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## Abuse of Diplomatic Immunity in Family Courts: There's Nothing Diplomatic About Domestic Immunity

*“The abuse of diplomatic privileges seems to be growing. Although it most often comes to the attention of the media in cases involving crimes, traffic accidents or sequestering domestic employees, its use in divorce suits is not unknown and may be increasing.”*<sup>1</sup>

### I. INTRODUCTION

Democracy is founded upon the principle that no one is above the law.<sup>2</sup> International law nevertheless permits diplomats to escape liability for crimes or civil wrongs they commit in the country where they are being hosted.<sup>3</sup> Some scholars estimate that, each year, individuals with diplomatic immunity commit thousands of crimes around the world.<sup>4</sup> Another abuse of diplomatic privilege is found in the form of “deadbeat diplomats” who avoid paying spousal and child support by claiming immunity from jurisdiction of the courts.<sup>5</sup>

There are many individuals who are known, and many more who are

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1. Ronald P. Sokol, *MEANWHILE: Falling into a Black Hole of Diplomatic Immunity*, N.Y. TIMES, Aug. 14, 2004, [http://www.nytimes.com/2004/08/14/opinion/14iht-edsokol\\_ed3.html](http://www.nytimes.com/2004/08/14/opinion/14iht-edsokol_ed3.html).

2. See William G. Morris, Note, *Constitutional Solutions to the Problem of Diplomatic Crime and Immunity*, 36 HOFSTRA L. REV. 601, 601 (2007) (observing inconsistency between democracy and diplomatic immunity).

3. See *id.* (setting forth premise of diplomatic immunity). The Vienna Convention grants diplomats and their families numerous protections, including immunity from criminal jurisdiction of the receiving state. See Vienna Convention on Diplomatic Relations art. 31, April 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (entered into force Apr. 24, 1964) (granting diplomats immunity from criminal and civil jurisdiction of receiving states). For a list of names and titles of all U.S. diplomats currently serving missions abroad, see *Diplomatic List*, U.S. DEP'T OF STATE, <http://www.state.gov/documents/organization/221422.pdf> (last visited Mar. 19, 2014), and for an account of current ambassadors serving missions to the United Nations, see *The Leadership*, U.S. MISSION TO THE UNITED NATIONS, <http://usun.state.gov/leadership> (last visited Mar. 19, 2014).

4. See Morris, *supra* note 2, at 611 (outlining statistics of diplomatic crime). Diplomatic immunity is defined as “the freedom from local jurisdiction accorded under principles of international law by the receiving state to the duly accredited diplomatic representatives of other states.” Eric C. Surette, Annotation, *Applicability of Diplomatic Immunity Under Vienna Convention and Diplomatic Relations Act*, 1 A.L.R. FED. 2d 351, 364 (2005). Simply put, diplomats are not subject to criminal or civil jurisdiction of the state in which they are being hosted. See *id.*

5. *U.N. Targets Deadbeat Diplomats*, DESERET NEWS (Mar. 6, 1999, 12:00 AM), <http://www.deseretnews.com/article/684073/UN-targets-deadbeat-diplomats.html>; see Sokol, *supra* note 1 (describing dismissal of child custody and spousal support case based on diplomatic immunity). “Deadbeat diplomats” is a term used for diplomat-fathers who evade their obligation to support their ex-spouses and children. See *U.N. Targets Deadbeat Diplomats*, *supra*.

unknown, who have had their otherwise valid family court claims nullified on diplomatic immunity grounds.<sup>6</sup> Such claims include divorce, alimony, child custody, child support, and paternity.<sup>7</sup> Diplomats are entitled to avoid these claims because, under the Vienna Convention on Diplomatic Relations (Vienna Convention), individuals who receive diplomatic status are immune from being sued both criminally and civilly.<sup>8</sup>

In an attempt to respond to concerns regarding the abuse of diplomatic privilege in family support cases, the United Nations implemented a wage-garnishment program in 1999.<sup>9</sup> Still, pursuant to the Vienna Convention, family court judges may not hear cases brought in their courts against diplomats who have immunity.<sup>10</sup> This forces judges to choose between foreign policy interests and the interests of the parties and their children, which can lead to a ruling contrary to the Vienna Convention.<sup>11</sup> Overall, diplomatic immunity in domestic relations cases creates confusion, does not support the policy behind it, and leaves families struggling without redress.<sup>12</sup> If countries chose to utilize the waiver provision of the Vienna Convention, however, or allow family court cases to be heard against diplomat-defendants in accordance with the theory underlying diplomatic immunity, these problems could be solved.<sup>13</sup>

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6. Cf. Morris, *supra* note 2, at 609-10 (explaining uncertainty surrounding frequency of diplomatic crime).

7. See, e.g., *In re Terrence K.*, 522 N.Y.S.2d 949 (N.Y. App. Div. 1987) (concerning child abuse); *Anonymous v. Anonymous*, 252 N.Y.S.2d 913 (N.Y. Fam. Ct. 1964) (concerning paternity); Motion to Strike Portions of Indictment, ¶ 4, *United States v. Conrey*, 2009 WL 3812044 (W.D. Mo. 2009) (No. 07-00390-05-Cr-W-SOW) (alleging father used false diplomatic identification card to avoid paying child support).

8. See Vienna Convention on Diplomatic Relations, *supra* note 3, art. 31.

9. See *U.N. Targets Deadbeat Diplomats*, *supra* note 5 (reporting United Nations announced new policy to dock paychecks of staffers eluding court ordered support payments); Letter from Janet E. Atkinson, to Kay Bossel, U.S. Dep't of State (May 27, 1998), available at <http://www.clintonlibrary.gov/assets/storage/Research%20-%20Digital%20Library/ricesub/Box%20012/647851-child-support-international.agencies-2.pdf> (presenting letters from women obstructed by diplomatic immunity calling for implementation of wage garnishment).

10. See Vienna Convention on Diplomatic Relations, *supra* note 3, art. 31 (providing diplomats immunity from both civil and criminal actions in receiving state); *Fernandez v. Fernandez*, 545 A.2d 1036, 1041 (Conn. 1988) (classifying divorce under civil action for purposes of establishing diplomatic immunity).

11. See *Salvatierra v. Calderon*, 836 So. 2d 149, 157 (La. Ct. App. 2002) (indicating trial courts have jurisdiction over domestic relations case against party with diplomatic immunity). Diplomatic immunity is deemed necessary in international law to protect a state's diplomats from being held criminally liable abroad in an attempt to harass the sending state or force the diplomat to leave the country altogether. See Mark S. Zaid, *Diplomatic Immunity: To Have or Not To Have, That Is the Question*, 4 ILSA J. INT'L & COMP. L 623, 627 (1998) (explaining necessity of diplomatic immunity in international relations). Because many foreign legal systems do not adhere to a modernized notion of due process, it is preferable to afford immunity to members of diplomatic missions to avoid fraudulent prosecution or interrogations. See *id.* (noting benefit of diplomatic immunity for United States' diplomats).

12. See *infra* Part III (analyzing abuse of diplomatic immunity in family court).

13. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 464 reporters' note 15 (1987) ("[A] sending state should waive immunity in every case in which waiver would not interfere with the functions of the diplomatic mission.").

This Note focuses on how diplomatic immunity affects civil-domestic and family court issues.<sup>14</sup> Parts II.A and II.B present a description of diplomatic immunity law before and after the Vienna Convention took effect.<sup>15</sup> Part II.C surveys the Diplomatic Relations Act of 1978, which took effect in the United States after the Vienna Convention entered into force.<sup>16</sup> Part II.D outlines the theories underlying diplomatic immunity.<sup>17</sup> Part II.E presents a snapshot of abuses of diplomatic privileges in criminal and administrative contexts, while Part II.F explains abuses of diplomatic immunity in civil-domestic cases.<sup>18</sup> Parts II.G and II.H explain various responses to such abuses, including the wage-garnishment program.<sup>19</sup> Part III analyzes the effect of diplomatic immunity law on domestic relations.<sup>20</sup> Specifically, Part III.A discusses the failure of the wage-garnishment program, and Part III.B explains how the other avenues to prosecution allowed under the Vienna Convention are unworkable for family court plaintiffs.<sup>21</sup> Finally, Part III.C recommends that international law allow for domestic disputes to be heard against diplomats despite their immunity.<sup>22</sup>

## II. HISTORY

### A. Pre-Vienna Convention Diplomatic Immunity Law

The principles of diplomatic immunity originated more than 3000 years ago.<sup>23</sup> Early societies first developed the idea of diplomatic immunity to allow messengers to move freely between communities to discuss war, peace, and trade.<sup>24</sup> In biblical times, messengers sent by dignitaries to their adversaries

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14. See *infra* Part II.

