

Diplomatic Immunity from Criminal Jurisdiction and its Abuse: A Critical Perspective

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Abstract

The rules regarding diplomatic relation are one of the earliest expressions of international law which exists to establish and maintain communication between States in order to achieve commercial, political, and legal objectives. Diplomatic immunity is one of the casual practices whereby diplomats are exempted from various legal obligations considering their functions and honoring their status. Unfortunately, this is frequently observed that due to misinterpretation and failure to realize the true spirit of immunity, they do misuse or abuse those immunities specially the absolute immunity from criminal jurisdiction. Taking into account the importance of diplomatic immunity, this write up beginning focuses on the meaning, historical evaluation and basis of immunity. And then the write up critically analyse the present immunity feature and practical scenario of abuse of immunity. Finally it focuses on the point of remission and prevention of immunity within the contemporary scheme of international diplomatic law.

Keywords : Diplomatic, Immunity, Jurisdiction, Criminal, Abuse.

1.0 Introduction

Generally International Law may be defined and appreciated as those rules and regulations including both customs and treaties which are necessary to maintain and uphold the pacific relation between the sovereign states. If it is all about relationship among the states in a broader sense, more precisely, the relationship between states is a matter of diplomacy, which always remains contemporary and crucial issue of international law.

Among the other important functions, achieving and fulfilling the foreign policy is the most important function of a sovereign state. These foreign policies can be realized from both inside the country and also by sending diplomatic mission to a foreign state, for conducting diplomacy.

The Oxford English Dictionary defines diplomacy as:- "The management of international relations by negotiation, the method by which these relations are adjusted and managed by ambassadors and envoys, the business or art of diplomacy: skill of address in the conduct of international intercourse and

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negotiation". Diplomacy is, therefore, an indispensable tool for directing both the domestic and foreign affairs of state. The machinery of diplomacy especially through the use and application of negotiation is the great engine used by civilized society for the purpose of maintaining peace (Raheem, 2010, p-2).

So, diplomacy, as a method of communication between various parties, is believed to be one of the few human occupations without which mankind will never be able to live. Hence, rules regulating the conduct of diplomatic relations constitute one of the earliest expressions of international law (Mugunthan, 2012, p-2).

On the other hand, immunity from foreign jurisdiction has been recognized throughout human history as an essential tool in conducting foreign affairs or diplomacy.

The concept of diplomatic law evolves as a result of state practice in this regard. It may be easily presumed that, whenever sovereign states realized that it must have good relation with other states, and without such relation it cannot go so far, that realization disseminates the idea of diplomatic immunity, the purpose is to facilitate international diplomacy, balancing the pursuit of the foreign policy interests of the sending state with respect for the territorial sovereignty of the receiving state (Higgins, 1985, p-1). When it comes to practice concerning diplomatic issues, including immunities, the main international agreements are the 1961 Vienna Convention on Diplomatic Relations which is considered as having codified most of the existing customary law. Vienna Convention on Diplomatic Relations of 1961 hereinafter referred as VCDR came into force on April 24 1964. The convention was the outcome of a UN Conference on Diplomatic Intercourse and Immunities 1961 and was based on series of Draft Articles prepared by the International Law Commission (ILC) (Raheem, 2010, p-4).

However diplomat are more likely those who occasionally tend to misinterprets the extent of their privileges and therefore make use or more qualifiedly we can say that abuse such immunities. Such abuse may still be tolerated by the receiving state in the name of securing effective performance of diplomatic function and also to maintain and uphold the obligation assumed by them under the VCDR. But this philosophy may be correct and receiving state may be able to maintain this in case of abuse which involves minor crimes or offences. But, what would be the situation, if abuse involves serious offences, like murder, rape, kidnapping, as well as war crime, and crime against humanity? Does the international community still have to tolerate this kind of abuse of diplomatic immunity (Vark, 2003, p-110)?

There is, however, still room for interpretation. During the last decade, the

abuse of diplomatic immunity reached at that high rate, it compels the international community to re- think about that absolute immunity. The present write up intends to address such issues and critical analysis of immunities, and existing remedies against abuse and therefore intends to serve a clear understanding about the immunity and its abuse by the diplomatic agents.

2.0 Historical background and philosophical idea

Ancient civilized states developed the concept and engaged in the practice of diplomatic immunity (Ross, 1989, P-173). From the earliest of times, interaction between sovereign entities has required secure means of communication between a government and its envoys in order to facilitate relations between governments. Sovereign entities have long recognized the concept of diplomatic immunity from the jurisdiction of the receiving sovereign as being necessary to ensure that these channels of communication are preserved. The concept of diplomatic immunity has long-standing roots in international practice, and can be traced as far back as the ancient civilizations of China, India, and Egypt. The Greek historian Thucydides records that the ancient Greek City-States regularly exchanged special missions, and ambassadors were ceremoniously received and courteously treated by the receiving City- State (Garcia ,2003, p-2). The term diplomacy is also derived from the Greek word "diploma". This was the name given in ancient Greece to paired wooden slabs with corresponding wordings that were given to state representatives being sent abroad. Such wooden slabs served as letters of credence of such representatives (Raheem, 2010, p-11).

The early Romans, too, maintained treaty relations with neighboring nations that included active diplomatic exchange (Garcia, 2003, p- 2).

