ADVOCATES LOCKDOWN E-01

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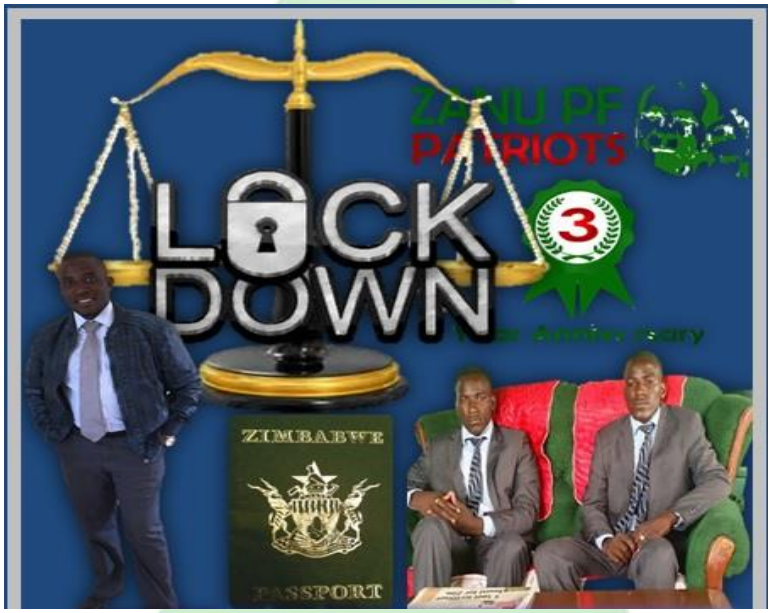

the godFather: Good Evening Patriots
Welcome to this special edition of Prime Time dubbed *THE ADVOCATES LOCKDOWN*

The journey to today's program began on Sunday two weeks ago at the Capital 20 West Hotel Sandton South Africa when our First Lady Dr.

Grace Mugabe allegedly beat up South African model Gabriella Engels. A series of events followed and it resulted with Dr. Mugabe being given Diplomatic Immunity.

We debated a lot here on Patriots but it then came to the Admins' observations that the debates were from a point of ignorance hence we had to rope in experts.

We started with Dr. FFF Bhunu an International Relations Guru who came with *INTERNATIONAL RELATIONS SYMPOSIUM* and today we wrap it up.

Without wasting much time let me hand over the proceedings to the Chief Moderator Admin Elias.

Admin Elias

The courtroom is all yours...

Elias:

Twalumba
Thank you very much Cde Godfather and good evening Patriots.

As has been happening in the private and public domain in the past two weeks we sought to ensure our members are enriched in the aspects of Diplomatic Immunity and tonight's program will be having the following theme and intent.

Theme:

The legal derivations involved in the permissibility of diplomatic immunities for acts committed by non-state and non-diplomatic actors.

This program seeks to discuss the subject of diplomatic immunity from arrest and criminal prosecution, specifically when such immunities and inviolabilities are awarded to the direct familial constituents of a head of state for actions carried out in an unofficial state capacity.

Our main goal will be to use the various case laws and juxtapose them with the happenings that culminated after the unfortunate Capital 20 West Hotel challenges.

I am your host and moderator Admin Elias.

	Advocates *Good evening and welcome to **THE ADVOCATES LOCKDOWN***
Adv Kuda:	Good evening Admin Elias
Katonha Farai:	**Good evening Admin & the entire crew behind the scene?**
Katonha Mayor:	**My pleasure, a very good evening Admin Elias**
Elias:	*Evening Adv Muzenda* *Good evening **The Katonhas*** *The Katonha brothers. Must I regard u as a tag team or as individuals during this session?*
Katonha Farai:	**Tag team**
Katonha Mayor:	**Tag team sir**
Elias:	*Very well* *Prime time now in session. Let's get down to business* *To begin with one must recognize the fundamental precepts underlying the utility and objective of immunity within the government arena. Immunities are granted to government officials and heads of state based on two interlocking theories:* *1. The theory of functional necessity and;* *2. The theory of personal representation.* *Let's begin by defining the two theories with Advocates The Katonhas defining the theory of functional necessity and Advocate Kudakwashe defining the theory of personal represantation.*
KATONHA FARAI:	The theory of Functional necessity is Essential, in fulfilling the important function of maintaining a line of communication between civilisations, which is indispensible for the furtherance of relations. In times of peace such communication facilitated mutual progress and in times of war, it was needed to end the conflict. The inviolability of the messenger was, therefore, of paramount importance to maintain this line of communication for, without it, the fallout would be negative both for the sending as well as the receiving party. This is a more pragmatic

reason than that of the representative character theory, namely that sovereigns of any state would not tolerate an insult against their person or their personal agent, as that could even result in hostilities. *Functional necessity* may, therefore, be regarded as being the cause of diplomatic immunity. .

