



**DIPLOMATIC IMMUNITY AND CHALLENGES TO ITS  
IMPLEMENTATION IN ETHIOPIA**

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## **DECLARATION**

I, **TEMESGEN MELESSE**, hereby declare that this thesis is original and the result of my own work and has never been submitted to any other institution. I also declare that any secondary sources or materials used in this thesis have been duly acknowledged.

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## List of Abbreviations

UN-ECA.....	United Nations Economic Commission for Africa
DRA.....	Diplomatic Relations Act
FDRE.....	Federal Democratic Republic of Ethiopia
FGA.....	Federal General Attorney
AAPC.....	Addis Ababa Police Commission
ICJ.....	International Court of Justice
IGAD.....	Intergovernmental Authority on Development
AU.....	African Union
IOs.....	International Organizations
MoFA.....	Ministry of Foreign Affairs
UN.....	United Nations
USA.....	United States of America
VCCR.....	Vienna Convention on Consular Relations of the 1963
VCDR.....	Vienna Convention on Diplomatic Relations of the 1961
ICC.....	International criminal court
ART.....	Article
KII.....	Key Informant Interview
VCLT.....	Vein Convention on the Law of Treaties
UNTC .....	United Nation Treaty Collection

## **ABSTRACT**

The principle of diplomatic immunity is premised on a fiction: injury to an individual is treated as if it constituted injury to the individual's national state, entitling the national state to espouse the claim based on the international law principles. While the 1961 VCDR and local laws of Ethiopia on diplomatic immunity acknowledged this legal fiction, it continues to be the subject of debate and complexity in its practical implementation. Therefore, the study examines and critical analysis the discrepancies, gaps and uncertainties in the 1961 VCDR and other pertinent local legislations on the implementation of diplomatic immunity in Ethiopia as the host state. As well, this study tries to consider with scrutiny about the magnitude of diplomatic immunity implementation challenges and the mechanisms designed and availed by the Ethiopian government, in light of the well-established diplomatic international law, in which they could be put in to practice to bring about proper implementation of diplomatic immunities.

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# CHAPTER ONE

## GENERAL INTRODUCTION

### 1.1 Background of the study

The concept of diplomatic immunity is an ancient idea based on a mutual understanding between different societies. The idea that a society could send a person on their behalf to negotiate and argue for their cause has been a vital tool in the history of international relations. And also, the need for diplomatic tools became more evident and the concept became customary law to later evolve to being structured by various treaties. Related to this, some of the purposes and principles of the charter of the United Nations concern the sovereign equality of all states, and the promotion of friendly relations among nations<sup>1</sup>. Also, international conventions on diplomatic intercourse and immunities have been considered significant to the development of friendly relations among nations<sup>2</sup>.

Towards this end, the laws on diplomatic immunity is one of the most important areas of international law<sup>3</sup> and these laws are codified for the sake of guiding the relations of sovereign states which is also an exception to the principle of territorial sovereignty that denies a state to have exclusive jurisdiction within its boundary. In terms of near-universal participation by sovereign States, the high degree of observance among States parties and the influence it has had on the international legal order, the 1961 VCDR may claim to be the most successful of the instruments drawn up under the United Nations framework for codification and progressive development of international diplomatic law.

Clearly, diplomatic relations are undertaken through diplomats that represent their states and diplomats need to be given certain exceptions and invulnerability to be engaged in diplomatic activity. In relation to this, the 1961 VCDR explicitly states that the person of a diplomatic agent

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<sup>1</sup> Charter of the United Nations done at San Francisco on 1945, Article 1(1) and 1(2)

<sup>2</sup> Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95 (VCDR); 23 UST 3227

<sup>3</sup> Natalia Dvornycsenko, 'The Specific Aspects of Privileges and Immunities of Diplomatic Agents in International Law: Theory and Practice' (Doctoral School of Law and Political Sciences, Budapest Press 2017) 14.

shall be inviolable and shall not be liable to any form of arrest or detention as well as the receiving state shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.<sup>4</sup> Further, diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State.<sup>5</sup> The Convention also provides immunity from civil and administrative jurisdiction of the host state except in the case of a real action relating to private property; action relating to succession; or action relating to professional or commercial activity.<sup>6</sup> Additionally, the members of the family of a diplomats forming part of his household shall, if they are not nationals of the receiving State, enjoy such privileges and immunities.<sup>7</sup>

While the 1961 VCDR on diplomatic immunity have been widely accepted as necessary for the conduct of diplomacy, it has been a frequent question and dilemma in history that when an official considered as exercising his /her official functions of the sending state, what his/her real diplomatic immunity and privileges actually and up to what extent and whose diplomatic immunity rights are being protected. Along with this, the loophole and uncertainties of the 1961 VCDR have often created a challenge in the proper implementation of diplomatic immunities in the host states.

Moreover, the apparent violation of host state laws and abuse of their immunity by rogue diplomats, and the seemingly lack of countermeasures in this law has fostered a growing debate as to the flaws of the 1961 VCDR. In other words, despite the immunities and privileges under the convention from host state's jurisdiction, the convention, in contradiction with such immunities and privileges, expects the diplomats to behave in a manner acceptable by the host country's laws and regulations<sup>8</sup> without providing any civil, criminal and administrative mechanisms whenever there is abuse of their diplomatic immunities and violation of the host country's laws and regulations.

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<sup>4</sup> VCDR (n 2) Art 29

<sup>5</sup> *ibid* Art 31 (1)

<sup>6</sup> VCDR (n 2) Art 31 (1) (a-c)

<sup>7</sup> *ibid* Art 37

<sup>8</sup> VCDR (n 2) Art 41

Addis Ababa, a capital of Ethiopia, hosts many foreign embassies, diplomatic missions and international and regional organizations including African Union (AU) headquarter, United Nations Economic Commission for Africa (UNECA), United Nations Development Programme (UNDP) Africa's regional office, European Economic Commission (EEC) office in Africa, the Intergovernmental Authority on Development (IGAD) and others. There are a number of diplomatic communities and international organizations having diplomatic immunity by the application of 1961 VCDR, the 1946 Convention on the Privileges and Immunities of United Nations<sup>9</sup>, and host country agreement<sup>10</sup> in Ethiopia. With no clear guidance from the law maker concerning diplomatic immunity and its implementation as the host state, the law enforcement organs in Ethiopia left to their own structure, reasoning and interpretations of this ambiguous and delicate issue, and the considerations of foreign affairs policy.

## **1.2. Statement of Problem**

The principle of diplomatic immunity is a long established component of international law that bestows upon the diplomatic communities and their immediate family exemption from the jurisdiction of local courts and other government systems on their actions as carried out on behalf of their home governments. Today, diplomatic immunity is a crucial and undeniable right of every diplomatic community. In order to perform their duties of promoting peace and understanding amongst nations, it is imperative that the diplomatic communities be protected by immunity that prevents foreign governments from illegal repercussions and provides the diplomatic communities with the environment free from civil, criminal, administrative and host state interference. The 1961 VCDR allows foreign country diplomats to go to other sovereign states with immunities and privileges of local judicial and administrative systems and the formulation of its' rules and principles on diplomatic immunity has been a vindication of the importance of facilitating peaceful reciprocal relations between states that is essential for the conduct of political economic and social interactions between states.

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<sup>9</sup> Convention on the Privileges and Immunities of United Nations, Adopted by the General Assembly of the United Nations on 13 February 1946.

<sup>10</sup> Host country agreement means an agreement between the host country and incoming international organizations to establish a legal framework under which that organization could conduct its affairs in the territory of the host country.

Ethiopia has ratified the 1961 VCDR 22<sup>nd</sup> March 1979<sup>11</sup> and it became an integral part of the law of the land. Despite the codification and acknowledgement of the legal fiction of diplomatic immunity and privileges under the 1961 VCDR and some local laws of Ethiopia, it continues to be the subject of debate and controversies in its implementation in Ethiopia. As the experience of the Ethiopian justice system has witnessed, the confusions and uncertainties of these diplomatic immunity laws on the exact extent and coverage of diplomatic immunity given to diplomatic communities; when an official considered as exercising his /her official functions of the sending state; up to what extent and whose diplomatic immunity rights are being protected have posed practical and legal challenges on the implementation of diplomatic immunity in Ethiopia. This also will likely to create complicated legal situations and possible misinterpretation among law enforcement organs and legal practitioners during their effort to implement diplomatic immunity to real life situations and cases.

Furthermore, the 1961 VCDR has an object to exonerate diplomats from domestic jurisdiction.<sup>12</sup> Whereas at the same time the Convention imposes obligation on diplomats to honor and adhere to the law of the host country in which they are accredited to<sup>13</sup> and also, for instance, the labor proclamation of Ethiopia clearly provides the scope of its application so as to include diplomatic communities and makes diplomats subject to this proclamation.<sup>14</sup> This is a clear contradiction which brought legal and practical implementation challenges and dilemmas on law enforcement organs in Ethiopia where justice could be served. Besides, the loophole, the clash with other international laws' principles and the lack of coercive mechanism in the convention and local laws, which concerns about diplomatic immunity, in enforcing or settling disputes whenever there is violation of the host country's laws and regulations by diplomatic communities also impose a practical and legal application problem of diplomatic immunity in Ethiopia.

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<sup>11</sup>United Nations Treaty Collection, 'Vienna Convention on Diplomatic Relations ratification status' <[https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=iii-3&chapter=3&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iii-3&chapter=3&lang=en) > accessed 16 June 2020

<sup>12</sup> VCDR (n 2) Art 29, 31(1), 37

<sup>13</sup> *ibid* Art 41

<sup>14</sup> Labor Proclamation 1156/2019, Negarit Gazzette 25<sup>th</sup> year No. 89, 5<sup>th</sup> September 2019, Art 3 (3)

The dimension and volume of such problems are more exacerbated challenge due to the fact that Addis Ababa, a capital of Ethiopia, is a hub for many diplomatic missions and also likely to increase with the raising numbers and transactions in which diplomatic communities that based in Ethiopia could meet and get in to civil, criminal and administrative transactions rise. As well, the problem is worsened by Ethiopia's level of economic and political development that makes it comparatively weaker in taking serious measures for fear of losing its' strategic partners and donors.

### **1.3. Objective of the Study**

#### **1.3.1 General objective**

The overall aim of this research is to clarify and advance an understanding of the discrepancies, gaps and uncertainties in the 1961 VCDR and other pertinent local legislations of Ethiopia on diplomatic immunity. As well, there needs to make research about the magnitude of diplomatic immunity implementation challenges and the mechanisms designed and availed by the Ethiopian government, in light of the well-established diplomatic international law, in which they could be put in to practice to bring about proper implementation of diplomatic immunities. By so doing, the research intends to contribute for the creation of the foundation up on which consistent and reasoned implementation of diplomatic immunities in judicial organs and other law enforcement institutions in Ethiopia.

#### **1.3.2 Specific Objectives**

- Identify and analyze the legislations (international or/and domestic) which govern issues of diplomatic immunity in Ethiopia;
- Identify and describe the coverage of diplomatic immunity in Ethiopia;
- Identify and describe the gaps between the law and practice in Ethiopia;
- Comparatively study countries experience in dealing with diplomatic immunity on one hand and its implementation on the other hand;
- Assessing the existing remedial approaches and measures availed by the Ethiopian government whenever diplomatic communities found against the laws of Ethiopia and abuse their diplomatic immunity.

#### **1.4. Research Questions**

- ✓ What are the laws (international or/and domestic) which govern issues of diplomatic immunity in Ethiopia?
- ✓ What exactly is the extent and for whom, and which areas of the diplomats' transactions are given diplomatic immunity under the 1961 VCDR and domestic law in Ethiopia?
- ✓ What are the gaps and confusions being noticed in the implementation of diplomatic immunity in Ethiopia?
- ✓ What are the mechanisms and measures designed by the Ethiopian government in which they could be put in to practice to bring about proper implementation of diplomatic immunities and their challenges to implement?
- ✓ What are the uncertainties in the link and status between human right laws and diplomatic immunity laws?
- ✓ Should the world community, including Ethiopia, need to reconsider absolute diplomatic immunity right under the 1961 VCDR?

#### **1.5. Significance of the study**

This research is important and different in its kind as it provides various instances of the practical and legal problems experienced with the application of diplomatic immunity, particularly when issues involving diplomatic communities become subjects of, inter alia, judicial and law enforcement institutions cases in Ethiopia. Along with this, the research is also vital in making and providing possible way outs in which the existing system of diplomatic immunity in Ethiopia could be enhanced through designing policies, enacting laws and code of conducts as well as improving the practice for the effective and efficient implementation of diplomatic immunity.

#### **1.6. Scope of the Study**

Diplomatic immunity is a very broad concept which can be analyzed in different ways. For this research, the researcher will try to assess diplomatic immunity of foreign state officials and persons mentioned under the 1961 VCDRV<sup>15</sup> by focusing on this convention and other laws and working manuals concerning diplomatic immunity in Ethiopia. Since all diplomatic communities of Embassies, International and Regional Organizations residing in Ethiopia have their head

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<sup>15</sup> VCDR (n 2)

offices in Addis Ababa and their first stop is the Ministry of Foreign Affairs to have diplomatic ID and to process their diplomatic immunity, the geographic scope of the research is limited to Addis Ababa. Further, the research focuses mainly on the implementation challenges of diplomatic immunity in Ethiopia as the host states, and the researcher will also confine the subject matter on the current issues and cases.

### **1.7. Literature review**

There are many writers who deal with the concept of diplomatic immunity and its specific implementation challenges in the host states in general. Among others; one is the work of Emelie Munoz<sup>16</sup> that the author tried to see diplomatic immunity from different perspectives. First the writer tried to analyze the structure of the concept of diplomatic immunity especially related with the definition of diplomatic agent and member of their family as they are holder of diplomatic immunity. Secondly, the writer tried to assess the implementation problem of the 1961, and by raising ICJ case called “arrest warrant case (Congo vs. Belgium)” based on the decision, the writer concluded that the immunity granted is personal or it includes all private acts but not limited to official act of diplomats. Thirdly, the writer showed that diplomatic immunity is problematic in creating inequality between people, discriminatory treatment of between citizen and diplomats is unjust and it is very violation of the principle “equality before the law”. Fourthly, the writer analyzed the concept of diplomatic immunity from the duty of state perspective that a state must respect, protect and fulfill all human rights.

