# GROWING THREAT OF TERRORISM AND DIPLOMATIC IMMUNITY

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## INTRODUCTION

The law relating to the diplomatic immunity which awards absolute immunity to diplomats in cases of penal crimes has been one of the most debatable topics in the area of International Law. There have been situations in the past when the interpretation of the Vienna Convention on Diplomatic Relations (Hereinafter referred to as VCDR)[1] have been. Minor violations in diplomatic immunity can be ignored but while dealing with situations of grave violations such as murder, criminal conspiracy, crime against humanity, terrorism etc., it is not easy to ignore the acts done by the diplomats. This Article is an attempt to analyze the laws related to diplomatic immunity, its implementation, violations and various events where states have transgressed from the line drawn by the VCDR.

In the recent years it has been observed that the diplomats have frequently abused this immunity and disregarded the laws of the receiving state.[2] There has been a growing concern at the international level for preventing the receiving state from diplomatic abuses.[3] In times of growing fundamentalism and terrorism, the abuse of diplomatic immunity has acquired a special attention since there have been news items at the international level proving the proliferation of nuclear materials and technology. The diplomats, under the garb of immunity have an upper hand to be involved in espionage and nuclear proliferation. There has been a rise in the incidents caused by the terrorist diplomats. After the incident of the Libyan Embassy in London, the gunmen who shot Constable Fletcher had received a heroic welcome by President Qaddafi.[4] In 1987, the U.S. State Department issued a circular note to all foreign missions in the U.S. since it

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[1]United Nations Treaty Series, vol. 500, p.95-96

[2]Leich, *Contemporary Practice of the United States Relating to International Law*, [1984] 78 AM. J. INT'L L. 655, 658; *See also* Minzesheimer, *Exceptions to the Rules*, Wash. Post, Feb. 20, 1983 (Magazine), at 11, col. 1.

[3]*See, e.g., There Sits A State Terrorist*, N.Y. Times, Nov. 20, 1984, at A22, col. 1; *Quarantine the Qaddafis*, THE ECONOMIST, Apr. 28, 1984, at 11; Walden, *Libya: Issues That Must Be Faced*, The Times (London), Apr. 18, 1984, at 12, col. 2.

[4]Griffin, *Diplomatic Immunity Re examined*, L.A. Daily J., Nov. 21, 1984, at 4, col. 3.

had been observed that the diplomats and their family members were involved in criminal activities.[5] Increasing involvement of diplomats in criminal activities creates a picture that diplomatic immunities are being violated for criminal as well as terrorist purposes.[6] According to Ithai Apter, if it is found that the diplomatic immunities are being violated for terrorist purposes like smuggling of arms, only sending a diplomatic note to the sending state is an absurd remedy.[7]

Though there is a definite link between diplomatic immunity and functional necessity, nevertheless it is acceptable that offences like war crimes, crime against humanity etc. do not come within the purview of the functions of the diplomats. Therefore, it can be argued that in cases of war crime and crimes against humanity, the diplomats must lose the immunity and inviolability granted to them. The Rome Statute of International Criminal Court (Hereinafter referred to as Rome Statute) can be referred to which contains the crimes of such nature against which the states can agree upon[8] to go beyond the diplomatic immunity veil. Moreover not all acts performed by the diplomatic agents are considered as under official capacity of the diplomats.[9]

Abuse of diplomatic immunity falls into three broad categories: first, the use of the diplomatic bag to smuggle illegal goods into or out of the receiving state, and second, crimes committed by the diplomats themselves, whereas a third can be added in the form of espionage which although is an age old concept but in the recent years of technological developments it has become quite prevalent. In all the three situations which are based on incidental proofs, the receiving government is left with very narrow range of remedies. For example in the incident of Libyan Embassy in London, British authorities felt constrained not only by the fact that Britain had signed the Vienna Convention, but also by the presence of 8,000 Britons in Libya.[10]

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[5]Marian Nash Leich,, "U.S. Practice" [1988] 82 A.J.I.L. 103, 106.