According to The Vienna Convention on Diplomatic Relations 1961 clearly espouses a *functional approach* as;

that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states

The natural law when establishing that immunity for ambassadors is, in part, derived from *functional necessity*.

This principle, which can be found in many of the treatises written on the subject, was applied in the Barbuits Case, for example, where the court used *functional necessity* in conjunction with representative character when interpreting the Diplomatic Privileges Act 1708. It was held that: “The privilege of a public minister is to have his person sacred and free from arrest, not on his account, but on account of those he represents, and this arises from the necessity of the thing, that nations may have intercourse with one another in the same manner as private persons, by agents, when they cannot meet themselves.”

With the weakening of the representative character and extra-territoriality theories at the end of the nineteenth century, partly due to the democratisation of states, the influence and use of the functional necessity theory grew considerably.

Mayor shall give a further explanation to encompass everything concerning the Theory of Functional necessity.

Adv Kuda:

The theory of personal representation is also known as the "representative theory".

This theory is based on the idea that the diplomatic mission personified the sending state. The theory has the deepest and earliest origin. The theory gained widespread recognition during the Renaissance period when diplomacy was dynastically oriented. These representatives received special treatment. When the receiving State honoured them their ruler was pleased and unnecessary conflict was

avoided. The representative was treated as though the sovereign of that country was
conducting the negotiations, making alliances or refusing requests. In short the representative was treated as if they were the monarch them self. generally speaking If applied in modern times this theory would be less appropriate, in that it was based mainly on monarchies and not on sovereign.

However traces of this theory apply in modern legal jurisprudence and diplomacy. for example the Supreme Court of America in Agostini v De Antueno, held that diplomats
are representatives of his master. Furthermore, Diplomatic privileges and immunities are based
upon the representative's character of the diplomat.

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KATONHA Mayor: **Just to add**

FUNCTIONAL NECESSITY

A functional necessity is a useful measure when faced with the interpretation of the degree of immunity and amount of privileges a diplomatic agent must enjoy in order to ensure his inviolability. Since this theory is not just a mechanism that enables the restriction of immunities, but also provides for the allocation of immunities, it can justify the granting of immunities and privileges. A final but important attribute of this theory is that it offers flexibility and can, therefore, stand the test of time.

Elias: *phew. Long responses. No wonder all judges a bald. Give a moment to go through all that*

ok. Let's deal with this and make sure we all understand from a layman's point of view.

1. The inviolability of the messenger. Could this be also be viewed simply as our traditional 'mutumwa haana mbonje' theory?

Katonha Farai: **That's true & it also meant that the messenger is just there to serve purpose besides all other factors thereof**

Elias: *2. Functional necessity;*

	Are u saying this immunity is actually granted to the sender nation rather than the actual person carrying that immunity in order to facilitate the work or relationship btwn nations regardless of the criminal act that person may commit? *may u give an example of the flexibilities this immunity can offer*
Katonha Mayor:	**Like I said before a functional necessity is a useful measure when faced with the interpretation of the degree of immunity and amount of privileges a *diplomatic agent must enjoy* in order to ensure his inviolability.** **Since this theory is not just a mechanism that enables the restriction of immunities, but also provides for the allocation of immunities, it can justify the granting of immunities and privileges.** **He / she can enjoy on behalf of a state and not necessarily his / her benefits** **Even though he or she is the one benefiting**
Elias:	*I am finding similarities in the 2 theories.* *How do we differentiate which one is in play? even though we no longer have those monarchs everywhere but wouldn't u agree that even in modern democracies, a foreign envoy still carries the clout of the sending state and can decide and sign agreements on behalf of the sending nation* *clear. Was just reaffirming on behalf of Sabhuku and crew. The layman*
Adv Kuda:	**there are similarities as you rightly observe though one would object to the influence of the representative theory on the following grounds:** **1. the foreign envoys cannot have the same degree of immunity as the ruler or sovereign.** **2. the decline of the monarchs and the progression of majority vote make it unclear who the diplomat represents. Last, the immunity does not extend from the consequences of the representatives' private actions. The theory by placing the diplomat above the law of the receiving sovereign, which is opposite to the principle that all sovereigns are equal.**

