Diplomatic Immunity versus Harm to the Individual: An Attempt at Appraisal

By Tania Sebastian

The general theories relating to punishment of crimes can be summarised as one of retribution, reformation, prevention and deterrence. Embodied and nourished in Constitutions around the world, it is nothing but surprising then that these theories have no mention within the doctrine of diplomatic immunity. This stems from the fact that the theory of diplomatic immunity represents an extraordinary departure from the conventional practice of holding individuals responsible for their wrongful actions.

The doctrine of diplomatic immunity nurtures the dual principle of protecting the personal inviolability of the diplomat and prohibiting a diplomat from being subject to administrative, civil or criminal jurisdiction of the receiving State. In furtherance of these principles, another two considerations can be added. One, that the diplomat is the sovereign representative of his national State and its people in the receiving State; and two, that the purpose of such privileges and immunities is not to benefit the individuals but to ensure the efficient performance of the functions of diplomatic missions.

In other words, diplomatic immunity can be grouped into the following four categories:

- Immunity from every form of legal proceedings
- Inviolability of premises and archives
- Currency privileges
- Freedom of communication

Diplomacy as a system, and immunity as a core principal, evolved slowly over time. A wise Government will treat the diplomats accredited to it well and protect them from harm, so as to demand that foreign Governments do the same for its diplomats. Though brought about with a noble intention, the demons of diplomatic immunity soon surfaced. It manifested itself in the form of various abuses, the most cogent among them being the violence done to the human body. Although commentators have proposed several solutions to the problem of abuse of diplomatic immunity, the dangers of reciprocity inhibit reform of the system. To solve the problems of abuse, one must weigh the safety of the home diplomats against the desirability of holding foreign diplomats responsible for their criminal and tortuous acts. The resultant rights hence affected can be compressed to a hierarchy form, the pinnacle consisting of non-derogable human rights such as the right to life and physical security. This is because their violations are regarded as particular evil, because of their universal recognition, and because all other rights are dependent on them.

Also, this article focuses on the international regime of diplomatic immunities rather than on international organisations' immunities. However, a clear cut demarcation is blurred by the use of various cases of abuse of immunity referring to these two regimes. Even though the scope of international organisations immunities is more limited, they present similar dilemmas.

I. Background; ancient roots, justification and subsequent codification

Ancient Roots

It has been said of diplomacy that, as of few other human occupations, mankind has never been able to live without it. Diplomatic immunity is one of the oldest and most accepted rules of international law dating many centuries back. It has also been said that the institution of diplomacy is as old as history itself. There are few principles of international law which are more universally accepted than diplomatic immunity. Hugo Grotius first presented a theory based on the sacredness of ambassadors. Citing several ancient texts, Grotius asserted the belief that both divine and human law protect ambassadors as sacred persons and hence violating this law was therefore considered unjust but also impious.

In its modern form, diplomatic immunity dates back to the establishment of permanent diplomatic missions in the seventeenth century Europe. The rights, duties, immunities, privileges, etc. (as we now know of it as) of the diplomatic agents in the eighteenth and nineteenth century were mostly governed by customary rules of international law.

Justification in the form of theories

Since the sixteenth century there were three main theories of diplomatic immunity. The first and the oldest is the theory of the representative character. It is essentially based on the notion that the representative should be treated as if the sovereign himself was conducting diplomacy, or in other words, the characterisation of the diplomatic personnel as the monarch's alter ego. The three main flaws of this theory are that sovereignty is increasingly vested in the nation rather than a monarch, and that it is too narrow and that it does not seem to cover personal acts of diplomats and low rank officials.

The second theory, of territoriality, is based on the proposition that the diplomats and his suite are resident entirely beyond the territory of the receiving State. Today, contrary to the popular belief, the idea that an embassy is physically a part of the sending country is largely treated as a little more than a fiction. The third theory of functional necessity suggests that the theoretical underpinning of diplomatic immunities lies in the simple fact that they are necessary for the performance of the diplomatic functions, wherein immunity is not required for acts that are not
essential for the diplomatic process.

