Abuse of Diplomatic Privileges and the Balance between Immunities and the Duty to Respect the Local Laws and Regulations under the Vienna Conventions: The Recent Indian Experience

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Abstract

The successful adoption of the Vienna Convention on Diplomatic Relations is hailed as the ‘landmark of the highest significance in the codification of international law’. It represented the first significant codification of any international instrument since the United Nations was established. However, despite the codification of the above rules, which is largely based on the pre-existing customary international law, the scope of diplomatic protection was not free from issues and controversies. In recent times, unfortunately, there is a growing tendency amongst the diplomats to abuse their diplomatic status to commit acts prohibited by law and still claim immunity from legal process. The States-parties also aggravate this situation by selectively interpreting the rules in their favor, ignoring the fact that reciprocity is the basis for the successful functioning of the diplomatic protection. In this connection, this paper addresses the problem of abuse of immunities and privileges and its adverse implications on the balance between immunities and the duty to respect the local laws and regulations, especially with special reference to the recent Indian experience. It explores the two recent Indian diplomatic confrontations, namely, the arrest of Devyani Khobragade and the travel ban on Daniele Mancini. Based on the study, it highlights the need for a well-balanced and equitable enforcement of the Vienna Conventions in the interest of maintenance of cordial diplomatic relations in the international community.

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Keywords

Vienna Convention on Diplomatic Relations – Vienna Convention on Consular Relations – diplomatic immunity – abuse of diplomatic immunity

1 Introduction

The successful adoption of the Vienna Convention on Diplomatic Relations¹ is hailed as the ‘landmark of the highest significance in the codification of international law’.² It represented the first significant codification of any international instrument since the United Nations was established.³ It may also rightfully claim to be the most successful instrument ever drawn up under the aegis of the United Nations, thanks to the ‘high degree of observance’ among States parties.⁴ Together with the Vienna Convention on Consular Relations,⁵ these two instruments systematized for the first time the rules governing the immunities and privileges available to foreign officials. The twin instruments are also known for their high amount of ratifications and the influence that they have on day-to-day conduct of international relations.

However, despite the codification of the above rules, which is largely based on the pre-existing customary international law,⁶ the scope of diplomatic protection offered thereunder has not been free from issues and controversies. In recent times, unfortunately, there has been a growing tendency amongst diplomats to abuse their status to commit acts prohibited by law and still

1 For full text see Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95 (VCDR); 23 UST 3227; 55 American Journal of International Law 1064 (1961).

2 J. Craig Barker, *The Protection of Diplomatic Personnel* (1st edn, Ashgate 2006) 63.

3 Grant V. McClanahan, *Diplomatic Immunity: Principles, Practices, Problems* (1st edn, C. Hurst & Co. 1989) 44.

4 Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (Fourth edn, Oxford University Press 2016) 1–2; Rosalyn Higgins, ‘Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience’ (1985) 79 American Journal of International Law 641.

5 For full text see Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261 (VCCR).

6 Case Concerning United States Diplomatic and Consular Staff in Tehran (USA v Iran), 1980 ICJ Rep. 3.

claim immunity from legal process.⁷ These have included reports suggesting the involvement of diplomats in the commission of international crimes, such as drug trafficking, organized crime and terrorism.⁸ The States-parties have also aggravated this situation by selectively interpreting the rules in their favor, ignoring the fact that reciprocity is the basis for the successful functioning of diplomatic protection.

India is a home to one of the oldest diplomatic traditions in the world.⁹ However, recent protracted diplomatic stand-offs with Italy and United States, have given rise to a number intriguing questions of international law relating to the enforcement of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations (shortly, as Vienna Conventions).

In this connection, this paper addresses the problem of abuse of privileges and immunities and its adverse implications on the balance between such immunities and privileges and the duty to respect local laws and regulations, with special reference to the recent Indian experience. For this purpose, it begins with a historical overview of the concept of diplomatic immunity, tracing its evolution both in India and in other major legal systems up to the adoption of the Vienna Conventions, followed by the comparative analysis of these two instruments. It also addresses the question of how diplomatic immunity is different from consular immunity and how these two immunities are distinguished from the immunity available under the Convention on the Privileges and immunities of the United Nations. However, the primary focus of the paper is in Sections 3 and 4. While Section 3 introduces the problem of abuse of privileges and immunities in the international context, Section 4 explores the two recent Indian diplomatic confrontations: the arrest of Devyani Khobragade and the travel ban on Daniele Mancini. In the case of the

7 For a list of such cases, See Mitchell S. Ross, Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities, *American University International Law Review*, (1989) Vol. 4, Iss. 1, 173–205, especially, pp. 184–188. It is also equally true that the diplomats are also denied the protection which they are otherwise entitled under the Vienna Conventions. The Tehran hostage case is a clear example for such scenario.

8 M. Cherif Bassiouni, *International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms* (Vol 2, 3rd edn, Martinus Nijhoff 2008) 234; Emma Reynolds, 'Diplomat tries to claim immunity after smuggling £160,000 of cannabis sprinkled with chilli powder into UK' *Daily Mail* (London, 2 August 2012) <<http://www.dailymail.co.uk/news/article-2182642/Diplomat-tried-claim-immunity-smuggling-160-000-cannabis-UK-disguised-smell-sprinkling-chili-powder.html>> accessed on 5th April 2017.

9 Chas W. Freeman Jr, 'Diplomacy', *Encyclopedia Britannica Online* (2015). <<http://www.britannica.com/topic/diplomacy>> accessed on 5th April 2017.

former, the Indian Consular Officer in New York was arrested on complaints of visa fraud despite the claim of consular immunity and in the latter, the Indian Supreme Court imposed certain travel restrictions on the movement of the Italian Ambassador in India over the breach of an undertaking given to it. The final part highlights the need for a well-balanced and equitable enforcement of the Vienna Conventions in the interest of maintenance of cordial diplomatic relations in the international community.

2 Evolution of the Principle of Diplomatic Immunity

The term '*diplomat*' is derived from the French term '*diplomate*', which indicates a person whose task is to negotiate on behalf of the state. Diplomats enjoy a special status both at home as well as abroad.¹⁰ It is said that the concept of diplomatic immunity has long-standing roots in international practice, and that the customary rules of diplomatic immunity are as old as diplomacy.¹¹ Early historians trace the origins of diplomacy from the regions of the Mediterranean, the Middle East, China and India.¹² In this connection, it is useful to provide an overview of the historical evolution of the concept of diplomatic immunity, both in India and in other legal systems.

2.1 Historical Evolution in India

The history of diplomatic relations and the personal inviolability of diplomatic envoys can be traced back to several ancient civilizations.¹³ India is a home to one of the oldest diplomatic traditions in the world, whose origin may be

10 Rudiger Wolfrum, 'Diplomacy', *Max Planck Encyclopaedia of Public International Law* (Vol. 3, 2013) 97; For additional materials on historical evolution of the diplomatic officials, See Ivor Roberts (ed), *Satow's Diplomatic Practice* (6th edn, Oxford University Press 2009) 3–21; Keith Hamilton and Richard Langhorne, *The Practice of Diplomacy: Its Evolution, Theory and Administration*, (2nd edn, Routledge 2011) 7–28; Bardo Fassbender and Anne Peters, *The Oxford Handbook of the History of International Law*, (1st edn, Oxford University Press 2012) 813–839.

11 Eileen Denza (n 4) 1.

12 Walter Carlsnaes, Thomas Risse-Kappen and Beth A Simmons, *Handbook of International Relations* (1st edn, SAGE 2002) 214.

13 J. Craig Barker (n 2) 29; Also See, Sally Marks, 'History of Diplomacy', *Britannica Encyclopaedia Online* (2013) <<http://www.britannica.com/EBchecked/topic/164602/diplomacy>> accessed on 5th April 2017.

traced back to the 4th Century BC.¹⁴ Arthashastra, meaning 'science of politics', written by the great Sanskrit scholar Kautilya who lived during the Mauryan dynasty, is an important source in our understanding of early Indian diplomatic history.¹⁵ It is a practical manual of instructions for kings structured in a complex work of 15 volumes, known as *Adhikarans*. In particular, Volumes 6 to 13 extensively cover foreign affairs and defence.¹⁶ Kautilya's rule relating to diplomatic relations was based on the doctrine of *Sama-dana-bheda-danda*¹⁷ (persuasion, gifts, division and threat of force).¹⁸ In fact, these four principles were considered the 'cardinal points of the ancient Indian diplomatic system'.¹⁹ According to this doctrine, while dealing with foreign powers, the ruler or diplomat should first exploit the methodology of persuasion or negotiation and where it fails, he may try with the methods of gifts or bribery. If despite the use of these two methods, the desired results are not achieved, then he may try to create dissension among the enemies. When all these options fail, then finally, as a matter of last resort, he may use the weapon of threat of war or force. However, it is not necessary that the ruler or diplomat should try only one method at a time. It is provided that depending on the personal attributes of the foreign ruler or enemy, these principles may either be applied jointly or severally.²⁰ Also, Kautilya justifies the latter controversial and violent methods of *bheda* and *danda* by recourse to *Matsyapurana*, which recommends that one and the same policy cannot be followed all the time and against all persons, for the world comprises of both righteous and evil-minded persons.²¹

The ancient treatise also delineates the qualities and assignments of the diplomat.²² It states that 'in the happiness of the subjects lies the happiness of the king and in what is beneficial to the subjects his own benefit. What is

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- 14 Roger Boesche, *The First Great Political Realist: Kautilya and His Arthashastra* (1st edn, Lexington 2002); Kalidas Nag and V R Ramachandra Dikshitar, 'The Diplomatic Theories of Ancient India and the Arthashastra', (1927) 6:1 *Journal of Indian History*, 15–35.
 - 15 Sally Marks (n 13).
 - 16 Arvind Gupta, 'Need for a Modern Arthashastra', *The New Indian Express* (New Delhi, 14 April 2014) <<http://www.newindianexpress.com/columns/Need-for-a-Modern-Arthashastra/2014/04/14/article2166746.ece>> accessed on 5th April 2017.
 - 17 *Arthashastra Sutra* 2.10.47. R. P. Kangle, *The Kautilya Arthasastra*, Part 2: An English Translation with Critical and Explanatory Notes, (8th Reprint, Motilal Banarsidass Publishers, 2010), 95.
 - 18 Gautam P. K., *One Hundred Years of Kautilya's Arthashastra* (1st edn, 2013, IDSA Monograph Series) 9.
 - 19 Subodh Kapoor, *Ancient Hindu Society* (1st edn, COSMO 2002) Vol 4, 1243.
 - 20 V. R. Ramachandra Dikshidar, *War in Ancient India* (1st edn, Macmillan 1944) 324.
 - 21 *Ibid.*
 - 22 They are well described in *Sutra* 1.19.34; R. P. Kangle (n 17).

dear to himself is not beneficial to the king, but what is dear to the subjects is beneficial (to him)'. The diplomats are expected to follow this *sutra* during the course of their tenure.²³ Moreover, the treatise also speaks of the period of commencement and termination of the privileges and duties of envoys.²⁴ While Kautilya insisted that the duty of an envoy is to uphold the King's honour, he also stipulated that no harm should be caused to envoys. It is mandated that foreign representatives are not to be detained, even if they present 'unpleasant' messages'.²⁵

Also, *Manusmriti*, the ancient Hindu Code of conduct, embodies the rules relating to diplomacy. According to its author, Manu, the arriving guest should be given a place to sit and rest, beddings and equal respect. He should not stay unfed.²⁶ Similarly, leading Indian historians opine that diplomacy also played a very important role in ancient Tamil society. References to various aspects of diplomatic traditions may be found in the notable Tamil literature, such as, *Silappadikaram*, *Tholkappium*, *Purananuru* and *Thirukkural*.²⁷ Also, the Tamil literary work known as *Purananura*, which may be translated as 'four hundred poems of external life', contains references to the role of an envoy in ending war.²⁸ It is said that 'even if the speech or conduct of an envoy was provoking, they were not taken to task'.²⁹

Similarly, the Kingdom of Maurya, especially under the King Ashoka, also had a vibrant diplomatic system. However, in view of his policy of renunciation of war, he was more interested in 'peace diplomacy' and 'Buddhist diplomacy' rather than in 'war diplomacy'.³⁰ In the end, it is submitted that despite the rudimentary nature of these rules, the contribution of these principles to the development of the modern law of diplomatic relations cannot be underestimated. With the rise of Mughals and the British, India's early diplomatic traditions were slowly subsumed into modern standards and traditions of diplomatic conduct.³¹

23 Gautam P. K., *One Hundred Years of Kautilya's Arthashastra* (n 19) 25.

24 Sally Marks (n 13).

25 *Ibid.*

26 Jovan Kurbalija, Dietrich Kappeler and Christiaan Sys, 'Evolution of Diplomatic Privileges and Immunities' (DiPLO, 2008) <<http://www.diplomacy.edu/resources/general/evolution-diplomatic-privileges-and-immunities>> accessed on 5th April 2017.

27 V. R. Ramachandra Dikshitar, *War in Ancient India* (1st edn, COSMO 1999) 350.

28 George L. Hart III, *Poets of the Tamil Anthologies: Ancient Poems of Love and War* (Princeton University 1979) 15 (Poem Number 305).

29 A. Palaniswami, 'Diplomacy of the Ancient Tamils' (1976) *Journal of Tamil Studies* 28–29.

30 Keith Hamilton (n 10) 30–31; Tansen Sen, *Buddhism, Diplomacy and Trade: The Realignment of Sino-Indian Relations, 600–1400* (1st edn, Association for Asian Studies 2003).

31 *Ibid.*

2.2 *Historical Evolution in Other Legal Systems*

During the time of the Ancient Greeks, ambassadors were referred to as ‘messengers of God’.³² The violation of an envoy’s person was widely considered to be offensive to the Gods. It is observed that in the entire history of diplomatic immunity, the notions of the Greeks have assumed a very special position. According to the leading publicists, Frey and Frey, envoys have enjoyed a ‘powerful protected position’ since the time of the Ancient Greeks.³³ It is interesting to note that the fall of Athens and Sparta in 491 BC was attributed to the divine wrath on account of the killing of the envoys of Darius.³⁴

Like the Greeks, the Romans too considered diplomatic immunity to be sacred and they placed a very high emphasis on the inviolability of envoys.³⁵ The Romans accordingly developed the *college of fetials*, a semi-religious and semi-political body for conduct of external relations.³⁶ This College was considered the principal source of diplomatic activity at the time and it developed a body of rules, better known as the ‘*fetial law*’.³⁷ This special law attached a great deal of importance to the personal inviolability of envoys.³⁸ This rule required that mistreatment of foreign envoys would be considered a capital crime and that the trial proceedings should be held in public.³⁹

Also, during the sixteenth century, the Mendoza affair contributed to the strengthening of the concept of diplomatic immunity.⁴⁰ In 1580, the English government accused Don Bernardino de Mendoza, the Spanish Ambassador in London, of the crime of conspiracy against the sovereign for his involvement in the Throckmorton plot.⁴¹ The plot aimed to eliminate Elizabeth I and to free Mary, Queen of Scots. When his case was brought before the Privy Council,

32 Timothy J. Lynch, ‘Theories of Diplomacy’, *Oxford Encyclopedia of American Military and Diplomatic History* (Oxford University Press 2013) 330.