3. This theory of representation is inadequate as it explains only those exemptions

concerning official acts which diplomatic agents enjoy in common with other State officials, but leaves unexplained those immunities which they possess with reference to acts performed in a private capacity.

But despite its declining popularity, the theory is still used, albeit infrequently. For example, in 1946, a federal court in New York granted diplomat immunity from service of process under this theory.

Elias: *Advocates, so from these two definitions does it mean Immunities are held as utilitarian, and are seldom exploited by agents, as they (primarily diplomatic agents) are required to respect and abide by the local laws and procedures of external states regardless of immunities granted?*

Advocate Kudakwashe you may respond first then Advocates The Katonhas will follow.

Adv Kuda: **Thank you Cde Elias**

Let me begin by explaining for the benefit of my fellow Patriots the categories of people who we generally refer to as Diplomats. The Vienna Convention on Diplomatic Relations refers to diplomats as heads of diplomatic missions and divides them in their order of precedence into:

1. **Ambassadors or Nuncios**
2. **Envoys, Ministers and internuncios**
3. **Charges d'affaires are accredited to ministers for foreign affairs**

The above are usually appointed with the prior consent of the receiving state but may be withdrawn unilaterally.
they have the following immunities/privileges

-They are immune from local, civil and criminal jurisdiction

-Their persons, premise, archives and documents are inviolable

-Diplomats are not exempted from observing the law but are rather immune from the jurisdiction of the courts.

-Since immunity really belongs to the state it may be waived by the state or the diplomat's superior regardless of his own wishes (persona non grata)

-Such waiver exposes him to prosecution or litigation

-Consuls are granted special privileges and exemptions in bilateral treaties and these include immunity from proceedings and inviolability for papers and archives.

From the above we can see how Diplomats are related to local laws and procedures and in summary we can say a diplomat is immune from local laws though their home nation can rescind the immunity. The Diplomat does however have a duty to respect local laws which makes good politics and relations

Elias: *the Katonhas may also post your response*

Katonha Mayor: **Unfortunately, the following points are often not emphasised in discussions or rulings on Article 98(1) and are entirely overlooked by the AU Commission:**

i. Article 98(1) only covers "State or diplomatic immunity of a person or property of a third State";

The concept of diplomatic agents residing in another country dates to the fifteenth century, but the role of diplomats has evolved with the passage of time. Originally, agents were asked to help to work out specific negotiations between countries. Nowadays, their duties include cultivating a relationship between their native country and the host country; serving as intermediaries by relaying each country's positions to the other; and trying to ensure the best possible treatment for their home countries. The Vienna Convention on Diplomatic Relations (Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95) contains the most widely accepted description of the International Law on diplomacy. The convention splits the functions of diplomatic agents into six categories: representing the sending state; protecting the sending state's nationals within the receiving state; negotiating with the receiving state; notifying the sending state of conditions and developments within the receiving state; promoting friendly relations

between the two states; and developing economic, cultural, and scientific relations between the two states.

ii. Head of state immunity is not the same thing as either a) state immunity or b) diplomatic immunity; and

iii. Head of state immunity is the relevant immunity in this case.

Katonha Farai: I conquer with advocate Kuda.

To add on that these agencies enjoys the 99¾% of these immunities.

Katonha Mayor: However I concur with my learned friends

Elias: so as examples, in which instances can the sending state waiver immunity and for what purpose
with the growing responsibilities for diplomatic agents over time, how has immunity evolved to match that

Adv Kuda: Lion of Binga

were a diplomat acts and behaves otherwise, disturbs the internal order of the receiving state, the latter will certainly request his recall or dismiss him at once. Thus it will often be the policy of the receiving states to request a waiver of immunity in such cases and if no waiver is forthcoming, normally to require the alleged offender to leave the country.