[6]Alia Szopa, "*Hoarding History: A Survey of Antiquity Looting and Black Market Trade*" [2004] 13 U. MIAMI BUS. L. REV. 55, 61.

[7]Ithai Apter, "International Immunities v Fighting Terrorism", at 27 available at <works.bepress.com/cgi/viewcontent.cgi?article=1000...ithai_apter> accessed on 21st August 2009.

[8]<http://untreaty.un.org/cod/icc/index.html> accessed on 31st August 2009.

[9]J E Donoughe, "Perpetual Immunity for Former Diplomat: A Response to the absintio affairs – A Restrictive Theory of Diplomatic Immunity?" [1988] 27 Columbia Journal of Transnational Law, 615-630.

[10]*See, e.g., Quarantine the Qaddafis, ibid* 5, at 11.

# 1. PERSONAL IMMUNITY CANNOT EXONERATE LEGAL LIABILITY IN CASES OF DIPLOMATIC VIOLATIONS

## Preamble of the VCDR reads,

*"The purpose of such privilege is not to benefit the individual but to ensure the efficient performance of the function of diplomatic missions as representing states."*

The close perusal of the preamble establishes that the immunity exists not only for personal benefit but to enable diplomats to carry out their jobs perfectly. Here, a conflict between personal advantages and functional necessity of the immunity is clearly discernible. The receiving states can simply take the defence of the preamble while violating the immunity granted to the diplomatic agents. In the classic case of *Empson v Smith*[11], the Judge has clearly brought the meaning of the term "immunity" by stating that immunity means immunity from the suit not from legal liability. Hence it can be said that there is general consent that diplomatic agents are not above the law rather they are under the legal obligation to respect the local laws of the receiving state.[12] Hence it can be said that the *personal immunity is the physical immunity not the immunity to be relieved from the liability of law.* In other words, the immunity granted is procedural in nature or diplomatic agents cannot be subject to the jurisdiction of the receiving state unless they submit to the jurisdiction. The immunity of the diplomatic immunity laws restricts the jurisdiction of the receiving states but does not have the *erga omnes* effect.[13] In International Law state practices, states that the inviolability of diplomatic premises is not absolute[14] this is evident from the immunity waiver clause present in the VCDR.[15] Add to these, if the inviolability of premises is abused, the receiving state need not bear it passively.[16]

## 1.1 INCIDENTS OF BREACHING INVIOLABILITY

Despite the fact that the diplomatic laws have been in practice since the beginning of early civilizations, states have often acted in a manner contrary to VCDR principles

[11]QB 426 (1996).

[12]Article 41, VCDR 1963.

[13]See for example former Syrian Ambassador to the GDR case- ILR, 1999 vol.115, p.597.

[14]Jennings, Robert & Watts, Arthur, Robert Jennings & Arthur Watts, *Oppenheim's International Law*, 9th ed. (London: Longman, 1992) at 1074-1075[*Oppenheim*].

[15]VCDR Article 32 Para 1-2.

[16]*Ibid* at 1080.

and laws.[17] There have been earlier incidents of the violation of inviolability of diplomatic privileges by the receiving state but most of them have been on the grounds of self defence or emergency. In 1927, Chinese forces broke into the Russian embassy at Peking, and seized arms during the Russian protests. The Chinese Government replied that the result of the search justified the actions.[18] In 1948 a Japanese diplomat to Belgium, General Oshima, was arrested and put on trial despite having the diplomatic status.[19]

In 1973 the Pakistan authorities entered the premises of the embassy of Iraq in Islamabad and found crates containing large quantities of arms and ammunition.[20] In 1980 Iraqi officials entered into Syrian embassy in Baghdad, where they discovered large quantity of arms.[21] Forces of USA forcibly entered into the embassy of Nicaragua in Panama in 1990. The possible breaches of diplomatic immunity are always related with what kind of searches can be made justified. As for an example, USA forces had searched the premises of Nicaraguan Ambassador in search of weapons.[22] Search comes out as the best solution since it may reveal any explosives; and would result in a minimal injury to the diplomat and the resulting damage would be lesser than the benefits if the explosives are prevented from entering into the territory of the state.[23] There have been instances when the diplomatic laws have been violated in order to protect human lives as is evident from the decision of a British Foreign Ministry which allowed a diplomatic bag to be opened in the suspicion of a human being hidden inside it, which later came to be true.[24] The above discussions prove that there have been earlier incidents of breach of violations of diplomatic privileges and immunities if the situations so demand besides the fact that the diplomats' personal rights are not above the law and the circumstances.