The concept of diplomatic immunity goes back to the ancient Indian practice of diplomacy. The concept of diplomatic immunity can be found in ancient Indian epics like Ramayana (between 500 and 301 BC) and Mahabharata (around 4th century BC) where messengers and diplomats were given immunity from capital punishment. In Ramayana, when the demon king Ravana ordered the killing of Hanuman, Ravana's younger brother Vibhishana pointed out that messengers or diplomats should not be killed or arrested, as per ancient practices (Wikipedia,2016).

The modern concept of diplomatic immunity was well-established by the end of the seventeenth century, evolving out of the principles of equality of states and immunity of the sovereign, who was said to embody the state (Pierrot, 2010, p-2). European diplomats realised that protection from prosecution was essential to performing their jobs, a set of rules evolved guaranteeing the rights of diplomats. These were confined only to Western Europe and were closely tied

to prerogatives of nobility. Modern international practice is rooted in the 1708 UK law that prohibited the arrest of foreign diplomats. Its provisions were expanded and formally guaranteed by the 1815 congress of Vienna (Garcia, 2003, p-4).

In the 19th Century the Congress of Vienna reasserted the rights of diplomats and they have been largely respected ever since. Nowadays, diplomatic immunity, along with diplomatic relations as a whole, is governed internationally by the Vienna Convention on Diplomatic Relations signed in 1961. There are currently 179 States party to this Convention (Stancu, 2008 P-27).

By the twentieth century the rationale behind diplomatic immunity had significantly altered. The notion of the monarch as the personification of the state by divine order had waned with the increasing secularization of society.

What is the philosophy behind the idea of diplomatic immunity?

The concept of State and diplomatic immunity flows from customary international law and it is often expressed in the maxim *par in parem non habet jurisdictionem*, or more simply, that no state can claim jurisdiction over another (Davis, 2008, p-1,) as international law is based on the principle of sovereign equality of states. This rule reflected the fundamental premise that all states are independent and equal under international law, and the notion that subjecting a state to a foreign court's jurisdiction would be inconsistent with the idea of sovereign equality (Tunks, 2002, p-653)

Historically, international law recognized a principle of absolute immunity for sovereign states, under which no state could be put on trial without its consent (Malanczuk, Akehurst, 1997, p-118).

Thus sovereign immunity paved the way to head of state immunity as state is an institution and it is represented by the head- of- the state and the principle of head-of-state immunity originally developed from the idea of state sovereign immunity, as the state and its ruler used to be deemed one and the same (Tunks, 2002, p- 652).

Head-of-state immunity has sought to achieve the goals of both sovereign and diplomatic immunity by (1) recognizing an appropriate degree of respect for foreign leaders as a symbol of their state's sovereign independence; and (2) ensuring that they are not inhibited in performing their diplomatic functions (Tunks, 2002, p- 654).

The second purpose stream the physiological idea of immunity towards the diplomats as state is also represented by them instead of head of the state for conducting diplomacy.

3.0 Rational behind diplomatic immunity

In the present world a vast majority of states widely and extensively practice the rules of diplomatic immunity every single day as they have diplomatic relation with others. But surprising fact is that, in comparison with the observance of other international obligation, we find that the observance of diplomatic law is exceptionally high, where as non observance of other obligation imposed by international law is very evident. Why is that so? Firstly, the rules of diplomatic law has long been stable and established before they were codified into the VCDR (Verk, 2003, p- 111).

In that sense, states are bound by the customary rules and not by the treaty.

Secondly, the simple principle of reciprocity plays an effective role for the observance of and shield against the violation of diplomatic law by the states. As most states are normally both sending and receiving states, they can respond to any inappropriate action from other state towards its diplomatic agents with similar measures against the diplomats of the offending state. Therefore, the principle of reciprocity with common interests of states guarantees efficient application of diplomatic law and also general obedience (Verk, 2003, p- 111).

Basis of diplomatic immunity is, therefore, expediency and reciprocity (Gaecia, 2003, p-5). The underlying concept is that foreign representatives can carry out their duties effectively only if they are accorded a certain degree of insulation from the application of standard law enforcement practices of the host country (US Department of State, 2011).

There are traditionally three theories that are used to describe the rationale behind diplomatic immunities and privileges, namely the theory of personal representation, the theory of extraterritoriality and the theory of functional necessity.

Under this section, an account will be given for each of these theories together with an explanation of their current standing in international legal doctrine (Lozancic, 2009, p-22).

i. Diplomatic immunity due to personal representation of the Sovereign:

As mentioned earlier, the idea of diplomatic immunity flows from sovereign immunity. This view on immunity can be summarised as personification through representation (Lozancic, 2009, p-22). The rationale for the personal representation theory was best expressed by Chief Justice Marshall in *The Schooner Exchange v. M'Faddon*. "The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers is implied from the considerations that,

without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad." (Wilson, 1984, p-115).

Under this traditional theory of diplomatic practice, a diplomatic envoy is believed to personify the sovereign he represents. Diplomatic agents therefore are given the same degree of privileges which are given to the Prince or to the Sovereign. The theory is essentially based on the notion that the representative should be treated as if the sovereign himself was conducting diplomacy. The representative's privileges are similar to those of the sovereign, and an insult to the ambassador is an insult to the dignity of the sovereign (Mugunthan, 2012, p-4).

Modern diplomatic practice does not accept this theoretical approach for several reasons. This theory is subject to criticism in the sense that extension of immunities of the sovereign to the diplomatic agents by no means is logical and therefore virtually abandoned today. The theory may be criticized in the following ways –

Firstly, the personification doctrine is too broad because it places the diplomat above the law of the host state and it is difficult to reconcile with the supremacy of the receiving sovereign (Mugunthan, 2012, p-5).