15. See *infra* Part II.A-B.

16. See *infra* Part II.C.

17. See *infra* Part II.D.

18. See *infra* Part II.E-F.

19. See *infra* Part II.G-H.

20. See *infra* Part III.

21. See *infra* Part III.A-B.

22. See *infra* Part III.C.

23. See R. Scott Garley, Note, *Compensation for "Victims" of Diplomatic Immunity in the United States: A Claims Fund Proposal*, 4 *FORDHAM INT'L L.J.* 135, 138 (1980) (outlining early development of diplomatic immunity). For example, ancient Greece recognized immunity of foreign diplomats as an "essential element of peaceful intercourse between nations." *Id.*

24. See Phil Felice, Comment, *Diplomatic Impunity: Time for a Change?*, 15 *TOURO L. REV.* 327, 329 (1998) (discussing diplomacy among "primitive" societies). "Man has recognized since the beginning of societal relations that in the name of diplomacy, those who act in the name of the sovereign need to be afforded generous treatment and protection so that actions between peoples can commence." *Id.* Diplomatic immunity was common to many ancient states, including Greece, Rome, Babylonia, Egypt, Israel, India, and China. See NICK HANRAHAN, *CTR. FOR ACCOUNTABILITY OF INT'L ORGS., A HISTORY OF DIPLOMATIC IMMUNITY AND THE DEVELOPMENT OF INTERNATIONAL ORGANISATION IMMUNITY 1* (2005), available at [http://www.caioch.org/reforms/Intern\\_Paper\\_I.pdf](http://www.caioch.org/reforms/Intern_Paper_I.pdf) (explaining early customs and procedures of diplomatic relations). For example, in 491 B.C.E., King Darius of Persia declined to kill Spartan envoys as vengeance for the murder of

received such unwelcomed treatment that complete immunity was imperative.<sup>25</sup> The first diplomatic immunity law arose in Europe when nations began to commonly exchange diplomats, meaning that individual countries would send an ambassador to other countries to foster foreign relations.<sup>26</sup> This law, the Act of Anne of 1708, stated that all writs and processes to arrest or imprison ambassadors or their servants were “null and void.”<sup>27</sup> The American Colonies adopted this Act until Congress passed the Crimes Act of 1790 (Crimes Act), which, following the traditional approach, forbade the arrest of an ambassador or the seizure of his property.<sup>28</sup>

The broad scope of diplomatic immunity granted by the Crimes Act began to clash with evolving world conditions and was no longer compatible with the modern world.<sup>29</sup> Throughout the 1800s, there were numerous instances in which abuses of diplomatic immunity resulted in financial loss, property damage, and personal injury with little to no compensation or other adequate legal remedy for the victims.<sup>30</sup> While the principles of diplomatic immunity

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two of his own envoys due to the negative diplomatic consequences that would ensue. *Id.*

25. See ABBA SOLOMON EBAN, *THE NEW DIPLOMACY: INTERNATIONAL AFFAIRS IN THE MODERN AGE* 332-45 (1983).

26. See Morris, *supra* note 2, at 603 (discussing evolution of diplomatic immunity in Europe). European nations recognized diplomatic immunity as an important requirement for the exchange of diplomats between them. *See id.*

27. Diplomatic Privileges Act, 1708, 7 Ann c. 12 (Eng.), *repealed by* Diplomatic Privileges Act, 1964, c. 81, § 8(4), sch. 2 (U.K.). England enacted the Act of Anne to quell the anger of Russian Czar, Peter the Great, after English authorities arrested his ambassador in London for failing to pay a debt. *See Felice, supra* note 24, at 329-30. Peter the Great forced the British ambassador to publicly convey Queen Anne’s regret for the insult. *See id.*

28. *See* Crimes Act of 1790, ch. 9, § 25, 1 Stat. 112, 117-18, *repealed by* Diplomatic Relations Act of 1978, § 3(a)(1), 92 Stat. 808, 808 (prohibiting arresting diplomats or seizing their property). The Crimes Act provided that:

if any writ or process shall at any time hereafter be sued forth or prosecuted by any person or persons, in any of the courts of the United States, or in any of the courts of a particular state . . . such writ or process shall be deemed and adjudged to be utterly null and void . . .

*Id.* The Crimes Act codified the ruling in *Respublica v. De Longchamps*, the earliest diplomatic immunity case in the United States. *See* 1 U.S. 111, 116-17 (1784); *see* Terry A. O’Neill, Comment, *A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978*, 54 TUL. L. REV. 661, 665 (1980). In *De Longchamps*, the Court held that when a diplomat is attacked through legal process, “his freedom of conduct is taken away, [and] the business of his Sovereign cannot be transacted.” *De Longchamps*, 1 U.S. at 117. The Crimes Act provided blanket immunity to the ambassador’s personal servants, as well as their staff, and made it a crime punishable by imprisonment for up to three years for even filing suit against them. *See* Crimes Act of 1790 §§ 25-26.

29. *See* Garley, *supra* note 23, at 139-40 (highlighting problems with scope of Crimes Act). The emancipatory thinkers of the Enlightenment and the French Revolutionaries were suspicious of diplomatic immunity, attacking the secrecy, luxury, and privileges it afforded. *See* HANRAHAN, *supra* note 24, at 7-8 (noting early criticism of granting diplomats immunity).

30. *See* Garley, *supra* note 23, at 140 (observing citizens’ frustration with Crimes Act). For a comprehensive account of incidents involving diplomatic immunity that resulted in uncompensated loss or injury to private citizens under the Crimes Act, *see* 4 GREEN HAYWOOD HACKWORTH, *DIGEST OF*

depend upon uniform application, more and more countries began to adopt narrower interpretations of the rule during the 1900s.<sup>31</sup> Widespread opinion favored modernizing diplomatic immunity by focusing on protecting the function of the mission rather than the diplomat.<sup>32</sup> The need for international uniformity on the scope of immunity, coupled with a growing dissatisfaction with absolute immunity, led to the adoption of the Vienna Convention.<sup>33</sup>

### B. Vienna Convention on Diplomatic Relations

From March 2 to April 14, 1961, delegates from eighty-one countries gathered at the United Nations Conference on Diplomatic Intercourse and Immunities in Vienna, Austria.<sup>34</sup> The representatives convened to create an international consensus on the immunities and privileges of diplomats.<sup>35</sup> The conference culminated in the signing of the Vienna Convention, which addressed every aspect of diplomatic relations between the participating nations.<sup>36</sup> Consent to be legally bound by its provisions would be expressed by ratification or accession.<sup>37</sup> The Vienna Convention adopted the more

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INTERNATIONAL LAW § 401, at 515-30 (1942).

31. See O'Neill, *supra* note 28, at 680 (bringing to light widespread dislike of absolute immunity for diplomats and subsequent restrictions). In 1928, the Sixth International Conference of American States adopted the Bustamante Code of Private International Law, which established that "diplomatic immunity from civil suit should extend only to actions related to the diplomat's official duties." *Id.* at 679-80. Many countries, including Italy, France, and Chile, restricted absolute diplomatic immunity from private suits without relying upon any international convention. See *id.* at 680 (citing cases in which countries declined to apply immunity to claims unrelated to diplomatic duties).

32. See Garley, *supra* note 23, at 141 (chronicling changing sentiment of diplomatic relations among international community).

