ARTICLES

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THE PARADOX OF DIPLOMATIC IMMUNITY: A COMPARATIVE APPROACH WITH PRACTICES FROM SRI LANKA, SOUTH AFRICA AND INDIA

DOI 10.31085/2541-8823-2020-5-2-70-93

Abstract: There is a sharp distinction between the rationale for granting diplomatic immunity and the practices of abuse. These practices are not even remotely connected with the uplifting of the undermining rationale of granting diplomatic immunities. Immunities should be granted based on a functional necessity instead of the personal advantageous sought and gained through the process. While many countries have both signed and ratified the Vienna Convention on Diplomatic Relations of 1961, which is seen as an incorporation of the, then existed customary laws on the subject, there are some grey areas which have been continuously abused. The immunity granted for the diplomatic mission and for the diplomatic bag has been the most abused immunity found in the contemporary practices. While there has been suggested reforms that range from isolating abusive countries to creating a fund to compensate victims, at the practical level none of these solutions have worked and some have not even been tried out. While there are instances of abuse, no country has ever doubted the importance of the Vienna Convention on the subject and many are trying to lessen the abuse of diplomatic immunities. This article explores the historical development of the diplomatic immunity, the

chronological order of the history of the Vienna Convention and its key provisions, the actual state practices, the instance of abuse, and possible reforms suggested in mitigating the abuse.

Keywords: Diplomatic Immunity, Sri Lanka, South Africa, India, Vienna Convention.

Introduction

Satow[1], a leading figure on the literature of diplomacy practice defines diplomacy as «the application of intelligence and tact to the conduct of official relations between the governments of independent states, extending sometimes also to their relations with dependent territories, and between governments and international institutions; or, more briefly, the conduct of business between states by peaceful mean». While there is some confusion as to whether foreign policy and diplomats (or diplomacy) are synonymous, it has to be mentioned that, diplomacy is one of the main tactics used in foreign policy and that the two terms are not synonymous to one another. Laws and principles related to diplomacy go back thousands of years and are influenced from a broad spectrum of cultures and customs. The formal sending of envoys as representatives of nation states may be traced back to the practice of the Greek cities. The instances of breach of the rule were rare and seem to have always been followed by terrible reprisals. For instance, the outrage committed at Athens and Sparta on the Persian envoys of Darius where two Spartan nobles offered their lives in expiation to Xerxes[2].

Denza[3] observes that, diplomacy was the means that was used to reach the ends of peace and harmony between states during times of turmoil where the diplomats acted on behalf of their respective states to put an end to the ongoing tensions by a way of negotiation and good office. The diplomats were considered to be sacrosanct, and by the time of the Congress of Westphalia in 1648, permanent legations were accepted as the normal way of conducting international business among sovereign states. Over the next century detailed rules emerged in relation to the immunity of ambassadors and their accompanying families and staff from civil as well as criminal proceedings. These rules included the inviolability of their embassy premises and their exemption from customs duties and taxes. Some rules of customary international law were described in detail by early writers such as Grotius (1625), Bynkershoek (1721) and Vattel (1758).

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1 *Ivor Roberts*. Satow's Diplomatic Practice (6th edn, OUP 2013). P. 1.

2 *Eileen Young*. 'The development of the law of diplomatic relations' (1964) 40 BYBIL 141.

3 *Denza E.* 'Vienna Convention on Diplomatic Relations' [2009] 1(1) United Nations Audio-visual Library of International Law<http://legal.un.org/avl/pdf/ha/vcdr/vcdr_e.pdf> accessed 16 April 2019.

By the end of the seventeenth century, the broad outlines of the law of diplomatic thinking point relations had emerged as a result of three hundred years of state practice. The controversial areas, such as the granting of asylum in the embassy and the position of the suite, were also evident. The law, however, was entirely customary and very much subjected to political considerations. Although, these considerations tended to have the effect of extending immunity for fear of reprisals, particularly where the head of legation was concerned. The recent entry into force of the Vienna Convention on Diplomatic Relations marks the evolution to maturity of a branch of international law which derives from customs in existence three thousand years ago.

The first international instrument to codify any aspect of diplomatic law was the Regulation adopted by the Congress of Vienna in 1815. This regulation simplified the complex rules on the classes of heads of diplomatic missions and laid down that precedence among heads of missions should be determined by date of arrival at post. Codification among states of immunities and privileges of diplomatic agents did not begin until the Havana convention of 1928, drawn up among the states of the Pan-American Union. However, this codification did not well reflect current practice either in its terminology or its rules. More influential was the Draft convention drawn up in 1932 by the Harvard Research in International Law. The establishment within the United Nations framework of the International Law Commission opened the way to comprehensive codification to confirm what were accepted as well-established – if not universally respected – rules of international law[1]. The preparatory work for the Vienna Conference followed the standard United Nations procedure for the codification of international law – applied in fields where there is already extensive state practice, precedent and doctrine. In 1952, Yugoslavia proposed that the topic should be given priority, and after discussion in the Sixth (Legal) Committee, the General Assembly requested the International Law Commission to undertake as a priority topic codification of the law of diplomatic intercourse and immunities.

The Commission appointed Mr. Sandström of Sweden as Special Rapporteur and his report formed the basis for the draft articles adopted by the commission in 1957. These articles were debated in the Sixth Committee of the General Assembly and sent to all members of the United Nations or any of its specialized agencies with an invitation to submit comments. Comments from 21 governments were considered by the commission who in 1958 prepared revised and extended articles and recommended that they should form the basis for a convention – a decision endorsed by the General Assembly. Eighty-one states took part in the conference held at Vienna from March 2 to

[1] *Denza E.* 'Vienna Convention on Diplomatic Relations' [2009] 1(1) United Nations Audio-visual Library of International Law<http://legal.un.org/avl/pdf/ha/vcdr/vcdr_e.pdf> accessed 16 April 2019.

April 14 of 1961, and the convention was signed on April 18. The convention entered into force in 1964 and had no fewer than 192 parties at the beginning of 2018, making it one of the most widely ratified international conventions.

In terms of near-universal participation by sovereign states, the high degree of observance among states parties and the influence it has had on the international legal order, the Vienna Convention on Diplomatic Relations may claim to be the most successful of the instruments drawn up under the United Nations framework for codification and progressive development of international law[1]. Diplomats represent their state abroad, and in order to do so properly, should be free from concerns about harassment or arrest. For that reason, international law has long recognized that diplomats, their immediate families and others working in or at an embassy, enjoy certain privileges and immunities. Those rules, customary in origin, have largely been codified in the 1961 Vienna Convention on Diplomatic Relations. Further[2], Eileen observes that, 'the recent entry into force of the Vienna Convention on Diplomatic Relations marks the evolution to maturity of a branch of international law which derives from customs in existence three thousand years.