Secondly, the concept of "personal representation" is difficult to apply to modern systems of government (Wilson, 1984, p-11) because it was based mainly on monarchies and not on sovereign States concept (Moutzouris, 2009, p-22,) and in many states there is no longer a monarchy and sovereignty has been transferred to the people and their elected officials. And "the people" do not enjoy immunity from prosecution in foreign states, their representatives should not either (Maginnis, 2002, p-3).

Thirdly, in a monarchy, for example, a diplomat would assume the role of his king, but in a democratic form of government where sovereign power is divided among executive, legislative and judicial branches, however, it is difficult to ascertain exactly whose authority the diplomat represents (Wilson, 1984, p-118).

Finally, the immunity does not extend from the consequences of the representatives' private actions, (Moutzouris, 2009, p- 23) and the personal representation theory offers no justification for why diplomats should be immune from jurisdiction for their private acts (Maginnis, 2002, p-4).

ii. Diplomatic immunity due to extraterritoriality:

Extraterritoriality is another theory employed during the eighteenth and nineteenth centuries to justify diplomatic immunity, (Robert A. Wilson, 1984, p-

117) after the establishment of resident embassies in the 15th century (Moutzouris, 2009, p- 23). This is based on the Roman law principle whereby a man took his own land's law with him when he went to another land (Moutzouris, 2009, p- 23).

The extraterritoriality approach to diplomatic immunity adopts the legal fiction that a diplomat is always on the soil of his native country, wherever he may actually go, (Mugunthan, 2012, p- 6) and therefore cannot be subjected to the jurisdiction of the receiving state even though he is physically present in that state (Lozancic, 2009, p- 23).

Hugo Grotius was of the view that extra territoriality of the diplomatic agent means that in spite of being physically present upon the soil of the country to which they are accredited, they remain for all purposes upon the soil of the country to which they represent (Mugunthan, 2012, p-7).

A judicial interpretation of this theory appeared in *Wilson v. Blanco*, 1889 New York Supreme Court case where, the court stated that the rule of international law "derives support from the legal fiction that an ambassador is not an inhabitant of the country to which he is accredited, but of the country of his origin, and whose sovereign he represents, and within whose territory he, in contemplation of law, always abides" (Wilson, 1984, p- 116).

But this theory is subject to severe criticism. Though this theory was adopted by many writers of the nineteenth century, it has been discarded by modern jurists and like most legal fictions; there is also limited usefulness (Mugunthan, 2012, p- 8).

Firstly, because the term "extraterritoriality" is subject to many different meanings, the term itself does not provide adequate guidelines for determining the scope and limits of diplomatic privileges and immunities. Moreover, strict application of this theory could result in dangerous consequences because it presupposes a grant of unlimited privileges and immunities which would transcend those ordinarily extended to diplomats (Wilson, 1984, p- 117).

For instance, the term is persistently used to describe not only the mission, but all types of immunities and privileges enjoyed by the personnel, which seems contrary to the original understanding of the term. The courts also found extraterritoriality conceptually difficult when finding that the actions of a diplomat were committed on the receiving State's soil rather than domestic soil (Moutzouris, 2009, p- 24).

Secondly, the principle fails to explain why the diplomat is under an obligation to respect the laws of the receiving State as well as why the receiving State is

obliged to protect him.

Technically speaking it is also misleading in that it confers the diplomat with unrestricted immunities and privileges and therefore goes way beyond what they are actually entitled to according to international law (Lozancic, 2009, p- 23).

Thirdly, the receiving state is under an obligation to ensure immunity [1] therefore, the notion of fictional theory, which "a diplomat is always on the soil of his native country, wherever he may actually go" does not apply whenever it comes to the point of ensuring immunity. The theory fails to give logical interpretation, why does the theory not apply in case of giving protection by the receiving state.

Finally, extraterritoriality assumes that diplomatic immunity is based upon the absolute independence of nations when, in fact, the question of immunity arises only because nations are interdependent in the area of international relations (Wilson, 1984, p- 117).

iii. Diplomatic immunity due to functional necessity:

The theory of functional necessity is for the time being the most widely acknowledged theoretical base for diplomatic immunity. The functionality lies in the fact that, knowing that immunity will protect him from interference from the authorities of the receiving State, the diplomat will be able to carry out his functions effectively (Lozancic, 2009, p-23). If diplomats were liable to ordinary legal and political interference from the state or other individuals, they would be dependent on the good will of the receiving state.

Considerations of safety and comfort might materially hamper the exercise of their functions. If immunities are not granted, then diplomats will be kept at the mercy of interruptions by the local administration, in turn making it impossible for them to carry out their duties. Thus, functional theory rests on practical necessity (Mugunthan, 2012, p- 9).

The preamble of the VCDR also reflects the functional necessities as a basis of diplomatic immunity, stating "Realizing 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" (Vienna Convention on Diplomatic Relation, 1961, preamble).

The purpose of the immunity is thus not to be of personal benefit for the individual diplomat, but rather to enable him – as a representative of the State - to carry out his duties in a secure, independent and fairly unhindered manner(Lozancic,2009, p-23).

Nevertheless, the functional necessity theory seems less vague than other theories that have been put forward and, also more soundly based on reality, is not without criticism.