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[17]S. Mohmaudi, *Some Remarks on Diplomatic Immunity from Criminal Jurisdiction*- J Ramberg O Bring, S. Mohmaudi (eds.). Festskrift till Lars Hjerner: Studies in International Law: Norstedts, 1990, p. 327.

[18]*Ibid* 46.

[19]C. Rousseau, *Droit International Public* Vol. 4 (Paris: Sirey 1980) at 202.

[20]The *Pakistan Times*, 13 February 1973.

[21]*Ibid* 8.

[22]Manegold C.S. & Lane C., A Standoff in Panama, NEWSWEEK , Jan. 8, 1990, at 28.

[23]Marcia Gelpe, "Constraints on Supreme Court Authority in Israel and the United States: Phenomenal Cosmic Powers; Itty Bitty Living Space" [1999] 13 EMORY INT'L L. REV. 493, 525.

[24]Lord Geoffrey Howe, "Essay: The Role of Law in International Affairs" [1994] 55 U. PITT. L. REV. 277, 285-286.

## 1.2 VIOLATION OF DIPLOMATIC PRIVILEGES ON THE GROUND OF SELF-DEFENSE

A very pertinent question that arises is with regard to the fact if diplomatic immunity can be violated on the ground of self defence since it is clear that states can act on the framework of the *"Just War Theory"*.[25] There are authors who have maintained that there is a right to self defence in the form of arrest or judicial proceedings in the situations of an immediate threat from a diplomat.[26] Even before the inception of VCDR, International Law Commission (Hereinafter referred to as ILC) has maintained that the personal inviolability does not exclude the right to self defence or the related rights.[27] Self defence was earlier considered as a possible argument to violate the law related to diplomatic immunity and it was very common during the 16th and 17thcentury. States too have availed the argument of self defence to violate diplomatic immunity. However, there are no clear parameters as to state when the arguments with respect to self defence can be adhered to. The classic *Caroline* case clearly defines the necessity of self defense.[28]

Although it is an established principle of international law that states can attack on the ground of self defence when it is necessary to do so, they are restricted on the ground of proportionality[29]. However, here the issue involved is the permissibility of the use of non-combat measures as self defence, as violations of international immunities tend to be. Yet, it can be claimed that non combat measures are very similar to peaceful measures hence there should not be any problem while invoking them because their exhaustion is a pre-requisite to the use of force for self defense.[30] While supporting the arguments for the violation of diplomatic immunities as a ground of self defence, a possible argument may be that such violations do not involve the use of lethal element, without specific injury of the sending state, but in many cases the violations are required to protect the citizens of the host state, territorial integrity which is utmost importance for international law coordination and relations.[31]

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[25]David Rodin, *War and Self-Defence* (Oxford University Press 2002) 103.

[26]See C.J. Lewis, State and diplomatic immunity. 3rd Edition London: Lloyd?s of London 1990 p.135.

[27]ILC Year book 1957, vol 1 pp.209-210; Vol. II p. 138; ILC Year book 1998, vol II p.97.

[28]See Caroline Case-British and Foreign State Papers 1857 vol.29 pp.1137-1139; See also, D.J. Harris, *Cases and Materials on International Law* (5th Edn Sweet and Maxwell London 1998) at 484-496.

[29]U.N. Charter, Art. 51, For an elaborate discussion on the framing of Art. 51 see Thomas Franck, *Recourse to Force* (Cambridge: Cambridge University Press, 2002) at 45-51.