This policy is followed in all most all the states. Even in the case of conspiracy the receiving state has only right to expel and not to prosecute or punish the diplomatic agent. Since the Second World War, the expulsion of diplomatic agents on the grounds amounting to engaging in activities subversive of the receiving state has become almost a commonplace of international relations.

Katonha Farai: It is mostly based on the receiving end.
The reaction of the receiving state to criminal offences committed by diplomatic agents depends largely on the gravity of the alleged offence. But when more serious crimes are concerned and admonition is not considered as a satisfactory punishment, it is more likely that the receiving state will request the sending state to waive the immunity of the offending diplomat so that the latter could be tried in court. The waiver must always be expressed and once given the waiver is irrevocable. The requirement of the expressisverbis waiver

reduces the possibility that the receiving state mistakenly considers, for example, an oral statement from the sending state as a valid *waiver of immunity*. It has to be borne in mind that proceedings in the same case, but on different stages, are to be regarded as a whole and thus one waiver is enough. The ILC also stated that it goes without saying that proceedings, in whatever court or courts, are regarded as an indivisible whole and that immunity cannot be invoked on appeal if an express waiver was given in the court of first instance.

The request for waiver of immunity usually means that the criminal offence in question is of such a degree that if the sending state does not waive the immunity, the receiving state is no longer prepared to accept the diplomat in issue as a diplomatic agent. States, however, have waived the immunity of their diplomatic agents and one of such instances concerns a Georgian diplomat. The second-highest ranking diplomat for the Republic of Georgia in the United States, Gueorgui Makharadze, was involved in a tragic automobile accident that resulted in the death of a sixteen-year-old girl, a Brazilian national, on 3 January 1997 in WashingtonD.C. He was alleged to have been driving at a speed of eighty miles per hour and under the influence of alcohol, but due to his diplomatic status he was not given a breathalyser or blood test. This incident was followed by public uproar, particularly when Georgia prepared to recall the diplomat. Finally, due to intense public pressure, the Georgian president agreed, as a moral gesture, to voluntarily waive Makhardze's immunity. The diplomat consequently pled guilty and currently serves his sentence in the United States.

The waiver of immunity does not prevent committing of serious crimes, but can allow justice to take its course where such crimes have been committed. Even then there is no guarantee that states will waive the immunity of their diplomats and as a traditional rule, an undertaking by the state or its agent that immunity will be waived if dispute arises is of no legal effect. This question is more likely to be relevant in case of civil matters, for example, when a landlord is reluctant to rent accommodation to diplomats and asks for such prior statement. The Vienna Convention and its travaux préparatoires, however, do not say anything about the effect of a prior agreement on waiving of diplomatic immunity. But as in the field of sovereign immunity it is now accepted that a state may agree in advance to submit a class of dispute to the jurisdiction of the court of another state and such agreement may constitute a valid waiver of immunity — there seems to be no reason why the state, which has the sovereign power to waive diplomatic immunity, could not do so in

	advance. Though prior waiver of immunity in respect of criminal offences is still very unlikely, receiving states should consider such steps in regard to such other states whose diplomats tend to gravely misbehave.
Elias:	*so here agents also face the risk of being sacrificial lambs when the sending state probably decides to deny any hand in the action of their agent?*
Katonha Mayor:	**But in few cases.**
Adv Kuda:	**a nation can sacrifice its diplomat for political expediency as submitted by Cde Adv. T. Katonha that is a rare occurrence**
Elias:	*so in a nutshell factors that are considered in waivering immunity are the seriousness of the crime and public reaction. Any other?* *can't they sacrifice their national for financial gain where an economic relationship may be affected?*
Adv Kuda:	**i would differ and say it's about the political and collateral damage**
Katonha Farai:	**And the relationship between the two member states will always take precedence**
Katonha Mayor:	**In recognition of this reality, it has long been a tenet of international law that a state must expressly consent to a rule (by, for example, signing a treaty) before it can be legally bound by the rule. Customary international law not only upsets this idea of consent, it does it by stealth.** **In relation to the psychological element that is opinio juris, the International Court of Justice further held in North Sea Continental Shelf, that "not only must the acts concerned amount to a settle practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it... The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.". The Court emphasised the need to prove a "sense of legal duty" as distinct from "acts motivated by considerations of courtesy, convenience or tradition". This was subsequently confirmed in Nicaragua v. United States of America.** ***Bilateral versus multilateral customary international law***