Firstly, the theory has been attacked as being too vague because it fails to indicate the limits to which immunities essential to "the accepted practice of diplomacy" are to be extended or, for that matter, what the accepted practice of diplomacy is.

Secondly, to hold that diplomats require immunity to function effectively implies that diplomats regularly engage in activities that are injurious or illegal (Wilson, 1984, p-118).

Thirdly, it does not fully address the real need for diplomatic immunity to cover other acts performed by diplomats outside their official function, as the convention provides for immunity outside of the official function (Vienna Convention on Diplomatic relation, 1961, Art. 31).

Current juridical understanding of diplomatic immunity demonstrates that diplomats cannot be prosecuted for criminal or civil acts outside their diplomatic functions. Yet it seems that in practice they have absolute immunity against criminal prosecution, whether their acts are during or outside their functions.

The theory also fails to explain the basis of immunity given by the VCDR, to persons other than diplomatic agent as they do not perform any diplomatic function at all (Vienna Convention on Diplomatic relation, 1961, Art. 37).

Finally, criticism of this theory is that it is vague, since it does not establish what a "necessary" function of a diplomat is (Moutzouris, 2009, p- 26).

4.0 Immunity from Criminal Jurisdiction and its Abuse

4.1 Immunity and diplomatic immunity in general

Though Vienna Convention On diplomatic relation, 1961 provides immunity for Diplomatic agents, but no where in the convention there is a definition of immunity as well as diplomatic immunity.

Very ordinarily, may be we can realize that, diplomatic immunities are those which are given to the diplomatic agents by the receiving states. But as the diplomats very often misinterpret the immunity by understanding that, immunity is a shield which permits them to do whatever they wish by placing them above the law of the receiving state, so it is very much necessary to determine the actual meaning of immunity.

Frequently (and erroneously), immunity is understood to mean pardon, total exoneration, or total release from the responsibility to comply with the law. In actuality, immunity is simply a legal barrier which precludes the courts from exercising jurisdiction over cases against persons who enjoy it and in no way releases such persons from the duty, embodied in international law, to respect the laws and regulations of the receiving states.

Immunity is usually defined as “the exception or exclusion of the entity, individual, or property enjoying it from the jurisdiction of the State; an obstacle to the exercise of jurisdiction; limitation of jurisdiction; a defence used to prevent the exercise of jurisdiction over the entity, individual or property” (Markovich, 2009, p-59).

According to Satow, a privilege denotes some substantive exemption from laws and regulations such as those relating to taxation or social security. Whereas, immunity does not imply any exemption from substantive law but confers procedural protection from the enforcement process of the receiving state (Raheem, 2010, p-4).

Now we should try to define diplomatic immunity. Defining the term ‘diplomatic immunity’, Garner observes that the term entails the general exemption of diplomatic ministers from the operation of local law, the exception being that a minister who is plotting against the security of the host nation may be arrested and sent out of the country (Mwenda, 2011, p-3).

The judges said in the classic case of *Empson vs. Smith* that ‘It is elementary law that diplomatic immunity is not immunity from legal liability, but immunity from suit (*Empson vs. Smith*, 1996).

The case of *Empson v. Smith* helps us to understand perhaps the most important thing about immunity, namely, that it represents a form of jurisdictional bar.

Diplomatic Immunities can also be defined as the immunities from local jurisdiction enjoyed by diplomatic agents in doing their work and maintaining their dignity as persons representing one national state, the sending government and another normally referred to as the host receiving government (Raheem, 2012, p-4).

In other words, diplomatic immunity does not prevent the commission of the substantive offence; it merely bars a court from taking jurisdiction over that offence. Put another way, the offence exists at the moment of its commission, and will continue to exist, even though we may not be able to punish the person that committed it because of immunity. To provide a colourful example, if an ambassador of a foreign state willfully drives over my foot with his Mercedes

Benz he has acted illegally (a civil and criminal wrong in most states). However because the diplomat is immune, may be procedurally barred from suing him in the courts of the receiving state.

Hence it can be said that there is general consent that the diplomatic agents are not above the law rather they under the legal obligation to respect the local law of the receiving state (Vienna Convention on Diplomatic Relation, 1961, Article 41{1}). Hence it can be said that the personal immunity is the physical immunity not the immunity to be relieved from the liability of law. In other words, the immunity granted is the procedural in nature or the diplomatic agents cannot be subjected to the jurisdiction of the receiving state unless they submit to the jurisdiction. The immunity of the diplomatic immunity laws do restrict the jurisdiction of the receiving states (Parwar, 2009, p-3).

4.2 Immunity from criminal Jurisdiction: Analysis of Vienna Convention

Though VCDR prescribes various immunities and privileges for diplomats, personal inviolability and diplomatic immunity from criminal jurisdiction of the receiving state still remain among the most problematic issues in modern diplomatic law. As we realize from the history of diplomatic immunity and privileges, which has been established from the very first day of human civilization, virtually renders it impossible for the host state to exercise its power over duly appointed diplomatic agents in respect of severe violation of local criminal law. And a common misconception is developed that diplomatic privileges and immunities confer a license to commit wrongs (Wilson, 1984, p- 113).

However, of all the protections granted by the VCDR, none has caused more of a stir than Article 31. Article 31 provides that diplomats "shall enjoy immunity from the criminal jurisdiction of the receiving States" (Article 31(1) of Vienna Convention on Diplomatic Relation, 1961). A necessary corollary to the provisions stated in Article 31 is the notion that a diplomat's person is inviolable and thus free from any "arrest or detention (Vienna Convention on Diplomatic Relation, 1961, Art. 29).