Codification? The first great landmark was the Congress of Vienna 1815, wherein the customary law regarding diplomatic agents were clarified and codified. In 1953, the UN’s General Assembly requested the International Law Commission to necessarily re-examine the subject of law on diplomatic intercourse and immunities, with an intention for its future prospects of codification. The Commission prepared a draft text by 1957, received comments from 21 nations, and then presented a draft treaty to the General Assembly in 1958. The UN Conference on Diplomatic Intercourse and Immunities convened in Vienna and established diplomatic immunity in its modern form in 196131, made further revisions to the draft and adopted the Vienna Convention for ratification by the member nations. Forty nations initially signed the treaty. Since then, nearly 190 nations have become party to the treaty.

People of all nations from ancient times have recognised the status of diplomatic agents, the treaty begins, going on to add that diplomatic immunities and privileges are important to contribute to the development of friendly relations among nations. It asserts that the treaty’s purpose is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States. This treaty, which came into force in 1964, contains fifty-three articles, governing every aspect of diplomatic immunity right from accreditation of ambassadors to the use of flags on diplomatic vehicles, to exemption of diplomats from local taxation. The Vienna Convention emphasises the functional necessity of diplomatic privileges and immunities for the efficient conduct, as enunciated in Boos v. Barry that the need to protect diplomats is grounded in a nation’s interest in international relations and those diplomatic personnel are essential to conduct the international affairs so crucial to the well-being of a nation.

The basis of giving immunities is a combination of representative theory as well as functional theory. The Preamble of the Vienna Convention refers to both considerations. Starke has rightly stated that the immunities and privileges of diplomatic agents are primarily based on the need to ensure performances of the functions of diplomatic missions, and to a secondary degree on the theory that a diplomatic mission personifies the sending State.

The regime of privileges and immunities is founded chiefly on practical necessity. In other words, the rules are perceived by States as necessary for the performance of the diplomatic functions. Herein lies the strength of the rules. Since every State is concurrently a sending and a receiving State, reciprocal interests are created. Diplomatic immunities therefore offer noticeable gains. These, in turn, provide an incentive to adequately comply with the provisions of the Vienna Convention. As observed by the ICJ in the case concerning United States Diplomatic and Consular Staff in Tehran...

... The institution of diplomacy, with its concomitant privileges and immunities has withstood the test of centuries and proved to be an instrument essential for effective cooperation in the international community, and for enabling States to achieve mutual understanding and to resolve their differences by peaceful means.

Even though the law relating to diplomatic and consular affairs remains the strongest section of international law, is it time that some alterations are made in the light of its heightened misuse?

II. Immunity versus Impunity: Some glaring examples Among the instances of abuse of immunity by diplomats themselves â€“ traffic offences, including rash and negligent driving, often in an inebriated condition, resulting in death of or injury to innocent passers-by, or damage to property, are a legion.

Broadly speaking, the problem of abuse of diplomatic immunity falls into two categories of abuse. The first kind involves a deliberate abuse, which is of terrorist or political nature, and the second variety of abuse is of a more personal nature. Members of diplomatic missions have on numerous occasions violated the civil and penal laws of receiving States.

The death of Dilawar, the Senegalese Ambassador’s driver, on 24O5O2003, allegedly at the hands of the Ambassador’s son, Ahmed El Mansoor Ali, has had the Ministry of External Affairs poring over the rulebooks. Mansoor Ali allegedly roughed up Dilawar after an altercation, pushing him so violently that the man fell, hit his head and died. Yet, so far, Mansoor Ali has eluded the law and his family has refused to acknowledge any wrongdoing on his part. This amounts to a monstrous miscarriage of justice and a deliberate misuse of the provision of diplomatic immunity. This incident puts the spotlight on the vast grey area of diplomatic immunity’s immunity granted from arrest and criminal proceedings, from enforceability of criminal liability of the accused in his country and from compensation claims of the kin of the deceased a vast grey area.

