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Note

***989** LIMITING DIPLOMATIC IMMUNITY: LESSONS LEARNED FROM THE 1946
CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

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I. Introduction

On April 17, 1984, demonstrators gathered outside the Libyan People's Bureau in London to protest the practices of Colonel Muammar Qaddafi's regime. [FN1] Officials of the British government had been forewarned that if the demonstration was allowed to take place, Libya “would not be responsible for its consequences.” [FN2] Suddenly, during the demonstration, machine gunfire erupted. [FN3] Shots were fired from inside the Libyan embassy toward the crowd. [FN4] Constable Yvonne Fletcher was killed, and eleven others injured. [FN5] This tragedy led to the severing of diplomatic relations between the United Kingdom and Libya. [FN6] No one was ever prosecuted. [FN7]

This incident at the Libyan embassy illustrates how diplomatic immunity shields the culpable from liability. While most scholars agree that some form of diplomatic immunity is necessary, the doctrine has historically been criticized. This is because diplomats enjoy absolute immunity for their official and ***990** private acts while on assignment in the receiving state. [FN8] Commentators have suggested numerous ways to curb this absolute immunity. These suggestions include, inter alia, creating a permanent international diplomatic court, [FN9] restricting or amending the Vienna Convention on Diplomatic Relations, [FN10] and creating compensation funds and mandatory insurance so that the injured have recourse. [FN11]

This Note will suggest that absolute immunity is unnecessary and undesirable. It will propose limiting immunity to only those acts required for a diplomat to fulfill his official functions. It will show that the functional necessity theory of immunity has been successful in its application to the privileges and immunities of officials working in international organizations, such as the United Nations (“UN”). It will argue that functional immunity should be applied to diplomats rather than absolute immunity. Further, it will propose that an additional Protocol to the Vienna Convention be drafted allowing states to execute bilateral agreements limiting the immunity of their diplomats to functional immunity. Finally it will argue that for these agreements to be truly effective they must provide waiver and settlement options similar to those used in the Convention on the Privileges and Immunities of the UN. [FN12] These options would make diplomats accountable for both criminal and civil wrongs.

Part II of this Note will provide background on diplomatic immunity, including its history, theoretical underpinnings, codification, and cases of abuse. Part III will provide an overview of the international privileges and immunities enjoyed by officials of the UN. In addition, Part III will focus on the waiver and settlement features of the UN Convention. Part IV will ***991** compare the immunities of diplomats to those of their international counterparts and will argue that diplomatic immunity should be limited to acts necessary to carry out the diplomat's official functions. Finally, this Note will propose methods for enforcing the functional theory of diplomatic immunity.

II. Background on Diplomatic Immunity

A. Practical Justifications for Diplomatic Immunity

On November 4, 1979 the American embassy in Tehran was seized by armed students and the entire staff of the embassy was held hostage. [FN13] The gunmen demanded that the United States (“U.S.”) extradite the Shah and apologize for its involvement in internal Iranian politics over the past several decades. [FN14] The Iranian government took no action to help gain the release of the hostages, and the Iranian minister in charge of supervising the embassy commented that, “this occupation is certainly positive.” [FN15] The last hostages were released after 444 days in captivity. [FN16]

The U.S. filed a claim before the International Court of Justice (“ICJ”). [FN17] In its judgment of May 24, 1980 the Court held:

***992** (T)he Government of the Islamic Republic of Iran shall . . . afford to all the diplomatic and consular personnel of the United States the protection, privileges and immunities to which they are entitled under the treaties in force between the two States, and under general international law, including immunity from any form of criminal jurisdiction and freedom and facilities to leave the territory of Iran. . . . [FN18]

Diplomatic immunity has been described as a “necessary evil.” [FN19] The above example illustrates the need to retain parts of the doctrine, especially those parts that provide physical protection to diplomatic personnel. The main rationale for providing diplomatic immunity is that the individual must be allowed to perform his functions freely and independently without fearing political persecution by the receiving state. [FN20] Another argument put forth is that diplomatic immunity is necessary for the efficient functioning of the diplomatic process. [FN21] A further benefit of diplomatic immunity is that it is reciprocal. [FN22] Reciprocity permits governments to extend diplomatic privileges and immunities because these governments expect the same will be done for their personnel. [FN23]

While these are all practical justifications for the doctrine of diplomatic immunity, they still do not support absolute immunity. For example, does it make sense to prevent civil suits by private individuals, where there is no intention on that individual's part to interfere with the free and independent functions of the diplomat? How do legitimate criminal prosecutions interfere with the diplomatic process? Why not limit the diplomat's immunity to those acts which are necessary for the exercise of official functions, instead of shielding them from civil

and criminal liability?

*993 B. Diplomatic Immunity Defined

Diplomatic immunity is the protection enjoyed by diplomats in a receiving state while representing the sending state. [FN24] The scope of diplomatic immunity differs for different levels of diplomatic personnel. [FN25] This Note will focus on the diplomatic staff defined in Article 1 of the Vienna Convention on Diplomatic Relations. [FN26] Diplomats classified in the “head of mission” category enjoy absolute immunity, with some exceptions. [FN27] These diplomats are immune for both private acts and acts carried out within the scope of their official functions. [FN28] Such diplomats *994 are, therefore, typically immune from both criminal and civil violations of the law. [FN29]

C. Traditional Theoretical Justifications for Diplomatic Immunity

The three main traditional theoretical justifications for diplomatic immunity are: (1) extraterritoriality, (2) personal representation, and (3) functional necessity. [FN30] While parts of each theory taken collectively can be used to justify absolute immunity, [FN31] each one taken individually fails to justify why diplomats require immunity for both private and official acts.

1. Extraterritoriality

The theory of extraterritoriality suggests that the property of a diplomat and the person of the diplomat are to be treated as if they exist on the territory of the sending state. [FN32] Because the diplomat is considered to be living in the sending state, he remains immune from the criminal and civil jurisdiction of the receiving state. [FN33] This theory is ironic, considering that the diplomat would not be immune for the same illegal conduct if committed in the sending state. Not surprisingly, this theory has been described as a legal fiction, [FN34] and has fallen out of favor, but was the dominant theory during much of the 18 th Century. [FN35] Critics view it as too expansive because it prevents states from restricting the privileges and immunities of diplomats. [FN36] In *995 short, the theory of extraterritoriality is viewed as excessive. [FN37]

2. Personal Representation

The personal representation theory is premised on the idea that the diplomat is a representative of a sovereign state, and that as the representative he is entitled to the same privileges as the sovereign. [FN38] Under this theory the diplomat is viewed as the personification of the head of the sending state. [FN39] This theory, like extraterritoriality, is not widely accepted in modern diplomatic practice. [FN40] It is criticized because in many states there is no longer a monarchy and sovereignty has been transferred to the people and their elected officials. [FN41] Because “the people” do not enjoy immunity from prosecution in foreign states, their representatives should not either. [FN42] In addition, the personal representation theory offers

no justification for why diplomats should be immune from jurisdiction for their private acts. [FN43] Thus, the theory of personal representation also fails a modern application.

3. Functional Necessity

Functional necessity is the most accepted theory for the justification of diplomatic immunity. [FN44] Under this theory, privileges and immunities should be limited to those necessary for the diplomat to carry out his official functions. [FN45] The approach is justified by arguing that diplomats could not fulfill their roles without certain privileges and immunities. [FN46] Proponents of this *996 theory suggest that it is dynamic and contains safeguards preventing the needless expansion of privileges and immunities. [FN47] Indeed, functional necessity has been acknowledged in the Vienna Convention on Diplomatic Relations, [FN48] the international instrument governing diplomatic relations. [FN49] This doctrine is unique, unlike its historical antecedents, because it provides some rational basis for restricting the immunity of diplomats, as long as the restrictions do not hinder the diplomat from accomplishing his functions. [FN50] However, functional necessity has not been carried to its logical conclusion in the diplomatic context. Perhaps this is because states are fearful that their diplomats would face unjust political prosecution or be rendered unduly cautious in carrying out their functions. Thus, diplomats still enjoy absolute immunity for their private acts, even though a truly functional approach would not support this degree of immunity. This theory, however, has been proven viable under the UN Convention.