33 Linda S. Frey and Marsha L. Frey, *The History of Diplomatic Immunity* (1st edn, Ohio State University 1999) 16.

34 *Ibid.*

35 J. Craig Barker (n 2) 30.

36 *Ibid.* 33.

37 David J. Bederman, *International Law in Antiquity* (1st edn, Cambridge University Press 2001) 85.

38 J. Craig Barker (n 2) 30.

39 Olga Tellegen-Couperus, *Law and Religion in the Roman Empire* (1st edn, BRILL 2012) 133.

40 Douglas Johnston and W. Michael Reisman, *Historical Foundations of World Order: Tower and the Arena* (1st edn, BRILL 2007) 358.

41 Stephen C. Neff, ‘Historic Moments in International Law: The Envoy from Hell—and What to Do with Him’ (*International Judicial Monitor*, Spring 2014) <http://www.judicialmonitor.org/archive_spring2014/historic.html> accessed on 5th April 2017.

the services of two leading lawyers, namely, Alberico Gentili and Jean Hotman was sought to determine whether the Ambassador was entitled to immunity. While Gentili argued that the official could only be expelled, Hotman contended that he had to be imprisoned as he had abused his position. Though the Ambassador was finally expelled, it gave rise to the rule that the diplomat enjoys immunity from criminal jurisdiction, subject to the receiving state's right to act in self-defence against the violent acts of the diplomat.⁴²

Also, during the above period, the concept of *droit d'ambassade* had come into vogue.⁴³ It recognized the right of states to send and receive diplomatic representatives. Also, consequent to the adoption of the Treaty of Westphalia in 1648, the modern state-system emerged.⁴⁴ The Treaty wanted to maintain the prevailing balance of power in Europe and thereby necessitated the close monitoring of the external situation.⁴⁵ As a consequence, the establishment of permanent diplomatic missions became the normal practice.⁴⁶

Over the next two centuries, an intense debate on the scope of diplomatic privileges and immunities took place.⁴⁷ It was a focal point for many leading publicists of international law including Hugo Grotius, Ayrault, Albericus Gentilis, Richard Zouche, Van Bynkershoek and Emer de Vattel. These authors gave varied explanations for granting of diplomatic privileges and immunities. These writings have contributed to the development of three primary theories of diplomatic law, namely, the 'theory of representative character', the 'theory of extraterritoriality', and the 'theory of functional necessity'.⁴⁸ Each of these will be taken in turn.

42 Barry Cohen, 'The Diplomatic Relations Act of 1978' (1979) 28 Catholic University Law Review 797 and 804.

43 Frey and Frey (n 33) 126.

44 However, quoting Encyclopedia Britannica, Costas M. Constantinou is of the opinion that the term had its origin only from late eighteenth century. See Costas M. Constantinou, *On the Way to Diplomacy* (1st edn, University of Minnesota 1996).

45 Generally, B. Sen, *A Diplomat's Handbook of International Law and Practice* (1st edn, Martinus Nijhoff 1965) 80.

46 Eileen Denza, 'Vienna Convention On Diplomatic Relations, (United Nations Audiovisual Library of International Law, 2009) <http://www.thehindu.com/thehindu/2003/06/10/stories/2003061000701000.htm> accessed on 5th April 2017.

47 Timothy J. Lynch (n 32).

48 J. Craig Barker (n 2) 42; see V. S. Mani, 'Diplomatic law and justice', *The Hindu* (New Delhi, 10 January 2003).

2.2.1 Theory of Representative Character

According to this theory, as the diplomatic agent represents the sovereign state, he should not be subjected to the jurisdiction of the receiving state and be liable to its laws.⁴⁹ This theory is essentially rooted in the history of international relations and is based on the independence and sovereign equality of states.⁵⁰ This theory highlights the fact that the freedom from territorial jurisdiction of the receiving state is essential for the preservation of peace and friendly relations among states.⁵¹ Significantly, under this theory the diplomat enjoys immunity from local jurisdiction not only because that he is representing another sovereign but his subjugation to the laws of another state would be incompatible with his duties to the sovereign.⁵²

2.2.2 Theory of Extraterritoriality

This theory postulates that the territory of the receiving state used by the diplomatic mission or the diplomat should be considered the territory of sending state.⁵³ It was originally conceived to exempt the diplomatic mission from the jurisdiction of the receiving state and to extend the cover of diplomatic immunity not only to the diplomat and his mission but also to his residence and the premises of the mission.⁵⁴ This theory was very influential when the concept of jurisdiction was territory-based rather than personality-based, and its current relevance is therefore very much in doubt as it would provide a blanket protection to all actions falling within its very broad ambit.⁵⁵ In effect, this theory neither provides a scope for balancing the claim of immunities and privileges nor does it provide a means through which the non-official actions of the diplomat can be assessed and controlled. In particular, the invocation of this theory by the violators of law who take refuge in the premises of the mis-

49 *Ibid* 81; Rene Vark, 'Personal Inviolability and Diplomatic Immunity in Respect of serious Crimes' (2003) 7 (112) *Juridica International* <www.juridicainternationaleu/public/pdf/ji_2003_1_110.pdf> accessed on 5th April 2017.

50 B. Sen (n 45) 97.

51 Montell Ogdon, *Juridical Bases of Diplomatic Immunity: A Study in the Origin, Growth and Purpose of the Law* (1st edn, J. Byrne & Co 1936) 144; Grant V. McClanahan, (n 3) 29.

52 Cornelius Van Bynkershoek and Tenney Frank, *Quaestionum Juris Publici Libri Duo; the translation*, Oceana 1964).

53 B. Sen (n 46) 80.

54 Montell Ogdon, 'The Growth of Purpose in the Law of Diplomatic Immunity' (1937) 31 *American Journal of International Law* 449.

55 Timothy J. Lynch (n 32).

sion makes this theory a most controversial juridical basis for the granting of diplomatic immunities.⁵⁶

2.2.3 Theory of Functional Necessity

Under this theory, diplomatic privileges and immunities are not unlimited and extend only to official functions of diplomats and diplomatic assets. This theory is based on the belief that the grant of immunities is essential for the normal functioning of international affairs.⁵⁷ Unlike the two theories already examined, it is generally reasoned that the theory of functional necessity provides a strong juridical basis for the development of the modern law of diplomatic immunity.⁵⁸ In point of fact, the Vienna Conventions also expressly endorse this approach as their guiding philosophy. The Preamble of the Vienna Conventions commonly declare 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'.⁵⁹ In the end, a comprehensive evaluation of all the three theories point out that the theory of functional necessity along with the theory of representative character provides a useful framework to determine the degree of immunity and privileges that will be admissible in the given situation.⁶⁰

Following on the above, the passage of the English Diplomatic Privileges Act of 1708 was an important historical moment given its general contribution to the development of rules relating to the granting of diplomatic privileges and

56 Elieen Young, *The Development of the Law of Diplomatic Relations*, *British Yearbook of International Law*, (Vol 40, Oxford University Press 1964) 141.

57 Montell Ogdon (n 51) 82.

58 Nina Maja Bergmar, 'Demanding Accountability Where Accountability is Due: A Functional Necessity Approach to Diplomatic Immunity under the Vienna Convention' (2014) 47 *Vanderbilt Journal of Transnational Law* 501.

59 In this connection, it is pertinent to refer to Article 3 of the Vienna Convention on Diplomatic Relations (VCDR) 1961 (500 UNTS 95) as it defines the scope of functions of diplomatic mission. The functions include 'a) Representing the sending State in the receiving State; b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law; c) Negotiating with the Government of the receiving State; d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State; e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations'. Similar provisions are there in VCCR (596 UNTS 261).

60 For comparative evaluation of all the three theories, See Mitchell S Ross (n 7); Nina Maja Bergmar (n 58); Hayatullah Khan Khattak, 'Diplomatic Privileges and Immunities: The Continuing Relevance of the Functional Necessity Theory' (2012), 3:3 *Criterion Quarterly*.

immunities, including on the basis of the theory of functional necessity.⁶¹ The Act is generally hailed as one of the early attempts at the domestic codification of diplomatic law.⁶² It was promulgated as a result of the case of *Mattueof*, wherein the Russian Ambassador to England, Mr. Andrew Artemonowitz Mattueof, was arrested and ill-treated by his creditors when he was trying to leave the country.⁶³ It stipulated that diplomatic staff enjoyed full immunity from civil and criminal proceedings. It also exempted them from local taxes.⁶⁴ However, it allowed only a limited extent of diplomatic immunity in respect of administrative and technical staff members of the diplomatic station. The Act provided that the holders of such posts were protected only in respect of actions taken by them in the course of their official duties, which implied that they would be liable for all non-official acts including their criminal conduct. The Act also had a novel provision for immunity from legal process in respect of ambassadors and their servants and it even made the issuance of such process a punishable offence.⁶⁵

2.3 *The Vienna Conventions*

On the international attempts for codification in this area, the first was made by the Congress of Vienna in 1815. It adopted the Regulation on the Classification of Diplomatic Agents as a part of the Final Act of the Congress.⁶⁶ This was followed by the Inter-American Conference organized by the Pan-American Union held in Havana in 1928, which adopted the two conventions, namely, the Convention on Diplomatic Officers and the Convention on Consular Agents.⁶⁷ Subsequently, in 1932 Harvard Research in International Law published a Draft Convention on Diplomatic Privileges and Immunities, an effort that did not succeed for failure to garner the universal acceptance of states.⁶⁸

However, the proposal for a codified international law on diplomatic immunities received a major boost with the establishment of the United Nations.⁶⁹ In one of its earliest sittings, the International Law Commission (ILC) iden-

61 Ivor Roberts (n 10).

62 Marc Cogen, *The Comprehensive Guide to International Law* (Die Keure 2008) 410.

63 *Mattueof's case* (109) 10 Mod Rep 4; Frey and Frey (n 33) 7.

64 Generally, Hilaire Barnett, *Constitutional and Administrative Law* (10th edn, Routledge 2013) 99.

65 J. Craig Barker (n 2) 45.

66 Bhagevutula Satyanarayana Murty, *The International Law of Diplomacy: the Diplomatic Instrument and World Public Order* (1st edn, Martinus Nijhoff 1989) 115.

67 Eileen Denza (n 46).

68 *Ibid.*

69 Rama Prasad Dhokalia, *Codification of Public International Law* (1st edn, Manchester University 1970) 326.

tified 14 topics for codification of international law, including 'diplomatic intercourse and immunities'. The Commission began its work in 1955, with the appointment of A. E. F Sandstrom (Sweden) as Special Rapporteur and prepared the draft convention, followed by the revision and endorsement of the draft by the UN General Assembly.⁷⁰ As a result, the Vienna Convention on Diplomatic Relations became a reality on 18th April, 1961 at the UN conference held at Vienna.⁷¹

Two years later a similar UN conference was convened at Vienna to codify the privileges and immunities of consular officials, resulting into the adoption of the Vienna Convention on Consular Relations of 1963.⁷² The Convention recognises, among other things, the personal inviolability of consular officers⁷³ and stipulates that consular officers and employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in exercise of their consular functions.⁷⁴ It also lays down the major consular functions, the most important being, the protection of the interests of the sending states and of its nationals and body corporate, within the limits permitted by international law and the promotion of commercial, economic, cultural and scientific relations between the sending states and the receiving states.⁷⁵ As the principal focus of this paper is to critically examine the abuse of diplomatic and consular privileges and immunities, the scope of protection available under the two instruments are compared in Table 1, below. Also, as the later study is concerned with the Convention on the Privileges and Immunities of the United Nations, 1946, the position under that Convention is also added.⁷⁶

70 J. Craig Barker (n 2) 63.

71 For full text, See VCDR (n 1). It is universally accepted with the participation of 191 state parties to the Convention. It had entered into force on 24th April, 1964. India acceded to the VCDR on 15 October 1965. As it is incumbent upon the Indian government to give effect to the provisions of the convention, it had enacted the Diplomatic Relations (Vienna Convention) Act, 1972 (Act No. 43 of 1972). It was operational with effect from 29 August 1972. (The status of the Vienna Convention on Diplomatic Relations is available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtsg_no=III-3&chapter=3 accessed on 5th April 2017).

72 VCCR (n 5).

73 *Ibid* art 41.

74 *Ibid* art 43.

75 *Ibid* art 5.

76 Convention on the Privileges and Immunities of the United Nations (adopted 13 February 1946, entered into force 17 September 1946) 1 UNTS 15; [1949] ATS 3. (UN Privileges Convention).

