestic law and incorporated into the domestic legal system. Korea is a monist state insofar as the incorporation of international law into domestic law is not required for international law to apply.<sup>6</sup> “[T]he same effect as those of domestic laws” refers to the fact that any treaties or international laws falling under any domestic laws or subordinate statutes have the same effect as those of the relevant domestic laws or subordinate statutes, respectively. But the level of effect of international law within the domestic legal system has been left to theoretical interpretation, as such law does not explicitly identify such interpretation.<sup>7</sup>

Given the place of customary international law in the domestic legal system, both treaty and customary law generally have the same effect as statutes as indicated by judicial decision. And the principles *lex specialis derogate legi generali* and *lex posterior derogate legi priori* apply whenever the problem of correlation between the given legal system arises.<sup>8</sup>

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<sup>5</sup> The Constitution of Republic of Korea, Constitution No.10, October 29, 1987, Whole Amendment.

<sup>6</sup> LEE (S)/LEE(H), *The making of international law in Korea: from colony to Asian power*, Leiden; Brill Nijhoff, 2016, p. 3.

<sup>7</sup> See PARK (N) “Application of International Law in Korean Courts,” Korea Legislation Research Institute, *Asia Law Review*, vol. 1, pp. 47-56.

<sup>8</sup> The Supreme Court, September 12, 1989, *88Nu6856 Decision*; The Supreme Court,

## 1.2. Treaty-Making Process

This introduction will be devoted to a short description of the treaty-making process in Korea. Under Article 73 of the Constitution, treaty-making is within the President's. Most of practical work for treaty-making is carried out by the International Legal Affairs Bureau of the Ministry of Foreign Affairs (MOFA), and a procedure of consultations with various domestic institutions should be followed before the President can conclude and ratify treaties.<sup>9</sup>

The bureau in charge of negotiations for a treaty prepares a draft text and the corresponding Korean text in consultation with the International Legal Affairs Bureau of the MOFA and other Ministries concerned. The bureau sends the agreed treaty text to the International Legal Affairs Bureau, and requests the Director-General to initiate the domestic procedures to conclude the treaty.

Once the formation and wording of the treaty texts have been reviewed, the proposed texts are sent to the Ministry of Government Legislation (MOLEG) for examination. Article 21 (3) of the Regulations on Management of Legislative Affairs<sup>10</sup> stipulates that “[t]he MOFA shall request the Minister of MOLEG to examine a treaty Bill before finalizing the details thereof, after consulting thereon with the heads of related agencies.” It is required that MOLEG reviews all proposed legislation before it is sent to the State Council for deliberation. The Minister of MOLEG may return the request if a treaty bill is deemed unconstitutional or deemed to have clear juridical problems.<sup>11</sup> In addition,

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November 25, 2016, *2014Do14166 Decision*.

<sup>9</sup> LEE (S)/LEE(H), *supra* note 6, p. 3.

<sup>10</sup> The Regulations on Management of Legislative Affairs, Presidential Decree No. 28521, December 29, 2017.

<sup>11</sup> Article 21 (4) of the Regulations on Management of Legislative Affairs. It stipulates that the bill may be returned in the following cases; (i) a treaty Bill not having undergone consultation with the head of a related agency, procedures for the pre-announcement of legislation, or examination of regulations; (ii) a treaty Bill not included in the Government's legislative plan; (iii) a treaty Bill deemed unconstitutional or deemed to have obvious juridical problems; (iv) a legislative Bill deemed necessary to be re-examined due to a change in circumstances, such as revisions of governmental policies; (v) other treaty Bills for which the legislative process needs to be rescheduled or which are in exceptional status.

the Minister of MOLEG examines whether the proposed treaty requires consent for ratification by the National Assembly as stipulated in Article 60 (1) of the Constitution, and provides opinions thereon.

In accordance with Article 89 (3) of the Constitution, when the review is completed, the proposed treaty shall be referred to the State Council for deliberation. When approved by the State Council, the review is then sent for the approval of the Prime Minister and President.<sup>12</sup>

Article 60 (1) of the Constitution stipulates that the National Assembly shall have the right to consent to the conclusion and ratification of treaties. The National Assembly's consent is certainly required for "treaties pertaining to mutual assistance or mutual security; treaties concerning important international organizations; treaties of friendship, trade and navigation; treaties pertaining to any restriction in sovereignty; peace treaties; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters."

## 2. Treaties Concluded by Korea on Diplomatic and Consular Immunity

### 2.1. Treaties on Diplomatic Relations

The VCDR was adopted on April 14, 1961 and entered into force on April 24, 1964. Korea signed the VCDR on April 18, 1961 and ratified it on December 28, 1970. The VCDR entered into force for Korea on January 27, 1971 and was incorporated into domestic law.

### 2.2. Treaties on Consular Relations

The VCCR was adopted on April 24, 1963 and entered into force on March 19, 1967. Korea ratified the Convention on March 7, 1977.

Korea has concluded four bilateral treaties on consular relations to "confirm, supplement, extend or amplify"<sup>13</sup> its own provisions. In that sense, it is natural that some of

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<sup>12</sup> Article 6 of the Act on the Promulgation of Statutes, Act No. 10059, March 12, 2010.

<sup>13</sup> Article 73 of the VCCR.

its provisions are even more detailed than those in multilateral conventions. The first bilateral treaty signed on consular relations was with the United States (U.S.)<sup>14</sup> on January 1963, which has 18 articles. Other treaties are those with Nepal,<sup>15</sup> the Russian Federation<sup>16</sup>, and the People's Republic of China (PRC).<sup>17</sup>

The Consular Convention between Korea and Nepal has only four Articles on establishing consular relations at the Consul General level between the two countries. Article 3 of the Convention stipulates that the Consul General and staff members, in the territory of either country, shall enjoy facilities, privileges and immunities in accordance with the VCCR.

The Consular Convention between Korea and the Russian Federation was signed on May 1992 and entered into force on July 29, 1992. The preamble of the Convention introduces further provisions for the conducting of consular relations to supplement the VCCR. The Convention has its own definition of the terms “vessel” and “aircraft” that are not included in the VCCR.<sup>18</sup> Accordingly, the term “vessel of the sending state” means any vessel with the exception of military vessels entitled to fly the flag of the sending State and registered in that State; while “aircraft of the sending State” means any aircraft, with the exception of military aircraft, registered in the sending State and entitled to use the national emblem of that State.<sup>19</sup>

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<sup>14</sup> Consular Convention between the United States of America and the Republic of Korea, signed in Seoul on January 8, 1963, December 19, 1963 by the exchange of instruments of ratification, in accordance with article 18, U.N.T.S. 493 (p.105) 7211.

<sup>15</sup> The Agreement for the Establishment of Consular Relations between the Government of the Republic of Korea and His Majesty's Government of Nepal, signed in Kathmandu July 29, 1969, entered into force on July 29, 1969.

<sup>16</sup> The Consular Convention Between the Republic of Korea and the Russian Federation, signed in Seoul May 18, 1992, entered into force July 29, 1992.

