

# Historicizing Diplomatic Immunity, Discourses on Uses and Abuses- A need to revisit

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## Abstract

*Respecting the representatives has been an age old tradition in global diplomacy. In modern context, “The Vienna Convention on Diplomatic relations (1961)” and Other on “Consular Relations (1963)” have been the path breaker, often surviving strongly against the test of time. The immunity given to the Diplomats and Consulars , have arguably been, one of the most controversial provision in modern international diplomatic setup, with privileges being misinterpreted, and laws being handcuffed. The worst, has been the helpless response of the states, often misusing the barter, the convention has brought in. The issue complicates with evolution of new criminal trajectory, involvement of citizens of third state and lack of collective goodwill from nations together. Are the victims, the sole loser or the law itself hibernates- amid protests, jingoism and with diplomatic bankruptcy? It’s high time, to review the half a century long original texts and work on the maladies- so the future experiences are better of than the questionable past.*

**Keywords** - Diplomacy, convention, traditions, privileges, regard, humiliation.

Safeguarding the representation and interests of the sovereigns in modern political set up, The Vienna Convention on Diplomatic Relations (April, 1961) is a living example of mutual collaboration, tactical trust and fair diplomacy. The Diplomatic immunity, as commonly called, is mutually signed, legally binding agreement among the partnering nations to provide the absolute safeguards to the representing diplomatic missions<sup>1</sup>. Even in the extremely hostile situations, it has mostly worked satisfactorily, maintaining mutual trust and global diplomacy. Unfortunately, the diplomats have more likely misinterpreted, (read misused) the extent of their privileges often making them intolerable<sup>2</sup>. In case of grievous crimes as murder, rapes and conspiracy including war crimes and crimes against humankind- the immunity nowhere means impunity and hence the question over absolute liberty, as trial in home state often sees multiple hurdles, have turned out to be a grave question in today’s time.

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<sup>1</sup> Art. 29 of *Vienna convention On Diplomatic Relations* enacted on 24 April (1961).

<sup>2</sup> Rene Vark, *Personal inviolability and diplomatic immunity in Respect of Serious crimes*, JURIDICA international 8/2003 p.110.

Respecting the representatives and honouring the messenger has been an age old practice. The earliest evidence of Vibhisana questioning Ravana's decision of punishing Hanumana in Valmiki's Ramayana in mythological Treta Yuga, and Krishna, an incarnation of Vishnu mediating between Kauravas and Pandavas to avert Kurukshetra war (in Dwapara) affirms India's ancient tradition of Diplomatic honouring. Even in ancient Greek mythology Herodotus states that "when the messenger of Persian king Xerxes demanded "earth and water" (i.e., symbols of submission) of Greek cities, the Athenians pushed them into a pit and the Spartans threw them down a well, symbolising that they would find both- earth and water at the bottom, these often being mentioned by the messenger as a threat of siege". However, for Herodotus too, this was grossly wrong and he recounts of divine threat, punishing Sparta for this deed<sup>3</sup>. The famous ambassador of Selucas, Megasthenes spent considerable time during Mauryas, receiving highest regards and produced exceptional, ancient Indian text- Indica. The mistreatment of Raja Raja Chola's envoys began the Kandalur War in last decades of the first millennium. Genghis Khan the dauntless Mongol general valued the envoys to heights— and burnt many cities to save this principle. The Khwarezmid empire attacked post one of Genghis Khan's messenger was murdered<sup>4</sup>.

Moving from medieval to modern Indian history, we do know Mughals emphasised enormously on pompous Persian Durbar culture and their messengers holding royal *Farman* were treated with utmost respect. Francois Bernier during Mughals had almost similar story to tell although he critiqued the ruling monarchs and administration. The first instance of diplomatic immunity was bestowed by British parliament in early 18<sup>th</sup> Century, after Matveyev, a Russian resident in London, was tortured by British bailiffs<sup>5</sup>. Modern diplomatic relations moved parallel with the changing politico-economic scenarios, running via the age of industrialization to mercantilism, via colonialism to imperialism. In aftermath of the second Great War (1939-45) where diplomatic immunity was largely upheld through the safe passage of mission members through neutral countries<sup>6</sup>, it was the same grounds of Vienna, where earlier the Congress of Vienna has reiterated the rights of diplomats in 19<sup>th</sup> century, again the modern convention on Diplomatic Relations was signed on 18<sup>th</sup> April, 1961.

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<sup>3</sup> HERODOTUS HISTORIES. BOOK 7, CH. 133-134. (pp. 558–559 ) TRANS. RAWLINSON, G. WORDSWORTH. WARE, HEREFORDSHIRE. 1996.