While functional immunity is the most accepted theory of diplomatic immunity, it is not without its shortcomings. For example, if functional necessity was fully implemented in the diplomatic context, who determines what constitutes an official function? Would all official acts be covered? [FN51] Once immunity is limited to covering official acts, would other immunities be further eroded? These are questions with potential solutions, and therefore, the theory of functional necessity presents the best opportunity for limiting diplomatic immunity.

*997 D. History of Diplomatic Immunity

Diplomatic law is one of the oldest branches of international law. [FN52] Over time, necessity forced most states to provide envoys basic protections; otherwise no international political system could exist. [FN53] The oldest records detailing actual diplomatic practice emerged in the Greek city-states over 2,000 years ago. [FN54] The doctrine of diplomatic immunity continued to develop and evolve throughout the Roman and Byzantine Empires, the Middle Ages, and the Renaissance and Classical periods. [FN55] Initially, much of diplomatic practice was based on custom. [FN56] Eventually, these customs became rights, and the issue of whether diplomats should be entitled to such rights became a legal question. [FN57] As a result, much of diplomatic practice required codification and was documented in international treaties, allowing states to rely on these agreements for the protection of their envoys. [FN58]

These efforts to codify diplomatic law culminated at the 1961 Vienna Conference, which ultimately led to the drafting of the Vienna Convention on Diplomatic Relations. [FN59] In 1953, by General Assembly Resolution 685, [FN60] The International Law Commission

(“ILC”) [FN61] was asked to undertake the codification of diplomatic*998 law. [FN62] Mr. A.E.F. Sandstrom was appointed Special Rapporteur, and was responsible for drafting a report on the issue, which was later submitted to the ILC for review. [FN63] The ILC then adopted a provisional set of draft articles and commentaries. [FN64] These drafts were submitted to all Member States of the General Assembly for review and input. [FN65] After receiving input from twenty-one Member States, the draft was amended and a final draft of the Vienna Convention was submitted to the General Assembly. [FN66]

E. The 1961 Vienna Convention on Diplomatic Relations

The Vienna Convention on Diplomatic Relations was signed on April 18, 1961 [FN67] and entered into force on April 24, 1964. [FN68] It is the seminal treaty governing diplomatic relations. [FN69] The Vienna Convention contains fifty-three articles that govern the behavior of diplomats, thirteen of which address the issue of immunity. [FN70] The preamble of the Vienna Convention acknowledges the theory of functional necessity. [FN71] It states that the *999 purpose of the Convention is “the development of friendly relations among nations, irrespective of their differing constitutional and social systems,” and that the purpose of providing privileges and immunities “is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.” [FN72] While it recognizes that immunity is not for the personal benefit of the diplomat, it stops short of fully adopting the theory of functional necessity.

1. Overview of Relevant Articles of the Convention

The Vienna Convention sets forth a system of diplomatic privileges and immunities based on (1) the functions of the diplomat, [FN73] (2) the premises used by the diplomat, [FN74] (3) taxation *1000 and inspections, [FN75] (4) the person of the diplomat, [FN76] and (5) diplomatic*1001 records and communications. [FN77] Several articles are relevant to the privileges and immunities enjoyed by diplomats under the Vienna Convention. The most relevant article relating to immunity is Article 31. [FN78] Under Article 31, a diplomat receives complete immunity from criminal jurisdiction and partial immunity from civil jurisdiction. [FN79] Pursuant to Article 31, the diplomat loses civil immunity in three situations: (1) when there is a dispute over immovable property in the receiving *1002 state; (2) if the diplomat is acting as an administrator, executor, heir, or legatee in his capacity as a private person; or (3) if the diplomat undertakes a commercial or professional activity which is not part of his official functions. [FN80]

2. Additional Limits to Diplomatic Immunity

There are additional limits to diplomatic immunity imposed by other articles of the Vienna Convention and by the sending state. These include, inter alia, waiver, designation of persona non grata, and sending state jurisdiction over its own diplomats. [FN81] These limits, however, are inadequate. While they may provide a way to address problematic diplomatic conduct, they do not provide the injured with recourse.

Under Article 32, a diplomat may be subject to the jurisdiction of the receiving state's courts if the sending state expressly waives the diplomat's immunity. [FN82] Negotiation for waiver seldom occurs because the sending state has no affirmative duty to waive immunity, but has the option to do so. [FN83] If waiver is *1003 granted, it is often done under benign circumstances. [FN84] For example, a state may grant a waiver for a diplomat or dependant to testify in court on behalf of another. [FN85] The state, however, would probably not grant a waiver if that same diplomat or dependent were subpoenaed to testify in court because of their own criminal wrongdoing. [FN86] In reality, waiver is not an effective way of limiting diplomatic immunity because states have an interest in protecting their diplomats from the effect of a waiver. [FN87]

Pursuant to Article 9, a diplomat may be declared persona non grata by the receiving state. [FN88] Once this designation has been made the sending state must recall the diplomat or terminate his functions in the sending state. [FN89] The declaration of persona non grata is usually reserved for behavior such as espionage, terrorism, or other subversive activity, but can be used in other circumstances. [FN90]

Article 9 also provides a significant legal restraint on absolute immunity. [FN91] However, because the diplomat can be recalled*1004 to the sending state, immunity is usually preserved. If the sending state chooses to terminate the functions of the diplomat in the receiving state, then the diplomat is no longer shielded by immunity. [FN92]

Another supposed limit to diplomat immunity is that diplomats may face the jurisdiction of their national courts for wrongs committed in the receiving state. [FN93] While the threat of potential prosecution by their own state may serve to encourage diplomats to respect the law of the receiving state, [FN94] a sending state is not required to prosecute its diplomatic personnel who have committed violent crimes or civil wrongs. [FN95] More importantly, in the civil context, potential claimants are unlikely to have success in pursuing the claim in the sending state. [FN96] It is unlikely that a claimant would be able to successfully serve process on the diplomat, or be able to sustain the costs of litigating the claim in the foreign country. [FN97] Thus, this is not a viable alternative for those who have been seriously injured.

3. Settlement under The Vienna Convention

The Optional Protocol to the Vienna Convention on Diplomatic Relations, Concerning the Compulsory Settlement of Disputes, [FN98] provides for the settlement of disputes arising out of the *1005 interpretation of the Vienna Convention. Disputes are to be heard by the ICJ. [FN99] While this is a valid attempt to provide a forum where states can bring claims arising out of breaches of the Vienna Convention, [FN100] it does not provide settlement options for individuals who are injured as a result of diplomatic misconduct. Moreover, the ICJ typically only hears cases involving severe breaches of the Vienna Convention. [FN101] The Court is not the most efficient way of addressing breaches of the Vienna Convention because most issues that arise must be resolved more expeditiously, usually at the Ministry of Foreign Affairs. [FN102]

F. Cases of Abuse of Diplomatic Immunity

Some diplomats have abused their immunity by committing criminal and civil wrongs. The most stereotypical abuse is in connection with parking tickets and other minor motor vehicle *1006 offenses. [FN103] These, however, are among the least egregious types of offenses. [FN104] Abuse often extends to serious breaches of state and federal law, including, inter alia, drunk driving, drug smuggling, and other acts of physical violence. [FN105]

One recent example is the case of *Ahmed v. Hoque*. [FN106] The plaintiff, a domestic servant of the defendant, the Economics Minister for the Permanent Representative of Bangladesh to the UN, claimed that he had been enslaved and assaulted in violation of New York State law, federal law, and international treaties and conventions. [FN107] The plaintiff was brought to the U.S. to work in the home of the defendant and his wife, and was paid only \$20 per month. [FN108] The plaintiff often worked fifteen hour days and was allotted approximately two hours of free time per day. [FN109] The plaintiff also alleged that the defendant pushed him to the ground causing him to cut his hand. [FN110] The defendant claimed diplomatic immunity. [FN111] The court dismissed the complaint, allowing the defendant to successfully assert his privilege and avoid compensating the plaintiff for his injuries. [FN112]