[30]Oscar Schachter, "International Law: The Right of States to Use Armed Force" [1984] 82 MICH. L. REV. 1620, 1635.

[31]As established by the U.N. Charter, art. 2(4); See John E. Noyes, Symposium: The New American Hegemony?, Article : American Hegemony, U.S. Political Leaders, and General International Law, [2004] 19CONN. J. INT'L L. 293, 305.

According to Philimore[31] and Hall[32] the grounds of justifications are either self defence or that there is a reservation of the right to exercise over an envoy upon sufficient emergency. In a very interesting statement, the Legal Adviser to the Foreign and Commonwealth Office took the view that "self defence applies not only to action taken directly against a State but also to action directed against members of that State."[33]

There are historical instances where states have asserted their criminal jurisdiction over foreign diplomats suspected of having acted against the host state. For example, arrest of a Swedish ambassador by English authorities in 1917, and more recently, in 1999 the arrest of a U.S. diplomat in Moscow suspected for working with the C.I.A[34], the capture of an Iranian Diplomat in Iraq suspected of acts against USA Forces and the arrest of a British Diplomat in Eritrea who was suspected of spying.[35] Since these cases are not linked with the situations of war time it can be perceived that self defence even during times of peace can be a ground for violation of diplomatic privileges. When British officials searched the Libyan Embassy, they justified it on the grounds of self defence under International Law.[36] It is worth noting that United States Courts have earlier decided that even if diplomats are attacked first for the exercise of self defence, it is legally justified.[37] In a situation of reliable suspicion, for example, of smuggling explosives or possible use of the immunity by third parties etc., can be the most appropriate pre requirement for the violation of diplomatic privileges as ground of self defense.

## 1.3 HIERARCHY OF NORMS, DIPLOMATIC IMMUNITY AND *JUS COGENS*

One way of evading the law related to diplomatic immunity may be to equate the laws of diplomatic immunity with that of the hierarchy of norms. Laws related to diplomatic immunity and norms protecting human lives are considered to be norms of fundamental nature. The crucial question that arises here is that which among these should be put

[31]*Oppenheim ibid* 8.

[32]*Ibid.*

[33]See House of Commons, Foreign Affairs Committee Report at para. 94 [*Foreign Affairs Committee Report*].

[34]Igor Trifonov, US woman diplomat arrested on espionage charges, ITAR - TASS NEWS WIRE, Nov 30, 1999 (New York)

[35]Eritrean authorities free British diplomat arrested over "illegal" activities, BBC MONITORING NEWSFILE, Jul 12, 2007 (London).

[36]John S. Beaumont, "Self-Defense as a Justification for Disregarding Diplomatic Immunity" [1991] 29 CAN. Y.B. INT?L L. 391, 396.

[37]See *United States v Liddle* 26 F. Cas. 936, 2 Wash. C. C. 205 (1808)

under the category of *jus cogens*[38] or whether both constitute the basic norms. From the analysis of the diplomatic laws, it can be said that such laws are function based laws and hardly fall in the category of *jus cogens* and the same functionality argument can be extended to exclude diplomatic immunity laws from natural rights principles. Emphasizing the rationale of natural law, D.G. Basher is of the opinion that how a law like that of the diplomatic immunity, which exclude trials on the basis of the utility based principle, be put under the ambit of natural law.[39] In addition to these, it is also true that administrative and technical staff[40] gets limited diplomatic immunity since diplomatic rank is not awarded to administrative and technical staffs which strengthens the presumption that the diplomatic privileges can be diluted in certain extreme situations with respect to certain class of officials. Hence it is very difficult to provide the *jus cogens* status to diplomatic immunity laws.

