

**LegCo Panel on Administration of Justice and Legal Services
on 15 July 2009**

**Supplementary Note on Questions Relating to Diplomatic and Consular
Immunities in Respect of Criminal Jurisdiction**

In response to the letter from the Clerk to the AJLS Panel dated 25 June 2009, this note sets out for Members' reference the relevant principles and practices concerning the claim for diplomatic and consular immunities in respect of criminal jurisdiction, as well as relevant statistical information.

Background

2. For background information, Members may wish to refer to the Speaking Note of the Secretary for Justice presented to the AJLS Panel on 30 March 2009 in which relevant legal issues on immunities of the spouse of a head of state are outlined (See Annex A – “SJ’s Speaking Note”¹).
3. The HKSAR Government follows well-established principles and practices in the treatment of diplomatic agents and consular officers (as well as their family members) in accordance with the international treaties (both multilateral and bilateral) and national laws, as applied to and implemented in the HKSAR.
4. The relevant instruments include the following:
 - (a) the Vienna Convention on Diplomatic Relations (1961) (“VCDR”);
 - (b) the Vienna Convention on Consular Relations (1963) (“VCCR”);
 - (c) applicable bilateral agreements concluded by the People’s Republic of China (“PRC”);
 - (d) Regulations of the People’s Republic of China Concerning Diplomatic Privileges and Immunities (“the PRC Regulations on Diplomatic Privileges”);

¹ Ie Mrs Grace Mugabe, wife of the President of the Republic of Zimbabwe, in LC Paper No CB(2)1215/08-09(02).

- (e) Regulations of the People’s Republic of China Concerning Consular Privileges and Immunities; and
- (f) Consular Relations Ordinance (Cap 557).

5. In the absence of applicable international treaties, treatment of certain foreign officials (including heads of state and government) and their family members follows general international law and diplomatic practices as well as the PRC Regulations on Diplomatic Privileges, as applied in the HKSAR.

General Principles

6. Immunities are granted to persons by virtue of their status in accordance with international law and diplomatic practices, as implemented in the laws of the HKSAR. It is significant to note that such immunities are conferred by law and need not be claimed by the persons concerned.

7. Whether a person is entitled to immunities depends on the provisions of the relevant treaties, national laws, and SAR legislation. For example, under VCDR Art 31(1), a diplomatic agent “shall enjoy immunity from the criminal jurisdiction of the receiving State”.² In the case of consular officers, VCCR Art 43(1) states that they are immune from criminal jurisdiction of the receiving State “in respect of acts performed in the exercise of consular functions”.³ Additional immunities may be conferred by bilateral agreements concluded by the PRC with other foreign states as permitted under VCCR Art 73(2).

8. As regards family members, VCDR Art 37(1) provides that “[t]he members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36”, including immunities from criminal jurisdiction under Art 31(1).⁴

9. However, such immunities are subject to waiver by the sending State. For example, VCDR Art 32(1) stipulates that the immunities of diplomatic

² This immunity is also provided for in Art 14(1) of the PRC Regulations on Diplomatic Privileges.

³ This treaty provision has been given the force of law in the HKSAR by s3(1) of Cap 557 (read with the Schedule).

⁴ In the case of the spouses of foreign heads of state, as observed in para 8 – 11 of SJ’s Speaking Note, several states grant immunities to spouses of foreign heads of state, including the UK and Australia, apart from China.

agents may be waived by the sending State.⁵ Similarly, VCCR Art 45(1) provides that the sending State may waive, with regard to a member of the consular post, the privileges and immunities provided for in VCCR Art 43⁶.

Practices

10. In practice, when law enforcement agencies come across cases involving individuals claiming diplomatic or consular immunities and are contemplating prosecutions against these individuals, they will approach the Protocol Division of the Office of the Chief Secretary for Administration (“the Protocol Division”) for assistance.

11. The Protocol Division will assist in establishing the status of the individuals concerned and the extent of immunity they enjoy. Where necessary, the Department of Justice will be consulted for legal advice on issues of immunities. Moreover, in case of doubt, the Office of the Commissioner of the Ministry of Foreign Affairs in the HKSAR may be approached for ascertaining the status of the person(s) concerned⁷. Law enforcement agencies will follow up with these cases, taking into account the Protocol Division’s advice.

12. Law enforcement agencies may also refer the case directly to the Prosecutions Division of the Department of Justice for legal advice, which may in consultation with the International Law Division (if necessary) seek assistance from the Protocol Division for ascertaining the status of the person(s) concerned.

Statistical Information

13. Annex B sets out the statistical information concerning diplomatic and consular immunities as provided by the Protocol Division.

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⁵ This provision is implemented by Art 15(1) of the PRC Regulations on Diplomatic Privileges.

⁶ See also the Schedule to Cap 557.

⁷ See para 3 and 4 of SJ’s Speaking Note.

AJLS Panel Meeting on 30 March 2009

**Incident concerning Mrs Grace Mugabe,
First Lady of Zimbabwe**

Speaking Note

Madam Chairman,

The incident concerning Mrs Grace Mugabe, the wife of the President of the Republic of Zimbabwe, was only touched upon briefly in the Special Finance Committee last Monday. I am grateful for the opportunity this afternoon to provide further details to this Panel.

2. By way of background, Mrs Mugabe was alleged to have assaulted Mr Richard Jones, a photojournalist working for the Sinopix Photo Agency, and a colleague of his, on 15 January 2009 during her visit to Hong Kong. The photojournalists made a report to the Hong Kong Police on 17 January 2009, the day after Mrs Mugabe's departure.

3. The police referred the case to the Prosecutions Division of the Department of Justice (DoJ) for legal advice. In view of the identity of Mrs Mugabe, the HKSARG approached OCMFA to ascertain whether she enjoyed any privileges or immunities.