The success of the conference, and of the convention which it drew up, may be ascribed first to the fact that the central rules regulating diplomatic relations had been stable for over 200 years. Although the methods of setting up embassies and communicating with them had radically changed, their basic functions remained and remain the same up to date. These functions include representing the sending state and protecting its interests and those of its nationals, negotiating with the receiving state, observing and reporting on conditions and developments there. The institution of diplomacy has always been regarded as one of fundamental importance to the proper functioning of international relations. Despite the overwhelming advances in technology, which have changed the whole landscape of international relations, states remain firm in their belief that the exchange of diplomatic representatives is critical to the methodology of inter-state relations.

The success of the convention also lies in the fact that many states cooperated with one another regarding issues which were rather peculiar. One such pertinent issue was whether the use of transmitters could be allowed as a means of communication. Most of the countries who were unable to use this technology opposed the idea of granting the use transmitters as a means of telecommunication, as it would not be in their best interest to do so. This convention is seen as a codification of the existing Customary International Law which was well settled during

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[1] *Denza E.* 'Vienna Convention on Diplomatic Relations' [2009] 1(1) United Nations Audio-visual Library of International Law<http://legal.un.org/avl/pdf/ha/vcdr/vcdr_e.pdf> accessed 16 April 2019.

[2] *Eileen Young.* The Development of the Law of Diplomatic Relations, 40 Brit. Y.B. Int'l L. 141 (1964) 7 Ibid.

the time of implementing the convention. Therefore, a compromise was reached on the basis that, not only should the sending state get the required permission from the receiving state to use transmitters in their communications, but it should also make proper arrangements for their use in accordance with the laws of the receiving state and international regulations.

Another issue was the inviolability of the diplomatic bag. Under the customary rules, it was permissible for a receiving state suspecting that a diplomatic bag contained material other than permitted (For instance official documents and equipment) to challenge the courier – upon which the sending state could either return the suspected bag unopened or submit it to inspection supervised by the authorities of both states. However, ultimately it was decided that although there was a duty on the sending state to use the bag only for diplomatic documents or articles for official use, the bag could not be opened or detained under any circumstances. Despite numerous amendments and arguments in the conference, this was the rule ultimately adopted in Article 27.

Diplomacy and diplomatic relations are underlined by the principle of reciprocity. As each state becomes both a sender and receiver state of diplomats, it would think more than twice before committing any wrong against a diplomat of another country as it would have to face up with the repercussions of doing so in the country to which the particular diplomat belongs to. Further, on the same footing, diplomats will also think twice before abusing their powers of diplomacy as they would also have to face up with the reciprocal duties casted upon them under this principle.

Leslie Shirin[1] observes that, there are three theories which try to explain the rationale behind diplomatic immunity. The purpose of these theories, however, has remained constant: to explain the need to give diplomats immunity 9. The theories include, representative of the sovereignty, exterritoriality and functional necessity. According to the representative of the sovereignty theory, it is claimed that, the representative's privileges are like those of the sovereign herself, and an insult to the ambassador is an insult to the dignity of the sovereign. However, this theory has not found much support due to the fact that, personification doctrine is too broad as it places the diplomat above the law of the host state and in the modern world, what king is the ambassador personifying is being seriously questioned.

The exterritoriality theory is based on the legal fiction that a diplomat is always on the soil of her native country, wherever she may go. However, this theory has also been questioned on the notion that, not only is the doctrine a mere legal fiction, but dangerous consequences could result because it presupposes a theory of unlimited privileges and immunities which would go beyond those extended to diplomats.

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[1] *Leslie Shirin Farhangi.* Insuring against Abuse of Diplomatic Immunity, 38 Stan. L. Rev. 1517 (1986)
9 Ibid

For this reason, commentators have generally rejected this theory as a basis for diplomatic immunity. Even the courts have vehemently rejected this theory[1].

The third theory which is based on functional necessity is the most accepted theory regarding the granting of diplomatic immunities. This theory is more pragmatic than the other two theories. This approach justifies immunity on the grounds that diplomats could not fulfil their diplomatic functions without such privileges. The Vienna Convention on Diplomatic Relations embraces the functional necessity theory and recognizes 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»[2]. Ademola Abass[3] also finds that, the rationale for extending immunity to diplomats and consular staff is generally accepted to be based upon the functional necessity theory. For officials in diplomatic and consular missions to fully perform their functions, immunities are applied.

Brief Overview of the Vienna Convention on Diplomatic Immunities

The main rationale of the Vienna Convention on Diplomatic Relations is set out in the preamble itself. The preamble declares 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'[4]. However, it is exactly this purpose of the convention that has on many occasions been violated by most of the state parties to the convention. Article 01 of the convention contains the interpretation clause. However, the interpretation clause fails to interpret in detail some of the clauses mentioned therein. Specially the "family members" who are entitled to immunity are not clearly defined. Therefore, some countries like South Africa have given an interpretation to the meaning of the term 'family members" in their respective legislations.[5] Article 02 makes it clear that Diplomatic Relations are made with the consent of the respective states, which underlines the sovereignty of the states. Article 03 of the convention sets out the respective functions of a diplomatic mission. These include *inter alia,* the functions of, representing the sending state in the receiving state, protecting in the receiving state the interests of the sending state and of its nationals within the limits permitted by international

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1 *Santos v Santos* 1987 (4) SA 150 (W)

2 Preamble of the Vienna Convention on Diplomatic relations 1961

3 *Abass A. Complete International Law* (2nd edn, OUP 2014) 243

4 *Vide* Preamble of the Vienna Convention on Diplomatic Relations

5 *Vide* Section 02 of the Diplomatic Immunities and Privilege's Act No 37 of 2001

law, negotiating with the government of the receiving state, ascertaining by all lawful means conditions and developments in the receiving state, reporting thereon to the government of the sending state, promoting friendly relations between the sending state and the receiving state and developing their economic, cultural and scientific relations.

Article 04 makes it clear that any person sent by the sending state must be given the approval of the receiving state, and the receiving state is not required to furnish any reason whatsoever for rejecting a person nominated by the sending state for a post. Article 09 deals with the concept of *persona non grata* by which the receiving state could declare that any member of the mission including the head, is unacceptable. The receiving state does not need to assign any reasons for declaring anyone *persona non grata* as well. Article 14 of the convention declares that, there shall be no differentiation between heads of mission by reason of their class except as concerns precedence and etiquette. Therefore, whether the Heads of mission is an ambassador, envoy or a chargés d'affaires they all enjoy the same amount of privileges and immunities. Article 22 of the convention which can be said to be the most important and perhaps the most controversial. It deals with the inviolability of the diplomatic premises. Under no circumstances is it allowed to deviate from the general norm of inviolability.

