

**DIPLOMATIC& CONSULAR IMMUNITIES AND PRIVILIGES-THE LAW AS IT  
STANDS AND ITS RAMIFICATIONS**

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*AnkitaChadha&SahibaAhluwalia*<sup>1</sup>

**ABSTRACT**

*DevyaniKhobragade, is a name that brings to the fore the recent diplomatic and consular crisis between the United States of America and India. She had charges of a visa fraud and making of false statements in connection with the employment of her housekeeper. However, Khobragade's motion to dismiss the indictment on the ground of diplomatic immunity was recently granted by a US Court amid much furore by India.*

*This is just another case in the history of cases where diplomatic immunity has been upheld and its importance in the international law has been reiterated. It is pertinent to point out that more often than not, the law of diplomatic immunity is complied with due to the existence of the reciprocal advantages inherent in it, thus making the states sceptical in taking any extreme actions to prevent its violations. This paper traces the evolution of the rules of diplomatic law, their codification and how in the modern international law those rules and principles are applied. It further delves into the extent to which the various diplomatic and consular immunities and privileges are endowed upon the diplomatic and consular agents. The last leg of the paper mulls over how these immunities are often a subject of flagrant violations.*

**I. INTRODUCTION-AN EVOLUTION OF THE LAW**

The rules of diplomatic law enshrined in the Vienna Convention have been described as ‘the cornerstone of the modern international legal order.’<sup>2</sup>The *raison d’etre* of diplomatic immunity lies in the fact that Diplomacy comprises any means by which states establish or maintain mutual relations, communicate with each other or carry out political, legal transactions, in each case through their authorized agents.<sup>3</sup>

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<sup>1</sup>IV<sup>th</sup>Year , BA. LLB (Hons), Students of Amity Law School, Delhi (Affiliated to Guru Gobind Singh Indraprastha University)

<sup>2</sup>EILEEN DENZA, DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATION, p. 1 (Oxford, 2008).

<sup>3</sup>BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (2004).

But the principle of diplomatic immunity is one of the oldest and customary rules of international law.<sup>4</sup>It was well-established by the end of the seventeenth century, evolving out of the principle of immunity of the sovereign, who was said to embody the state and the principle of equality of states.<sup>5</sup> Ancient civilized states developed the concept and engaged in the practice of diplomatic immunity.<sup>6</sup>

Traditionally, diplomatic immunity has been extended on the strength of three theories: personal representation, extraterritoriality, and functional necessity. The first theory proposes that a diplomat is, in a sense, the personification of the sovereign he represents; the second suggests that the diplomat's offices, residences and persons are to be treated as if they are always on their home territory and the third theory submits that immunity should be extended to diplomats only to the extent that they may be able to carry out their duties without hindrance. With the passage of time and shifts in the nature of diplomatic scheme, the first two theories have been abandoned in favour of the third.

As Oppenheim rightly states, "Legation, as an institution for the purpose of negotiating between different States, is as old as history, whose records are full of examples of legations sent and received by the oldest nations. And it is remarkable that even in antiquity, where no such law as the modern international law was known, ambassadors everywhere enjoyed a special protection and certain privileges, although not by law but by religion, ambassadors being looked upon as sacrosanct."<sup>7</sup>

In *Holland v. Lampen*<sup>8</sup> it was held that state immunity is not a 'self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt' and which it can, as a matter of discretion, relax or abandon. It is imposed by international law without any discrimination between one state and another."<sup>9</sup> The fact that the source of immunity from foreign jurisdiction is customary international law is noted in rulings of national courts.<sup>10</sup> The

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<sup>4</sup>Tachiona v. Mugabe 95 AJIL 874 Vol. 95 (October 2001).

<sup>5</sup>By 1758 the rules of diplomacy were put in writing by Vattel in his *Le Droit Des Gens*; *Supra N.1* at p.2

<sup>6</sup>E. SATOW, *SATOW'S GUIDE TO DIPLOMATIC PRACTICE* 106 (Lord Gore-Booth 5th ed. 1979).

<sup>7</sup>L. OPPENHEIM, *INTERNATIONAL LAW-A TREATISE*, Vol. I, *Peace*, 7th ed.; H. Lauterpacht (New York, Longmans, 1948).p.687 and 688.