33. See O'Neill, *supra* note 28, at 680-81 (summarizing intent behind implementing Vienna Convention). "The establishment of an international convention on diplomatic immunity sought to standardize the practice of receiving diplomatic officials and establishing diplomatic missions, and to codify the customary international law of diplomatic immunity." Mitchell S. Ross, Comment, *Rethinking Diplomatic Immunity: A Review of Remedial Approaches To Address the Abuses of Diplomatic Privileges and Immunities*, 4 AM. U. J. INT'L L. & POL'Y 173, 180 (1989).

34. See Antoinette Marie Tease, Note, *Diplomatic Immunity and Divorce: Fernandez v. Fernandez*, 21 CONN. L. REV. 1071, 1072 (1989). The Conference adopted the Vienna Convention, which set forth criminal, civil, and administrative diplomatic immunity the participating nations would accord. See *id.* at 1071.

35. See LINDA S. FREY & MARSHA L. FREY, *THE HISTORY OF DIPLOMATIC IMMUNITY* 479-81 (1999) (considering focus and goals of Vienna Convention). Several governments became convinced of the necessity of drafting a new international code on diplomatic immunity due to the many severe attacks on international law and the frequent violations of formerly accepted immunities. See *id.*

36. See Tease, *supra* note 34, at 1072 (discussing ratification and provisions of Vienna Convention). The Vienna Convention contains fifty-three articles that regulate every detail of diplomatic immunity, including seemingly insignificant ones, like the use of flags on diplomatic vehicles and taxation exemptions. See Vienna Convention on Diplomatic Relations, *supra* note 3, arts. 5-7, 20, 23, 28, 34 (enumerating variety of diplomatic privileges and immunities); see also Leslie Shirin Farhangi, Note, *Insuring Against Abuse of Diplomatic Immunity*, 38 STAN. L. REV. 1517, 1522-23 (1986) (summarizing scope of articles of Vienna Convention).

37. See Tease, *supra* note 34, at 1072. Ratification is governed by the rules of the signatory state as well as the rules that are set forth in the treaty itself. See MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 22 (4th ed. 2003). Accession occurs when a state that did not originally sign a treaty, but wishes to adhere to the agreement, assumes the same legal position as held by the states that have ratified it. See *id.*

contemporary, “functional approach,” which no longer afforded complete and unqualified immunity to foreign nationals associated with a diplomatic mission.<sup>38</sup>

The Vienna Convention established four categories of diplomatic personnel, each having different levels of immunity: diplomatic agents, administrative and technical personnel, service staff, and private servants.<sup>39</sup> Those falling under the first category—diplomatic agents—include heads of diplomatic missions as well as members of their staff or family; all are immune from criminal prosecution and civil liability for acts committed within their official capacity in the receiving state.<sup>40</sup> However, the Vienna Convention specifically provided three exceptions to their immunity from civil jurisdiction: real actions relating to a diplomat’s immovable property in the territory of the receiving state; actions relating to succession in which the diplomat is an executor, administrator, heir, or legatee; and actions relating to any professional or commercial activities in the receiving state, which are outside of official duties.<sup>41</sup> This third exception establishes that persons who enjoy diplomatic immunity are immune from neither actions relating to activity exercised beyond the scope of their official functions, nor execution of judgments relating to those actions.<sup>42</sup> Therefore, immunity from legal process in civil actions applies only to official acts and omissions.<sup>43</sup> Those falling under the other three categories enjoy a more limited immunity from the jurisdiction of the receiving state.<sup>44</sup>

### C. *Diplomatic Relations Act of 1978*

The Vienna Convention was a self-executing treaty—that is, the treaty

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38. See Garley, *supra* note 23, at 142.

39. See Ross, *supra* note 33, at 181-82.

40. See *id.*

41. See Vienna Convention on Diplomatic Relations, *supra* note 3, art. 31(1) (placing limits on diplomatic immunity in certain situations); Yu-Long Ling, *A Comparative Study of the Privileges and Immunities of United Nations Member Representatives and Officials with the Traditional Privileges and Immunities of Diplomatic Agents*, 33 WASH. & LEE L. REV. 91, 109 (1976) (explaining exceptions to complete immunity afforded by Vienna Convention).

42. See Vienna Convention on Diplomatic Relations, *supra* note 3, art. 31(1) (limiting immunity in actions relating to professional or commercial activity outside his official functions).

43. See 11 LOUIS R. FRUMER & MELVIN I. FRIEDMAN, *PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES* § 48.03 (Matthew Bender rev. ed. 2013) (explaining basic immunity for diplomatic officials and exceptions to immunity); Ross, *supra* note 33, at 181-82 (explaining scope of immunity for diplomats and their personnel).

44. See Ross, *supra* note 33, at 181-82 (describing four categories of diplomatic immunity and privileges each enjoys). The administrative and technical personnel enjoy complete immunity from criminal prosecution, but are only immune from civil acts performed within the course of their duties. See *id.* The service staff is only immune from liability for acts performed in the course of their domestic duties. See *id.* at 182. Private servants (those who are not employed by the sending state) are only immune to the extent that the receiving state concedes, so long as any prosecution does not interfere with the functions of the mission. See *id.*; see also Vienna Convention on Diplomatic Relations, *supra* note 3, art. 37.

immediately became a part of U.S. law upon ratification.<sup>45</sup> When the United States ratified the Vienna Convention in 1972, it permitted Congress to enact additional legislation to supplement the Convention's provisions and to abolish the Crimes Act, ultimately providing diplomats more protection than the treaty required.<sup>46</sup> The Diplomatic Relations Act of 1978 formally codified the Vienna Convention and mandates that "[a]ny action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention . . . shall be dismissed."<sup>47</sup>

In response to public hostility towards the lack of accountability following crimes committed by diplomats, Congress enacted limiting provisions regarding liability insurance, which the Vienna Convention had not addressed.<sup>48</sup> The Diplomatic Relations Act of 1978 requires diplomats to purchase liability insurance and also provides a direct right of action for injured parties against the diplomat's insurer.<sup>49</sup> The intent of these provisions was to make the diplomat's immunity immaterial by allowing recovery through the diplomat's insurer.<sup>50</sup>

Still, the Act is seen as inadequate for the purpose of protecting the rights of private citizens.<sup>51</sup> Many difficulties remain with respect to enforcing the liability insurance provisions and there are many circumstances in which individuals cannot recover for their injuries received through civil or criminal acts committed against them by diplomats.<sup>52</sup> Congress considered several bills that would have provided some relief in these situations by establishing a

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45. See Morris, *supra* note 2, at 605 (discussing intent underlying enactment of Diplomatic Relations Act of 1978). As a treaty, the Vienna Convention has the full force of law in the United States and is recognized as part of the law of the land pursuant to Article VI of the U.S. Constitution. See *id.* at 604.

46. See Garley, *supra* note 23, at 145-49 (tracing United States' ratification of Vienna Convention); Morris, *supra* note 2, at 605-06 (highlighting difference between Vienna Convention and Diplomatic Relations Act). Because the Vienna Convention's provisions set forth minimum standards, Congress had to adopt a new law to repeal the broad immunity allowed under the Crimes Act. See Surette, *supra* note 4, at 364-65. The Diplomatic Relations Act of 1978 reduced the number of diplomats and their staff entitled to full immunity from about 19,844 to 8081. FREY & FREY, *supra* note 35, at 490.

47. Diplomatic Relations Act of 1978 § 5, 22 U.S.C. § 254d (2012). The Act also clarified that the Vienna Convention was the sole U.S. law on the subject of diplomatic immunity. See Surette, *supra* note 4, at 365.

48. See Ross, *supra* note 33, at 183 (explaining two provisions of Diplomatic Relations Act of 1978 regarding insurance).