Article 24 of the convention stipulates that, archives and documents of the mission shall be inviolable. Article 27 is yet another important and controversial provision regarding diplomatic immunity. It deals with the diplomatic correspondence and the diplomatic bag. These are also inviolable under any circumstances. Article 31 of the convention provides for a blanket immunity from criminal jurisdiction for the diplomatic agents and except for few exceptions they also enjoy a broad immunity from civil suits as well. According to the same Article he/she is also not required to give evidence in a Court of law. Article 32 of the convention allows for the waiver of immunity of a diplomatic agent by the sending state. Article 33 and 34 exempts a diplomatic agent from the social security provisions and taxes of the receiving state.

Article 41 obliges all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving state. They also have a duty not to interfere in the internal affairs of that state. The article also stipulates that; the diplomatic premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present convention or by other rules of general international law or by any special agreements in force between the sending and the receiving state. Article 42 stipulates that, a diplomatic agent shall not in the receiving state practise, for personal profit, any professional or commercial activity. However, these provisions have been seldomly invoked and they have been put to a state of mere decorations.

One appreciation of the convention has been its ability to gather a vast amount of states to become members of it. Even with all the limitations which the convention has, it has been acclaimed as one of the success stories coming under International Law. Many states have made domestic legislations to give effect to its obligations deriving under the provisions of the convention. Rosalyn Higgins observes that, 'it has frequently been observed that there is generally good compliance with the law of diplomatic immunity because here, almost as in no other area of international law, the reciprocal benefits of compliance are visible and manifest.'[1]

Instances of Abuse Regarding the Vienna Convention of Diplomatic Relations 1961

Many instances could be put forward to showcase an unfortunate tendency on the part of diplomats to disregard the law of the receiving state and invoke their diplomatic immunity to escape liability. This is very much in contradiction to the functional immunity which is granted on the diplomats to discharge their duties without being subjected to the jurisdiction of the receiving state. The immunity is granted to be used as a shield and not as a sword, however, the experience has shown that it has always been tried to be used to cut instead to protect. The main reason for tolerating this kind of abuse lies in the reciprocity of the immunity granted. For an example, if the receiving state is to act against a person holding diplomatic immunity of a sending state, the receiving state may have to face up with difficulties regarding their own missions in the sending state. Therefore, retaliation prohibits and discourages against the taking of strong actions against abuse.

Higgins observes that, for about 15 years it was generally felt that the provisions of the Vienna Convention did indeed provide a fair balance between the interests of the sending and receiving states. But in many of the major capitals of the world, it came to be felt that diplomats were abusing the privileged status given to their vehicles, and in particular parking illegally, causing obstructions and failing to pay traffic fines.[2] Leslie Shirin finds that, 'abuses of diplomatic immunity fall into two broad categories: the use of the diplomatic bag to smuggle illegal goods into or out of the receiving state, and crimes committed by the diplomat's themselves'.[3] Perhaps the most well-known is the shooting of a British policewoman in St. James' square by an unidentified assailant who was within the Libyan Embassy in London in April

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[1] Rosalyn Higgins, 'The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience' (1985) 79 (3), AJIL P. 641–651.

[2] Rosalyn Higgins, 'The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience' (1985) 79 (3), AJIL P. 641–651.

[3] Leslie Shirin Farhangi, Insuring against Abuse of Diplomatic Immunity, 38 Stan. L. Rev. 1517 (1986).

1984. There, protesters were demonstrating peacefully when submachine gunfire from the embassy killed British constable Yvonne Fletcher and wounded eleven others. The Libyans claimed diplomatic immunity for all embassy occupants; the British Government declared the diplomats' *persona non grata,* expelled them, and broke off relations with Libya- all that it could do under the Vienna Convention.

The Libyan experience caused outrage in the United Kingdom and raised many questions as to why the British authorities could not enter the Libyan embassy and search the premises. It was even argued that, as the act of shooting was inconsistent with the true spirit of the Vienna Convention on Diplomatic Immunities, that in such an instance the receiving state can act to protect its interest by entering the premises.[1] However, the British authorities stuck with the letter of the convention and it did what it could do, the maximum allowed by the convention as a method of reprisal and that was to name those diplomats as persona non grata and to terminate the diplomatic ties with the Libyan Government. In rejecting the view of allowing for exceptions on the inviolability of the diplomatic premises, Higgins also finds that, inviolability had to be absolute if the door was not to be opened to possible abuse by the receiving state.[2]

On November 4, 1979 the American embassy in Tehran was seized by armed students and the entire staff of the embassy was held hostage. The gunmen demanded that the United States ("U. S.") extradite the Shah and apologize for its involvement in internal Iranian politics over the past several decades. The Iranian government took no action to help gain the release of the hostages, and the last hostages were released after 444 days in captivity. The U. S. filed a claim before the International Court of Justice. In its judgment on May 24, 1980 the Court held that, 'the Government of the Islamic Republic of Iran shall afford to all the diplomatic and consular personnel of the United States the protection, privileges and immunities to which they are entitled under the treaties in force between the two states, and under general international law, including immunity from any form of criminal jurisdiction and freedom and facilities to leave the territory of Iran'.[3]

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

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[1] *Rosalyn Higgins*. 'The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience' (1985) 79 (3), AJIL P. 641–651.

[2] Ibid.

[3] United States Diplomatic and Consular Staff in Tehran (U. S. v. Iran), 1980 I. C. J. 3 (May 24).

expel the diplomats involved with the kidnapping. This was not the first time the immunity of a diplomatic "bag" was used for purposes of abduction.[1] In another incident, the customs authorities in Rome realized that a large diplomatic "bag" destined for Cairo was emitting moans. They seized and opened it and found that it contained a drugged Israeli who had been kidnapped.[2]

The United States has also had its share of incidents. 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 dollar "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.[3] Later that year Nam Chol, a North Korean diplomat, surrendered to American authorities. He had found sanctuary in the North Korean Embassy for ten months after allegedly sexually assaulting a woman in a park in New York. In order to force Mr. Chol out of the North Korean mission, the State Department threatened to expel Mr. Chol's superior. Mr. Chol then surrendered to the authorities, who charged him with the crime and ordered him to leave the country.[4] In another incident reported in November **1982,** the grandson of the Brazilian Ambassador in Washington assaulted and shot an American citizen outside a local nightclub. The victim of the assault filed suit against the Ambassador and Brazil. These charges were dismissed on grounds of diplomatic immunity[5].

