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**INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH**

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**Analyzing the Scope of Jurisdictional Immunity of the State and its Diplomats Through the Provisions of the 1961 Vienna Convention on Diplomatic Relations and the 2004 Convention on Jurisdictional Immunities of States and Their Properties**

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*“The jurisprudence arising from the conflict of the laws of different nations, in their actual application to modern commerce and intercourse is a most interesting and important branch of public law”*

- Anonymous

The notion of diplomatic immunity is not a brainchild of modern politics, it is fairly an old tradition. For instance, its mention can be stumbled on in ancient manuscripts like Mahabharata, where envoys were given immunity from capital punishments. This custom was also practiced in other parts of the world, in some fashion. Mongolians even waged wars against the kingdoms that did not honor this set practice. Legal positivists and naturalists each had their own idea of granting immunity to diplomats and messengers. Hence the degree and privileges of such immunity varied from sovereign to sovereign. There was a necessity for a precedent or a treaty to tackle such variance. Act of Anne 1709 of England is one such example of an early diplomatic law, which exempted ambassadors against civil suits.<sup>2</sup> Similarly, jurisdiction immunity or state immunity in the present time has evolved through legal proceedings of national courts. With exceptional growth in commercial transactions and other socio-economic activities among nations, jurisdictional immunity transitioned from absolute immunity in the 19<sup>th</sup> century to restrictive immunity in the present arena of international law<sup>3</sup>. In contemporary times, Jurisdictional immunity of the states and their diplomats are categorized in the

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<sup>3</sup>Yang, Xiaodong. "The History of State Immunity." *State Immunity in International Law*. Cambridge: Cambridge UP, 2012. 6-32. Print. Cambridge Studies in International and Comparative Law. <https://doi.org/10.1017/CBO9781139016377.005>. Accessed 10<sup>th</sup> October 2021.

Convention on Jurisdictional Immunity of States and Their Properties 2004 (hereafter referred to as CJISP) and Vienna Convention on Diplomatic Relations 1961 (hereafter referred to as VCDR/Vienna Convention) respectively. This paper will analyze and critically comment on the conflicts which arose in the field of diplomatic and state immunity on the functioning of the conventions concerning domestic laws of nations who ratified/signed them. Including case studies for further analysis.

### Jurisdictional Immunity of Diplomats

Diplomatic immunity and privileges are salient features of healthy international relations and communications. The following is a part of the preamble of the VCDR “Believing that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems.”<sup>4</sup> This preamble signifies the positive intent behind granting immunity, but are those desired outcomes realized in an imperfect world? Moreover, which law trumps when diplomatic immunity and domestic laws conflict? On one hand, diplomatic immunity is essential to safeguard foreign nations’ representatives and their role in strengthening international relations, but it is equally important to ensure justice to the residents. For instance, in 1997 in Washington D.C a diplomat from the Republic of Georgia was involved in a vehicular accident. Which resulted in the death of a 16-year-old resident, a dweller of Maryland. The diplomat was driving under the influence of alcohol. Yet the diplomat escaped being prosecuted because of his/her diplomatic status.<sup>5</sup>

In the case, *A Local Authority v AG* [2020] of the family court in the UK, two laws, namely Diplomatic Privilege Acts 1964 (derived from VCDR) and the Human Rights Act 1998 (hereafter referred to as HRA) were at odds. Articles 31(1) and 37(1) of the VCDR exempts the diplomat from the receiving state’s civil and administrative jurisdiction. The diplomat’s family too enjoys certain privileges. In this case, the diplomat and his wife were accused of physically abusing their children, who were protected under Article 3(1) of HRA. During the trial Justice Mostyn J. remarked: “If a tacit exception based on safeguarding the children of diplomats were

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<sup>4</sup>Vienna Convention on Diplomatic Relations, United Nations Conference on Diplomatic Rights and Immunities, 1961. [https://legal.un.org/ilc/texts/instruments/english/conventions/9\\_1\\_1961.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf). Accessed on 12th October 2021.

<sup>5</sup>Zaid, Mark S. "Diplomatic Immunity: To Have or Not to Have, That Is the Question." *ILSA Journal of International & Comparative Law*, vol. 4, no. 2, Spring 1998, p. 623-634. *HeinOnline*, <https://jguelibrary.informaticsglobal.com:2055/HOL/P?h=hein.journals/ilsaic4&i=638>. Accessed on 12<sup>th</sup> October 2021.