<sup>8</sup>*Holland v. Lampen Wolfe*, 1 WLR 1573 (2000)

<sup>9</sup>*Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* (The Kingdom of Saudi Arabia) 26 UKHL (2006), *Supra N.3* at p.383

<sup>10</sup>*Supra N.1* at p.2.

need to protect diplomats is in a nation's interest in international relations as those diplomatic personnel are essential to conduct the international affairs for the well-being of the nation.<sup>11</sup>

A strong sense of codification of the rules of diplomatic immunity was felt by the representatives of different states as they felt that violations of the rules of diplomatic intercourse and immunities had become increasingly frequent.<sup>12</sup>

Thus, was the birth of The Vienna Convention on Diplomatic Relations, 1961<sup>13</sup> which was widely regarded as codifying diplomatic law.<sup>14</sup>

This treaty, which is the embodiment of diplomatic relations, came into force in 1964, emphasises the functional necessity of diplomatic privileges and immunities for the efficient conduct of international relations,<sup>15</sup> as well as pointing to the character of the diplomatic mission as representing its state.<sup>16</sup>

As the International Court held, *“the rules of diplomatic law, in short, constitute a self-contained regime, which on the one hand, lays down the receiving state's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving state to counter any such abuse.”*<sup>17</sup>

There is no right as such under international law to diplomatic relations, and they exist by virtue of mutual consent.<sup>18</sup> Accordingly, the Convention specifies in article 4 that the sending state must ensure that the consent of the receiving state has been given for the proposed head of its mission, and reasons for any refusal of consent do not have to be given. Likewise the receiving state must take steps to enable the sending state to benefit from the content of the licence. This process of giving 'full faith and credit' to the licence, results in a body of 'privileges and immunities'. One explanation, now discredited, for this situation has been the

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<sup>11</sup>HUGO GROTIUS, HUGO GROTIUS ON THE LAW OF WAR AND PEACE 438,439 (Student ed. 2012); US Diplomatic and Consular Staff in Tehran (United States of America v. Iran), 1980 I.C.J. 3, Para 86 (May 24). Boos v. Barry, 485 U.S. 312 (1988).

<sup>12</sup>*Official Records of the General Assembly, Fourth Session, Supplement No. 10*, para. 15.

<sup>13</sup>The Vienna Convention on Diplomatic Relations, 1961, entered into force 24 April 1964, U.N.T.S.95[*Hereinafter* VCDR]

<sup>14</sup> UN Doc. A/Conf.20/13

<sup>15</sup>Third Avenue Associates v. Permanent Mission of the Republic of Zaire to the United Nations, 988 F.2d 295 (1993).

<sup>16</sup>*Yearbook of the ILC*, 1958, vol. II, pp. 94-5

<sup>17</sup>United States Diplomatic and Consular Staff in Tehran, [1979] ICJ Reports, 1980, p. 3

<sup>18</sup>Art 2 VCDR.

diplomatic agent and the mission premises were 'extraterritorial' in other words for all purposes were legally assimilated to the territorial jurisdiction of the sending state.<sup>19</sup>

The main functions of a diplomatic mission are specified in Article 3 and revolve around the representation and protection of the interests and nationals of the sending state, as well as the promotion of information and friendly relations.

Heads of mission are divided into three classes by Article 14, viz. ambassadors or nuncios accredited to heads of state and other heads of mission of equivalent rank envoys, ministers and inter-nuncios accredited to heads of state and charges d'affaires accredited to ministers of foreign affairs.<sup>20</sup>

Naturally, every state that is a host to diplomatic missions of foreign states in its territory would have its own missions in the territory of the sending state and this leads to honouring of the diplomatic ties between the states.

Article 253 of the Indian Constitution entails the Parliament to introduce a legislation to give effect to an international agreement. In light of this provision, the Indian Parliament enacted The Diplomatic Relations (Vienna Convention) Act, 1972 to give effect to India's obligations under the Vienna Convention.

A balance between the foreign diplomatic interests of the sending state's mission and the receiving state's territorial sovereignty is the essence of the law of diplomatic immunity. The privileges that are endowed upon the embassies and the diplomats then allow them to carry out the requisite functions of diplomacy with the necessary amount of secrecy. Thus, diplomatic immunities and privileges, whilst being an exception to the principle of territorial sovereignty on one hand, do not allow transgressing of local laws on the other.

Notwithstanding the fact that diplomatic immunity is a concept of antiquity, its purpose is often misunderstood by the citizens of all countries. Frequent abuses of diplomatic immunity, which are brought to public attention, have also functioned to prejudice public attitudes toward this practice. Dealing with the concept of immunity poses particular problems for law enforcement officers who, by virtue of their training and oath, are unfamiliar to granting special privileges to individuals who break the law. On the contrary, officers who understand

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<sup>19</sup>8 Canad. Yrbk. (1970), 337.

<sup>20</sup>*Supra* N.1 at p.110.

the importance of diplomatic immunity may be inclined to be overly generous in its application if they do not have a full knowledge of its parameters.

