

**LAWFOYER INTERNATIONAL**  
**JOURNAL OF DOCTRINAL LEGAL**  
**RESEARCH**  
**(ISSN: 2583-7753)**

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Volume 1 | Issue 4

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2024

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**DEPTH OF DIPLOMACY: DEALING WITH THE DIPLOMATS**

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**I. ABSTRACT:**

Diplomats are those who lend their hand forward towards the other nation, settle in the hosting state and act as a representative of sending nation's head of state for diplomatic relations they are serving as an intermediary between two nations, but all this is possible because of Vienna Convention of 1961 on Diplomatic Relation's provided immunities. These immunities are based on various theories that are endorsed in different contexts by multiple individuals. But are they just using those powers to enjoy themselves fearlessly? They can kill anyone but cannot be convicted because of the shield exists in the form of diplomatic immunities, but everything has its own flaws that could lead to its demise as nothing is absolute same is the case with power. However, in the absence of diplomats, who will be in charge of establishing cordial diplomatic ties? Nevertheless, because it deals with diplomats, diplomacy is a big fuss in international law. The study's conclusion demonstrates that diplomats are a crucial component of any country's successful diplomatic relations, and these immunities are also vital.

**II. KEY WORDS:**

Diplomats, Persona Non Grata, Diplomatic Immunities, Vienna Convention on Diplomatic Relation, Inviolability.

**III. INTRODUCTION:**

Whenever questions about the formation of some international relations appear in front of any country, the initial notion that springs to mind is about diplomacy, and its subject matter that pops up are the diplomatic agents, are the persons who reside in foreign countries as representatives of their state and advocates for the support of their country. If there is no diplomacy means no international institution<sup>2</sup>“Diplomacy is neither the invention nor the pastime of some particular political system, but is an essential element in any reasonable relation between man and man and between nation and nation”<sup>3</sup>. This is the right of every state

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<sup>2</sup> Anon (2019) *The functions of diplomacy, E- International Relation*. Available at: <https://www.e-ir.info/2011/07/20/the-functions-of-diplomacy/> (Accessed: 02 December 2023).

<sup>3</sup> Nicolson, H. (1977) *Diplomacy*. 3rd edn. New York: Oxford University Press p.25.

to send their diplomats and state duty to respectfully receive sending state diplomats as well. This long standing system of permanent appointment of diplomatic agents or envoys is an ancient thing that started in the seventeenth century, and the further cycle of development continues, adding different rights to the envoys, their obligations, and the immunities and privileges available to them in the nineteenth century. They are present in the form of customary rules of international law.

In the year 1815, which was the very first time when these customary rules were codified and clearly stated, many efforts were taken, and this process of development didn't stop till the year 1961. This year was a milestone as a convention was adopted called the Vienna Convention on Diplomatic Relations, which altogether contained everything about the envoys it is a multilateral treaty. The convention, adopted on April 18, 1961, came into force on April 24, 1961, and around 61 countries signed that treaty. At present, there are 193 countries that are parties to this convention. "Continuity of the diplomatic institution throughout thousands of years and in all known civilizations shows that diplomacy is an institution inherent to international life itself, one that may undergo transformations or may be used with more or less intensity, but cannot be dispensed with"<sup>4</sup>

They play a very crucial role in the relationship between the country that appointed them and the state where they have been credited, as these diplomatic agents, ambassadors, or envoys act as a bridge between the two countries and help in the development of a methodology between the states about how to act. They represent national policies rather than their ethnicity or social composition. They are provided with the appointment letter, which is known as the "Letter of Credence."<sup>5</sup> Mainly, these diplomats are appointed on a political basis. The United States is one of the major countries to follow this. If we see in the past, ambassadors were appointed on the recommendations of the president and then approved by the Senate, whereas later this was highly criticized but still prevails<sup>6</sup>. This research paper is a study in depth about the diplomats, their immunities, the basis on which they are provided, and their usage in the situation.

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<sup>4</sup> Gardner, L.C. (1990) 'The pure concept of diplomacy. by José Calvet de Magalhães. translated by Bernardo Futscher Pereira. New York, Westport, Conn., and London: Greenwood Press, 1988. pp. 150. index. \$37.95.', *American Journal of International Law*, 84(4), pp. 950–951. doi:10.2307/2202847.

<sup>5</sup> Sally Marks, Chas Freeman. *Modern diplomatic practice*, *Encyclopædia Britannica*. Available at: <https://www.britannica.com/topic/diplomacy/Modern-diplomatic-practice> (Accessed: 02 December 2023).