The death of a Malaysian in an incident involving a foreign embassy car in Singapore on December 1546 underscores the diplomatic and legal conundrum that arises when diplomats are involved in wrongdoing. Immunity does not put them above the law or give them a blank cheque to flout the laws. Diplomatic immunity is not a permanent condition. Usually, it is granted only when a foreign representative is on official duty or business. Their spouses may sometimes be extended the same courtesy. However, it is clear Mrs Mugabe was not on official business, but was granted immunity from criminal proceeding after assaulting a photographer in the country where her husband was placed as an Ambassador and she herself was only visiting. Therefore, she should not automatically expect immunity; nor should...
from jurisdiction are especially difficult to justify in the light of the growing role and status of international human rights.63

In February 1987, an Ambassador from Papua New Guinea returned home after he killed a man while driving intoxicated49. He escaped prosecution by using diplomatic immunity. In November 1982, a 23 year old student shot and seriously wounded a nightclub bouncer in Washington D.C. When identified as the son of the Brazilian Ambassador he was immediately released and he subsequently left US. He was charged with assault once before but charges were dropped and he was allowed to remain in Washington on the ground of diplomatic immunity50.

In 1981, a man linked to at least 15 rapes at knifepoint in the New York City area was arrested and positively identified by two victims. He was then released because he was the son of Ghanaâ€™s Ambassador to the United Nations. The man spent 45 minutes in custody and was reported as leaving the police station laughing.51 The son of a diplomat from an Arab country, who had beaten, robbed and sexually assaulted their domestic help in New York, was reported as stopping for a drink at his favorite bar on his way to the airport while his victim recovered from five hours of surgery.52 In April 1984, during a demonstration outside the Libyan Peopleâ€™s Bureau (Embassy) in London, shots were fired from the windows of the Bureau, killing a young lady on-duty Police Constable, Yvonne Fletcher and injuring eleven others.53 The Libyans claimed diplomatic immunity for all embassy occupants; the British Government declared the diplomats persona non grata, expelled them, and broke off relations with Libya â€“ all that it could do under the Vienna Convention. Upon severance of diplomatic relations between UK and Libya, the Libyans, including those allegedly responsible for the killing, were allowed to leave UK.

The Paris-based â€œCommittee Against Modern Slaveryâ€‌ has 135 documented cases of exploitation including violence and rape, in Western capitals, of maids by internationally protected persons over the span of two years.54 Shamela Begum, a maid for high ranking diplomat from Bahrain was kept as a virtual prisoner in high-rise apartment on Manhattanâ€™s east side for almost nine months. Begum, in rare effort to hold an official of foreign Government accountable to laws of US, has accused Mohammed Salehe and his wife of State and Federal labour law violations. Immediately after the institution of charges, he had claimed diplomatic immunity, thereby requesting the Federal Judge of Manhattan to dismiss charges. However, the trial began, but the lawyer for the US Government asked Judge Richard M. Berman to dismiss the case, warning that failure to uphold diplomatic immunity for envoy could lead to retaliation against American diplomats abroad. Finally, the diplomat reached an out-of-court settlement with the maid.55

Diplomatic immunities are very commonly abused in most inhuman ways. On 3-12-2004, a guard for the American Embassy in Bucharest, Romania, allegedly drunk, collided with a taxi and killed the popular Romanian musician Teo Peter56. In 1981, New York Police were looking for a black youth who had raped, sodomised and battered many young women. When captured, he was identified as Mannel Aryee, son of an attachÃ© to the Ghanian mission. His father was a Diplomat in the United Nations. Aryee could not be arrested and walked out of police station within minutes as if nothing had happened57.

Dr. Halla Brownâ€™s story is an especially vivid example of the injustices inherent in the policy of diplomatic immunity. On 20-4-1974, Brown was riding in the passenger seat of a car that was struck by Alberto WatsonOfabrega, a cultural attachÃ© to Panama. Brown was left a quadriplegic, despite three months in intensive care and several more months in a special rehabilitative hospital. Protected by diplomatic immunity, Alberto avoided all liability. The Panamanian Government, under extreme pressure by American authorities, eventually paid Brown $10,000, not nearly enough to cover her nearly $30,000 medical bills or her $50,000 loss in yearly income58.