Thus the application of this law has been quite subjective, varying from state to state. An instance of this can be seen by the recent furore caused in the Italian Marines Case. The Supreme Court of India's order restraining the Italian Ambassador from leaving India and the possibility of contempt proceedings against him were said to be without any basis in law. The order restraining the Ambassador and the potential contempt of court proceedings were a breach of India's obligations of providing diplomatic immunity under the Vienna Convention on Diplomatic Relations, 1961.

Determining what distinguishes an official act from a personal one is often not easy. No law enforcement officer, diplomatic mission, consulate or State Department officer is authorized to determine whether a given set of circumstances constitutes an official act. It is an issue which may be resolved only by the court which has the jurisdiction of the subject matter in the alleged crime. However, in most cases, these kinds of issues are resolved through negotiations. The courts rarely get involved as the countries have a lot of relations with each other and thus there is a huge amount of interest of both sides in resolving the dispute without any recourse to the courts.

It has been observed over the years how, in the garb of immunities and privileges diplomats and other consular officers have misused their position for some benefit or the other.

## **II. EXTENT OF THESE PRIVILEGES AND IMMUNITIES ARE CONSIDERED UNDER THE FOLLOWING HEADS;**

### **1. The Inviolability of The Premises of The Mission**

In order to facilitate the operations of normal diplomatic activities, Article 22 of the Convention specifically declares that the premises of the mission are inviolable and that agents of the receiving state are not to enter them without the consent of the mission. This appears to be an absolute rule.<sup>21</sup>

The US Supreme Court, for instance, while making a specific reference to article 22 of the Vienna Convention, emphasised in *Boos v. Barry* that, 'the need to protect diplomats is

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<sup>21</sup>*Supra N.14* at p. 194.

grounded in our Nation's important interest in international relations... Diplomatic personnel are essential to conduct the international affairs so crucial to the well-being of this Nation.<sup>22</sup> By the same logic, the premises of a mission must not be used in any way which is incompatible with the functions of the mission.<sup>23</sup>

In 1980, the International Court declared that, under the 1961 and the 1963 Convention on Consular Relations, "Iran was placed under the most categorical obligations, as a receiving state, to take appropriate steps to ensure the protection of the United States Embassy and Consulates, their staffs, their archives, their means of communication and the free movement of the members of their staffs."<sup>24</sup>

In *Congo v. Uganda*<sup>25</sup>, the International Court held that attacks on the Ugandan Embassy in Kinshasa, the capital of Congo, and attacks on persons on the premises by Congolese armed forces constituted a violation of article 22.

Further, by article 23, a general exception from taxation in respect of the mission premises is posited. The Court in the *Philippine Embassy* case explained that, in the light of customary and treaty law, 'property used by the sending state for the performance of its diplomatic functions in any event enjoys immunity even if it does not fall within the material or spatial scope' of article 22.<sup>26</sup>

It is to be noted that the archives and documents of the mission are inviolable at any time and wherever they may be.<sup>27</sup>

## **2. Diplomatic asylum**

The Vienna Convention contains no provision on diplomatic asylum, although in Article 41 the reference to 'special agreements' makes room for bilateral recognition of the right to give asylum to political refugees within the mission.

The International Court in the *Asylum case* between Colombia and Peru<sup>28</sup> emphasised that a decision to grant asylum involves derogation from the sovereignty of the receiving state 'and

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<sup>22</sup> 99 L.Ed.2d 333, 345-6 (1988); 121 ILR, p. 551.

<sup>23</sup> Article 41(3) VCDR.

<sup>24</sup> The Iranian Hostages case, ICJ Reports, 1980, pp. 3, 30-1; 61 ILR, p. 556.

<sup>25</sup> Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 I.C.J. 168, para 337-8 and 340.

<sup>26</sup> 65 ILR, pp. 146, 187.

<sup>27</sup> Article 24 VCDR.

<sup>28</sup> ICJ Reports, 1950, pp. 266, 274-5.

constitutes an intervention in matters which are exclusively within the competence of that state. Such derogation from territorial sovereignty cannot be recognised unless its legal basis is established in each particular case.’

### **3. The Diplomatic Bag**

Article 27 provides that the receiving state shall permit and protect free communication on behalf of the mission for all official purposes. Such official communication is inviolable and may include the use of diplomatic couriers and messages in code and in cipher.

Article 27(3) and (4) deals with the diplomatic bag<sup>29</sup>, and provides that it shall not be opened or detained<sup>30</sup> and that the packages constituting the diplomatic bag ‘must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use’.<sup>31</sup> Although article 27 provides for the non-opening of the diplomatic bag, however, the view of the international community seems to be that non-opening does not essentially accord full inviolability. Screening, scanning and use of sniffing by dogs must be allowed in certain situations wherein the receiving state has a reasonable doubt to believe otherwise.