## 1.4 DRAWBACKS OF THE VCDR

Though Vienna Convention on Diplomatic Relation (VCDR), 1961, provides the remedy in Article 9 by equipping the receiving state with the power to grant *persona non grata*, nevertheless, in the wake of diplomats aiding terrorist activities it is an inadequate deterrent as well as an inadequate punishment. The weakness of the present remedy under the provisions of VCDR is that it might become a reason for the forced break off of diplomatic relations by expelling all the diplomats, or else nothing can done at all. The minute analysis of this remedy carries us to the conclusion that the receiving state is left with two extreme options i.e. either to break off the diplomatic relations or to let the abuse be carried on. Again, this goes against the very underlying purpose of law as has been described by Roscoe Pound: that law is a tool to balance conflicting interests.[41] Also the solutions being extreme in nature, it goes against the principles of reasonableness, which is the heart and soul of international relations. The ease with which the air travel can be made and the capability of hiding firepower in the diplomatic bags besides the inviolability granted to them makes the situation very serious and thinkable. Even in the words of the *Economist*, "The immunity of the diplomatic pouch is an open invitation for the import of spies and criminals complete with drugs, guns, and explosives."[42]

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[38]Article 53 VCLT, 1969

[39]D. Ben. Asher *"Human Rights Meet Diplomatic Immuities: Problms and Possible Solutions.* Available at <www. law.harvard.edu/Admissions/GraduatePrograms/publicationspaper/benasher.pdf> [last visited on 5.8.2003].

[40]*Vienna Convention on Diplomatic Relations*, 18 April 1961, 500 UNTS 95, at Article 1(d) and (f) (*VCDR*).

[41]G W Paton, *A Textbook of Jurisprudence* (Oxford University Press, 2007) 37-38.

[42]*Quarantine the Qaddafis*, The Economist, Apr. 28, 1984, at 11.

## 1.5 WHETHER VCDR CAN BE AMENDED

There is no way of ascertaining if a bag contains illicit materials save by examination; and that possibility gives too much opportunity to a receiving state to interfere with the proper flow of diplomatic materials. International community has started to realize that the present level and nature of diplomatic immunity causes the incidents of abuse to be more inevitable.[43] This takes us to the debate as to whether the provisions of VCDR can be amended? Though the provisions of VCDR are unambiguous and therefore not difficult to interpret, one of the suggestions could be in the form of amending the provisions of VCDR in such a way so that the receiving state could invoke the right to self-defence when the diplomats go on with blatant abuse of the privileges granted to them. According to the former Associate Justice of the Supreme Court, USA, Arthur Goldberg, actions must be taken for the abuse of diplomatic privileges.[44] A possible change can be made in Article 27(3) of the VCDR which grants inviolability to the diplomatic bags. Article 27(3) reads:

*"The diplomatic bags shall not be detained or opened."*

However, one can depart from this principle in the form that, there is no provision as to the checking of the diplomatic bags through electronic medium. Some states have raised this point that diplomatic bags can be made subjected to the electronic search.[45] Arguably, the convention fails to accord for the full "inviolability" to the bag as the negotiators were conscious of the abuse and they had the intention to bring the diplomatic bags within the ambit of external examinations by any equipment or dog or any other kind of safeguard.[46]

Two main grounds have been advanced for suggesting that one does not have to treat the provision in Article 27(3) of the Convention to be mandatory. The first is that the inviolability of the bag is to protect diplomatic materials, but not materials that do not fall in that category and indeed constitute an abuse of the diplomatic bags. The second is that abuse by members of a mission of the functions protected under the Convention entails forfeiture of the protection of the Convention.[47] Sir John Freeland noted that[48]

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[43]Generally Minutes of Evidence Before the House of Commons, supra note 37; S. 2771, 98th Cong., 2d Sess. (1984).

[44]Goldberg, "The Shootout at the Libyan Self-Styled People's Bureau: A Case of State Supported International Terrorism" [1984] 30 S.D.L. REV. 1, 3-4.

[45]See, e.g., Minutes of Evidence before the House of Commons, *ibid* 37, at 5.

[46]E. Denza, *Diplomatic Law* (1976) at 1.

[47]Rosalyn Higgins, "The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience" [1985] 79 A.J.I.L. 641.