<sup>17</sup> The Consular Convention Between the Republic of Korea and the People's Republic of China, signed in Seoul July 3, 2014, entered into force April 12, 2015.

<sup>18</sup> The bilateral convention with PRC also has articles about the definition of “vessel” and “aircraft” in Article 1 (d) and (e).

<sup>19</sup> The Consular Convention Between the Korea and the Russian Federation, Article 1 (l) and (m).

The Consular Convention between Korea and PRC confirms that their consular relations are dealt with in accordance with the VCCR. The convention contains specific provisions. For example, the term “consular district” means the area assigned to a consular post for the exercise of consular function. The term “consular post” means any consulate-general, consulate, vice-consulate, consular agency or consular office<sup>20</sup>, and “consular officer” means *any person* entrusted in that capacity with the exercise of consular functions, including the consul-general, vice consul-general, consul, vice-consul, consular attaché or consular agent.<sup>21</sup> Article 12 (2) stipulates that all expressions used in the present Agreement not defined in Article 1 shall have the same meanings as those stated in the VCCR.

The provisions of these bilateral conventions are very similar to the text of the VCCR, but each convention has its own provision which reflect the diplomatic relationship between the specific consular functions and services, which are assured on a reciprocal basis in the bilateral convention include the issuance of passports and visas, and the representation of the interest of nationals. Other provisions include the establishment of consular posts, the appointment of personnel, the inviolability and immunity of consular officers and employees, and the representation of the interest of nationals with respect to vessels and aircrafts. The bilateral instrument deals more with the criminal and procedural protections of consular members and foreign nationals, and less with the issue of privileges and immunities.

### 3. Diplomatic and Consular Immunity in the Korean Legal Order

This section deals with statutory laws and regulations with regards to the immunity and inviolability of mission premises, freedom of communication, personal inviolability, immunity from jurisdiction, exemption from taxation, and other exemptions. In particular, over the last few years several cases concerning the guarantee of freedom of assembly and the protection of premises have led to debates about the need to reconsider the relevant implementation of domestic and international law.

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<sup>20</sup> Article 1 (b) of the Consular Convention Between the Korea and the Russian Federation.

<sup>21</sup> Article 1 (a) and (c) of the Consular Convention Between the Korea and the Russian Federation.

### 3.1. Inviolability of Mission Premises

One of the principle immunities extended to foreign diplomats is mission inviolability. Article 22 of the VCDR lays down that “[t]he premises of the mission shall be inviolable.” Inviolability in modern international law is a status accorded to premises, persons, and property physically present in the territory of a sovereign State, but not subject to its jurisdiction in the ordinary way.<sup>22</sup> Article 22 (1) and (2) in relation to mission premises spell out the first duty of abstention, and the positive duty of protection. This section will show Korea’s judicial practices and current statutes concerning the inviolability of mission premises.

#### 3.1.1. Duty Not to Enter the Premises

Without the consent of the head of a mission, the premises may not be entered by the police, process services, building safety, or health inspectors.<sup>23</sup> The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post, except with the consent of the head of the consular post.<sup>24</sup>

Article 235 of the Criminal Investigation Regulation (CIR)<sup>25</sup> stipulates that “a police officer must not enter embassies and premises; legations; and the residences or second residences and accommodations of ambassadors, members of the staff of embassies and legations, except when requested by them.” The second subparagraph of Article 235 stipulates that a police officer “may in cases when a person, after whom the police officer is in pursuit, who has committed a serious crime enters such a place, and the situation allows no delay, search such place with the consent of the person with authority to represent them. When any investigation commences, a police officer should refer to and

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<sup>22</sup> DENZA (E), *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 3rd edn., Oxford; Oxford University Press, 2008, p. 135.

<sup>23</sup> ROBERTS (I) ed., *Satow’s Diplomatic Practice*, 7th edn., Oxford; Oxford University Press, 2018, p. 225. Article 22 (1) of the VCDR.

<sup>24</sup> Article 31(2) of the VCCR.

<sup>25</sup> The Criminal Investigation Regulation, The Directive of Police, No. 937, revised at July 18, 2019.

deal with it under the direction by the Commissioner General of National Police Agency without delay.”

Concerning on the a consular post, Article 238 (2) of CIR specifies that “a police officer is not to enter consular posts headed by the deputy consuls-general, consuls or vice-consuls, except when requested or given consent by the career head of the consular post or a person who has authority to represent him/her.”

A case concerning the status of diplomatic mission premises arose in Germany. Crimes occurring on diplomatic mission premises are regarded in law as taking place in the territory of the receiving State.<sup>26</sup> In 1997, the defendant, a former Korean national who had taken German nationality, was accused of violating the National Security Act.<sup>27</sup> He had visited the Interest Section of DPRK in Berlin to attend the memorial ceremony of Kim Il-Sung and met a member of an anti-government organization.<sup>28</sup> The Court accepted the status of Interest Section of DPRK as a consular premise, but denied that the territory of DPRK extended thereto.<sup>29</sup>

In the 1980s and 1990s, there were intrusions and damage to facilities of foreign

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<sup>26</sup> The Supreme Court of Korea, September 22, 2006, *2006Do5010*. The Court said that the Consulate premises of Korea to China is not deemed to be territory of Korea.

<sup>27</sup> The National Security Act, Act No.13722, January 6, 2016. The stated purpose of the National Security Act is to secure the security of the State and the subsistence and freedom of nationals, by regulating any anticipated activities compromising the safety of the State (Article 1 (1)). The term “anti-government organization” is defined as domestic or foreign organization or group which uses fraudulently the title of the government or aims at a rebellion against the State, and which is provided with a command and leadership system (Article 2). Under Article 8 of this Act, any person who makes contact with a member of an anti-government organization or a person who has received an order from it, by means of a meeting, correspondence or other method, with the knowledge of the fact that it threatens to endanger the existence and security of the nation, or democratic fundamental order, shall be punished.

<sup>28</sup> The Interest Section of DPRK, a provisional mission, opened after closing the embassy of DPRK to Germany with the German reunion and the DPRK embassy re-opened in 2001.