On one hand, missions require a confidential means of communication, while on the other, the need to guard against the abuse is clear as there would be no way of ascertaining whether the articles contained in the diplomatic bag are illegal or not. Article 27, however, lays the emphasis upon the former.<sup>32</sup>

One very famous or rather infamous illustration of the same would be the Dikko incident on 5 July 1984, a former Nigerian minister was kidnapped in London and placed in a crate to be flown to Nigeria. The crate was opened at Stansted Airport, although accompanied by a person claiming diplomatic status. The crate did not contain an official seal and was thus clearly not a diplomatic bag. This was not the first time the immunity of a diplomatic bag was used for purposes of abduction.

### **4. Inviolability of Diplomatic Agents**

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<sup>29</sup>*Yearbook of the ILC*, 1989, vol. II, part 2, p. 15.

<sup>30</sup> Article 27(3) VCDR.

<sup>31</sup> Article 27(4) VCDR.

<sup>32</sup>*Supra* N.28 at, p. 15.

Inviolability of the ambassador is a well-established rule of customary international law<sup>33</sup> and has no exceptions to it. A diplomatic agent is inviolable under Article 29 of the Vienna Convention and he may not be detained or arrested. In the *Arrest Warrant Case*, the ICJ held that Belgium had violated an international legal obligation due to the issuance of an arrest warrant against The Minister of Foreign Affairs of the Democratic Republic of the Congo, thereby violating the diplomatic immunity enjoyed under international law.<sup>34</sup>

The receiving state is under an obligation to 'take all appropriate steps' to prevent any attack on the person, freedom or dignity of diplomatic agents.<sup>35</sup> In *Congo v. Uganda*, the International Court held that the maltreatment by Congo forces of persons within the Ugandan Embassy constituted a violation of article 29 in so far as such persons were diplomats, while the maltreatment of Ugandan diplomats at the airport similarly breached the obligations laid down in article 29.<sup>36</sup>

Consequently, in the case where Iranian Authorities took over the American Embassy in Tehran, the Court held that Iranian authorities have committed a continuing breach of their obligations under Articles 26 and 29 of the VCDR.<sup>37</sup> Besides, the Court held that a diplomatic agent caught in the act of committing an offence might only be briefly arrested<sup>38</sup> and in politically tense situations he may be expelled.<sup>39</sup> Even in cases where the envoy became involved in conspiracies against the receiving state, state practice confined itself to its expulsion.<sup>40</sup> Thus, the view is that arrest can lead only to expulsion, never to arrest and detention.<sup>41</sup>

Moreover, Article 30(1) of the convention provides for the inviolability of the private residence of a diplomatic agent, while article 30(2) provides that his papers, correspondence and property are inviolable.

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<sup>33</sup> Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002 I.C.J. 3, para52 (Feb 14); *Supra N.1* at p.135; HAZEL FOX, *THE LAW OF STATE IMMUNITY* 710 (2nd ed. 2008); Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), 2008 I.C.J. 177, para174 (Jun 4).

<sup>34</sup>*Supra N. 32* at para.58.

<sup>35</sup>*Mariam Aziz v. Aziz and Sultan of Brunei* [2007] EWCA Civ 712, para 88.

<sup>36</sup>*Supra N.24* at paras.338–40

<sup>37</sup>*Supra N.16* at, para77; *Supra N.24* at para339, 340

<sup>38</sup>*Supra N.16* at, para86

<sup>39</sup>William G. Morris, *Constitutional Solutions to the Problem of Diplomatic Crime and Immunity*, 36 HOFSTRA REV 601, 609 (2007)

<sup>40</sup>*Medina v. United States*, 259 F.3d 220 (4th Cir. 2001); *United States v. Rios*, 842 F.2d 868 (6th Cir. 1988); *Farnsworth v. Zerbst*, 98 F.2d 541 (5th Cir. 1938); *United States v. Noriega*, 746 F. Supp. 1506.1510; *United States v. Egorov*, 232 F. Supp. 732

<sup>41</sup>Philippe Cahier, *Vienna Convention on Diplomatic Relations*, 37 INTL CONCIL.5, 25 (1967)



Diplomatic agents are generally exempt from the social security provisions in force in the receiving state<sup>42</sup>, from all dues and taxes, personal or real, regional or municipal except for indirect taxes<sup>43</sup>, from personal and public services<sup>44</sup> and from customs duties and inspection.<sup>45</sup> The personal baggage of a diplomat is exempt from inspection unless there are serious grounds for presuming that it contains articles not covered by the specified exemptions in article 36(1). Inspections can only take place in the presence of the diplomat or his authorised representative<sup>46</sup>.