<sup>4</sup> Praeen Swamy, *Why diplomatic immunity matters*- THE HINDU [Delhi Edition December 14, 2013]

<sup>5</sup> [http://self.gutenberg.org/articles/eng/Diplomatic\\_immunity](http://self.gutenberg.org/articles/eng/Diplomatic_immunity), WORLD HERITAGE ENCYCLOPEDIA-1.2.

<sup>6</sup> Mallikarjuna Minch I, PARIPEX INDIAN JOURNAL OF RESEARCH, 224, vol 3, Issue 4, [2014].

In modern age, this notion of diplomatic immunity although being problematic saves diplomats from any bilateral feud that might arise between nation states. It's a typical barter of security extension of representatives in each other's territory. There is another dimension to this discourse, why even on any grievous misuse the complaining country often falls silent- the expatriate community of the receiving state. In the famous, Libyan People's bureau incident in 1984, the UK restrained itself from harsher reactions as the safety and well being of approx 8000 Britons resident in Libya was a major concern<sup>7</sup>. Hence, maintaining diplomatic relations and extending absolute immunity comes with same share of trust and response in reciprocity. Its mutual give and take, granting and receiving of pleasantries whose goal lie beyond individual's safety in institutional strengthening of the larger apparatus. As one article put it: "So why do we agree to a system in which we're dependent on a foreign country's whim before we can prosecute a criminal inside our own borders? The practical answer is: because we depend on other countries to honor our own diplomats' immunity just as scrupulously as we honor theirs"<sup>8</sup>.

There have been stray incidents of grievous crimes since the promulgation of the Vienna convention, but its alarming rise of misuses since 1980s has made it a burning pot now and then. Post Yvonne Fletcher murder in 1984 street fire from Libyan embassy to Shamela Begum a Bangladeshi woman's claim over a senior Bahraini envoy couple of forced slavery in 1999, From recent Devyani Khobragade's incident of handcuffing in New York( Dec, 2013) to latest Nepalese women chronic sexual exploitation at a Saudi Diplomat's residence in Gurgaon( Sept. 2015) the issue of inviolability and mission immunity beyond official purpose keeps coming in news. Apart from the allegations of murder, sexual exploitation to slavery, the diplomats and councillors have often been alleged of gross misusing of privileges ranging to parking violations, drunk driving, vehicular assault, financial abuses of rent, failed alimony and children support to non payment of taxes and fees. Article 41(1) of Vienna convention on Diplomatic relations clearly dictates, "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. They also have a duty not to interfere in the internal affairs of that state"<sup>9</sup>. Of course the safeguards come in, where the receiving state may ask to waive the immunity of the alleged person concerned of grave crime or in form of

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<sup>7</sup> R. Higgins, *The abuse of diplomatic privileges and immunities: Recent UK experience*, AMERICAN JOURNAL OF INTERNATIONAL LAW, July [1985].

<sup>8</sup> Mgr. E. Mathew, *A Comparative study of state immunity from jurisdiction, recognition and enforcement action*, A S U publishing 2014, p.75.

<sup>9</sup> Art. 41, Vienna Convention on Diplomatic Relations, Came into force on April 24 196.

Art. 9 of the same document<sup>10</sup> explaining *persona non grata*- yet these measures often lack substance and permanency acting as strong deterrence.

At the very beginning, it's important to understand the difference between diplomatic agents of states and consular staffs. While the 1961 Vienna Convention on Diplomatic Relations covers the privileges and immunities of diplomatic agents, the rights that consular staffs enjoy are stated in the 1963 Vienna Convention on Consular Relations. Unlike the 1961 Convention, which vests "diplomatic agents with absolute immunity from arrest", the 1963 Convention states that "Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority" (Article 41(1))<sup>11</sup>. Article 43 of the Convention goes on to vest consular officers "with immunity from jurisdiction of the receiving State in respect of official acts only"<sup>12</sup>. One must note that the immunities and privileges of all personnel working in UN agencies and UN-affiliated organizations are governed by the so-called "headquarters agreements" between the host government and the UN agency. Thus, as an example, the UNO (New York), UNESCO (Paris), WTO (Geneva), UN Economic and Social Commission for Asia and the Pacific (Bangkok) etc, just like the ADB, all have headquarters agreements with the host countries. The immunities and privileges of the staff of the UN bodies cited are defined in these agreements, not in the Vienna conventions<sup>13</sup>.