4. OCMFA advised that in accordance with customary international law and Chinese diplomatic practice, the Central People's Government in general confers diplomatic privileges and immunities to spouses of foreign heads of states during their stay in China, and requested the HKSARG to handle the case in accordance with Article 22.1(3) of the Regulations of the People's Republic of China Concerning Diplomatic Privileges and Immunities ("the Regulations").

5. Article 22.1(3) of the Regulations provides:

"The following persons shall enjoy immunity and inviolability necessary for their transit through or

sojourn in China: ... (3) other visiting foreigners to whom the Chinese Government has granted the privileges and immunities specified in the present Article."

6. OCMFA further advised that the privileges and immunities that Mrs Mugabe enjoyed included the immunity from criminal jurisdiction equivalent to that enjoyed by diplomatic agents under Article 14 of the Regulations, irrespective of whether the relevant act was performed in the exercise of official functions.

7. The issue of privileges and immunities is a matter of foreign affairs, which is the sole responsibility of the Central People's Government under Article 13.1 of the Basic Law. It is further specifically governed by the Regulations, which apply to Hong Kong by virtue of Article 18.2 and their inclusion in Annex III of the Basic Law upon their promulgation by the Promulgation of National Laws Notice 1997.

8. This case has been handled strictly in accordance with the Regulations and the relevant customary international law and practice. In fact, apart from China, several states grant immunities to spouses of foreign heads of state, including the UK and Australia.

9. In the case of UK, section 20(1) of the State Immunity Act 1978 provides that the Diplomatic Privileges Act 1964 shall apply to "a sovereign or other head of State" and "members of his family forming part of his household", "as it applies to the head of a diplomatic mission" and "to members of his family forming part of his household". Therefore, the immunities of the travelling head of state and his family members are taken to be the same as the complete procedural immunity enjoyed by a diplomatic agent. As such, family members, including spouses, of foreign heads of state are conferred immunities in the UK, including immunities from arrest or detention, and from criminal, civil and administrative jurisdiction. Members may note that similar protection was conferred in Hong Kong before 1997 by the State Immunity Act 1978 through the State Immunity (Overseas Territories) Order 1979.

10. In the case of Australia, section 36 of the Foreign States Immunities Act 1985 (Cth) provides that the Diplomatic Privileges and Immunities Act 1967 (Cth) extends to both “the head of a foreign State” and “a spouse of the head of a foreign State” as that Act applies “in relation to a person when he or she is the head of a diplomatic mission”. Spouses of foreign heads of state are therefore conferred immunities in Australia, including immunities from arrest or detention, and from criminal, civil and administrative jurisdiction.

11. It is clear from the above that there is considerable international practice of conferring immunities to spouses of foreign heads of state, which serves the important purpose of contributing to the development of friendly relations among nations.

12. There is no question of this incident having the effect of undermining the rule of law or the principle of one country two systems and high degree of autonomy laid down in the Basic Law.

13. As I have pointed out before, the issue of privileges and immunities is a matter of foreign affairs for which the Central People's Government is responsible under the Basic Law, and the matter is regulated by the Regulations which apply to the HKSAR under the Basic Law.

14. In exercising DoJ's independent prosecution powers conferred by Article 63 of the Basic Law, DoJ is obliged to take into account all relevant laws and factors, including the issues of immunity under any applicable national laws. DoJ has no power to prosecute a person who enjoys immunity from criminal prosecution pursuant to the laws of Hong Kong. DoJ acted in strict accordance with the law in the present case.

15. I should add that the OCMFA was informed of circumstances of the case before it advised HKSARG of the position of immunity regarding Mrs. Mugabe. The HKSARG has acted in strict accordance with the Basic Law and other relevant laws of Hong Kong, and has conveyed to the CPG the concerns of the community of Hong Kong about the incident.

16. Thank you.

30 March 2009

Statistical information concerning diplomatic and consular immunities
(Provided by the Protocol Division)

(a) The number of people eligible for diplomatic and consular immunities

(i) Diplomatic Immunities

Under the Regulations of the People's Republic of China Concerning Diplomatic Privileges and Immunities, diplomatic agents and certain foreign officials (e.g. heads of state and heads of government) and their family members shall enjoy the privileges and immunities specified therein during their visit or sojourn in China. As these persons are not stationed in the HKSAR and that they do not necessarily notify the HKSARG of their visit to the HKSAR, the Protocol Division does not know how many of them are currently in the HKSAR.

(ii) Consular Immunities

Consular immunities refer to those immunities enjoyed by members of consular posts established in HKSAR (and their family members) in accordance with the international treaties (both multilateral and bilateral) and national laws, as applied to and implemented in the HKSAR. The number of people eligible for consular immunities in HKSAR is about 1000.

(b) The number of times diplomatic/consular immunities have been involved and details of these cases

(i) Diplomatic Immunities

- According to the record of the Protocol Division, apart from the recent incident involving the First Lady of the Republic of Zimbabwe, there has been one other case since 1997 in which diplomatic immunity has been involved. Details are as follows -

Year	Nature of Suspected Offence
2002	Shop theft

(ii) Consular Immunities

- According to the record of the Protocol Division, apart from some traffic offence cases, there have been two cases since 1997 in which consular immunities have been involved. Details are as follows -

Year	Nature of Suspected Offence
1999	Common assault
2001	Indecent assault

- Statistics on traffic offence cases (the majority of which involved illegal parking, other examples include failing to display valid vehicle licence) are as follows -

Year	No. of cases
1997	86
1998	88
1999	59
2000	48
2001	32
2002	28
2003	21
2004	23
2005	26

2006	23
2007	16
2008	17
2009 (as at 29.6.2009)	7