Reference has also to be made here of Democratic Republic of Congo v. Belgium59, also known as â€œArrest warrant caseâ€‌ wherein an international arrest warrant in absentia was issued against Mr Abdonlaye Yerodia Ad Mbasi, a diplomat, for having made a series of speeches arousing racial hatred. The ICJ held that personal immunity prevents prosecutions of Heads of States, Heads of Government and Foreign Ministers, even if they are alleged to have committed international crimes. Also, the ICJ held that this type of immunity applies even where these three types of officials are abroad on a private visit. The ICJ in describing the rule according to immunity ratione personae stated that it applies to â€œdiplomatic and consular agents (and) certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairsâ€‌ (Para 53).60 The use of the words â€œsuch asâ€‌ suggests the list of senior officials entitled to this immunity is not closed. Also, the ICJ justified the immunity of Foreign Ministers from foreign domestic courts on the basis that Foreign Ministers are responsible for the international relations of the State and âœsein the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise.â€‌ (Para 53).

In all these situations the host Government had an alarmingly narrow range of options i.e. expulsion and a break in diplomatic relations were the only options available. Because these actions were the most severe that could be taken under the Vienna Convention, there was great public feeling that injustice had been done. Understandably, much anger is caused by such events and, obviously, most people do not understand why they have to put up with such behaviour whereas those responsible generally get away with it. It has been argued that such a privileged regime, going beyond the jurisdictional reach of the courts, contrasts with the prevailing attitudes in modern democratic societies.62 Immunities from jurisdiction are especially difficult to justify in the light of the growing role and status of international human rights.63 As aptly pointed out, throughout its modern history, international law has been more an instrument of diplomacy than a...
weapon of formal forensic confrontation.64

The following articles of the Vienna Convention65 apply when a diplomat has abused his immunity:

- Article 29 provide that the person of the diplomat shall be inviolable and that the diplomat is not liable to any form of arrest or detention.
- Article 31 exempts the diplomat from the criminal jurisdiction of the receiving State, though a diplomat can be tried in the receiving state if her immunity is waived.
- Under Article 31, however, only the sending State may waive immunity, and the waiver must always be express. In short, the diplomat himself cannot be touched.

Articles 41 and 42 of the 1961 Vienna Convention expressly circumscribe the diplomatic privileges and immunities. Article 41 imposes three sets of duties on a diplomat and his embassy:

(1) a duty to respect the laws and regulations of the receiving State and a duty not to interfere in the internal affairs of that State;66
(2) a duty to conduct the diplomat's diplomatic business with or through the Ministry of Foreign Affairs of the receiving State or such other ministry as may be agreed;67 and
(3) a duty not to use the premises of the mission in any manner incompatible with the functions of the mission.68

Article 42 forbids a diplomat to practise for personal profit any professional or commercial activity. But neither the Convention nor general international law provides for remedies, should any of these duties be violated. The usual response of receiving States has been either to get the offending diplomat recalled by his home State or, if that is not possible, declare him persona non grata and get him out of the country. Indeed, general international law would permit taking of countermeasures in appropriate cases, within the limits prescribed by the law. However, the efficacy and choice of each of these responses will have to be primarily assessed in terms of considerations of reciprocity and bilateral relations of the sending and receiving States.

It must be borne in mind that diplomatic immunity does not mean total escape from legal liability. What of the demands of criminal justice and compensation to victims of crimes committed by diplomats? In a suit for injury caused by the car of a Secretary of the Peruvian Embassy in London, a British court ruled in 1930 that international law does not impart immunity from legal liability but only from local jurisdiction.70

III. Preservation of immunities and minimisation of violations through maximisation of prevention and punishment of diplomatic abuses. ...71 It is time for a re-think with respect to the traditional norm of that in case of a violation of a law by a diplomat and the consequent recourse of one of registering a diplomatic complaint to her Government or as an extreme case, to demand his withdrawal as persona non grata.72 to include more stringent measures to not only curb and prevent the criminal acts of the diplomats resulting in bodily harm of individuals, but also subsequent punishment with regard to the crimes when such have no connection with the purpose of their missions, while leaving no doubt in the minds of the reader that were an attempt made by agreement to abolish diplomatic privileges and immunities, they would of necessity have to be renewed the day after.73