<sup>29</sup> The Supreme Court of Korea, April 17, 2008, *2004Do4899*. Article 3 of the Constitution extends the sphere of the (expected) validity of this constitution to the entire Korean peninsula and its adjacent islands by thus defining the territory of ROK. Given that the territory of DPRK is legally under the sovereignty of ROK.

government. U.S. Cultural Centers in several major Korean cities were the frequent object of protest and often violence with regards to the policies of the U.S. and Korean governments. After the May 18, 1980 Kwangju Democratic uprising, the protest spread nationwide. Korean wives and relatives of prisoners convicted of involvement in the Kwangju uprising staged a 22-hour sit-in at the U.S. Cultural Centre in Kwangju.<sup>30</sup> In March 18, 1982, there was an arson attack against the U.S. Cultural Centre in Busan, South Korea's second-largest city, with two men subsequently sentenced to death and two to life imprisonment for arson.<sup>31</sup>

In the 1985 U.S. Cultural Centre Case incident, 73 students occupied the U.S. Cultural Centre in Seoul for 72 hours<sup>32</sup>. Following which, over 20 students were arrested under National Security Act charges. Seoul District Court ruled that "in accordance with the VCDR, the Korean Government, as a party to the convention, should protect the inviolability of the premises of mission against any intrusion or damage, and has a special duty to take all appropriate steps to prevent any disturbance of the peace of the mission or impairment of its dignity."<sup>33</sup> In this case, the Supreme Court made a decision based on personal jurisdiction without any territorial test with the reasoning that the U.S. Cultural Centre falls under 'extraterritoriality.'<sup>34</sup>

The term 'extraterritoriality' is sometimes used to denote the totality of immunities and privileges accorded to diplomatic agents, their families, and subordinate staff, or to describe the status of embassy premises.<sup>35</sup> This does not mean that a diplomat is not legally present in the receiving State or that the embassy is deemed to be foreign territory.<sup>36</sup> It is not correct that only personal jurisdiction hinders a court's reach, for

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<sup>30</sup> REDITT (J), "Women protesters occupy US centre in S. Korea" *Times*, May 23, 1981, available at: <http://tinyurl.galegroup.com/tinyurl/BUvJc4>. Accessed August 8, 2019.

<sup>31</sup> The Supreme Court, March 8, 1983, *82Do3248 Decision*.

<sup>32</sup> WATTS (D), "Protesters demand truth about Kwangju killings," *Times*, May 25, 1985, p. 4.

<sup>33</sup> Seoul District Court, February 4, 1986, *85No3184 Decision*.

<sup>34</sup> Supreme Court Decision, June 24, 1986, *86Do403 Decision*.

<sup>35</sup> ROBERTS, *supra* note 23, p. 225.

<sup>36</sup> *Ibid*.

territorial jurisdiction does too.

Physical damages resulted in most of these cases, regardless of severity. The duty to protection in Article 22 does not make it a matter of legal obligation to pay compensation in respect of any damage that may be inflicted on embassy premises by protesters in the absence of a failure on the part of the receiving State to accord the appropriate protection.<sup>37</sup>

### 3.1.2. Duty of protection

#### (1) Protection against any intrusion or damage

As mentioned above, foreign official premises, including consulates and diplomatic premises, have frequently been targeted to protest the policies of a sending State. On occasion, protests result in physical intrusion or physical damage to diplomatic premises.

In October 13, 1989, six students broke into the U.S. ambassador's residence and went on a half-hour rampage after 2,000 students had staged anti-U.S. protests, burned American flags, and hurled rocks at police.<sup>38</sup> Trespassing on the premises of foreign consulates and diplomatic missions is a criminal offence under the domestic law of many nations.<sup>39</sup> Under the Criminal Act of Korea<sup>40</sup>, there is no specific provision for diplomatic premises *per se*, but intruding into or damaging diplomatic missions or consular posts constitute the crime of intrusion upon habitation or attempt to commit such crime.<sup>41</sup>

Recently, six South Korean youths were taken into police custody after staging a protest inside the Japanese Consulate in central Busan against Japan's export restrictions.

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<sup>37</sup> *Ibid.*, pp. 230-231.

<sup>38</sup> They were protesting against U.S. pressure on South Korea to open its markets and demanded that former President Roh cancel his visit to Washington. 'Occupying U.S. ambassador's residence', *JoongAng Ilbo*, October 13, 1989, A1.

<sup>39</sup> LUKE T/LEE J.D./QUIGLEY (J), *Consular Law and Practice*, 3rd edn., Oxford University Press, 2008, p. 373.

<sup>40</sup> The Criminal Act of Korea, Act No. 15163, December 12, 2017, Partial Amendment.

<sup>41</sup> Article 319 of the Criminal Act stipulates the crime of intrusion upon habitation and refusal to leave. Attempts to commit any such crime shall be punished (Article 322).

Police are investigating the protesters on charges of trespassing in the building.<sup>42</sup>

(2) Prevention of disturbance of the peace of the mission or impairment of its dignity:  
Demonstrations

Demonstrations in front of foreign embassies are a fairly common form of public protest, not only against the policies of the sending State but also the receiving State. In its modern history, Korea has experienced political turmoil for The process of democratization, and demonstrations near foreign embassies continue to attract popular attention.<sup>43</sup> Over the last few years, several cases concerning the safeguarding of freedom of assembly and the protection of premises have led to debates about the need to reconsider the relevant implementation of domestic- and international-law.

After U.S. Forces in South Korea (USFK) deployed the Terminal High Altitude Area Defense antimissile system in the south-eastern part of Korea on April 26, 2017, over 3,000 protesters surrounded the U.S. Embassy compound. The U.S. Embassy lodged a complaint with the Korean government that this was a violation of the VCDR, which stipulates that a host country is responsible for the protection of a foreign diplomatic mission.<sup>44</sup>

Under the constitutional guaranties of freedom of speech and assembly, the police and government authority must strive to balance the right of demonstrators to protest with the rights of diplomatic premises to perform their functions and have its inviolability and dignity protected.<sup>45</sup> Article 11 (1) of the Assembly and Demonstration Act 1989 states that protests are not allowed in areas within one-hundred meters (328 feet) of the premises of diplomatic missions. The legislative purpose of this provision is clear, i.e. preventing the disturbance of the peace of a mission and the functions of diplomatic offices or residence. The diplomatic institutions of a foreign nation located on Korean

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<sup>42</sup> ‘Six youths detained for protest performance at Japanese Consulate in Busan,’ *The Korea Herald*, July 22, 2019.

<sup>43</sup> To understand the attributes of Korean street protest culture, see Kim (S-C), *Democratization and Social Movements in South Korea: Defiant Institutionalization*, Routledge, 2016.

<sup>44</sup> CHANG (S), ‘An uncomfortable alliance’, *JoongAng Ilbo*, February 25, 2019, p. 28.

<sup>45</sup> ROBERTS, *supra* note 23, p. 230.

territory are included in the no outdoor assembly and demonstration zone, as the normal functioning and safety thereof significantly affect “national interest from the aspect of maintaining and developing amicable diplomacy.”<sup>46</sup>

In the *2000Hun-Ba67* case, the complainant intended to hold an outdoor assembly on February 23, 2000.<sup>47</sup> The complainant submitted an outdoor assembly report to the Superintendent of Jongno Police Station, the competent authority, on the morning of February 21, 2000, pursuant to Article 6 of the Act on Assembly and Demonstration. On February 22, 2000, the authority served a notice of prohibition of outdoor assembly on the complainant on the grounds that the ‘intended location for assembly was within the no outdoor assembly or demonstration zone under Article 11 of the Act on Assembly and Demonstration.

The complainant in the other original case *2000Hun-Ba83*<sup>48</sup> also filed an administrative proceeding with Seoul Administrative Court seeking to nullify the notice of prohibition of the assembly on the grounds that subdivision of this article, which was the grounds for the above measure prohibiting the intended assembly, was unconstitutional, and petitioned Seoul Administrative Court to request a constitutional review of the same provision.<sup>49</sup> Upon the dismissal of the petition by Seoul Administrative Court<sup>50</sup>, the complainant filed a constitutional complaint on August 16, 2000.