[48]Foreign Affairs Committee Report *ibid* 50 at para. 29.

Article 27 of the Convention requires only that the bag not be "opened or detained" and does not accord full inviolability. Routine examinations can be done through external methods which will be helpful in detecting guns, or any illicit material while keeping the things inside safe.[49] There is no international consensus as to the fact that diplomatic bags should be granted absolute immunity for search and should never be subjected to such search. The states could claim to open it[50] and states (like Saudi Arabia) have exercised this power.[51] The United Kingdom made no objection to this reservation, believing that it was not incompatible with the object and purpose of the Convention, and that it represented customary international law as it was before the Convention.[52]

## 2. INTERNATIONAL CONCERNS

Article 1 of the UN Charter says that international peace and security must be maintained by removing the threats to the peace. United Nations Security Council (UNSC) adopted Resolution 1540 on the non-proliferation of weapons of mass destruction (WMD).[53] The resolution is a code of conduct for a binding legal instrument against proliferation of WMDs which is a global concern[54] supported to stop non-state efforts to access[55] nuclear and biological weapons. The Security Council, *affirming* that proliferation of nuclear weapons constitutes a threat to international peace and security urges states to establish domestic controls to prevent the proliferation of such weapons, in particular for terrorist purposes.[56] *Gravely concerned* by the threat of terrorism and the risk that non-state actors, as per UNSC Resolution 1267 and 1373 and to take additional measures, all states have to refrain from assisting non-State actors that attempt to develop, or acquire, nuclear weapons. All states are expected to adopt and enforce appropriate effective laws, thereby urging states to take effective domestic control[57] which prohibits any non-State actor to manufacture or acquire nuclear weapons.[58]

[49]Diplomatic Immunities and Privileges: Minutes of Evidence Before the House of Commons Foreign Affairs Comm., Session 1983-84.

[50]Satow's, *Guide to Diplomatic Practice* 5th Ed (Lord-Gore Booth, 1979).

[51]Malcom Shaw 530 (4th Edition, 1997).

[52]House of Commons, Foreign Affairs Committee Report at para. 99.

[53]Security Council Resolution to Prevent Proliferation of weapon of mass destruction, UNSC 1540 Available at:<"http://www.un.org/Docs/sc/unsc_resolutions04.html"> last visited 17 July 2009 [*UNSC 1540*].

[54]UN General Assembly General Debate, September 21 - September 30, 2004: Excerpts on Disarmament, Non-Proliferation & International Security, online at: <http://www.acronym.org.uk/docs/0409/doc22.htm> last visited 30 July 2009.

[55]*UNSC 1540* Preamble.

[56]*Ibid*

[57]*UNSC 1540 ibid* 57.

[58]*Ibid*

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[55]*UNSC 1540* Preamble.

[56]*Ibid*

[57]*UNSC 1540 ibid* 57.

[58]*Ibid*

Here it is worth mentioning the analysis of various statutes of ICC whose close perusal gives an idea that the official status cannot be a ground to evade liability. Various International Tribunals like International Military Tribunal of Nuremburg to try the offences committed by the Nazi Germany has clearly rejected the official position as the ground to evade the liability.[59] Article 7 of International Military Tribunal of Nuremburg clearly provides that the position of defendants as the heads of the states or responsible officials of the Government Department cannot be considered as a ground to evade the liability incurred due to crimes of the international nature. The Rome Statute of ICC has clearly established that the jurisdiction of the statute to all the persons irrespective of the distinction based on the official capacity.[60] Further, paragraph 2 of the same Article says that immunities or special procedural laws which may attach to the official capacity of a person whether national or international shall not bar the Court from exercising jurisdiction over such persons.[61] Therefore it is discernible that one cannot hide under the garb of diplomatic protection or official status if a crime of an international nature has been committed on the land of a nation who is party to the statute of ICC or the accused is the party of the statute.[62]