Abuse of immunity: Prevention The ultimate sanction and prevention measure available for the Governments is the severance of diplomatic relations. Such preventive measures do not seem incompatible with international law and may be seen as a genuine attempt to reduce the risk of abuse, along with which a number of mechanisms are available in order to prevent abuse of immunity and violations therein. For example, in 1985 the British Government decided to adopt a firmer application of the rules of the Vienna Convention. Measures taken included stricter appointment notification procedures as to prospective staff of diplomatic missions; limiting the size of missions; scanning and weighting the diplomatic bag; limiting the extent of mission premises, and announcement of greater readiness to declare an accredited person a persona non grata even in cases of serious civil claims and persistent unpaid parking tickets.74 There is evidence, based on the reduced number of offences allegedly committed by accredited persons that preventive measures adopted in UK and US during the 1980s have been successful despite the recognition of many new independent States and the resulting increase in the number of missions and diplomats.55 France, Germany, and Italy have all expelled Libyan diplomats suspected of fostering criminal activities.76

Once a disturbing pattern of behaviour, individual or collective, has been identified, the receiving State is far from being powerless under international law. The powers of receiving States to prevent human rights abuse do not stop here. The doctrines of self-defence and self-preservation are also available.77

Prosecution in Home State. Indeed, the 1961 Vienna Convention has made the waiver of immunity discretionary on the part of the sending State and is silent on prosecution of the diplomat in his home State. This needs to be remedied. To comply with the demands of criminal justice, the sending State must either waive immunity from the jurisdiction of the receiving State, or recall the offending diplomat and proceed against him on the basis of the principle of nationality. In the Indian scenario, a diplomat falls within the purview of a public servant and his wrongdoing well ought to be punished.
Prosecution for bringing shame on his country as a result of his criminal forages well comes within the criminal radar.

Amending the Vienna Convention. Advocating the stand of amending the Vienna Convention is one of the propositions taken up. The amendment should also include some kind of a monetary bond to the ICJ as security against offences by diplomatic personal. Recent international events bolstering international cooperation may make amending the Vienna Convention, in this form or in some other, as a viable option, as long as the vision of curbing abuse is not blurred.

Purchase insurance. The sending State, under this measure will require its diplomats to purchase insurance. Although insurance companies may be reluctant to take on the potentially high risk, proponents of this solution suggest companies should be compelled by the respective Governments, in the interest of the larger goal of international harmony. Also, the victim could take direct action against the insurer to circumvent a diplomat’s claim of immunity. Wherein follows the corollary that the home country will also force such reciprocity of insurance to be meted out to their diplomats.

Isolation of offending nations. Though an attractive solution, but shifting loyalties, political allegiances and self-interested Governments make it unlikely that a Government will agree to a long standing economic and political isolation of a large trading partner when the economic well-being of its own citizens hangs in balance. Questions of policy such as when and how to isolate an offending nation, which countries decide to isolate an offending nation and how and for what reasons the isolation is lifted, must all be agreed upon before the procedure could be implemented. A successful isolation of the sending State would involve severing diplomatic relations with the target country and implementing trade and cultural sanctions. Such international pressures, generally unsuccessful in the past, demand collective action of such magnitude as to render isolation essentially unenforceable. Isolation may provide as a good solution in exceptional cases but it is too difficult to sustain as a regular response to sporadic abuse.

Subjugation to the ICJ. Giving power to the ICJ to suspend non-complying countries from the UN is one of the propositions taken up. An agreement, while figuring out any amendment to the Vienna Convention, should be to the effect to have all decisions of the receiving States justice system to be appealable to the ICJ. While reluctance of nations in this regard is understandable, the benefit of greater flexibility in the light of potential danger makes the trade-off of jurisdiction over the narrow and well-defined area of diplomatic abuse worthwhile. Although certain categories of crime lend themselves to enforcement in an international context, crimes with ideological or political ramifications pose significant problems for an international court.