In *2000Hun-Ba67 and 83 Decision* of October 30, 2003, the Constitutional Court

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<sup>46</sup> Seoul Administrative Court, *2000Gu7642*, Nullification of Notice of Prohibition of Assembly (*2000Hun-Ba67*); Seoul Administrative Court, *2000Gu15360*, Nullification of Notice of Prohibition of Assembly (*2000Hun-Ba83*).

<sup>47</sup> The National Alliance for Democracy & Reunification of Korea was planning to hold an outdoor assembly under the title ‘Appeal for Truth-Finding Inquiry into the Civilian Massacre by the U.S. Army during the Korean War’ in Seoul. The police banned it for being located within 97 meters of the boundary of the U.S. Embassy and 35 meters from the boundary of the Consulate Division of the Japanese Embassy.

<sup>48</sup> The complainant, the Committee Fighting for the Reinstatement of Former Employees of Samsung, had intended to hold an outdoor assembly in April 2000. The reported march route included the buildings that housed the Singaporean Embassy and the El Salvadorian Embassy.

<sup>49</sup> Seoul Administrative Court, *2000Gu7642*; Seoul Administrative Court, *2000Gu15360*

<sup>50</sup> Seoul Administrative Court, *2000A643*; Seoul Administrative Court, *2000A497*.

decided whether a special provision setting forth places where assembly is prohibited is an excessive regulation or not. The Court held that the part of Subdivision 1 of Article 11 of the Act on Assembly and Demonstration that provides for the “diplomatic institutions of a foreign nation located in the Korean territory” was unconstitutional.<sup>51</sup> The Court said that the legally protected interests presupposed by the provision at issue in this case included the protection of free entry to and exit from diplomatic institutions on Korean territory, efficient business performance, and the physical safety of diplomats. Furthermore, the Court affirmed that the choice of place of assembly on many occasions determines the success and failure of assembly, as the purpose and content of assembly is inseparably and inherently related to the place of assembly in general. As the place of assembly has an important meaning for the very purpose and effect of such assembly, freedom of assembly may be effectively guaranteed only when every and any person can freely decide the ‘location’ of the planned assembly in principle.<sup>52</sup>

This provision was challenged in the courts by individuals who claimed that the restrictions infringed their right to assembly as guaranteed by the Constitution.<sup>53</sup>

In its conclusion, the Court noted that:

Assemblies in the vicinity of diplomatic institutions have a higher probability in general to cause conflicts with important legally-protected interests compared with other places, and thereby to inflict infringement upon such other legal interests. Therefore, the provision at issue in this case prohibits assemblies in the vicinity of diplomatic institutions in the entirety in order to effectively prevent in advance a situation of such serious conflicts between legally-protected interests. The legal interests protected under the provision at issue in this case include the guarantee of free entry and exit to and from the diplomatic institutions on Korean territory, and of the smooth performance of activities and bodily safety of diplomats.<sup>54</sup>

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<sup>51</sup> Prohibition of Assembly in the Vicinity of Diplomatic Institutions, 2000Hun-Ba67, etc. (consolidated), October 30, 2003.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

In order to mitigate any potential excessive limitation on basic rights that may result from such a general and abstract provision of the law, the judgement asserts that legislators should follow the principle of proportionality.

According to this decision, Article 11(4) of the Assembly and Demonstration Act 2004 revised as follows:

No person may hold any outdoor assembly or stage any demonstration anywhere within a 100-meter radius from the boundary of the diplomatic offices or residences of heads of diplomatic missions in Korea. The same shall not apply if it is presumed that an assembly or demonstration, which falls under any of the following items, may not interfere with the functions or security of the diplomatic offices or residences of the heads of diplomatic missions:

- (a) Where the assembly or demonstration is not directed at the diplomatic offices or residences of the heads of diplomatic missions;
- (b) Where the assembly or demonstration will not escalate into a large-scale assembly or demonstration; and
- (c) Where the assembly or demonstration takes place on a holiday when diplomatic offices are closed.<sup>55</sup>

Since the Court declared it unconstitutional, the balancing of the protection of diplomatic premises and the right of peaceful assembly was given more careful consideration. Seoul Administrative Court stated that it is legal to hold rallies within the vicinity of foreign missions in the country if the event does not pose a risk of spreading or becoming violent.<sup>56</sup> The Court underscored an exception clause that allows rallies to be

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<sup>55</sup> Article 11(4) of the Assembly and Demonstration Act, January 29, 2004, Law No. 7123.

<sup>56</sup> The organiser of the demonstration was denied after submitting a plan with Police to hold a rally some 50 meters from the U.S. Embassy from 8 a.m. to 9 p.m. on November 10, 2015. Police pointed out that one of the rally's stated purposes was aimed at the U.S. Embassy, protesting against the deployment of a Terminal High Altitude Area Defence battery here. But the ruling also pointed out that the same group had held outdoor rallies with less than 50 participants between February and September that year. The court said that none of the previous rallies had grown violent. 'Court says that rally can be held near foreign embassies', *The Korea Herald*, June 20, 2016.

held if there is no concern of the demonstration further spreading, and thereby ruled that the police's measure was unlawful.<sup>57</sup>

Recently, the National Human Rights Commission of Korea (NHRCK) urged the chief of Seoul's Jongno Police, which is in charge of the U.S. Embassy's external security, to permit one-person protests directly in front of the embassy, arguing that the ban is a violation of freedom of expression. In the recommendation, the NHRCK insisted that one-person protests are not expected to impair the dignity of diplomatic premises or diplomats, and that the free selection of a place of protest is an important part of freedom of expression.<sup>58</sup> However, the NHRCK has been notified by Police of the decision to retain the ban on demonstrations just outside the embassy compound: the Police rejected the NHRCK recommendation, citing the need to protect the functions of a foreign mission, the special nature of international relations, as well as citizens' rights of passage.<sup>59</sup> The Police also stressed that one-man protests should be fully guaranteed, as long as they don't obstruct pedestrians on the sidewalk in front of the embassy.<sup>60</sup>

It is apparent that appropriate measures and considerations are essential to address the protection of premises of diplomatic missions. However, it is necessary to maintain a fine balance between the guarantee of freedom of assembly and the interests of the sending States in ensuring that the function of diplomatic mission is available without undue interruption.

### (3) Prevention of Impairment of Its Dignity

Destroying the national flag of a foreign State may constitute the "impairment of its dignity" as referred to in Article 22 (2) of the VCDR and Article 31 (2) of the VCCR.

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<sup>57</sup> Seoul Administrative Court, June 6, 2016, *2015Gu-Hap77967*.

<sup>58</sup> The National Human Rights Commission of Korea, *The violation of freedom of expression by the ban on One-man-demonstration in front of U.S. Embassy*, No. 16-Claims)-0109600.