Higgins observes that, the extent to which countries will avail themselves of the opportunities for lawful response to abuse of diplomatic immunities will depend in large measure upon whether that expatriate community is perceived to be at risk. That is something that the balanced text of the Vienna Convention cannot provide against and by the same token, any amendment of that text or withdrawal from its obligations would not change that reality.[6] In all these situations the host government had an "alarmingly narrow" range of options.

Expulsion and a break in diplomatic relations were the only actions available. Because these actions were the most severe that could be taken under the Vienna Convention, there was great public feeling that injustice had been done.

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1 The Times (London), July 7, 1984, at 1, col. 2.

2 Ivor Roberts, *Satow's Diplomatic Practice* (6th edn, OUP 2013). P. 251.

3 N.Y. Times, July 16, 1983, at 2, col. 1.

4 N.Y. Times, July 22, 1983, at B4, col. 1.

5 *Skeen v. Federative Rep. of Brazil*, 566 F. Supp. 1414 (D.D.C. 1983).

6 Rosalyn Higgins, 'The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience' (1985) 79 (3), AJIL P. 641–651.

In order to overcome some of the harshness provided by the Vienna Convention on Diplomatic Immunities, some countries have adopted their own local laws with such provisions which tries to limit the possible abuse of diplomatic immunities. These measures include, having a proper registry of the people enjoying immunity, having special insurance schemes to protect the local citizens from abuse, having good diplomatic practices abroad so as to provide good precedents for the diplomats of the hosting state, having clear definitions and interpretations as to respective privileges and immunities and having qualified personnel to the respective posts. Considering these practices, it becomes important to look at specific practices of states regarding diplomatic relations. Hence a thorough analysis of the state practices regarding South Africa, India and Sri Lanka is preferred here to get an understanding as to how states have designed their own legislations to both give effect to its international obligations arising out of the convention, and at the same time to protect its citizenry from possible abuse by having provisions to counter them while adhering to the true spirit of the convention.

South African Practice

Dugard[1] writing from a south African perspective observes that, the principles relating to diplomatic immunity are universally accepted and are most probably the oldest of all the principles in International Law. He finds that while political affairs are handled by the diplomats, the trade related aspects and commercial dealings are handled by the consular services. In 1951 South Africa enacted the Diplomatic Privilege's Act which accorded to the existing Customary International Law on the subject. In 1989 South Africa acceded to both the conventions on diplomatic and consular immunities and made legislative changes accordingly.

South Africa enacted the Diplomatic Immunities and Privilege's Act No 37 of 2001 to give full effect to the Vienna Conventions on diplomatic and consular relations. Section 02 of the act stipulates that, both the Vienna Conventions on diplomatic and consular relations forms a part of the South African Law if it is consistent with the act. Section 02 interprets a member of the family[2]. Section 04 of the

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[1] J. Dugard, *International Law: A South African Perspective* (3rd edn Juta 2005).

[2] 'member of a family' means— (i) the spouse; (ii) any [unmarried] dependent child under the age of [21] 18 years; (iii) any [unmarried child between the ages of 21 and 23 years who is undertaking full-time studies at an educational institution] other dependant family member, officially recognised as such by the sending state or the United Nations, a specialised agency or an international organisation; and (iv) [any other unmarried child or other family member officially recognised as a dependant member of the family by the government of the sending state, the United Nations, a specialised agency or organisation] the life partner, officially recognised as such by the sending state or the United Nations, a specialised agency or an international organisation, and [who is issued with a diplomatic or official passport], if applicable, 'spouses and relatives dependant' has the same meaning".

act provides that, a head of state, special envoy or representative from another state, government or organization is immune from the criminal and civil jurisdiction of the courts of the republic. The Minister of Foreign Affairs has the duty to notify in the *gazette*, those personnel who enjoys the diplomatic/consular immunities according to section 07 of the act. Further, section 09 provides that there should be a registry with the respective names of persons who enjoy such immunities from both criminal and civil jurisdictions of the country and the same section of the act requires that the names of such persons be put in the *gazette* annually.

According to section 10 of the act, if it appears to the minister that, the privileges and immunities granted in South Africa to a particular diplomatic mission of another state is greater than the privileges and immunities enjoyed by a South African mission in that state, the minister has the power to withdraw so much of the privileges to that mission as he/she deems adequate. This again reemphasises the duty of reciprocity regarding diplomatic relations. One key feature in the South African Act is the requirement to have liability insurance for persons enjoying immunity under the act or the convention. This requirement is laid down in the section 13 of the act. This can be seen as a very good initiative to protect the South African Citizens from abuse by the persons enjoying immunity whereby, the South African citizens will have a right to recoup any loss or damage from the insurance company and it will also help to keep the Vienna Convention as it is without being prejudicial to the rights and immunities enjoyed by diplomats and others alike[1].

The South African Courts have rejected diplomatic immunity based on the extraterritoriality theory. W J Van der Merwe[30] has succinctly pointed out that the theory is no longer supported in the South African context. This view was endorsed in the decision of ***S v Mharapara***[2]**.** Further in the decision of ***Santos v Santos***[3] the Court opined that; a marriage was invalid when solemnized in a foreign embassy by a person not recognized as a marriage officer under the South African Law. Referring to Michael Akehurst[4], Groskopf J, observed that 'diplomatic premises are not extraterritorial; acts occurring there are regarded as taking place on the territory of the receiving state, not on that of the sending state.' The South African Courts in the case of ***Portion 20 of Plot 15 Athol Ltd v Rodriques***[34] held that, a claim to immunity in respect of a real action relating to private property that was not used for the purpose of carrying out of diplomatic purposes or any other purpose related

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1 J. Dugard, *International Law: A South African Perspective* (3rd edn Juta 2005) 263 30 *Ibid* ft note 163.

2 1986 (1) SA 556 (ZS) at 558C mand 559B.

3 1987 (4) SA 150 (W).

4 Peter Malanczuk (ed), *Akehurst's Modern Introduction to International Law* (8th edn Routledge 2002) 34 2001 (1) SA 1285 (W).

thereto, that such property nor the holder of such property even it be a diplomat would not enjoy the immunities which are otherwise applicable.