Abuse of immunity: Punishment. It has been argued above that States are by no means powerless in preventing abuse of diplomatic immunity and violations. Nevertheless, violations will continue to occur as it is unreasonable to expect that the whole world-wide diplomatic population, consisting of good or bad thousands of normal human beings, will remain flawless. Upon the occurrence of abuse, receiving States have several options. First, it is possible to conclude, in advance, a bilateral or regional treaty providing for compulsory waiver of immunity, or compulsory prosecution in the sending State. Second, the receiving State can request waiver of immunity from the sending State. The lifting of immunity is not frequent but can be seen in a number of recent cases. Third, the declaration of persona non grata in itself, though not a perfect punishment for human rights violations, is not without punitive value. Fourth, abuse of diplomatic immunity involving harm done against the human body may be seen as an international crime suitable for trial by an international criminal tribunal. However, there are various obstacles to such a solution, including the diversity and international crimes and their various levels of receptivity. It may also require the amendment of the Vienna Convention to that effect.

Abuse of immunity: Remedies for victims. Administrative staff and their families. It must be remembered that the Vienna Convention does not protect administrative staff and their families acting outside their official duties from civil and administrative proceedings. Thus, suits may be brought by victims against these people, and diplomatic immunity is not a bar to such action.

Special compensation fund. It is possible that an international fund designed to compensate the victim of diplomatic wrongdoing would help stop abuse of diplomatic immunity. The idea of an international fund designed to compensate the victim of diplomatic wrongdoing is an attractive one, but its administration will require much international cooperation as well as admittance of fault on the part of the sending State. A domestic fund created for the same purposes by receiving States would suffer from the hazard if prohibitively high costs and lack of enthusiasm on the part of foreign ministries. Variations on the idea of monetary bond requirements may nevertheless prove fruitful. Yet most nations would avoid admitting a diplomat’s complicity in an illegal or tortuous act. Furthermore, the difficulty of setting international criminal and tortious law standards would complicate administration of an international fund, although adherence to the legal standards of the receiving State could minimise such difficulties. Section 86 CPC has made all civil actions against a foreign Government subject to prior consent of the Central Government. The Government consent generally is discretionary (except in four well-defined categories of cases including civil actions relating to immovable property). However, one learns that the Government is fairly liberal in giving its consent under this provision of law. Therefore, Dilawar’s kin are well advised to first exhaust the administrative channels of the Senegal Embassy/Foreign Ministry, and then take the CPC route. Further, private claims of Indian nationals against foreign States could also be espoused on the international plane by the Ministry of External Affairs in appropriate cases under the law of State responsibility.
There already exists a strong case for an urgent overhauling of the Indian Law of sovereign immunity. The compensation issue raised by the Dilawar incident further augments it98.

Right of direct action against insurers of diplomatic missions. The victims can directly assert their rights because the insurance company is liable and appears in place of the diplomat, and the immunity defence is circumvented. At the same time, there is no need for international agreement and diplomats remain protected. True, enforcement of the requirement itself is subject to immunity; but there should not be a special difficulty in adopting a hard line approach similar to that of tackling other abuses, including expulsion, upon non-compliance. At bottom, establishment of compensatory mechanisms of that type constitutes a risk worth taking.99

IV. Time for re-think: Conclusion Any measure to limit the existing norm of diplomatic immunity to actions directly related to the diplomat’s official functions would run counter to the purpose of diplomatic immunity, namely, providing protection for diplomats in their professional and personal capacities so that they may carry out their official functions unhindered by the burdens imposed by foreign laws. Even so, a diplomat’s official function should not include free licence to abuse children, commit rape, or otherwise flagrantly ignore the laws of the receiving State. As is abundantly clear, the intention behind the formulation of the rules of the Vienna Convention is to protect the diplomatic process rather than the individual diplomat. Limiting immunity to professional diplomatic functions would allow courts to hold diplomats responsible for criminal and tortuous acts and might deter diplomats from abusing their immunity.

The doctrine of diplomatic immunity has existed since the beginning of recorded history and although the rationale for extending diplomatic immunity may have been somewhat different then, Governments of those times, as today, recognised its necessity in developing and maintaining international relations. Individuals living at that time also experienced its unfortunate ramifications: in the form of diplomatic immunity abuses. Abuse of the privilege has gone largely un punished and undeterred for centuries.