*1007 Another example is *Tabion v. Mufti*, which illustrates how Article 31 of the Vienna Convention functions in practice. [FN113] In this case, a domestic servant sued her employer, who was First Secretary at the Embassy of Jordan to the U.S. [FN114] The domestic servant alleged, inter alia, breach of her employment contract, false imprisonment, and race discrimination. [FN115] She also alleged that the defendant paid her only 50¢ per hour and confiscated her passport. [FN116] The defendant filed a motion to quash, claiming diplomatic immunity under the Vienna Convention. [FN117] The plaintiff opposed the motion under Article 31(1)(c), [FN118] arguing that “a diplomatic agent shall not be immune from civil actions ‘relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside of his official functions.’” [FN119] The plaintiff contended that her employment relationship with the defendant constituted a “commercial activity” within the meaning of Article 31, and therefore the defendant was not immune from suit. [FN120] The district court, while noting that the outcome might be perceived as unjust, held that the plaintiff’s employment relationship was not “commercial activity” within the meaning ascribed by Article 31. [FN121] The plaintiff appealed the judgment, but the U.S. Court of Appeals for the Fourth Circuit affirmed. [FN122] Thus, the court *1008 preserved the immunity of the defendant, leaving the plaintiff without a remedy.

In *Skeen v. Federative Republic of Brazil*, the plaintiff had been shot by the grandson of the ambassador of Brazil to the U.S. [FN123] The grandson asserted diplomatic immunity under the Vienna Convention, and the court dismissed the complaint. [FN124] This situation underscores one of the more serious flaws of the Vienna Convention. Pursuant to Article 37, the extended family of the diplomat is protected from legal process, and thus is able to escape prosecution by virtue of his or her relationship to the diplomat. [FN125] Under no circumstances does the theory of functional immunity support the extension of immunity to the family of diplomatic personnel.

Yet another example is the story of Alexander Kashin, a Russian citizen who was paralyzed from the neck down when a car driven by an American diplomat broadsided his car. [FN126] Because the incident occurred in Russia, where the American envoy was stationed, he asserted diplomatic immunity and avoided the jurisdiction of Russian courts. [FN127] Kashin has moved to the U.S. to pursue litigation against the American envoy, but thus far to no avail. [FN128] The Kashin example is just one of many of these kinds of incidents, most of which are reported by the media, but which never get fully litigated, if at all. [FN129]

***1009** Unsurprisingly, it is this type of misconduct that elicits moral outrage by the public and suggests that there must be a limit to diplomatic immunity. By restricting the immunity to only official acts, these types of cases would be fully litigated and the injured would at least have some hope of being compensated for their losses.

III. Background On International Immunities

International immunity describes the immunity enjoyed by international organizations and their personnel. [FN130] This Note will focus on officials of the UN. Articles 104 [FN131] and 105 [FN132] of the UN Charter provide the framework for the development of the ***1010** privileges and immunities of the organization and its officials. [FN133] International immunities of UN officials are premised on functional necessity as articulated in Article 105(2) of the UN Charter. [FN134]

On February 13, 1946, the UN General Assembly adopted the Convention on the Privileges and Immunities of the UN. [FN135] This Convention set forth the system of privileges and immunities of the organization, to more fully define the concept of privileges and immunities characterized in the Charter. [FN136]

A. The History Of International Immunity

International immunities first appeared during the 19th Century, even though the development of international organizations did not begin to drastically increase until the post World War II period. [FN137] Initially, many of the international organizations that were established, such as the International Postal Union, did not require privileges and immunities because they did not have a political mandate, and therefore the rationale for immunity did not exist. [FN138] When international organizations began to emerge that did serve a political function, many granted officials diplomatic immunity because it offered a convenient model. [FN139] This misapplication of diplomatic immunity to officials working in international organizations created doctrinal confusion, because the international official's primary duty was to represent the organization, not their home state. [FN140] ***1011** This misapplication had a dual effect. [FN141] First, international officials were susceptible to pressure by their own state to work toward the state's interests rather than the international organization's, and second, the extension of absolute immunity to this category of individuals risked undermining their accountability for private acts. [FN142]

Recognizing the doctrinal confusion, the drafters of the UN Charter sought to avoid this

by categorically adopting functional, rather than diplomatic, immunities for the organization and its officials. [FN143] The drafting of the Convention on the Privileges and Immunities of the UN was proposed by the Preparatory Commission of the UN. [FN144] The Preparatory Commission recommended to the General Assembly that it should propose such a convention pursuant to Articles 104 and 105 of the UN Charter. [FN145] On February 13, 1946 the General Assembly, on the advice and counsel of the Sixth (Legal) Committee and the Subcommittee on Privileges and Immunities, adopted Resolution 6 which approved the text of the Convention and proposed it for accession by Member States. [FN146]

B. The 1946 Convention on the Privileges and Immunities of the UN

Pursuant to Article 105 of the UN Charter, the UN Convention, unlike the Vienna Convention, limits the privileges and immunities of UN officials to those that are “necessary for the independent exercise of their functions in connection with the Organization.” [FN147] Thus, the theory of functional necessity is carried to its logical conclusion in the UN Convention. [FN148] By *1012 uniformly applying the functional approach to immunity, the UN Convention prevents officials from abusing immunities for personal benefit. [FN149] Indeed, UN officials only have immunity for acts undertaken in an official capacity.

*1013 1. Relevant Articles of the Convention

Under the UN Convention there are four groups that receive immunity. The first group includes high level personnel, such as the Secretary-General and Assistant Secretaries-General, as well as representatives of Member States. [FN150] These individuals receive diplomatic immunity. [FN151] The second, third, and fourth categories include the organization itself, officials of the UN, and experts on mission. [FN152] These three groups have functional immunity, rather than diplomatic immunity. [FN153]

For the purposes of this Note, Article V, Section 18 of the UN Convention is the most relevant because it describes the immunity given to officials of the organizations. [FN154] Under Section *1014 18(a), officials are entitled to “be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity.” [FN155] This immunity is intended to enable UN officials to accomplish the work of the organization in an unrestricted fashion. According to UN practice “any act which is performed by (UN) officials, experts or consultants which is directly related to the mission or project, such as driving to and from a project site, would constitute prima facie an official act within the meaning of Section 18(a).” [FN156]

Under the Convention, it is the Secretary-General, and not local judicial authorities, who determine what constitutes an official act for the purposes of asserting immunity. [FN157] The ICJ *1015 underscored the Secretary-General's authority to assert immunity in one of its advisory opinions. [FN158] The Court concluded that the decisions of the Secretary-General regarding immunity are to be given a presumption of validity, and that such a finding on his part can only be “set aside for the most compelling reasons and is thus to be given the greatest weight by national courts.” [FN159]

Officials of the UN include all staff members of the UN, regardless of nationality, residence place of recruitment, or rank. [FN160] In addition, under Article VI, Section 22 experts on mission for the UN are accorded privileges and immunities so they may carry out the work they were hired to perform on behalf of the organization. [FN161]

*1016 2. Case Law Demonstrating the Privileges and Immunities of the UN

One of the first cases to test the system of privileges and immunities set out by the UN Charter was *Westchester County v. Ranollo*. [FN162] Ranollo, chauffeur of then Secretary-General of the UN, the Honorable Trygve Lie, was arrested for speeding while driving the Secretary-General to an official UN conference. [FN163] The court held that Ranollo was not acting in his official capacity and was therefore not immune from the jurisdiction of U.S. courts. [FN164] The UN strongly disagreed with this holding and subsequent U.S. jurisprudence would suggest that, if the case were tried today, Ranollo would be protected under the UN Convention because he was acting in his official capacity. [FN165]

*1017 Another early case of functional immunity as applied by U.S. courts was *U.S. v. Coplon*. [FN166] Although at this time the U.S. had not yet acceded to the UN Convention, it was a Member of the UN and was bound by the provisions of Article 105 of the Charter. [FN167] The defendant, a citizen of the Soviet Union and an employee of the UN, was charged with espionage. [FN168] Although the defendant asserted immunity, the court held that “unlawful espionage is not a function of the defendant as an employee of the UN.” [FN169]

In *People v. Leo*, the defendant, a Tanzanian national employed by the UN, was charged with assault and resisting arrest. [FN170] He asserted immunity based on his UN employment. [FN171] The court held against the defendant and distinguished between diplomatic immunity and the immunity enjoyed by UN officials: “(Immunity) is limited in scope and purpose to protection for acts committed by UN officials in the course of accomplishing their functions as UN employees in distinction to the unlimited form of immunity traditionally accorded diplomats.” [FN172] The court went on to hold that “an analysis of the facts in this case, in the most liberal perspective possible, fails to demonstrate any basis whatsoever upon which to conclude that defendant was acting in his official capacity or that there was some reasonable relationship between the alleged altercation and defendant’s UN employment.” [FN173]

These cases illustrate that the functional approach announced in the UN Charter and used in the UN Convention provides the injured with recourse.