Before the enactment of the Diplomatic Immunities and Privilege's Act No 37 of 2001 there was a discussion as to whether a person enjoying such immunity could be detained or arrested under some circumstances. In the case of ***Nkondo v Minister of Police***[1] Smuts J in his *obiter dictum* stated that, a diplomat may be arrested and detained for acts which endanger the state. However, Dugard[2] observes that, this cannot stand true after the implementation of the Diplomatic Immunities and Privilege's Act No 37 of 2001 which does not provide for such kind of exception to the general inviolability of diplomats who enjoy immunity from both criminal and civil jurisdiction of the domestic courts. The controversy surrounding this type of a situation arose once again when President Al Bashir of Sudan came to visit South Africa in 2015. When President Al Bashir visited South Africa for a summit he had an arrest warrant issued by the International Criminal Court. However, he was not arrested by the South African authorities. This was challenged in the case of ***The Minister of Justice and Constitutional Development v The Southern African Litigation Centre***[34] where it was successfully argued that, in failing to both arrest and detain President Al Bashir, South Africa failed to meet its obligations imposed upon by the ICC statute. In its judgement, the Court cited the case of ***Tachiona v Mugabe***[38] where the American Court opined that 'resort to head-of-state and diplomatic immunity as a shield for private abuses of the sovereign's office is wearing thinner in the eyes of the world and waning in the cover of the law'. Further, the Court held that, 'in the case of international crimes and South Africa's obligations to the ICC in terms of the Rome Statute, such immunity had been specifically removed in terms of section 10(9) of the Implementation Act (*International Criminal Court Act 27 of 2002*).' (Emphasis added).

South Africa has also seen its fair share of abuse related to diplomatic immunity and regarding diplomatic asylum. Dugard[5] provides several examples where the diplomatic mission and the inviolability thereof was used to give asylum to people who have breached the South African Law. In 1984 six members of the United Democratic Front sought refuge in the British embassy after they were found wanting for alleged breaches of the Internal Security Act. However, the British embassy refused to hand

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[1] 1980 (2) SA 894 (O) at 900-2.

[2] J. Dugard, *International Law: A South African Perspective* (3rd edn Juta 2005) 264.

[3] (867/15) [2016] ZASCA 17; 2016 (4) BCLR 487 (SCA); [2016] 2 All SA 365 (SCA); 2016 (3) SA 317 (SCA) (15 March 2016).

[4] F. Supp. 2d 259 (S.D.N.Y. 2001).

[5] Dugard P. 266.

these men over to the South African authorities. It was only after the men voluntarily decided to leave the diplomatic mission that they were arrested. In retaliation to this South Africa reneged their decision to hand over four South African citizens to stand trial in the United Kingdom for violating arms embargos. Similarly, in 1985, Klass de Jonge, a Dutch National retained under the the Internal Security Act managed to escape from the police custody and entered the diplomatic mission of Netherlands. The police entered the premises without the permission of the Dutch officials and apprehended the escapee. However, Netherlands complaint about the illegal entry into its premises and this was upheld. This led to Klass de Jonge being able to return to Netherlands without further calamity.

Things have changed from the situation that we found in the mid 80's and in 2017, former Zimbabwean first lady Grace Mugabe was denied diplomatic immunity for assaulting a South African model in a Johannesburg hotel. The South Gauteng High Court in Johannesburg in the case of ***Democratic Alliance v Minister of International Relations and Co-operation and Others***[1] overturned a government decision to grant the wife of former Zimbabwean leader Robert Mugabe diplomatic immunity and stated that, 'If the minister makes such a determination, then she may confer such immunities and privileges on such a person or organisation. It is important to emphasise, however, that the discretion given to the Minister is not absolute. It requires the Minister to consider all the facts and circumstances and that her decision must be reasoned. In other words, her decision cannot be arbitrary; it must be rational. This is the test for the proper exercise of discretion in matters of foreign affairs (rationality). The Minister has accordingly considered all the facts and the circumstances at her disposal before coming to a determination'. Hence, it can be seen from the South African experience and context that it showcases a more pragmatic approach in both dealing and handling abuses of diplomatic immunities.

Indian Practice

India acceded to the Vienna Convention on Diplomatic Relations on October 15 1965. In order to give effect to the obligations arising out of the convention, India enacted the Diplomatic Relations (Vienna Convention) Act No 43 of 1972. Preamble of the act provides that, the objective of the act is to give effect to the Vienna Convention on Diplomatic Relations, 1961 and to provide for matters connected therewith. Section 2 makes it clear that the provisions of the convention which is given in the scheduled to the act will have effect irrespective of whatever is stated in the other laws. The schedule refers to some of the articles of the convention, namely Articles, 1, 22, 23, 24, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40.

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[1] (58755/17) [2018] ZAGPPHC 534; [2018] 4 All SA 131 (GP); 2018 (6) SA 109 (GP); 2018 (2) SACR 654 (GP) (30 July 2018).

Section 04 of the India Act mentions the restrictions that may be applied. Such restrictions include that if a particular state is in breach of its obligations under the Vienna Convention on Diplomatic Relations, that the Relevant Minister in charge of the subject, by notification in the Official Gazette, withdraw such of the privileges and immunities so conferred from the diplomatic mission of that state or from members thereof as may appear to the Central Government to be proper. This is something interesting to note as this particular provision goes beyond the general concept of reciprocity. The provisions allow the power to the Minister to act in the manner provided if any state is in breach of its obligations under the Vienna Convention on Diplomatic Relations, irrespective of the fact whether such breach is detrimental or is having any effect on India or not. The section also provides that if India is according more immunities to a diplomatic mission of a state, where such state is not according the same kind of immunities to the Indian mission there, then the minister can act as mentioned above. This is an example for the classical reciprocal duty which is envisaged in the convention. The Indian Act is not as comprehensive as the South African Act and it does not have a way to protect the interest of the Indian Citizens as in the case of South Africa which required embassies to have insurance policies. Further, the Indian Act does not make provisions to have a list of persons who are entitled to these diplomatic immunities as in the case of South Africa. The Indian Act reiterates the inviolability of the diplomatic premises in section 08 of the Act. This may be superfluous as the schedule to the act makes direct reference to Article 22 of the Vienna Convention on Diplomatic Relations[1].

There are several judicial opinions in which the issue of diplomatic immunity has been discussed in the Indian context. In the case of ***Union of India v Bilash Chand Jain***[2] the issue in hand was whether diplomatic immunity could be claimed for commercial and/or private acts. In this case a suit was filed against Romanian as the second defendant for a principal sum of some Rs. 50 lacs, for services rendered to, and goodwill established on behalf of one Ice Chimica, but not paid for. The question that arose was whether the first defendant being a Romanian could claim diplomatic immunity. Secretary to the Ministry of External Affairs rejected the claim made by the appellants to execute a decree obtained by him under Section 86 Sub-section (3) of the Code of Civil Procedure. The Court made some interesting observations regarding the applicability of diplomatic immunity in India. First, the Court observed that, 'the law of diplomatic immunity has not developed any very much in India (*and that there is)* a host of cases are to be found decided in England

[1] G. P. Singh, *International Law* (1st edn EBC Publishers 2015) 233.