<sup>6</sup> Cengage (2023) . " west's encyclopedia of American law. . *encyclopedia.com*. 15 Nov. 2023 . *Encyclopedia.com*. Available at: <https://www.encyclopedia.com/law/encyclopedias-almanacs-transcripts-and-maps/diplomatic-agents> (Accessed: 01 December 2023).

#### IV. CLASSIFICATION:

If we look at the classification of these diplomatic agents, which is done on the basis of their status and the role they perform, then it is divided into 4 different categories: ambassadors, Minister Pleni-Potentiary, Charges d' affaires, and Minister Resident. The former 3 categories were defined in the year 1815 in the Congress of Vienna, whereas the last one was included in the year 1818 but then dropped by convention on diplomatic relations in 1961<sup>7</sup>.

- **Ambassadors, Legate, and Nuncios** are considered in the first category of diplomatic agents. Ambassadors are considered to be personal representatives of the head of the state (the native state), so their posts are cherished with more honor than others. In the United Nations, they are even appointed as permanent representatives. When the Holy See sent them, they were recognized as Papal Legates or Papal Nuncios. The Holy See is that area of acers where the rule of the Pope is present. If these ambassadors are present in the commonwealth, they are known as High Commissioners, and they are even entitled to use the title "excellency." Ambassadors are personally interviewed by the head of the host state when they are appointed in that state; if no personal interview takes place, then it is considered a discourteous act on the part of that state.
- **Minster Pleni-potentiary and Envoys Extraordinary:** They are the second category of diplomatic agents; they are also appointed by the head of state but enjoy fewer privileges and lower status than ambassadors. They don't use any title of "excellency", but if they do, it is not treated as right. They are not allowed to have a personal interview with the head of state, but when they receive their letter of credence, which is an appointment letter, they get their personal audience. But on a practical basis, there is no such thing as a major difference between the first category and the second category of diplomatic agents.
- **Charges d' affaires:** They are the agents of the last category considered to be the lowest in the chain; they are appointed by the foreign ministers of the state in the same way that when they are accredited, they present the letter of credence to the Minister of Foreign Affairs. Their term of office is either temporary or permanent. It's not just the

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<sup>7</sup> Kapoor, D.S.K. (2021) *International Law and Human Rights*. 22nd edn. Prayagraj, Uttar Pradesh: central law agency.

category of diplomatic agents that's important; rather, the staff who resides in that embassy is also a topic to throw light on.

- **Diplomatic staff:** Apart from the high-ranking people like the ambassadors, all the mission personnel processing the diplomatic rank are there for some task. It consists of the military, naval, and air attaches, and all their deputies, like their first, second, and third secretaries, are present.
- **Administrative and Technical Staff:** It consists of cervical services, the head of office, technical staff, accountants, typists, translators, and other staff who are performing administrative and technical functions<sup>8</sup>. Ordinary Staff: It includes the drivers, couriers, and other persons who are performing different domestic functions. The Vienna Convention provides another category, which is that of a private servant. They are the domestic employees of the mission. Here, the point is that when the immunities were provided to them during that time, private servants didn't get any of them.

Consequent on a development over some hundreds of years, the institution of diplomatic representatives has come to be the principal machinery by which the intercourse between the states is conducted<sup>9</sup>. Vienna Convention on Diplomatic Relation its Article 3(1) lays down the functions that diplomatic agents perform. While talking about their functions, representation, protection of the nationals within the limits permitted by the municipal law, negotiation, observation about what is happening in the host state, promotion of friendly relations between states, and also performing consular functions

## V. BASIS OF IMMUNITIES:

They are those people who got the highest of the immunities present with them, considered to be the safest person also in the most crucial situations but question here arises is why immunities are provided to them dealing with this three theories are present because jurists have divergent views on this let's start with the first view that is the :

- A. **Extra- Territorial Theory or Friction Theory-** This theory was propounded by Hugo Brothers as per their views they believe that though the diplomatic agent live in the host

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<sup>8</sup> 2201 C St. NW, Room 2236 Washington, DC 20520 202-895-3500 and U.S. Department of State (1998) *Diplomatic and consular immunity: Guidance for law enforcement and judicial authorities*. Washington, D.C.: U.S. Dept. of State.