	The recognition of different customary laws can range from simple bilateral recognition of customary laws to worldwide multilateral recognition. Regional customs can become customary international law in their respective regions, but do not become customary international law for nations outside the region. The existence of bilateral customary law was recognized by the International Court of Justice in the Right of Passage Over Indian Territory case between Portugal and India, in which the court found "no reason why long continued practice between the two states accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two states
Adv Kuda:	**these are the factors that really form relations between states and the considerations are thus about whether a nation can afford a fallout or diplomatic row with another**
Elias:	*so it doesn't what kind of crime was committed?* *Don't host nations have clauses in their Acts on immunity that consider the seriousness of the crime? for example when death is involved? Advocate* *So are u saying diplomatic immunity is not universal? it varies from state to state. Region to region?*
Katonha Farai:	**The nature of the crime has got an impact. Though the bilateral relations between states will supersede everything.** **For example crimes against persons in SA are more their immunities are decided by pressure groups unlike the State on in own.** **Section 6(a) of the SA's Immunities Act 87 of 1981. All crimes against injury or deaths of a person . The priviledge of immunity falls away even though the state finds it feet to grant it.**
Katonha Mayor:	**For example SA** **Death or injury can be invoked where they said section 6(a) states no foreign person shall be immune to criminal charges if death or injury** **"A foreign State [which includes the Head of State] shall not be immune from the jurisdiction of the courts of the republic in proceedings relating to, inter alia (among other things), the injury of any person caused by an act or omission in the republic,"**

"Any derivative immunity that may attach to any state would, in our contention, not contain immunity in conflict with section 6(a) of the Foreign States Immunities Act.

"If the minister intended such immunity, it would lack legality and be irrational."

Section 2(2)(a) of the Diplomatic Immunities and Privileges Act 37 of 2001 states that immunity is stripped if the accused person, if convicted, could face five or more years in jail.

The Diplomatic Immunities and Privileges Act 37 of 2001 enacts into South African law the Vienna Convention on diplomatic relations, which is widely used for most global diplomatic transactions.

"The purpose of the Vienna Convention is set out in the preamble, thereof:

"One of the founding principles set out in the preamble is the realisation that the purpose of such privileges is not to benefit individuals, but to ensure the efficient performance of the functions of diplomatic missions representing States," the court papers read.

"In it, one of the founding principles is that the purposes of privileges and immunities are not to benefit individuals but 'to ensure the efficient performance of the functions of diplomatic missions as representing States'."

Mostly it depends with the relationship between the States

Elias: so if such provisions do exist yet the relationship of the 2 states is good and immunity is granted against the Acts of the host nation, can such granting be challenged? By whom? and what are the most likely outcomes and subsequent course of action

Katonha Mayor: **Thank u, although the 2 States may agree on Immunity to be granted, but individual's rights will take precedence**
Unlike when the crime is committed against a State rather than an individual.

1) When one is wronged it can be challenged
2) When it is a state it's a done deal when granted

Katonha Farai: **And it depends on the host,**
If the society is more influential than the state then automatically the immunity will be challenged & revoked

Elias: *Advocates, the term Immunities has been cropping up a lot from our two first questions. Let's get down to defining these immunities. When the term 'immunities' is traditionally presented, many legal experts first look to the 1961 Vienna Convention on Diplomatic Relations and Optional Protocols, specifically: Article 29 regarding full inviolability against arrest or detention, within the scope of Article 37 granting immunities to family members of agents.*

Does, this treaty (and the 1969 New York Convention on Special Missions) explicitly represents diplomatic agents and their families, include heads of state or ministers of state? If not is it therefore invalid and ill-equipped to handle the scope of a case where a Head of State and his families is involved?

Advocates The Katonhas you naturally respond first then we have Advocate Kudakwashe responding after you.

Adv Kuda: **I will start by defining what the concept of immunity entails:**

Immunity means an exemption. And diplomatic immunities means the exemption of normally granted to the diplomats. immunity is a form of legal immunity and a policy held between governments, which ensures that diplomats are given safe passage and are considered not susceptible to lawsuit or prosecution under the host country's laws. It was agreed as international law in the Vienna Convention on Diplomatic Relations 1961, though the concept and custom have a much longer history.