*1018 3. Waiver and Settlement under the UN Convention

There are two mechanisms provided for in the UN Convention that allow the injured to seek compensation and the sending state to prosecute criminal wrongs: waiver and settlement.

a. Waiver

Article V, Section 20 solidifies the functional approach of the UN Convention [FN174] by requiring the Secretary-General to waive immunity even when an official of the UN has acted within his official capacity, but where the waiver of immunity is required so as not to impede the course of justice. [FN175] The authority to waive immunity has been delegated by the Secretary-General to the Legal Counsel of the UN. [FN176] In evaluating whether to waive immunity, the Secretary-General, acting through the Legal Counsel “consider(s) . . . whether the immunity of any UN official would impede the course of justice and whether it can be waived without prejudice to the interests of the organization.” [FN177] In the majority of cases reported to the Office of Legal Affairs immunity has been waived where justice so required. [FN178]

***1019** The Secretary-General determines in essence what constitutes an official act for the purposes of waiver. This does not mean, however, that there can be no independent review of the Secretary-General's decisions regarding waiver. [FN179] These decisions can be subject to the review of the ICJ. [FN180]

Commentator Charles Brower has argued that the ICJ's ability to review determinations concerning waiver, lends to a genuine legal restriction on the immunities of the UN and its officials. [FN181]

b. Settlement

Article VIII, Section 29 permits the UN to settle with claimants. [FN182] When a dispute involves a UN official who has acted in a private capacity, waiver is not an issue because the official is in the same position as any other private individual. [FN183] However, if the Secretary-General determines that the official was acting in an official capacity and that the interests of the organization do not permit a waiver, the UN has traditionally settled with the claimants. [FN184]

The settlement process described in Article VIII, Section 29 has been developed with specificity by the UN in its policy document entitled Procedures in place for implementation of Article 8, Section 29, of the Convention on the Privileges and Immunities of the UN, adopted by the General Assembly, on 13 February 1946, Report of the Secretary-General. [FN185]

***1020** Although the Convention does not specifically provide a mechanism to deal with claims brought against officials who have acted in an official capacity, and whose immunity has not been waived, it does state in Article VIII, Section 29 that the UN will make provisions for appropriate forms of settlement. [FN186] Additional guidance is provided by Article V, Section 21, which states that the UN will “cooperate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities set out in Article V.” [FN187]

Thus, the Convention provides a two-tiered system in which those injured by UN officials have recourse. They may either seek a remedy through national courts if the Secretary-General waives immunity, or settle under the provisions of the UN settlement policy when immunity

has not been waived.

IV. A Comparison of Diplomatic and International Immunities

The most striking difference between the UN Convention and the Vienna Convention is that the former fully employs the functional necessity theory while the latter attempts to implement it, but fails. This difference is evidenced by the two obvious, yet deceiving, similarities between the conventions. Both have a mechanism for settling disputes and both provide for waiver of immunity in certain circumstances. However, the substantive application differs in each because of the competing theoretical approaches of absolute immunity and functional immunity.

A. Settlement

Under the privileges and immunities framework set out in the UN Convention, [FN188] claimants may pursue a remedy by seeking a settlement with the UN when immunity has not been waived. [FN189] While the UN settlement policy does not specifically describe what type of settlement will be offered, the organization*1021 does commit to making “appropriate modes of settlement” available to those who are injured. [FN190] Thus, under the UN framework, the organization makes settlement available for claimants who have been injured by UN officials who have retained immunity. [FN191] In those cases in which the UN official does commit a criminal or civil wrong while acting in his private capacity, he or she is responsible and provisions for settlement are unnecessary.

In contrast, the system of privileges and immunities in the Vienna Convention has no provision for private settlement. While it does provide for settlement under the Optional Protocol, the Protocol only covers disputes between states and not individuals. [FN192] The Vienna Convention overlooks the costs inflicted on individuals by diplomatic personnel.

B. Waiver

Waiver is the second mechanism used by both Conventions to assure accountability. Under the UN Convention, the Secretary-General is required to waive the immunity of individuals who have acted within their official capacity when not doing so would impede the course of justice. [FN193] This adds another layer of protection to potential litigants. They are first protected by the doctrine of functional immunity itself, and in addition, waiver is available if justice so requires.

While the Vienna Convention does allow the sending state to waive the immunity of its diplomats, this seldom happens. [FN194] The Vienna Convention's reliance on the sending state to waive the immunity of its own diplomat creates an inherent conflict of interest. The situations in which a diplomat's immunity may be waived are usually politically charged, and therefore are not available for average offenses which harm others.

***1022 V. Conclusion: Suggestions For Enforcing A Functional Approach To Diplomatic Immunity**

Diplomatic immunity should be reformed to fully incorporate the theory of functional necessity and to provide additional safeguards to potential plaintiffs under this theory. These safeguards include the mechanisms of settlement and waiver implemented under the UN Convention described in Part III.B.

This objective could be accomplished by drafting an additional protocol to the Vienna Convention that permits states to execute bilateral agreements to limit the immunity of their diplomats to functional immunity. [FN195] By enabling states to opt into such an agreement, it allows states who truly fear diplomatic persecution to continue using the regime set forth under the Vienna Convention. Such a protocol, however, provides an alternative for states that are willing to curtail absolute immunity. If enough states execute such agreements, the functional approach may, at some point, ripen into a rule of customary international law, whereby all states would be bound to respect functional immunity. [FN196] In addition, this approach respects state sovereignty and allows states to choose how their diplomatic personnel will be treated. It also addresses the issue of reciprocity, in that states who execute such agreements would be assured the same treatment for their diplomats in the receiving state.

Such an agreement would not be in derogation of the other protections and doctrines contained within the Vienna Convention. The agreement would supercede those parts of the Convention dealing with absolute immunity, while respecting those sections providing other protections. [FN197]

The lesson to be learned from the UN Convention is that it fully implements functional immunity, but at the same time provides additional safeguards to assure that this limited immunity is not abused. Thus, these bilateral agreements, to be truly useful and to provide the injured with recourse, must provide the additional protections of waiver and settlement conferred by the UN Convention.

In situations where a diplomat is protected by functional immunity, but where waiver may be required to assure that justice is done, a non-political system of determining whether to waive must be established. The sending state and receiving state would have to develop a procedure whereby the representatives of each have input into the decision of whether to waive functional immunity. This would mitigate the fear that immunity was being waived in order to politically persecute the diplomat. If a dispute did arise between states as to whether to waive immunity, such a question could be referred to the ICJ. As is the case under the UN Convention, the ICJ may review waiver decisions of the Secretary-General, thereby creating a genuine restraint on immunity. [FN198] In addition, because the ICJ is already empowered under the Optional Protocol to hear disputes among states regarding diplomatic immunity, it would be in the best position to help decide questions regarding the granting of a waiver.

These agreements must also call for settlement funds to be established so that if individuals are harmed by a diplomat performing official acts, they may still recover for their injuries.

If states implement these mechanisms, diplomats will be held accountable for their ac-

tions, when both acting in a private and official capacity. Justice so requires.