4.2.1 Immunity from criminal jurisdiction

In international law, certain persons and institutions are immune from the jurisdiction of foreign municipal courts. One of such person is a diplomatic agent. A diplomatic agent shall enjoy immunity from the criminal, civil and administrative jurisdiction of the receiving state except in the case of:

a) A real action relating to private immovable property situated in the territory of the receiving state, unless he holds it on behalf of the sending state for the purposes of the mission.

b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of his state and;

c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions (Vienna Convention on Diplomatic Relation, 1961, Art.29).

This means that a diplomatic agent who is not a national and/or permanently resident in the receiving State enjoys immunity for actions conducted as part of his duties as a diplomatic agent but also for acts performed outside of his duties, i.e. in his capacity as a private individual. However, there are some exceptions to this pertaining to immunity from the receiving State's civil and administrative jurisdiction (Lozancic, 2009, p- 30).

Thus, since article 31(1) mentions that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State and no exceptions are given to this rule, such immunity is valid both for the diplomat's official acts as well as for acts committed in his capacity as a private individual. This unlimited immunity concerns all possible minor offences as well as grave crimes, starting with breaches of traffic regulation and finishing with conspiracy against the national security of the receiving state or crime against humanity (Vark, 2003, p-113.) The International Court of Justice (ICJ) in the Hostages Case emphasized the importance of immunity from criminal jurisdiction according to article 31 of the VCDR. In the judgment, the Court stresses that if the threat of submitting the hostages – which in this case enjoyed diplomatic immunity according to the VCDR to 'any form of criminal trial or investigation' would be implemented, this would entail a grave breach of the receiving State's obligations under Article 31 paragraph 1 of the 1961 Vienna Convention.' (Lozancic, 2009, p- 34).

There is, however, no precise definition of what constitutes a private and official act respectively, although the provisions in article 3(1) of the VCDR might provide some guidance. This article states that the functions of a diplomatic mission, inter alia, consist in:

- a) Representing the sending State in the receiving State;
- b) Protecting (in accordance with international law), the interests of the sending State and its nationals;
- c) Negotiating with the Government of the receiving State;
- d) Ascertaining (by lawful means) conditions and developments in the receiving State, and reporting these to the sending State's Government;

e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations (Vienna Convention on Diplomatic Relation, 1961, Art.3).

The above functions of diplomatic agents probably leave no place for committing a crime by the diplomatic agent while performing those functions. The nature of functions clearly indicates that at the time of performing those functions there is a very little scope for a diplomatic agent to countenance such a situation which compel him to commit a crime.

In fact, however, it is rare that a crime is committed by an agent while functioning in an official capacity-unless it is an act of espionage sanctioned by his government (Ling, 1976, p-91)

Then what compels them to commit crime? Probably the answer is, acts performed in private capacity or for personal ends induce them to commit crimes. Acts performed in private (i.e. non-official capacity) could therefore be interpreted as being contrary to or other than the ones mentioned in article 3(1) (a)-(e). Some suggest that it is more correct to determine whether an act is official or private by consulting the receiving and the sending States respectively, preferably by looking at the sending States' instructions to the diplomat concerned (Lozancic, 2009, p- 30).

However, the legal consequence of diplomatic immunity from criminal jurisdiction is procedural in character and does not affect any underlying substantive liability. Therefore, whenever immunity is established and accepted by the court, the later must discontinue all proceedings against the defendant concerned (Vark, 2003, p-113).

4.2.2 Personal inviolability

Before going to further discussion, we should look at the principle of personal inviolability, which is the oldest established rule of diplomatic law and also closely connected with diplomatic immunity (Verk, 2003, p-111).

In the course of its historic development, the scope of personal inviolability became absolute, regardless the severity of concerned offence (Verk, 2003, p- 111).

Sir Ernest Satow states that the term "inviolability" implies a higher degree of protection to the diplomatic agent and his belongings than is accorded to a private person (Ling, 1976, p-93).

A necessary corollary to the provisions stated in Article 31 is the notion that a diplomat's person is inviolable and thus free from any "arrest or detention (Verk, 2003, p- 114).

Article 29 of the VCDR entails the principle of inviolability beneficial to diplomatic agents – the oldest principle in diplomatic law. According to the article, the person of a diplomatic agent shall be inviolable, meaning that he shall not be liable to any form of arrest or detention and that the receiving State shall treat him with due respect as well as take all appropriate steps to prevent any attack on his person, freedom or dignity (Lozancic, 2009, p- 33).

As we can see, the article itself makes no effort to define or explain the concept or extent of inviolability. Nevertheless, the article mentions two important aspects of this principle. Firstly, diplomatic agents are free from any sort of arrest or detention by the authorities of the receiving state, and secondly, the later has a duty to protect diplomatic agents (Verk, 2003, p- 112). Thus personal inviolability is a physical privilege in nature, and involves three general concepts: (a) arrest and detention; (b) assault and attack; and (c) personal protection.

Article 29 is said to corollary of art. 31, because, the immunity of a diplomatic representative from the criminal jurisdiction of the receiving state was, in the earlier literature, regarded as indistinguishable from his personal inviolability. Because, it is very much unusual for criminal proceedings to take place without prior arrest and detention.