Reform of the system is long overdue and hence steps, nevertheless baby steps, should be taken in the direction of reforms to bring to justice the diplomat-offenders and to provide to innocent bystanders of this ancient concept of immunity to diplomats with measures of redress. The measures suggested may seem to be antagonistic to harmonious international relations, but they do violence neither to the purpose of the Vienna Convention nor to the functional necessity underlying the Vienna Convention. The Vienna Convention’s purpose is not to provide a shield for scoff-law diplomats, but rather to ensure that diplomats may efficiently perform their duties and to bolster friendly relations between nations. It is hence essential that the privileges and immunities as provided in the Vienna Convention are pulled up for a review in the light of today’s circumstances.

In recent years, scholars, legislators, and the public have addressed diplomatic immunity abuse. The primary focus throughout has been on the causes of abuse: the overextension of immunity by receiving States, the absence of cooperation by sending states, the lack of deterrence under diplomatic legislation, and the fear of retaliation. Perhaps the time has come to focus on the results of abuse: individuals harmed by diplomats are being denied the right to bring a cause of action for the sake of promoting international relations. We must reconcile ourselves to the fact that the doctrine of diplomatic immunity is indispensable. This does not mean, however, that the unfortunate ramifications of this doctrine must continue to be tolerated.

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- Also known as â€œrevengeâ€• or â€œretaliationâ€•. Wherein suffering is imposed on criminals as the most fitting and just way in order to make the criminal feel the pain he inflicted.
- This theory can be best explained by the anonymous quote â€œBut that is the beginning of a new storyâ€•the story of the gradual renewal of a man, the story of his gradual regeneration, of his passing from one world into another, of his initiation into a new unknown life.â€•
- This theory aims to prevent the crime rather than avenging it.
- The individual actor is not the focus of the attempt at behavioural change, but rather receives punishment in order to deter other individuals from deviance in the future. The focus here rests on prevention of crime by making an example of the criminal.
- For example, the Fifth Amendment Clause in the American Constitution, not to forget the Code of Criminal Procedure in India made within the constitutional parameters, to provide relief and do justice to the victim, while dealing stringently with the one held guilty.
- Supra, n. 7, 47.
- Preamble to the Vienna Convention, 1961.
violated the First Amendment while the ban on congregations did not.

The Court found that the Code's restriction on sign displays
concealing the geographical boundaries of the enacting State's jurisdiction. Until recently scholars often used these terms interchangeably and confused the distinction between these two terms.

- The "suite" included the diplomat's family, servants, administrative personnel, the diplomat's residence, personal property and the embassy premises. No distinction has been made when exterritoriality was the dominant theory for justifying diplomatic privileges and immunities.


- Oppenheim, as cited in supra, n. 7, 92.


- Supra, n. 18, 433.

- Ibid.

- Supra, n. 18, 434.

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- Hereinafter â€œthe Commissionâ€•.

- The Commission was established by the General Assembly of the UN to implement Article 13(a) of the United Nations Charter, which provides that one of the principal functions of the General Assembly was to encourage â€œthe progressive development of international law and its codificationâ€•. In its first session, the Commission compiled a provisional list of topics of international law selected for codification, including the topic of â€œDiplomatic intercourse and immunitiesâ€•.

- The starskest illustration being the 2005 episode, involving alleged sexual assault during a board meeting on a staff member by the High Commissioner. The staff member lodged a complaint about the incident, after which an internal report was produced, which held the witnesses to be reliable and recommended disciplinary sanctions for the High Commissioner. This report was forwarded on to the Secretary General of the United Nations, who pardoned this official.

- In another incident ten years back, involved the Director General of an International Organisation, who assaulted a staff member, who was part of a â€œlock-outâ€• and was sitting on the corridor as the Director General walked down the corridor. He grabbed the staff member by her hair and flung her to the side, enabling him to pass, and causing her to lose consciousness. The staff member tried to initiate action against him, but her complaint was not permitted by the Organisation, www.cai-o-ch.org last accessed 21-2-2010. The most recent example being the 2009 criminal probe into allegations that a former senior UN official misappropriated nearly half a million dollars in aid money destined for Afghanistan. UN Secretary General Ban Ki-moonâ€™s decision to waive the Gary K. Helsethâ€™s diplomatic immunity to conduct the criminal probe has been stated as a â€œdisappointmentâ€• by Helsethâ€™s attorney, even though the case has not progressed so far since then. Washington Post, 11-6-2009, www.washingtonpost.com/wp-dyn/content/article/2009/06/10/AR2009061003827.html. last accessed 21-2-2010.