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to be excavated it would not be difficult to imagine another state, a theocracy, for example, claiming that the teenage children of British diplomats were at risk because their parents allowed them to drink alcohol or to dress immodestly.”<sup>6</sup> The diplomatic privileges prevailed, as the native country of the diplomat did not waive the immunity. Another such instance of exploitation of diplomatic immunity is when a young British policewoman Yvonne Fletcher was shot just outside an embassy in the United Kingdom in 1984. Allegedly, the bullet was shot from one of the Libyan embassy’s windows. Three privileges namely diplomatic premises, diplomatic bag and diplomatic status were misused. British authorities during the investigation of that tragic incident found forensic evidence that indicated that the bullets which killed the policewoman originated from the embassy. There was political pressure from Libya, as in retaliation Libyans seized the British embassy in Tripoli and held its staff, including the British ambassador<sup>7</sup>. Owing to this pressure, diplomatic bags were not scanned and staff of 30 were not frisked by the British authorities before they were deported back to Libya. Despite the convincing reasons to believe that the murder weapon was in one of those bags.<sup>8</sup> Since the adoption of VCDR, several envoys and their family members have escaped prosecution even when the nature of the offence was grave. In 2017, 23,000 personnel were entitled to diplomatic status in the UK alone. Out of which 12 serious offences by the people with diplomatic status were reported in the same year.<sup>9</sup>

Evidence cited above indicates that how domestic laws are less effective and confined when in conflict with the working of diplomatic immunity. And how this ‘immunity’ can be potentially abused due to technical inconsistencies. The above-mentioned incident of the slaying of Yvonne Fletcher highlights the fact that the “VCDR lacks deterrence against criminal acts.”<sup>10</sup> Following

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<sup>6</sup>Happold, Mathew. “Diplomatic Immunity Trumps Children’s Rights, the English High Court Reluctancy Concludes: A comment on *A Local Authority v AG* [2020] EWFC 18, EJIL: Talk!, 6th April 2020. <https://www.ejiltalk.org/diplomatic-immunity-trumps-childrens-rights-the-english-high-courtreluctantly-concludes-a-comment-on-a-local-authority-v-ag-2020-ewfc-18/>. Accessed on 12th October 2021.

<sup>7</sup> Wright, Stephen L. "Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts." *Boston University International Law Journal*, vol. 5, no. 1, Spring 1987, p. 177212. *HeinOnline*, <https://jguelibrary.informaticsglobal.com:2055/HOL/P?h=hein.journals/builj5&i=186>. Accessed 14<sup>th</sup> October 2021.

<sup>8</sup> Asher, Dror B. “Human Rights Meet Diplomatic Immunities: Problems and Possible Solutions. Harvard Law school, Nov. 2000. [https://ilmc.univie.ac.at/uploads/media/Benasher\\_Human\\_Rights\\_meet\\_Diplomatic\\_Immunities.pdf](https://ilmc.univie.ac.at/uploads/media/Benasher_Human_Rights_meet_Diplomatic_Immunities.pdf). Accessed 15th October 2021.

<sup>9</sup> UK Parliament, Written questions, answers and statements. Alleged Serious and Significant Offences (Diplomatic Immunity) :2017. 18th Dec. 2018. <https://questionsstatements.parliament.uk/written-statements/detail/2018-12-18/HCWS1197>. Accessed on 19th October 2021.

<sup>10</sup> Wright, Stephen L. "Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter  
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are the proposed changes to fill the lacunae in the Vienna Convention and to avoid conflict:

- i. The serious criminal offence should be placed out of the scope of diplomatic immunity. Offences like rape, culpable homicide amounting to murder, sexual assault, etc. should be taken critically to manufacture deterrence for future offences. Nations with similar common law backgrounds should be allowed to prosecute the alleged diplomats or other personnel with such immunity. Such court trials and proceedings should be allowed to be witnessed by the officials of sending state.
- ii. Extensive background checks of the diplomat and their family should be made mandatory. Including any previous civil or criminal offences. The killing of the 16-year-old by the diplomat of the Republic of Georgia could have been avoided with help of background checks. The Georgian representative had a record of driving under the influence of alcohol before his diplomatic mission in the United States. Had the background check been done, the diplomat could have been denied the opportunity to drive whilst his stay in Washington D.C.<sup>11</sup>
- iii. An independent international court should be constituted solely for criminal cases relating to diplomatic immunity. This will help in obtaining an unbiased and fair judgment as the judges presiding over the case would belong to other countries than the countries involved. This way justice could be served the right way.<sup>12</sup> The constitution of the court can be agreed upon by the signatories of the Vienna Convention.
- iv. The United Nations General Assembly should constitute an ad-hoc committee, to formulate a detailed report about working the VCDR region wise. For a better analysis of its shortcomings and effectiveness. This committee should also be

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Violent Criminal Acts." *Boston University International Law Journal*, vol. 5, no. 1, Spring 1987, p. 177212. *HeinOnline*, <https://jguelibrary.informaticsglobal.com:2055/HOL/P?h=hein.journals/builj5&i=186>. Accessed 19<sup>th</sup> October 2021.