Another writer<sup>17</sup>, Eirwen-Jane Pierrot, on the work of “Escaping Diplomatic Impunity” argues that in recent decades evidence has mounted of abuse by diplomats of their immunities and also the author maintains that despite the duty of diplomats enshrined under article 41 of the 1961 VCDR, there is no any enforcement mechanisms under it whenever the diplomatic communities engage in violation of the laws and regulations of the host states. Further, concerning the hierarchy of diplomatic immunity and human rights, the writers argue that international human right shall prevail over diplomatic immunity whenever there are contradictions between them,

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<sup>16</sup> Emelie Munoz, Diplomatic Immunity- a Functioning Concept in the Society of Today (Lund University, Department of Human Rights Studies, 2012) 2 & 33-35

<sup>17</sup> Eirwen-Jane Pierrot, Escaping Diplomatic Impunity: The case for Diplomatic Law Reform ( October 2010) 1

and the author proposes the amendment of the 1961 VCDR and the Rome Statute so as to subject diplomatic communities under the jurisdiction of ICC.

In addition, there is additional paper written by Rita Bonillo and its topic is that “Vienna Convention on Diplomatic Relations: Abuse Arising Therefrom.”<sup>18</sup> Based on its objective, the paper tries to point out the reason behind diplomatic abuse and attempt to elucidate the possible remedies against abuses of diplomatic privileges and immunities. Also the author reiterates the importance of the need for amendment of the VCDR for a truly effective re-evaluation of immunity via restrictive interpretation, the adoption of a functional approach and the limitation of immunity to grave or official crimes.

The other journal article written by Mitchell S. Ross, which titled as “Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities”<sup>19</sup>, talks about how diplomatic immunity functions in United States. It also explains the effective remedies available to prosecute diplomats immune from US civil and criminal jurisdiction like persona non grata procedure, waiver of immunity, termination of diplomatic relations, and state department measures.

Further, the most recent work<sup>20</sup> that the researcher try to examine shows that immunity is designed for smooth functioning of relations among states and their representatives, and equating immunity with impunity in cases of domestic abuse of diplomatic protection presents a major handicap against the well-functioning and implementation of other laws.

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<sup>18</sup> Rita Bonillo, ‘Vienna Convention on Diplomatic Relations: Abuse Arising Therefrom’ (LL.D Thesis, Faculty of Laws, University of Malta 2014).

<sup>19</sup> Mitchell S. Ross, ‘Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities’ (1989) 4 American University International Law Review, Issue 1 Article 14

<sup>20</sup> Selam Ozdan, ‘Immunity Vs. Impunity in International Law: A Human Rights Approach’ (2018) 4 Baku State University Law Review, No. 1

Moreover, the other literature that the researcher try to examine shows that how is the near-blanket immunity, which accorded to the diplomats, implement in the host states?<sup>21</sup>, and it further offers that the abuse of diplomatic immunity is as a result of weak legislation and that the lack of an enforcement mechanism in the 1961 VCDR has curtailed its implementation.

Almost all of the aforementioned literatures are basically designed from international law rules and perspectives, and the scope of the studies is mainly limited to specific jurisdictions. Ethiopia has ratified the 1961 VCDR 22<sup>nd</sup> March 1979<sup>22</sup> and consequently, the country is obliged to adhere to the rules and principles recognized in the Convention. Thus, all the above literatures did not address the issue of diplomatic immunity and its implementation challenges in Ethiopia. And also the researcher has not come across any research or report with regard to the state of the diplomatic immunity and its implementation challenges in Ethiopia to the best of his knowledge. Therefore, the research will try to address this issue in detail.

## **1.8. Research Methodology**

### **1.8.1. Data Collection Methods**

The researcher will use both primary and secondary data to conduct the research. The research intends to conduct interview with MoFA, FGA and AAPC officials in Ethiopia. It is evident from the nature of the objectives stated above that the lion share area of this study mainly the theoretical aspect of it and will involve doctrinal legal research as the research will be based on a traditional legal texts and case analysis. So that, the 1961 VCDR as an international legal document, and other local laws and working draft manuals of Ethiopian MoFA which is subject of consideration, and Cases that have been decided by Ethiopian Federal first instant courts and pending cases in Arbitration Affairs Directorate of Ethiopian MoFA will be analyzed.

This research also draws on an extensive reading of academic literature, books and journal articles as secondary sources. Considerations will also be made to make sure that the materials selected being recent works and their authors' expertise on the subject under investigation.

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<sup>21</sup> Charity Simuli Wanyela, 'Diplomatic Privileges and Immunities: A Critical Analysis of the Vienna Convention on Diplomatic Relations' ( MA Thesis, Nairobi University 2014)

<sup>22</sup> UNTC (n 12)

### **1.8.2. Method of Analysis**

The research employs doctrinal or conceptual methods of analysis. This is mainly because the thematic area of the research will be based on critical analysis and consultation of traditional legal texts and court and other law enforcement organs. Due to the problem of the ambiguities and uncertainty of diplomatic immunity laws and non-existence of domestic law that govern the practical implementation of diplomatic immunity, the research tries to identify and critically analyze the relevant laws (international and domestic) and decisions along with the practical implementation problem of diplomatic immunity in Ethiopia. But, the analysis of the practical implementation problem of diplomatic immunity will inevitably lead to use cause and effect method of legal research. This method is used to assess the problems of diplomatic immunity implementation in Ethiopia as the host state.

The techniques of data analysis will be qualitative and this method will be used for analyzing cases and information which is going to be gathered from the interviewees for their expertise in the subject under consideration. Also, the researcher will try gathering first hand facts at their source and actively searching the production of desired information.

### **1.8.3. Sampling Method**

There are a number of workers and officials of MoFA, FGA and AAPC in Ethiopia. Due to this and in order to draw conclusions about those large populations, it is commended to determine a sample design. So that, the research intends to conduct in-depth interviews of MoFA, FGA and AAPC officials in Ethiopia who will be selected, using purposive sampling method, for their expertise in the subject under consideration and to their experiences in solving diplomatic immunity implementation challenges in Ethiopia. Snow ball method will also be used as the researcher of this proposal could be referred by the selected interviewees to persons who could have more knowledge and experience on the subject.

### **1.8.4. Ethical Considerations**

The researcher will take an important ethical consideration while working on collecting data using the above design and methodology. Adequate level of confidentiality of the research data will be ensured. Any deception or exaggeration about the aims and objectives of the research and only type of misleading information will be avoided.

### **1.9. Limitation of the study**

In order to provide accurate context for the work and give readers sufficient information to evaluate the relevance and impact of the result; it is worth mentioning some forefront limitations. The first limitation is finding of pertinent cases on which decisions have already been given in Courts and other law enforcement organs which might have passed quasi-judicial decisions on litigations involving the issues under this study over, at least, the past few years might face with difficulties since those organs have not such an organized file retrieval system, and possibly the tendency of misunderstanding research as inspection of their activities could be added to this problem to make the problem even more complex. The other challenge is time limitation as the researcher is full-time civil servant. The last but not least limitation is the absence of resources and data on the subject matter under investigation and the outbreak of Corona Virus (Covid-19) may negatively affect the research outcome.

### **1.10. Organization of the study**

The research consists of four chapters each having various sections and subsections. Chapter one of the research is the Research Proposal on the subject matter containing the background of the study, objective of the study, research questions, scope of the study, significance of the study, research methodology, literature review, limitations of the study and organization of the research. Then chapter two is designed to discuss the Nature and Concept of Diplomatic Immunity, the rights involved in diplomatic immunity, Jurisdictional Immunity, its implementation challenges in the host state in general and other jurisdictions experiences in Handling Diplomatic immunity implementation challenges, as the host state, in which comparative analysis of mechanisms is conducted. Chapter three provides the legal and practical implementation challenges of diplomatic immunity in Ethiopia. The researcher will discuss and analyzes diplomatic immunity laws and cases in which diplomatic communities in Ethiopia have been parties to the litigation. This chapter also will look at the data that will gather with scrutiny and try to demonstrate gaps existing between the law and the practice. Finally, Chapter four presents conclusions and possible recommendations.

## CHAPTER TWO

### Introducing Diplomatic Immunity

#### 2.1. Brief Historical Background of Diplomatic Immunity

The concept of diplomacy is as old as mankind relations, and the practice of granting diplomatic immunity is thousands of years old that different kingdoms, tribes and clans had used different methods of sending and receiving official messages during ancient time.<sup>23</sup> Sovereign entities have long recognized the concept of diplomatic immunity from the jurisdiction of the receiving sovereign as being necessary to ensure that these channels of communication are preserved.

The law of diplomatic immunity was significantly developed by the Romans and the early Greek City States', too, regularly exchanged special missions, and ambassadors were ceremoniously received and courteously treated by the receiving City State.<sup>24</sup> At that time, the main focus of granting diplomacy was to ensure personal safety of the diplomat as well as to promote his freedom to travel in order to promote relations and communication with other kingdoms, tribes and clans.<sup>25</sup> Furthermore, the trend followed to exchange diplomatic message were dynamic.<sup>26</sup> In both ancient Rome and Greece, diplomats enjoyed personal inviolability that included immunity from the receiving nation's civil and criminal jurisdiction, and the receiving sovereign owed a special duty to protect the diplomat's person.<sup>27</sup>

Diplomacy was being practiced in a manner closely resembling modern practice, and the first permanent mission was established in Europe during the fifteenth century. And it was the need for trade that made permanent mission-important in international relations.<sup>28</sup> The recognition of

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<sup>23</sup> Harold George Nicolson, *Diplomacy* (Oxford, Oxford University Press, 2ed, 1950) 19 and 27

<sup>24</sup> Biswanath Sen, *A Diplomat's Handbook of International Law and Practice* (The Hague, Netherlands, 3<sup>rd</sup> ed, 1988)

<sup>25</sup> Nicolson (n 23) 27.

<sup>26</sup> Sen (n 26) (1st edn, Martinus Nijhoff 1965) 5

<sup>27</sup> Barry E. Carter and Phillir R. Trimble, *International Law* (3rd ed. 1999) 654

<sup>28</sup> Sen (n 28)

diplomatic immunity by receiving States had become a customary norm since the sixteenth century when it was established in Europe as a result of the common exchange of permanent ambassadors.<sup>29</sup> Therefore, until the 15<sup>th</sup> century diplomacy was conducted without permanent mission, but after the 15<sup>th</sup> century diplomacy has been conducted with the establishment of permanent diplomatic mission until now.<sup>30</sup> However, non-permanent missions are still under function by the name of the special mission, and mostly used to exchange messages and solve political, economic and military conflicts.<sup>31</sup> With legislation prohibiting prosecution, arrest, and imprisonment of ambassadors and their servants, modern embodiment of diplomatic immunity practice in law began in Britain in 1708.<sup>32</sup>

The concept of diplomatic immunity as international law was primarily based on custom and international practice until quite recently.<sup>33</sup> However, the 1946 Convention on the Privileges and Immunities of UN embodies Privileges and Immunities of the organization itself in member states and also talks about the privileges and immunities of representatives of the Organization and its officials. The principles used in ancient times in protecting Diplomats and the Vienna congress in 1815 and 1928 Havana Convention gave rise to the codification of the Vienna Convention on Diplomatic Relations (VCDR) of 1961, hereafter referred to as the 1961 VCDR. Especially, the 1815 Vienna Congress started the idea of creating a unified regulatory system all over the world<sup>34</sup> and By the year 1928 Havana Convention, a dialogue between states continued on the Sixth International Conference of American States and the dialogue major focus was on

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<sup>29</sup> Leslie Farhangi, 'Insuring Against Abuse of Diplomatic Immunity' (1986) 38 STAN. L. REV. 1517, 1519

<sup>30</sup> *ibid* 6.

<sup>31</sup> James Michael and Hardy Langley, *Modern Diplomatic Law* (Manchester University Press, 1968) 2. Cited in Savio Goossens, *Diplomatic Immunity: An Argument for Re-evaluation*, University of KwaZulu-Natal (Pietermaritzburg) 17.

<sup>32</sup> Statute of Queen Anne c. 12 of 1708, cited in Dror (n 33) 6.

<sup>33</sup> Elieen Young, 'The Development of the Law of Diplomatic Relations' (1964) *British Yearbook of International Law*, Vol 40, Oxford University Press

<sup>34</sup> Savio Goossens, 'Diplomatic Immunity: An Argument for Re-evaluation' (thesis for Masters in Law, University of KwaZulu-Natal) 20

the issue of diplomatic immunity and privileges, but there was no consensus reached up on the issue of diplomatic immunity and privileges.<sup>35</sup>

The 1961 VCDR came as a result of the UN Convention and Diplomatic Intercourse in 1961 which was based on many dialogues and a series of draft articles prepared by the International Law Commission<sup>36</sup>, and the convention was signed on 14<sup>th</sup> April 1961. As well, the Convention codified existing customary diplomatic law, resolved points of conflicting state practice and introduced other rules.<sup>37</sup> Moreover, the Convention in its preamble recognized that customary international law remains to govern parts that were not covered. Lastly and most importantly, this convention is considered as one of the most successfully accepted convention by almost all states including Ethiopia, and it sets out the playing ground rule for all signatory states in their diplomatic mission.<sup>38</sup>

## **2.2 Theoretical background of diplomatic immunity**

The evolution of diplomatic law through the seventeenth to the twentieth centuries hinged on philosophical arguments and scholarly articulations that were advanced by such scholars as Vattel, Callières, Oppenheim, Grotius and Satow among others.<sup>39</sup> The three main theories that influenced the rationale for diplomatic immunity will be discussed as follows:-

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<sup>35</sup> Garretson A H, Convention Regarding Diplomatic officers, adopted by the Sixth International American Conference, signed at Havana, Feb 20,1928. 155 L.N.T.S. 261, in 7 U.N. Leg. Ser. Laws and Regulations Regarding Diplomatic and Consular Privileges and Immunities. Cited in Savio Goossens, Diplomatic Immunity: An Argument for Re-evaluation, University of KwaZulu-Natal (Pietermaritzburg) 20.