49. See Diplomatic Relations Act of 1978 § 6, 22 U.S.C. § 254e (2012); Farhangi, *supra* note 36, at 1530-01 (discussing rationale behind diplomatic-insurance requirement). Because these provisions only apply to civil injuries arising from transportation, the remedies do nothing to comfort victims who wish to see the perpetrator serve jail time or receive other criminal sanctions. See Morris, *supra* note 2, at 607 (considering remedies provided for by Diplomatic Relations Act of 1978).

50. See O'Neill, *supra* note 28, at 691. Before Congress enacted the Diplomatic Relations Act of 1978, insurance companies had the ability to sell liability policies to diplomats and then assert the diplomat's immunity to avoid paying damages. See *id.* at 692 (noting significance of direct action provision of Act).

51. See Garley, *supra* note 23, at 146 (presenting shortcomings of present Diplomatic Relations Act of 1978).

52. See *id.* (outlining inadequacies of protections provided by Diplomatic Relations Act of 1978).

claims fund, which would compensate injured citizens who could not otherwise bring a successful action against a diplomat, but none of them passed.<sup>53</sup>

#### D. Theories Underlying Diplomatic Immunity

The policy justifications underlying diplomatic immunity have fluctuated over time.<sup>54</sup> Historically, courts and legal scholars have used four theories to justify diplomatic immunity: sacredness of ambassadors, extraterritoriality, representative character, and functional necessity.<sup>55</sup> The first theory claimed that because diplomats are “sacred,” they are immune from prosecution, but this theory can no longer be justified in a modern world where a person’s status alone does not shield her from responsibility for all of her wrongful acts.<sup>56</sup> The second theory, the theory of extraterritoriality, posits that because a diplomat represents the government of his or her home state, he or she is considered to always be within that state’s territory and is thus never subject to personal jurisdiction in the host state.<sup>57</sup> The third theory, the “representative character” theory or “representative of the sovereign” theory, contends that because diplomats represent and personify the sending states, they should have the same privileges and immunities that their home country, as a sovereign nation, would have.<sup>58</sup>

The fourth, and most widely recognized, theory in support of diplomatic immunity is now the functional-necessity approach, which asserts that the diplomat must be protected from jurisdiction in the receiving state in order to conduct his duties efficiently.<sup>59</sup> This theory is based on the principle that meaningful interaction among nations depends upon the ability of diplomats “to carry on their representative functions in an atmosphere of inviolability.”<sup>60</sup> In a

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53. See *id.* at 149-51 (looking at claims-fund proposals). House Representative Stephen J. Solarz of New York proposed a bill that would have established a Bureau of Claims responsible for awarding compensation to persons injured by foreign diplomats and reimbursing the government for revenue lost due to the inability to collect fines from foreign diplomats. See *id.* at 150 (synthesizing Representative Solarz’s proposal).

54. See Farhangi, *supra* note 36, at 1520-23 (surveying theoretical bases for diplomatic immunity).

55. See O’Neill, *supra* note 28, at 664-65; see also Farhangi, *supra* note 36, at 1520-1522 (explaining three recent theories).

56. See O’Neill, *supra* note 28, at 664.

57. See *id.*

58. See *id.* (explaining representative-character theory); Farhangi, *supra* note 36, at 1520 (explaining representative-of-sovereign theory). The representative-of-the-sovereign theory is based on the premise that an insult to the diplomat is an insult to the dignity of the sovereign. See Farhangi, *supra* note 36, at 1520. This theory is largely discredited because it places the diplomat above the law of the host state and provides no justification for excusing private acts. See *id.*

59. See O’Neill, *supra* note 28.

60. Garley, *supra* note 23, at 138. The United States’ primary concern is that its diplomats, as well as other private citizens, located abroad are safe and have the ability to perform their duties without fear. See Felice, *supra* note 24, at 328. In return, the United States is cognizant of the fact that it must afford the same privileges to foreign diplomats in the United States. See *id.* at 327-28 (setting forth policy reasons for affording diplomats immunity). Scholars have recognized that in order to carry out the task of diplomacy there is a need for uninhibited dialogue and movement, which will be hindered if diplomats are worried about being



letter to the Secretary of Commerce and Labor, Elihu Root, Secretary of State at the time, wrote that the rationale for diplomatic immunity is so “that Governments may not be hampered in their foreign relations by the arrest or forcible prevention of the exercise of a duty in the person of a governmental agent or representative.”<sup>61</sup> Later, the Vienna Convention embraced this theory by stating that the purpose of diplomatic immunity is “not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.”<sup>62</sup> Nonetheless, even the actions of diplomats outside of the normal sphere of conducting the mission are immune from prosecution, which raises questions regarding whether the theory behind diplomatic immunity supports its construction.<sup>63</sup>

#### *E. Abuse of Diplomatic Immunity in Criminal and Administrative Cases*

Despite the intent behind diplomatic immunity, many diplomats have grossly abused the privileges afforded to them by disregarding the laws of the host state.<sup>64</sup> The most widely recognized abuse of diplomatic immunity comes in the form of escaping parking violations and various criminal offenses, such as drunk driving.<sup>65</sup> The State Department no longer requests the cancellation of traffic citations on behalf of diplomatic missions because of the unreasonable number of issuances, and has even recalled drivers’ licenses in instances of flagrant disregard for the traffic laws.<sup>66</sup> In an attempt to address alcohol-related offenses, the State Department suspended the licenses of thirty-seven diplomats

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incarcerated or sued during political standoffs. See Morris, *supra* note 2, at 604 (citing reasons for implementation of Vienna Convention).

61. HACKWORTH, *supra* note 30, at 513; see *Biographies of the Secretaries of State: Elihu Root*, U.S. DEP’T OF STATE OFF. OF THE HISTORIAN, <http://history.state.gov/departmenthistory/people/root-elihu> (last visited Mar. 19, 2014) (profiling Secretary of State Elihu Root who served from 1905 to 1909).

62. Vienna Convention on Diplomatic Relations, *supra* note 3, pmb1.; see Ernest L. Kerley, *Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities*, 56 AM. J. INT’L L. 88, 90-94 (1962) (explaining signatories’ decision to include preamble favoring functional-necessity approach). The functions of a diplomatic mission in the receiving state include: representing the sending state; protecting the interests of the sending state and of its nationals; negotiating with government officials of the receiving state; ascertaining the conditions and developments in the receiving state and reporting that information to the government of the sending state; and promoting friendly relations between the two states while developing their economic, cultural, and scientific relations. See Vienna Convention on Diplomatic Relations, *supra* note 3, art. 3. The Vienna Convention codified diplomatic immunity to maintain international peace and security, and to promote friendly relations among nations. See *id.* pmb1.

63. See Ross, *supra* note 33, at 179 (critiquing diplomatic immunity based on functional-necessity theory). The current construction of diplomatic immunity, extending immunity to individuals, is inconsistent with the functional-necessity theory that renders protection to the diplomatic process alone. See *id.* at 179-80 (arguing diplomatic immunity not justified by policy behind it).

64. See Felice, *supra* note 24, at 328 (surveying abuse of diplomatic immunity).

65. See Zaid, *supra* note 11, at 624 (noting public’s attitude toward diplomatic immunity in United States). For example, as of 1998, there were millions of dollars owed in unpaid parking and traffic tickets of diplomats in New York City alone. See Felice, *supra* note 24, at 336.

66. See Felice, *supra* note 24, at 334-35 (providing State Department’s reaction to amount of traffic citations given to diplomats).

in just three years.<sup>67</sup>

Serious traffic incidents that resulted in bodily harm, and sometimes death, led the United States to require diplomats to carry a large amount of liability insurance.<sup>68</sup> Due to the reality of diplomatic crime and abuses of privilege, a survey conducted in 1997 found that the majority of Americans felt diplomatic immunity should not supersede the laws of the United States.<sup>69</sup> While many recognize that the benefits of diplomatic immunity protect diplomats around the world, they also feel that it should be modified to ensure fewer violations to the host states' laws.<sup>70</sup>

#### F. Abuse of Diplomatic Immunity in Civil-Domestic Cases

While the focus of diplomatic-immunity abuse has traditionally been on criminal law, such abuse also arises in the family court system.<sup>71</sup> Yet, there are few court opinions to rely upon in determining the frequency of these abuses because most cases are dismissed during the pretrial phase as a result of the defendant's diplomatic immunity.<sup>72</sup> However, news sources around the world

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67. See Zaid, *supra* note 11, at 627 (taking stock of measures taken by State Department to combat diplomatic crime). In addition, "eight diplomats were expelled from the United States in 1996 for repeated drunk driving." *Id.* at 627 n.16.