<sup>59</sup> The Police said that it would continue to permit one-man protests at adjacent buildings and the nearby square, from where messages could be adequately delivered to the U.S. Embassy. 'Police Reject Watchdog's Proposal to Allow One-man Protest in front of U.S. Embassy,' *Yonhap*, December 18, 2018.

<sup>60</sup> *Id.*

Article 109 of the Criminal Act punishes the crime of profanation of a foreign flag or foreign emblem. If a person who, for the purpose of insulting a foreign country, damages, removes or stains a foreign national flag or emblem will be punished when such is officially used for such country. Article 110 forbids prosecution without foreign governmental complaint.

### 3.2. Exemption of Mission Premises from Taxation

Article 23 of the VCDR and Article 32 of the VCCR provide for exemption from “regional or municipal dues and taxes”. National taxes, such as income tax, property tax, special tax for rural development and value added tax (VAT) might be levied on the premises of a mission in Korea. Further, diplomatic missions are not expected to pay any local taxes, such as acquisition tax, inhabitant tax, local income tax and local education tax. Tax exemption is granted based on reciprocity and bilateral agreement with Korea.

In 2007, the French embassy to Korea had refused to pay taxes based on the Gross Real Estate Tax Law.<sup>61</sup> Both governments granted exemption to premises of the mission, but imposed property taxes on embassy-owned real estate in their respective territories on a reciprocal basis. According to the National Tax Service (NTS), the French embassy had a total of KRW 60 million of such taxes in arrears on 13 buildings in the embassy-owned residence. The French embassy argued that it had no legal obligations regarding this tax, because there was no corresponding tax system in France. Furthermore, the embassy insisted that it should not be subject to the Gross Real Estate Tax Law that aimed to regulate speculation, and proposed to pay ordinary property taxes, which had a lower tax rate than gross real estate tax.<sup>62</sup> The NTS responded that the embassy had to pay the taxes because the Gross Real Estate Tax is also a type of property tax, and that taxation is a nation’s legal right subject to international conventions or bilateral treaties. The NTS forthwith seized one of the buildings. In the end the embassy relented and admitted

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<sup>61</sup> KIM (C)/JEONG (Y), ‘Inappropriate Taxation, no corresponding tax in France,’ *Joongang Ilbo*, April 26, 2007, A1.

<sup>62</sup> ‘French Embassy, pay for the comprehensive real property tax,’ MBC News, May 1, 2007, available at [http://imnews.imbc.com/replay/2007/nwtoday/article/2018635\\_18819.html](http://imnews.imbc.com/replay/2007/nwtoday/article/2018635_18819.html).

its tax liability.<sup>63</sup>

It is provided that, as an exception to that exemption, the diplomatic agent under Article 34 of the VCDR and consular officers and employees, and their families under Article 49 of the VCCR, are subject to indirect taxes of this kind which are normally incorporated in the price of goods or services. The indirect tax mentioned here is VAT, traffic tax, energy tax and environmental tax, and individual consumption tax in Korea.

The refund of VAT levied on certain goods and services may be allowed to diplomats and diplomatic envoys from a sending State under the Restriction of Special Taxation Act.<sup>64</sup> The Individual Consumption Tax Act also allows tax exemption on imported or purchased goods at a manufacturing place by diplomatic missions for official use, imported goods by diplomats and their families for their own use, and oil for the official use of the mission.<sup>65</sup> Under the Traffic, Energy and Environmental Tax Act,<sup>66</sup> tax exemption is only granted based on reciprocity.<sup>67</sup>

Missions are exempt from acquisition tax on real estate, motor vehicles, heavy machinery, plants, golf or condominium memberships that are purchased for official use, registration tax on motor vehicles, as well as real estate such as land and buildings.<sup>68</sup> Missions and their members are exempt from residence tax and property tax on official assets. Missions are also exempt from environmental improvement costs.<sup>69</sup>

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<sup>63</sup> LANG (M)/PISTONE (P), *Tax Rules in Non-tax Agreements*, IBFD Publications, 2012, p. 697.

<sup>64</sup> Article 107 (7) of the Restriction of Special Taxation Act, Act No. 15881, December 11, 2018.

<sup>65</sup> Article 16 (1) of the Individual Consumption Tax Act, Act No.15217, December 19, 2017.

<sup>66</sup> Article 14 of the Traffic, Energy and Environmental Tax Act, Act No. 13621, December 29, 2015.

<sup>67</sup> Article 14 (3) of the Traffic, Energy and Environmental Tax Act.

<sup>68</sup> The Guide for Foreign Missions in Korea, MOFA, May 2019, pp. 52-53.

<sup>69</sup> Article 9 (3) of the Environmental Improvement Cost Liability Act, Act No. 13039, January 20, 2015.

### 3.3. Freedom of Communication

#### 3.3.1. Wireless and Satellite Communication

The necessary functions of a mission can only be carried out with unrestricted communications. A mission may use all appropriate means to communicate with their Government and other missions and consulates. However, Article 27(1) of the VCDR and Article 35 (1) of the VCCR provides that a diplomatic mission or consular post “may install and use a wireless transmitter only with the consent of the receiving State.”

In principle, a foreign government or its representative may not establish any radio station under Article 20 (1) (b) of Radio Waves Act.<sup>70</sup> However, Article 20 (2) gives permission to install a radio station in a diplomatic mission, such as an embassy in which the diplomatic and consular affairs of a foreign nation are carried out in Korea for communications between specific points.<sup>71</sup> Permission for the installation of a wireless facility in a mission shall be given on a reciprocal basis,<sup>72</sup> and the wireless facility installed in a mission must not disrupt other domestic radio waves.<sup>73</sup>

The Minister of MOFA requests the establishment of a radio station which is used for diplomatic and consular affairs of a foreign mission in Korea. In such cases, the Minister of Science and ICT may prioritize granting approval for a radio station which is necessary for national security.<sup>74</sup>

To install and operate wireless transmitters for communication with the sending state or another state, the mission must send a diplomatic note to the MOFA in order to obtain permission to use frequency waves from the Ministry of Science and ICT.<sup>75</sup> To install a mobile communication network covering a certain area in Korea for communication among members of a mission, a mission should send a diplomatic note to the MOFA

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<sup>70</sup> Article 20 (1) (b) of the Radio Waves Act, Act No. 16019, December 24, 2018.

<sup>71</sup> Article 20 (2) (d) (i) of the Radio Waves Act.

<sup>72</sup> Article 20 (4) of the Radio Waves Act.

<sup>73</sup> Article 20.2 (6) of the Radio Waves Act.

<sup>74</sup> Article 23 (3) of the Enforcement Decree of the Radio Waves Act, Presidential Decree No.28464, December 12, 2017.

<sup>75</sup> Article 20. 2 of the Enforcement Decree of the Radio Waves Act.

with information such as details of the construction plan in order to obtain approval from the Ministry of Science and ICT. A mission intending to install and utilize a satellite earth station for the purpose of official communications also has to send a diplomatic note to the MOFA for approval.