<sup>36</sup> Dixon Martin, Textbook of international law (England, 7ed, Oxford University press, 2013) 209

<sup>37</sup> Ernest Satow L, Satow's Guide to Diplomatic Practice ( London, 5th. ed., 1979) 108

<sup>38</sup> Goossens (n 36) 21

<sup>39</sup> Charity Simuli Wanyela, 'Diplomatic Privileges and Immunities: A Critical Analysis of the Vienna Convention on Diplomatic Relations' (1961 MA Thesis, Nairobi University 2014)28

### **2.2.1 Theory of Functional Necessity**

The theory of functional necessity is the philosophical base for the current 1961 VCDR.<sup>40</sup> According to this theory, diplomatic immunities and privileges are not absolute; rather, it is granted to the official functioning of the diplomatic mission.<sup>41</sup> This concept is expressly incorporated under 1961 VCDR preamble “the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing state”.

Thus, the immunity granted to the diplomatic mission is not for individual benefit; rather, they are granted for a diplomat to carry out his/her task efficiently without any interference of receiving state. Still, this theory is not free from criticism scholars argue that this theory is “disturbingly vague” through failing to stipulate clear limitation to immunity. Although it grants immunity to diplomatic task in practice diplomatic private act is also immune.<sup>42</sup> In general, the three theories had useful contributions to the 1961 VCDR and mostly, the functional necessity theory is highly reflected in the 1961 VCDR.

### **2.2.2 Extraterritoriality Theory**

According to this theory, the territory where the diplomatic mission is executed in the receiving state is presumed to be the territory of the sending state.<sup>43</sup> This theory argues that a diplomat, his/her home and office are presumed to be the property of the sending state though the physical existence is in the receiving state.<sup>44</sup> The main aim of this theory was to free diplomatic mission area from local jurisdiction of the receiving state and to extend diplomatic immunity to the personal residence of a diplomat in addition to the diplomatic mission area.<sup>45</sup> In general, this

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<sup>40</sup> Nina Maja Bergmar, ‘Demanding Accountability Where Accountability is Due: A Functional Necessity Approach to Diplomatic Immunity under the Vienna Convention’ (2014) 47 Vanderbilt Journal of Transnational Law 501.

<sup>41</sup> Montell Ogdon, *Juridical Bases of Diplomatic Immunity: A Study in the Origin, Growth and Purpose of the Law* (1st edn, J. Byrne and Co 1936) 144

<sup>42</sup> Muhammad-Basheer A. Ismail, *Islamic law and transitional diplomatic Law*, 84

<sup>43</sup> Sen (n 26) 80

<sup>44</sup> Ismail (n 43) 82

<sup>45</sup> Montell Ogdon, ‘The Growth of Purpose in the Law of Diplomatic Immunity’ (1937) 31 American Journal of International Law 449.

theory concludes that a diplomat who resides in receiving states, his/her residence, is considered as the property of sending states and also the territory or the diplomatic premises are considered as the territory of sending state.<sup>46</sup>

This theory was very influential at the time when the concept of immunity is territory based rather than personality-based. This theory was also controversial as it allows immunity to all actions of diplomats without any specific limitation to their official function<sup>47</sup> and violators who reside in the premises.<sup>48</sup> However, scholars agree that this theory is nothing but “explanatory fiction” and has little contribution to determine the scope of diplomatic immunity. That is why the state does not fully apply it practically though the theory accepts diplomatic immunity.<sup>49</sup> As unlimited immunity granted to diplomats “result in dangerous consequences.”<sup>50</sup>

### **2.2.3 Representative Theory**

The theoretical foundation of this theory bases its argument on absolute sovereignty and sovereign equality of all-state.<sup>51</sup> This theory believes that freedom from receiving state jurisdiction is essential for keeping the peaceful relation between the sending and receiving states.<sup>52</sup> Here it is said that Diplomats represent states and they are the symbolic representation of his/her sovereign state in international relation.<sup>53</sup> As per this theory, diplomats are agents sent by a sovereign state by representing the interest of the sending State in the receiving state. Thus, the

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<sup>46</sup> Garretson A H, ‘The immunities of representatives of foreign states’ (1966) 41 *New York University Law Review* 67

<sup>47</sup> Timothy J. Lynch, *Theories of Diplomacy* (Oxford Encyclopaedia of American Military and Diplomatic History, Oxford University Press 2013) 330.

<sup>48</sup> Young (n 35)

<sup>49</sup> Ismail (n 45)

<sup>50</sup> Timothy Hampton, ‘The Diplomatic Moment: Representing Negotiation in Early Modern Europe’ (2006) *MLQ*, 67(1) 82, 83.

<sup>51</sup> Sen (n 26) 81.

<sup>52</sup> *India Juridical Bases of Diplomatic Immunity, A Study in the Origin, Growth and Purpose of the Law* (1st edn, J. Byrne and Co 1936) 144

<sup>53</sup> Hoffman John, ‘constructing diplomacy’ (2003) 4 *British Journal of Politics and International Relation*, Political Studies Association 531.

argument is that he/she should not be governed or bound by local jurisdiction and law of the receiving state.

Moreover, this theory promotes that diplomat should enjoy immunity or exemption from local jurisdiction not only because he/she is representative of the sending state but making diplomat bound by local law or jurisdiction would be inconvenient to function their duty properly.<sup>54</sup>

Recent scholars criticize this theory as outdated. Because in democracy, sovereignty shifted from hand of autocrats to the hand of the people, and it is shared between the three branches of government. However, it is said that it is difficult to identify on whose behalf diplomats are representing within the three branches of government.<sup>55</sup> Other scholars criticize this theory as being too broad and too vague for conducting international relations.<sup>56</sup> However, this theory has a positive contribution to 1961 VCDR, as the diplomatic mission has the nature of representing the sending state in the receiving state.<sup>57</sup>

### **2.3 Definition and Concept of diplomatic immunity in general**

The immunities granted to diplomats grew as a result of sovereign immunity, the independence, the equality of states and partially as a result of the essential requirement of an international system.<sup>58</sup> Since diplomats represent states, it is the symbolic representation of his or her countries sovereign statehood and the purpose of diplomatic immunity is to enable diplomatic staff to represent their home state effectively. Diplomats and the diplomatic system continue to derive their authority from the claim that they represent sovereign states in their relations with one another.

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<sup>54</sup> Rajiv Gandhi School of Intellectual Property Law, 'Abuse of Diplomatic Privileges and the Balance between Immunities and the Duty to Respect the Local Laws and Regulations under the Vienna Conventions: The Recent Indian Experience' (2017) 3 *The Chinese Journal of Global Governance* 190.

<sup>55</sup> Ismail (n 43) 80.

<sup>56</sup> Tariq Hassan, 'Diplomatic or Consular Immunity for Criminal Offences' (2011) *Virginia Journal of International Law Online* 2(1) 23.

<sup>57</sup> Sajjad Ashraf, 'Raymond Davis Affair: A Case with Global Ramification'

<<http://dr.ntu.edu.sg/bitstream/handle/10220/7868/RSIS0332011.pdf>> accessed 12 September 2020

<sup>58</sup> Shaw Malcolm N, *International Law* (England, 7ed., Cambridge University Press 2014) 546.

According to Black's Law dictionary, diplomatic Immunity means that "the immunity that is given to representatives of foreign countries when they may break certain rules and regulations while working in this country."<sup>59</sup> As well, Black's law dictionary also defines privileges as "A particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens, an exceptional or extraordinary power or exemption. A right, power, franchise, or immunity held by a person or class, against or beyond the course of the law. Privilege is an exemption from some burden or attendance, with which certain persons are indulged, from a supposition of law that the stations they fill, or the offices they are engaged in, are such as require all their time and care, and that, therefore, without this indulgence, it would be impracticable to execute such offices to that advantage which the public good requires."<sup>60</sup> From these two definitions, we can safely say that there is a distinction between immunities and privileges conferred to diplomats. A privilege may exempt an agent from application of certain laws and regulations of the receiving state while immunity does not exempt her/him but instead protects him from the application of the laws of the host state.

According to Ernest Stow definition, immunity is not personal immunity but in reality, the immunity of the sending state.<sup>61</sup> Wilson also defines diplomatic immunity as a situation where members of diplomatic missions are shielded from legal processes.<sup>62</sup>

Furthermore, the main source of diplomatic immunity is a long-standing custom embodied into a comprehensive and widely accepted international treaty<sup>63</sup>, and in its modern sense, Diplomatic immunity can be broadly defined as immunity granted to the duly certified diplomatic representatives of the sending state by the receiving state under principles of international law.<sup>64</sup>

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<sup>59</sup> <<https://thelawdictionary.org/diplomatic-immunity/>> accessed 22 September 2020.

<sup>60</sup> <<https://thelawdictionary.org/privilege/>> accessed 21 September 2020.

<sup>61</sup> Satow L (n 39) 131

<sup>62</sup> Robert A. Wilson, 'Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations' (1984) 7 *Loy. L.A. Int'l & Comp. L. Rev.* 113

<sup>63</sup> Dror Ben-Asher, 'Human Rights Meet Diplomatic Immunities: Problems and Possible solution' (PhD Thesis, Harvard Law School, November 2000) 10.

<sup>64</sup> William W. Bishop, *International Law* (3rd ed. 1971) 709, cited in Garley (n 11) 137.

Diplomatic Immunity can be divided into functional immunity (immunity *ratione materiae*) and personal immunity (immunity *ratione personae*). Immunity *ratione materiae* is a type of immunity relates to conduct carried out on behalf of a state and granted to a person with cumulative conditions, the act should be official and the act should be done in exercise of diplomatic duty or in an official capacity.<sup>65</sup> Unlike functional immunity, a *ratione personae* is an immunity granted to a person irrespective of the character of the act committed by diplomatic agents in official duty or not, and it is absolute as it applies to both private and public acts of the accredited person. However, this immunity will end or terminate when the official duty of a diplomatic agent is terminated.<sup>66</sup>

#### **2.4. The concept, nature and extent of Diplomatic Immunity and Privileges under the 1961 VCDR**

The 1961 VCDR is the most successful as it has pretty much influence on the international legal order. The VCDR of 1961 provisions talk about tremendous issues of privileges and immunities.

##### **2.4.1. The concept and nature of Diplomatic Immunity**

The Preamble of the Convention has different points that show the rationale of granting diplomatic immunities and privileges that the drafter had in mind.<sup>67</sup> Among others, It recalls that peoples of all nations from ancient times have recognized the status of diplomatic agents, it underscores the purpose of the Convention's privileges and immunities are not to benefit individuals rather to ensure efficient functioning of diplomatic missions in the host state, it also Having in mind the purpose and principle of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations, it affirms that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention and it realizes that an international convention on diplomatic intercourse privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems.

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<sup>65</sup> *ibid* 3

<sup>66</sup> *ibid*

<sup>67</sup> Goossens (n 36) 23

As stated under 1961 VCDR Art 31<sup>68</sup> and Art 39(2)<sup>69</sup>, the two types of diplomatic Immunity, namely, *ratione personae* & *ratione materiae* embodied in the convention respectively.

#### **2.4.2. The extent of diplomatic immunity**

Even if the nucleus of the 1961 VCDR focus on the issue of immunity from local jurisdictions, it has also embodied about inviolability of diplomats' person, bag, missions' premises and documents, exemption from local taxes and other duty-free privileges.

##### **2.4.2.1. Diplomatic immunity from local jurisdictions**

In principle state courts assume power over acts committed within its territory. However, diplomatic immunity is an exception to such principle in which states are denied from trying cases against persons having diplomatic immunity. The exception is born out of the principles like state sovereignty, equality of states, and through the operation of specific international law. The 1961 VCDR and other instruments like the 1946 Convention on Privileges and Immunities of UN and host country agreement with IOs keeps their official away from the reach of the local jurisdiction.

Jurisdictional immunity is a basic principle of public international law, and according to which certain foreign government officials, including diplomatic agents, are not subject to the jurisdiction of local courts and other authorities of the receiving state for both their official and, to a large extent, their personal activities.<sup>70</sup>

Under the Convention, diplomats shall enjoy immunity from civil, administrative, and criminal jurisdiction of the receiving State saving the exceptions that; (a) a case relating to private immovable property situated in the territory of the receiving State unless he/she own behalf of the sending State for the mission,(b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State and (c) An action relating to any professional or commercial activity

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<sup>68</sup> VCDR(n 2) Art 31

<sup>69</sup> *ibid* Art 39(2)

<sup>70</sup> Rene Vark, *Diplomatic Law* (Juura,Tallinn 2004)141, cited in Rene Vark, *Diplomatic Agents, Civil Actions and Jurisdictional Immunity*, 27.

exercised by the diplomatic agent in the receiving State outside its official functions.<sup>71</sup> Surprisingly not only the diplomatic agents who enjoy such privileges and immunities but also the members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, and mission-staff enjoy variable privileges and immunities even if the 1961 VCDR failed to define “members of the family of a diplomatic agent forming that part of his household.”<sup>72</sup>

Most scholars argue that the immunity granted to diplomat is absolute immunity from criminal liability of the receiving state. That means diplomat will not be detained or arrested or subjected to a body search, many not be prosecuted and may not be required to give evidence as a witness. According to Article 31(1) of the Vienna Convention on Diplomatic Relations, diplomatic agents and their family shall enjoy immunity from the criminal jurisdiction of the receiving state. The convention provides that the person of a diplomatic agent shall be inviolable; he/she shall not be liable to any form of arrest or detention, and the receiving state is under a duty to respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.<sup>73</sup>

However, it should be noted that although the immunities stipulated in the Vienna Convention prohibits the prosecution of diplomatic agents from the jurisdiction of the receiving state this should not be rendered as immunity from liability of the diplomat,<sup>74</sup> this is due to the fact that diplomatic agents can be prosecuted when their period of service is over in the receiving state and also situations where such persons have been recalled by the sending state. As well, if diplomat gives consent to be liable by domestic jurisdiction, then he/she will be subjected to domestic legislation.<sup>75</sup>

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<sup>71</sup> VCDR( n 2) 31

<sup>72</sup> *ibid* Art 37

<sup>73</sup> VCDR( n 2) Art 29

<sup>74</sup> *ibid* Art 9 (4)

<sup>75</sup> Rene Vark, ‘personal inviolability and diplomatic immunity in case of serious crime’ (2003) *Juridical International* VIII 113.