[2] (2001) 3 CALLT 352 HC.

and it is those cases which are still relied upon in India.'[1] The Court opined that, the rationale behind diplomatic immunity lies in the fact that. 'one equal cannot have jurisdiction over another equal'.[2] The Court also found that, 'If the existence of the law of diplomatic immunity prohibits the grant of sanction for execution, as is the impression under which the Secretary seems to have laboured, then 'and in that event, no plaintiff with a decree will ever get a sanction for execution.'[3]. The Court made the following observation and declared that, diplomatic immunity also has limits which must be accepted.

"Whenever and wherever a foreign state either acting by itself or through its agents or instrumentalities engages in ordinary or commercial transactions with parties or persons of another state, in all such cases, the sovereign comes down from his high pedestal. The sovereign engages in businesses and commerce and subjects itself to the ordinary incidents of commerce and industry and attempts at profit makings. In such cases there will be disputes, and resolution of disputes, and the necessity of the consequent satisfaction of the rights and liabilities arising either in favour of or against the foreign sovereign. The foreign sovereign might well have to sue in a foreign Court and might equally will be sued in a foreign Court. No principle of international amity or the maintenance of dignity of an international sovereign in the modern days requires that the Courts of law stay their hands against a foreign sovereign only because he is a foreign sovereign."[4]

In this case, the Court in deciding on both sovereign immunities combined with diplomatic immunity decided that, diplomatic immunity is also subjected to the limitations of sovereign immunity that has developed over time. The Court in this case emphasised on the functional immunity of the diplomatic immunity instead of advocating for a blanket immunity to cover all incidents. This decision can be appreciated for the fact that it sets a good precedent against the abuse of diplomatic immunity in future cases.

In the case of ***Earth Builders v state of Maharashtra***[5] the issue was whether access to the plaintiffs could be had through the Afghan consulate office premises. In considering the issue, the Court looked at both the Vienna Convention on Diplomatic and Consular Relations. The Court opined that, the acquisition of the property of the consulate for the purpose of providing an access to the landlocked property and declaring such access as a public street would qualify to be a public

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1 (2001) 3 CALLT 352 HC. Para 21.

2 Ibid Para 17.

3 Ibid Para 20.

4 Ibid Para 26.

5 AIR 1997 Bom 148.

utility and, therefore, the consulate would not enjoy immunity from the jurisdiction of the Court.

India has also felt the abuse of diplomatic immunity by other states in its own territory. It was reported that the Consul General of Bahrain in Mumbai was accused of molestation of a 49 year-old woman working as a manager at a residential society where the diplomat also resided.[1] Although he was suspected for the crime of molestation, he was not arrested as he enjoyed diplomatic immunity. Similarly, in 2014 the Indian police filed a criminal case against certain diplomats of Israel for injuring an airport immigration official, though no action was taken against them.[49]

India too had to face up with some of the issues related diplomatic and consulate immunity in foreign states. In one such incident, an Indian Devyani Khobragade who was the Deputy Consul General of the Consulate General of India in the United States was charged with making a fraudulent visa and for failing to pay the minimum wages to her domestic worker. For these charges she was arrested and strip-searched. The charges against her were shown to be true and in the mean time she was transferred to the United Nations mission in the United States. This was done in order to grant her with the full immunity which she would not have enjoyed as a consul. After her transfer to the United Nations the charges against her were dropped as she enjoyed full immunity from suit. This can be seen an an instance of India abusing her powers of diplomacy to protect one of its citizens which is contrary to the spirit and letter of the Vienna Conventions on diplomatic and consular relations.

In another incident, an Italian Ambassador to India signed as a guarantor for two Italian marines who had shot dead two Indian fishermen in February 2012, probably mistaking them to be pirates, and were being held in custody in India pending trial. The two sailors were given permission to return to Italy to celebrate Christmas with their families and return to India to continue their trial after the Italian Ambassador signed as a guarantor to ensure the return of the two marines. Once the marines reached Italy, it was announced that the marines will not return to India to stand trial. Prime Minister Manmohan Singh's fragile coalition was accused by the opposition of being too soft and for colluding with the Italians and pressure was brought to bear to insist on the return of the two marines. The Indian Chief Justice notwithstanding diplomatic immunity in the case of ***Republic of Italy and Others v Union of India and Others***[2] barred the Italian Ambassador from leaving the country. Though this was in contravention to the provisions of

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[1] Sagar Rajput, 'Bahrain diplomat accused of abusing woman sent home' *Mid-Day* (Mumbai, 29 December 2013) <http://www.mid-day.com/articles/bahrain-diplomat-accused-ofabusing-woman-sent-home/246384> 49 India lodges criminal case against Israeli diplomats' (*Islamic Invitation Turkey*, 7 April 2014). <http://www.islamicinvitationturkey.com/2014/04/07/india-lodges-criminal-case-against-Israeli-diplomats/>

[2] W. P. 135/ 2012 and SLP (Civil) 20370.

the Vienna Convention on Diplomatic Relations, Italy had to surrender the two marines to India to Stand trial.

Indian experience showcases that is has been an abuser and the abused. While the judiciary has made some inroads in trying to prevent the abuse of diplomatic immunities, the Indian Government being quite opposite to the same token has at times abused its powers of diplomatic immunities for which the Khobragade incidents provides ample evidence.

Sri Lankan Practice

As with many other international treaties' Sri Lanka is a state party to the Vienna Convention on Diplomatic Relations. Sri Lanka ratified the convention on 02 June 1978. However, it took nearly 18 years to implement enabling legislation regarding this Convection. It was in 1996 when Sri Lankan legislature enacted the Diplomatic Privileges Act, short title No. 9 of 1996. The preamble states that the act is enacted in order to, 'give effect to the Vienna Convention on diplomatic relations; to provide for the grant of immunities and privileges to tub officers, agents and property of certain international organizations; and to provide for matters connected therewith or incidental thereto.' Section 02 of the act provides that, subject to Section 03 of the act, the Vienna Convention on Diplomatic Relations is to have the full force of Law in the Country. The Sri Lankan Act is more achingly like the Indian Act than the South African one. Section 04 of the act speaks of the reciprocity as usually found in the respective legislations of India and South Africa. Section 03 provides that, if Sri Lanka is according more immunities to a diplomatic mission of a state, where such state is not according the same kind of immunities to the Sri Lankan mission there. Then the minister can by Order published in the Gazette, declare that such of the provisions of this act as are specified In such order shall, with effect from such date as may be specified in such order, cease to apply with respect to the mission of that state or to such categories of members of the mission of that state, as is, or are, specified therein. However, it has to be noted that, unlike the South African system, Sri Lankan system does not have a registry to identify persons enjoying diplomatic immunity nor an insurance mechanism to protect its citizens from abuse as in South Africa.