68. See Diplomatic Relations Act of 1978 § 6, 22 U.S.C. § 254e (2012) (requiring members of mission to hold liability insurance); Zaid, *supra* note 11, at 629 (describing serious diplomatic abuses and requirement of liability insurance as remedy); *supra* notes 48-50 and accompanying text (describing insurance provisions).

69. See Zaid, *supra* note 11, at 625 (explaining results of survey conducted regarding public sentiment towards diplomatic immunity). When asked whether diplomatic immunity should supersede U.S. law, five percent of respondents answered yes, fifty-three percent answered no, and forty-two percent had mixed feelings. *Id.* As of 1998, there were more than 18,000 individuals in the United States who held some form of diplomatic immunity. *Id.* at 627.

70. See *id.* at 630-32 (suggesting modification to current diplomatic immunity mechanism to better protect host state). As former House Representative David Dreier once stated, "while the concept of diplomatic immunity remains an important underpinning of peaceful diplomacy, it is time, with the exponential growth of the diplomatic corps, that we reexamine the procedures and policies implicit in the doctrine of diplomatic immunity." *Id.* at 630-31.

71. See Sokol, *supra* note 1 (reporting abuse of diplomatic immunity in family court setting); see also Oytan v. David-Oytan, 288 P.3d 57, 63 (Wash. Ct. App. 2012) (reiterating husband's argument that diplomatic immunity prevents exercise of jurisdiction over him or his property). For example, the court in *Fernandez v. Fernandez* held that a divorce proceeding is a civil action for the purposes of establishing immunity under the Vienna Convention. See 545 A.2d 1036, 1040 (Conn. 1988). In its holding, the court rejected the lower court's argument that the defendant's diplomatic immunity did not extend to the divorce proceeding because it constituted a family-relations matter rather than a civil one. *Id.* at 1041.

72. See *Fernandez*, 545 A.2d at 1041 (dismissing case due to husband's diplomatic immunity); Sokol, *supra* note 1 (reporting divorce case dismissed due to diplomatic immunity). Most of the evidence demonstrating abuse of diplomatic immunity is anecdotal rather than statistical in nature. See Morris, *supra* note 2, at 609 (considering problem of diplomatic crime). This is likely due to "underreporting and misreporting" of abuse. *Id.* at 610. First, official records are not always kept because they are typically handled by the State Department quietly and confidentially to avoid embarrassment. See *id.* Second, police officers often decline to submit reports for incidents involving a diplomat because the diplomat's immunity status will likely result in the claim being dismissed, rendering the police work meaningless. See *id.* Third, many victims are unwilling to come forward for various reasons, such as the diplomat convincing them of the likely failure of the claim or threatening them to stay quiet, especially in domestic cases. See *id.* For examples

have reported on abuses of diplomatic privilege, providing a glimpse of the extent of diplomatic immunity abuse.<sup>73</sup> One telling instance of such abuse occurred when a diplomat from Central America, without his wife's knowledge, was granted both a divorce and custody of his and his wife's children from a religious tribunal in a Middle Eastern country where the couple did not live.<sup>74</sup> The wife then retained a lawyer who asked a court in France, where the family lived and the husband had a diplomatic posting, for custody of the children and support payments.<sup>75</sup> Her husband sent two lawyers to ask the court to dismiss the case because of his diplomatic immunity—a request that the court granted, leaving the couple's marital status in “limbo.”<sup>76</sup>

Another publicized instance involved the Canadian Foreign Affairs Minister ordering an employee of the Canadian High Commission in Australia back to Canada after he asserted his diplomatic immunity to evade paying alimony.<sup>77</sup> The minister said he ordered the technical officer to return immediately because he felt “disgusted by the official's abuse of diplomatic privileges.”<sup>78</sup> Although the local Australian court ordered him to pay \$330 per week to support his wife and two children, it held that it could not enforce the order once he refused to pay because of his immunity status.<sup>79</sup>

In 2013, *Massachusetts Lawyer's Weekly* reported on a case in Massachusetts in which the former wife of Gabon's ambassador to the United States filed suit in probate and family court claiming \$75,000 dollars in overdue child support payments.<sup>80</sup> The ambassador stopped paying the court-ordered \$50 per week in child support soon after the couple divorced in 1989.<sup>81</sup>

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of cases involving family courts faced with diplomatic immunity challenges, see *In re Terrence K.*, 522 N.Y.S.2d 949 (N.Y. App. Div. 1987); *Anonymous v. Anonymous*, 252 N.Y.S.2d 913 (N.Y. Fam. Ct. 1964); *Motion to Strike Portions of Indictment*, ¶ 4, *United States v. Conrey*, 2009 WL 3812044 (W.D. Mo. 2009) (No. 07-00390-05-Cr-W-SOW).

73. See, e.g., *Child Support Case Raises Diplomatic Immunity Question*, MASS. LAW. WKLY., Aug. 20, 2012, at 4 [hereinafter *Child Support Case*] (reporting diplomat using immunity to avoid paying child support); André Picard, *Diplomat Recalled over Abuse of Immunity*, GLOBE & MAIL, Mar. 25, 1995 (reporting diplomat recalled over using his immunity to avoid alimony payments); Sokol, *supra* note 1 (reporting diplomat using immunity to avoid court-ordered support payment).

74. See Sokol, *supra* note 1 (tracing incident of diplomatic abuse in family court).

75. See *id.* (explaining procedure plaintiff took to file claim against diplomat husband).

76. See *id.* (summarizing how diplomat obtained dismissal of case against him in family court). The husband became a citizen of a small Central American country, which then appointed him its ambassador in Paris, entitling him to diplomatic privileges. See *id.*

77. See Picard, *supra* note 73 (reporting incident of abuse of diplomatic privilege).

78. See *id.* (observing Foreign Affairs Minister's reaction to abuse of diplomatic privilege with regard to family matters).

79. See *id.* (offering instance of court reluctance to claim jurisdiction over foreign diplomats). After the divorce, his wife and children were left impoverished and homeless. See *id.*

80. See *Child Support Case*, *supra* note 73 (reporting recent case of assertion of diplomatic privilege in family court).

81. *Id.* The ambassador refused to pay his child support payments, despite the fact that he allegedly held an interest in African diamond mines and lived in an expensive home in the Washington, D.C. area. See *id.*; Michael Moussa-Adamo *Ambassador Extraordinary and Plenipotentiary*, GABONESE REPUBLIC EMBASSY,

The defendant asserted his diplomatic status to have the claim dismissed.<sup>82</sup>

### G. Responses to Abuse of Diplomatic Immunity

The Vienna Convention permits a state to take only a few possible actions against a diplomat who has committed a crime or has abused his diplomatic privileges.<sup>83</sup> In the most serious situations, the receiving state can limit the size of the mission or terminate relations with the sending state altogether.<sup>84</sup> The receiving state may also issue threats of expelling the diplomat.<sup>85</sup> Governments will not resort to such drastic measures though, unless they feel obligated by extreme circumstances.<sup>86</sup>

In order to subject a diplomat to the host state's law, the host state can negotiate with the sending state to waive immunity.<sup>87</sup> Under Article 32 of the Vienna Convention, if the sending state waives immunity, the receiving state does not violate any of the Convention's protections by punishing the offending diplomat.<sup>88</sup> While waiver is an excellent procedure in theory, it has proven

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<http://www.gabonembassyusa.org/ambassador.html#!ambassador/c4h1> (last visited Mar. 29, 2014) (providing brief biography of Ambassador Moussa-Adamo).