Furthermore, as per article 31(1) of Vienna convention, diplomats enjoy immunity from the civil and administrative jurisdiction of the receiving state. Except for private immovable property situated in the territory of the receiving state unless he/she holds it on behalf of the sending state for purposes mission. There are two more exceptions, which Article 31 of the Vienna Convention mentions where a diplomat is not immune from the jurisdiction of the receiving state. A diplomat shall enjoy immunity from its civil and administrative jurisdiction, except in the case of an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State, because, the nature of succession law is complex and it involves a large number of parties.<sup>76</sup> The second exception is related to an action relating to any professional and commercial activity exercised by the diplomatic agent in receiving state outside his official function. According to Article 32(3) of 1961 VCDR, it stipulates that diplomats cannot claim diplomatic immunity in relation to civil claims if they have initiated the court proceedings.

#### **2.4.2.2. Personal and familial immunity**

According to article 29 of the Vienna Convention on Diplomatic Relations, the person of a diplomatic agent is inviolable. It should be noted that immunities granted to diplomats are personal because they are enjoyed by individuals rather than by the state itself.<sup>77</sup> The immunity and privilege granted to diplomatic agent is not meant to benefit the individual but to enable the diplomat carry out his designated function.<sup>78</sup>

Moreover, the immunities and privileges granted to the diplomatic agents are extended to members of their families with an exception that such persons are not nationals of the receiving state<sup>79</sup> *ration personae*, by virtue of their office, however, diplomatic agents representing the

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<sup>76</sup> Goossens (n 36) 57

<sup>77</sup> Dixon (n 38) 208

<sup>78</sup> VCDR (n 2) Preamble

<sup>79</sup> *ibid* Art 37

sending state who are nationals or permanent residents of the receiving state also enjoy immunity *rationemateriae* in respect of their official act.<sup>80</sup>

Additionally, article 41 and 42 of the Vienna Convention on Diplomatic Relations stipulates the fact that in order to enjoy privileges and immunities, members of diplomatic missions owe certain duties towards the receiving state which include; the duty to respect the laws and regulations of the receiving state, the duty not to interfere in the internal affairs of the receiving state, the fact that the premises of the mission must not be used in a manner which is incompatible with the function of the mission and the fact that a diplomatic agent must not carry out any professional or commercial activity for personal profit in the receiving state.

#### **2.4.2.3. Diplomatic immunity to administrative and technical staff**

Administrative and technical personnel's are members of staff of the mission employed in the administrative and technical service of the mission.<sup>81</sup> Diplomatic immunity is granted to both administrative and technical staff although not all privileges and immunities which are granted to diplomatic officers are enjoyed by administrative and technical staff. According to Article 37(2) of 1961 VCDR<sup>82</sup>, administrative and technical staffs of the diplomatic mission and their families, who are not nationals or permanent residents, hold the same immunity regarding criminal liability but not to civil and administrative liability for an act outside their duty in the receiving state.

#### **2.4.2.4. Diplomatic immunity to Service Staff and Private Servant**

According to Article 37(3) of 1961 VCDR<sup>83</sup> service staffs who are employed by the diplomatic mission have no broad immunity, their immunity is only limited to acts performed in the course of their duties. Usually, Service staffs are national of the sending state, and they might work in the office of diplomatic mission as drivers, cleaners, and handyman or at the residence of the

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<sup>80</sup> VCDR (n 2) Art 38 (1)

<sup>81</sup> *ibid* Art 1(f)

<sup>82</sup> VCDR (n 2) Art 37(2)

<sup>83</sup> *ibid* Art 37(3)

Ambassador.<sup>84</sup> According to article 1(g) of VCDR of 1961, “members of the service staff” are the members of the staff of the mission in the domestic service of the mission.”

Unlike the above personnel’s private servants are not employed by the sending state; rather, they are employed by diplomatic agents or administrative staffs to do domestic works. According to Article 37(3),<sup>85</sup> private servants have only the immunity that the receiving state grant based on its requirements.

#### **2.4.2.5. The immunity of Diplomatic property**

Article 22 of the Vienna Convention on Diplomatic Relations stipulates the fact that the premises of the mission are inviolable; this consequently means that state officials of the local country may not enter without the consent of the head of mission<sup>86</sup>. Further, as per article 45 of the Convention, the immunities and the obligation to protect the mission<sup>87</sup> continue even if diplomatic relations is broken off or armed conflict occurs. This immunity does not extend towards such premises if the premises cease to be used for diplomatic purposes. This provision of the Vienna Convention does not consider the exception to the inviolability principle in cases of emergencies<sup>88</sup> and hence tends to make this provision an absolute rule.<sup>89</sup>

Moreover, the private residence of a diplomatic agent enjoys the same inviolability and protection as the premises of the mission.<sup>90</sup> The inviolability principle further extends to the furnishings and other property as well as the means of transport, which are immune from search,

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<sup>84</sup> Paul Behrens, *Diplomatic Law in a New Millennium* (Oxford university press, published 2017) 133

<sup>85</sup> VCDR (n 2) Art 37(4)

<sup>86</sup> Shaw (n 59) 548

<sup>87</sup> VCDR( n 2) Art 22

<sup>88</sup> ELieen Denza E, *Diplomatic law: A Commentary on the Vienna Convention on Diplomatic Relations* (Oxford, 3ed, University Press 2008) 162- 165.

<sup>89</sup> *Third Avenue Associates v. Permanent Mission of the Republic of Zaire to the United Nations* 988 F.2d 295 (1993); 99 ILR,194

<sup>90</sup> VCDR( n 2) Art 30(1)

requisition, attachment or execution.<sup>91</sup> Even if the term archives has not been defined in the 1961 VCDR, article 24 of the convention states that the archives and the documents of the mission are inviolable at any time.

#### **2.4.2.6. The immunity of Diplomatic bag**

Article 27 of the 1961 VCDR, provides for the inviolability of the official correspondence of the mission and also states that the diplomatic bag shall not be opened or detained. The article also provides for the protection from interference of diplomatic couriers.

Recently, the sanctity of the diplomatic bag has become a thing of concern in many states which is due to the fact that the bag has been used for criminal activities such as to smuggle drugs, weapons, art treasures and even individuals into or out of the receiving state.<sup>92</sup>

### **2.5. Brief Assessment of Comparative Experiences on Diplomatic Immunity**

The practice of states on diplomatic jurisdictional immunity has a varying degree. This practical difference emanates from the level of states' evaluation and the different understanding of states on the scope and extent of diplomatic immunity. The other factor is owing to the narrow or liberal understanding of diplomatic immunity depends upon the nature of the national interest at stake. It could also be because of the theories backing diplomatic immunity followed by that specific state. This section is designed in a way to show the practice of some countries' experiences by taking into consideration that countries hosting relatively higher number of diplomatic missions and at the same time geographically representative.

#### **2.5.1. USA**

History had been told us that diplomatic immunity had been considered as very essential in the United States for facilitating international relations. The Congress passed the 1790 Act and later repelled by the 1978 Diplomatic Act.<sup>93</sup> This is because of that the 1790 Act of the United States grants absolute immunity or gives a broad definition of diplomatic immunity that contradicts

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<sup>91</sup> *ibid* Art 22(3)

<sup>92</sup> Dixon (n 38) 211

<sup>93</sup> Robert A. Wilson, 'Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations' (1984) 7 *Loy. L.A. Int'l & Comp. L. Rev.* 113, 8.

with 1961 VCDR.<sup>94</sup> Moreover, the 1790 Act had faced opposition from the general public because of its inherent implementation challenges and lack of Mechanisms or approaches of accommodation for the practical problems thereof, and this intern leads to the adoption of the 1978 Diplomatic Relation Act in conformity with the VCDR.<sup>95</sup>

In 1978, Congress passed the Diplomatic Relations Act (DRA) which codified the 1961 VCDR.<sup>96</sup> The 1978 DRA provides two important provisions that intended to establish a mechanism by which all diplomatic missions to be a member of mandatory liability insurance<sup>97</sup> and grants the victim a right to directly claim compensation from the insurer of immune diplomat.<sup>98</sup> Because car accidents were very prevalent and many injured individuals were complaining about abuse of diplomatic immunity right<sup>99</sup>, it seems that the mandatory insurance and direct action provisions are prepared to address the problem of car accident liability committed by immune diplomats.

However, the 1978 Diplomatic Relations Act was not successful in bringing justice for victims of diplomatic immunity because of a lack of adequate enforcement mechanisms and adequate remedy for tortious or criminal acts of diplomats. Among others, there were three major weaknesses in trying to implement the Act.<sup>100</sup> Firstly, there was no available remedy for victims when the diplomat fails to be member of mandatory Insurance liability.<sup>101</sup> Secondly, despite the

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<sup>94</sup> Ross, Mitchell S, 'Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities' (1989) 4 American University International Law Review, no. 1, 188

<sup>95</sup> *ibid*

<sup>96</sup> R. Scot Garley, 'Compensation for Victims of Diplomatic Immunity in the United States: A Claims fund Proposal' (1980) 4 Fordham International Law Journal Issue 1, 135

<sup>97</sup> <<http://www.koreaherald.com/view.php?ud>, Published: Jul 22, 2019> accessed 15 October 2020.

<sup>98</sup> *ibid*

<sup>99</sup> Wilson (n 98) 14

<sup>100</sup> *ibid*

<sup>101</sup> "Compare A New Regime, at 694-97 (outlining the inadequacies of the insurance provisions of the Diplomatic Relations Act) with Comment, The Diplomatic Relations Act, 13 J. INT'L L. & ECON. 471, 478-80 (1979) (discussing the lack of enforcement mechanisms under the Diplomatic Relations Act)." p. 480, Cited in Robert A.

fact that the United States Department beside the State Department preserves diplomatic license plates, there was no compulsory implementing mechanism to force diplomatic missions to be a member of insurance liability<sup>102</sup> and thirdly, even if the diplomats are insured in case of abuse of diplomatic immunity, the 1978 Act limits the amount of money to be compensated to 300,000\$ for body injury and 50,000\$ and this is said insufficient to cover serious medical expenses due to diplomatic immunity abuse.<sup>103</sup>

Due to the above reasons, the 1978 Diplomatic Relation Act had become ineffective and In 1983 Congress amended the Act to hold embassies responsible for full liability insurance coverage for their diplomats.<sup>104</sup> The Act also confers power on the President of the United States to specify greater or lesser immunity protection for certain diplomats, based on reciprocity.<sup>105</sup> As well, in 1982, the Congress passed the Foreign Missions Act ("FMA").<sup>106</sup> The FMA established a duty in the government to oversee the activities of all foreign missions in the United States.<sup>107</sup>

The practice of USA on diplomatic jurisdictional immunity had been reflected in different cases. Inter alia, In *Skeen vs. Federative Republic of Brazil*, the United States District Court for the District of Columbia dismissed an action for lack of jurisdiction based on defendant's status as

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Wilson, 'Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations' (1984) 7 Loy. L.A. Int'l & Comp. L. Rev. 113, 14

<sup>102</sup> *ibid*

<sup>103</sup> 'Compulsory Liability Insurance for Diplomatic Missions and Personnel' 22 C.F.R. & 151.4 (1988), Cited Robert A. Wilson, 'Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations' (1984) 7 Loy. L.A. Int'l & Comp. L. Rev. 113, 14

<sup>104</sup> David H. Goodman, 'The U.S. Needs to Play Hard Ball'(1989) 11 Hous. J. INT'L L. 395, 400 cited in Rina Goldenberg, 'Abuse of Diplomatic Immunity: Is the Government Doing Enough?' 1 (1995) ILSA Journal of International and Comparative Law 209

<sup>105</sup> Rina Goldenberg, 'Abuse of Diplomatic Immunity: Is the Government Doing Enough?' 1 (1995) ILSA Journal of International and Comparative Law 209

<sup>106</sup> Foreign Missions Act 1993, 22 U.S.C. §§ 4301 cited in Goldenberg (n 10) 209.

<sup>107</sup> Lori Shapiro, 'Foreign Relations Law: Modern Developments in Diplomatic Immunity' (1990) 1989 ANN. SURV. AM. L. 281, 286 cited in Goldenberg (n 110) 209.

Ambassador to the United States.<sup>108</sup> In this case, the grandson of a Brazilian Ambassador assaulted and shot an American citizen without accountability for criminal or civil liability.<sup>109</sup> The court hinted that it was the function of the other two branches to provide a proper solution to such incidents.<sup>110</sup> Similarly, these instances amply justify the Second Circuit's reasoning in *767 Third Avenue Associates vs. Permanent Mission of Zaire*," in which the landlord could not evict his delinquent tenant.<sup>111</sup> Thereafter the courts avoided such cases without looking the merit. Again, the courts' reasoning is not mainly based on the 1961 VCDR, rather on the position that the only way to protect American diplomats abroad is via blanket recognition of immunity without exceptions.

Moreover, on February 13, 1987, a car driven by the ambassador from Papua New Guinea crashed into four parked cars and seriously injured 2 people in Washington, D.C and preliminary report showed that the ambassador was found drunken but escaped liability.<sup>112</sup> Another example of blatant abuse of diplomatic immunity is the case of Manuel Ayree, the nineteen-year old son of the third attaché to the Ghanaian delegation, allegedly committed rape, sodomy, assault and an array of other crimes during his stay in New York City during 1980 and 1981 later on released from arrest owing to his status. The State Department's only remedy was to declare Ayree *persona non grata* and expel him from the United States.<sup>113</sup>

Since the nature of diplomacy is very sensitive, any unilateral decision by the United States would lead other signatory states to 1961 VCDR to decide whatever they think is appropriate to American diplomats abroad based on the principle of reciprocity. In order to solve the problem,

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<sup>108</sup> *Skeen v. Federative*, 'Republic of Braz.' (D.D.C. 1983) 566 F. Supp. 1414, cited in Goldenberg (n 10) 198.