Here, I would take the argument towards the optimism with which the convention has drafted its preamble. It would also be marked out that the fissured discourses rising under the clauses and sub clauses of convention through three case studies from very recent experiences involving India as well. Here, the effort is not to show how dark is the other side, but infect it's as Linda L. and Marsha S Frey (co- authors of "History of Diplomatic Immunity") importantly remarks in New York Times; 'Diplomatic Immunity is essential, But it needs updating'<sup>14</sup>.

There are few arguments to keep in mind while discussing the present state of diplomatic immunity. First, as the convention's preamble echoes, 'the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the

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<sup>10</sup> *Id.*, at Art. 9.

<sup>11</sup> Vienna Convention on Consular Relations, 1963.

<sup>12</sup> Deepak Raju, *An abuse of immunity*, THE HINDU [Delhi edition; December 23, 2013].

<sup>13</sup> Cruz Hermenegildo C, PHILIPPINES DAILY INQUIRER [ November 6, 2015].

<sup>14</sup> LINDA S.AND MARSHA L. FREY, *diplomatic immunity is essential but it needs updating*, available at <http://nytimes.com/> [July 17,2013].

functions of diplomatic missions as representing states'<sup>15</sup>. Here, even the slightest excuse given to the host state of criminal violability would definitely have had resulted in conspicuous chaos what was common during Napoleonic Era or more recently during The Iran Hostage crisis. Concern here is of dual safety- of the victims from the coercive abuses on one hand, but equally important of legally-moral security inscribed in the global diplomatic constitution, on another. Hence, these regulations were definitely not for the individual benefits but more so of safeguarding state trust and representing missions in global world order. Second, why the issue has become problematic is its large-scale personal misuse, contrary to the convention makers' dream. Here, the alleged 'criminals' forget that the "immunity is not impunity from legal liability, but immunity from suit in the host country"<sup>16</sup>. As Rene Vark summarises, "while personal inviolability is a physical privilege, diplomatic immunity is a procedural obstacle"<sup>17</sup>. Third, why there is a need for imminent revisit to the convention is because of alarming rise of new issues such as terrorism, espionage, repeated wrongdoings, large exceptions and the complexity of issues rising out of unconventional issues concerning three or more parties, eg. The Nepalese women Case against Saudi diplomats in India.

Moving towards the case studies- The second convention (1963) was more so in recent news, getting global media attention involving the U.S. against India and Pakistan. In 2013, Devyani Khobragade who was working at the Indian consulate in New York was arrested being alleged of employing her maid at a salary below the legal minimum. And in January 2011, Raymond Davis, a CIA contractor, was charged of murder of two men stating of being robbed by them. Ms. Khobragade was arrested after her maid complained the same to the authorities. She was also charged with visa fraud and making false statements. The Indian government, pinched on by a vocal media and political opposition supportive of Khobragade, came in strong argument with U.S. authorities. Manhattan US Attorney Bharara, an Indian born, who pursued the case against Khobragade was accused "of betraying his origins", while communication between Delhi and Washington was put on a halt<sup>18</sup>.

Delhi initially claimed of Khobragade being a diplomat, but since she was a consular rather than being in embassy, she enjoyed limited privileges. Similar case was of Davis working as

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<sup>15</sup> *Id.*, at Preamble.

<sup>16</sup> *Empson v. Smith*, Q B D 1996 1 Q.B. 426 [Supreme Court of UK].

<sup>17</sup> Rene Vark, *Personal Inviolability and Diplomatic Immunity In Respect Of Serious Crimes*, JURIDICA INTERNATIONAL 8/2003 p.113.

<sup>18</sup> <http://firstpost.com/world/is-us-attorney-preet-bharara-using-the-khobragade-case-for-a-political-career-1295701.html>, [December 19, 2013].

a technical staff at U.S. consulate in Lahore. In both cases, there were unsuccessful attempt by states in granting diplomatic immunity. India transferred her to the UN getting the special immunity. In a controversial move, Obama administration came in open claiming Devis was “their diplomat”. Later, it emerged that he was neither a diplomat, nor covered by diplomatic immunity.<sup>19</sup> On apologising to victim’s family, Davis returned to US and Kerry, then a senator who brokered the deal of his safe passage promised he would be charged in US, but it never happened. In case of Khobragade, she was a national hero then, and received a warm welcome back home.

More venomous than US and Europe, in postcolonial modern states and constantly being bullied by west, the euphoria of nationalism in India, Pakistan and others is sometimes beyond the legal niceties of the Vienna conventions<sup>20</sup>. India’s later step of transferring Ms. Khobragade as a diplomatic agent to the U.N., giving her the security under diplomatic immunity, might’ve been viewed internationally as an abuse of the international legal process, given that Section 14 of the 1946 Convention on the Privileges and Immunities of the United Nations expressly states, “Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations”<sup>21</sup>.

