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**THE EFFECT OF DIPLOMATIC
IMMUNITY ON REAL PROPERTY
DISTRIBUTION INCIDENT TO
MARITAL DISSOLUTION
PROCEEDINGS — *FERNANDEZ v.*
*FERNANDEZ****

I. INTRODUCTION

Modern rules of international diplomacy are founded on the principles enumerated in the Vienna Convention on Diplomatic Immunity of 1961 (Vienna Convention or Convention).¹ The Convention codified the rules governing diplomatic privileges and immunities, as well as diplomatic relations in general.² It established the notion that the goal of international diplomacy is functional.³ That is, the purpose of diplomatic privileges is not to benefit the individual personally, but to ensure the "efficient performance of the functions of the diplomatic mission."⁴ This approach to immunity is a departure from the two classical theories of immunity, the first of which regarded the diplomat as the embodiment of the sending state and deserving of the highest dignity, and the other of which rested on the legal fiction that because the diplomat was always standing on foreign soil, such an individual was extraterritorially immune from service of process.⁵

Article 31 of the Vienna Convention, entered into force in the United States in 1972, provides that a diplomatic agent shall enjoy immunity from civil and administrative jurisdiction, except in the case of "a real action relating to private immovable

* *Fernandez v. Fernandez*, 208 Conn. 329, 545 A.2d 1036 (1988), *cert. denied*, 493 U.S. 958 (1989).

1. Vienna Convention on Diplomatic Relations, opened for signature Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 [hereinafter Vienna Convention]. The United States codified the treaty in the Diplomatic Relations Act of 1978, Pub. L. No. 95-393, 92 Stat. 808 (codified as amended at 22 U.S.C. § 254(a)-(e) (1991)).

2. Antoinette M. Tease, Note, *Diplomatic Immunity and Divorce*, 21 Conn. L. Rev. 1071, 1077 (1989) [hereinafter Tease].

3. Vienna Convention, *supra* note 1, at Preamble.

4. Vienna Convention, *supra* note 1, at Preamble.

5. *Fernandez v. Fernandez*, 208 Conn. 329, 545 A.2d 1036, 1043 (1988); *see generally* William F. Marmon, Jr., Note, *The Diplomatic Relations Act of 1978 and Its Consequences*, 19 VA. J. INT'L L. 131, 132 (1978); MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 113 (6th ed. 1987) [hereinafter AKEHURST]; CLIFTON E. WILSON, DIPLOMATIC PRIVILEGES AND IMMUNITIES 1-16 (1967) [hereinafter WILSON].

property situated in the territory of the receiving state, unless he holds it on behalf of the sending state for the purposes of the [diplomatic] mission."⁶ Article 31, reflecting the functional attitude toward immunity embodied in the Convention, balances the need to give diplomats protection from harassment arising out of frivolous suits with the need to minimize the abuse of immunity by diplomats in areas outside of their work.⁷ The real action exception also serves as a recognition by the drafters of the Convention that receiving states have a strong interest in maintaining and regulating property located within their borders.⁸ The drafters sought to provide receiving states with a means of litigating property claims involving diplomats who were otherwise traditionally recognized as jurisdictionally immune from process. If the exception were not recognized, diplomats could "tie-up" otherwise marketable property, for however long they desired, without fear that the states could do anything to inhibit their actions. The most that a state could do was declare the diplomat *persona non grata* and request that the individual leave the country. Hence, Article 31 and its real action exception strike a balance between traditional notions of immunity and recognized internal state concerns.⁹

A. *Development of the Vienna Convention*

The Vienna Convention on Diplomatic Relations was the culmination of the United Nations Conference on Diplomatic Intercourse and Immunities held in Vienna in 1961.¹⁰ The Convention was intended to cover every aspect of diplomatic relations among those states which consented to be bound, either by assent or accession.¹¹ The United States became a signatory to the Convention on April 18, 1961, and ratified it on December 13,

6. Vienna Convention, *supra* note 1, at art. 31. The Vienna Convention applied in *Fernandez* through the Agreement Regarding the Headquarters of the United Nations, June 26, 1947, 61 Stat. 3416, T.I.A.S. No. 1676, 11 U.N.T.S. 11, which grants United Nations representatives in New York the same privileges as diplomats.

7. EILEEN DENZA, *DIPLOMATIC LAW* 149-89 (1976) [hereinafter DENZA]; *see also* LUDWIK DEMBINSKI, *THE MODERN LAW OF DIPLOMACY* 207 (1988) [hereinafter DEMBINSKI].

8. *Fernandez*, 208 Conn. at 340, 545 A.2d at 1042, *citing* *Shaffer v. Heitner*, 433 U.S. 186, 208 (1977) (recognizing the state's interest in maintaining the marketability of property within its borders).

9. *See generally* Vienna Convention, *supra* note 1.

10. *See generally* Vienna Convention, *supra* note 1.

11. *See* Tease, *supra* note 2, at 1072; Vienna Convention, *supra* note 1, at art. 49.