<sup>109</sup> Goldenberg (n 110) 198.

<sup>110</sup> *ibid.*

<sup>111</sup> *ibid.*

<sup>112</sup> Ali M. Farahmand, 'Diplomatic Immunity and Diplomatic Crime: A Legislative Proposal to Curtail Abuses' 16 *Note Journal of Legislation* Iss. 1, Article 7, 89.

<sup>113</sup> *ibid* 99

it needs a unified agreement between all signatory states to provide a solution to the existing problem.<sup>114</sup>

### **2.5.2. South African**

Before its' independence, any diplomatic agent representing South Africa did not receive diplomatic status at that time.<sup>115</sup> However, after independence, in 1932, Diplomatic Immunities Act 9 was adopted as the first legislation and this act grants diplomatic agents and their families to be free from local civil and criminal liability. In 1951, a new Act 71 were enacted and extended the diplomatic immunity to the public organization and official representatives from a foreign state to enjoy diplomatic immunity during their stay in South Africa. The Act prescribes that any proceeding against any official who is the holder of diplomatic immunity is prohibited as it would lead to a punishment of fine not exceeding 500\$ or being imprisoned for not more than three years.<sup>116</sup>

In 1989, South Africa adopted the Vienna Convention on Diplomatic Immunities and Privileges without making any reservations.<sup>117</sup> The Diplomatic Immunities and Privileges Act 35 of 2008 is the primary source for South African legislation relating to diplomatic immunities and privileges.<sup>118</sup> According to section 2(b) of this Act, in addition to the spouse, the definition of who member of diplomatic agent family are “dependent children below the age of eighteen years, other dependent family members officially recognized as such by the sending state, the United Nations, a specialized agency, or an international organization, and the life partner of the diplomat are entitled to diplomatic immunity as they form part of the diplomat’s family.”<sup>119</sup>

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<sup>114</sup> Farahmand (n 117) 15

<sup>115</sup> Montell Ogdon, *Juridical Bases of Diplomatic Immunity: A Study in the Origin, Growth and Purpose of the Law* (1st edn, J. Byrne and Co 1936) 15

<sup>116</sup> Diplomatic Immunities and Privileges Act 1989, Section 15

<sup>117</sup> Diplomatic Immunities and Privileges Act 37 of 2001, preamble

<sup>118</sup> Goossens, (n 36) 96.

<sup>119</sup> *ibid* 98.

Furthermore, the South African Diplomatic Immunities and Privileges Act requires that all registered Diplomats must be insured and the Act also confers the Minister with the authority to limit or withdraw so much of the immunities, privileges and exemptions so accorded.<sup>120</sup> Moreover, as South Africa is a signatory to 1961 VCDR, it has the same remedies available as contained in the 1961 Vienna Convention on Diplomatic Relation.

There are various practical cases that had been reflected diplomatic jurisdictional immunity in South Africa. Among others, the cases that a drunk driver that killed a young student who was released instantly upon identifying her as a wife of diplomat<sup>121</sup> and *Portion 20 of Plot 15 Athol (Pty) Ltd v Rodrigues*<sup>122</sup>, the company brought a claim for an eviction order to the High Court against Mr. Rodrigues, Angolan Ambassador to the Republic of South Africa, upon contractual obligation default. Although the Ambassador argued based on Art 29 of the VCDR, the company argued that the ambassador is not entitled to diplomatic immunity based on the domestic act and art 31 of the VCDR which provides exception to diplomatic immunity when the claim is a real action relating to private property situated in the territory of the receiving state. The court decided that Mr. Rodrigues did not provide evidence to rebut the exclusion of immunity contained in section 6(1) (a) of the act and section 31 (1) (a) of the Vienna Convention and was therefore liable.<sup>123</sup>

### **2.5.3. United Kingdom**

After the landmark case of *Mattueof*, Russian Ambassador who failed to pay his debt, the Diplomatic Privilege Act adopted by the English Parliament /Crown/ in 1708.<sup>124</sup> This Act allows bringing judicial proceedings against any diplomat or their servants.<sup>125</sup> The Diplomatic Privilege

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<sup>120</sup> Diplomatic Immunity and Privilege Act 1989, Section 13

<sup>121</sup> Goossens (n 36) 105.

<sup>122</sup> Goossens (n 36) 102

<sup>123</sup> *ibid* 103

<sup>124</sup> Przetacznik F, 'The History of the Jurisdictional Immunity of the Diplomatic Agents in English Law' (1978) 7 *Anglo-American Law Review* 369

<sup>125</sup> Goossens (n 36) 110

Act of 1708 was repealed by 1964 Diplomatic Privileges Act which gave recognition to 1961 Vienna Convention on Diplomatic Relation.<sup>126</sup>

The Diplomatic privilege Order 1999 which conformed with the 1961 VCDR, gave recognition to all three categories a) administrative staff and technical staff, b) service staff and c) private servants as the lawful holder of immunity and privileges.<sup>127</sup>

By the year 1985, In the United Kingdom, it was reported by the Foreign and Commonwealth Office that most of the fault of diplomats is related to driving with intoxication. Based on this reason the United Kingdom announced to all the heads of mission in London that diplomats that fail to comply with local traffic rules would be reconsidered whether they were still acceptable members of the mission and the government would use its power to declare members that fail to pay the fines as a persona non grata.<sup>128</sup>

The United Kingdom has a different mechanism of remedies in case of violation of local law by diplomats. The United Kingdom may request a waiver of immunity by sending state, it could declare persona non grata, and ultimately it might cut any relationship with the sending state when all remedies are not possible.<sup>129</sup> “A request for the withdrawal of a diplomat is normal after the commission by him or her of firearms offenses, serious sexual offenses, fraud, drink/driving offense, road traffic offenses involving death or serious injury, driving without third-party insurance, theft, and any other offences normally carrying a prison sentence of more than 12 months.”<sup>130</sup>

In general, the United Kingdom has faced many instances of diplomatic immunity abuse and yet there is no clear and adequate way of making diplomats liable, which leaves the victims and the public disappointed.<sup>131</sup> For instance, in April 1984, during a demonstration outside the Libyan

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<sup>126</sup> Przetacznik (n 129)

<sup>127</sup> Goossens ( n 36) 111

<sup>128</sup> Denza ( n 94) 70

<sup>129</sup> Goossens (n 36) 126.

<sup>130</sup> *ibid*

<sup>131</sup> *ibid* 128

People's Bureau (embassy) in London, shots were fired from the windows of the Bureau, killing a young on-duty Police Constable. Upon severance of diplomatic relations between the UK and Libya, the Libyans, including those allegedly responsible for the killing, were allowed to leave the UK.<sup>132</sup>

#### **2.5.4. India**

Historically, diplomatic traditions in India traced back to the 4<sup>th</sup> Century BC and India is one of the oldest diplomatic traditions origins in the world.<sup>133</sup>

The practice of India on diplomatic jurisdictional immunity had been reflected in different cases. For instance, in 2013, it was reported that the Consul General of Bahrain in Mumbai was accused of molestation of a 49-year-old woman working as a manager at a residential society where the diplomat also resided.<sup>134</sup> Although he was suspected for the crime of molestation, he was not arrested as he enjoyed diplomatic immunity.<sup>135</sup> Similarly, in 2014 the Indian police filed a criminal case against certain diplomats of Israel for injuring an airport immigration official, though no action was taken against them.<sup>136</sup>

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<sup>132</sup> Balancing Human Rights and Diplomatic Immunities pdf, 306

<[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjf39jD7qPpAhUkyoUKHYtnCBAQFjAAegQIBBAB&url=http%3A%2F%2Fshodhganga.inflibnet.ac.in%2Fbitstream%2F10603%2F38483%2F10%2Fchapter%25207.pdf&usg=AOvVaw1CrrYhdSdH2A\\_Igq4\\_cxTo](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjf39jD7qPpAhUkyoUKHYtnCBAQFjAAegQIBBAB&url=http%3A%2F%2Fshodhganga.inflibnet.ac.in%2Fbitstream%2F10603%2F38483%2F10%2Fchapter%25207.pdf&usg=AOvVaw1CrrYhdSdH2A_Igq4_cxTo)> accessed 17 September 2020.

<sup>133</sup> Roger Boesche, *The First Great Political Realist: Kautilya and His Arthashastra* (1st edn, Lexington 2002)

<sup>134</sup> Sagar Rajput, 'Bahrain diplomat accused of abusing woman sent home' *Mid-Day* (Mumbai, 29 December 2013) <<http://www.mid-day.com/articles/bahrain-diplomat-accused-ofabusing-woman-sent-home/246384>> accessed 17 September 2020.

<sup>135</sup> S. R. Subramanian, 'Abuse of Diplomatic Privileges and the Balance between Immunities and the Duty to Respect the Local Laws and Regulations under the Vienna Conventions: The Recent Indian Experience' (2017) 3 *The Chinese Journal of Global Governance* 204.

<sup>136</sup> 'India lodges criminal case against Israeli diplomats' (*Islamic Invitation Turkey*, 7 April 2014) <<http://www.islamicinvitationturkey.com/2014/04/07/india-lodges-criminal-caseagainst-israeli-diplomats/>> accessed 18 September 2020.

Recently, the Italian Ambassador's case depicts the hard reality of the position of the Indian government in which the 1961 VCDR is selectively interpreted to suit their convenience and the friction of local laws and institutions on one hand and the 1961 VCDR on the other. The case was that the armed operatives that protect Italian ships and seamen from piracy opened fire against an Indian fishing boat at a distance of about 20.5 nautical miles off the coast of the state of Kerala, assuming it was a pirates' boat, and killed two Indian fishermen. The Indian government arrested two Italian marines on board. Italy contested the jurisdiction of India from the beginning but the marines remain under the control of the Italian Embassy in Delhi. Later on, the marines and the Italian Ambassador to India requested the Supreme Court for permission to visit Italy for casting their vote in the national elections. The Court granted the permission; however, later on the Italian government sent a note verbale to India stating that they are not going to be returned back to India. Upon the breach of the undertaking, the court ordered that the Ambassador shall not leave India without the prior permission of the court and issued alerts to all airports and the immigration outposts to bar the diplomat from leaving the country. The embassy objected the restraining order based on the 1961 VCDR. The Supreme Court argued that the presence of the Ambassador to the court as a petitioner for request of permission supported by affidavit shows that the diplomat has already voluntarily waived his immunity.<sup>137</sup> The debate comes on whether this constructive waiver suffices to lift the personal immunity of the diplomat, which customarily requires it to be in express form and such scenario shall be narrowly interpreted which makes the position of India arguably without legal basis. The issuance of the order is against the provision of Art 26 and 44 of the 1961 VCDR that provides for the right to movement of diplomats in and outside the territory of the receiving state.

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<sup>137</sup> Subramanian ( n 140 ) 182

## CHAPTER THREE

### Diplomatic immunity and challenges to its implementation in Ethiopia

#### 3.1. The Laws Concerning Diplomatic Immunity in Ethiopia and implementation challenges arising thereof

The principle of diplomatic immunity is a long established component of international law and it was primarily based on custom and international practice.<sup>138</sup> However, by giving recognition and adding some improvements on the existing customary diplomatic law, the 1961 VCDR, the 1963 VCCR and other instruments like the 1946 Convention on Privileges and Immunities of UN and host country agreement with IOs now provides diplomatic immunity and special privileges to all the diplomatic communities of the Embassies and organizations. Especially and more importantly, the 1961 VCDR is considered as the first instrument to codify aspects of diplomatic law and practice.<sup>139</sup> Besides, it is a comprehensive and modern multilateral codification of diplomatic immunities extended to members of permanent diplomats and their families.<sup>140</sup>

Ethiopia is a hub for many diplomatic missions having diplomatic immunity by the application of the 1961 VCDR, the 1946 Convention on the Privileges and Immunities of United Nations<sup>141</sup>, and host country agreement.<sup>142</sup> Its capital, Addis Ababa, hosts a number of international and regional organizations and the Ethiopian MoFA Protocol Affairs Directorate General issues a diplomatic ID card not only for the diplomats but also for spouse, children and other dependents

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<sup>138</sup> Charity Simuli Wanyela, 'Diplomatic Privileges and Immunities: A Critical Analysis of the Vienna Convention on Diplomatic Relations' (MA Thesis, Nairobi University 2014) 20

<sup>139</sup> *ibid* 13

<sup>140</sup> Yoram Dinstein, 'Diplomatic Immunity from Jurisdiction Ratione Materiae' (1966) 15 *The International and Comparative Law Quarterly* 76, 79

<sup>141</sup> Convention on the Privileges and Immunities of United Nations, Adopted by the General Assembly of the United Nations on 13 February 1946

<sup>142</sup> Host country agreement means an agreement between the host country and incoming international organization to establish a legal framework under which that organization could conduct its affairs in the territory of the host country. Almost all host country agreements of Ethiopia have similar provisions with VCDR with regard to immunity from jurisdiction of local courts.

with similar protection.<sup>143</sup> And also, Ethiopia has ratified the 1961 Vienna Convention on Diplomatic Relations (VCDR) 22<sup>nd</sup> March 1979<sup>144</sup> to rule and guide diplomatic communities of foreign Embassies as the host state. Since international treaties ratified by Ethiopia are integral parts of the law of the land<sup>145</sup>, 1961 VCDR is an integral part of Ethiopian laws and Ethiopia is obliged to adhere to the rules and principles recognized in the Convention.

Although formulation of diplomatic immunity laws under the 1961 VCDR was a vindication of the importance of facilitating peaceful reciprocal relations between states and can be considered a good source of international law that is essential for the conduct of political economic and social interactions between states, it is evident that there are still legal and practical difficulties in implementing it in the host state<sup>146</sup> including Ethiopia. For instance, the ICJ explained in the United States' diplomatic and consular staff in Tehran Case saying that "the rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse."<sup>147</sup>

Without enumerating immunities and privileges<sup>148</sup>, the 1961 VCDR does not provide the exact extent and coverage of diplomatic immunities and privileges. Since the Convention does not

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<sup>143</sup> Interview with Mr. Kurabachew Terfasa, arbitration affairs directorate second secretary diplomat in Ethiopian Ministry of foreign affairs (interviewed in Addis Ababa, November 18, 2020)

<sup>144</sup>United Nations Treaty Collection, 'Vienna Convention on Diplomatic Relations ratification status' <[https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=iii-3&chapter=3&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iii-3&chapter=3&lang=en)> accessed 27 October 2020.