Another recent incident of involving Saudi diplomat and Nepalese women complicates the situation. Majed Hassan Ashoor, a diplomat in Saudi Arabian embassy in New Delhi, was alleged to have sexually exploited Nepalese women<sup>22</sup>. After being freed from the residence at Gurgaon by police, in contrary, the Embassy blamed Indian Police as violating the Convention. It was claimed that these poor women could go to Saudi for the trial! Here, it’s the blatant nakedness of diplomatic shielding. However, in a famous case of domestic harassment, the London based Indian diplomat Anil Verma was removed and recalled to India<sup>23</sup>.

Diplomatic crime is not only a third world problem. Although expatriates, economy and global influence do impact the arithmetic of violations, yet it’s now a sort of everyday

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<sup>19</sup> <http://usatoday.com/news/world/2011-02-21-pakistan-us/> Davis case.

<sup>20</sup> Omar Waraich, *How Diplomatic Immunity protects Accused Criminals*, Al JAZEERA AMERICA [September 19, 2015].

<sup>21</sup> Deepak Raju, *an abuse of immunity*, THE HINDU [Delhi Edition; December 23, 2013]

<sup>22</sup> <http://kathmandupost.ekantipur.com/news/nepali-women-sexually-abused-by-saudi-diplomat>, [September 9, 2015].

<sup>23</sup> <http://tribuneindia.com/2011/20110117/main3.html/> [January 17, 2011].

phenomenon. It's only those crimes which catches the attention of media come to limelight, rest are gutted down, shielded with bureaucratic influences. Cases like Italian marine officers shooting Indian fishermen, Devyani Khobragade's underpaying maid, Nepalese women being sexually exploited by Saudi diplomats are going and would run for years- but, under international prejudiced confession and with high spirits of saving own citizen, of course the morality takes a setback. Question is here not if this 'immunity syndrome' has some defect, bigger problem is when this immunity seems impunity, caring least about neo global rule of law and its thin notions to check the corrupting powers of high end authorities. Again, safety and security of all should be the biggest concern in bigger domain of Universal Human Rights and not to those selected few, moving in red beacon, tinted glass vehicles.

So, on the basis of so many heinous, stray incidents, should we assume that the Convention has lost its core point and should be done away with? It's answered by Linda S. and Marsha L Frey, "diplomatic immunity remains as essential now as it was when envoys worried about being eaten by other tribes. Then and now emissaries need some form of protection in dealing with hostile states. In earlier times, religion or rather, divine laws, protected envoys. Representatives from foreign lands carried sacred staffs, painted their bodies or pegged their noses to convey their status".<sup>24</sup> Even in disrupted world of misunderstandings, trust deficits and hegemonic imbalances, the convention does give a fair representation and sense of security to many. Hence, its importance can never be undermined, what is required is a revisit, a necessary change within continuities to bridge the negative voids created out of its abuses. On the basis, of the suggested views, the host states may have larger rights to sue the illegal claims challenging internal peace, social dignity and human life.<sup>25</sup>

On the given grounds of numerous incidences, there are few suggestions worth emulating. Very importantly, reduce the number of Immune personalities to least possible and to the most required. Several solutions have been proposed to the problems encountered with current law. Great Britain has discussed isolating nations which abuse Vienna Convention provisions. The US has thought of creating a common fund to help those harassed by foreign mandarins. A third option requires prosecution of the diplomat in her sending state and a fourth would interpret some of the Vienna Convention's provisions more restrictively. Last,

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<sup>24</sup> LINDA S.AND MARSHA L. FREY, *diplomatic immunity is essential but it needs updating*, available at <http://nytimes.com/> [July 17,2013].

<sup>25</sup> Matthias Herdegen , *the abuse of diplomatic privileges and countermeasures not covered by Vienna Convention on Diplomatic Relations- some observation in light of recent British experience* available at <http://www.zaoerv.de>. p.753.

the Vienna Convention could itself be amended.<sup>26</sup> But, none of these solutions are away from drawbacks. On similar grounds, there have been many suggestions coming like, A Claim fund by state departments to the victims later reimbursed by the Mission, a mandatory insurance scheme, a permanent international Diplomatic Criminal Court, Diplomatic Crime Legislations in UN etc<sup>27</sup>. Again, either in lack of collective will to bring change or in fragmented, selfish individual concerns- none of the suggested measures seems bearing any satisfactory fruit.