Article 29 stipulated that receiving states "shall take all reasonable steps to prevent any attack" on the person, freedom or dignity of diplomatic agents. This provision appears quite necessary in view of the hazards faced by diplomatic agents or foreign servicemen since political kidnapping has become a popular terrorist weapon (Ling, 2009, p-98). The personal protection of diplomatic agents normally means prosecution of offenders as well as apologies and any necessary redress on the part of the host government to the victim's government after an attack or a serious crime is committed (Ling, 2009, p-18).

On the other hand a deep look into the VCDR makes it clear that some other provisions also make the inviolability concept much stronger, and make it almost impossible for the host state to impose any kind of arrest or detention upon the diplomats, and simultaneously ensure protection for them. Article 22 of the VCDR entails the principle of inviolability of the premises of diplomatic mission, and agent of the receiving state may not enter, except with the consent of the head of the mission. Moreover, it also imposed obligation upon the receiving state to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity (Article 22 (1) (2) of Vienna Convention on Diplomatic Relation, 1961).

In this connection, article 30 also deserves special mention as it entails the

principle of inviolability of private residence of diplomatic agent like the premises of the mission (Article 30 (1) of Vienna Convention on Diplomatic Relation, 1961).

Both the provisions put an extended shield upon the principle of personal inviolability. By virtue of article 29 he/ she is not subject to arrest or detention. And also by virtue of article 22 and 30, an agent who is inside the mission or inside his/her private residence is not subject to arrest or detention as both the places are inviolable. If for the sake of argument, suppose that VCDR provides no personal inviolability, even then the situation will not changed at all because of the inviolability of the mission premises and private residence as the agent of the receiving state cannot enter the places without permission and therefore cannot make him subject to arrest or detention.

Apart from the above theoretical analysis, practically there are many occasions where the diplomatic agents violate or abuse other immunities using the shield of immunity from criminal jurisdiction and personal inviolability.

In the next part of the write up it will shown how they misinterpreted the concept of immunity from criminal jurisdiction, and also how the above mentioned immunities influence the abuse of other immunities by analyzing some cases of abuse of immunities.

4.3 Practical Sketch: Cases of abuse of immunity

Diplomatic immunity has been asserted in a number of cases to prevent liability from attaching to a diplomat's crime or otherwise illegal behavior.

Diplomats, their families, personal servants, and staff escape prosecution for crimes ranging from driving under the influence of alcohol, to shoplifting, assault, drug trafficking, kidnapping, rape, the imposition of slavery, and even murder (Ross, 1989, p-175).

In 1979, in Sri Lanka, the Burmese Ambassador to Sri Lanka shot his wife as she got out of the car after seeing a player in a night-club band of whom she was enamoured. The next morning, his neighbours were surprised to see the Ambassador building a pyre on the back lawn. When the police were called, the Ambassador opened the metal front gates just enough to say that there was no trouble and to remind them that his house enjoyed diplomatic inviolability and could not be entered by Sri Lankan police (Garcia,2003, p-22).

In 1983 two Guatemalan diplomats helped kidnap the wife of El Salvador's former Ambassador to the United States. She was taken from her Florida home and held for a 1.5 million dollars 'war tax'. The two diplomats involved were taken into custody after the State Department, in an 'unusual move',

successfully negotiated with the Guatemalan Government for the waiver of their diplomatic immunity (Mugunthan, 2012, p- 9).

In 1988 Manuel Ayree, the son of a Ghanaian diplomat to the United Nations, was identified as a serial rapist but never faced any charges (Pierrot, 2010, p-5).

In July 1990, the Delhi police recovered 485 kilograms of hashish from a deserted house which was in the vicinity of the residence of a Ugandan diplomat. According to the police, the diplomat probably had a plan to smuggle it out of India but on being inquired the Ugandan High Commission is reported to have denied any link between the recovered hashish and the diplomat. The matter was ultimately dropped, but an important point for consideration is that even if the police had irrefutable evidence and were sure of the direct involvement of the diplomat in the case, they were helpless and could not arrest him because the diplomats are immune from criminal prosecution under the provisions of international law (Mugunthan , 2012, p-9.).

In January 1997, in the U.S., the Deputy Ambassador of the Republic of Georgia, Gueorgui Makharadze, caused an accident that injured four people and killed a 16-year-old girl. He was found to have a blood-alcohol level of 0.15%, but was released from custody because he was a diplomat (Garcia, 2003, p- 22). Though he was punished subsequently when the Georgian government waived his immunity upon request from the U.S, but without that the receiving state found itself helpless to inflict punishment upon a diplomat.

In January 2001, in Canada, Andrei Knyazev, a Russian diplomat drove his car into two pedestrians on a quiet residential street, killing one and seriously injuring the other. Knyazev had previously been stopped by Ottawa police on two separate occasions on suspicion of impaired driving. Russia refused the Canadian government's request to waive his immunity (Garcia, 2012, p- 22).

In December 2009, in Singapore, the Romanian chargé d'affaires, Silviu Ionescu, was allegedly behind a drunk-driving hit-and-run accident that killed a 30-year-old man and seriously injured two others. He left Singapore for Romania three days after the accident (Gracia, 2012, p-22).

In April of 2012, in Manila, Panamanian diplomat Erick Bairnals Shcks was accused of raping a 19-year old Filipino woman, but was later released from detention because Shcks "enjoys protection under the 1961 Vienna Convention" (Mugunthan , 2012, p- 10).