<sup>145</sup> Federal Democratic Republic Ethiopia Constitution 1994, Art 9(4)

<sup>146</sup> Eileen Denza, Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations (Oxford University Press, Fourth Edition 2016)

<sup>147</sup> International Court of Justice Reports of Judgments, Advisory Opinions And Order, Case Concerning United States Diplomat And Consular Staffs in Tehran, International Court of Justice (UNITED STATES OF AMERICA v. IRAN), JUDGMENT OF 24 MAY 1980, Paragraph 86.

<sup>148</sup> VCDR (n 2) Art 20-47

clearly state the ambit of inviolability of diplomatic communities and whether the action of diplomats falls under private act or under official functions, it seems that the Convention allows for unrestrained and unconditional license for diplomatic communities and their families to commit all manner of crimes and do what they want without consequences. Besides, because diplomatic premises are protected against entry by the receiving State without limitation, this will be the perfect instrument to harbor terrorists and criminal offenders. Also, since the convention has being silent about the size of a diplomatic bag and its content as well as there is nothing in the Convention to regulate the use of diplomatic bags, diplomats smuggle anything in them. Moreover, the problem of lack of a clear definition of what includes “members of the family of a diplomats forming part of his household” creates an implementation problem and left the discretion of interpretation to the receiving states law enforcement organs.

The best reference point for this challenge being the 1984 Libyan Embassy case in London which depicts at least the unconditional immunity of diplomatic premises, diplomatic bag, and the diplomatic status under the 1961 VCDR. By the year 1984, during opposition demonstration against Libyan government around Libyan embassy in England, London, a diplomat from the Libyan embassy fired on the crowd and murdered London policewoman called Yvonne Fletcher and injured 11 others.<sup>149</sup> England authorities who entered the premises of the Libyan embassy after its evacuation found weapons and forensic evidence indicating that the shots that killed the police woman actually came from the embassy. Following the severance of diplomatic relations between the England and Libya, diplomatic bags leaving the embassy with its departing staff were not searched or scanned despite a possible reliance on Libyan reservation to the relevant provision of the Vienna Convention. There is strong reason to believe that the murder weapon was in one of those bags. The diplomatic status played a particular significant role as the Libyans leaving the embassy were not arrested despite the strong probability that one (or more) of them was responsible for the killing.<sup>150</sup> The England government requested a waiver of immunity, but the Libyan government refused to waive immunity and yet couldn't be charge with any crime.<sup>151</sup>

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<sup>149</sup> Rosie Cowan and Hugh Muir, 'Police to Fly to Libya in New Search for PC's Killer'( 26 March 26 2004) Guardian <<http://www.guardian.co.uk/Lockerbie/Story/0,2763,1178415,00.html>> Accessed 28 September 2020.

<sup>150</sup> Denza ( n 95)

<sup>151</sup> *ibid*

Furthermore, the rules and principles of 1961 VCDR seem to have two minds. The first and the obvious one is its object to exonerate diplomatic communities from criminal, civil and administrative domestic jurisdictions. It provides that the person of a diplomatic agent shall be inviolable and shall not be liable to any form of arrest or detention.<sup>152</sup> Diplomats shall enjoy immunity from the criminal jurisdiction of the receiving State.<sup>153</sup> The Convention also provides immunity from civil and administrative jurisdiction of the host state save for some exceptions.<sup>154</sup> As well, the members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy such privileges and immunities.<sup>155</sup> On the other hand, in a clear contradiction of such immunities from host state's jurisdiction, the Convention at the same time imposes obligation on diplomatic communities to honor the law of the soil in which they are accredited to.<sup>156</sup> However, though the Convention expects diplomats to behave in a manner acceptable by the host country's laws and regulations, it is superfluous due to the fact that the convention does not provide for any effective mechanism for redress whenever there is violation of host states laws.<sup>157</sup>

As well, nowhere in the 1961 VCDR one has found that employment jurisdiction in connection to employees of diplomatic communities. Failing to raise employment jurisdiction creates devastating problems for the receiving state as employees of diplomatic communities are barred from bringing claims.<sup>158</sup> Also the challenge does not stop here; usually, there is political

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<sup>152</sup> *ibid* Art 29.

<sup>153</sup> VCDR (n 2) Art 31 (1).

<sup>154</sup> *ibid* Art 31 (1) (a-c).

<sup>155</sup> VCDR (n 2) Art 37

<sup>156</sup> *ibid*, Art 41 (1)

<sup>157</sup> 'Insuring Against Abuse of Diplomatic Immunity' (1986) 38 STAN. L. REV 1522

<sup>158</sup> Lisa Rodgers, 'the Inviolability of Diplomatic Agents in the Context of Employment Craig Barker', 'Negotiating the Complex Interface between State Immunity and Human Rights: An Analysis of the International Court of Justice Decision in *Germany v Italy*' (2013) 15 *International Community Law Review* 415, 421. Cited in Paul Behrens *Diplomatic Law in a New Millennium*, Oxford university press published in 2017, p. 113.

interference in favor of diplomatic immunity and this makes it very difficult to redress most prevalent labor abuse by diplomats in the host state.<sup>159</sup>

In the same vein, according to the Ethiopian Criminal Code,<sup>160</sup> where foreign diplomats in Ethiopia commit a crime, he/she will not be subjected to prosecution. As well, according to the Ethiopian Criminal procedure Code<sup>161</sup>, the public prosecutor shall close the police investigation file where diplomats commit a crime in Ethiopia. However, even if there are such immunities in Ethiopia as a host state's jurisdiction, some of Ethiopian laws oppositely and clearly provides the scope of its application so as to include diplomatic communities and makes diplomats its subject. According to the FDRE court establishment proclamation no 25/1996, the Federal Supreme Court shall have exclusive first instance jurisdiction without prejudice to international diplomatic law and custom, offenses for which foreign ambassadors, consuls as well as representatives of international organization and foreign states are held liable.<sup>162</sup> Besides, the labor proclamation of Ethiopia provides the scope of its application so as to include diplomatic communities and makes diplomats its subject.<sup>163</sup> However, these local laws are superfluous because they do not provide for any effective mechanism for redress whenever there is violation of laws of Ethiopia by diplomatic communities, and there is no single and detailed law enacted by the House of People Representative to deal with diplomatic immunity of diplomats in Ethiopia.

As a result, the aforementioned gaps, uncertainties and two-fold position of the 1961 VCDR and local laws have posed legal and practical challenges on how diplomatic immunity enforced in Ethiopia and it shows that there is confusion on whether members of diplomatic communities could be tried in any judicial organs and other law enforcement institutions in Ethiopia.

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<sup>159</sup> *ibid* 113.

<sup>160</sup> Federal Democratic Republic Ethiopia Criminal Code proclamation 2004, Art 11(2)

<sup>161</sup> Federal Democratic Republic Ethiopia Criminal Procedure Code Proclamation 1962, Art 39(c)

<sup>162</sup> Federal Democratic Republic Ethiopia Court Establishment Proclamation No. 25 (1996), Art 8(2)

<sup>163</sup> Labor Proclamation No.1156 (2019) Negarit Gazzette 25<sup>th</sup> year, Art.3(3)

For instance, a criminal case<sup>164</sup> in which Azerbaijan woman, Miss Abasova Anetaga, was brought before Federal First Instance Court Arada criminal bench in December- 5-2019 suspected of drug trafficking after being caught at Bole International Airport while connecting flights is the most popular case. On the date she was brought to the bench, three diplomats, Aleman Abedulhi, Roczeshan Hussen and Goshekar Zemalon, from her country's embassy appeared in the court and attempted to enter while the hearing of Mr. Belete woldetsadeke case was ongoing. However, the police in charge of controlling arrested persons and acting as a bailiff of a court advised him to stay out since the bench has commenced its task. The diplomat then kicked the police in his uniform and made him roll out down the stairs sustaining damage including bone fracture. Then the diplomat forcefully entered the bench insulting the police officers, and attendants. The judge on the bench ordered their detention for court contempt crime on the same file and they were detained. Then after, the diplomats were released based on court order on the same night at 3:00 hours due to the diplomatic immunity and the same court send the file to Ethiopian MoFA for decision.

The other notorious sample case, still has been pending for more than two years without solution insight, that involves diplomatic immunity issue is Mr. B.M Vs. Embassy "X".<sup>165</sup> While a drunken diplomat was driving in speed to his home in the midnight, a 29 years old son of Mr. B.M. was killed. The deceased was a single father who has left a five years old child without a mother and Mr. B.M. is pensioned elderly person with severe poverty. Mr. B.M. is unable to raise the child of his deceased son. The insurance company paid them 35,000 ETB as per the third-party mandatory insurance scheme. The concerned police department conducted its investigation but unable to pursue prosecution owing to the reason of diplomatic immunity. The father of the deceased Mr.B.M. lodged his complaint of compensation for maintenance of the child to the FDRE MoFA Arbitration Affairs Directorate and it was communicated to the concerned Embassy in Addis Ababa. However, the embassy argued that the insurance company has already paid the compensation and claimed not to pay any further indemnity. The Ministry

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<sup>164</sup> Annex P. 61

<sup>165</sup> Mr. Kurabachew Terfasa (n 149)

elaborated the purpose and objective of the Third-Party Insurance Proclamation<sup>166</sup> and requested the Embassy to make payment based on the governing law of Ethiopia.

However, there is no clear laws and guidance from the law maker that enable Ethiopian MoFA to entertain and enforce both criminal and civil cases concerning diplomatic communities. Due to this fact the cases depicts the friction of local laws and law enforcement organs on one hand and the 1961 VCDR on the other.

Besides, when the researcher went to FDRE MoFA to conduct interview and to gather data on November 18, 2013 E.C., one German diplomat disturbed and insulted the security guards at the get entrance of FDRE MoFA by refusing his personal search and interred without any search by showing his diplomatic ID. But, all other customers including the researcher searched out. This shows that there is the hard reality to enforce diplomatic immunity on the one hand and local laws including the right to equality in Ethiopia on the other.

Whenever diplomats act contrary to the law of Ethiopia, the Ethiopian government chooses negotiation and diplomatic courtesy as the best and the only option to settle disputes through FDRE MoFA Arbitration Affairs Directorate because the playing field of diplomacy is by and large political as well as diplomatic immunity is crucial and important for diplomatic relations to undergo and keep safe political, economic and legal objectives of the country.<sup>167</sup> Moreover, because diplomacy is very sensitive and Ethiopia is poor in the economy and dependent on loan, aid and foreign investment, diplomatic courtesy by MoFA is option less way to solve disputes that involve diplomats rather than regular law enforcement mechanisms which will ruin the relationship that Ethiopia has with other countries.<sup>168</sup> The diplomats, particularly their families

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<sup>166</sup> Vehicle Insurance Against Third Party Risks Proclamation No. 7999(2013), Federal Negarit Gazette, 19<sup>th</sup> year No. 53. The main object of the proclamation is to facilitate the provision of emergency medical treatments and it is not to assess the level of damage. Art 16 (3) of the proclamation provides for possibility of claiming compensation beyond what is provided in the proclamation.

<sup>167</sup> Interview with Miss. Yanit Abera, international legal affairs directorate director general in Ethiopian Federal Democratic Republic Ministry of foreign affairs (interviewed in Addis Ababa, November 18, 2020)

<sup>168</sup> Interview with Mr. Yesuf Jemaw, international cooperation on legal affairs directorate director in Federal General Attorney (interviewed in Addis Ababa, November 15, 2020)

involve in criminal activities and flash their ID cards to escape liability, especially traffic accident cases involving diplomats, investigated by Addis Ababa Police commission, between January 2019 and November 20 2020 are more than 30 in which death, bodily injury and damage of property are registered.<sup>169</sup> All these criminal cases that involve delinquent diplomats do not prosecute rather the crimes investigation files that started without any arrest have been sent to FDRE MoFA for decision.<sup>170</sup>

This interview about the practical implementation of diplomatic immunity in Ethiopia shows that there exist practical and political implementation challenges of diplomatic immunity in addition to the abovementioned legal challenges. And also the data gathered indicates that, pragmatically in Ethiopia, the issue of diplomatic immunity solve by diplomatic courtesy rather than implementing coreicve ways of law enforcement mechanisms. Hence, the law enforcement organs in Ethiopia left to their own structure, reasoning and interpretations of this ambiguous and delicate issue of diplomatic immunity, and the considerations of foreign affairs policy. As a result, this have paved way for dilemmas in the decisions of law enforcement organs that involve diplomatic communities, and have created difficulties in finding justice when diplomatic communities have violated Ethiopian laws and regulations.

Additionally, the relationship between human rights and diplomatic immunity is a very controversial issue. The problem of their hierarchy to implement them as well as difficulties in finding justice when a diplomat has wronged a citizen incompatible with international human rights laws in receiving states increased from time to time. On the one hand, even though in principle that state courts assume power over acts committed within its territory, diplomatic immunity is an exception to such principle in which states are denied from trying cases against persons having diplomatic immunity. This exception is born out of the principles like state sovereignty, equality of states, and through the operation of specific international law. More specifically, 1961 VCDR shields diplomats from domestic jurisdiction as international law, despite the need to uphold principle of human rights law, equality before the law and rule of law.