### 3.3.2. Diplomatic and Consular Pouch

A diplomatic or consular courier shall present an official document to a customs officer indicating his/her status and the number of packages in the pouch. When a pouch is delivered as a consignment, the bill of lading shall be submitted to a customs officer. The diplomatic and consular pouch must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.<sup>76</sup>

The diplomatic pouch shall not be opened or detained.<sup>77</sup> The consular pouch may be subject to inspection by a customs officer only in the presence of an authorized representative of the consular post if there are serious reasons to believe that the pouch contains something other than official correspondence or documents or articles intended exclusively for official use.

The exemption to the security screening of a diplomatic pouch can be approved only when such pouch is accompanied by a diplomatic courier. To request the exemption of security screening of outbound diplomatic pouches accompanied by diplomatic couriers, missions must send to the Ministry of Foreign Affairs a diplomatic note at least one week prior to the expected date of departure of the diplomatic pouch.<sup>78</sup> A certificate stating that the diplomatic pouch contains only official correspondence, documents or articles intended for official use and does not contain any prohibited items must be attached to the diplomatic note.<sup>79</sup>

The diplomatic note, with an accompanying certificate received by the MOFA, will then

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<sup>76</sup> Article 27 (4) of the VCDR and Article 35 (4) of the VCCR.

<sup>77</sup> Article 27 (3) of the VCDR and Article 35 (3) of the VCCR stipulates that a diplomatic or consular bag “should be neither opened nor detained.”

<sup>78</sup> *Supra* note 68, p. 55.

<sup>79</sup> *Ibid.*

be forwarded to the Ministry of Land Infrastructure and Transport, which is responsible for air traffic safety and security. In the event that diplomatic pouches accompanied by diplomatic couriers transfer through Korean airports, the missions must send a diplomatic note to the MOFA for approval.<sup>80</sup>

#### 3.4. Personal Inviolability

The inviolability of a diplomatic agent is the oldest established rule in diplomatic law. The personal inviolability of a diplomatic agent is guaranteed under Article 29 of the VCDR. This inviolability has two aspects: (i) immunity from any act by law enforcement officers of the receiving State who must not subject the diplomat to any form of arrest or detention, (ii) the positive duty of protection of the receiving State which must treat the diplomat with due respect and shall take all the appropriate steps to prevent any attack on his person, freedom or dignity.<sup>81</sup>

Many States have created special offences under national law with regard to attacks on diplomats, or have imposed especially severe penalties.<sup>82</sup> Article 2 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons<sup>83</sup>, including Diplomatic Agents, requires that specified crimes are to be ‘punishable by appropriate penalties which take into account their grave nature.’

In a further effort to specify the protection of foreign relations, the Criminal Act has its specific chapter on crimes concerning foreign relations. In accordance with the provision under Chapter IV, violence or intimidation, insults or defamation against the envoy of a foreign county is punished by the Criminal Act of Korea. Article 108 of the Criminal Act establishes the crime of Assault against a Foreign Envoy. A person who uses violence or intimidation against the envoy of a foreign county sent to the Republic of Korea shall be punished by imprisonment or imprisonment without prison labor for not

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<sup>80</sup> Ibid.

<sup>81</sup> DENZA, *supra* note 22, p. 258.

<sup>82</sup> ROBERTS, *supra* note 23, p. 249.

<sup>83</sup> Annexed to General Assembly resolution 3166 (XVIII) of December 14, 1973. Entered into force on February 20, 1977. UN Treaty Series, vol. 1035, p. 167.

more than five years.<sup>84</sup> Punishment for insults or defamation is imprisonment or imprisonment without prison labor for not more than three years.<sup>85</sup> The victim of this crime is ‘a foreign envoy’ regardless of rank, including non-permanent mission. But it is not for cases when third States are used for transit by diplomats and their families. No public action may be instituted against these crimes against the express objection of the foreign government concerned.<sup>86</sup>

On March 5, 2015 an anti-U.S. activist attacked the U.S. Ambassador to South Korea.<sup>87</sup> The attacker was arrested and charged with attempted murder, violence against a foreign envoy, and obstruction of justice. The Supreme court sentenced him to 12 years imprisonment for attempted murder, crime constituting obstruction of justice, and assaults against a foreign envoy on September 28, 2016.<sup>88</sup> Several cases of offending this article occurred and the perpetrators were charged with assault against a foreign envoy.<sup>89</sup>

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<sup>84</sup> Article 108 (1) of the Criminal Act.

<sup>85</sup> Article 108 (2) of the Criminal Act.

<sup>86</sup> Article 110 of the Criminal Act.

<sup>87</sup> On March 5, 2015, the U.S. Ambassador to Korea was cut on face and wrist by pro-North Korean activist. Police said that the attack was premeditated with an intention to kill, as his Internet browsing history showed that he had looked up the Ambassador’s blog and South Korea’s criminal law a day before the assault. ‘Envoy’s attacker had intention to kill,’ *The Korea Herald*, March 13, 2015.

<sup>88</sup> Prosecutors have been arguing that the attacker should be punished on charges of violating the National Security Act. Lower courts, however, said just because some of the arguments made by Kim coincided with those made by North Korea, does not make him a person who engages in anti-national activities that help the communist state. The Supreme Court upheld the lower courts’ decision and sentenced him to 12 years in prison for attempting to murder. ‘Top court confirms 12-year term for U.S. envoy attacker,’ *Yeonhap News*, September 28, 2016.

<sup>89</sup> Mostly throwing eggs at the diplomatic agency and diplomatic vehicles. However, the attacker of the U.S. Ambassador to Korea in 2015 had other criminal records, including assaulting a foreign envoy, and had attacked the staff of foreign embassies in 2010. He had thrown a cement block at the Japanese ambassador to Korea concerning the Liancourt Rocks/Dokdo-Takeshima issue and charged for it. *Ibid.*

### 3. 5. Immunity from Jurisdiction

#### 3.5.1. Immunity from Jurisdiction of the Diplomatic and Consular Mission

Immunity is usually defined as the exception or exclusion of the entity, individual, or property enjoying such immunity from the jurisdiction of the State; an obstacle to the exercise of jurisdiction; limitation of jurisdiction; a defense used to prevent the exercise of jurisdiction over the entity, individual or property.<sup>90</sup>

The VCDR rationalizes the privileged status of diplomats by stating that such privileges and immunities contribute to the development of friendly relations between nations and ensure the efficient performance of diplomatic missions.<sup>91</sup> The functional necessity theory seems to represent a more contemporary rationalization of immunities.<sup>92</sup> Diplomatic immunity from criminal jurisdiction is unqualified and absolute, while in the case of civil and administrative jurisdiction there are certain exceptions. Article 31 (1) of the VCDR grants diplomatic agents' immunity from the criminal jurisdiction of the receiving state, and immunity from civil and administrative jurisdiction. Article 32 stipulates that this immunity may be waived by the sending State, but that such waiver must always be explicitly expressed.