- Oppenheim, as cited in supra, n. 7, 92.


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- In the course of its Tenth Session.

- Hereinafter â€œthe Vienna Conventionâ€•.

- http://untreaty.um.org/cod/are/ha/vedv.html last accessed 14-1-2010.

- Preamble to the Vienna Convention.

- Article 14 of the Vienna Convention.

- Article 20 of the Vienna Convention.

- Article 23 of the Vienna Convention.

- 99 L Ed 2d 333 : 485 US 312 (1988) http://www.oyez.org/cases/1980-1989/1987/1987_86_803 last accessed 6-4-2010. The case essentially related to a provision in the District of Columbia Code prohibiting the display of signs within 500 feet of a foreign embassy which tended to bring that Government into public disrepute. Congregations of three or more persons within the 500 feet limit were prohibited as well. Boos and others were denied permission to display signs criticising the Soviet Union in front of that country's embassy. On the question of whether the District of Columbia Code violated the First Amendment of the American Constitution, the Court found that the Code's restriction on sign displays violated the First Amendment while the ban on congregations did not.


- Ibid.
There is even a documented case where an ambassador’s dog escaped the consequences of biting several neighbours by means of his owner’s diplomatic immunity!! For more on the same, see, âœA Paper on The Vienna Conventionâœ www.academon.com last accessed 10Ó3Ó2010.

- Supra, n. 42.
- Ibid and also, on the contrary as the Vienna Convention categorically states, it is their âœdutyâœ to âœrespect the laws and regulations of the receiving State.âœ
- News article http://www.worldpress.org/2282.cfm last accessed 12-4-2010.
- Article 9 of the Vienna Convention.
- Supra, n. 17.
- Para 1, Article 41.
- Para 2, Article 41.
- Para 3, Article 41.
- Article 9(1) of the Vienna Convention.
- Supra, n. 42.
According to which, the UN’s Geneva-based Commission on Human Rights presented with details of several cases in March 1998; smuggling, assault, slavery, kidnapping and other crimes committed by persons enjoying diplomatic immunity have all been reported.

- Ibid.
- Supra, n. 18.

- According to this principle, any person is liable to be proceeded against for violation of his national laws, irrespective of the place where he may have committed the offence. For eg. Section 4 of the Penal Code applies the Code to all Indian nationals wherever they may be.

- Supra, n. 79, 1538.
- Supra, n. 80, 492.
- Supra, n. 79, 1542.
- Ibid, 1543.
- Ibid, 1529.
- Ibid, 1530.
- Supra, n. 73, 291.
- Supra, n. 80, 494.
- Supra, n. 79, 1536.
- Supra, n. 80, 497.
- Supra, n. 79, 1532.
- Supra, n. 73, 293.

- Waiving immunity is sometimes seen as the honourable thing to do but-unfortunately-it is still the exception rather than the rule. Note, that the US policy is not to waive the immunities of American Diplomat when asked to do so. Perhaps the only recent exception was the waiver of the immunity of a civilian employee in Bolivia with the US anti-drug programme who was suspected of stealing large sums from the programme’s funds. See, Kempster, N. and Jackson, R.L., Immunity May End for Envoy in Fatal Crash, LA Times, 11-1-1997, http://articles.latimes.com/1997/jan/11 last accessed 29-3-2010.
- This notion is somewhat akin to the French administrative law concept of égalité devant les charges publiques. Some States already follow that path. For example, innocent victims of diplomatic immunities’ violations in UK have access to Criminal Injuries Compensation Board.
- Supra, n. 73, 290.
- Case as cited earlier in supra, n. 44.
- Supra, n. 42.
- Supra, n. 17.