Katonha Farai: **Article 29 & 37 can be articulated in the following sense.**

Limiting immunity to official acts

Occasionally it has been suggested that diplomatic agents should enjoy their diplomatic immunity only in connection with actions forming part of their official functions. Therefore, any illegal acts, which are private acts in character or committed in connection with private activities, are under the jurisdiction of the receiving state and the latter can adjudicate over the offending diplomat. On the one

hand, this can cause serious problems when deciding whether this or that action falls under acts performed in a private capacity or as part of official functions as numerated in article 3. Indeed, a Portuguese court once held that article 3 sets out the general framework for diplomatic functions and must be interpreted as also covering all other incidental actions, which are indispensable for the performance of those general functions listed in that article. The ICJ also takes a similar stand and holds that no distinction can be drawn between acts performed in an official capacity and those claimed to have been performed in a private capacity. Even though one could prima facie conclude that certain actions can be considered to be outside his official duties, such actions may still be of official character if the diplomat was instructed by his sending state to undertake that activity. On the other hand, can diplomatic agents and their sending state ever reasonably and credibly argue that committing serious offences can be considered as performing official functions (unless such offences were accidentally committed while carrying out diplomatic functions)? .

The scope of official functions becomes relevant also in another context. In fact, not all acts performed by a diplomatic agent remain forever immune from the jurisdiction of the receiving state.

After the function of a diplomatic agent comes to an end, he loses his diplomatic immunity and he may be sued for all his actions except for those performed in the exercise of his official functions. The diplomat concerned of course has reasonable time to leave the receiving state before he loses his immunity, but whenever he chooses to return to that country, he may find himself faced with criminal procedure. One can reasonably argue that such offences as murder, rape, causing serious bodily injuries, kidnapping, war crimes and crimes against humanity do not form a part of official functions and can be tried by the receiving state. The latter can also seek for extraction of the former diplomat concerned from the sending state or other states which exercise territorial jurisdiction over him. However, the usability of such a possibility is again somewhat doubtful, as the sending state is unlikely to extradite its own diplomat, and if it was ready to see the diplomat prosecuted, it could have waived his immunity or tried him itself.

Katonha Mayor:

Presently, we have to conclude that the possibilities to prosecute diplomats or other state officials who have committed serious crimes but enjoy personal inviolability and diplomatic immunity are very much limited, both in number and effectiveness. As amendments to

	the Vienna Convention are unlikely to be achieved either through treaties or custom, so far we have to hope for greater readiness of sending states, in co-operation with receiving states, to ensure prosecution of serious criminals. Hopefully, we can in the future also rely on proceed should be the least biased and restricted. The problem is that the principle of reciprocity prevents states from introducing, through practice, perhaps desirable changes to diplomatic law by establishing a hierarchy between diplomatic laws on the one hand and human rights and international humanitarian law on the other. But besides ensuring prosecution, receiving states should also attribute more importance to the prevention of such crimes by asking sending states to provide general and possible criminal background information on the diplomat and explanations about why the person left prior postings (if not because of normal termination of functions) and also by contacting those countries where the diplomat in question has served prior terms and inquire as to whether any problems arose involving that person.
Elias:	*may u also address the second part of the question. The scope. The issue of heads of states, ministers, their family's et al* *so can the host nation shelve even crimes committed during discharge of official duties and patiently wait to prosecute when the agent returns when they no longer have immunity?* *Basically in principle, diplomats are above the law while on foreign mission?* *Secondly can the receiving nation refuse a diplomat entry based on the personal background given by the sending state*
Katonha Farai:	**It depends with country & it's perspectives but the nature of the crime will form the base. Some crimes do not warrant immunity since crafting a defence out of the circumstances surrounding the offence are always being a challenge. Considering the diplomat in his/her capacity. But mostly some of the issues will be centered on the Bilateral relations between those two states.**
Elias:	*Advocates, so prior to the adoption of the Vienna Convention, what was the standard measure used by the International Law Commission to gauge immunities?* *Advocate Kudakwashe you come in first and Advocates Katonhas you add your input later.*

Adv Kuda: In a nutshell Diplomatic Immunity was governed by customary law and practice before codification the Vienna Convention that you allude to. Earlier i did speak on the representative theory which was the basis of diplomatic immunity then

Katonha Mayor: 4 . *Customary international law*
Customary international law are those aspects of international law that study the principle of custom. Along with general principles of law and treaties, custom is considered by the International Court of Justice, jurists, the United Nations, and its member states to be among the primary sources of international law.