TABLE 1 *Comparison of immunities and privileges of diplomatic and consular officers and the representatives of UN members*

Sl. No	Parameter	Diplomatic Immunities and Privileges (VCDR, 1961)	Consular Immunities and Privileges (VCCR, 1963)	Immunities and Privileges of UN representatives (Convention on the Privileges and Immunities of the United Nations, 1946)
1	Inviolability of Person	<ul style="list-style-type: none">• The receiving states shall treat diplomats with due respect and they should take all ‘appropriate steps’ to prevent any attack on his person, freedom or dignity. (Article 29)• The diplomatic agents are not liable for any form of arrest or detention. (Article 29)• The diplomatic agents are not obliged to give evidence as witness in all cases. (Article 31.2)	<ul style="list-style-type: none">• The host-nations must take all ‘appropriate steps’ to protect consular officers from any attacks on their free-dom and dignity. (Article 40)• The consular offi-cers are not liable for arrest and detention in minor cases, but they are liable in case of grave crimes.^a (Article 41)• No obligation to give evidence concerning consular functions. (Article 44)	<ul style="list-style-type: none">• Representatives of members to principal and sub-sidiary organs of UN are immune from arrest or detention. (Article IV, Section 11 (a))• Immunity in respect of words spoken or written, while exercising functions. (Article IV, Section 11 (a))

It may be noted that neither the Vienna Conventions^b nor the ILC Commentary has defined the term ‘appropriate steps’. It will be determined on a case-by-case basis.^c

Sl. No	Parameter	Diplomatic Immunities and Privileges (VCDR, 1961)	Consular Immunities and Privileges (VCCR, 1963)	Immunities and Privileges of UN representatives (Convention on the Privileges and Immunities of the United Nations, 1946)
2	Inviolability of Mission Premises	<ul style="list-style-type: none">• Mission premises shall be inviolable.• The authorities of the receiving state shall not enter the mission premises in any case.• But they can enter the premises with the consent of the head of the mission either to protect the premises or to prevent any disturbance of the peace of the mission. (Article 22)	<ul style="list-style-type: none">• The consular premises are inviolable.• The authorities of host country cannot enter any part of consular premises, except in case of emergency or fire or other disaster. (Article 31)	<ul style="list-style-type: none">• There is no direct reference with reference to inviolability of mission premises.• However, representatives are entitled to such other privileges, immunities and facilities not inconsistent with the privileges and immunities of diplomatic envoys and hence inviolability of mission premises may also be covered (residuary provision). (Article IV, Section 11 (g)).
3	Inviolability of Archives	<ul style="list-style-type: none">• The archives and documents of the mission are inviolable. (Article 24)	<ul style="list-style-type: none">• The consular archives and documents are inviolable. (Article 33)	<ul style="list-style-type: none">• Inviolability for all papers and documents. (Article IV, Section 11 (b))

TABLE 1 *Comparison of immunities and privileges (cont.)*

Sl. No	Parameter	Diplomatic Immunities and Privileges (VCDR, 1961)	Consular Immunities and Privileges (VCCR, 1963)	Immunities and Privileges of UN representatives (Convention on the Privileges and Immunities of the United Nations, 1946)
4	Inviolability of Residence	<ul style="list-style-type: none"> The private residence of the diplomat also enjoys the same inviolability. (Article 30) 	<ul style="list-style-type: none"> No express provision. 	<ul style="list-style-type: none"> No provision
5	Immunity from Local Jurisdiction	<p><i>Criminal Jurisdiction:</i></p> <ul style="list-style-type: none"> It provides 'absolute immunity' for diplomatic agents in case of 'criminal jurisdiction'. (Article 31) <p>Thus, it is clear that the absolute immunity available to the diplomats shall extend to acts committed in their private capacity under the VCDR.^d</p> <p>However, they may be prosecuted before judicial authorities of their home country for the crimes they are alleged to have committed abroad.</p> <p><i>Civil and Administrative Jurisdiction:</i></p> <ul style="list-style-type: none"> The diplomatic agents are immune from 'civil and 	<ul style="list-style-type: none"> No absolute immunity in criminal cases. Immunity is limited to acts performed in the exercise of consular functions (Article 43) <ul style="list-style-type: none"> The consular officers and employees shall not be amenable to the jurisdiction of the administrative 	<ul style="list-style-type: none"> Immune from legal process of every kind. (Article IV, Section 11 (a))

Sl. No	Parameter	Diplomatic Immunities and Privileges (VCDR, 1961)	Consular Immunities and Privileges (VCCR, 1963)	Immunities and Privileges of UN representatives (Convention on the Privileges and Immunities of the United Nations, 1946)
		administrative' jurisdiction of the receiving state. (Article 31)	authorities of the state in respect of 'acts performed in exercise of their consular functions'. (Article 43)	
6	Freedom of Movement	<ul style="list-style-type: none"> The host nation should ensure to all members of the mission freedom of movement and travel in its territory. This is subject to the laws relating to zones, entry into which is prohibited or regulated for reasons of national security. (Article 26) 	<ul style="list-style-type: none"> The consular officers have the full freedom of movement to travel inside the host country. However, they are not allowed to travel to the zones which is prohibited or regulated for reasons of national security. (Article 34) 	<ul style="list-style-type: none"> No reference on freedom of movement of representatives of UN Members.
7	Freedom of Communication	<ul style="list-style-type: none"> The Convention protects the diplomatic missions from intrusions and guarantees the diplomats to communicate freely with their sending state. 	<ul style="list-style-type: none"> The official correspondence of the consular post shall be inviolable. (Article 35(2)) 	<ul style="list-style-type: none"> Complete freedom of speech and independence in the discharge of their duties. (Article IV, Section 12)

TABLE 1 *Comparison of immunities and privileges (cont.)*

Sl. No	Parameter	Diplomatic Immunities and Privileges (VCDR, 1961)	Consular Immunities and Privileges (VCCR, 1963)	Immunities and Privileges of UN representatives (Convention on the Privileges and Immunities of the United Nations, 1946)
		<ul style="list-style-type: none">• It applies only for official purpose. (Article. 27)	<ul style="list-style-type: none">• The consular officers shall be free to communicate with the nationals of the sending state and to have access to them. (Article 36)	<ul style="list-style-type: none">• UN Representatives are having the right to use codes and to receive papers or correspondence by courier or in sealed bags. (Article IV, Section 11 (c))
8	Exemption from Taxation	<ul style="list-style-type: none">• The sending state and the head of the mission are exempted from all national, regional or municipal dues or taxes. (Article 23)• The diplomatic agents are exempted from all dues and taxes unless it is covered under any one of the exceptions. (Article 34)	<ul style="list-style-type: none">• The consular premises and the residence of the head of the consular post are exempted from all national, regional or municipal dues or taxes. (Article 32)• The consular agents are exempted from all taxes unless provided for. (Article. 49)	<ul style="list-style-type: none">• UN Representatives are exempted from any form of taxation, during the period of their residence in the host state to discharge official duties. (Article IV, Section 13)

Sl. No	Parameter	Diplomatic Immunities and Privileges (VCDR, 1961)	Consular Immunities and Privileges (VCCR, 1963)	Immunities and Privileges of UN representatives (Convention on the Privileges and Immunities of the United Nations, 1946)
9	Other Immunities: – Use of Flag and Emblem – Obligations of Third State	<ul style="list-style-type: none"> The diplomatic mission and its head have the right to use the flag and emblem of the sending state. (Article 20) The third state shall afford him inviolability and such other immunities for his transit or return. (Article 40) 	<ul style="list-style-type: none"> The home country has the right to use its flag and the coat-of-arms in the host country. (Article 29) The third state should allow consular officer to pass through its territory for transit or return. (Article 54) 	<ul style="list-style-type: none"> Representatives and their spouses are exempted from immigration restrictions, in case they are visiting or passing through states to exercise their official functions. (Article IV, Section 11 (d)) Personal baggage is also immune from search and seizure. (Article IV Section 11 (a) and (f))
10	Respect for the laws and regulations of the receiving State	<ul style="list-style-type: none"> The diplomatic agents have to abide by the rules and regulations of the receiving state. The diplomatic agents have a duty to not to interfere in the internal affairs of receiving state. (Article 41) 	<ul style="list-style-type: none"> The consular officers have to abide by the rules and regulations of the receiving state. The consular officers have the duty to not to interfere in the internal affairs of the receiving state. (Article 55) 	<ul style="list-style-type: none"> No provision

TABLE 1 *Comparison of immunities and privileges (cont.)*

Sl. No	Parameter	Diplomatic Immunities and Privileges (VCDR, 1961)	Consular Immunities and Privileges (VCCR, 1963)	Immunities and Privileges of UN representatives (Convention on the Privileges and Immunities of the United Nations, 1946)
11	Waiver of Immunity	<ul style="list-style-type: none"> • The diplomatic immunity and privileges can be waived by the sending state. • The waiver should be done in an express manner. (Article 32) 	<ul style="list-style-type: none"> • The Consular immunity and privileges can be waived by the sending state on express terms • (Article 45) 	<ul style="list-style-type: none"> • Members can waive immunity of their representatives if in their opinion immunity would impede the course of justice. (Article IV, Section 14)
12	Commencement and End of privileges and immunities	<ul style="list-style-type: none"> • <i>Commencement:</i> The protection shall commence from the moment he enters the territory of the receiving state. • <i>Cease:</i> It shall normally cease at the moment he leaves the receiving state or in some cases, on expiry of reasonable period. 	<ul style="list-style-type: none"> • <i>Commencement:</i> It shall continue from the moment he enters the territory of the receiving state. • <i>Cease:</i> It shall normally cease at the moment he leaves the receiving state or in some cases, on expiry of reasonable period. 	<ul style="list-style-type: none"> • No provision

Sl. No	Parameter	Diplomatic Immunities and Privileges (VCDR, 1961)	Consular Immunities and Privileges (VCCR, 1963)	Immunities and Privileges of UN representatives (Convention on the Privileges and Immunities of the United Nations, 1946)
		<ul style="list-style-type: none"> • <i>In case of death:</i> Immunity continues until the expiry of reasonable period for the members of the diplomat's family to leave. (Article 39) 	<ul style="list-style-type: none"> • <i>In case of death:</i> The members of the family of the consular employee shall enjoy immunity until the expiry of reasonable period for the members of his family to leave. (Article 53) 	
13	Restriction on private gainful activities	<ul style="list-style-type: none"> • The diplomatic agent shall not involve in any professional or commercial activity for personal profit. (Article. 42) 	<ul style="list-style-type: none"> • The consular officers shall not carry on for personal profit any professional or commercial activity in the receiving state. (Article. 57) 	<ul style="list-style-type: none"> • No reference

- a For further detailed discussion on the scope of 'grave crimes', See Section 4.1.2 of this article.
- b VCDR (n 1); VCCR (n 5); Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (adopted 14 March 1975, not yet in force) UN Doc.A/CONF.67/16; Convention on Special Missions (adopted 8 December 1969, entered into force 21 June 1985) 1400 UNTS 231; 9 ILM 127 (1970).
- c Maria Flemme, 'Due Diligence in International Law' (LLM thesis, University of Lund 2004) 25. Available at. <<http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1557482&fileId=1564336>> accessed on 5th April 2017.
- d B. Sen (n 46) 107.

3 The Problem of Abuse of Diplomatic Privileges and Immunities

As discussed in the Introduction, diplomatic immunity is a fundamental principle of international relations⁷⁷ and it was established to promote international relations by protecting diplomats 'from retaliation in time of international conflicts'.⁷⁸ However, there have been an increasing number of challenges to the object and purpose of the Vienna conventions, as diplomats, their family, and consular officials have increasingly paid scant respect for laws and regulations of the receiving states and have frequently abused their immunities and privileges, necessitating the invocation of local jurisdiction by the receiving state.⁷⁹ At the same time, it is equally true that at times receiving states have rejected claims of diplomatic immunity on flimsy grounds, including the assertion that such immunity is available only for 'official acts'. It is submitted that the abuse of privileges and immunities by diplomats, as well as by the states that receive them, constitute one of the major challenges to the continued success of the Vienna Conventions.

It may be noted that out of all the abuses of diplomatic immunity, abuses of criminal nature merits special scrutiny.⁸⁰ The crimes committed by them range broadly from drunk driving, assault, child abuse, possession of deadly weapons, bribery, slavery, money laundering, rape and even murder.⁸¹ Leading international cities, such as New York, Geneva, London and Washington have been prone to the occurrence of 'diplomatic crimes', given the relatively high number of foreign embassies and international organizations in these places. In fact, this problem is particularly acute in the US, in view of the headquarters

77 Erik M. G. Denters and Nico Schrijver, *Reflections on International Law from the Low Countries: In Honour of Paul de Waart* (Martinus Nijhoff 1998) 163.

78 Mitchell S. Ross (n 7) 174.

79 The subject of abuse of diplomatic immunities and privileges has attracted a large amount of scholarship, especially in the recent times. To illustrate, See Rosalyn Higgins (n 4); Amanda M. Castro, 'Abuse of Diplomatic Immunity in Family Courts: There is Nothing Diplomatic about Domestic Immunity' (2014) 47 *Suffolk University Law Review* 353; Emily F. Siedell, 'Swarna and Baoanam: Unravelling the Diplomatic Immunity Defense to Domestic Worker Abuse' (2011) 26 *Maryland Journal of International Law* 173; Nina Maja Bergmar (n 58).

80 William G. Morris, 'Constitutional Solutions to the Problem of Diplomatic Crime and Immunity' (2007) 36 *Hofstra Law Review* 601.

81 Kitty Donaldson, 'Murder, rape, assault: the secret crimes of London's diplomats' *The Independent* (London, 16 July 2006) <<http://www.independent.co.uk/news/uk/crime/murder-rape-assault-the-secret-crimes-of-londons-diplomats-408170.html>> accessed on 5th April 2017.

of the UN being located in that country. In recent years, thousands of individuals from low-income countries, especially women, have entered the US with A-3 and G-5 visas⁸² to work as domestic employees in the residences of diplomats, consular officers, and officials of international organizations.⁸³ Reports suggest that many of these domestic employees have been subjected to abuses such as withholding of wages, underpayment of wages, ill-treatment, illegal confinement, withholding of passport, rape and other forms of physical and sexual violence.⁸⁴ Unfortunately, it is not uncommon to find that sometimes diplomats are charged with serious crimes such as human trafficking and forced labour.⁸⁵

Of all the crimes with which the diplomatic agents have been charged, the crime of human trafficking has been prevalent and widespread. To curb the menace of human trafficking, the US Congress passed the Victims of Trafficking and Violence Protection Act (TVPA) in 2000.⁸⁶ Though this Act was considered a landmark piece of legislation to address the growing problem of human trafficking in the US, it was subsequently noticed that the domestic workers who came to US under A-3 and G-5 visas for a temporary period were unable to stay for a longer duration to successfully prosecute their employers.⁸⁷ This major flaw was rectified through reauthorization legislation in 2008, thanks to protests and opposition from the human rights and non-governmental organizations

82 A-3, G-5 and B-1 are the types of temporary visas issued by US government for domestic employees who are accompanying an employer or diplomat who is visiting or on temporary assignment in the United States.

83 Human Rights Watch, 'Abuse of Domestic Workers with Special Visas in the United States' (HRW, 2001 (13) 2 G) <<http://www.hrw.org/reports/2001/usadom/usadom0501.pdf>> accessed on 5th April 2017; American Civil Liberties Union, 'Trafficking and Exploitation of Migrant Domestic Workers by Diplomats and Staff of International Organizations in the United States' (ACLU, 17 January 2007) <<https://www.aclu.org/trafficking-and-exploitation-migrant-domestic-workers-diplomats-and-staff-international>> accessed on 5th April 2017; Also See Human Rights Watch, 'Hidden Away: Abuses Against Migrant Domestic Workers in the UK', (2014) Human Rights Watch <<https://www.hrw.org/report/2014/03/30/hidden-away/abuses-against-migrant-domestic-workers-uk>> accessed on 5th April 2017.