Stephen L. Wright has commented for removal of diplomatic immunity "for substantial criminal conduct has been commented"[63]. Though VCDR acts as balancing the interests of the sending and receiving states is accepted,[64] proponents of the removal of immunity argue that there is no theoretical justification for that immunity. Article 41 of the VCDR specifically commands that a diplomat has the duty to "respect the laws and regulations of the receiving State.[65]

Diplomatic agents and staffs are supposed to act as per the principles of UN Charter concerning the sovereign equality of States[66], the maintenance of peace and security[67],

[59]See for example Charter of the International Military Tribunal of Nuremberg, article 7 paragraph 2; statute for International Criminal tribunal for Rwanda, article 6, paragraph 2; Rome Statute of the International Criminal Court, article 27 Paragraph 1,2.

[60]Article 27, paragraph 1 of Rome Statute.

[61]Article 27, paragraph 2 of Rome Statute.

[62]Article 12 of Rome Statute.

[63]Stephen L. Wright, "Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Act" [1987] 5 B.U. INT'L L.J. 177, 184.

[64]H.C. Foreign affairs committee, first report, the abuse of diplomatic immunities and privileges, report with an annex; together with the proceedings of the committee; minutes of evidence taken on 20 June and 2 and 18 July in the last session of parliament, and appendices (Dec. 12, 1984).

[65]36 Hofstra L. Rev. 601.

[66]Charter of the United Nations 59 Stat. 1031, T.S. 993 Art 1(1) [UN Charter].

[67]UN Charter Article 1(2)(v).

and the promotion of friendly relations.[68] The purpose of privileges and immunities is to ensure the efficient performance of the functions of diplomatic missions.[69] Terrorism or other criminal activities can never be justified with reference to these functions. In a speech to the American Bar Association, Secretary of Defence Caspar Weinberger said that "the idea of immunity needs to be re-examined in light of diplomats who abuse their privileges, particularly through terrorism."[70] Privileges are granted to harmonize the relations among states.[71] A diplomatic envoy must not assist in the preparation of terrorist acts in or against the receiving state.[72] The administrative staffs by participating in the operation to leak sensitive nuclear technology to a fundamentalist group grossly misuse their diplomatic immunities and powers. Instead of working towards their diplomatic mission, they indulged in criminal activities and thus cannot take the plea of diplomatic immunity.

## 3. WHETHER AIDING TERRORISM AMOUNTS TO VIOLATION OF *JUS COGENS*

Article 53 of the Vienna Convention of Law of Treaties (VCLT) defines *jus cogens* as,

"Norms accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by subsequent norm of general international law having the same character".

Whereas, Article 64 contemplates the emergence of new rules of *jus cogens* in future, such a category of rules of *jus cogens* is a comparatively recent development and there is no general agreement as to which rules have this character.[73] The full content of the category of *jus cogens* remains to be worked out in the practice of states and in the jurisprudence of international tribunals. Article 66 of the VCLT provides for the judicial settlement of disputes concerning the application and interpretation of Articles 53 and 64.[74] The appropriate test would require universal acceptance of the proposition as a legal rule of *jus cogens* by an overwhelming majority of states, crossing ideological and

[68] *VCDR ibid* 63 at Preamble of VCDR.

[69] *Oppenheim ibid* 8 at 1091.

[70] *Oppenheim ibid* 8 at 1098.

[71] *Oppenheim ibid* 8 at 1096.

[72] *Oppenheim ibid* 8 at 1069.

[73] Hannikainen, *Peremptary norms (jus cogens) in International Law: Historical Development, Criteria, Present Status* (Finnish Lawyers Publishing Company Helsinki 1988); F A Mann, *Further studies in defence International Law* (Clarendon Press Oxford 1990) at 84-102.