[FN^a1]. The author wishes to thank everyone who provided guidance in the preparation of this Note, especially Richard Erwine and Karen Byrnes. I would like to dedicate this Note to my parents Thomas and Silvia Maginnis.

[FN1]. Rosalyn Higgins, *The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience*, 79 *Am. J. Int'l L.* 641, 643 (1985).

[FN2]. *Id.*

[FN3]. Joshua D. Groff, *A Proposal for Diplomatic Accountability Using the Jurisdiction of the International Criminal Court: The Decline of an Absolute Sovereign Right*, 14 *Temp. Int'l & Comp. L.J.* 209, 218 (2000).

[FN4]. *Id.*

[FN5]. Grant V. McClanahan, *Diplomatic Immunity: Principles, Practices, Problems* 6 (1989).

[FN6]. *Id.*

[FN7]. *Id.* at 8.

[FN8]. See generally J. Craig Barker, *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* (1996). The sending state is the diplomat's home state and the receiving state is the foreign country where the diplomat is assigned.

[FN9]. Groff, *supra* note 3, at 222-23.

[FN10]. Vienna Convention on Diplomatic Relations, Apr. 8, 1961, 23 *U.S.T.* 3227, 500 *U.N.T.S.* 95 (hereinafter Vienna Convention); Lori J. Shapiro, *Foreign Relations Law: Modern Developments in Diplomatic Immunity*, 1989 *Ann. Surv. Am. L.* 281, 295.

[FN11]. Groff, *supra* note 3, at 220-21.

[FN12]. Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 *U.S.T.* 1418, 1 *U.N.T.S.* 16 (hereinafter UN Convention).

[FN13]. McClanahan, *supra* note 5, at 8.

[FN14]. *Id.*

[FN15]. *Id.* at 8-9.

[FN16]. *Id.* at 9.

[FN17]. *Id.* at 9-10. **United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)**, 1980 *I.C.J.* 3 (May 24).

The International Court of Justice is the principal judicial organ of the **United Nations**. Its seat is at the Peace Palace in The Hague (Netherlands). . . . It operates under a Statute largely similar to that of its predecessor, which is an integral part of the Charter of the **United Nations**. . . . The Court has a dual role: to settle in accordance with international law the legal disputes submitted to it by States, and to give advisory opinions on legal questions referred to it by duly authorized international organs and agencies . . . only States may apply to and appear before the Court. The States Members of the United Nations (at present numbering 189), and one State which is not a Member of the United Nations but which has become party to the Court's Statute (Switzerland), are so entitled The Court decides in accordance with international treaties and conventions in force, international custom, the general principles of law and, as subsidiary means, judicial decisions and the teachings of the most highly qualified publicists.

ICJ, Homepage, at <http://www.icj-cij.org/icjwww/igeneralinformation/icjgnnot.html>.

[FN18]. [United States Diplomatic and Consular Staff in Tehran \(U.S. v. Iran\), 1980 I.C.J. 3, 7 \(May 24\).](#)

[FN19]. [Barker, supra note 8, at 219.](#)

[FN20]. [See id. at 224.](#)

[FN21]. [Id. at 225.](#)

[FN22]. [See Clifton E. Wilson, Diplomatic Privileges and Immunities 32 \(1967\).](#)

[FN23]. [See id. at 32.](#)

[FN24]. [McClanahan, supra note 5, at 1.](#)

[FN25]. A diplomatic agent is a “national representative in one of four categories: 1) ambassadors, 2) envoys and ministers plenipotentiary, 3) ministers residents accredited to the sovereign, 4) charges d'affaires accredited to the minister of foreign affairs.” Black's Law Dictionary 64 (7th ed. 1999).

[FN26]. The Vienna Convention classifies diplomatic personnel based on their individual functions. Article 1 states:

For the purpose of the present Convention, the following expressions shall have the meanings hereunder assigned to them:

(a) the “head of the mission” is the person charged by the sending State with the duty of acting in that capacity;

(b) the “members of the mission” are the head of the mission and the members of the staff of the mission;

(c) the “members of the staff of the mission” are the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission;

(d) the “members of the diplomatic staff” are the members of the staff of the mission having diplomatic rank;

(e) a “diplomatic agent” is the head of the mission or a member of the diplomatic staff of the mission;

(f) the “members of the administrative and technical staff” are the members of the staff of the mission employed in the administrative and technical service of the mission;

(g) the “members of the service staff” are the members of the staff of the mission in the domestic service of the mission;

(h) a “private servant” is a person who is in the domestic service of a member of the mission and who is not an employee of the sending State.

Vienna Convention, *supra* note 10, art. 1.

[FN27]. See *id.* art. 31.

[FN28]. *Id.*

[FN29]. See Eileen Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* 229 (Clarendon Press 1998) (1976).

[FN30]. Groff, *supra* note 3, at 215.

[FN31]. Wilson, *supra* note 22, at 5.

[FN32]. See McClanahan, *supra* note 5, at 30.

[FN33]. Stephen L. Wright, *Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts*, 5 *B.U. Int'l L.J.* 177, 196-97 (1987).

[FN34]. See Wilson, *supra* note 22, at 6 (quoting Justice O’Gorman in *George Wilson v. Fuzman Blanco*, 52 N.Y. Sup. Ct. 582 (1889), that extraterritoriality “derives support from the legal fiction that an ambassador is not an inhabitant of the country to which he is accredited, but of the country of his origin and whose sovereign he represents, and within whose territory, in contemplation of the law, he always resides”).

[FN35]. See Wilson, *supra* note 22, at 9; Wright, *supra* note 33, at 198-200.

[FN36]. See Wright, *supra* note 33, at 199.

[FN37]. See Wilson, *supra* note 22, at 10 (quoting *Trenta v. Ragonesi*, Italy 1938).

[FN38]. Groff, *supra* note 3, at 215-16.

[FN39]. *Id.*

[FN40]. Wilson, *supra* note 22, at 4.

[FN41]. *Id.*

[FN42]. See Groff, *supra* note 3, at 216.

[FN43]. *Id.*; Wilson, *supra* note 22, at 4.

[FN44]. Wright, *supra* note 33, at 200-04; Groff, *supra* note 3, at 216; McClanahan, *supra* note 5, at 32.

[FN45]. See McClanahan, *supra* note 5, at 32.

[FN46]. Leslie Shirin Farhangi, [Insuring Against Abuse of Diplomatic Immunity](#), 38 *Stan. L. Rev.* 1517, 1521 (1986).

[FN47]. See Wilson, *supra* note 22, at 17; McClanahan, *supra* note 5, at 32; Faranghi, *supra* note 45, at 1522; Wright, *supra* note 33, at 202-03.

[FN48]. See Groff, *supra* note 3, at 216-17; Farhanghi, *supra* note 46, at 1521; Wright, *supra* note 33, at 202-03.

[FN49]. While the Vienna Convention on Diplomatic Relations acknowledges the theory of functional immunity it still provides for absolute immunity for certain classes of diplomatic personnel.

[FN50]. Farhanghi, *supra* note 46, at 1522.

[FN51]. For example, if a diplomat was returning home from an official function, but was inebriated and killed someone, would this be an official act or an unofficial act? See [Westchester County v. Ranollo](#), 67 N.Y.S.2d 31 (City Court of New Rochelle 1946).

[FN52]. Barker, *supra* note 8, at 14.

[FN53]. Linda S. Frey & Marsha L. Frey, *The History of Diplomatic Immunity* 3 (1999).

[FN54]. Groff, *supra* note 3, at 213.

[FN55]. Groff, *supra* note 3, at 213. See also Barker, *supra* note 8, at 14-25 (discussing the evolution of diplomatic immunity).

[FN56]. Barker, *supra* note 8, at 29.

[FN57]. See Frey & Frey, *supra* note 53, at 4.

[FN58]. See *id.* See also Barker, *supra* note 8, at 29-31 (describing the adoption of the Regulation of Cambridge by the Institute of International Law in 1895, which was the first formal attempt to codify diplomatic law: attempted codifications by the American Institute of International Law took place in 1925; later The Havana Convention was drafted; The Institute of International Law's revision of the 1895 Regulation occurred in 1929; and the Draft Convention on Diplomatic Privileges and Immunities created by Harvard Law School took place in 1932).