##### **5. Exemption from Civil and Criminal Jurisdiction**

It is pertinent to note that as per Article 31(1) of the VCDR, the diplomat enjoys immunity from the criminal jurisdiction and from civil and administrative jurisdiction as well, subject to the three exceptions mentioned in sub clauses (a), (b) and (c) of Article 31(1). First, where the action relates to private immovable property situated within the host state, unless held for mission purposes<sup>47</sup>, secondly, in litigation relating to succession matters in which the diplomats involved as a private person and, lastly, with respect to unofficial professional or commercial activity engaged in by the agent. These exceptions do not include ordinary contracts incidental to life in the receiving state, such as a contract for domestic services. Diplomatic functions must be interpreted as also covering all other incidental actions, which are indispensable for the performance of those general functions.<sup>48</sup>

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 when *prima facie* certain actions could be considered to be outside the official duties, such actions may still be of official character if the diplomat was instructed by his sending state to undertake that activity.

The diplomatic agent is also immune from any measure of execution and he can raise his immunity from execution to bar any form of enforcement of a conviction or judgment against

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<sup>42</sup> Article 33 of VCDR

<sup>43</sup> Article 34(b) to (g) of VCDR

<sup>44</sup> Article 35 of VCDR

<sup>45</sup> Article 36(1) OF VCDR

<sup>46</sup> Article 36(2) of VCDR

<sup>47</sup> *Intpro Properties (UK) Ltd v. Sauvel* [1983] 2 All ER 495; 64 ILR, p. 384; *The Deputy Registrar* case, 94 ILR, pp. 308, 311.

<sup>48</sup> *Portugal v. Goncalves* 82 ILR 115 (1990)

him.<sup>49</sup> Article 31(3) of VCDR makes it amply clear that no measure can be taken in respect of the diplomatic agent and that any measure of execution cannot extend to infringing the inviolability of his person.

Impliedly, the question of immunity from jurisdictional process should be considered as a preliminary issue and decided in *liminelitis*.<sup>50</sup> The immunity of the diplomat is so strong that in the *Pinochet case* it was decided that “immunity enjoyed by an ambassador in post is a complete immunity...rendering him immune from all actions or prosecutions”.<sup>51</sup>

However, in exceptional cases, a diplomat may be arrested or detained on the basis of self-defence or in the interests of protecting human life.<sup>52</sup> The acts which amount to international crimes may never be regarded as official acts. According to the draft principle III of the Charter of the Nuremberg Tribunal, which is recognised as law, “the fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law”.<sup>53</sup> There has been an occasion where a diplomat was sentenced as a war criminal. This happened when the Japanese ambassador to Belgium, General Oshima, in 1948 was sentenced for his war crimes during the Second World War despite his diplomatic status, by a military tribunal.

The remedy of self-defence against the crimes by diplomats can be found in the commentary of the ILC which states that being inviolable, the diplomatic agent is exempted from certain measures that would amount to direct coercion, but this, however, does not exclude self-defence.<sup>54</sup> The ILC considered self-defence as a measure of immediate reaction and not as a ground for trial and punishment. The ICJ, referring to the principles of personal inviolability and diplomatic immunity from jurisdiction, also said that naturally it does not mean that a diplomatic agent caught in the act of committing an assault or other offence may not, on

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<sup>49</sup> René Värk, *Personal inviolability and diplomatic immunity in respect of serious crimes*, 8 JURIDICA INT. 110, 113 (2003)

<sup>50</sup> Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62, ¶63 (Apr 29)

<sup>51</sup> *Re Pinochet Ugarte Case (No. 3)*, [2000] 1 A.C. 147; D. Akande & S. Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR.J.INT. LAW 815, 818 (2011)

<sup>52</sup> ICJ Reports, 1980, p. 40; *Supra N.1* at p. 267.

<sup>53</sup> International Law Commission, Yearbook of the International Law Commission 1950, vol II (New York: UN, 1957), UN Doc A/CN.4/SER.A/1950/Add.I

<sup>54</sup> I.L.C. Yearbook, 1957, Vol. II, p.138.

occasion, be briefly arrested by the police of the receiving state in order to prevent the committing of the particular crime.<sup>55</sup>

An argument that is pertinent to be made here is, when it has been established that a person enjoying diplomatic privilege has committed an illegal act, the appropriate action for the receiving state is to request the recall of such person. He must lose his immunities and if the sending government fails to honour this request, the receiving state may declare the offending diplomatic officer to be *persona non grata*, and demand his rapid departure from the territory of the receiving state.<sup>56</sup> Article 9 of the Vienna Convention allows the receiving state to declare the person in question *persona non grata*.<sup>57</sup>

### III. WAIVER OF IMMUNITY

By article 32 of the 1961 Vienna Convention, the sending state may waive the immunity from jurisdiction of diplomatic agents and others possessing immunity under the Convention. No proceeding can take place against a diplomat unless his immunity has been waived by the sending state<sup>58</sup> as such immunity belongs not to the individual but to the sending state. The receiving state if feels the need can request the sending state to waive of the immunity of the diplomat in accordance with Article 32 of VCDR to try the diplomat. However such waiver can only be made by the sending state in express terms.<sup>59</sup> In the absence of such a waiver, any arrest made will be illegal.