84 *Ibid.*

85 Mitchell S. Ross (n 7).

86 US Department of State, 'US Laws on Trafficking in persons' (*US Department of State: Diplomacy in Action*, May 2015) <<http://www.state.gov/j/tip/laws/>> accessed on 5th April 2017.

87 Martina E. Vandenberg and Alexandra F. Levy, 'Human Trafficking and Diplomatic Immunity: Impunity No More?' (2012) 7 Intercultural Human Rights Law Review 77, 84.

such as American Civil Liberties Union (ACLU).⁸⁸ The Reauthorization Act of 2008 allowed the victims to remain in the US as temporary residents so they could effectively pursue litigation against alleged traffickers. However, notwithstanding this legislation, in most cases the diplomatic agents manage to avoid liability due to successful claims of diplomatic immunity,⁸⁹ prompting one commentator to remark that while the Vienna Conventions have been fraying at the edges, the perpetrators remain free under the shield of diplomatic immunity.⁹⁰

In the case of London, the situation is no different. In 2004, the UK government had released data showing the crimes committed by diplomatic and consular staff posted in the diplomatic outposts of various countries located in London. It demonstrated that between 1999 and 2004, 122 serious offences were committed by diplomats and other officials.⁹¹ However, the UK government was unable to prosecute the alleged offenders in view of their diplomatic immunity.

Even recent Indian history is replete with many cases of such abuses.⁹² In 2013, 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.⁹³ Although he was suspected for the crime of molestation, he was not arrested as he enjoyed diplomatic immunity.⁹⁴ 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.⁹⁵ These cases demonstrate that foreign

88 *Ibid.*

89 *Ibid* 78 ('Impunity has long been the norm').

90 *Ibid* 84–87.

91 For a recent report, See Ludovica Laccino, 'Britain's Diplomats Abuse Their Immunity to Enslave Human Traffic Victims' *International Business Times* (London, November 26, 2014) <<http://www.ibtimes.co.uk/britains-diplomats-abuse-their-immunity-enslave-human-traffic-victims-1476772>> accessed on 5th April 2017.

92 Martina Vandenberg (n 91).

93 Sagar Rajput, 'Bahrain diplomat accused of abusing woman sent home' *MidDay* (Mumbai, 29 December 2013) <<http://www.mid-day.com/articles/bahrain-diplomat-accused-of-abusing-woman-sent-home/246384>> accessed on 5th April 2017.

94 *Ibid.*

95 '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/>> accessed on 5th April 2017.

officials have a greater misunderstanding about the concept of diplomatic privileges and immunities.⁹⁶

4 The Recent Controversies Involving India

Recently, the scope of diplomatic and consular immunity and privileges was contested in two cases in which India was involved. The first case concerned the abuse of personal immunity by an Indian Consular Officer in New York, while the second concerned the alleged deprivation of immunity of the Ambassador of Italy by the Indian government and the Supreme Court of India.

4.1 *Arrest of Devyani Khobragade*

4.1.1 Factual Background

In this case, the then Deputy Consul-General of India in New York, Devyani Khobragade hired one Sangeeta Richard from India as a domestic servant in 2012 on certain contractual terms.⁹⁷ Subsequent to her arrival and commencement of work in the US, Richard alleged that she was ill-treated and underpaid by her employer. In her complaint to the New York Police, she levelled allegations of labour exploitation and human trafficking against the consular officer. After inquiry, the police found out that the consular officer had knowingly made several false representations and statements to the US authorities in order to obtain a visa for Richard, thereby giving rise to allegations of visa fraud and furnishing false statements under US law.⁹⁸

Subsequent to the filing of charges by the US authorities, the District Judge of Southern New York District issued an arrest warrant against Devyani.⁹⁹ On December 12, 2013, she was arrested while dropping her child to school but later

96 See Mitchell S. Ross (n 7) at 176. Recently, in Pakistan, a suspected US Central Intelligence Agency (CIA) contractor, Raymond Davis was charged with the killing of two Pakistani citizens. The US government claimed that he cannot be prosecuted as he enjoyed diplomatic immunity in connection with his employment at the US Consulate in Lahore. It was reported that by payment of *diyya* (heavy blood money) to the tune of \$2.4 million, the matter was settled outside the court. (Kishore Mahbubani, 'Two shades of immunity' *The Indian Express* (New Delhi, 12 January 2014) <<http://indianexpress.com/article/opinion/columns/two-shades-of-immunity/>> accessed on 5th April 2017.

97 *United States v Devyani Khobragade* [2013] 14 Cr.008 (SAS). Interestingly, Devyani was not charged for trafficking.

98 *Ibid.* Generally, fraud and misuse of visas, permits, and other documents is covered by 18 U.S.C.A § 1546 and false statements or entries is dealt with under 18 U.S.C.A § 1001.

99 *Ibid.*

on the same day she was released on conditional bail.¹⁰⁰ After her release, she wrote a mail to her colleagues that, she 'broke down many times,' owing to 'the indignities of repeated handcuffing, stripping, and cavity searches, swabbing,' and for being held 'with common criminals and drug addicts'.¹⁰¹ However, the US Marshals Service denied the reports that she was subjected to 'cavity search' but maintained that she was merely subjected to 'strip search,' which is a standard practice in US in the interest of personal safety of arrested persons.¹⁰²

As a response to the above treatment and also to protect Devyani under the shield of full diplomatic immunity, on January 8, 2014, the Government of India re-designated her as a Special Adviser in the Permanent Mission of India to the United Nations.¹⁰³ With this 'protective' measure, Devyani left US the next day, without facing further legal process.¹⁰⁴ While the Indian government claimed that the incident represented a serious breach of the VCCR, 1963, the US government relied upon the 'grave crime' exception available under Article 41 of the VCCR. Since the above issue raises a number of questions of international law pertinent to the use and abuse of diplomatic and consular immunities and privileges, a detailed examination of the case is undertaken here.

4.1.2 Nature and Scope of Consular Immunity Under VCCR, 1963

The US government justified the arrest of Devyani, as she was merely a consular official at the time of her arrest, and as such enjoyed only consular immunity in respect of consular functions, as against the complete immunity from arrest

100 PTI, 'Indian Diplomat Devyani Khobragade Arrested while dropping daughter at school for US visa fraud, Preet Bahara on case' *The Indian Express* (New York, 17 December 2013) <<http://archive.indianexpress.com/news/indian-diplomat-devyani-khobragade-arrested-while-dropping-daughter-at-school-for-us-visa-fraud-preet-bharara-on-case/1207222/>> accessed on 5th April 2017.

101 'Devyani Khobragade letter to her colleagues: The full text' *Washington Post* (New York, 18 December 2013). <http://www.washingtonpost.com/world/devyani-khobragade-letter-to-her-colleagues-thefulltext/2013/12/18/aaad7018-6804-11e3-ae56-22de072140a2_story.html> accessed on 5th April 2017.

102 Lalit K. Jha, 'Diplomat's 'Strip Search' Part of Standard Procedures: US' *Outlook* (Washington, 18 December 2013) <<http://news.outlookindia.com/items.aspx?artid=821384>> accessed 5th April 2017.

103 *United States v Devyani Khobragade* (n 101).

104 The US Department of State contended that the UN immunity applicable to Devyani will only have prospective effect. See Narayan Lakshman, 'No Retroactive Immunity for Devyani, says US' *The Hindu* (Washington, 20 December 2013) <<http://www.thehindu.com/news/international/world/no-retroactive-immunity-for-devyani-says-us/article5481901.ece>> accessed on 5th April 2017.

enjoyed by diplomats.¹⁰⁵ Of course, the scope of consular immunity is far more limited relative to the privileges and immunities accorded diplomats.¹⁰⁶ As discussed earlier, Article 43 of the VCCR provides immunity to consular officers and consular employees from the jurisdiction of the judicial or administrative authorities of the receiving State only in respect of 'acts performed in the exercise of consular functions', which are elaborately outlined in Article 5 of the VCCR. However, neither the consular officer nor the Indian government ever contended that the criminal acts with which she was charged i.e., furnishing the false information about Richard's wages to obtain a visa for her, come within the purview of 'official functions'. Thus, it is submitted that, from the viewpoint of the VCCR, there was no bar to the US courts to validly exercise criminal jurisdiction in the matter and to order her arrest.¹⁰⁷ Moreover, VCCR does not completely exempt the consular officer from arrest. It provides that the consular officers shall enjoy immunity from 'arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority'.¹⁰⁸

This implies that the judicial or administrative authorities of the receiving states are not completely barred from exercising their power to arrest any consular officer. It merely provides that the arrest of the consular officer will be subject to two conditions: Firstly, the crime should be of such nature that it can be classified as a 'grave crime' and secondly, the decision to arrest the consular officer should be taken by a judicial authority. In the instant case, though there is no doubt as to the 'judicial' nature of the decision to make arrest, there is some uncertainty as to whether the crime committed by the consular officer came within the scope of 'grave crimes'.

It is pertinent to note that the term 'grave crime' has not been defined by the VCCR. However, the reference to the Commentaries of the International Law Commission (ILC)'s Draft Articles on Consular Relations provides some

105 *United States v Devyani Khobragade* (n 101).

106 See Comparison of Immunities and Privileges of Diplomatic and Consular Officers and Representatives of UN Members, Section 2 of this article.

107 For the stand of the Indian government on this aspect, See PTI, 'US Courts Have No Jurisdiction in India over Devyani' *The New Indian Express* (New Delhi, 15 March 2014) <<http://www.newindianexpress.com/nation/us-court-has-no-jurisdiction-in-india-over-devyani/2014/03/15/article2110551.ece>> accessed on 5th April 2017.

108 VCCR (n 5), art 41(1). It also generally provides that the 'consular officers shall not be committed to prison or be liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect'. However, it stipulates that in case of grave crimes, this protection will not be available [VCCR, art 41(2)].

clues as to how the earlier bilateral consular instruments regulated this issue.¹⁰⁹ According to the ILC, the practice in earlier conventions providing for exemption from personal inviolability was varied. While many states stipulated the quantum of sentence which would disentitle consular officers from claiming immunity (say 5 years or so), others expressly enumerated the crimes for which diplomatic immunity could not be claimed. In certain other conventions, such crimes were referred to by the type of penalty applicable, while in certain others, it was confined to only felony-type crimes. Still, few conventions generally provided that no personal immunity would be available in the cases of 'serious criminal offences'. In fact, the ILC proposed two approaches: one that would withhold diplomatic immunity 'in the case of an offence punishable by a maximum term of not less than five years imprisonment' and the other that would do so in cases where a grave crime was in issue.¹¹⁰ However, since most governments preferred the subjective term over the prescribed sentence, the present rule was adopted.¹¹¹

In this connection, a remedy of the nature of a provision as exists in the UK Consular Relations Act, 1968 merits special attention.¹¹² The UK Act provides that 'a reference to a grave crime shall be construed as a reference to any offence punishable with imprisonment for a term that may extend to 5 years or with a more severe sentence'.¹¹³ However, the major problem with this prescription is that there are wide variations in sentencing across the major criminal justice systems and hence it is very difficult to find the common threshold. In this connection, it may be noted that in the areas of extradition, which is dominated by bilateral treaties, the variations between the legal systems in terms of quantum

109 ILC, 'Documents of the Thirteenth Session, Including the Report of The Commission to the General Assembly' (26 January 1961) UN Doc. A/CN.4/134 & ADD.I, 115; Dapo Akande, 'Immunity of Consular Officials: The Arrest by the US of an Indian Deputy Consul-General' (*EJIL: Talk!*, 20 December 2013) <<http://www.ejiltalk.org/immunity-of-consular-officials-the-arrest-by-the-us-of-an-indian-deputy-consul-general/>> accessed on 5th April 2017.

110 ILC (n 113) 116; Arthur Watts, *The International Law Commission 1949–1998: Volume One: The Treaties*, (art 42 Commentary) (1st edn, Clarendon 1999) 282.

111 It is interesting to note that the Indian delegate had supported the adoption of the 'grave crime' exception. See Extract from the official records of 'The United Nations Conference on Consular Relations' (Vienna 4 March–22 April 1963) (18 April 1963) UN Doc A/CONF.25/SR15, 53.

112 Consular Relations Act [1968] CH.18 (The UK Act).

113 The UK Act, sec 1(2). Also See, The Foreign Missions and International Organizations Act [1991] SC C 41 (Canada), sec 2(4); The Diplomatic and Consular Relations Act [2005] No 8/2005 (Singapore), sec 4(2) (b).

of sentences or imprisonment are resolved through a 'double criminality' rule.¹¹⁴ This rule requires that the alleged crime for which extradition is sought should be punishable in both the requesting and requested countries. However, it is submitted that even a solution of this type may not be feasible in the context of the personal inviolability of consular officers, in view of the multi-lateral nature of the VCCR framework.

Thus, in the absence of definition and other feasible solutions, cooperation between the signatories is the only way to avoid friction over the application of this exception. Accordingly, it is emphasised that the scope of this term cannot be completely left to the determination of the receiving states, as the potential of narrow interpretation may effectively curtail the rights provided under the Convention. In this respect, the arrest of consular officers would be harmful to the interests of both the sending and the receiving states. In this connection, it is poignant to look into the purpose for which this provision was codified in the Convention. The Commentaries observed that:

The privilege under this paragraph is granted to consular officials by reason of their functions. The arrest of a consular official hampers considerably the functioning of the consulate and the discharge of the daily tasks—which is particularly serious inasmuch as many of the matters calling for consular action will not admit of delay (e.g., the issue of visas, passports and other travel documents; the legalization of signatures on commercial documents and invoices; various activities connected with shipping, etc.). Any such step would harm the interests, not only of the sending State, but also of the receiving State, and would seriously affect consular relations between the two States. It would therefore be inadmissible that a consular official should be placed under arrest or detention pending trial in connexion with some minor offence.¹¹⁵

Thus, it is clear that a fine balance needs to be maintained between the power of receiving states to make arrest where grave crimes are in issue, and the interests of sending states in ensuring that consular services are available without much interruption and that the personal inviolability of consular officers is respected in all required situations. In this connection, it is suggested that certain procedural safeguards may be built into the mechanism of the VCCR to provide for balance in disputed or borderline cases. Accordingly, it is suggested

¹¹⁴ S R Subramanian, 'Role of Extradition in Human Rights: The Imperatives of Reforming the Indian Extradition Law' (2014) 40 *Commonwealth Law Bulletin* 245.