[FN59]. Barker, *supra* note 8, at 30.

[FN60]. G.A. Res. 685, U.N. GAOR, 7th Sess., Supp. No. 20, at 62, U.N. Doc. A/2361 (1952).

[FN61]. A description of the work of the International Law Commission is provided on the United Nations website.

The International Law Commission was established by the General Assembly in

1947 to promote the progressive development of international law and its codification. The Commission, which meets annually, is composed of 34 members who are elected by the General Assembly for five year terms and who serve in their individual capacity, not as representatives of their Governments. Most of the Commission's work involves the preparation of drafts on topics of international law. Some topics are chosen by the Commission and others referred to it by the General Assembly or the Economic and Social Council. When the Commission completes draft articles on a particular topic, the General Assembly usually convenes an international conference of plenipotentiaries to incorporate the draft articles into a convention which is then open to States to become parties.

International Law Commission, Introduction (1998), at <http://www.un.org/law/ilc/introfra.htm>

[FN62]. Report of the International Law Commission to the General Assembly, (1958) 2 Y.B. Int'l. Comm'n ¶ 45, U.N.Doc. A/CN.4/SER.A/1958/Add.1.

[FN63]. Id. ¶ 46.

[FN64]. Id. ¶ 47.

[FN65]. Id. ¶ 48.

[FN66]. Id. ¶¶ 49-50. One more round of changes was made to the draft, and it was later adopted.

[FN67]. See Vienna Convention, *supra* note 10.

[FN68]. McClanahan, *supra* note 5, at 44.

[FN69]. Barker, *supra* note 8, at 30.

[FN70]. Groff, *supra* note 3, at 214.

[FN71]. See Groff, *supra* note 3, at 216-17; Farhangi, *supra* note 46, at 1521; Wright, *supra* note 33, at 202-03.

[FN72]. Vienna Convention preambular paragraphs state:

Recalling that peoples of all nations from ancient times have recognized the status of diplomatic agents, Having in mind the purposes and principles 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, Believing that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems, Realizing that 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 States, Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention

Vienna Convention, *supra* note 10, preambular paragraphs.

[FN73]. McClanahan, *supra* note 5, at 47. Article 3 of the Vienna Convention states:

1. The functions of a diplomatic mission consist, *inter alia*, in:
 - (a) representing the sending State in the receiving State;
 - (b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
 - (c) negotiating with the Government of the receiving State;
 - (d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
 - (e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.
2. Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission.

Vienna Convention, *supra* note 10, art. 3.

[FN74]. McClanahan, *supra* note 5, at 47. Vienna Convention Article 22 states:

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Vienna Convention, *supra* note 10, art. 22. See also *id.* art. 30 (“1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission. 2. His papers, correspondence and, except as provided in paragraph 3 of article 31, his property, shall likewise enjoy inviolability.”)

[FN75]. McClanahan, *supra* note 5, at 47. Vienna Convention Article 34 states:

A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

- (a) indirect taxes of a kind which are normally incorporated in the price of goods or services;
- (b) dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
- (c) estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of article 39;
- (d) dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State;
- (e) charges levied for specific services rendered;
- (f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 23.

Vienna Convention, *supra* note 10, art. 34.

[FN76]. McClanahan, *supra* note 5, at 47. Vienna Convention art. 29 states: “The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. 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.”

[FN77]. McClanahan, *supra* note 5, at 47. Article 24 of the Vienna Convention 24 states: “The archives and documents of the mission shall be inviolable at any time and wherever they may be.” Vienna Convention, *supra* note 10, art. 24.

[FN78]. Vienna Convention Article 31 states:

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of 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;

(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

Vienna Convention, *supra* note 10, art. 31.

[FN79]. *Id.*

[FN80]. *Id.* See also Denza, *supra* note 29, at 237-38, 245-50 (discussing in detail the exceptions related to private immovable property, private involvement in succession, and professional and commercial activity).

[FN81]. See McClanahan, *supra* note 5, at 126-37.

[FN82]. Vienna Convention Article 32 states:

1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under article 37 may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

Vienna Convention, *supra* note 10, art. 32. See also Farhangi, *supra* note 46, at 1522; Denza, *supra* note 29, at 273-88 (discussing waiver of immunity).

[FN83]. See Shapiro, *supra* note 10, at 285-86. See also McClanahan, *supra* note 5, at 137-38 (discussing waiver of immunity).

[FN84]. See Denza, *supra* note 29, at 287 (describing U.S. State Department practice on waiver of diplomatic immunity); McClanahan, *supra* note 5, at 137.

[FN85]. See Denza, *supra* note 29, at 287; McClanahan, *supra* note 5, at 137.

[FN86]. McClanahan, *supra* note 5, at 137.

[FN87]. Shapiro, *supra* note 10, at 285.

[FN88]. Vienna Convention Article 9 states:

1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this article, the receiving State may refuse to recognize the person concerned as a member of the mission.

Vienna Convention, *supra* note 10, art. 9. See also McClanahan, *supra* note 5, at 126-30 (describing the *persona non grata* doctrine); Denza, *supra* note 29, at 59-71 (chronicling the practice of Article 9).

[FN89]. Vienna Convention, *supra* note 10, art. 9(1).

[FN90]. See Denza, *supra* note 29, at 63-67.

[FN91]. See *id.* at 62.

[FN92]. See McClanahan, *supra* note 5, at 128.

[FN93]. *Id.* at 136.

[FN94]. *Id.*

[FN95]. See *id.*

[FN96]. Denza, *supra* note 29, at 265-66.

[FN97]. *Id.*

[FN98]. Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes, Apr. 18, 1961, 23 U.S.T. 3374, 500 U.N.T.S. 241 (hereinafter *Optional Protocol*). The *Optional Protocol* states:

The States Parties to the present Protocol and to the Vienna Convention on Diplomatic Relations, hereinafter referred to as 'the Convention', adopted by the United Nations Conference held at Vienna from 2 March to 14 April 1961,

Expressing their wish to resort in all matters concerning them in respect of any dispute arising out of the interpretation or application of the Convention to the compulsory juris-

diction of the International Court of Justice, unless some other form of settlement has been agreed upon by the parties within a reasonable period,

Have agreed as follows:

Article I

Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

.....

Article III

1. Within the same period of two months, the parties may agree to adopt a conciliation procedure before resorting to the International Court of Justice.

2. The conciliation commission shall make its recommendations within five months after its appointment. If its recommendations are not accepted by the parties to the dispute within two months after they have been delivered, either party may bring the dispute before the Court by an application.

Id.

[FN99]. See *id.* art. I.

[FN100]. See, e.g., [United States Diplomatic and Consular Staff in Tehran \(U.S. v. Iran\) 1980 I.C.J. 3 \(May 24\)](#); [The Arrest Warrant of 11 April 2000 \(Democratic Republic of the Congo v. Belgium\), 2000 I.C.J. 182, \(Dec. 8\)](#) (for examples of States bringing claims arising out of the Vienna Convention to the ICJ).

[FN101]. See *id.*

[FN102]. Denza, *supra* note 29, at 421.

[FN103]. Michael Cooper, *More Diplomatic Parking Causes Some to Grumble*, N.Y. Times, Apr. 4, 1997, at B3; Bob Minzesheimer, *Delinquent Diplomats: Soviets Rank First In Unpaid Parking Tickets*, Wash. Post Mag., Feb. 20, 1983, at 11; Eduardo Cue, *Diplomat Parking Tickets Put at 80 Per Cent Unpaid*, Wash. Post, May 5, 1977, at B5.

[FN104]. These minor, but repeated offenses, nonetheless evidence a systematic disregard for the laws of the receiving state. It should be noted that even these minor offenses cost local municipalities significant sums of money.

[FN105]. Michael B. McDonough, [Privileged Outlaws: Diplomats, Crime and Immunity](#), 20 *Suffolk Transnat'l L. Rev.* 475, 488 (1997).