<sup>11</sup>Zaid, Mark S. "Diplomatic Immunity: To Have or Not to Have, That Is the Question." *ILSA Journal of International & Comparative Law*, vol. 4, no. 2, Spring 1998, p. 623-634. *HeinOnline*, <https://jguelibrary.informaticsglobal.com:2055/HOL/P?h=hein.journals/ilsaic4&i=638>. Accessed on 19<sup>th</sup> October 2021.

<sup>12</sup>Wright, Stephen L. "Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts." *Boston University International Law Journal*, vol. 5, no. 1, Spring 1987, p. 177212. *HeinOnline*, <https://jguelibrary.informaticsglobal.com:2055/HOL/P?h=hein.journals/builj5&i=186>. Accessed 19<sup>th</sup> October 2021.

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tasked with finding appropriate solutions to the existing problems and loopholes in the VCDR. The findings of this committee should be published so that public discourse and transparency are maintained.

- v. The Liability of the 'sending nations' should be made strict. Mere compensations are not enough, the sending nations should ensure the prosecution of the accused person (*lexpatriae*) if sent back to his/her country.

### Jurisdictional Immunity of the State

By the virtue of CJISP, states and their properties under this Convention maintain immunity from falling under the jurisdiction of "foreign courts" albeit subject to certain exceptions under Article 7 to 18. The Convention also includes 'representatives of the state' acting in their official capacity under the broad definition of a state<sup>13</sup>. The Convention does not affect but reasserts the values of diplomatic immunity and privileges laid down by the Vienna Convention. However, CJISP approaches state immunity as 'restrictive' rather than absolute. This approach effectively put the governments under the same jurisdiction as that of private entities transacting commercially<sup>14</sup>. Therefore, under Article 10(1) of the Convention, a "State cannot invoke immunity in a proceeding arising out of a commercial transaction with a foreign natural or juridical person when, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State"<sup>15</sup>. However, this modern multilateral Convention is yet to be enforced. Only 28 member nations of the United Nations Organization have signed the Convention and, therefore, will be enforced after getting a minimum of 30 signatories.

In the case of *Germany v. Italy*<sup>16</sup>, Courts of the Italian Republic from 2004 to 2008 heard and passed judgments in favour of the plaintiffs who were the victims of the "war crimes and crimes against humanity committed by the German Reich during World War 2"<sup>17</sup>. Therefore, on the 23<sup>rd</sup> of December 2008, the "Federal Republic of Germany (Germany) instituted proceedings against the Italian Republic (Italy) before the International Court of

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<sup>13</sup>Stewart, David P. "United Nations Convention on Jurisdictional Immunities of States and Their Property." *International Legal Materials* 44.4 (2005): 801-14. <https://doi.org/10.1017/S0020782900011633> Accessed 20th October 2021.

<sup>14</sup> Ibid, p. 801, para. 2.

<sup>15</sup> Ibid, p. 802, para. 2.

<sup>16</sup>Jurisdictional Immunities of the State (*Germany v. Italy: Greece intervening*) (2012), ICJ 2012/2.

<sup>17</sup> "Jurisdictional Immunities of the State (*Germany v. Italy: Greece intervening*)". International Crimes Database Project, <http://www.internationalcrimesdatabase.org/Case/1231>. Accessed 22<sup>nd</sup> October 2021.

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Justice (hereafter referred to as ICJ) ". Germany claimed that Italy infringed its sovereign rights<sup>18</sup> and undermined its jurisdictional immunity as a sovereign state as determined by customary international law. This began when in 2004 the Supreme Court of Italy in the Ferrini<sup>19</sup> case held that the "commission of international crimes" is a violation of universal principles and values, thus, protected by "peremptory or ius cogens norms". Therefore, Court observed that the "nature of these peremptory norms underlying the prohibition of international crimes, entails, inter alia, that national courts possess universal jurisdiction over them in both criminal and civil proceedings. Furthermore, they take precedent over conflicting customary or treaty law, in light of their superior hierarchical position". The Court further cited a judicial practice of removing "functional immunity" of the representatives/agents of the state when charged with international crimes<sup>20</sup>.

