

# The state of Grace

SA's rules on diplomatic immunity mean that Grace Mugabe may have to face the law in future

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**G**RACE Mugabe, the wife of President Robert Mugabe of Zimbabwe, is accused of assaulting a young woman while on a visit to South Africa. A week after the incident in a hotel in Sandton, Johannesburg, a South African government minister announced that she had been granted diplomatic immunity.

She has subsequently returned to Zimbabwe without any attempt by the South African Police Service to arrest her.

The incident has sparked a furious debate about whether she should have been granted immunity, and what this means for the victim of the alleged assault.

At the time of the alleged assault, Grace Mugabe was on a private, not official, visit to South Africa. She wasn't granted immunity before her visit and it's not clear on what basis she's now been granted it. Normally, diplomatic immunity is granted to an individual envoy by prior agreement, or by the minister of International Relations if it is in the interests of a country.

Since it is conceivable that Mugabe might visit South Africa again in future, it's worth reviewing the rules, considerations and implications of diplomatic immunity.

## RULES GOVERNING DIPLOMATIC IMMUNITY

Mugabe was neither a visiting head of state or government, nor a diplomat representing her country — both of which would have qualified her for diplomatic immunity.

There is no basis in customary, conventional international law or domestic law for the spouse of a head of state to claim — as a right or entitlement — some form of immunity when visiting a foreign state.

A foreign state, in this case South Africa, can, of course, grant immunity. But there's a legal framework that governs this. In her case, as the spouse of a foreign head of state, she could be granted immunity from the criminal and civil jurisdiction of the courts in SA if, for instance, she was on a visit as an envoy of her country to attend an international conference, or if she was accompanying her husband on an official visit. The fact that she happens to be an important person isn't a good enough criterion.

In other words, it's not status that serves as a basis for granting immunity. Rather, it's the nature of the person's visit. South Africa's Diplomatic Immunities and Privileges Act gives the minister of International Relations and Co-operation the power to grant immunity to foreign visitors who represent their countries on official business. The act sets out how this must be done. If there's no prior agreement that already covers the visit, a notice must be published in the *Government Gazette*.

What's clear is that the spouses of foreign heads of states, members of foreign royal families, international celebrities and the like, can't be granted immunity on a whim. There are laws, protocols and procedures to be followed.

Formalities aside, it's also important to keep in mind the underlying rationale of diplomatic immunity in international law and relations. Diplomatic immunity is a principle with ancient roots and forms an integral part of international



Grace Mugabe has been granted diplomatic immunity after allegedly assaulting a young woman in South Africa. She has subsequently returned to Zimbabwe without any attempt by the South African Police Service to arrest her.

PHOTO: SUPPLIED

relations. At the heart is the idea that diplomats, or others representing their countries or international organisations, must be able to pursue their official duties free from interference by the host state. Foreign envoys who are granted immunity therefore enjoy immunity from the criminal and civil jurisdiction of the courts of the host country.

## WHAT ABOUT JUSTICE FOR THE VICTIM?

Diplomatic immunity can indeed be seen as a shield against accountability for criminal conduct or civil obligations. The abuse of diplomatic immunity can therefore lead to impunity.

If a person who enjoys diplomatic immunity is accused of a crime and their immunity isn't waived, it's normal practice for the host country to declare the person to be *persona non grata*. They are then expected to leave the country. But that also means there is no justice for



Gabriella Engels claims to have been assaulted by Grace Mugabe in a luxury hotel in Johannesburg.

PHOTO: REUTERS

the victim of the crime.

It's important to remember that the immunity initially granted to the diplomat or envoy does not attach to that person in his or her personal capacity. It would have to have been granted in one or other official capacity.

The right to institute a prosecution for most crimes (including assault) lapses only after 20 years. There are exceptions. This right never lapses in the case of serious offences such as murder, rape, robbery with aggravated circumstances and the atrocity crimes of genocide, war crimes and crimes against humanity.

It's conceivable that a person who once enjoyed diplomatic immunity but who no longer benefits from it, will face justice at a future date. This assumes that they find themselves back in the country in which the alleged crime took place. It would be hard to justify continued immunity for someone accused of a crime given that criminal conduct, in-

cluding assault, is not normally associated with official business between two sovereign states.

That's not to say that the victim can easily get justice. Diplomatic immunity conferred on visiting envoys and representatives means immunity from prosecution and civil action. This means that a victim will be frustrated in his or her quest for justice in the courts.

However, that doesn't mean it's impossible. Taking into account the rules around the prescription of the right to institute prosecution of a crime, and the underlying rationale of diplomatic immunity as a tool to facilitate official political and commercial relations between sovereign states, it can be argued that diplomatic immunity isn't the impenetrable shield of impunity imagined by some. — The Conversation.

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