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<sup>169</sup> Interview with deputy inspector Ayalew Mesfin, traffic accident investigation coordinator in Addis Ababa police commission (interviewed in Addis Ababa, November 16, 2020)

<sup>170</sup> Annex P.61

On the other hand, however, such prevalence of diplomatic immunity seriously affects the government's effort in the protection, promotion and fulfillment of human rights, and implementation of human rights laws in the host state. Additionally, the issue of Human Right especially in Europe is flourishing recently, and there has been major development at the international level to make diplomats accountable for grave human rights violations, and this might change the concept of providing absolute criminal and civil immunity of diplomatic missions.<sup>171</sup> Every person who claims that his or her rights has not been respected, protected or fulfilled must be able to seek an effective remedy before a competent and independent domestic body vested with the power to order reparations and to have its decisions enforced.<sup>172</sup>

Also, since article 38 of the VCLT also failed to express the hierarchy between treaties, the hierarchical implementation of diplomatic immunity and human rights treaties is a contesting issue. The Ethiopian constitution leaves the hierarchy between and among treaties that Ethiopia ratified for controversial arguments and implementation difficulties by stipulating that all international agreements ratified by Ethiopia are an integral part of the law of the land.<sup>173</sup> And this obviously gives both the 1961 VCDR and IHRLs equal status in terms of enforcement. They both are considered as part and parcel of the Ethiopian laws and the only point of reference here is the fact that they are compatible with the spirit of the constitution.<sup>174</sup> Thus, there is a clash and confusion in the implementation of the principle of diplomatic immunity and human rights laws in Ethiopia in particular, and in other host states in general.

From the above discussion, interviews and sample recent case lodged before federal court and MoFA in Ethiopia, the researcher has observed that the uncertainty, ambiguities and gaps of diplomatic laws have caused a serious challenge to law enforcement organs, have paved way for dilemmas in law enforcement organs decisions, clashes in the implementation of diplomatic immunity laws and human rights laws, difficulties in finding justice when a diplomat has wronged the laws of Ethiopia, opening a gateway to diplomatic immunity abuses.

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<sup>171</sup> Rodgers (n 158) 119

<sup>172</sup> *ibid.*

<sup>173</sup> FDRE constitution ( n 150 )

<sup>174</sup> *ibid* Art 9 (1)

### **3.2. The assessment of remedial mechanisms for diplomatic immunity abuse and their implementation challenges.**

In recent times it is being observed that the immunities and privileges that codified under diplomatic immunity laws are being used outside their purpose or objective to the personal interest of diplomats. From the 1961 VCDR, it has to be noted that there is no universal consensus on the scope and extent as well as what constitute private act on one hand and official activity on the other, as there is no watertight demarcation.

It is being observed that many diplomats are violating the laws' of the host states and abusing their immunity and privileges in a country where they are assigned. However, countries like USA, Ethiopia and Switzerland are more victims since these countries host many diplomatic communities. As diplomats are free from local jurisdiction of receiving state, they commit from simple crimes like, driving with intoxication to serious crimes like rape, physical abuse, murder, drug trafficking, etc., and fail to pay compensations, failing to pay house rent, failing to pay salary to the domestic servants and other payments to victims. Such intrusions are worsened by lack of effective and efficient means of redress. However, in developed countries the integrated system that has built reveals the track record of diplomats and any liability they owe is readily available. For instance, in these countries, landlords prepare rental contracts they insert a clause for waiver for jurisdictional immunity and they also confirm this from their Foreign Affairs office.<sup>175</sup>

The challenge would be more severe in Ethiopia due to lack of efficient and effective mechanisms in providing compensation for victims, lack of infrastructures and systemic protection of citizens, and low level of economic and political development.<sup>176</sup> Even though there are no efficient and effective redress mechanisms in Ethiopia, it is not without option whenever diplomats are found undisciplined or commits any offence in Ethiopia as a receiving state. The researcher tries to discuss the available remedies and their implementation challenges in Ethiopia as follows.

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<sup>175</sup> Miss. Yanit Abera( n 168)

<sup>176</sup> *ibid*

### **3.2.1. Remedies Available under 1961 VCDR for Diplomatic Immunities abuse and its' implementation challenges**

Ethiopia ratified the 1961 Vienna Convention on Diplomatic Relation and as per FDRE Constitution Art 9(4) international treaties ratified by Ethiopia are integral parts of the law of the land. Thus, 1961 VCDR is an integral part of Ethiopian laws. There are available remedial approaches under 1961 VCDR whenever diplomats are found abuse their diplomatic immunity accredited and implementation problems arising thereof. This includes;

#### **✓ Personan non-grata**

Even if, in practice, it is said that the sending states are hesitant to recall offenders and the receiving states are also reluctant to deport or force to expel offenders of diplomats<sup>177</sup>, according to Article 9 of the VCDR,<sup>178</sup> a receiving state can declare a diplomat 'persona non grata' which forces diplomat for expulsion or require diplomat to choose to leave out of the receiving state or face a trial for whatever reason state believe appropriate or for no reason at all. This remedy might create tension between receiving and sending state relations.<sup>179</sup> Moreover, under such circumstance it left the victim without any remedy or claim of compensation against diplomat who is forced to be expelled. For instance, recently South Korean diplomat called Lee was accused of committing sexual assault against young Ethiopian fellow Embassy staffer by intoxicating her. The diplomat was recalled to his home country. However, no information has been disclosed whether he is punished or not.<sup>180</sup> This is because starting suit in sending state would be very inconvenient because of financial problem, bringing evidence, language problem and many other reasons.

Thus, this implies that this remedy would be more difficult to implement in Ethiopia due to lack of efficient and effective local mechanisms, infrastructures and systemic protection of citizens, and low level of economic and political development. Also, this indicates that there are

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<sup>177</sup> Robert A. Wilson, 'Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations' (1984) 7 Loy. L.A. Int'l & Comp. L. Rev.113, 24

<sup>178</sup> VCDR( n 2 ) Art 9 (1)

<sup>179</sup> Ross Mitchell S., 'Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities'(1989) 4 American University International Law Review no. 1, 188

<sup>180</sup> Mr. Kurabachew Terfasa ( n 149)

circumstances where diplomat escapes punishment by using his diplomatic immunity right or for other political reason.

#### ✓ **Request for Waiver of Immunity**

According to Article 32 of 1961 VCDR,<sup>181</sup> the sending state is allowed to remove diplomatic immunity upon request of the receiving state. On positive response, by sending state, the diplomat will be treated just like an ordinary citizen of receiving state, and he/she will be held liable for any offence committed. However, practically this remedy is not that much used because of political reasons sending state prefer not to waive diplomatic immunity.<sup>182</sup>

For instance, a case by the year 2015 Saudi diplomat to India was accused of committing domestic violence to two female Nepali domestic servants who were employed by Saudi diplomat. Victims reported that they were denied food and water, beaten and repeatedly raped by up to seven men, including the diplomat. The diplomat left India without any prosecution. The Indian Ministry for External Affairs requested a waiver of the diplomat's immunity, but the Saudi government refused and withdrew their diplomat.<sup>183</sup> The wording of Article 32 makes it clear that the state cannot be forced to waive diplomatic immunity in any situation and it is argued that the power of the state to decide whether to grant a waiver of immunity is not legal; rather, it is a political decision based on the principle of reciprocity.<sup>184</sup>

#### ✓ **Limiting or Terminating the Size of Mission**

According to Article 4<sup>185</sup> and 11<sup>186</sup> of 1961 VCDR, the receiving state has full discretion to limit the size of a diplomatic mission or in the worst situation to cut any relationship with sending state. This solution might include limiting the size of missions, control the number and to some

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<sup>181</sup> VCDR( n 2 ) Art 31 (1)

<sup>182</sup> Paul Behrens (n 85) 48.

<sup>183</sup> Bagchi Inedin, 'Gurgaon Rape Case: Saudi Arabia Calls Back Tainted Diplomat' (16 September 2015) Times of India Accessed 21 October 2020.

<sup>184</sup> Farahmand Ali M., 'Diplomatic Immunity and diplomatic Crime: A Legislative Proposal to Curtail Abuses; Note' (1990) 16 Journal of Legislation Iss. 1 Art.7, 49

<sup>185</sup> VCDR( n 2 ) Art 4 (2)

<sup>186</sup> Ibid Art 11 (1&2)

extent, the identity of the diplomatic personnel assigned to the receiving state.<sup>187</sup> However, none of the administrative measures stipulates clear reprimands up on diplomats who abused his/her immunity and privilege. Hence, the ultimate power to determine whom to receive as diplomat depends on the receiving state.<sup>188</sup> For instance, in Fletcher case, she was a British police killed by Libyan diplomat by a gun fired from the Libyan Embassy in London and let eleven injured. After eleven days of the lockdown of the embassy, the British government expelled all occupants of the Libyan embassy and terminated its relationship with the Libyan government.<sup>189</sup>

### **3.2.2. The existing local remedial approaches available for diplomatic immunities abuse and its' implementation challenges**

Even if the effectiveness of the remedies provided by the Ministry of Foreign Affairs (MoFA)'s Arbitration Affairs Directorate is obviously impacted by diplomatic issues like political relations, economy and reciprocity; it is the viable mechanism in providing justice for victims of diplomatic abuse in Ethiopia. The Ministry of Foreign Affairs (MoFA) handles cases involving embassies, IOs and individual diplomats. The Directorate has both legal and diplomatic approach in settling issues. Since the 1961 VCDR apparently precluded Ethiopian local courts from entertaining cases brought against diplomats, the Arbitration Affairs Directorate of the Ministry of Foreign Affairs (MoFA) entertains cases mainly on mediation basis. Indeed, the Arbitration Directorate is established in 2019 as a separate department. Prior to this, the task of arbitration was used to be carried out by the Privileges and Immunities Directorate of the Ministry. Currently, the latter directorate is mainly mandated to facilitate the privileges of diplomats, like issuing and renewing diplomatic ID cards, permitting import of duty-free items, permitting tax free fuel, duty free shops, and so on.<sup>190</sup>

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<sup>187</sup> Paul Behrens (n 85) 44

<sup>188</sup> Ibid46

<sup>189</sup> Ewan Palmer, 'PC Yvonne Fletcher: Was Britain Right to "allow murderer to walk free" under Diplomatic Immunity?'(20 November 2015) International Business Times <[http:// www. ibtimes.co.uk/ pc- Yvonne- Fletcher- was- britain- right- allow- murderer- walk- free- under- diplomatic immunity-1529723](http://www.ibtimes.co.uk/pc-Yvonne-Fletcher-was-britain-right-allow-murderer-walk-free-under-diplomatic-immunity-1529723)> Accessed 22 October 2020

<sup>190</sup> Mr. Kurabachew Terfasa ( n 149)

The draft Arbitration Procedural directive on Settlement of dispute that may arise between Ethiopians and diplomatic missions prepared in 2009<sup>191</sup> for MoFA arbitration affair's directorate, which is yet to be ratified and it is not yet binding. The MoFA arbitration affair's directorate which is the department responsible for dealing with disputes arising between diplomatic immunity holders and Ethiopians.

Even though the arbitration directorate established with its own structure quite recently<sup>192</sup>, it does not have full-fledged legal environs to operate. The overall assessment of the draft arbitration procedural directive shows that it is not a kind of robust procedures that stand for justice, and it has many legal and practical implementation challenges and problems.

Among others, the first problem is that the draft arbitration procedural directive has not been signed yet though it passed ten years since its preparation, and it shows there is a lack of commitment by arbitration affair's directorate or the Ministry to legalize their function. The second problem is that pursuant to article 2 of the draft arbitration procedural directives, the scope of the implementation is on the issue of contractual, extra-contractual and administrative issues arising from diplomats of international organization and diplomatic missions. Moreover, it clearly states that the draft Arbitration procedure shall not apply to criminal issues. Thus, this shows that the Arbitration Affair Directorate department only deals with civil matters and it does not entertain criminal issues at all. Hence, it is a devastating problem for victims and it is a weakness of MoFA because as a foreign Affairs institution, it should at least look for any available option to prosecute the offenders or follow-up for the execution of justice through communicating by diplomatic channels.

The third point of challenge is that the Directorate does not have a means to enforce its decision, as opposed to regular courts. And also it has no power or mechanisms to force the diplomat to come to the office. Even if it is not binding, Article 4-11 of the draft arbitration procedural

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<sup>191</sup> በውጭ ጉዳይ ሚኒስቴር የፕሮቶኮል ዕ/ቤት የተዘጋጀ፤ በኢትዮጵያዊያንና በባለልዩ መብት መካከል ለሚነሱ አለመግባባቶች የአቤቱታ አቀራረብ፤ የድርድር ውሳኔ አሰጣጥና አፈፃፀም ሥነ-ሥርዓት መመሪያ (ታህሳስ 2001፣ ረቂቅ መመሪያ)።

<sup>192</sup> Miss. Yanit Abera ( n 177)

directives, which deals about the appearance of parties and the effect of failure to appear before the Arbitration Affairs Directorate, show that the execution of arbitration award depends upon the good will of the diplomats. Hence, the researcher observed that the draft arbitration procedural directive is toothless law which lacks enforcement power and the work of the directorate is the work of mediator than an arbitrator.

Furthermore, the Circular Note No, P 12/36/80 is enacted by the MoFA by the year 1990 to solve disputes through amicable negotiation (mediation) whenever a dispute arises between diplomats of embassies and international organizations with their domestic servants such as baby sitter, janitor, cooker, guard...etc. for personal services. As there is no domestic law in Ethiopia to govern the relationship between domestic servant and employer, the only available document to solve the dispute between diplomats and the domestic servant is this circular note.

This circular note was prepared to solve the problem of lack of law/regulation regarding domestic servant. It provides a form of compensation in the manner that if the employee is for any reason dismissed by his/her employer, severance payment and compensation shall be calculated as; two month's salary as severance payment, one month's payment for service of one (1) year and for less than one year, a proportion thereof, for service of more than one (1) year, in addition to one month's payment, a third of one month's payment for each year of service, and if the employee terminates employment up on his/her own will, the employee shall not receive severance payment, but only compensation of one month's payment for service of one (1) year and for less than one year, a proportion thereof or for service of more than one (1) year for, a third of one month's payment for each year of service.<sup>193</sup> However, the circular is now almost 30 years old in which its application and validity is reasonably challenged.

In a net shall, the researcher found that the available remedial approaches for diplomatic immunity abuse in Ethiopia are difficult to easily enforce. The 1961 VCDR is without having working procedure, enforcement mechanisms for diplomatic abuse, and even the available remedies under the convention do not efficient and effective. Also, the researcher found that unlike countries like the USA and South Africa Ethiopia has no diplomatic act or any specific law that governs dispute between diplomatic communities and citizens. MoFA Arbitration

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<sup>193</sup> Annex P. 62

Affair's Directorate approach to solving dispute between diplomats and complaints are based on mediation or dialogue. However, the directorate does not have the power to give a binding decision and its enforcement mechanism of decisions is based on diplomatic courtesy.