¹¹⁵ Arthur Watts (n 114).

that in cases where the arrest of a consular officer is inevitable in the opinion of the receiving state on the ground that the officer may have committed a grave crime, the actual arrest should be made in consultation with the sending state, wherever practicable. This suggestion would also be in line with the principle of reciprocity, which is the basis of the Vienna Conventions. Moreover, it is expected to ensure adequate opportunities for both states to resolve the differences through regular diplomatic channels.

Applying this analysis to the facts of the case, it cannot be stated that the US government breached the VCCR, especially in the absence of a clear and acceptable definition of grave crime. But at the same time, it cannot be denied that the US government should have explored more conciliatory options through diplomatic means before taking the final decision to arrest the consular officer. Moreover, the US government should have investigated whether the consular officer committed the crime of 'forced labour' against the laws of US.¹¹⁶ If the US government found such allegations were true, it should have included the crime of forced labour in the indictment against Devyani, a scenario in which the US government could have met the broad requirements of grave crime without much difficulty. Moreover, the crime of forced labour is also an international crime punishable under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, an

116 Forced Labor, 18 U.S.C.A § 1589, Ch 77 provides that: 'Whoever knowingly provides or obtains the labor or services of a person-(1) by threats of serious harm to, or physical restraint against, that person or another person;(2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or(3) by means of the abuse or threatened abuse of law or the legal process, shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both'.

instrument ratified by both the countries.¹¹⁷ Of note, in US the above crime is punishable by imprisonment up to 20 years.¹¹⁸

Moreover, as the receiving state it is incumbent upon the US government to show that its criminal proceedings have been 'conducted with the respect due to [Devyani] by reason of [her] official position'.¹¹⁹ On this issue, the Indian government argued that Devyani was not treated with the human dignity required of the occasion,¹²⁰ as she was 'handcuffed, strip-searched, swabbed for DNA, subjected to cavity search and then placed in a cell with drug addicts'.¹²¹ However, the US prosecuting attorney denied all these allegations and contended that the US Marshals Service had 'arrested her in the most discreet way possible, and unlike most defendants, she was not then handcuffed or restrained'.¹²² Instead, it is claimed that she was allowed the access to phone calls and 'to arrange personal matters and [to] contact whomever she needed, including allowing her to arrange for child care'.¹²³ Thus, in view of the official

117 The USA has ratified the United Nations Convention against Transnational Organized Crime [40 ILM 335 (2001)] on 13th December 2000 and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2237 UNTS 319/Doc. A/55/383) on 3 November 2005. India has also ratified both the Convention and the Protocol.

118 Forced Labor (n 120), sec 1589 (d). It is suggested that if a consular officer had committed or involved in any one of the international crimes, such as terrorism, drug trafficking, organized crime, no state would be taking a stand that it would not qualify as a grave crime, as every state is affected by such crimes.

119 VCCR (n 5), art 41(3).

120 ANI, 'Dignity of Indian diplomats needs to be accepted, asserts Salman Khurshid' *DNA* (New Delhi, 8 January 2014) <<http://www.dnaindia.com/india/report-dignity-of-indian-diplomats-needs-to-be-accepted-asserts-salman-khurshid-1947464>> accessed on 5th April 2017.

121 Mala Das, 'Devyani Khobragade arrest case: John Kerry calls India's National Security Advisor, voices 'regret' *NDTV* (New Delhi, 19 December 2013) <<http://www.ndtv.com/india-news/devyani-khobragade-arrest-case-john-kerry-calls-indias-national-security-advisor-voices-regret-544979>> accessed on 12th April 2017.

122 Laura Collins, 'There was NO cavity search: US Marshals say 'slave wage' diplomat got special treatment when arrested in New York as Indian government claims it's a conspiracy' *Daily Mail* (London 19 December 2013) <<http://www.dailymail.co.uk/news/article-2526293/Revealed-Indian-diplomat-center-furor-arrest-paying-maid-slave-wage-called-New-York-cops-six-months-ago-claim-extorted-U-S-visa.html>> accessed on 12th April 2017.

123 *Ibid.*

clarification issued by the US prosecuting attorney, the allegation that the diplomat was ill-treated does not appear to be true.

4.1.3 Immunity Under the Convention on the Privileges and Immunities of the United Nations, 1946

As mentioned earlier, subsequent to the arrest of Devyani, on 18 December 2013, India re-assigned her official position so that she could claim full diplomatic immunity to avoid further judicial process. This was considered to be an abuse of the VCCR.¹²⁴ As has been already pointed out, the VCCR does not provide consular officers with a blanket exemption from all criminal proceedings. In fact, it stipulates that when criminal proceedings are instituted against such officers, they must appear before the competent authorities and offer all cooperation.¹²⁵ Thus, it can be argued that Devyani's appointment to the UN posting gave her an immunity from all criminal proceedings pending in the US thereby contradicting the intentions of the VCCR.

Moreover, despite the request of the US government to waive the UN immunity of Devyani so that she could be tried, the Indian government refused to do so.¹²⁶ It is contended that though the Convention on the Privileges and Immunities of the United Nations, 1946¹²⁷ guarantees the representatives of Members to the United Nations, an immunity from personal arrest or detention and also an immunity from legal process of every kind,¹²⁸ it is subject to two other provisions in the Convention. Firstly, the Convention prescribes that the privileges and immunities accorded to the Members, officials and experts of United Nations are 'not for the personal benefit of the individual themselves but in order to safeguard the independent exercise of their functions

124 Also See Irina Kotchach Bleustein, 'Achieving the Co-existence of Accountability and Immunity: The Prosecution of Devyani Khobragade and the Role Immunity in Criminal Cases' (2015) 52 *American Criminal Law Review* 355, 372–373.

125 VCCR (n 5), art 41(3).

126 PTI, 'India Refuses US Request to Waive Devyani's Immunity' *Deccan Herald* (Washington, 10 January 2014) <<http://www.deccanherald.com/content/379651/india-refuses-us-request-waive.html>> accessed on 5th April 2017. Moreover, India wanted to accord her the immunity applicable to the representatives of the UN with retroactive effect. However, during the credentialing process, the US State Department in its capacity as the host country made it clear that the full diplomatic immunity will be available to her only from the date of joining in the United Nations. See *The Hindu* (n 108); Also See Agreement Between the United Nations and United States Regarding the Headquarters of the United Nations (26 June 1947) 11 UNTS 11.

127 UN Privileges Convention (n 77).

128 *Ibid*, art IV, sec 11 and art V, sec 18.

in connection with United Nations'.¹²⁹ Secondly, Members of the United Nations (or the Secretary-General, in case of officials and experts working for the United Nations) 'not only ha[ve] the right but [are] under a duty to waive the immunity of [their] representative[s] in any case where in the opinion of the Member the immunity would impede the cause of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded'.¹³⁰

Thus, it can be argued that India is under an obligation to waive the United Nations immunity of Devyani as both the conditions for waiver of immunity are satisfied. It should be noted that the invocation of immunity by India on behalf of Devyani not only frustrates the criminal complaint brought by Richard but it can also be waived without prejudice to the performance of her official assignments. Accordingly, it is submitted that the Indian government's rejection of the waiver of immunity preventing her criminal prosecution would not be in line with the terms of the Convention on the Privileges and Immunities of the United Nations.

4.1.4 Assessment

The above discussion once again clearly shows that how far diplomatic immunity and privileges can be abused by diplomats and states.¹³¹ In the instant case, although the consular officer had initially entered into a formal employment contract with the domestic employee and had agreed to pay her the wages 'at the prevailing or minimum wages rate as required by law, whichever is greater',¹³² she did not pay the wages as stipulated under the contract. On the contrary, she entered into another contract with the domestic employee privately so that she could pay her the wages below the statutory limit¹³³ in violation of the duty to respect the laws and regulations of the receiving state under the VCCR.¹³⁴

Also, it is not appropriate on the part of India to refuse to waive immunity of Devyani as sought by the US government, as the condition for the fulfilment

¹²⁹ *Ibid*, sections 14, 20 and 23.

¹³⁰ *Ibid*.

¹³¹ Also See, Irina Kotchach Bleustein (n 128).

¹³² The copy of the Complaint is available at the website of the US Department of Justice. It can be accessed from <<http://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/Khobragade%2C%20Devyani%20Complaint.pdf>> accessed on 12th April 2017.

¹³³ *Ibid* at 9, para 17.

¹³⁴ VCCR (n 5), art 55(1).

of the waiver is well made-out. It needs to be emphasized that the balance of rights and obligations between receiving states and sending states is the essence of the VCCR and hence any attempt to bypass the obligations prescribed under the Convention will have the potential to undermine the VCCR. Also, India may not be justified to remove the security barricades near the US Embassy in New Delhi, in retaliation of the treatment meted out to the Indian consular officer, as it is under the duty 'to take all appropriate steps to protect the premises of the mission against intrusion or damage, or disturbance of peace or impairment of its dignity'.¹³⁵

Similarly, the US government, as already mentioned, should have entered into the process of consultation with the Indian government before making the arrest of the consular officer rather than keeping it in the dark on the details of law enforcement process,¹³⁶ especially in the absence of the common understanding on what constitutes 'grave crime' for the purpose of the VCCR. It is emphasized that reciprocity is the foundational pillar of the Vienna Conventions and hence it is the responsibility of all those concerned to respect them in both letter and spirit.

4.2 *Italian Marines Case and the Issue of Diplomatic Immunity*

4.2.1 Factual Background of the Case¹³⁷

Since the collapse of the central government in Somalia in 1991, the world community has witnessed a dramatic increase in the incidents of piracy and

¹³⁵ *Ibid*, art 22(2). It could be argued that India had withdrawn only certain discretionary privileges rather than the privileges mandatorily required under the Vienna Conventions. Also, there seems to be no change in its commitment to provide basic security. But still it had to defend the measure that it does not impair the dignity of the mission.

¹³⁶ See PTI, 'Diplomat Case: India Says Did Not Get Response from US' *The Indian Express* (Washington, 9 January 2014) <<http://indianexpress.com/article/india/india-others/diplomat-case-india-says-did-not-get-response-from-us/>> accessed on 12th April 2017. Though there was a series of communications between the government of India and the US, for over a long period of time spanning several months on related issues, no report seems to be available on consultation on the issue of grave crime.

¹³⁷ Case W.P. 135/ 2012 and SLP (Civil) 20370 of 2012, *Republic of Italy &ors v Union of India &ors* (2013) 4 SCC 721, popularly known as the Italian Marines Case, para 1. For additional materials on the background of this case, See Manimuthu Gandhi, 'The Enrica Lexie Incident: Seeing Beyond the Grey Areas of International Law' (2014) 53 Indian Journal of International Law 2; Stefan Talmon, 'The (Not So) 'Sacred' Word of an Italian Ambassador and Diplomatic Immunity for Contempt of Court' (2014) 54 Indian Journal of International Law 1; Natalino Ronziti, 'The Enrica Lexie Incident: Law of the Sea and Immunity of State Officials Issues' (2012) 22 Italian Yearbook of International Law 1; Marino Forti, 'Italy and Its Maro' (6 April 2013) 48 Economic and Political Weekly 14; Danielle Ireland-Piper, 'The Enrica Lexie and St Antony: A Voyage into Jurisdictional

armed robbery at sea off the coast of Somalia.¹³⁸ This problem has continued unabated despite the various initiatives taken by the United Nations and the members of the international community.¹³⁹ To protect their ships and seamen from piracy, the Italian government took certain legislative measures under which certain armed operatives, known as 'Team Latorre' were asked to be on board the merchant vessel M. V Enrica Lexie. When the vessel was crossing the Arabian Sea on its journey from Muscat to Djibouti on February 15, 2011, it encountered an Indian fishing boat 'St Antony' at a distance of about 20.5 nautical miles off the coast of the State of Kerala. The Italian marines allegedly mistook the Indian boat for a pirate vessel and opened fire resulting in the death of two Indian fishermen.

Subsequently, the two Italian marines on board the merchant vessel were arrested and they were sought to be tried for various offences under the Indian Penal Code and the Suppression of Unlawful Acts against the Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 (SUA Act). Right from the time of arrest, Italy contested the jurisdictional claim of India to prosecute the marines.¹⁴⁰ It contended that as the event happened in international waters, India should not exercise jurisdiction in the matter. It had initially and unsuccessfully sought a motion of the Kerala High Court seeking to quash the criminal proceedings against the marines.¹⁴¹ Thereafter,

Conflict' (2014) 14 QUT Law Review 74–89. It may be noted that the writings on this case may be classified into two categories, one on the issue of jurisdiction and the other on the issue of diplomatic immunity.

138 Noah Black, 'Criminal Jurisdiction over Maritime Security in the Indian Ocean' (*Cornell International Law Journal Online*, 1 November 2013) <<http://cornellilj.org/wp-content/uploads/2013/11/Black-Criminal-Jurisdiction-Martime-Security-final.pdf>> accessed on 12th April 2017; Jon Bellish, 'On Pirates, PMSCs, and Signature Strikes' (*Denver Journal of International Law and Policy*, 10 October 2012) <<http://djilp.org/2897/on-pirates-pmscs-and-signature-strikes/>> accessed on 12 April 2017; Jayan P.A, 'Jurisdictional Waters Delimitation: India's Exclusive Economic Zone (EEZ) In Mv Enrica Lexie case' (2013) 7 NALSAR Law Review 03–119; Valeria Eboli, 'Coastal State Jurisdiction over Vessel Protection Detachments and Immunity Issues: the *Enrica Lexie Case*, *Military Law and the Law of War Review*, 2012 <http://www.mllwr.org/archive/volume-51-2012/51_12_eboli-pierini/> accessed on 12th April 2017.

139 Bibi van Ginkel and Frans-Paul van der Putten, *International Response to Somali Piracy: Challenges and Opportunities* (1st edn, Martinus Nijhoff 2010); S R Subramanian, 'Fighting the Somali Pirates: The Ship-rider Agreement Breakthrough' (*Jurist Legal News and Research*, 29 June 2009). <<http://jurist.law.pitt.edu/forumy/2009/01/fighting-somali-pirates-shipriders.php>> accessed on 12th April 2017.