In December 15, 2009, the Established Rules of Criminal Jurisdiction on Diplomatic Missions<sup>93</sup> issued by the Supreme Prosecutors' Office stipulated the basic principles and procedures. Criminal immunity is conferred on all diplomatic agents and administrative and technical staff of foreign diplomatic missions, and on all consular officers and consular employees at foreign consular missions in Korea. However, it has been suggested that their diplomatic immunity is permissible only in connection with acts

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<sup>90</sup> "Preliminary report on the immunity of State officials from foreign criminal jurisdiction", A/CN.4/601, by Special Rapporteur Roman Anatolevich Kolodkin, p. 27.

<sup>91</sup> The preamble of VCDR.

<sup>92</sup> *Yearbook of the International Law Commission*, 1958, vol. II, General Comments on Section II, paras 1-3. The ILC noted that "this theory seems to be gaining ground in modern times."

<sup>93</sup> The Established Rules of Criminal Jurisdiction on Diplomatic Missions, Rule No. 524, Revised Rule No. 1021, September 4, 2019.

that constitute part of their official functions.<sup>94</sup>

The Guideline on Investigation of Crimes Committed by Foreigners emphasizes that due care shall be exercised in accordance with international law, including bilateral conventions and the VCDR, when investigating crimes related to diplomatic missions and consular premises.<sup>95</sup> It mentions that the authority has to conclude investigations promptly when a person with career consular officers and the consular staff is concerned.<sup>96</sup> In the event of the arrest or detention of consular officers and members of the consular staff, or of criminal proceedings being instituted against him or her, the police must promptly notify the head of the consular post. If the head of the mission is to be the object of any such measure, the MOFA must notify the sending State through a diplomatic channel. Due care and considerations shall be exercised not to infringe the privileges of inviolability which the career consular officers and consular courier enjoy with respect to their mission.<sup>97</sup>

### 3.5.2. Immunity from Jurisdiction Concerning the Premise of the Mission or Property

#### (1) Premises of the Mission

As indicated previously, there is no exception to a diplomatic agent's immunity from the criminal jurisdiction of the receiving State, however, there are exceptions to the immunity enjoyed from civil and administrative jurisdiction. The first relates to "a real action relating to private immovable property situated in the territory of the receiving State", unless such property is held by the diplomatic agent "on behalf of the sending State for the purposes of the mission."<sup>98</sup> Although there is some doubt about the meaning of a "real action"<sup>99</sup>, it is probably confined to actions "in which the ownership or possession,

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<sup>94</sup> Ibid.

<sup>95</sup> The Guideline on Investigation of Crimes Committed by Foreigners, revised at December 8, 2015, The Ministry of Law, Rule No. 1100.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> Article 31 (1) (a) of the VCDR.

<sup>99</sup> See, DENZA, *supra* note 22, pp.291-294.

as distinct from mere use”<sup>100</sup> of real property is in issue. The others are exceptions for private involvement in succession and for private, professional, or commercial activity.<sup>101</sup>

In practice, the majority of premises occupied by diplomatic agents are leased or owned by their sending States which, even if amenable to the jurisdiction under the law relating to foreign State immunity, cannot be the subject of any measures of execution whilst used as the private residence of a diplomatic agent, because these premises enjoy the same inviolability as the premises of the mission.<sup>102</sup> Likewise, no measure of execution could be taken against the private immovable property of a diplomatic agent so long as it is used as his or her private premises.<sup>103</sup>

In *Zaire’s Mission case*, the plaintiff sought to evict Zaire’s Mission to Korea from its rental premises when the Mission failed to meet its rental obligations due to the unfortunate financial condition of the sending State. The Mission became a month-to-month tenant from June 4, 1990 to June 6, 1992. The first lawsuit commenced in 1992, when the plaintiff brought an action against the Mission after it had failed to make rental payments from October 7, 1991. On September 15, 1992, the Court assumed jurisdiction and ordered the Mission to vacate the premises and to pay the full amount of damages.<sup>104</sup> But the Mission refused to follow the order.

In May 30, 1993, the landlord requested the Court to authorize the measure of execution and, the Court issued a document of execution. But the enforcement officer refused to

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<sup>100</sup> BROWN, J. “Diplomatic immunity: State practice under the Vienna convention on diplomatic relations,” *International and Comparative Law Quarterly*, vol. 37, no. 1, 1988, p. 75.

<sup>101</sup> The second exception is in the case of “an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State.” (Article 31 (1) (b) of the VCDR) The third exception is in the case of “an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his or her official functions.” (Article 31 (1) (c) of the VCDR)

<sup>102</sup> Article 30 (1) of the VCDR.

<sup>103</sup> Article 30 (3) of the VCDR.

<sup>104</sup> Seoul District Court, September 15, 1992, *92Ga-Hap22089 Decision*.

perform his/her duty of measure because of the immunity of premises of diplomatic mission.<sup>105</sup> It comes under criticism that the measure of execution on the diplomatic premises was authorized, and the concern was expressed by scholars that this would destroy the basis of diplomatic immunity.<sup>106</sup> The plaintiff filed a lawsuit with the Korean Government to compensate for the damages, but it was dismissed. The landlord then finally brought the case to the Constitutional Court. The Court indicated that the immunities of proceedings of VCDR does not harm the rights of property, and it was not the case that the Korean government had to compensate this kind of damage, as the plaintiff could have requested an advance waiver of immunity.<sup>107</sup>

From a practical standpoint, it is apparent that the burden of mission inviolability fell exclusively on landlords. It is easily assumed that the landlords are not willing to enter into rental transactions with foreign states at all, or they may charge high rent for the associated risk management.<sup>108</sup> The MOFA must increase its involvement through the diplomatic channel in preventing future litigation and resolving similar matters to protect the rights of landlords, the property rights of which are subordinated to the rights of a foreign sovereign in the name of diplomatic immunity.

## (2) Diplomatic or Consular Vehicles

Vehicles registered with foreign missions to Korea are immune from ‘search, requisition, attachment or execution’ in accordance with VCDR.<sup>109</sup> In recent years concern has

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<sup>105</sup> KANG (P), “Issues in international law involving diplomatic Premises with specific reference to the interpretation of Article 31(1)(a) of the Vienna Convention of 1961,” *Anam Pophak*, vol. 14, 2002, p. 370.

<sup>106</sup> *Ibid.*, pp. 353-354. Cf. CHOI (T), “Relationship between State Immunity and Diplomatic Immunity under the Restrictive Theory of State Immunity,” *Pophak nonch’ong*, Hanyang University, vol. 36, no.2, 2019, p. 27.

<sup>107</sup> The Constitutional Court, May 28, 1998, *96Heon-Ma44 Decision*.

<sup>108</sup> See, BARTLETT (D.F.), “767 Third Avenue Associates v. Permanent Mission of the Republic of Zaire: An uncompensated Governmental Taking”, *DePaul Law Review*, vol. 45, no.1, 1995, pp. 188-189 (noting that the drafters of the Vienna Convention did not envision this result when they adopted the liberal definition of mission inviolability into Article 22).