## CHAPTER FOUR

### CONCLUSION AND RECOMMENDATIONS

#### 4.1. Conclusion

Diplomatic immunity is one of the oldest and most established rules of international law<sup>194</sup>and initially, rules regarding diplomatic immunity were only of customary nature. Diplomatic immunity, as it has been stated by the governing instruments and the majority of the international community interprets the principle, as one which is granted not to benefit the diplomats but to protect diplomats in an attempt to ensure diplomatic relations and promote the efficiency of the official functions of the diplomats. It is also not deny that diplomatic immunity has strong reason for its existence principally. This is because guaranteeing the freedom and independence to diplomatic communities exceptionally enables them to carry out their functions without risk of undue pressure by receiving States.

However, the concept of diplomatic immunity is a very vibrant issue in the international arena and various factors have influenced the conception and practical application of diplomatic immunity in different countries as a host state. More specifically, while the 1961 VCDR and local laws of Ethiopia on diplomatic immunity acknowledged this legal principle, it continues to be the subject of debate and complexity in its practical implementation. These debate and complexity is caused by the ambiguities, uncertainties and gaps of the Convention and other local laws concerning diplomatic immunity.

As the experiences of Ethiopia, as the receiving State, has witnessed, there have been confusions on the exact extent and coverage of diplomatic immunity given to diplomatic communities under diplomatic immunity laws, and there is ambiguities, uncertainties and gaps of the laws that concerning diplomatic immunities. Also the researcher found that this area of law is not understood as clearly as the other parts of laws like Tort laws and Inheritance laws, even by lawyers in Ethiopia, including those working in judicial organs and other law enforcement institutions. By taking this problems of diplomatic laws as an advantage, diplomatic immunity being used as conduits to break laws and regulations in Ethiopia as well as diplomats will remain

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<sup>194</sup> Eileen Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* (3rd edn, OUP 2008) 1

to misuse their diplomatic immunity incompatible with other competing international norms like human rights and rule of law so as to accrue undue benefits or just to undertake violent behavior.

Moreover, the researcher found that in Ethiopia there is no clear guidance from the law maker concerning diplomatic immunity and its implementation, and there is no coercive mechanism in the 1961 VCDR and local laws in enforcing or settling disputes whenever there is violation of the country's laws and regulations by diplomatic communities. Due to this fact, the law enforcement organs in Ethiopia left to their own structure, reasoning and interpretations of this ambiguous and delicate issue, and the considerations of foreign affairs policy. As a result, this have paved way for dilemmas in the decisions of law enforcement organs that involve diplomatic communities, and have created difficulties in finding justice when diplomatic communities have violated Ethiopian laws and regulations.

#### **4.2. Recommendations**

Today in Ethiopia, diplomatic immunity implementation challenges are more severe due to lack of efficient and effective mechanisms and local laws to enforce diplomatic immunity laws as well as due to lack of systemic protection of citizens, and low level of economic and political development. The dimension and volume of such problems is also likely to increase with the arising numbers and transactions of diplomatic communities based in Ethiopia. Now, there is an urgent need to balance those diplomatic immunity implementation challenges and diplomatic immunities and privileges. Therefore, the researcher recommends the following so as to mitigate, if not eliminate, the challenges:

- ❖ Since, the 1961 VCDR has overbroad scope of the immunity, vacant loopholes, and also provides undue blanket immunity that it has created as it is stated in terms of individuals and not functions, the Ethiopian government shall enact laws that govern diplomatic relations which details that who deserve diplomatic immunity; what constitute official act and non-official act; providing a cover for the loophole and clearly articulating the exceptions provided in the convention and other local laws;
- ❖ The Minister of Ministry of Foreign Affairs and the Federal General Attorney under the federal government of Ethiopia shall be vested with the power to modify and restrict privileges and immunities on the basis of reciprocity within the framework of the 1961 VCDR;

- ❖ It is undeniable that diplomatic communities need immunity to perform their functions in safe and consistent manner; however, there are also powerful reasons to hold that diplomatic communities being liable for their unlawful act in the host states' courts, but this might be follow unjustifiable interference with the performance of their functions. Thus, quasi-judicial body in Ethiopia that capable of dealing with both law and diplomacy as well as that will provide much desired redress without risk of bias should be established to entertain cases that involves diplomats;
- ❖ The Ethiopian government shall enact laws how to settle issues concerning diplomatic cases. So that, practical and vigorous mechanisms like compulsory liability insurance recovery mechanism for all diplomatic communities need to be invented in line with the framework of the 1961 VCDR;
- ❖ The international community, especially the Ethiopian government, shall start to bark and rethink for the amendment of the concept of diplomatic immunity under the 1961 VCDR with current time challenge and context.

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ANNEXES



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ቀን 26 /03/ 2012

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ከተባለ በኋላ

- 1ኛውን ግለሰብ በኢትዮጵያ የአዘርባጃን እምባላደር ከ2ኛ 3ኛ ያሉት ግለሰቦች ደግሞ የአዘርባጃን ዜግነት ያላቸው ዲፕሎማቶች ስለመሆናቸውና ሁሉም ግለሰቦች diplomatic immunity ያላቸው ስለመሆኑ የሚሰረዱ የሰነድ ማስረጃ ያቀረቡ በመሆኑ እና ደ.ሀ በ1961 ዓ.ም በወጣው ሺያና ኮንቪንሽን አንቀጽ 29 መሰረት ያለመታሰር መብት



- የሚያገናኝ ሰዎች በመሆን ከፍ ሲል ግለሰቦች በአስር ላይ ይቆይ ተብሎ የተሰጠው የአስር ትዕዛዝ ተራ ሆኗል
- በመሆንም የኢትዮጵያ የውጪ ጉዳይ ሚኒስቴር ከፍ ብሎ እንደተመለከተው ሰባትም ግለሰቦች ችሎት በመደረግ ጥፋተኞች የተባሉ መሆንን አውቆ በተለይም ግለሰቦቹ በእንግሊዘኛ ቋንቋ dirty people በማለት የፍ/ቤቱ ማህበረሰብ የተሰየሙና ይህም አጠቃላይ በሀገሪቱ ዜጎች ላይ የተፈፀመ አሰነዋሪ ተግባር መሆንን ከግምት ውስጥ በማስገባት በግለሰቦቹ ላይ አስፈላጊውን እርምጃ ወስዶ ውጤቱን ለፍ/ቤቱ በዕቅድ እንዲያሳውቁ በጥብቅ ታዟል
- ትዕዛዙን የፍ/ቤቱ ፓስተኛ ያደርሱ ውጤት ለመጠየቅ A07 /04/ 2012 በ8:30 ተተግኝቷል።

የጃን ፊርማ- ተስፋዬ ደቻላ

ገ/አ 30 /3/ 12  
 ቆ







በቦሌ ከፍላ ከተማ ፖሊስ መምሪያ  
**BOLE SUB-CITY POLICE OFFICE**  
 የወንጀልና ትራፊክ አደጋ ምርመራ ዲቪዥን  
**CRIME AND TRAFFIC ACCIDENT INVESTIGATION**



18968/03/11  
 24-09-12

**ለውጭ ጉዳይ ሚኒስትር**  
**አ/አበበ**

**ጉዳዩ፡- የትራፊክ አደጋ ጀምር የምርመራ መዝገብ ስለመላክ ይመለከታል**

ይኸውም በቀን 20/05/2012 ዓ/ም በግምቱ ከመሸቱ 1:00 ሰዓት ሲሆን በቦሌ ከተማ ወረዳ ዕድ ከልል ልዩ ቦታው የሌ ለሞ ሆኔል የባቡር ፈርማታ አካባቢ ሲሆን ተከላሽ ሚ/ር አሸራሞ ብራሞ የተባሉ የሰሌዳ ቁጥር ኮድ 3 087 CD ፈሪጅና መኪና ይዘው ከ22 ወደ መገናኛ አቅጣጫ በማሸከርከር ላይ እያሉ ከላይ በተገለጸው ቦታ ላይ ስደርሰ ያሉደጋ ተካፋይ አቶ ግርማቸው ካሳውን ከተባለው የሰሌዳ ቁጥር ኮድ 3 A 46538 አ/አ ገዛፍ መኪና ይዞ በተመሳሳይ አቅጣጫ በማሸከርከር ላይ እያሉ ተከላሽ ርቀቱን ሳይጠብቅ ከጎሳ ጥቶቱ በንብረት ላይ ጉዳት አድርጏል ።

ስለሆነም ተከላሽ ሚ/ር አሸራሞ ብራሞ ያለመክሰስ ሙብት ያላቸው ስለሆነ የዲፕሎማቲክ መታወቂያ ቁጥር E03/259/18A ሽውጭ ጉዳይ ሚኒስትር የተሰጣቸው በመሆን ተከላሹ በእኛ በኩል የማይከሰስ ስለሆነ በእናንተ በኩል በውስጥ ደንባቸው መሰረት እንድትጠይቁ እየገለጸን ጀምሮ የምርመራ መዝገቡን በውስጡ 15 ነገር እንደያዘ በዚህ ሽፍ ደብዳቤ አባሪነት የላከንላችሁ መሆንን እየገለጸን ምርመራ መዝገቡ ላይ ውሳኔ ከተሰጠ በኋላ ገደብ እኛ እንድትሰጡን እንጠይቃለን።

ከውላምታ ጋር  
  
 ሙሉ ስም፣  
**MEAZA ZEWDIA**  
 ር.አ.ፈ.  
 ASSISTANCE INSPECTOR  
 የትራፊክ አደጋ ምርመራ  
 ማስተባበሪያ ኃላፊ

የውጭ ጉዳይ ሚኒስትር  
 ፋኛ መዝገብ ቁጥር  
 የሚረዳበት ቀን  
 የመዝገብ ቁጥር  
 የገለጸው ተባብሮ





Date : 07 Aug. '90  
Ref.No: P 12/76/82

The Ministry of Foreign Affairs of the People's Democratic Republic of Ethiopia presents its compliments to all Heads of Diplomatic Mission and International Organization and has the honour to bring the following to their kind attention:-

It is to be recalled that whenever a dispute arises between members of Diplomatic Missions and International Organizations and their domestic staff, the Ministry has been mediating and attempting to resolve such disputes through amicable negotiation and on the basis of Circular Note No. P 12/36/80.

Some privileged persons, however, have argued that Labour Proclamation No. 64 of 1975 specifically excludes domestic help and as a consequence refused to consider granting due compensation to their dismissed employees.

In order to clarify such ambiguity, although the referred Proclamation excludes domestic staff, in the spirit of the same Proclamation and other relevant articles of the Ethiopian Civil Code the Ministry will mediate all such disputes and continue to request due compensation in the following manner.

1. If the employee is for any reason dismissed by his employer severance pay and compensation shall be calculated as follows:
  - a. two month's salary as severance pay;
  - b. one month's pay for service of one (1) year, and less than one year, a proportion thereof.
  - c. for service of more than one (1) year; in addition to one month's pay referred to in para (b) a third one month's pay for each year of service.
2. If the employee terminates his employment of his own will, the employee shall not receive severance pay, but only compensation as indicated in paras. b or c above.

The Ministry of Foreign Affairs is therefore requesting Head of Diplomatic Mission and International Organization to bring the regulations to the attention of all their diplomatic or privileged personnel.

The Ministry of Foreign Affairs of the People's Democratic Republic of Ethiopia avails itself of this opportunity to renew to all Heads of Diplomatic Mission and International Organization the assurance its highest consideration.

To All Heads of Diplomatic Missions  
and International Organization

ADDIS ABABA

## **KII(Key Informant Interview )**

### **A. Objective of the KII**

The KII is aimed at collecting data and information to be used for academic research entitled “DIPLOMATIC IMMUNITY AND CHALLENGES TO ITS IMPLEMENTATION IN ETHIOPIA.” Specifically, the objectives of this data gathering is to identify and critically analyze the practical implementation problem of diplomatic immunity in Ethiopia and it will claim you to narrate and refer specific cases that appeared before your organization or before courts.

The interview will conduct by face-to-face ways in soliciting information with just simply taking notes. As well, be assured that your interview will be kept in the strictest confidentiality, keeping you anonymous if you wish and getting your informed consent. The interview will take twenty to twenty five minutes to complete.

### **B. List of questions for KII(Key Informant Interview ) for Ethiopian MoFA, FGA and AAPC**

#### **Section I – Questions for Identification**

Respondent’s name	
Place of work and Position	
How long has she/he worked in the relevant Position.	
Place of Interview	
Date of Interview	

#### **Section II – Questions for specific information**

1. How long have you served in the MoFA or FGA or AAPC?
2. In which position and department have you been doing so far?
3. Are you aware of diplomatic immunity? Are you aware of the national and international laws dealing with diplomatic immunity? Please explain as much as possible!

4. What is your assessment of practices in diplomatic immunity in Ethiopia, in general and at your ministry, office, etc. in particular?
5. Do you think there are violation of laws and abuses of diplomatic immunity in Ethiopia by diplomats residing here? Are there specific cases, which appeared before your organization or before courts, you might narrate and refer to the researcher?
6. What do you think are reasons for violation of laws by diplomats and abuses of diplomatic immunity in Ethiopia?
7. What do you think are reasons for abuses of diplomatic immunity?
8. What are the types of cases in which diplomatic immunity is often abused and why?
9. What do you think also of the attitudes of diplomats in Addis Ababa regarding diplomatic immunity?
10. What are mechanisms and measures availed by your institution whenever diplomats found against the laws of Ethiopia and abuse their privileges and immunities? Are there some known cases (civil or criminal) by the foreign diplomats? If yes, kindly describe the facts and procedures followed to entertain the cases.
11. Do you think the practices of the existing remedial approach followed by the Ethiopian government are effective whenever diplomats found violate the laws of Ethiopia and abuse their immunity? What are their implementation challenges?
12. Any other information?

I thank you!