140 Manimuthu Gandhi (n 141) 2.

141 On 29 May 2012, the learned Single Judge of the Kerala High Court dismissed the Writ Petition (Civil) No.4542 of 2012 on two grounds. The learned Single Judge held that under

it petitioned the Supreme Court of India on the issue of jurisdiction.¹⁴² On January 1, 2013 a two-judge bench headed by the Chief Justice of India (CJI) Justice Altamas Kabir and Justice Chelameswar held that 'the State of Kerala as a unit of the Federal Union does not have jurisdiction to investigate into Italian marines shooting incident'.¹⁴³ Alternately, the Bench directed that the Union of India (UOI) should set up a Special Court for conducting the exclusive trial of this case.¹⁴⁴ It further directed that the marines to remain under the control of the Italian Embassy in Delhi, which agreed to take responsibility for their movement.¹⁴⁵ The court also made a point of ruling that until the Special Court is established in accordance with its order, the marines should remain under the custody of the Supreme Court.

Subsequently, the Italian marines requested the permission of the Supreme Court to visit Italy for casting their votes in the national elections.¹⁴⁶ This application was filed with the support of the Italian Embassy in India. In fact, the Italian Ambassador to Italy Daniele Mancini had filed an affidavit before the apex court that he would take full responsibility to ensure that the applicants return to India in accordance with the orders of the Supreme Court.¹⁴⁷ Relying mainly upon this affidavit of undertaking, and taking into account the fact that Italian law does not permit the marines to franchise their

the Notification No. SO 67/E dated 27 August 1981, the entire Indian Penal Code had been extended to the Exclusive Economic Zone and the territorial jurisdiction of the State of Kerala was not limited to 12 nautical miles only. The learned Single Judge also held that under the provisions of the SUA Act, the State of Kerala has jurisdiction upto 200 nautical miles from the Indian coast, falling within the Exclusive Economic Zone of India.

142 Italian Marines Case (n 141).

143 *Ibid* 157.

144 Also See V S Mani, 'It's our boat, our courts' *The Hindu* (New Delhi, 23 March 2013). <<http://www.thehindu.com/opinion/lead/its-our-boat-our-courts/article4538854.ece>> accessed on 12th April 2017. Professor V. S. Mani was of the opinion that no need for special court to try this case. Citing the Supreme Court decision in *M V Elisabeth and Ors v Harwan Investment and Trading* AIR 1993 SC1014, he argued that all the High Courts have Admiralty Jurisdiction under the Constitution of India.

145 Italian Marines Case (n 141) 158.

146 Previously, the marines were allowed to go to Italy on the occasion of Christmas by the High Court of Kerala. See K. C. Gopakumar, 'Italian Marines Can Go Home for Two Weeks: High Court' *The Hindu* (Thiruvananthapuram, 20 December 2012) <<http://www.thehindu.com/news/national/kerala/italian-marines-can-go-home-for-two-weeks-high-court/article4221352.ece>> accessed on 12th April 2017.

147 J. Venkatesan, 'Supreme Court issues notice to Italian envoy & marines' *The Hindu* (Chennai, 14 March 2014) <<http://www.thehindu.com/news/national/supreme-court-issues-notice-to-italian-envoy-marines/article4508717.ece>> accessed on 12th April 2017.

votes through postal ballot, the Supreme Court granted permission to the marines to visit their home country for participation in the election. The Court made it clear that the bail granted to the marines was subject to the condition that they would return to India within four weeks, i.e. before March 22, 2013.

However, on March 11, 2013, the Italian government sent a *note verbale* to the Indian Ministry of External Affairs (MEA) stating that the marines 'will not return to India on the expiration of permission granted to them'.¹⁴⁸ Subsequently, the Attorney General of India brought to the notice of the Court the *note verbale* concerned and the reply of the Indian government. He contended that 'the failure of the accused marines to return to India would be a breach of the sovereign undertaking given by the Republic of Italy to the Supreme Court of India'.¹⁴⁹ The Court took serious view of the breach of undertaking and had issued notices to the diplomat and the two marines seeking explanations on why they went back on their promises to the court. The court also further directed that the diplomat 'shall not leave India without the permission' of the court.¹⁵⁰ Also, as a follow-up to the orders of the Supreme Court, the Indian Ministry of Home Affairs had issued alerts to all airports and the immigration outposts to bar the diplomat from leaving the country without permission.¹⁵¹

In protest of the restraining order of the Supreme Court, the Italian Embassy in New Delhi contended that '[a]ny restriction [on] the freedom of movement of the Ambassador of Italy to India including any limitation [on] his right [to] leav[e] the Indian territory, will be contrary to the [i]nternational [o]bligations of the receiving State to respect his person, freedom, dignity

148 Legal Correspondent, 'India has violated International Obligations: Italy' *The Hindu* (New Delhi, 15 March 2014) <<http://www.thehindu.com/todays-paper/tp-national/india-has-violated-international-obligations-italy/article4510856.ece>> accessed on 12th April 2017.

149 Ministry of External Affairs, Government of India, 'Press Statement on the Italian Marine Issue' (MEA, 12 March 2013) <<http://mea.gov.in/press-releases.htm?dtl/21341/Press+statement+on+the+Italian+Marines+issue>> accessed on 12th April 2017.

150 The copy of the order passed by the Supreme Court in this matter is available at <<http://www.sidi-isil.org/wp-content/uploads/2013/03/Supreme-Court-of-India-Ambassador-Mancini.pdf>> accessed on 12th April 2017. In the meantime, a public-spirited politician Subramanian Swamy had filed public interest litigation in the Supreme Court and sought action against the diplomat for contempt of court. It is reported that the Supreme Court had solicited the opinion of the Attorney General of India and in accordance with his advice, ordered an explanation from the Italian Ambassador on the retreat of assurances.

151 FP Staff, 'Immigration told to not to allow Italian Envoy Mancini to leave India' (*First Post*, 16 March 2013) <<http://www.firstpost.com/india/airport-alert-immigration-not-to-allow-italy-envoy-to-leave-662671.html>> accessed on 12th April 2017.

and function'.¹⁵² When the Supreme Court met again on March 18, 2013, the Attorney General brought the claim of diplomatic immunity under the VCDR to the attention of the Supreme Court. The court made it clear that although there was no actual breach of undertaking given by the petitioners, as they still had time to return till March 22, 2013, it had remarked that: 'a person who has come to the court as a petitioner, I don't think has any immunity'.¹⁵³ It further extended the order directing the diplomat to not to leave India until further orders.¹⁵⁴ Moreover, on the specific request of the Attorney General of India, the court additionally prescribed that '[a]ll authorities in India shall take appropriate steps to see that th[e] order is strictly implemented'.¹⁵⁵ On the question of violation of the VCDR by the Indian authorities, as alleged by Italy, the Spokesperson of the Indian Ministry of External Affairs replied that while India is 'conscious of the provisions of the Vienna Convention [on Diplomatic Relations] and [its] obligations under it, [... it is] also bound by the directions of the Supreme Court'.¹⁵⁶

However, on March 21, 2013, the Italian government expressed its desire to return the marines to India if assurances were given that they would not be arrested on their return or that they would not be sentenced to the death penalty in the event of conviction by the Indian court.¹⁵⁷ The Indian government clarified that the two marines would not be liable to arrest if they returned within the time stipulated by the Supreme Court. It further opined that the case 'would not fall in the category of matters which attract the death penalty, that

152 TNN, 'Vienna Convention bars Indian authority from restricting Mancini: Italy, The Times of India' *The Times of India* (New Delhi, 19 March 2013) <<http://timesofindia.indiatimes.com/india/Vienna-Convention-bars-Indian-authority-from-restricting-Mancini-Italy/articleshow/19054004.cms>> accessed on 12th April 2017.

153 J. Venkatesan, 'I don't think you have immunity, Chief Justice tells Italian Envoy' *The Hindu* (New Delhi, 18 March 2014) <<http://www.thehindu.com/news/national/i-dont-think-you-have-immunity-chief-justice-tells-italian-envoy/article4521565.ece>> accessed on 12th April 2017.

154 *Republic of Italy Thr. Ambassador v Union of India* (2013) 4 SCR 595.

155 *Ibid.*

156 IANS, 'India bound by apex court direction on Italian envoy' *Zee News* (New Delhi, 18 March 2013) <http://zeenews.india.com/news/nation/india-bound-by-apex-court-direction-on-italian-envoy_836265.html> accessed on 12th April 2017.

157 Sandeep Dikshit, 'Diplomacy wins the day as Italian marines return' *The Hindu* (New Delhi, 23 March 2013) <<http://www.thehindu.com/todays-paper/diplomacy-wins-the-day-as-italian-marines-return/article4540324.ece>> accessed on 20th April 2017.

is to say the rarest of rare cases'.¹⁵⁸ In view of these assurances, Italy returned the marines to India on 22 March 2013. At a subsequent hearing on April 2, 2013, the Supreme Court recognized these developments and vacated the restraining order imposed on the diplomat, noting that '[s]ince the petitioners [...] have returned to India within the stipulated time, the undertaking given by the Ambassador of Italy in India, has been satisfied and [accordingly] he is discharged there from'.¹⁵⁹ In this context, this section will examine and analyse the observance of the VCDR against the backdrop of the abuse of immunities and privileges available to diplomats.

4.2.2 Scope of Diplomatic Immunity Under VCDR

4.2.2.1 *Immunity from Criminal Jurisdiction*

At the outset, it is important to note that the Supreme Court must have satisfied itself about the personal jurisdiction of the court before issuing any order imposing the restrictions against the Italian diplomat. Article 31 of the VCDR provides that diplomatic agents shall enjoy immunity from all types of jurisdiction, such as civil, criminal and administrative jurisdictions of the receiving state, unless their case falls under any one of the specified exceptions.¹⁶⁰ In fact, the VCDR prescribes that diplomats are not even obliged to give evidence as witnesses, unless they voluntarily decide to do so.¹⁶¹ Thus, it is clear that diplomats are generally exempt from all judicial process. Moreover, as already discussed with reference to the case of Devyani, the immunity from jurisdiction as enjoyed by diplomats is of a greater scope than the immunity enjoyed by consular officers. While consular officers are amenable to the jurisdiction of the judicial or administrative authorities of the receiving state only if their actions fall outside the sphere of consular functions described in Article 5 of VCCR, diplomats are entitled to blanket personal immunity.¹⁶² Accordingly, it is submitted that the Italian diplomat would be outside the jurisdiction of the Indian Supreme Court and hence the court ought not to have exercised criminal jurisdiction over him in the ordinary course.

158 Ministry of External Affairs, Government of India, 'Statement in Loksabha by External Affairs Minister on return of two Italian marines to India accused in the killing of two Indian fishermen' (MEA, 22 March 2013) <<http://mea.gov.in/Speeches-Statements.htm?dtl/21461/>> accessed on 20th April 2017.

159 Italian Marines Case (n 141).

160 VCDR (n 1), art 31(1).

161 *Ibid.*

162 *Generally*, J. Craig Barker (n 2).

4.2.2.2 *Waiver of Immunity*

However, during the hearing, the Supreme Court observed that a person who has approached the court as a petitioner will not be entitled to any diplomatic immunity and thereby brought in arguments of waiver. Even the Government of India contended that the Ambassador had voluntarily participated in the proceedings on behalf of the Government of Italy and thereby waived his diplomatic immunity. In this connection, the Affidavit of Undertaking filed by the diplomat on behalf of his government is cited as a principal argument. The diplomat through the Affidavit of Undertaking filed by him on March 9, 2013, 'has taken full responsibility' to ensure that the marines return to India, which fact was also recorded by the court in its order passed on February 22, 2013.¹⁶³ Also, there were other circumstances such as, the assurance of the Italian Embassy to see that the marines remained under their control and to report to court on their whereabouts.¹⁶⁴ Moreover, in view of its contentions on the issue of jurisdiction, the Italian Embassy had shown its special interest in the freedom of the marines and represented the Italian government in all legal proceedings ever since the arrest of the Italian diplomats.¹⁶⁵

However, it is very doubtful whether these facts and circumstances can constitute a valid case of waiver of diplomatic immunity. In this context, a reference may be made to Article 32 of the VCDR which deals with waiver. It sets out that the immunity from the jurisdiction of the receiving state may be waived by the sending state.¹⁶⁶ However, rules of customary international law supplement this provision and provide that the heads of diplomatic missions also have the power to waive diplomatic immunity, of their own or other persons, when authorized by the sending state.¹⁶⁷ The Indian Diplomatic Relations (Vienna Convention) Act, 1972,¹⁶⁸ seems to recognise the position of custom-

163 Italian Marines Case (n 141), Order of February 22, 2013.

164 Italian Marines Case (n 141), Order of January 1, 2013,

165 *Massimiliano Latorre v Union of India*, High Court of Kerala (2012) 252 KLR 794.

166 The rationale behind this position is that the diplomatic immunity has been conferred on the diplomat only in the interest of the sending state and hence it cannot be waived by the diplomat himself. See Anthony Aust, *Handbook of International Law* (2nd edn, CUP 2010) 130.

167 UN, 'Yearbook of the International Law Commission, Documents of 10th Session' (Vol II, United Nations 1958) UN Doc.A/CN.4/SER.A/1958/Add.I, 99, [Para 2 (commentary to Art 30)]; For contrary viewpoint See *ibid* 131. ('Waiver by the head of the mission will normally be regarded as valid unless it purports to be of his own immunity; and most governments require a head of mission to seek authority before waiving the immunity of any of his staff').

168 Act No. 43 of 1972 (came into force on 29th August 1972).

ary international law and provides that 'a waiver by the head of the mission of any state or any person for the time being performing his functions shall be deemed to be a waiver by that state'. However, the major hurdle comes from the substantive requirement that the waiver shall always be in express terms. Thus, from the facts it is clear that neither the Italian government nor the diplomat himself duly waived the immunity in express terms.

However, there is considerable discussion as to whether constructive waiver can also be considered as a valid waiver of the diplomatic immunity.¹⁶⁹ In the leading case of *Propend Finance Pty. Limited and Others v Sing*, speaking for the High Court of England and Wales, Justice Laws had outlined the possibility that 'constructive waiver' is also a legally acceptable method of waiver.¹⁷⁰ Yet, it is very doubtful whether such a proposition can be universally accepted and that too in the context of criminal proceedings. Moreover, in this connection, it is pertinent to refer to the observation of the International Law Commission, wherein it has sought to distinguish between civil and criminal proceedings for the application of waiver.¹⁷¹ It suggested that in the case of criminal proceedings, waiver must be express, though in the case of civil or administrative proceedings, waiver may be express or implied.¹⁷² In such a scenario, it is emphasized that any exception to the concept of diplomatic immunity should be interpreted narrowly and in line with the objects and purposes of the Vienna Conventions. Thus, it is opined that the position of the Indian government and the Supreme Court that the Italian diplomat lost his immunity by way of constructive waiver has no legal basis.