*In the case of Fatemi v. United States*<sup>60</sup>, it was stated that diplomatic authorities may waive an embassy's diplomatic immunity and request local police to enter the building for purposes of law enforcement.

It is further submitted that in accordance with Article 32(3) of the VCDR, the initiation of proceedings by a diplomat shall preclude him for invoking immunity from jurisdiction in respect of any counterclaim against him. However, as per the Vienna Convention on

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<sup>55</sup> *Supra* N.16 at, para86

<sup>56</sup> James T. Southwick, *Abuse of Diplomatic Privilege and Immunity: Compensatory and Restrictive Reforms*, 15 SYRACUSE J INTL COM 83, 92 (1988).

<sup>57</sup> Art 9, VCDR

<sup>58</sup> *Draft Articles on Diplomatic Intercourse and Immunities*, [1958] 2YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 16, U.N.Doc A/CN.4/116/Add.1 and 2, Art 30.

<sup>59</sup> *R v. Kent*, [1941] 1 K.B. 454.

<sup>60</sup> 192 A.2d 525, 528 (D.C. 1963)

Consular Relations, 1963<sup>61</sup> representation of nationals of the sending State before the tribunals and other authorities of the receiving State<sup>62</sup> is essentially a consular function.

For a court to give effect to an explicit waiver, the waiver must express the 'clear, complete, unambiguous, and unmistakable' manifestation of the foreign sovereign's intent to waive its immunity.<sup>63</sup> In an action for possession of land of which the defendant, the Counsellor of the Italian Embassy, contested the action on merits without raising a plea to the jurisdiction, the Court treated his defence on the merits as a waiver of his immunity and gave judgment for plaintiff. On appeal, the judgment was quashed. The Court held, that "...diplomatic representatives cannot validly waive their immunity except by authority of their Government."<sup>64</sup>

Further in accordance the Vienna Convention on Diplomatic Relations, 1962 there is a special waiver with respect to the execution of the judgment.<sup>65</sup> Express waiver of immunity from jurisdiction, which must be granted by an authorised representative of the state,<sup>66</sup> does not of itself mean waiver of immunity from execution.<sup>67</sup>

#### **IV. CONSULAR PRIVILEGES AND IMMUNITIES:**

##### **THE VIENNA CONVENTION ON CONSULAR RELATIONS, 1963**

The Vienna Convention on Consular Relations, 1963 deals with the aspect of consular immunities and privileges. Consuls represent their state in many administrative ways. Consuls must possess a commission from the sending state and the authorisation (*exequatur*) of a receiving state.<sup>68</sup> They are entitled to the same exemption from taxes and customs duties as diplomats. Consular premises are inviolable just like diplomatic premises, they must be protected against intrusion or impairment of dignity<sup>69</sup>, and similar immunities exist with regard to archives and documents and exemptions from taxes.

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<sup>61</sup> Vienna Convention on Consular Relations, 1963, 19th March 1967, 596 U.N.T.S. 261.

<sup>62</sup> Article 5(i) of VCCR.

<sup>63</sup> Aquamar, S.-A v. Del Monte Fresh Produce, NA, 179 F.3d 1279, 1292 (11<sup>th</sup> Cir. 1999) (quoting Aquinda v. Texaco, Inc., 175 F.R.D. 50, 52 (S.D.N.Y. 1997).

<sup>64</sup> Bolasco v. Wolter, [1957] Int'l L. Rep. 525-526; Fayed v. Al-Tajir, [1987] 2 All ER 396.

<sup>65</sup> Article 32(4) of VCCR

<sup>66</sup> R v. Madan [1961] QB 1, 7; Aziz v. Republic of Yemen [2005] EWCA Civ 745, para. 48.

<sup>67</sup> Article 20 of the UN Convention on Jurisdictional Immunities; A Company v. Republic of X [1990] 2 LL. R 520; 87 ILR, p. 412; Sabah Shipyard v. Pakistan [2002] EWCA Civ. 1643 at para. 18

<sup>68</sup> Articles 10, 11 and 12 of the Vienna Convention on Consular Relations, 1963

<sup>69</sup> R (B) v. Secretary of State for Foreign and Commonwealth Affairs [2004] EWCA Civ 1344; 131 ILR, p. 616.