<sup>9</sup> Starke, J. (1989) *Introduction to the International Law* . 10th edn. Singapore: Butterworths.

country on a diplomatic mission but they are considered to present in their native country only as the property on which the embassy is made in the host country belongs to the sending state only i.e. they considered to live in that country only even though they live in the receiving state, hence all the staff present in it belongs to the law of their own state territorial jurisdiction but it faces criticism as well from Oppenheim and Fenwick according to them how is this possible that person residing in the receiving state considered to live in the sending state only. Judgment was given by the Australian Supreme Court regarding the same in *Ex Parte Petroff Case 1971*<sup>10</sup>. In the facts of the case, two Australian citizens threw explosives on the Russian Chancery in Canberra. They were prosecuted for damaging the chancery and injuring the people's thereof. They argued that they can't be prosecuted in the Australian court because of the extra territorial theory that was held by the court. They rejected this theory, saying that offenses that happen in Australia need to be dealt with in this country only.

**B. Representative Theory:** As per this theory, they are the total believer that the diplomatic agents are appointed by the head of the state and will get the same immunities as the heads of the state will get because they are his representative only, The reason that early envoys were inviolable was that they were to be treated “as though the sovereign himself were there”<sup>11</sup> and all after this theory, the immunities are also provided to the diplomatic staff. The facts of the case *Bergman vs. De Sieyes 1946*<sup>12</sup> are as follows: De Sieyes was a foreign minister of Bolivia; he went to the US for some official purposes after an accident in the USA. Bergman sued him for the damages. This suit was dismissed by the lower court, which then went to the Supreme Court of the USA. The Supreme Court confirmed the Representative Theory, which holds that diplomatic agents who are working in their official capacity get the same immunities as the head of state.

**C. Functional Theory:** According to this theory, diplomatic agents are posted to do many functions; they not only represent their state head but also develop social, economic, and cultural relations between the two states. These ambassadors and all the other diplomatic personnel have to carry out various functions, and for performing those

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<sup>10</sup> *ex parte Petroff v Turnbull and ors* (1971) 17 FLR 438, ILDC 2572 (AU).

<sup>11</sup> Jönsson, C. (2017) *Diplomatic representation in the 21 Century*, *swp-berlin.org*. Available at: [https://www.swpberlin.org/publications/products/arbeitspapiere/WP\\_Diplomacy21\\_No14\\_Christer\\_J%C3%B6nsson.pdf](https://www.swpberlin.org/publications/products/arbeitspapiere/WP_Diplomacy21_No14_Christer_J%C3%B6nsson.pdf) (Accessed: 02 December 2023).

<sup>12</sup> *Bergman vs. De Sieyes* (1946) 71 F. Supp. 334, (District Court, S. D. New York.)

functions, there is a requirement of immunities as well, which are provided to them by this theory. All of these are governed by the Vienna Convention, 1961, and if there is any topic that is not covered under this, then it is dealt with by international customary law. By going over these theories, it becomes evident how these immunities are granted because they serve as the spokesperson for the head of state while working outside of their country and need have a high degree of freedom, all while keeping their safety in mind.

#### **D. IMMUNITIES:**

It is given to the diplomats exempt the territorial jurisdiction of receiving state but not from the sending state<sup>13</sup> as it allows diplomats to confidently perform their duties. Diplomats are said to be “conscious of world interests superior to current time national interests”<sup>14</sup>. What are the immunities that are available to them in detail?

- **Inviolability of person-** It stands for that a human body is not violated in any sense that can neither be detained nor arrested<sup>15</sup> by the host states authority along with that they are free as per their own wish can move and it is one among the duties of the receiving state is to always protect the dignity of the diplomats, protect his freedom of speech and expression, they cannot be harassed in any manner either its physically or mentally no one can embarrass but in return of this diplomatic agent also need to follow the municipal laws of the receiving state like should not cause nuisance of any kind, not to do any act against the sovereignty of the state, respect the privacy of the receiving state not to enter in the prohibited area such as military area, cantonment area etc. The terrorist attacking the United States between 1969 and 2009, 28 percent were clearly against US diplomatic officers. In 2012 only various diplomatic premises and institutions were attacked 95 times, of which more than one-third were targeted towards UN personnel<sup>16</sup> When we talk about the protection available to the family members of the diplomats, only those members who are near relatives who reside permanently in

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<sup>13</sup> Supra 3

<sup>14</sup> Feis, H. (1959) *In some corner of a foreign field; diplomat.* by Charles W. Thayer. foreword by sir Harold Nicolson. 299 pp. New York: Harper & Bros. \$4.50., *The New York Times*. Available at: <https://www.nytimes.com/1959/10/25/archives/in-some-corner-of-a-foreign-field-diplomat-by-charles-w-thayer.html> (Accessed: 02 December 2023).