Ministry of Foreign Affairs in its website[1] specifically mentions that, according to the Vienna Convention, Diplomat and Diplomatic Organizations are exempted for the Civil and Criminal Jurisdiction of the receiving country to perform duties on behalf of the representing states. However, exemption from the jurisdiction will not be provided if any Diplomat or Non -Diplomat or any staff member of the Diplomatic

[1] https://www.mfa.gov.lk/dpl-act/

Missions are involved the following offences which includes, **Violation of Motor Traffic Rules** (The Ministry will not issue TPN in favour to a Mission if they violate the domestic motor traffic rules. I.e. Driving under the influence of alcohol etc and **Dispute on locally recruited staff members).** According to the Labour Ministry's law (EPF & ETF act), all Missions are required to comply with employer's contribution and employees' contribution to the Department of Labour on time. If the Mission has an alternative Employees' Right Protection Scheme, the concurrence of the Ministry of Labour and the Ministry of Foreign Affairs must be obtained. The site further states that, any dispute on locally recruited staff should be settled in accordance to the domestic law enforcement and any outstanding payments to locally recruited staff or other parties must be settled in accordance to the domestic law enforcement.

There have been several incidents in which the issue of diplomatic immunity has been dealt by the Courts in the Country. In the case of ***International Water Management Institute v Kithsiri Jayakody***[1] the question to be answered was whether the appellant incorporated under the International Irrigation Management Act No. 6 of 1985, as amended by Act No. 50 of 2000 was entitled to diplomatic immunity under the provisions of Diplomatic Privileges Act No. 9 of 1996. The lower Courts have held that the best way to prove that the Appellant is entitled to prove of immunity is to produce the certification issued under the hand of the Secretary to the Minister in charge of the subject of the Foreign Affairs as specified under the act and since such was not produced it was not entitled to immunity. The Supreme Court in making its determination declared that, in looking at the immunity of the appellant, not only the provisions of the Diplomatic Privileges Act No. 9 of 1996 but recourse is also to be had to the Section 33 of the International Irrigation Management Act No. 6 of 1985, as amended by Act No. 50 of 2000 in determining whether the appellant is entitled to immunity as held that in considering the circumstances it was entitled to immunity. On the contrary in the case of ***Ranasinghe v Minister of Foreign Affairs and Others***[2] the petitioner an English stenographer attached to the Sri Lanka Mission in Pakistan, on her return to Sri Lanka brought the van imported from Japan and used by her – as 'personal belongings' and complained that she was entitled to import the van 'duty free' but the customs had informed her she had to pay the import duties. However, the Court rejected this argument and held that, customary Laws based on the International Conventions have no application to the petitioner once she returns to Sri Lanka on termination of her duties as a non-diplomatic officer in a foreign mission abroad and she is subject to the laws of Sri Lanka – and is subject to the provisions of the Customs Ordinance and other laws

[1] *SC Appeal No.* 11/2011.

[2] 2010 (1) Sri L R 178.

of Sri Lanka. Hence it was held that the petitioner was not entitled to Diplomatic Immunity as she was no longer a 'diplomat'.

Before the enactment of the [1]Diplomatic Privileges Act No. 9 of 1996 and even before the implementation of the Vienna Convention on Diplomatic Immunity in 1961, Sri Lanka too had to go through certain abuses of diplomatic immunity which were evident in the case of ***Appuhamy v Gregory***[54] where the Court held that, under the rules of international comity, diplomatic immunity from judicial process is extended not only to a Minister or Ambassador but also to his family, suite and servants. An assistant to a military or naval attaché, if he in fact works in an embassy, is covered by the immunity. However, this case cannot be considered as good law since the Ministry of Foreign Affairs has made it clear that regarding issues pertaining to locally recruited staff members there are some restrictions on the applicability of the diplomatic immunities.

Maybe the most (in)famous case regarding the abuse of diplomatic immunity was the murder of Shirley Boonwaart in 1967[2] who was the wife of the Burmese Ambassador. Even with enough evidence to convict the Burmese Ambassador for killing his wife, Sri Lanka authorities were left with no option but to respect the diplomatic immunity enjoyed by the Ambassador and not to violate on the inviolability of his person or premises.

Recently there was an incident involving Brigadier Priyanka Fernando[3] who made a controversial gestures at pro-LTTE demonstrators outside the Sri Lanka High Commission in London. For this incident the Westminster Magistrate's Court tried to issue a warrant against the officer. However, this had to be dropped later as it was found from the Commonwealth Office that the said officer was immune from the jurisdiction of the court as he enjoyed diplomatic immunity.

In commenting on the Sri Lankan situation, due to its lack of power in the international terrain and the judiciary being unable to bring clarity like its Indian counterpart, Sri Lanka could be a country which is more prone to be abused by the concept of diplomatic immunity.

Possible Reforms for Mitigating the Abuse of Diplomatic Immunity

While the fact that, diplomatic immunity in its totality has not been always used for its intended purpose, there is no universal consensus as to how the instances of abuse could be stopped. The main reason behind this could be linked

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1 NLR 235.

2 http://dailynews.lk/2019/01/25/features/175476/murder-enshrouded-diplomatic-immunity

3 http://www.sundaytimes.lk/190127/news/british-court-seeks-clarification-of-lankan-brigadiers-dpl-status333242.html

to the reciprocity of the diplomatic immunity itself. If a country is going to be hostile towards another country, the fear of retaliation for its own people living in such a country to whom such hostilities are shown would be a real and imminent danger. Leslie observes that, there are five approaches which could be taken in order to stop the abuse of diplomatic immunity.[1] Firstly, countries which are continuously abusing diplomatic immunity could be isolated. Secondly, creating a separate fund to compensate victims of such abuse. Thirdly, to bring a suit against the abuser in his or her own country. Fourthly, to interpret the Vienna Convention in a restrictive manner to curtail the instance where the immunity would apply. Fifthly, amending the Vienna Convention.[58] However, these solutions are more paradoxical than pragmatic.