Of course, the issue complicates once a diplomat of one country does crime in host nation against the citizen of a third nation. And, if the diplomat hails from economically or militarily stronger nation, the ultimate loser always remains the victims. Here there is a strong role for civil societies and the domestic and international media to play- being rationally objective and keeping the human rights and sensitivity involved of both- the alleged and the victims, in concern. Besides, jingoistic nepotism and a biased approach for few political, economic or TRP gains often dilutes the character of judgement. Remembering the core ethics of universal justice, human rights and rule of law, the complexity of these cases should be studied and dealt with that ethical honesty- where goal is not merely to punish the guilty ones but to set strong deterrence for a safer diplomatic global order.

## **Conclusion**

Here, there are few suggestions that can be kept in mind to deal with such changing issues- first, the clauses of Art 41 should be reinterpreted and be made more harsher if required, where respecting the law and regulation of host state be made legally compulsory, otherwise in heinous crime the trial could happen with joint jury at the place where alleged crime occurred. Second, there should be a provision of binding international acceptance of mistake, not installing the same diplomat to work anywhere till the trial gets verdict. There could be a strong group of those ‘ internationally weak’ nations whose large expatriates often work in other parts of world and it must not be a deterrence in lodging a strong protest against any such ‘ dominant’ nation. Lastly, the International Court of Justice should gear up; with UNGA legislation to give binding judgements- once such shaking incidents take place. Effort should not be here to discourage diplomats to accept an assignment, nor should it be bashing those

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<sup>26</sup> Leslie Shirin Farhangi, *Ensuring against the abuse of diplomatic immunity*, STANFORD LAW REVIEW, p.13 jstor /1228786 p.13.

<sup>27</sup> Michell S. Ross, *Rethinking diplomatic Immunity-A Review of Remedial approaches to address the abuses of diplomatic privileges and immunities*, AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW, Vol-4, Issue 1, article 6.

maximum honest ones working in hostile situations- it's more of checks only for those who infringe the mission ethics at global level diplomacy. All of these measures are arguably deficient till the collective concerns of the nations of globe don't wish for trusted collateral. Vienna Convention on Diplomatic Relations is indeed the pathfinder but a time has come, to revisit changes in suiting changing demands.

Going by "the equality before law" perspective, this immunity seems unjust not because in present state it protects the diplomats at foreign land with special privileges but it often gets beyond limit to encroach other's life and dignity. The system is unjust in the sense that "the concept of diplomatic immunity does not comply with the first component of 'equality before the law', presumptive-identity component."<sup>28</sup> Here again, keeping the concerns and challenges of a foreign mission in a host country, the equality of law principle would be challenged on affirmative security grounds. Similarly questioning the mission enjoying a tax free, domestic life,<sup>29</sup> the nation concerned, remunerations and salary paid to them, currency value- all would signal towards the need for positive discrimination, safeguarding the official's life and property.

The Vienna convention was the need of required time in post war period where the new socio- capitalist relations were shaping the emerging concerns in diplomatic relations. Since five decades, there could be new institutional mechanisms to install nationalistic pride and coherent display of responsibilities during course of training. There could be continuous grading on behavioural etiquettes of diplomats enjoying immunity under the convention by some supra national body with Hague's jurisprudence as appealing resort. Also, the knowledge of host laws, customs and usages should be binding criteria while being posted on a mission. Although, even not all of these could be the foolproof evidence to curb the 'diplomatic violence' completely, yet, the result would definitely be of grave satisfaction.

Hence, as per the needs raised because of the varying statecraft and upcoming global challenges, a constant, continuous exchange of messages and messengers are ever required. Even in the Draft Articles on Diplomatic Intercourse and Immunities later adopted by the International Law Commission in 1958, there was an attempt both to establish a classification into categories of those persons who should be entitled to varying types of privilege, and to

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<sup>28</sup> Emelie Munoz, *Diplomatic Immunity- a functioning concept in the society of today?* HUMAN RIGHTS STUDIES, Lund University, 2012 p.34.

<sup>29</sup> *Id.*, at Art 34.

create a qualified immunity from civil jurisdiction for the ordinary diplomatic agent.<sup>30</sup> The revisited convention would be sustainable to both- the nation concerned and the victims. Of course, a job of diplomat is challenging, and equally important is their institution for the well maintained world order. The level field should be for all- the mission's safeguard, nation's honour and sovereignty rights, at the same time, saving people from the wrath of 'diplomatic bankruptcy'. The last effort should be of adequate awareness, of rights and responsibilities to the person(s) concerned, and equally important is the acknowledgement of the host police and legal offices with the nuisances of The Vienna Conventions, as not to harass an individual in futile.

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<sup>30</sup> K.R. Simmonds -*The 'rationale' of Diplomatic Immunity*, THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY p.7, Cambridge University Press, jstor/75599.4