Article 36(1) of the convention, provides that consular officers shall be free to communicate with nationals of the sending state and to have access to them, while nationals shall have the same freedom of communication with and access to consular officers. The International Court emphasised in the *La Grand(Germany v. USA)* case, it 'establishes an interrelated regime designed to facilitate the implementation of the system of consular protection'.<sup>70</sup>The International Court held that article 36(1) created individual rights for the persons concerned which could be invoked by the state, which, by virtue of the Optional Protocol on Compulsory Settlement of Disputes attached to the Convention, may be brought before the Court.<sup>71</sup>

Under article 43 their immunity from jurisdiction is restricted in both criminal and civil matters to acts done in the official exercise of consular functions. Article 41 provides that consular officers may not be arrested or detained except in the case of a grave crime and following a decision by the competent judicial authority. In *Koeppele and Koeppele v. Federal Republic of Nigeria*<sup>72</sup>, it was held that the provision of refuge by the Nigerian Consul-General to a Nigerian national was an act performed in the exercise of a consular function within the meaning of Article 43 and thus attracted consular immunity.

### **THE CONVENTION ON SPECIAL MISSIONS, 1969**

This convention incorporates the law on special missions. For instance the States will send out special or ad hoc missions to particular countries to deal with some defined issue in addition to relying upon the permanent staffs of the diplomatic and consular missions. By Article 8, the sending state must let the host state know of the size and composition of the mission.

In the *Tabatabaica* case<sup>73</sup> the Federal Supreme Court noted that the Convention had not yet come into force and that there were conflicting views as to the extent to which it reflected existing customary law. However, it was clear that there was a customary rule of international law which provided that an ad hoc envoy, charged with a special political mission by the sending state, may be granted immunity by individual agreement with the host state for that mission and its associated status and that therefore such envoys could be placed on a par with members of the permanent missions of states. The aim is to protect the mission.

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<sup>70</sup> ICJ Reports, 2001, pp. 466, 492;

<sup>71</sup> ICJ Reports, 2001, p. 494

<sup>72</sup> 704 F.Supp. 521 (1989)

<sup>73</sup> 80 ILR, p. 388

## **THE VIENNA CONVENTION ON THE REPRESENTATION OF STATES IN THEIR RELATIONSWITH INTERNATIONAL ORGANISATIONS OF A UNIVERSAL CHARACTER, 1975.**

This treaty applies with respect to the representation of states in any international organisation of a universal character, irrespective of whether there are diplomatic relations between the sending and the host state. There are many similarities between the VCDR and the above mentioned convention. For instance, by virtue of Article 30, diplomatic staff enjoy complete immunity from criminal jurisdiction, and immunity from civil and administrative jurisdiction in all cases, except for the same exceptions stated in Article 31 of the 1961 Convention.

However, the Convention has received an unenthusiastic response, chiefly because of the high level of immunities it provides for on the basis of a notorious analogy with diplomatic agents of missions. However, the range of immunities contrasts with the general situation under existing conventions such as the Convention on the Privileges and Immunities of the United Nations, 1946.<sup>74</sup>

### **V. AN ABUSE OF THE IMMUNITIES AND PRIVILEGES**

There have been myriad of cases where the diplomatic immunities have been the subject of flagrant violations. To a layman, these abuses may just be a simple non-payment of fines or parking tickets, however, it must be noted that these abuse operate on a much higher and a serious level.

For instance, the case of Floyd Karamba, a representative at the Zimbabwean mission to the United Nations who was deported on charges that he severely abused his children, yet could not be charged with any crime.<sup>75</sup> Karamba's victimized son Terrence remained in the United States temporarily until a State Department psychiatrist determined that the boy, who was badly injured and severely traumatized as a result of the beatings, was psychologically prepared for the journey to Zimbabwe. In recognition of Karamba's diplomatic immunity, the United States Supreme Court lifted the stay preventing the boy's return.<sup>76</sup>

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<sup>74</sup> Article IV of the Convention of 1975.

<sup>75</sup> Mark A. Uhlig, 'Court Won't Bar Return of Boy in Abuse Case to Zimbabwe', *New York Times*, 1 January 1988.

<sup>76</sup> Kamen, *Supreme Court Lifts Stay; U.S. to Return Boy to Zimbabwe*, *Wash. Post*, Jan. 16, 1988.

In 1988 Manuel Ayree, the 19 year old son of a Ghanaian diplomat to the United Nations was positively identified as the perpetrator of at least two and possibly as many as fifteen rapes and robberies on the Upper East Side of Manhattan. Mr. Ayree "voluntarily repatriated" to Ghana and never faced charges for the crimes.<sup>77</sup> An unenforced judgment by a federal court in New York approved \$1,786,462 in civil damages for two of the rape victims in a suit against Mr. Ayree.