Considering the first solution in isolating Countries who are constant abusers, the Vienna Convention itself provides the necessary impetus for adopting such an issue. The convention allows each state to stop and cease its diplomatic missions of another country without assigning any reason. Article 02 and Article 09 of the convention when read together makes it clear that, as diplomatic relations between two states arise out of mutual consent and once the mutuality aspect is hindered, without assigning any reasons whatsoever, diplomatic relations could be terminated between two countries. This was the case with Libya where the United Kingdom terminated its diplomatic relations with the Libyan government after the shooting incident that took place in London. British government campaigned to gather support from other countries to put up sanctions against the Libyan government. However, this strategy has not been found to be a suitable solution as history has shown that in changing the behaviours of a country sanctions or isolations has not worked. The option of creating a separate fund to compensate the victims of the abuse of diplomatic immunity has found some acceptance in some countries. For an example, in the United States under the Diplomatic relations Act of 1978 requires the diplomats to obtain personal insurance. On the surface of idea, it seems like a good one. However, on a practical note, as the diplomatic relations carries with it a reciprocal duty, if one state imposes such an obligation against a diplomat of another country, the imposing country's diplomats would also be required to take out personal insurance in the corresponding country as well. As international relations are both power dynamic and unequal in terms of the respective authority of each and every country, the countries who are not so strong may be reluctant to take up such measures. Even countries who are strong in their wealth and power has found it difficult to have a good rate of compliance with these kinds of initia-

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[1] Leslie Shirin Farhangi, Insuring against Abuse of Diplomatic Immunity, 38 Stan. L. Rev. 1517 (1986)
58 *Ibid.*

tives. The United States of America provides a classic example for being unable to successfully implement this policy of personal insurance schemes of diplomats[1].

Bringing a suit against the diplomat who has abused his or her immunities is a possible option though it might not always be the practical one. It would be not an option available for all the victims as the cost of litigation would not be bearable for many. Further, even if initiating such proceedings are possible, there would be no assurance as to the successfulness of such claims. Therefore, this solution, though is in theory is a possible solution is nevertheless cannot be said to be a practical one. Another solution which has been proposed is to interpret the Vienna Convention in a rather restrictive manner which will be helpful to limit the instances where the immunities will become applicable. However, most of the provisions in the convention are not unambiguous and therefore, it would not be an easy task to find their way around the provisions of the convention in order to interpret it in a manner which would be able restrict the diplomatic immunities and thereby to restrict the instances of abuse.[60] A rather radical approach in amending the Vienna Convention has also been suggested without much support as well. However, a renegotiation of the Vienna Convention would be a very difficult task. It must be remembered that, the implementation of the Vienna Convention did not happen overnight and that it took centuries to finally get down most of the states to an agreeable situation and thereby to finally affirm the customary practices relating to diplomatic immunities into a convention. Therefore, amending the convention does not seems to be a pragmatic option.

In the above analysis though there is a general understanding as to the need of preventing the abuse of diplomatic immunities, there seems to be no consensus on the exact measures to be taken in order to achieve the final endeavour of hindering the abuse.

Conclusion

The Vienna Convention on Diplomatic Relations is a classic example of a treaty that has codified the existing Customary International Law on the subject. It is considered as one of the most ratified treaties in the world with almost a universal acceptance. The true spirit of the convention is set out in the preamble itself which declares that the immunities granted to the diplomatic agents are so granted not for their personal benefit but only for them to discharge their duties properly. Further, Article 41 obliges the diplomatic agents to both respect and act according to the laws of the receiving state. However, many of the incidents associated with

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[1] Leslie Shirin Farhangi, Insuring against Abuse of Diplomatic Immunity, 38 Stan. L. Rev. 1517 (1986) 60 *Ibid.*

diplomatic immunity have been instances of gross abuse of the immunities and privileges which have been granted for those diplomatic agents. This has led many to question the validity of the rationale for providing such privileges and immunities to those diplomatic agents. The diplomatic mission has been the centre piece of abuse as it enjoys absolute inviolability. This has caused severe tension in some instances and the classic example is provided in the Libyan incident that took place in 1984. Though some have argued for certain exceptions to be made to these absolute provisions it has not found global acceptance as others are unable to see the benefits of such an initiation outweighing the possible repercussions which it may bring. Inviolability of the diplomatic bag has also caused many incidents of abuse and the reforms suggested for allowing for scanning the bags without opening it or detaining it has also met up with serious opposition.

As for the law that is applicable regarding diplomatic immunities and privileges the Vienna Convention on Diplomatic Relations has remained unchanged from its inception in 1961. In trying to battle the gross abuse of diplomatic immunities, states have tried to take some measures to protect its citizens from possible abuse. Some suggestions have also been made regarding the possible actions that could be taken regarding limiting the abuse, which includes isolating troublesome nations, creating a fund to compensate victims, bringing suit in the sending state, interpreting the Vienna Convention to provide a more restrictive diplomatic immunity and amending the Vienna Convention. While none of these schemes have found support in the existing practice, a solution in the form of requiring the diplomats to have mandatory insurance to protect the victimized citizens of the receiving state has found some support and South Africa is a good example for adopting such a measure.

In adopting measures which are suitable for stopping the abuse of diplomatic immunities recourse must be made to the enshrining the rationale for granting the immunities in the first place, which is not to make gains or to put the diplomats in an advantageous position. Instead the rational is to provide them with the necessary manoeuvrability for the proper discharge of their functions and duties. Whatever the decision or policy that is going to be taken regarding stopping the instances of abuse, it must be conditioned by the nature of reciprocity. Solutions should be pragmatic enough to be capable of working under such a condition. The best option would be the self-discipline of the diplomats themselves and the respective governments in selecting suitable posts for these diplomatic missions should be wary about this fact.

Diplomatic Immunity, even with its abuse and criticism, is a sine qua none for the smooth functioning of diplomatic relations under the rubric of international relations. While diplomatic immunities when abused would cause hardships to citizens of a country who are the victims of such abuse. On the same token, by

having diplomatic relations with another country the benefits and the advantageous gained would be too greater cost to bear for most countries, who would try to think of retaliative methods in combating against the abuse of diplomatic immunities. Though there is a conundrum or a dilemma as there may be where, the paradox of diplomatic immunity has caused tensions which have undermined the rationale for the granting of such immunities. However, the states themselves are forced to accept the hard realities and proceed with the consequences, at times even unpleasant ones, due to the reality of international relations which are based on the power relationships of the states.

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Recommended citation

Thilakarathna K. A. A. N. The Paradox of Diplomatic Immunity: A Comparative Approach with Practices from Sri Lanka, South Africa and India. Kazan University Law Review. 2020; 2 (5): 70–93. https://doi.org/ 10.31085/2541-8823-2020-5-2-70-93.