82. See *Child Support Case*, *supra* note 73 (calling out use of diplomatic status to avoid court-ordered support payments). The defendant's defense surprised the attorney for the plaintiff because she believed diplomatic immunity extended only to criminal offenses. See *id.* (indicating confusion among members of legal community regarding scope of diplomatic immunity).

83. See Farhangi, *supra* note 36, at 1526 (setting forth three possible actions state can take against offending diplomat).

84. See *id.* at 1527 & n.55 (observing situations in which countries have terminated diplomatic relations for serious crimes). One such instance occurred in 1984 when a British policewoman died and eleven others suffered injuries from machine-gun shots fired into a crowd from inside the Libyan Embassy during a public rally against the Libyan government. See Morris, *supra* note 2, at 609 (offering instance where diplomatic crime has gone unpunished). Aware of the possible harm that could come to their diplomats and citizens in Libya, "[t]he only remedy available to the British government under the Vienna Convention was to break off diplomatic relations." *Id.* at 609. Another instance of similar severity occurred after considerable debate, when the United States broke diplomatic relations with Iran after terrorists seized the American Embassy in Tehran and held fifty-two American nationals hostage. See Ross, *supra* note 33, at 190 (providing justification for United States' diplomatic break from Iran). The Vienna Convention also permits the receiving state to close an individual embassy. See Vienna Convention on Diplomatic Relations *supra* note 3, arts. 9, 11. This remedy "could deter a country from using their diplomats for terrorist plots or continually failing to bring their criminal diplomats to justice." Morris, *supra* note 2, at 607.

85. See Morris, *supra* note 2, at 608-09 (citing examples of Vienna Convention's remedies leading to positive outcomes in civil matters). England effectively employed expulsion threats in London against diplomats who failed to pay their parking and traffic tickets; the state cut the number of unpaid diplomat parking tickets by over 90,000 in three years. See *id.* at 609.

86. See *id.* (observing reluctance to terminate relations with countries in order to prosecute diplomats without extreme conditions); Ross, *supra* note 33, at 190 (explaining governments' hesitations to take drastic measures that terminate diplomatic relations).

87. See Morris, *supra* note 2, at 608 (noting ability to ask countries to waive immunity of diplomats); see also Vienna Convention on Diplomatic Relations, *supra* note 3, art. 32 (prescribing immunity may be waived by the sending state); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 464 reporters' note 9 (1987) (explaining function of waiver in diplomatic immunity).

88. See Vienna Convention on Diplomatic Relations, *supra* note 3, art. 32 (establishing waiver provision); Farhangi, *supra* note 36, at 1526 (enumerating actions available under Vienna Convention). This

ineffective in practice, as there is no enforcement mechanism compelling the sending state to waive immunity.<sup>89</sup> Under the Vienna Convention, in order to allow prosecution and end abuses, the State Department need only request the sending state waive immunity; however, like many large institutions, governments are “lethargic” and only move when “hounded” to do so.<sup>90</sup>

Under Article 31 of the Vienna Convention, a receiving state can request that the sending state discipline the diplomat in the sending state using its own judicial system.<sup>91</sup> When using this provision, the sending state has the benefit of avoiding fear that a potentially defective foreign justice system may condemn its diplomats abroad.<sup>92</sup> The diplomat would receive a trial in his or her own jurisdiction and be entitled to the specific protections it provides—ones that foreign systems may not.<sup>93</sup>

Another avenue to pursue prosecution arises under Article 9 of the Vienna Convention, which allows the host state to declare a person with diplomatic immunity *persona non grata*, literally meaning “unwelcome person.”<sup>94</sup> Once a person is declared *persona non grata*, he or she is removed from the host country or his diplomatic functions are terminated.<sup>95</sup> This method is rarely

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approach makes the diplomat’s obligation to respect the host state’s law more tangible while also recognizing the nature of the Vienna Convention. *See* Farhangi, *supra* note 36, at 1526 (considering benefits of waiver provision). One example of waiver occurred in 1997 when an ambassador from the Republic of Georgia, driving three times the speed limit, caused an accident in Washington, D.C., leading to four injuries and the death of a teenage girl. *See* Morris, *supra* note 2, at 608. The United States formally requested to have his immunity waived and the Republic of Georgia complied. *See id.* (summarizing waiver-remedy procedure). Ultimately, he plead guilty to involuntary manslaughter and was sentenced to a term of seven to twenty-one years in federal prison. *See id.* (explaining result of case where waiver issued against diplomat); Terry Frieden, *Georgian Diplomat Convicted in Fatal Crash Goes Home*, CNN.COM (June 30, 2000, 6:11 PM), <http://archive.is/bRU7n#selection-2145.1-2145.20> (stating disposition of criminal proceedings against Georgian diplomat); *see also* 7 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW § 43, at 431 (1970) (providing brief description of cases where United States granted waiver of diplomatic immunity).

89. *See* Farhangi, *supra* note 36, at 1526 (explaining ineffectiveness of using waiver provision of Vienna Convention).

90. *See* Sokol, *supra* note 1 (referring to slow process of requesting State Department to waive diplomatic immunity).

91. *See* Vienna Convention on Diplomatic Relations, *supra* note 3, art. 31(4) (mandating diplomats not immune from jurisdiction of sending state).

92. *See* Morris, *supra* note 2, at 606 (examining Article 31 remedy provided by Vienna Convention).

93. *See id.* (indicating benefits of using Article 31 remedy). One example took place in 2001 when a Russian diplomat to Canada caused a car accident, killing one pedestrian and severely injuring another. *See id.* at 608. The diplomat was drunk at the time and had been previously stopped twice for drunk driving by the Canadian police, but he could not be prosecuted due to his immunity. *See id.* While Russia would not waive his immunity, the administration agreed to prosecute him in the Russian justice system, resulting in a four year prison sentence for involuntary manslaughter. *See id.*

94. *See* Vienna Convention on Diplomatic Relations, *supra* note 3, art. 9 (allowing receiving state to declare diplomat or member of mission *persona non grata*). “*Persona non grata*” is a Latin term meaning the person is unwanted; in the diplomatic context it refers to a diplomat who is not acceptable to a host state. BLACK’S LAW DICTIONARY 1260 (9th ed. 2009).

95. *See* Vienna Convention on Diplomatic Relations, *supra* note 3, art. 9 (requiring sending state to recall diplomat or terminate functions with mission).

used, as it will likely create lasting tension between the receiving and sending states, an extremely adverse effect.<sup>96</sup> Further, by expelling the diplomat or requiring that the case be adjudicated in his or her own country, a plaintiff is required to bring suit in that state, which often results in great financial, logistical, and political hardships for the plaintiff, thereby impeding the possibility of successful litigation.<sup>97</sup>

#### H. United Nations Wage-Garnishment Program

In response to calls to remediate the problem of diplomats failing to pay their court-ordered support payments, the United Nations implemented a wage-garnishment program in 1999, more than twenty years after the U.S. federal government required wages to be garnished from individuals required to pay support.<sup>98</sup> The program came after significant pressure from women around the world who were left unable to collect support payments from husbands employed by the United Nations.<sup>99</sup> The Committee on Relations with the Host Country recognized that some United Nations staff members were using their immunity from the jurisdiction of the courts to avoid meeting their spousal and child support obligations.<sup>100</sup> The new program would deduct funds from the salaries of those staff members who were under court orders to provide support, but who failed to comply with them.<sup>101</sup>

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96. See Ross, *supra* note 33, at 188 (explaining difficulty of declaring diplomat *persona non grata*). If the diplomat is declared *persona non grata* in one host country, it is unlikely that he or she would ever be approved to be a diplomat in any other country. See Morris, *supra* note 2, at 606-07.