4.2.2.3 *Preclusion of Immunity and Initiation of Proceedings*

The observation of the Supreme Court that a person who has approached it as a petitioner cannot claim any diplomatic immunity may also be viewed as the preclusion of immunity due to initiation of proceedings contained in Article 32(3) of the VCDR. Also, the spokesperson of the Indian Ministry of

169 Arthur Goldberg, 'The Shoot-Out at the Libyan Self-Styled People's Bureau: A Case Of State-Supported International Terrorism' (1984–85) 30 *South Dakota Law Review* 1, Especially, in the context of rule of sovereign immunity; Stephanie Markovich, 'Balancing State Sovereignty and Human Rights: Are There Exceptions in International Law to the Immunity Rules for State Officials' (2009) *Potentia* 57–74. Also, on the question of the relationship between the VCDR and the general rules of international law, See the Preamble of the VCDR. It provides that 'the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention'.

170 *Propend Finance Pty Ltd and Others v Sing and Others* (1998) 111 ILR 611 and 643.

171 *Ibid* 173; UN (n 171).

172 *Ibid* at 99, para 3.

External Affairs echoed the same line of argument in remarking that: 'if diplomatic agents willingly submit to the jurisdiction of the court, then that jurisdiction applies'.¹⁷³ However, it is doubtful whether the Italian diplomat could be said to have initiated the proceedings for allowing the marines to go to Italy. In fact, the two marines and the Republic of Italy were the petitioners in the application for travel permissions. Also, the Ambassador had a limited involvement in the litigation as he only submitted an Affidavit of Undertaking for the timely return of the marines. Accordingly, it is argued that the submission of the affidavit should not be considered as the initiation of the proceedings for the purpose of Article 32(3) of VCDR, which would preclude his immunity. This argument also draws its support from the decision of *Propend Finance Pty Ltd & Others v Sing & another* discussed earlier. In that case, the Court of Appeal held that a breach of undertaking given by a diplomat, that certain documents seized in the United Kingdom in connection with a criminal investigation in Australia would not be removed from the jurisdiction of the court or from the Australian High Commission in London until the legality of the seizure had been settled, would not amount to an express waiver of immunity in contempt proceedings that may be initiated against him.¹⁷⁴

Reverting to the present case, even if we consider the submission of the affidavit of undertaking as amounting to 'initiation of proceedings', the possibility of it acting as a valid exception to immunity is slim, due to the other legal requirement that the ground is applicable only 'in respect of any counter-claim directly connected with the principal claim'.¹⁷⁵ It may be observed that the use of the terms such as 'principal claim' and 'counter-claim' indicates the possibility that it is related to 'civil proceedings'. According to the Indian law of civil procedure, counter-claim is a claim brought by the defendant against the plaintiff seeking certain relief from the plaintiff. However, in the case in hand, no counter claim was involved. At the most, the court could therefore try the diplomat for committing contempt of court for wilful breach of undertaking given to the court.¹⁷⁶ But contempt proceedings, though they are incidental to

173 Ministry of External Affairs, Government of India, 'Transcript of Media Briefing by Official Spokesperson' (MEA, 14 March 2013) <http://www.mea.gov.in/media-briefings.htm?dtl/21388/Transcript_of_Media_Briefing_by_Official_Spokesperson_March_14_2013> accessed on 20th April 2017.

174 *Propend Finance Pty Ltd and Others v Sing and Others* (n 174) 656.

175 VCDR (n 5), art 32(3).

176 The Indian Contempt of Courts Act, 1971 (Act No.70 of 1971) classifies the contempt of court in to two categories, such as civil contempt and criminal contempt. They are defined in Sections 2(b) and (c) respectively. An examination of the above provisions disclose that 'wilful breach of an undertaking given to a court' will come within the purview of the

the main proceedings, cannot be treated as the equivalent of counter-claim for they are not brought by the defendant against the plaintiff for determination of certain rights and duties or for grant of some remedy. On the contrary, contempt proceedings were launched by the court against the alleged contemnors, they are of *sui generis* nature, and they exist for the purpose of vindication of the authority of the court. Accordingly, the argument that since the diplomat had filed the affidavit of undertaking, he would be precluded from asserting his immunity is arguably not correct and is not supported by the VCDR.

4.2.2.4 *Restraining Order*

Moreover, the issuance of the restraining order against the diplomat is a direct violation of the VCDR. It should be noted that the international responsibility of the Indian state arises in this matter not only because the Indian Supreme Court assumed jurisdiction over the diplomat despite the jurisdictional bar but also because it passed orders restricting his movement outside the country. In particular, through its orders passed on 14th March 2013 and 18th March 2013, it had directed the Italian diplomatic agent to not to leave the country without its permission. Further, it had also directed the government of India to see that its order is enforced by all Indian authorities. It is submitted that this international travel embargo imposed on the Italian diplomat had constituted a serious violation of a) his freedom and dignity b) his right to leave India¹⁷⁷ and c) his right to personal inviolability laid down under the VCDR.

4.2.2.4.1 Freedom and Dignity

It is contended that the order of the Supreme Court imposing restrictions on the movement of the Italian diplomat also constitutes an attack on the freedom

'civil contempt'. However, in the context of Italian marines case, Rajeev Dhavan argues that the conduct of the diplomatic agent will attract both civil and criminal contempt; See Rajeev Dhavan, 'India and Italy's handling of the marine standoff turned a political crisis into a legal farce' *Daily Mail* (London, 24 March 2013) <<http://www.dailymail.co.uk/indiahome/indianews/article-2298533/India-Italys-handling-marine-standoff-turned-political-crisis-legal-farce.html>> accessed on 20th April 2017. However, in the case of *Delhi Judicial Services Association v State of Gujarat* AIR 1991 SC 2176, the Supreme Court has held that the power of the Supreme Court to punish for contempt under Article 129 of the Constitution is independent of the provisions contained in the Contempt of Courts Act, 1971; Also See, Stefan Talmon (n 141).

177 In this article, especially, with reference to the analysis of the VCDR and VCCR, the term 'right' has not been used in the strict sense of the term. See Yuri A Kolesnikov, 'Meddling with the Vienna Convention on Consular Relations: The Dilemma and Proposed Statutory Solutions' (2009) 40 McGeorge Law Review 179.

of the diplomat. It may be noted that the VCDR not only requires that the 'person of a diplomatic agent shall be inviolable' under all circumstances,¹⁷⁸ but it also specifically enjoins all the receiving states to treat him with due respect and mandates the states to take all appropriate steps to prevent any attack on his person, freedom or dignity'. Moreover, Article 26 of the VCDR provides that 'the receiving states shall ensure to all members of the mission, freedom of movement and travel in its territory'. Similarly, with regard to the international travel, Article 44 obligates the receiving states to 'grant facilities' 'to leave at the earliest possible moment' 'even in case of armed conflict' and to 'place at [the] disposal [of persons enjoying privileges and immunities] the necessary means of transport for themselves and their property'.¹⁷⁹ Thus, it becomes clear that not only the diplomatic agents but even any person enjoying diplomatic privileges and immunities is entitled to leave the receiving state according to his choice. Hence, it can be concluded that the international travel restrictions imposed by the Supreme Court constitutes a direct violation of the freedom of the diplomat provided under the VCDR.¹⁸⁰ Similarly, such restrictions will also amount to a violation of dignity as he is compelled against his will to not to leave India.¹⁸¹

4.2.2.4.2 Right of Departure

As discussed above, VCDR obligates the receiving states to ensure the timely and safe departure of the diplomats, even in case of armed conflict. Moreover, this position is not only recognized by customary international law, but a number of decisions of the International Court of Justice (ICJ) and the UN Security

¹⁷⁸ VCDR (n 1), art 29.

¹⁷⁹ For customary origin of this rule, See G. R. Berridge, *Embassies in Armed Conflict* (1st edn, Bloomsbury 2012) 31 ('The long-established custom that on the outbreak of war, enemy diplomats have a right to expect a prompt, safe and dignified departure reflects the desire of states to secure, by reciprocity, the same treatment for their own diplomats').

¹⁸⁰ See Stefan Talmon (n 141) 26–27.

¹⁸¹ Oscar Schachter, 'Human Dignity As A Normative Concept' (1983) 77 *American Journal of International Law* 848 ('a violation of human dignity can be recognized even if the abstract term cannot be define'); UN (n 171) 97, para 1 ('Being inviolable, the diplomatic agent is exempted from measures that would amount to direct coercion'). Also, in the context of immunity for head of states, See *Certain Questions of Mutual Assistance in Criminal Matters in Djibouti v France* [2008] ICJ Rep 240, para. 180; *Aziz v Aziz* [2008] 2 All ER 501, The Sultan of Brunei Intervening, esp. at p. 522, wherein Collins LJ refused to accept any simple insult or embarrassment as an attack on the dignity of the diplomat.

Council resolutions also consistently affirm this position.¹⁸² However, it needs to be pointed out that despite the use of the phrase ‘even in case of armed conflict’ in the language of Article 44 of VCDR, this right is applicable not only in times of armed conflict but at all times including at times of peace. The framers have used this phrase only as a matter of abundant caution and to ensure that the diplomatic agents are not victimized in retaliation. Also, such an interpretation finds its support from the International Law Commission (ILC) Commentary to the Draft Convention on the Representation of States in their Relations with International Organizations of a Universal Character.¹⁸³ The Commentary, while advocating the deviation from the VCDR, explained that the language as used in the VCDR may mean ‘any extreme situations’, including ‘rupture of diplomatic relations’.¹⁸⁴ Thus, it becomes clear that the right of departure mentioned in Article 44 of the VCDR will be applicable to both during the time of peace and armed conflict. Accordingly, it can be contended that the Supreme Court’s order restraining the Italian diplomat will be a violation of Article 44 of the VCDR.

Also, in this connection, the Indian government cannot argue that it was merely a technical breach as the diplomat was not actually prevented from leaving the country.¹⁸⁵ It is contended that if the observation of the International Court of Justice (ICJ) in the case of Democratic Republic of Congo v Belgium is taken into account, even the mere passing of the restraining order is sufficient to constitute a violation of the diplomat’s right to leave the territory.¹⁸⁶ In that case, the Court held that a mere circulation of an international arrest warrant against the Foreign Affairs Minister of Congo, irrespective of whether

182 VCCR (n 5), art 26; Convention on Special Missions (n 78), art 45(1); UNSC Res. 667, 16 September 1990 (The Situation in Iraq and Kuwait); Case Concerning United States Diplomatic and Consular Staff in Tehran (*United States of America v Iran*) [1980] ICJ Rep 3, 45, para 95(3)(b).

183 ILC, ‘Commentary to the Draft articles on the Representation of States in their Relations with International Organizations’, ILC Year Book vol II (Part One) (1971) UN DOC A/CN.4/SER.A/1971/Add.I (Part 1).

184 *Ibid* 329, Para 2, art 80. Unlike the VCDR and VCCR, this Convention does not make any special mention of the cases of armed conflict and it simply provides that ‘[t]he host State shall, if requested, grant facilities to enable persons enjoying privileges and immunities, other than nationals of the host State, and members of the families of such persons irrespective of their nationality, to leave its territory’.

185 Stefan Talmon (n 141) 27; In fact, the diplomat also never tried to leave the country since the Supreme Court had passed the restraining order.

186 Arrest Warrant of 11 April 2000, *Democratic Republic of the Congo v Belgium* [2002] ICJ Rep 3.

it significantly interfered with his official activities or not, would amount to a violation of the obligation of Belgium towards Congo, especially, the immunity from criminal jurisdiction and the personal inviolability enjoyed by the Foreign Minister under international law.¹⁸⁷ Thus, the Indian government cannot argue that the restraining order does not lead to an actual breach of the VCDR.

4.2.2.4.3 Personal Inviolability

Similarly, the action of the Indian government and the Supreme Court will also amount to a violation of the principle of personal inviolability incorporated under the VCDR. It is remarked that though the term 'personal inviolability' has not been defined by the Convention, it has been very widely construed by the national courts. For instance, in the leading case of *Tachiona v United States*, the US Court of Appeals ruled that the service of summons on the President of Zimbabwe Robert Mugabe and the Foreign Minister Isaak Stanislaus Mudenge relating to certain human rights violations committed by them, violated their immunity stipulated under Article IV, Section 11(g) of the Convention on the Privileges and Immunities of the United Nations.¹⁸⁸ The US appellate court proceeded on the reasoning that the 'inviolability principle precludes [the] service of process on a diplomat as [he is the] agent of a foreign government'. Thus, it can be argued that the service of notice on the diplomat and the demand of explanation from him constitute a violation of the India's obligations to secure the personal inviolability of the diplomat.

However, it is equally true that the diplomat also had the duty to 'respect the laws and regulations of' India¹⁸⁹ and to abide by the judicial undertakings he had given. Also, as contended by the then Attorney-General of India, the violation of the undertaking given by the diplomat will be considered as the promises of the sovereign and hence, they should not be violated. Yet, it is pointed out that it would be wrong if India attempts to link his breach of judicial undertaking to the enjoyment of privileges and immunities, as the VCDR had categorically stated that the claim of diplomatic immunity should be without prejudice to the other obligations of the diplomat towards the host state.

187 *Ibid* 29–30, para 71.

188 *Tachiona v Untied States* (2004) 386 F.3d 205; The provision makes an indirect reference to the VCDR and provides that representatives of members of UN shall enjoy, *inter alia*, such other privileges, immunities and facilities not inconsistent with the immunities and privileges of diplomatic envoys.

189 VCDR (n 1), art 41.

Though this issue has died-down, following the return of the marines, the two Indian cases discussed above reflect the hard realities of the implementation of the Vienna Conventions. It also brings to light once again how the state-parties to the Vienna Conventions are selectively interpreting the terms and texts to suit their convenience. Also, it is interesting to note the differing viewpoints of India on identical situations. For instance, in the case of the Italian Ambassador, the Indian government purported to argue that he had scant respect for Indian laws and institutions by breach of his undertaking given to court, but that is what the Indian Consular officer did in New York by his ill-treatment of the domestic worker. This raises the question of why India interprets the diplomatic law restrictively at home but liberally in US? However, this is not to give an impression that it is only the approach of India.¹⁹⁰ In fact, many countries in the world are seen to be 'over-protective' of their representatives, unmindful of the repercussions on the diplomatic law. Moreover, despite the existence of the provisions relating to dispute settlement in the Optional Protocols to the Vienna Conventions,¹⁹¹ there is hardly any reference to the International Court of Justice on such issues. This reiterates once again the call for principled interpretation of the international diplomatic law, on which the contemporary international relations stand.