<sup>15</sup> Article 29-*Vienna Convention on Diplomatic Relations, 1961 - Office of Legal Affairs* (no date) *legalun.org*. Available at: [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: 02 December 2023).

<sup>16</sup> Ismail, M.-B.A. (2016) *Islamic law and Transnational Diplomatic Law*, SpringerLink. Available at: <https://link.springer.com/book/10.1057/9781137558770> (Accessed: 02 December 2023).

the same house get the immunities, as we saw in the case discussed earlier in *Bergman vs. De Sieyes*<sup>17</sup>.

- **Inviolability of Premises:** Premises here include the embassy, any office of a diplomat, his residence, or any place where he hires any official for the working of a diplomatic mission. Nobody in the receiving state gets to enter any of the premises, and along with that, the police also can't interrogate the premises; this is beyond the jurisdiction of the receiving state. On 4<sup>th</sup> December, 1979 Iran there embassy of United States was invaded by the militant student it happen in form of protest for the extradition of the Shah Iranian authorities approved whatever done by the students it was a grave breach of Vienna Convention and ICJ also contended the same about their act but Iranian contended that these acts are valid under the Islamic law though still it was a breach of Vienna convention<sup>18</sup>. **Jurisdiction of the local court:** No local court in the receiving state has the right to deal with any of the matters of the diplomatic agent. If any problem arises, they are also immune to the criminal jurisdiction of the court; but if it is heinous then they are declared "persona non grata" it is given in Vienna Convention on Diplomatic relation its Article 9 which is a remedy for such act of diplomats. **Police Rule:** Diplomats are never to be afraid of the police of the receiving state. That is why they can perform their duty without any fear, but they need to remember to protect the privacy of the receiving state. No police can investigate the baggage of the diplomat or his family. They are even exempt from serving as witnesses as well.
- **Doctrine of waiver immunity** this is special power where this immunity didn't work when diplomats did some heinous crime then receiving state can ask the sending state to waive the immunity<sup>19</sup> so that diplomat can be prosecuted, here point to not is that this is power given to state authority not to the diplomats<sup>20</sup>. There is presence of certain norms as well which need to be go through for waving as life of people is not topic to play with. **Excise duty and custom:** They are immune from any of the taxes that are there, but if any extra taxes are added, then it's their private thing to deal with. For

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<sup>17</sup> *Bergman vs. De Sieyes* (1946) 71 F. Supp. 334, (District Court, S. D. New York.)

<sup>18</sup> Vark, R. (no date) *Personal inviolability and diplomatic immunity in respect of serious crimes, Personal Inviolability and Diplomatic Immunity in Respect of Serious Crimes*. Available at: [https://www.juridicainternational.eu/public/pdf/ji\\_2003\\_VIII\\_110.pdf](https://www.juridicainternational.eu/public/pdf/ji_2003_VIII_110.pdf) (Accessed: 02 December 2023).

<sup>19</sup> Article 38 *Vienna Convention on Diplomatic Relations, 1961 - Office of Legal Affairs* (no date) *legalun.org*. Available at: [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: 02 December 2023).

<sup>20</sup> *ibid*



example, if the diplomat engages in any personal business for which there are any dues present for the taxes, then it is the diplomat's duty to pay for the same, and if he is the owner of any immovable property in the receiving state, then he should pay the taxes for the same from his own pocket; no sending state government has to pay for that property. Article 28 of the Vienna Convention states The fees and charges levied by the mission in the course of its official duties shall be exempt from all dues and taxes<sup>21</sup>.

#### **E. MISUSE OF IMMUNITIES:**

But this is not what it looks like, as now diplomats themselves are misusing their power in the veil of immunities available, like the scenario that happened in South Africa when the expulsion of five Lesotho diplomats was involved in the illegal trade of alcohol<sup>22</sup> and in India diplomat molested a hotel staff but was not punished for the same hands of Indian Government are tied<sup>23</sup>. Contrary to that, these immunities that are available don't put diplomats above the law; diplomatic immunities are a two-way street that are only available to the diplomats of the sending state if they abide by the receiving state as well<sup>24</sup>. But it is required that to limit these immunities for this first thing require is that to know what act fall under the private work of the diplomats as in case held by Portuguese court held that Article 3 of Vienna Convention that general framework of the diplomatic function happen must cover all the incidental action which takes place for the matter.<sup>25</sup>

#### **F. FREEDOMS:**

After going through all the immunities of the diplomats, there are some freedoms also provided to the diplomats. These freedoms include: freedom of speech, expression, and thought; freedom to practice his own religion; freedom to communicate with his native country members, and no privacy is infringed in that, like prohibition on phone tapping, etc.; freedom of movement this have two motives 1<sup>st</sup> to protect the nationals of sending state and 2<sup>nd</sup> delivering the information

<sup>21</sup> *Vienna Convention on Diplomatic Relations, 1961 - Office of Legal Affairs* (no date) *legalun.org*. Available at: [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: 02 December 2023).