All the incidents are the pathetic and drastic reality, and practical impact of immunity from criminal jurisdiction. So, can we say that, immunity places the diplomats above the law, and releases them from complying with the laws of the

receiving states? Apparently the answer seems positive one, but very interestingly the answer is negative one. Article 41 of VCDR entails that without prejudice to their privileges and immunities, it is the duty of all persons enjoying such Privileges and immunities to respect the laws and regulations of the receiving State (Article 41(1) of Vienna Convention on Diplomatic Relation, 1961).

More interesting things happened in case of abuse of diplomatic immunity, as they not only abuse personal immunity but also misuse other privileges and immunities provided by the convention. And also in those cases they are not subject to liable, because of personal immunity.

While there are many forms of conduct that could fit the broad definition of corrupt practice by a diplomat, as set above, other major types of conduct that involve the abuse of inviolability principles pertaining to diplomatic missions, diplomatic agents, diplomatic bags, private residences of diplomatic agents as well as property and documents of diplomatic agents. The said types of conduct relate to situations where (a) a diplomat is found to have used a diplomatic bag to conceal and/or transport illegal drugs or prohibited pornographic material; (b) a diplomat is found to have used his or her private residence to carryout illegal activities such as prostitution or the production of prohibited pornographic videos; and (c) a diplomat is carrying out money-laundering activities at his private residence or through the use of diplomatic bags. In all these instances, the diplomatic bag, the private residence of a diplomat, as well as his or her own person, are mediums through which a corrupt diplomat can act to abuse his or her immunity (Mwenda, 2011, p-4).

In 1964, an Egyptian Diplomat kidnapped a Israeli Diplomat, and dragged him , bound and gagged in a trunk marked as 'diplomatic mail' that was being sent by the Egyptian mission. But at Rome airport some custom official heed a sound like crying coming out from the so called diplomatic mail. As a result the airport authorities suspected him and opened the bag and found the Israeli Diplomat inside the diplomatic bag (Egypt vs. Italy, 1964).

Another incident in Britain involved an ex-member of the former Nigerian government, Alhaji Umaru Dikko. In July 1984 Mr. Dikko was kidnapped from his London home, drugged, and put into a diplomatic crate bound for Nigeria. The crate also contained Israeli mercenaries who had helped in the kidnapping. The Nigerian government refused to cooperate, and again, all Britain could do was expel the diplomats involved with the kidnapping (Nigeria vs. U.K, 1984).

Another incident in 1984 incident in which a British police constable was allegedly shot to death from the windows of the Libyan embassy. British authorities who entered the premises of the Libyan embassy after its evacuation

found weapons and forensic evidence indicating that the shots that killed the police woman actually came from the embassy. Following the severance of diplomatic relations between the UK and Libya, diplomatic bags leaving the embassy with its departing staff were not searched or scanned. There is strong reason to believe that the murder weapon was in one of those bags. The diplomatic status played a particular significant role as the Libyans leaving the embassy were not arrested despite the strong probability that one (or more) of them was responsible for the killing (Garcia, 2003, p- 22.).

The incidents are cited here because those are more crucial as involved at least three types of abuse, other than abuse of immunity from criminal jurisdiction -abuse of the diplomatic premises abuse of the diplomatic bag, and abuse of the diplomatic status - all of which seem to have unconditional immunity under the 1961 Vienna Convention. It is very much evident and crystal clear to understand that diplomat dares to abuse other immunities due to the absolute immunity from criminal jurisdiction, as they know they will face any kind of punishment or arrested or detention as they are shielded by the VCDR.

5.0 Existing deterrent measures in response to combating diplomatic crime

Maybe the above discussion will successfully draw a sketch that there may not exist any kind of sanction for combating diplomatic crime. Although the normal procedures and sanctions against those who break local laws cannot be enforced against diplomats, a number of safeguards exist which are designed to deter diplomatic representatives from breaking local laws (Hill, 1931, p-256).

Ways in which abuse of privileges and immunities can be controlled are: the declaration of persona non grata, waiver of immunity, handing the offender over for prosecution in the jurisdiction of the sending State, reciprocity, breaking off diplomatic ties and settlement of disputes.

i. Persona Non Grata

Article 9 of the Vienna Convention allows the receiving state to declare the person in question persona non grata. The fundamental rationale of this Article allows for the receiving State to expel a diplomat who has behaved unacceptably (Moutzouris, 2009, p- 108).

Article 9 has proved in practice to be a key provision which enables the receiving State to protect itself against numerous forms of unacceptable activity by members of diplomatic missions and forms an important counterweight to the immunities conferred elsewhere in the Convention...

For example, the United Kingdom successfully used persona non grata to dramatically decrease the number of diplomats who deliberately and

systematically refused to pay their parking ticket (Kappus, 2010, p- 304).

This Article essentially means that declaring a diplomat, staff or his family persona non grata forces the sending State to take one of two actions: either recalling the diplomat to his home country or terminating his functions with the sending State's mission. Should the sending State refuse to remove the individual from his duties then the receiving State may refuse to recognise the person as a member of the mission, resulting in him being liable to prosecution. The time frame in which he has to leave will depend on the circumstances of the incident. It is not possible to come to a conclusion as to what is a reasonable period. Interestingly, 48 hours has been the shortest time span justified as a "reasonable period" (Moutzouris, 2009, p- 108).

