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MRS GRACE MUGABE DOES NOT ENJOY DIPLOMATIC IMMUNITY UNDER INTERNATIONAL LAW EITHER

In an incident which has made global news, the First Lady of Zimbabwe, Mrs Grace Mugabe, is alleged to have assaulted a young South African woman while on a visit to the city of Johannesburg in South Africa. Early media reports had stated that she was on a visit to the country to seek medical attention. The most recent media reports, in line with a statement released by the South African Police Service (SAPS), stated that she was in South Africa to attend meetings convened by the Southern African Development Community (SADC). The Department of International Relations and Cooperation (DIRCO) has since, controversially so, granted Mrs Mugabe immunity. This has left the Zimbabwean First Lady free to return to Harare, which freedom she promptly exercised.

South African legal experts have lined up to condemn the granting of immunity - citing the *Diplomatic Immunities and Privileges Act* (Diplomatic Immunities Act) which, under the circumstances, precludes immunity for the First Lady. Little has been said, however, of whether international law considerations would yield a different result. The South African Constitution requires that recourse be had to international law when interpreting the Bill of Rights. Further, the Constitution stipulates that when interpreting legislation, the spirit, purport and objects of the Bill of Rights must be promoted. This is the basis upon which it is necessary to consider international law on the question of whether Mrs Mugabe is entitled to immunity.

It must be stated at the outset that diplomatic immunity in international law has come to be one of the most abused doctrines, often invoked when States seek to avoid the embarrassment of misbehaving diplomats. At its core, diplomatic immunity is envisaged to allow individuals to accomplish the competent functions of their office - meaning that heads of State and diplomats should be free to conduct their work in foreign States, free from the threat of arrest. The *Vienna Convention on Diplomatic Relations of 1961* (Vienna Convention), of which South Africa has signed and ratified, is the key international instrument governing diplomatic immunity. For the present purposes, its most salient provision is the granting of complete immunity from criminal sanction, while civil sanction may be permitted in a few narrowly prescribed circumstances. Linked to this provision is the granting of immunities to family members of such diplomats or agents. Suffice to say, the Zimbabwean President is not a diplomatic agent to South Africa, and on that basis, Mrs Mugabe could not qualify for familial immunity as anticipated by the Vienna Convention.

The next consideration thereafter is customary international law. Customary international law refers to the evidence of a generally practiced norm, which has come to be accepted as law. This includes "*opinio juris*" or opinions of law which are settled and uncontroversial practices by nation States. The International Law Commission has opined that diplomatic immunity for assault under customary international law would arise in instances of self-defence but only while the act giving rise to the assault exists. It is noteworthy that media reports have quoted Mrs Mugabe as saying she acted in self defence - the presence of her bodyguards notwithstanding.



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The United Nations Secretariat 2008 Memorandum regarding *Immunity of State Officials from Foreign Criminal Jurisdiction* (the Memorandum) includes immunities, both in private and/or official capacity. This immunity is recognised specifically for heads of State, as holders of their State's highest office. The Memorandum recognises that there is no State practice concerning the granting of immunity to the family members of heads of State, but recommends that family members too be granted immunity.

However, the Constitution explicitly states that “*customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament*”. In this instance, the fact that Mrs Mugabe may have immunity at customary international law needs to be juxtaposed against the *Diplomatic Immunities Act*. Diplomatic immunity from criminal and any civil liabilities is enabled by the *Diplomatic Immunities Act* but it only applies in certain narrow and specified circumstances. It is only afforded to the head of a State or a special envoy or representative from another state or organisations. Representatives of the State who are participating in an international conference can also receive immunity for the duration of the stay or meeting. However, the agreement or decision to grant immunity must be published in the *Government Gazette*. DIRCO has since granted immunity to Mrs Mugabe, although the legality of granting the immunity, post the event, is debatable and possibly constitutes an abuse of the doctrine of diplomatic immunity.

It is apparent that the Diplomatic Immunities Act, in line with the Constitution, takes precedence over customary international law. On this basis, there is no ground for Mrs Mugabe to receive any kind of immunity for the alleged assault.

Ultimately, as happened in the al-Bashir matter, the South African government has shown that it lacks the political will and inclination to abide by the Rule of Law when faced with thorny political questions. This failure by the government to abide by the spirit and letter of its own laws, while cynically circumventing due process, chips away at South Africa's constitutional foundations. The granting of immunity is currently before the courts, and yet again, the Judiciary finds itself having to adjudicate a matter in which the Executive has failed its duties. The South African government, emboldened by its Constitution, needs to play a more dynamic role in its foreign relations.

Issued by the FW de Klerk Foundation
28 August 2017