<sup>109</sup> Article 22 (3) of the VCDR.

been increasingly voiced about the chronic problems of illegal parking by diplomatic cars and numerous minor traffic infringements. In the case of parking violations, diplomatic vehicles are entitled to somewhat privileged treatment in respect of being towed away, which is permitted in principle.<sup>110</sup> In Seoul, one of the most congested cities, towing away a diplomatic vehicle which is causing a serious traffic obstruction is rarely done.

### 3.5.3. Motoring Offences and Claims

The most widely recognized abuse of diplomatic immunity is evading parking violations and various criminal offences, reckless driving, or driving while intoxicated.

Diplomatic vehicles are ticketed if illegally parked or in the case of traffic offences. The question is whether the diplomats will pay their traffic fines.<sup>111</sup> In 2010, the MOFA and City of Seoul used strong administrative sanctions against diplomats who failed to pay their parking and traffic tickets in Seoul, which was hailed by the media as a major improvement. Since then, the number of diplomats' traffic offences has declined significantly.<sup>112</sup> The acquisition and disposal of all vehicles for official use is denied if a mission fails to pay the traffic fines imposed on any of its vehicles.<sup>113</sup> If the driver or owner of motor vehicles that fall into the following categories, the acquisition and disposal of vehicles shall be denied: when the traffic fines imposed on the motor vehicle have not been paid without any specific reason; liability or reparation as a result of

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<sup>110</sup> See HWANG (S), "A review of the privileges and immunities in diplomatic relations," *Kukjipop pyungron*, 2009, vol. 29, p. 99.

<sup>111</sup> 'Many foreign embassies in Korea leave traffic fines unpaid,' *Yeonhap News*, November 12, 2006; AHN (B), '20 percent of diplomatic vehicles, fines unpaid', *MBN*, September 27, 2017.

<sup>112</sup> In 2011 it was announced that the City of Seoul reduced the number of traffic offences by 50% in one year. 'Drastic Reduction of Traffic Offences by Diplomatic Missions', *Yeonhap News*, December 8, 2011.

<sup>113</sup> As for vehicles for personal use, the disposal of a vehicle shall be denied if the driver or owner of the vehicle fails to pay traffic fines. Entitled entities are advised to check regularly to see whether any traffic fines have been imposed on their vehicles. Administrative sanctions may also be imposed if the entitled entity does not observe the rules governing the registration, disposal, inspection and insurance of motor vehicles. *Supra* note 78, p. 46.

traffic accidents of the motor vehicle has not been resolved.<sup>114</sup>

The MOFA considers drunk driving a serious offence. If the member of a mission is found to have driven under the influence of alcohol or caused traffic accidents while drunk driving, the MOFA may take necessary measures, including the declaration of *persona non grata*.<sup>115</sup>

It is noted that, as of 2017 millions of dollars were owed from diplomats' unpaid parking and traffic tickets in Korea.<sup>116</sup> According to the report from the National Police Agency, many foreign diplomats in Korea do not take responsibility for violating traffic laws and use their diplomatic immunity to avoid paying fines.<sup>117</sup> Furthermore, in practice, when the Head of Mission provides an explanation of an incident and requests withdrawal of charges, the Office of Protocol of the MOFA tends to comply.<sup>118</sup>

#### 3.5.4. Waiver of Immunity

In order to subject a diplomat to Korean law, the Korean government can negotiate with the sending state to waive immunity. Under Article 32 of VCDR, if the sending state waives immunity, the receiving state does not then violate any of the Convention's protections by punishing the offending diplomat. Under the requirement of the *expressis verbis* waiver, the statement concerning the waiver of immunity should be submitted in writing.<sup>119</sup>

In practice, the majority of cases where proceedings against a person entitled to diplomatic immunity are considered never come to trial, as the sending states are unwilling to waive his/her immunity. But the waiver of immunity happens when the incident seriously affects relations between receiving and sending States. Recently, a Mexican

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> KIM (T), 'Diplomats to Korea, 73 offences of Korean domestic laws for 5 years', *The Hankyoreh*, October 1, 2017.

<sup>117</sup> *Id.*

<sup>118</sup> HWANG, *supra* note 110, p. 99.

<sup>119</sup> *Supra* note 93, Paragraph 3(b).

diplomatic agent left Korea after police began investigating his acts of sexual abuse. This incident was followed by public uproar, particularly when he had defied two police orders for questioning and instead returned to his country. Finally, due to intense public pressure the MOFA strongly requested that the Mexican Embassy cooperate in the investigation, and the Mexican government then returned him to Korea.<sup>120</sup>

### Concluding Remarks

International law, to which Korea is firmly committed, requires that Korea's law enforcement authorities extend certain privileges and immunities to members of foreign diplomatic missions and consular posts. The VCDR and VCCR are without doubt the most widely used multilateral regimes in international relations. Diplomat or consular agencies can thereby act independently of any pressures in representing the sending State under the legal system of immunity, which is essential for the safe and regular conduct of diplomatic relations by diplomatic missions of their daily functions representing the sending State.<sup>121</sup>

The Korean government implements international law concerning diplomatic and consular immunity and inviolability by applying domestic laws and regulations as much as possible. The revised version of the Guideline on the Investigation of Crimes Committed by Foreigners<sup>122</sup> also requires complying with treaties and international practices regarding consular immunities and privileges. However, it should be noted that many diplomats have abused the privileges afforded to them by diplomatic immunity by disregarding Korean national law. Due to incidences of the abuse of privilege, such as various criminal offences including sexual assaults, assaults and traffic offences, it is suggested that the MOFA should respond strongly and ensure that diplomats comply with Korean law.<sup>123</sup>

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<sup>120</sup> 'Mexican Diplomat Accused of Sex Crime,' *KBS News*, August 16, 2017.

<sup>121</sup> BROWN, *supra* note 100, p. 54.

<sup>122</sup> *Supra* note 95.

<sup>123</sup> *Supra* note 116. In the case of a crime committed by diplomats, the receiving State can only take a few possible steps. In the most serious cases, the receiving state can limit the size of the mission or terminate relations with the sending state altogether, and the receiving State may also

The VCDR and VCCR oblige members of a diplomatic mission and their families to respect the laws and regulations of the host country.<sup>124</sup> It is obvious that the abuse of privileges and immunities by the diplomatic or consular missions constitute one of the major challenges to the Conventions. The Korean practices and existing legal rules are mostly in line with the Conventions on diplomatic and consular relations. Yet it remains to be seen how the Korean government and judicial courts will adjust the balance, and adopt new solutions to old problems by implementing international law in its national legal system.

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issue threats of expelling the diplomat. See CASTRO (A. M.), "Abuse of diplomatic immunity in family courts: There's nothing diplomatic about domestic immunity," *Suffolk University Law Review*, vol. 47, no. 2, 2014, pp. 364-365; MORRIS (W.G.), "Constitutional Solutions to the Problem of Diplomatic Crime and Immunity," *Hofstra Law Review*, vol. 36, iss. 2, 2007, pp. 608-609.

<sup>124</sup> Article 41 of the VCDR; Article 55 of the VCCR.