[74] *Oppenheim ibid* at .8

political divides.[75] Inviolability of Embassy Premises is by no stretch of imagination a *jus cogens* norm and derogation from this principle is permissible. The acts of terrorism has been condemned by almost every member of international community and considered to be crime against humanity.[76] UN has sought to tackle question of terrorism in comprehensive manner.[77] Security Council[78] and General Assembly[79] have passed resolutions condemning terrorism and to counter terrorism. A supplementary declaration was adopted in 1996, which emphasizes in addition that acts of terrorism and assisting them are contrary to the purposes and principles of the UN. The inconsistency of State Practice illustrates that no single definition of terrorism exists [80] therefore, if the diplomatic privileges are being violated to aid the acts of terrorism, must be included within the purview of *jus cogens* since, terrorism being a crime against humanity has caused the death of thousands of people. In *Prosecutor v Galic*[81] the International Criminal Tribunal for Yugoslavia ("ICTY") identified the "*specific intent*" to spread "terror" as the *mens rea* of terrorism. Passing the nuclear technology to a fundamentalist group that avows *malafide* intention can be seen as a *mens rea* of terrorist activity. Prohibition of terrorist activities has got the characteristics of falling under the category of *jus cogens* norm and thus holds a greater priority over the principle of diplomatic immunity. If any diplomatic immunity is being abused to aid and support the cause of terrorism by providing the nuke technology know how, it must be considered as an aid to acts of crime against humanity or moreover a violation of *jus cogens* norms. Although customarily such acts are not considered as the violation of *jus cogens* norms but the international relations are so dynamic that the customary principles keep on evolving[82] like the evolution of exclusive economic zones. Add to these, there are provisions of instant customary law too which are developed keeping in mind the requirement of the international community.[83] Basing on the above line of arguments it is discernible that in the present situation of global order when terrorism has posed a

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[75]Sinclair, *The Vienna Convention on Law of Treaties* (Manchester University Press Manchester 1984) at 218-24.

[76]E Schwelb, "Crime against Humanity" [1946] 23 Brit. Y. Int?l L. 178.

[77]M Shaw, *International law*, 5th ed. (Cambridge University Press 2003) at 1049.

[78]SC Res. 1373 (2001), UN SCOR, 2001, UN Doc. S/INF/57, 291 where Security Council Unanimously Adopts Wide-Ranging Anti-Terrorism Resolution; Calls For Suppressing Financing, Improving International Cooperation.

[79]*Ibid.*

[80]Franck, "Preliminary Thoughts Towards an International Convention on Terrorism" [1974] 68 A.J.I.L. 69.

[81]*Prosecutor v Stanislav Galic*, Case No.IT-98-29-T, (5th December 2003) ((International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).

[82]*M. Shaw ibid* 77 at 69.

[83]*M. Shaw ibid* 77 at 70.

big challenge the world community should consider to put the abuse of diplomatic privileges for aiding the terrorist activities as violation of *jus cogens* norms. And for the protection of the humanity, the international rules and laws should be moulded in such a way so that the growing demands of the situation could be fulfilled.

## CONCLUSION

From the analysis of the various laws related with the international crime, diplomacy and other relevant rules it is easily understandable that the diplomatic immunity laws are very tough to be interpreted in favour of the receiving states. A possible remedy could be to develop a new norm through international cooperation making the rules of diplomatic immunity a more flexible one. Whenever there is consent that there should be *ad hoc* permission for the searching of diplomatic bags or premises states sometimes allow host states to examine the contents of diplomatic cargo in specific instances[84] which may lead to the development of the new norms of international law.[85] The receiving state may also ask for the background details of the diplomat before receiving him. With the rise of the diplomatic abuses along with the rise of the terrorist activities there must be a balanced approach and an alternative so that the legitimate concerns of receiving state could be protected beside to prevent the potential of abusing immunity from searches by security personnel or by third parties could be ended.

[84]See for example the consent by the U.S.S.R. to allow West German customs agents to inspect diplomatic cargo, William Drozdiak, Dispute Over Truck's Cargo Is Settled in Bonn, THE WASH. POST, July 24, 1984, at A17.

[85]Jun-shik Hwang, "A Sense and Sensibility of Legal Obligation: Customary International Law and Game Theory" [2006] 20 TEMP. INT'L & COMP. L.J. 111, 129.