The vast majority of the world's governments accept in principle the existence of customary international law, although there are many differing opinions as to what rules are contained

The International Court of Justice Statute defines customary international law in Article 38(1)(b) as "evidence of a general practice accepted as law. “This is generally determined through two factors: the general practice of states and what states have accepted as law.

There are several different kinds of customary international laws recognized by states. Some customary international laws rise to the level of jus cogens through acceptance by the international community as non-derogable rights, while other customary international law may simply be followed by a small group of states. States are typically bound by customary international law regardless of whether the states have codified these laws domestically or through treaties

A peremptory norm (also called jus cogens, Latin for "compelling law") is a fundamental principle of international law which is accepted by the international community of states as a norm from which no derogationis ever permitted. These norms rooted from Natural Law principles,[3]and any laws conflicting with it should be considered null and void. Examples include various international crimes; a state which carries out or permits slavery, torture, genocide, war of aggression, or crimes against humanity is always violating customary international law.

Jus cogens and customary international law are not interchangeable. All jus cogens are customary international law through their adoption by states, but not all customary international laws rise to the level of

peremptory norms. States can deviate from customary international law by enacting treaties and conflicting laws, but jus cogens are non-derogable.

Codification of international customary

Some international customary laws have been codified through treaties and domestic laws, while others are recognized only as customary law.

The laws of war, also known as jus in bello, were long a matter of customary law before they were codified in the Hague Conventions of 1899 and 1907, Geneva Conventions, and other treaties. However, these conventions do not purport to govern all legal matters that may arise during war. Instead, Article 1(2) of Additional Protocol I dictates that customary international law governs legal matters concerning armed conflict not covered by other agreement.

Consent and International Customary Law

It is commonly said that the international community is 'anarchical', in that there is no layer of higher government with absolute power to treat states like citizens. This is in a way unsurprising, since most states could (if pressed) rely solely on themselves for survival. States are thus in a position, unlike individual humans, to refuse the benefits and reciprocal responsibilities of participating in a community under law.

In recognition of this reality, it has long been a tenet of international law that a state must expressly consent to a rule (by, for example, signing a treaty) before it can be legally bound by the rule. Customary international law not only upsets this idea of consent

The International Court of Justice

The Statute of the International Court of Justice acknowledges the existence of customary international law in Article 38(1)(b), incorporated into the United Nations Charter by Article 92: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply...international custom, as evidence of a general practice accepted as law."

Customary international law "... consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way. “It follows that customary international law can be discerned by a "widespread repetition by States of *similar international acts over time* (State practice); Acts must occur out of sense of obligation (opinio juris); Acts must be taken by a significant

Bilateral versus multilateral customary international law

The recognition of different customary laws can range from simple bilateral recognition of customary laws to *worldwide multilateral recognition. Regional customs can become customary international law in their respective regions, but do not become customary international law for nations outside the region. *The existence of bilateral customary law* was recognized by the International Court of Justice in the Right of Passage Over Indian Territory case between Portugal and India, in which the court found "no reason why long continued practice between the two states accepted by them as regulating their relations.

Other examples accepted or claimed as customary international law include the principle of non-refoulement and immunity of visiting foreign heads of state. United Nations Security Council in 1993 adopted Geneva conventions as customary international law because since the time being it has transformed itself into customary international law. If any treaty or law has been called as customary international law then parties which have not ratified said treaty will be bound by the treaty

Elias: *what then stopped agents from being executed back then in the absence of international standard practices*
at this juncture, i have to put into consideration the time. Late is the hour
i am forced to adjourn and break our session into a 2 part or possibly a 3 part session.

For that reason, i will forego follow up questions on question 4 Advocates

I can’t thank you yet as the journey still continues...

Katonha Farai: **Most indebted**

Elias: But for tonight

SESSION ADJOURNED