97. See Ross, *supra* note 33, at 188 (explaining difficulty for plaintiffs bringing suit in foreign country).

98. See U.N. Secretary-General, Secretary-General's Bulletin: Family and Child Support Obligations of Staff Members, U.N. Doc. ST/SGB/1999/4 (May 20, 1999) (outlining obligations and procedures of complying with family support orders); Press Release, Committee on Relations with the Host Country, Decision to Garnish Wages from Staff Refusing To Pay Court-Ordered Family Support Welcomed by United States Representative in Host Country Committee, U.N. Press Release HQ/595 (Mar. 10, 1999), available at [www.un.org/News/Press/docs/1999/19990310.hq595.html](http://www.un.org/News/Press/docs/1999/19990310.hq595.html) (reporting decision to garnish wages from diplomats refusing to pay court ordered support).

99. See Letter from Janet E. Atkinson to Kay Bossel, *supra* note 9 (presenting collection of letters calling on State Department to implement wage garnishment); Maggie Farley, *Club Aids Diplomats' Wives Who Have Been Left Behind*, L.A. TIMES, Dec. 18, 1999, <http://articles.latimes.com/1999/dec/18/news/mn-45057> (reporting on group of women unable to collect family support). Prior to the implementation of the wage-garnishment program, women from all over the world would meet once a month in New York through a club they called the United Nations Family Rights Committee. Jim Yardley, *Immunity at U.N. Covers Divorce, Ex-Wives Find*, N.Y. TIMES, Nov. 19, 1998, <http://www.nytimes.com/1998/11/19/nyregion/immunity-at-un-covers-divorce-ex-wives-find.html>. "They are estranged or divorced spouses of United Nations employees, women who followed their husbands around the world and are chasing after them once again." *Id.* These women cannot collect unpaid support orders from American or foreign courts. See *id.* (stressing need for solution to diplomatic abuse in domestic matters). One seventy-one-year-old member of the United Nations Family Rights Committee has been trying unsuccessfully to collect support from her husband for twenty-six years. See *id.* (demonstrating extent to which diplomats go to avoid paying their support payments).

100. See Press Release, *supra* note 98 (exposing problem of United Nations members avoiding support payments).

101. See *id.*; U.N. Secretary-General, *supra* note 98.

In announcing the new wage-garnishment policy, former Secretary General, Kofi Annan, said: “As divorce rates increase everywhere, ever more women are left with the responsibility of caring for their children without the support which the father is legally and morally obligated to provide.”<sup>102</sup> The United States applauded the United Nations on the development of this program, recognizing that garnishing wages would be critically important to the women and children to whom the diplomats are indebted.<sup>103</sup> The United Nations’ role is limited, however, because it can only enforce court orders by garnishing wages, and lacks authority to execute support orders.<sup>104</sup> In fact, the Legal Affairs Department must first decide whether such court orders are valid before any pay will be deducted, creating a review process that slows down wage garnishment and makes it more difficult for families to receive payments.<sup>105</sup>

### III. ANALYSIS

#### A. Failure of the Wage-Garnishment Program

While many viewed the United Nations wage-garnishment program as a major feat, it accomplishes little in the realm of diplomatic abuse in family court.<sup>106</sup> This program, laid out in staff rule 101.2(c), provides that all staff members of the United Nations must honor court orders to make payments for family support.<sup>107</sup> The regulation fails to recognize, however, that courts are not allowed to enter orders against such staff members who can claim diplomatic immunity.<sup>108</sup> Therefore, many individuals with valid claims against diplomats staffed by the United Nations are still unable to have their needs met, despite rule 101.2(c).<sup>109</sup>

As of 2013, approximately 3500 U.S. citizens are serving as diplomats

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102. *U.N. Targets Deadbeat Diplomats*, *supra* note 5. The Secretary-General made this speech to hundreds of people gathered for a conference on “Equality for Women.” *See id.*

103. *See* Press Release, *supra* note 98; *see also Children Unleash the IRS*, FLA. TIMES-UNION, Mar. 15, 1999, at B-4 (commending United Nations for implementing wage-garnishment program).

104. *See* U.N. Secretary-General, *supra* note 98 (explaining enforcement power of wage-garnishment program).

105. *See U.N. Targets Deadbeat Diplomats*, *supra* note 5 (examining review process of wage-garnishment program).

106. *See Child Support Case*, *supra* note 73 (reporting on diplomat using immunity to avoid paying child support).

107. *See* U.N. Secretary General, *supra* note 98 (outlining obligations and procedures of complying with family support orders).

108. *See* Vienna Convention on Diplomatic Relations, *supra* note 3, art. 31 (stipulating courts lack jurisdiction over diplomats in civil cases, except in limited circumstances).

109. *See* Oytan v. David-Oytan, 288 P.3d 57, 63 (Wash. Ct. App. 2012) (noting husband’s assertion of diplomatic immunity prevents exercise of jurisdiction over him or his property); Motion to Strike Portions of Indictment, ¶ 4, United States v. Conrey, 2009 WL 3812044 (W.D. Mo. 2009) (No. 07-00390-05-Cr-W-SOW) (alleging father used false diplomatic identification card to avoid paying child support); *Child Support Case*, *supra* note 73 (reporting case of diplomatic-immunity abuse in child support case); Sokol, *supra* note 1 (explaining increase of abuse of diplomatic immunity in divorce cases).

around the world.<sup>110</sup> There are approximately 100 U.S. personnel working as staff members at the United Nations.<sup>111</sup> Based on these numbers alone, it is clear that the majority of diplomats who can claim immunity are not United Nations staff members, and thus escape the reach of the wage-garnishment program entirely, which in turn means the program does not protect nearly enough family court plaintiffs, and potentially their children, from getting the justice they deserve.<sup>112</sup>

For purposes of illustration, consider the recent Massachusetts case in which a father owed \$75,000 dollars in child support payments, and where the court could not hear the case because it lacked personal jurisdiction due to the father's diplomatic immunity.<sup>113</sup> The father, Michael Moussa-Adamo, is Gabon's ambassador to the United States and not a staff member of the United Nations.<sup>114</sup> Therefore, even if the court decided to issue an order requiring Ambassador Moussa-Adamo to pay child support, the United Nation would not provide an enforcement mechanism obligating him to actually pay.<sup>115</sup> This case provides an example of what most domestic relations cases look like where the defendant is a diplomat.<sup>116</sup>

#### *B. Failure of Remedies Provided by the Vienna Convention*

With the wage-garnishment program unavailable to most claimants seeking redress in family courts, and because courts are reluctant to exercise jurisdiction over diplomats, the only other option is to use one of the avenues of prosecution the Vienna Convention prescribed: waiver, discipline in the sending state, or declaring the individual persona non grata.<sup>117</sup> Waiver must be expressly given by the sending state, except when the diplomat commences the action on his or her own accord.<sup>118</sup> The waiver provision of the Vienna Convention provides a mechanism to allow for prosecution when a legitimate claim arises, and would serve as a valid mechanism for plaintiffs to resort to, if proven to be reliable.<sup>119</sup> As previously noted, however, it is extremely rare for

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110. See *Diplomatic List*, *supra* note 3 (listing names and titles of all U.S. diplomats serving missions abroad).

111. See *The Leadership*, *supra* note 3 (indicating current U.S. ambassadors to United Nations).

112. See Sokol, *supra* note 1 (pointing to increase of abuse of diplomatic immunity in divorce cases).

113. See *Child Support Case*, *supra* note 73 (reporting on mother's inability to collect child support payments from ambassador).

114. See *id.* (naming father in child support case); *Michael Moussa-Adamo Ambassador Extraordinary and Plenipotentiary*, *supra* note 81 (providing brief biography of Ambassador Moussa-Adamo).

115. See Vienna Convention on Diplomatic Relations, *supra* note 3, art. 31 (affording diplomats civil immunity from receiving state's jurisdiction, except in limited circumstances); U.N. Secretary-General, *supra* note 98 (explaining wage-garnishment program applies to United Nations staff members).