<sup>22</sup> Kabi, P. (2021) *Lesotho: Diplomats' booze saga deepens - allafrika.com, allafrika*. Available at: <https://allafrica.com/stories/202106300714.html> (Accessed: 02 December 2023).

<sup>23</sup> Rajput, S. (2013) *Bahrain diplomat accused of abusing woman sent home, Mid*. Available at: <https://www.mid-day.com/news/india-news/article/bahrain-diplomat-accused-of-abusing-woman-sent-home-246384> (Accessed: 03 December 2023).

<sup>24</sup> Government of Netherlands (2013) *Diplomatic immunity, Embassies, consulates and other representations | Government.nl*. Available at: <https://www.government.nl/topics/embassies-consulates-and-other-representations/diplomatic-immunity> (Accessed: 02 December 2023).

<sup>25</sup> *portugal vs. gonclaves Vol 82 (1974) 82 I.L.R. 115 (Civil Court of Brussels)*.

about receiving state progress<sup>26</sup>; and the freedom to settle wherever they like but not in a prohibited area of the receiving state.

- **NOT ABSOLUTE:** But this post of the diplomatic agent is also not absolute; it also comes to an end in situations where a diplomat dies. It dissolves eventually if he loses his post by the removal of the sending state, a change in government happens because of which an earlier diplomat is replaced, strains in the relations between the two states arise like the same happen in India and Pakistan in 2016 displeasure was seen with the action of country India expelled Pakistan diplomat accused of espionage<sup>27</sup>, which dissolve the diplomatic relations between the states, a transfer of the diplomat to another post happens, a war has been declared between the states, he or she is declared a persona non grata by the receiving state<sup>28</sup>, and their letter of credence expires and in situation where the diplomats has done some work unfit as per his character then there no requirement of any receiving state authority to take action formally against him he leave himself or withdrawn from the duties<sup>29</sup>. These are some situations in which the diplomatic agent loses his post. Article 1 Vienna Convention on Diplomatic relation of additional protocol provides that any disputes arising with the Vienna Convention on Diplomatic Relations lie within the jurisdiction of the International Court of Justice.<sup>30</sup>

## VI. CONCLUSION-

One of the most crucial components of international law are diplomats; their presence and their capacity to manage situations skillfully and carry out diplomatic missions as effectively as possible enable amicable relations between two states. They have immunities, which they utilize ironically in this situation because the Vienna Convention itself gives the state the option to renounce those immunities for the benefit of the public alone. Although diplomatic law is meant to protect the public solely, diplomats occasionally abuse it as well. This presents a hurdle for the appropriate ratification of the Vienna Convention and a barrier to diplomatic

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<sup>26</sup> Denza, E. (2016) *Freedom of movement, Oxford Public International Law*. Available at: <https://opil.oup.com/abstract/10.1093/law/9780198703969.001.0001/law-9780198703969-chapter-24> (Accessed: 02 December 2023).

<sup>27</sup> PTI (2016) 'Espionage case: India declares Pakistan Mission staffer persona non grata', *The Indian Express JOURNALISM OF COURAGE*. The Indian Express JOURNALISM OF COURAGE, 28 October. Available at: <https://indianexpress.com/article/india/india-news-india/espionage-case-pakistan-mission-staffer-declared-persona-non-grata/> (Accessed: 02 December 2023).

<sup>28</sup> Example of Queen Elizabeth I of England's expulsion of Don Bernardino de Mendoza, the Spanish Ambassador his involvement in conspiracy.

<sup>29</sup> Ahmad, N. (2020) 'The obligation of diplomats to respect the laws and regulations of the hosting state: A critical overview of the international practices', *Laws*, 9(3), p. 18. doi:10.3390/laws9030018.

<sup>30</sup> supra 2

efforts, but what can be done about this as stated by many jurists that international law didn't have proper sanction present, so there should be cooperation present in between both the state for proper functioning. However, examining the specifics of the diplomatic system reveals that these privileges are crucial to a country's improved functioning because they maintain the strength of the consulate but given that more changes are anticipated in the international backdrop, the future of the diplomatic regime is seen as promising.

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