Possibly the most widely publicized incident of diplomatic complicity in serious crime was the murder of a London policewoman, killed from a shot fired from the Libyan People's Bureau. On that fateful day, demonstrations were conducted by Libyan opponents of the Gaddafi Government on the pavement opposite the bureau. Shots were fired from the bureau and killed the police woman on duty.<sup>78</sup> The British government proposed severance of all diplomatic ties with Libya.

Likewise, the United States, after much internal debate, broke diplomatic relations with Iran after terrorists seized the United States Embassy in Tehran and held 52 United States nationals hostage.<sup>79</sup>

In the year 1987, when Shah Mohammad Dost, a former foreign minister of Afghanistan was posted as Afghanistan's diplomat to the United Nations, he rammed a woman with his car in a dispute over parking place in New York, but he could not be arrested and prosecuted.

In *Skeen v. Federative Republic of Brazil*<sup>80</sup>, the United States District Court dismissed a suit against the grandson of the Ambassador of Brazil, for lack of jurisdiction. The plaintiff alleged that the ambassador's grandson had assaulted and shot him.

Owing to their privileged status diplomats, their families, staff and personal servants escape prosecution for crimes ranging from driving under the influence of alcohol, to shoplifting, to rape and even to murder as seen above in the London police woman's case.

Theorists in the United States have proposed the establishment of a claims fund to compensate those injured by diplomats.<sup>81</sup> The success of this proposal requires the diplomat's

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<sup>77</sup> McFadden, Repatriation Asked for Diplomatic's Son, N.Y. Times, Feb. 8, 1981, at 33

<sup>78</sup> Ian Black, 'Search for PC Yvonne Fletcher's Killer Casts Old Shadow Over Libya's New Era', *The Guardian*, 3 September 2010.

<sup>79</sup> G. SICK, ALL FALL DOWN: AMERICA'S TRAGIC ENCOUNTER WITH IRAN, 288-89 (1985)

<sup>80</sup> 566 F. Supp. 1414, 1416 (D.C. 1983).

<sup>81</sup> Comment, Compensation for "Victims" of Diplomatic Immunity in the United States: A Claims Fund Proposal, 4 *FORDHAM INTL L.J.* 135, 149-59 (1980).

participation in the compensation procedure. The diplomat becomes a "witness" in the determination of liability, without affecting diplomatic immunity status.<sup>82</sup>

## VI. CONCLUSION

While the shield of diplomatic or consular immunity in cases of violent crime or tortious acts may seem unfair, the inability to serve process on or obtain the testimony of a diplomat is merely inconvenient. Removing these obstacles may indeed facilitate prosecution of foreign businesses or governments, but it may also frustrate the goals of the Vienna Convention and complicate the performance of a diplomat's duties. The revocation of diplomatic immunity for civil purposes is therefore less pressing than the need to protect victims of crime and to make diplomats legally responsible for their criminal acts.

Today diplomatic immunity often contradicts fundamental principles of justice in civilized countries. Defenders of diplomatic immunity maintain that the trade-off between preserving harmonious international relations and protecting diplomats abroad while allowing those who have engaged in wrongdoing to escape sanction is acceptable. The consequence of the trade-off is justification for the international community to re-evaluate the principle of diplomatic immunity.<sup>83</sup>

At the end of the day, preventing the abuse of the diplomatic immunities and privileges cannot be done merely by controlling any demonstrations or amending the Vienna convention. The need of the hour also is a close co-ordination between the governments which would facilitate an international security mechanism.

It has been rightly observed by legal scholars like Dr Ben-Asher that 'the occasional abuse of the diplomatic immunity rules is largely offset by the continuing need for them. The actual number and percentage of abuses affecting fundamental human rights is relatively small, therefore a complete wholesale rewriting of the rules or even a too-radical reform, is undesirable.'

However, if need be the international community must analyse this conundrum and bring about certain changes in the law as the abuse of diplomatic immunity is a serious matter and

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<sup>82</sup>Id at 73.

<sup>83</sup>*Diplomatic Crimes Legislation: Hearings Before the Senate Committee on Foreign Relations*, 100th Cong., 1st Sess. 102 (1987)



cases of grievous crimes in the likes of rape, murder et al must not go unpunished as this is against the very basic and fundamental principle of human rights.

Lastly, the researchers would like to conclude by stating that a diplomat's demeanour in a foreign state can be very aptly gathered from the Arabic proverb, '*Yaghareeb, khalleekadeeb*' - 'O stranger, be thou courteous'.

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