116. See Sokol, *supra* note 1 (criticizing "black hole" of diplomatic immunity in family court cases).

117. See *supra* Part II.G (discussing responses to abuse of diplomatic immunity under Vienna Convention).

118. See FRUMER & FRIEDMAN, *supra* note 43.

119. See Vienna Convention on Diplomatic Relations, *supra* note 3, art. 32 (permitting state to waive



a country to waive its own diplomat's immunity because there is no means of enforcement and governments must be repeatedly petitioned before they are willing to do so.<sup>120</sup> In recent years, there has only been one occasion where the United States agreed to waive a diplomat's immunity.<sup>121</sup> This instance was a 1995 criminal case in Bolivia where the United States itself was the aggrieved party.<sup>122</sup>

The Vienna Convention, by implementing provisions allowing a suit to commence in the sending state and declaring a diplomat *persona non grata*, relies on the fact that plaintiffs with claims against diplomats can sue them in their home state.<sup>123</sup> This avenue is infeasible for most plaintiffs, however, as the cost of suing in another country, including traveling and retaining an attorney, will likely outweigh the benefit of successful prosecution.<sup>124</sup> Furthermore, declaring the diplomat *persona non grata* requires expulsion from the host state or termination of his functions with the mission, which is infrequently done as it has the potential to create tension between the nations involved.<sup>125</sup> Even in criminal cases, which governments find more serious than domestic cases insofar as diplomatic immunity is concerned, if the receiving state must decide between breaking off relations or taking no action, the latter course of action is, unfortunately, chosen most often.<sup>126</sup>

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immunity); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 464 reporters' note 15 (1987) (preferring sending state waive immunity of diplomats if not interfering with function of mission).

120. See Sokol, *supra* note 1 (noting reluctance of state departments to waive diplomatic immunity); *supra* note 87 and accompanying text (focusing on waiver provision).

121. See Zaid, *supra* note 11, at 630 (observing infrequency of United States waiving immunity of diplomats).

122. See *id.* (tracing instance when State Department waived immunity). The accused diplomat was a contractor for the United States Drug Enforcement Agency charged with embezzling funds from the United States. See *id.*

123. See Vienna Convention on Diplomatic Relations, *supra* note 3, art. 31(4) (mandating diplomats not immune from jurisdiction in sending state); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 464 reporters' note 15 (1987) (indicating immunity in receiving state does not exempt diplomats from sending state's jurisdiction). "Relying on plaintiffs to bring suit in the sending state for harms committed by diplomats in the receiving state enjoys the advantage of not altering the existing international law." Farhangi, *supra* note 36, at 1532.

124. See Farhangi, *supra* note 36, at 1532-33 (stressing impracticality of bringing suit in sending state); Ross, *supra* note 33, at 188 (pointing to difficulty of bringing suit in foreign jurisdiction). "Insurmountable financial, cultural, logistical, and political limitations severely limit the possibilities of success in a foreign forum." Ross, *supra* note 33, at 188. There may also be cultural and political problems to bringing suit in the sending state, as it may have a "radically different system of law" and may block recovery for the foreign plaintiff. See Farhangi, *supra* note 36, at 1533 (suggesting cultural and political climate differences potential source of problems for foreign plaintiffs).

125. See Vienna Convention on Diplomatic Relations, *supra* note 3, art. 9; Ross, *supra* note 33, at 188 (considering problems involved with declaring diplomat *persona non grata*).

126. See Farhangi, *supra* note 36, at 1527 (recognizing reluctance to break off relations with sending state due to diplomatic crime).

### C. Suggestion for Change

The Preamble to the Vienna Convention states that the purpose of diplomatic immunity is “not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions.”<sup>127</sup> This indicates that the drafters of the Vienna Convention intended only for diplomatic immunity to be invoked when the work of the mission would be disrupted, not anytime a diplomat would be subject to legal action.<sup>128</sup> It is unlikely that the drafters anticipated that diplomats would exploit their immunity status given to them by the Vienna Convention in order to evade family court jurisdiction.<sup>129</sup>

Functional necessity, the primary theory behind diplomatic immunity and the Vienna Convention, is based on the assumption that diplomats could not fulfill their diplomatic function without the privilege of being immune from jurisdiction of the host state.<sup>130</sup> In turn, the theory provides justification for restrictions on such immunity if the restrictions do not affect the functions of the mission.<sup>131</sup> It is highly unlikely that a court order affecting divorce, paternity, child support, spousal support, or any other family-relations obligation would inhibit a diplomat from executing his or her functions.<sup>132</sup>

Based on the functional-necessity theory and the waiver provision of the Vienna Convention, a sending state should always waive immunity when it would not impede the functions of the diplomatic mission.<sup>133</sup> Similarly, the Restatement (Third) of Foreign Relations Law recommends that the sending state waive immunity of diplomats with respect to civil matters of persons in the receiving state when it can be done without impeding the functions of the mission.<sup>134</sup> This would apply to almost all family court proceedings.<sup>135</sup> In fact, there was one instance in 1969 in which the State Department authorized

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127. Vienna Convention on Diplomatic Relations, *supra* note 3, pmb1.

128. See Kerley, *supra* note 62, at 92 (characterizing how drafters of Vienna Convention regarded waiving diplomatic immunity); O’Neill, *supra* note 28, at 681-82 (setting forth purpose and function of diplomatic mission). One representative at the Vienna Convention asserted that following the functional-necessity approach implies “an obligation on the part of the sending state to waive immunity where the mission’s functions would not thereby be impeded.” Kerley, *supra* note 62, at 92.

129. See Vienna Convention on Diplomatic Relations, *supra* note 3, art. 38 (granting immunity only for official acts performed in exercise of functions). The Vienna Convention specifically provides that the immunity from civil and administrative jurisdiction of the receiving state “shall not extend to acts performed outside the course of their duties.” *Id.* art. 37.

130. See Farhangi, *supra* note 36, at 1521 (analyzing functional-necessity theory behind diplomatic immunity).

131. See *id.* at 1522.

132. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 464 reporters’ note 15 (1987) (setting forth when countries should waive immunity of diplomats).

133. See *id.* (recommending waiver in all cases where functions of mission not impeded).

134. See Vienna Convention on Diplomatic Relations, *supra* note 3, art. 32 (allowing waiver of diplomatic immunity by sending state); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 464 reporters’ note 15 (1987) (explaining how representatives of Vienna Convention regarded waiver).

135. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 464 reporters’ note 15 (1987) (favoring waiver in civil cases when performance of functions of mission not impeded).

waiver of immunity on the part of an officer on a mission in Geneva in connection with all procedures of a divorce action.<sup>136</sup>

#### IV. CONCLUSION

Diplomatic immunity has been afforded to foreign diplomats by nations around the world since ancient times. Today, the Vienna Convention dictates who receives immunity, and to what extent. Many theorists, including the drafters of the Vienna Convention, rely on the functional-necessity approach to justify diplomatic immunity. This approach holds that in order to protect the diplomatic mission and the diplomat's functions, he must be immune from prosecution in the foreign state that receives him.

The United Nations implemented the wage-garnishment program to permit the collection of support payments from their staff members who could otherwise claim immunity. The program fails, however, in the overall scheme of immunity as few diplomats qualify for the program. Furthermore, the program still requires the plaintiff to have received a court order for support, which the Vienna Convention prohibits judges from awarding. The other avenues of redress—waiver, declaring the diplomat *persona non grata*, and expulsion—have also proven fruitless when prosecuting family court claims. While countries have traditionally been reluctant to waive the immunity of their diplomats, the waiver exception provided by the Vienna Convention, if implemented correctly, would allow for prosecution of all family court matters in the receiving state.

Still, the theory behind the Vienna Convention and diplomatic immunity in general does not support denying valid family court claims from being heard in the receiving state. Diplomats will rarely be inhibited from carrying out the mission's functions because they have to pay support orders, settle a divorce agreement, or subject themselves to a paternity test. To solve the problem of abuse of diplomatic privileges in family court cases, diplomatic immunity should either be waived or not applied at all to domestic relations cases.

*Amanda M. Castro*

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136. See WHITEMAN, *supra* note 88, at 431 (citing cases where United States granted waiver of immunity for diplomats). The State Department also authorized waiver of immunity in connection with proceedings to annul the marriage of a minor. See RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 464 reporters' note 15 (1987) (highlighting instances where countries waived immunity in civil cases).