Article 9 is not used in every case of suspected serious crime. It is used sparingly, especially in instances of persistent or serious abuse, for example in cases where diplomats cannot be prosecuted and waiver is not granted. There is no need to give reasons for expulsion, as it is clear cut: a crime was committed and the responsible diplomat cannot be prosecuted or punished. Thus the fear of reciprocal action by the sending State will not be relevant because no other options are available to the receiving state.

ii. Waiver of Immunity

Article 32 of the Vienna Convention allows the sending state to waive the diplomat's immunity (Article 32 of Vienna Convention on Diplomatic relation.). The Vienna Convention requires the sending state to make an express waiver of this privilege. One commentator has argued, however, that a diplomat's lawbreaking activity can constitute a constructive waiver of diplomatic immunity (Ross, 1989, p-183).

Once waiver occurs, the local courts in the receiving State will have jurisdiction to prosecute and punish the offender. The Preamble of the Vienna Convention states that the purpose of a diplomatic agent's immunity is not to benefit the individual, but to ensure that his performance to represent his State is unhindered (Preamble of Vienna Convention on Diplomatic Relation, 1961).

The decision to waive immunity is not based on a legal decision but rather on a political basis; for instance, retaliatory measures taken against their own diplomats or even fabricated charges being brought against their personnel in the receiving State. Waiver is a good remedy if States are willing to grant it. A possible solution is for States to enter into agreements for automatic waiver in serious criminal offences. This would serve as a better deterrent than merely having the option to waive immunity (Moutzouris, 2009, p-113).

iii. Approach to the Sending State

Another deterrent is for a diplomat to face the jurisdiction of his own national courts for crimes committed in the receiving State. The purpose behind this is to ensure that diplomats who were recalled or expelled cannot avoid legal action being taken against them in their own countries, since they have no immunity at home (Moutzouris, 2009, p-113).

A major drawback is that while there is a threat to respect the laws of the receiving State for fear of being prosecuted at home, the sending State is not obliged to prosecute its diplomatic personnel. Silva asserts that if the sending State does not waive immunity to allow the receiving State to prosecute, it then has a moral duty to bring the person before its courts. Despite this, it does not often happen and diplomats frequently go unpunished. Another drawback, apart from jurisdiction, is that an act constituting an offence in the receiving State might not be an offence in the sending state.

iv. Reciprocity

States usually adhere to the law of immunities primarily because of the fear of retaliation. All diplomatic privileges and immunities are extended to representatives of the sending state on the understanding that such privileges and immunities will be reciprocally accorded to the representatives of the receiving State.

In the VCDR, the principle of reciprocity follows from article 47(2)(a), which provides that discrimination (which is forbidden according to article 47(1)) shall not be regarded as taking place where the receiving State applies any of the provisions of the Convention restrictively because of a restrictive application of that provision to its mission in the sending State (Lozancic, 2009, p-24).

v. Breaking Diplomatic Ties

In some instances it is a measure used as the only remaining option to stop serious abuses. The Vienna Convention permits the receiving state to limit the size of a diplomatic mission or even shut down an individual embassy. It should also be noted that as "a last resort, if the receiving state does not have the cooperation of the sending state in applying the above sanctions or if the crimes committed by immune persons are especially egregious and offensive to the receiving state, it may break diplomatic relations with the sending state." This broad remedy allowed by the Convention could deter a country from using their diplomats for terrorist plots or continually failing to bring their criminal diplomats to justice (Morris, 2007, p-607). Using this remedy might ensure that diplomats from that specific country never commit a crime in the receiving State again, but once again, the perpetrator goes unpunished.

6.0 Conclusion

Based on the above discussion, we can smoothly draw a picture of the circumstances that what VCDR provides for the diplomatic agents and how do they misappropriate those immunities. One may argue that VCDR only provides privileges and immunities without referring any counter measures for the helpless receiving state. But the argument far from truth as already it has discussed that there is some deterrent measures to prevent the abuse or misuse of immunities. But still, the picture remains same. Diplomatic Immunity has protected outlaw diplomats for thousands of years. So, what should the international community do? It is high time to re- think about diplomatic immunities. One can recommend the option that receiving state's government has to choose from in order to deal with outlaw diplomats. Unilateral action is simply not the best way to approach this problem. Unilateral action violates customary international law embodied in the Vienna Convention, and many negative consequences would befall receiving States interests, diplomatic personnel, and citizens as a result of reciprocal action that would be taken by other nations. But the crisis can be sort out in other ways. Although the VCDR makes no attempt to distinguish crimes according to their gravity, one may draw a line between the crimes of different gravity and also discuss the corresponding degree of immunity. On the other hand, as the preamble of the convention refers functional necessity as the basis of immunity. It can easily be suggested that, they should enjoy immunity, not absolutely, rather to justify the functional basis only in connection with actions forming part of their official functions.

To conclude, it can be said that the VCDR form the legal framework to diplomatic immunities, within which a more informal system of practice has been established. Within this system of practice, emphasis is primarily placed on informal methods to solving issues where a person enjoying diplomatic immunity is involved in a crime, as opposed to the formal methods enshrined in the VCDR. Within this context, the VCDR and Vienna Convention on Consular Relation, 1961 can be seen as outlining what can be done when a person enjoying diplomatic immunity is involved in a crime, while the informal system of practice decides what is done.

Note

[1] Article 22 (1) of Vienna convention on Diplomatic Relation ,1961,entails that the receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

Article 29, the person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

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