[FN106]. [Ahmed v. Hoque](#), 2002 WL 1964806 (S.D.N.Y. Aug. 23, 2002).

[FN107]. *Id.* at 1.

[FN108]. *Id.*

[FN109]. *Id.*

[FN110]. Id.

[FN111]. Id. at 2. Ahmed claimed that Hoque's immunity was governed by the Convention on the Privileges and Immunities of the United Nations and not the Vienna Convention. Hence, Ahmed claimed that Hoque was acting outside the scope of his functions, and therefore should not be entitled to immunity. The court noted that under Article IV, Section 11 of the Convention on the Privileges and Immunities of the United Nations, representatives of Member States like Hoque, unlike employees of the UN, enjoy the same level of immunity as diplomats under the Vienna Convention.

[FN112]. Id. at 8.

[FN113]. *Tabion v. Mufti*, 877 F. Supp. 285 (E.D. Va. 1995), aff'd 73 F.3d 535 (4th Cir. 1996).

[FN114]. Id. at 286.

[FN115]. Id.

[FN116]. Id.

[FN117]. Id. at 287.

[FN118]. Vienna Convention, supra note 74, art. 31.

[FN119]. *Tabion*, 877 F. Supp. at 287 (quoting Article 31(1)(c) of the Vienna Convention).

[FN120]. Id.

[FN121]. Id. at 292.

[FN122]. *Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996). The court stated that:

It is evident from the foregoing authorities that the phrase “commercial activity,” as it appears in the Article 31(1)(c) exception, was intended by the signatories to mean “commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.” Day-to-day living services such as dry cleaning or domestic help were not meant to be treated as outside a diplomat's official functions. Because these services are incidental to daily life, diplomats are to be immune from disputes arising out of them.

Id. at 538-39.

[FN123]. *Skeen v. Federative Republic of Brazil*, 566 F. Supp. 1414, 1416 (D.C. 1983).

[FN124]. Id. at 1416. See also *Aldi v. Yaron*, 672 F. Supp. 516 (D.C. 1987) (holding that former Brigadier General was entitled to diplomatic immunity for action taken by him as a general once he became an attaché in embassy in the U.S.).

[FN125]. See Vienna Convention, supra note 10, art. 37 (“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 the privileges and immunities specified in articles 29 to 36.”). These privileges

and immunities include immunity from criminal and civil jurisdiction.

[FN126]. Tom Jackman, Judge Moves Russian's Suit Against U.S. Diplomat, Wash. Post, Dec. 11, 2002, at A17.

[FN127]. Id.

[FN128]. Id.

[FN129]. See also Matt Nixson, Foreign Envoys Get Away With Crime--And Owe Britain GBP 1.5m, Mail on Sunday, July 21, 2002, at 11 (exposing that British diplomats have escaped criminal prosecution on twenty-one separate occasions by hiding behind the cloak of diplomatic immunity); Catherine Wilson, Saudi Prince Used Diplomatic Cover To Smuggle Tons of Cocaine, DEA Says, Orlando Sentinel, July 18, 2002, at A7 (describing how a Saudi Prince used his diplomatic immunity to smuggle 4,400 pounds of cocaine on his private jet from Venezuela to Paris); Andrea Perry & Tim Shipman, Political Storm Erupts as Suspects Claim Diplomatic Immunity; Embassy Staff Evade Quiz Over Murder, Sunday Express, May 26, 2002, at 6 (describing how two Colombian diplomats refused to be questioned in connection with the murder of a young British father); Pamela Ferdinand, Law Deposed in Pedophilia Case; Prelate Says He Does Not Recall Letters Warning About Convicted Priest, Wash. Post, May 9, 2002, at A2 (suggesting that Cardinal Law might try to flee to Rome because he has dual citizenship with the Vatican and could claim diplomatic immunity, thereby avoiding testifying in pedophilia cases).

[FN130]. Peter H.F. Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* 153 (1994).

[FN131]. U.N. Charter art. 104 (“The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.”).

[FN132]. U.N. Charter art. 105, para. 1-3.

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this article or may propose conventions to the Members of the United Nations for this purpose.

Id.

[FN133]. See generally *The Charter of the United Nations: A Commentary* 1314-25 (Bruno Simma ed., 2002) (1994) (hereinafter *The Charter of the United Nations*).

[FN134]. See id. at 1317.

[FN135]. U.N. Convention, *supra* note 12.

[FN136]. International Court of Justice: Pleadings, Oral Arguments, Documents, Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations 184, Sales No. 627 (1992) (hereinafter I.C.J. Pleadings).

[FN137]. See Charles H. Brower, II, [International Immunities: Some Dissident Views on the Role of Municipal Courts](#), 41 *Va. J. Int'l. L.* 1, 8-9 (2000). See also C. Wilfred Jenks, *International Immunities* 1-16 (1961) (providing a brief history of international immunities).

[FN138]. Brower, *supra* note 137, at 9.

[FN139]. *Id.* at 11.

[FN140]. *Id.* at 16.

[FN141]. *Id.*

[FN142]. *Id.*

[FN143]. *Id.* at 16-18.

[FN144]. I.C.J. Pleadings, *supra* note 136, at 184.

[FN145]. *Id.* After recommending that the General Assembly propose such a convention, the Preparatory Commission proposed draft text of the convention and submitted it to the General Assembly. The General Assembly then referred it to the Sixth (Legal) Committee of the Assembly, which then referred it to the Sub-Committee on Privileges and Immunities.

[FN146]. G.A. Res. 6, at 26-28, Feb. 13, 1946.

[FN147]. U.N. Charter art. 105(1). See also *The Charter of the United Nations*, *supra* note 133, at 1314-25.

[FN148]. Although functional immunity is granted to officials of the UN, the General Convention grants diplomatic immunity to the representatives of Member States. This grant of diplomatic immunity to representatives of Member States is one of the flaws of the Convention. Article IV, sec. 11 states:

Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their functions and during the journey to and from the place of meeting, enjoy the following privileges and immunities:

a. immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind;

b. inviolability for all papers and documents;

c. the right to use codes and to receive papers or correspondence by courier or in sealed bags;

d. exemption in respect of themselves and their spouses from immigration restrictions, aliens registration or national service obligations in the state they are visiting or through

which they are passing in the exercise of their functions;

e. the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

f. the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys, and also;

g. such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from exercise duties or sales taxes.

UN Convention, *supra* note 12, art. IV, sec. 11.

[FN149]. *Id.* art. V, sec. 20 states in part: “Privileges and immunities are granted to officials in the interests of the UN and not for the personal benefit of the individuals themselves. . . .” See also Statement by Secretary-General Trygve Lie in *The Practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency Concerning Their Status, Privileges and Immunities: A Study Prepared by the Secretariat*, U.N. Doc. A/CN.4/L.118 and Add.1 and 2, reprinted in (1967) 2 *Y.B. Int'l L. Comm'n* ¶¶ 248-49 (hereinafter *ILC Study (1967)*) (“United Nations personnel do not enjoy immunity from arrest or interrogation for alleged acts unrelated to their official duties which are unlawful in the Member States where they are committed or alleged to have been committed”); *The Charter of the United Nations*, *supra* note 133, at 1320-22 (providing a broad overview of UN practice as it relates to officials of the UN).

[FN150]. Frederick Rawski, *To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations*, 18 *Conn. J. Int'l L.* 103, 109-10 (2002).

[FN151]. See UN Convention art. V, sec. 19; art. IV, sec. 11 (describing the diplomatic immunity of the Secretary-General and Assistant Secretaries-General, as well as the diplomatic immunity of Representatives of Member States).

[FN152]. Rawski, *supra* note 150, at 110-11.

[FN153]. See generally UN Convention arts. I-III, V, VI (describing the functional immunity of the organization, its officials and its experts).

[FN154]. UN Convention art. V, sec. 18 states:

Officials of the **United Nations** shall:

a. be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;

b. be exempt from taxation on the salaries and emoluments paid to them by the **United Nations**;

c. be immune from **national** service obligations;

d. be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration;

e. be accorded the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of diplomatic missions to the Government concerned;

f. be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crisis as diplomatic envoys;

g. have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question.