5 Consequences of Breach of Duty to Respect the Local Laws and Regulations

The two cases discussed above highlight the friction between the foreign officials' claim of privileges and immunities and their duty to respect the local laws and regulations. However, in the existing literature, the emphasis is on the scope of privileges and immunities rather than on the legal nature of these

190 Also, there are other incidents in US where the Indian diplomats are involved. See Emily F. Siedell (n 83); Domani Sprero, 'Embassy Row's Dirty Little Secret: Abuse of Migrant Domestic Workers by Diplomats' (*Diplo pundit*, 23 December 2013) <<http://diplopundit.net/2013/12/23/embassy-rows-dirty-little-secret-abuse-of-migrant-domestic-workers-by-diplomats/>> accessed on 20th April 2017.

191 Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 241; Optional Protocol to the Vienna Convention on Consular Relations, concerning the Compulsory Settlement of Disputes (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 487.

duties and the consequences of their breach, especially, the duty to respect the local laws and regulations. This section seeks to address them.

The textual provisions of both the VCDR and the VCCR broadly mandate that not only foreign officials but also 'all persons enjoying such privileges and immunities' have the duty to respect the laws and regulations of the receiving state.¹⁹² However, in view of the language of the provision, it was generally viewed as the 'moral duty' or 'a duty of courtesy' rather than as a legal duty to respect the local laws.¹⁹³ This is mainly because of the theoretical position that diplomats and consular staff are entitled to special protection in the receiving state and as such they are not subject to the local laws or they are exempted from the substantive liability.¹⁹⁴ Nonetheless, state practice¹⁹⁵ and, in some cases, even the provisions of the Vienna Conventions demonstrate that this does not represent a complete picture.

In this connection, it may be noted that a number of provisions of the Vienna Conventions refer to the 'local laws and regulations'. In particular, Articles 26 (freedom of movement) and 36 (exemption from customs duties and inspection) of the VCDR as well as Articles 5 (consular functions), 29 (use of national flag and coat-of-arms), 30 (accommodation), 34 (freedom of movement), 36 (communication and contact with the nationals of the sending state), 37 (duty to inform in case of death etc.), 49 (exemption from taxation), 50 (exemption from customs duties and inspection) and 60 (exemption from taxation of consular premises) of the VCCR make direct references to the 'laws and regulations of the receiving state'.¹⁹⁶ Among them, a significant amount of provisions of

192 Article 41(1) VCDR and Article 55 (1) VCCR; However, as Table 1 illustrates, there is no corresponding provision in the Convention on the Privileges and Immunities of the United Nations, 1946 (n 76).

193 Eileen Denza (n 4) 374.

194 Sanderijn Duquet and Jan Wouters, *Legal Duties of Diplomats Today: The Continuing Relevance of the Vienna Convention*, Working Paper Series No. 146, (2015) Leuven Centre for Global Governance Studies, 6. For instance, Article 34 of VCDR as well as 49 of VCCR generally exempts the diplomatic agents and consular officials and their families from all taxes and dues, whether national, regional or municipal, unless their case falls under any one of the enumerated categories. Similarly, as illustrated in Table 1, foreign officials cannot be subjected to the process of arrest or detention and their personal inviolability is protected.

195 In matters of traffic regulations, the state practice shows that diplomats are required to abide by the local laws in the interest of safety of everyone.

196 Only provisions in which the local laws of the receiving state having a material bearing on the scope of privileges and immunities are referred here. In other words, instances in which the foreign officials are exempted from the local laws are not examined here.

VCCR are relative to the scope of the 'laws and regulations of the receiving state'.¹⁹⁷ In effect, this means that the scope of consular functions, immunities or privileges available under the Conventions cannot be determined without considering its position under the laws and regulations of the receiving state. This demonstrates how local laws play a crucial role in the overall functioning of the Vienna Conventions.

However, only in cases of Articles 41 (respect for the laws and regulations) and 42 (professional or commercial activity) of VCCR as well as Articles 55 (respect for the laws and regulations), 56 (insurance against third party risks) and 57 (special provisions concerning private gainful occupation) of VCCR, the Conventions impose it as obligations on the diplomatic or consular staff to respect or to comply with the local laws and regulations.¹⁹⁸ Hence, it becomes clear that the signatories to the Vienna Conventions attach greater significance to these provisions. Nevertheless, a crucial question arising in this connection is whether individuals such as diplomats and consular officials can be vested with (rights and) obligations under international instruments, given the fact that it is the state-parties who enter into the Conventions and are liable for their breaches.¹⁹⁹ Though this is true to some extent, it may be noted that nothing in the existing international law will prevent them from incurring individual responsibility, especially for their private acts.²⁰⁰ Also, on the same lines, foreign officials can also be vested with the rights and duties even under the domestic law of the receiving state.²⁰¹ In this connection, a leading scholar opines that the foreign state acting for itself or through its diplomatic or consular official is generally considered in other jurisdictions as a legal person endowed with rights and duties, even though sovereign and diplomatic immunity protect it from the issue of legal process.²⁰² Under the circumstances, it is generally established that a diplomat will have the obligations (including the duty to respect the local law), though they will be exempt from liability in view

197 This is more conspicuous in the case of Vienna Convention on Consular Relations. See Article 5, Paragraphs (f) to (m).

198 Duquet and Wouters, (n 198) 5. In the context of VCCR, he classifies the diplomatic obligations into the following: a) obligation to respect the laws and regulations of the receiving state b) obligation not to interfere in the internal affairs of the receiving state c) obligation to abstain from professional and commercial activities d) obligation relating to how the mission conducts its business and e) obligations relating to the use of the premises of the mission. *Ibid.*

199 Duquet and Wouters (n 198) 21.

200 *Ibid.*

201 Eileen Denza (n 4) 374–376.

202 *Ibid.* at 375.

of the diplomatic immunity granted to them. It also indicates that, by default, foreign officials will be subject to the local rules and regulations, unless the rules of the Vienna Conventions expressly provide otherwise.²⁰³

Moreover, diplomatic or consular immunity does not imply exemption from all jurisdictions. In particular, the offending foreign official may be prosecuted or be answerable in the courts of the sending state as he is not immune from the legal process of the sending state. Similarly, he may be answerable in the receiving state itself, if the sending state decides to waive his immunity. In addition to these two major possibilities, sometimes, it is also suggested that the official may be subjected to *post*-immunity prosecution in the receiving state, that is, prosecution after the termination of his functions with the mission, though its invocation is very controversial.²⁰⁴

Given the fact that foreign officials are exempted from liability by the receiving state, a question which naturally arises out of the above analysis is how these duties are enforced and what consequences will follow in case of their breach. It is submitted that the receiving state where the breach has occurred will not be left without any remedy, though not necessarily will it mean a legal remedy. Such remedies range from ordinary diplomatic measures to the drastic step of severance of foreign relations and are supported by the text of the Vienna Conventions and the general international law as well as state diplomatic practices. Among them, the first recourse which will be open to the receiving state where the breach of duty to respect the local law has occurred is to draw the attention of the head of the foreign mission or the foreign government itself. Usually, this recourse can be had in such cases where the infraction is of a minor nature or where it has occurred for the first time. However, in cases where the receiving state wants to send out a stern message of the breach, it may summon the head of the mission and express its displeasure.²⁰⁵

Moreover, the receiving state may also interpret the provisions of the Vienna Conventions in a restrictive manner, although it will be subject to the limits of international law.²⁰⁶ The natural consequence of this would be to withdraw

203 Ibid. at 374.

204 See Dror Ben-Asher, *Human Rights Meet Diplomatic Immunities: Problems and Possible Solutions*, (Cambridge: Harvard Law School, 2000; Joan E. Donogue, Perpetual Immunity for Former Diplomats? A Response to the 'Absinito Affair': A Restrictive Theory of Diplomatic Immunity, 27 *Columbia Journal of Transnational Law*, 615 (1989); Mariam Nash Leich, Prosecution of Former Diplomats for Non-official Acts, 81, *American Journal of International Law*, 937 (1987).

205 Paul Beherens, *Diplomatic Interference and the Law*, (Hart Publishing, 2016) 19.

206 Mitchell S Ross (n 7) 202; S. E. Nahlik, Development of Diplomatic Law: Selected Problems, Collected Courses of the Hague Academy of International Law, *Recueil Des Cours*, (1990: III, Tome 22 de la collection, Martinus Nijhoff) 246.

the discretionary privileges currently enjoyed by the offending diplomatic mission. This may take a number of forms such as a request to downsize the mission,²⁰⁷ decline permission for establishment of branches of the mission in other localities,²⁰⁸ prohibit the use of wireless transmitter equipment,²⁰⁹ impose quotas on the import of certain products used by the mission,²¹⁰ or take measures restricting the entry into such zones on grounds of national security.²¹¹ However, in extreme cases, where these measures are considered inadequate, the drastic steps of requesting the recall of the offending official or the declaration of the official as *persona non grata* or even the severance of foreign relations may be taken.

Though these actions as such do not involve violation of any international legal obligation, the receiving state shall ensure that any of its actions and omissions including the withdrawal of discretionary privileges shall not violate any international legal obligation, especially, the receiving state's obligation to provide immunity. In other words, what is permitted is diplomatic retorsions²¹² and not anything which is expressly prohibited under international law.

The above analysis shows that it is not true that the diplomatic and consular duties are completely devoid of any legal merit. On the contrary, the breach of diplomatic duties may have a legal impact and, more importantly, diplomatic and political consequences. Also, as the preambular language of the Vienna Conventions declares, the immunities and privileges provided to the foreign officials are 'not to benefit individuals but to ensure the efficient performance of [their] functions'. Accordingly, the immunity shall not act as a licence to disrespect local laws and regulations even when efficient performance of functions does not demand the deviation. This underlines the need for delicate balance between the two important but conflicting goals of the Vienna Conventions.

207 Article 11 VCDR and Article 20 VCCR.

208 Article 12 VCDR and Article 4 VCCR.

209 Article 27 VCDR and Article 35 VCCR.

210 Article 36 VCDR and Article 50 VCCR.

211 Article 26 VCDR and Article 34.

212 Diplomatic retorsions mean unfriendly measures not inconsistent with any international legal obligation. It is said that 'retorsions live and breathe in the incompleteness of international law where no unambiguous rules of international law prohibit the remedy'. Hjortur B. Sverrisson, *Counter-measures, International Legal System and Environmental Violations*, (Cambria Press, New York, 2008) 72.

6 Conclusion

The principle of diplomatic immunity is a well-established principle of international law. In fact, diplomacy is a fundamental fact of international life and without which, the international life will be in peril. In other words, it is very essential for the promotion of friendly relations among states, be it trade, peace, security or cultural relations. The Vienna Conventions, considered as the major achievement of the United Nations, born out of the recognition of these facts.

However, in the recent past, it is disturbing to note that diplomatic crimes and misconduct is on the rise. It is observed that the abuse of privileges and immunities by the diplomats as well as by the governments constitute one of the major challenges to the continued success of the Vienna Conventions. Also, rule of law demands that even the crimes committed by the diplomats should be duly brought to book. However, on many occasions, it is found out that the problem is due to the broad interpretations of the immunities and privileges put upon by the states. Hence, it is suggested that the process of interpretation should be guided by the theory of functional necessity, which is embodied in the Vienna Conventions. It emphasizes that the object behind diplomatic protection is 'to ensure the efficient performance of the functions of diplomatic missions as representing States' and not because that the diplomat is the representative of another sovereign.

It is said that the principle of personal inviolability is 'the most fundamental' and yet 'the oldest established rule of diplomatic law'. However, in the case of consular officers, the scope of personal inviolability is very much limited in the sense that, they may be liable for arrest or detention for grave crimes, provided such actions are in pursuance of a decision by the competent judicial authority. Yet, in the absence of any textual provision as to what constitutes 'grave crimes', it is necessary to maintain a fine balance between the power of the receiving states to make arrest in such cases and the interests of the sending states in ensuring that consular services are available without undue interruption. Also, in view of the escalations of diplomatic crimes, it is estimated that the true scope of this exception is going to be a major issue in the coming years. Accordingly, it is suggested that certain procedural safeguards may be built into the mechanism of the VCCR to provide for balance in sensitive and borderline cases. It is suggested that in cases where there are differences of opinion between the states as to whether the particular conduct of the consular officer amounts to a grave crime for the purposes of the VCCR, the actual arrest should be made in consultation with the sending state, wherever practicable.

Moreover, it is observed that diplomatic immunity law itself foresees the possibility of its abuse and 'specifies the means at the disposal of the receiving State to counter any such abuse'. They mainly include the options of declaration of *persona non grata* and the waiver of privileges and immunities by the sending state. Though these options are not very effective in state practice, it is submitted that the broader interpretation of the requirements of waiver should not be viewed as an option to counter the menace of the abuses of the privileges and immunities. It is suggested that any exception to the concept of diplomatic immunity should be interpreted narrowly and in line with the goals and purposes of the Vienna Conventions.

Further, on the question of re-appointment of indicted consular officers to UN diplomatic posts, it is pointed out that though the action is not a violation of any specific provision of the Vienna Conventions or the Convention on the Privileges and Immunities of the United Nations, it becomes clear that the conferment of UN immunity to such officials will completely frustrate the claims brought against them under the local laws and thereby effectively disturbs the equilibrium of rights and obligations between the sending and receiving states. It is submitted that UN immunity should not be viewed as the legal cover for indicted consular officers.

Also, the Vienna Conventions prescribe a number of duties including the duty to respect the laws and regulations and the duty not to interfere in the internal affairs of the receiving state. However, the consequences for the breach of such duties are not laid down in the Conventions. Though the language of the Vienna Conventions settles the non-enforceable nature of these duties beyond any doubt by use of words 'without prejudice to [the] privileges and immunities', it should not be forgotten that they are one of the key components of the composite scheme and hence their significance should not be whittled down.

In the end, it is submitted that, pragmatic solutions need to be devised so that a robust mechanism for dispute settlement is built into the framework of Vienna Conventions. Though the Optional Protocols to the Vienna Conventions (Concerning the Compulsory Settlement Disputes), through its Article II, enables the parties to resort to arbitration, a dedicated arbitral framework along with a complete overhaul of the Vienna Conventions will go a long way in addressing the contemporary problems.