In furtherance of the Ferrini case, Italy argued its case before the ICJ on three grounds "(1) Customary international law does not accord state immunity for war crimes and crimes against humanity. (2) The rule of State immunity is triumphed by the jus cogens nature of the alleged violations. (3) Italian Courts were the last resort for the victims of these crimes to secure compensation."<sup>21</sup> ICJ in its judgement moved to dismiss all three contentions. After examining the jurisprudence laid down by "national court decisions, national legislation, international conventions and UN Convention and its drafting history" in detail ICJ observed that under the status quo maintained by the customary international law "a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict."<sup>22</sup> For the second contention, ICJ reasoned that there was no conflict between the "substantive jus cogens prohibitions and the procedural rules of on state immunity" and further stated that "no rule which is not of the status of jus cogens may be applied if to do so would hinder the enforcement of a jus cogens rule."<sup>23</sup> Concerning the final contention, ICJ observed that there was no legal basis in the "State practice from which customary international law is derived that international law makes the entitlement of a State to

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<sup>18</sup> Moneta, Francesco. "Commentary: State Immunity for International Crimes: "The Case of Germany versus Italy before the ICJ", *Hague Justice Journal*, vol. 4, no. 2, 2009, pp 139-146 [https://www.elevenjournals.com/tijdschrift/hjj/2009/2/HJJ\\_187-4202\\_2009\\_004\\_002\\_006.pdf](https://www.elevenjournals.com/tijdschrift/hjj/2009/2/HJJ_187-4202_2009_004_002_006.pdf). Accessed 21<sup>st</sup> October 2021.

<sup>19</sup> Luigi Ferrini v. Federal Republic of Germany, (2004), Supreme Court of Italy, no. 5044.

<sup>20</sup> Moneta (n 17), pp 140.

<sup>21</sup> Van Alebeek, Rosanne. "Jurisdictional Immunities of the State (Germany v. Italy): On Right Outcomes and Wrong Terms." *German Yearbook of International Law*, 55, 2012, p. 281-318. *HeinOnline*, <https://heinonline-org.opj.remotlog.com/HOL/P?h=hein.journals/gvil55&i=289>. Accessed 21<sup>st</sup> October 2021.

<sup>22</sup> Ibid, pp 288, para. 2.

<sup>23</sup> Ibid, pp 288, para. 3.

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immunity dependent upon the existence of effective alternative means of securing redress.”<sup>24</sup> Thus, dismissing all three contentions. Based on the dismissal of the claims ICJ determined that “Italy had breached its obligations towards Germany by the denial of immunity from the jurisdictions of its courts”. However, out of fifteen judges who heard the case, three judges disagreed with the final judgement and “issued dissents” with distinct opinions and reasoning.

### Conclusion

The Vienna Convention, in its present form, may allow guilty people entitled to diplomatic immunity to slip through the cracks. On the contrary, this kind of immunity cannot be forsaken, it is required to promote peace amongst nations. The responsibility of not letting diplomatic immunity turn into special immunity lies on every nation and forum. A balance of legal positivism and naturalism should be achieved to devise a better version of the Vienna Convention with the inclusion of customary laws of various countries which would remain unique to their nation. Therefore, the diplomat of the sending nation should be obligated to familiarize himself/herself with the customary laws of the receiving nation and abide by them. This distinct balance would improve the effectiveness of domestic laws and ensure justice for local citizens/residents. Further, CJISP presents a healthier approach in dealing with jurisdictional immunity of the state by reaffirming and endorsing the concept of restrictive immunity. Thus, the Convention is a step forward in narrowing the chances of conflict of laws and likewise addresses the conflicts which may arise. Moreover, the provisions stipulated in CJISP are inclusive and are appropriate for the contemporary period as the world is commercially transacting more than it did in the past. However, CJSIP does not include matters related to criminal acts of the states and its representatives/agents and, therefore, leaves room for legal lacunae to arise. The case of Germany v. Italy (2012) heard before the ICJ further illustrates how the Judges had to rely on multiple sources of jurisprudence throughout the proceedings of the case. For instance, ICJ referred to multiple domestic and national cases including those of the “European Court of Human Rights”. In addition to cases, treaties like International Humanitarian Law, International Human Rights Law, European Convention on State Immunity (1972) etc. were also cited in the case. These extensive sources also potentially give rise to a ‘grey area’ in private international law. Therefore, the international community requires a more comprehensive document to effectively taper conflict of laws arising in the modern era.

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<sup>24</sup>Ibid, pp 288, para 3 and 4.

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