UN Convention, *supra* note 12, art. V, sec. 18. See also 1976 U.N. Jurid. Y.B. 223-24, U.N. Doc. ST/LEG/SER.C/14 (providing that UN salaries are not subject to garnishment, but that deductions from salaries and allowances of staff members is permitted, in the Secretary General's discretion, for debts to third parties); 1975 U.N. Jurid. Y.B. 191-92, U.N. Doc. ST/LEG/SER.C/12, 1984 U.N. Jurid. Y.B. 185-86, U.N. Doc. ST/LEG/SER.C/22 (describing the Secretary-General's discretionary authority to grant to a staff member special leave to complete military service in his/her own country under certain circumstances, but noting that UN officials are exempt from military service). See generally *The Charter of the United Nations*, *supra* note 133, at 1320-21 (chronicling the practice of the **United Nations** as it relates to article V, sec. 18 of the UN Convention); **United Nations**, *Repertory of Practice of United Nations Organs*, Supp. 6, Volume VI, arts. 92-105, 108-11, at 158-73, U.N. Sales No. E.99.V.10 (1999) (providing UN practice as it relates to article 105 of the UN Charter).

[FN155]. See UN Convention, *supra* note 151, art. V, sec. 18(a).

[FN156]. 1985 U.N. Jurid. Y.B. 154-55, U.N. Doc. ST/LEG/SER.C/23.

[FN157]. 1995 U.N. Jurid. Y.B. 403-04, U.N. Doc. ST/LEG/SER.C/33. See also *The Practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency Concerning Their Status, Privileges and Immunities: Supplementary Study Prepared by the Secretariat*, U.N. Doc. A/CN.4/L.383 and Add. 1-3, 177 (recognizing that it is exclusively the right of the Secretary-General and not national tribunals to determine what constitutes an official act). Under Article V, Section 20 of the Convention, the Security Council has the authority to waive the immunity of the Secretary-General.

[FN158]. [Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. 62, ¶ 60 \(Apr. 29, 1999\)](#)

As the Court has observed, the Secretary-General, as the chief administrative officer of the Organization, has the primary responsibility to safeguard the interests of the Organization; to that end, it is up to him to assess whether its agents acted within the scope of their functions and, where he so concludes, to protect these agents, including experts on mission, by asserting their immunity. This means that the Secretary-General has the authority and responsibility to inform the Government of a member State of his finding and, where appropriate, to request it to act accordingly and, in particular, to request it to bring his finding to the knowledge of the local courts if acts of an agent have given or may give rise to court proceedings.

Id.; Rawski, *supra* note 150, at 112-13.

[FN159]. [Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. 62, 87 \(Apr. 29, 1999\)](#); Rawski, *supra* note 150, at 112-13.

[FN160]. G.A. Res. 76(1) at 189, Dec. 7, 1946. However, staff that are locally recruited and assigned to hourly rates are not considered officials within the definition.

[FN161]. UN Convention art. VI, sec. 22 states:

Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connexion with their missions. In particular they shall be accorded:

a) immunity from personal arrest or detention and from seizure of their personal baggage;

b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;

c) inviolability for all papers and documents;

d) for the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;

e) the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

f) the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

UN Convention, *supra* note 12, art. VI, sec. 22.

[FN162]. *Westchester County v. Ranollo*, 67 N.Y.S.2d 31 (City Court of New Rochelle 1946).

[FN163]. Lawrence Preuss, Immunity of Officers and Employees of the United Nations for Official Acts: The Ran(o)llo Case, 41 Am. J. Int'l L. 555, 556 (1947).

[FN164]. *Ranollo*, 67 N.Y.S.2d at 35.

[FN165]. See ILC Study (1967), *supra* note 149, ¶ 255 (describing the position of the Secretariat vis-a-vis the *Ranollo* case).

[FN166]. *U.S. v. Coplou*, 84 F. Supp. 472 (S.D.N.Y. 1949).

[FN167]. *Id.* at 474.

[FN168]. *Id.* at 473.

[FN169]. *Id.* at 474. Cf. *De Luca v. United Nations Organization*, 41 F.3d 1502 (2d Cir. 1994), cert. denied, 514 U.S. 1051 (1995) (affirming the District Court's decision to uphold the immunity of the UN and individual UN officers who were being sued for the alleged failure to reimburse the UN employee for withheld income taxes); *Askir v. Boutros-Ghali*, 933 F. Supp. 368 (S.D.N.Y. 1996) (holding that a UN official could not be held liable in an individual capacity for acts undertaken in an official capacity as set forth in the Convention on the Privileges and Immunities of the **United Nations**).

[FN170]. *People v. Leo*, 407 N.Y.S.2d 941, 942 (N.Y. Crim. Ct. 1978).

[FN171]. *Id.*

[FN172]. *Id.* at 943.

[FN173]. *Id.*

[FN174]. UN Convention Article V, Section 20 states:

Privileges and immunities are granted to officials in the interests of the **United Nations** and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.

UN Convention, *supra* note 12, art. V, sec. 20.

[FN175]. Brower, *supra* note 137, at 29. See also 1995 U.N. Jurid. Y.B. 403-4, U.N. Doc. ST/LEG/SER.C/33 (describing the Secretary-General's duty to waive immunity when immunity would impede justice).

[FN176]. 1978 U.N. Jurid. Y.B., 191, U.N. Doc. ST/LEG/SER.C/16.

[FN177]. Procedures in place for implementation of article 8, section 29, of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly, on 13 February 1946 : Report of the Secretary-General, U.N. GAOR, 49th Sess., at 12 U.N. Doc. A/C.5/49/65 (1995) (hereinafter UN Settlement Policy). See also Rawski, *supra* note 150, at 112-13 (criticizing the method of waiver under the UN Convention).

[FN178]. UN Settlement Policy, *supra* note 177, at 12. "In a few cases, however, the Organization has not waived immunity but has cooperated with the competent authorities, on a strictly voluntary basis, by providing, for example, the necessary information with a view to assisting the authorities in the proper administration of justice and preventing the occurrence of any abuse of privileges and immunities." *Id.*

[FN179]. Brower, *supra* note 137, at 30-31.

[FN180]. *Id.*

[FN181]. *Id.*

[FN182]. UN Convention art.VIII, sec. 29 states:

The United Nations shall make provisions for appropriate modes of settlement of: a. disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party; b. disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.

UN Convention, *supra* note 12, art. VIII, sec. 29.

[FN183]. ILC Study (1967), *supra* note 149, ¶ 387.

[FN184]. *Id.*

[FN185]. UN Settlement Policy, *supra* note 177.

[FN186]. Id. at 12.

[FN187]. UN Convention, *supra* note 12, art. V, sec. 22.

[FN188]. See *supra* Part II.

[FN189]. See generally UN Settlement Policy, *supra* note 177.

[FN190]. Id. at 12.

[FN191]. Id.

[FN192]. See Optional Protocol, *supra* note 98.

[FN193]. UN Settlement Policy, *supra* note 177, at 12.

[FN194]. See *supra* Part II.E, for a discussion of waiver and settlement.

[FN195]. There is some precedent for these kinds of bilateral agreements. For example, the U.S. has negotiated such agreements with other states to prohibit the surrender of U.S. nationals to the International Criminal Court. Although the reasons for these agreements have been controversial, they serve as a possible model. See Jennifer Trahan & Andrew Egan, [U.S. Opposition to the International Criminal Court](#), 30 *Hum. Rts.* 10 (2003) (for a discussion of these agreements).

[FN196]. [Restatement \(Third\) of Foreign Relations Law of the United States § 102\(2\)](#) (1987).

[FN197]. There are several articles of the Vienna Convention that confer protection of diplomatic premises, and inviolability of diplomatic correspondence. These provisions would be unaffected by such an agreement because they do not implicate the doctrine of diplomatic immunity.

[FN198]. See Brower, *supra* note 137, at 31.

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