1972.¹²

The Convention represented a shift in both the theory surrounding, as well as the applicability of, principles of international diplomacy. Classical notions of diplomacy had declared a diplomat jurisdictionally immune in any potential action in which the diplomat may have been involved.¹³ The "extraterritoriality" principle rested on the legal fiction that the diplomat was always on the soil of the sending state and was therefore extraterritorially immune from process.¹⁴ The "personification" theory rested not on notions of territoriality, but rather on the idea that the diplomat both embodied and personified the sending state and was therefore entitled to the highest dignity.¹⁵

Both classical theories of immunity proved problematic because they fostered abuse of diplomatic immunity.¹⁶ Diplomats, jurisdictionally immune from process, could commit acts that would otherwise have rendered them liable to a civil, criminal, or administrative suit. Yet, because they maintained a diplomatic status, they could not be served with process, and consequently, could not be tried in United States courts. As a result, diplomats could not be held accountable for their actions.

The Convention drafters, recognizing that such abuse existed among diplomats, sought to create a "functional" approach to immunity.¹⁷ Under such an approach, the diplomats enjoyed immunity status not for their personal benefit, but rather to facilitate the efficient performance of their official responsibilities.¹⁸ The functional approach was designed to balance this efficiency idea with the drafters' desire to curb abuses of diplomatic immunity by diplomats in activities that had little or nothing to do with their mission.

B. Diplomatic Immunity as it Relates to Domestic Relations Law

The Convention drafters envisioned a broad scope of immunity for the diplomats covered by the treaty. Although they es-

12. IGOR I. KAVASS & ADOLF SPRUDZS, A GUIDE TO THE UNITED STATES TREATIES IN FORCE (pt. 1) 194, 289 (1988).

13. See generally DENZA, *supra* note 7.

14. See *supra* note 5.

15. See *supra* note 5.

16. WILSON, *supra* note 5, at 15-16.

17. WILSON, *supra* note 5, at 15-16.

18. See generally Vienna Convention, *supra* note 1, at art. 31.

poused a functional approach to international diplomacy notions, the drafters articulated in broad language their concept of diplomatic immunity and provided few exceptions to the general rule of Article 31.

Several cases decided both before and after the adoption of the Convention by the United States courts indicate that domestic relations law falls within the purview of diplomatic immunity principles. The courts in *Tsiang v. Tsiang*,¹⁹ *Anonymous v. Anonymous*,²⁰ and *Carrera v. Carrera*,²¹ all decided before the adoption of the Vienna Convention, "held foreign diplomats immune from process in domestic relations cases."²² In fact, the *Anonymous* court found that "the prevailing interpretation of international law and the one followed in American practice, [at that time], [was] that complete immunity from civil process [was to] be granted [to diplomats] under all circumstances."²³

Decisions rendered after the adoption of the Vienna Convention similarly echo the pre-Convention courts' interpretations of the applicability of diplomatic immunity principles to domestic relations cases. A child abuse proceeding, brought in New York in 1987, demonstrated the continuing applicability of diplomatic immunity to domestic relations issues two decades after the adoption of the Convention.²⁴ The court in that case dismissed a child abuse proceeding filed against a diplomat because the court reasoned that both the father and his children were immune from the civil process of the courts of the State of New York.²⁵

Fernandez v. Fernandez,²⁶ decided by the Supreme Court of Connecticut, is a case which successfully balanced the goals of the Vienna Convention.²⁷ In *Fernandez*, the court held, by a five to two margin, that diplomatic immunity status conferred upon the Ambassador to the United Nations for the People's Republic

19. 194 Misc. 259, 86 N.Y.S.2d 556 (N.Y. Sup. Ct. 1949).

20. 44 Misc.2d 14, 252 N.Y.S.2d 913 (N.Y. Fam. Ct. 1964).

21. 174 F.2d 496 (D.C. Cir. 1949).

22. Tease, *supra* note 2, at 1077, citing *Tsiang*, 194 Misc. 259, 86 N.Y.S.2d 556, *Carrera*, 174 F.2d 496, and *Anonymous*, 44 Misc.2d 14, 252 N.Y.S.2d 913.

23. *Anonymous*, 44 Misc.2d at 18, 252 N.Y.S.2d at 918, citing HACKWORTH, DIGEST OF INTERNATIONAL LAW, vol. II, § 169 & vol. IV, § 400 (1942).

24. *In re Terrence K.*, 135 A.D.2d 857, 522 N.Y.S.2d 949 (1987).

25. *Id.* at 858, 522 N.Y.S.2d at 951.

26. 208 Conn. 329, 545 A.2d 1036 (1988).

27. See generally *supra* note 17 and accompanying text; Vienna Convention, *supra* note 1.

of Mozambique, did not prohibit his wife, who was seeking a divorce in an American court, from litigating a claim for the marital residence.²⁸ The *Fernandez* court successfully balanced the competing needs of the state's interest in regulating property located within its borders, with the political importance of upholding principles of international diplomacy.²⁹ The decision is consistent with functional goals embodied in the Vienna Convention.³⁰

The *Fernandez* decision, however, left several issues unanswered which could lead to confusion and inconsistency in future decisions. The majority failed to address whether its decision was based on the partial waiver of immunity that had been granted by Mozambique. Nor did the court discuss how its analysis would have been altered were it not for the partial waiver. Additionally, the majority and dissent differed significantly as to both the meaning of the real action exception, as well as to what actions are permissively encompassed within that exception. The *Fernandez* dissent argued that the majority's interpretation improperly expanded the exception beyond which the drafters had intended it to apply.³¹ Finally, the court failed to stress the important policy considerations clearly underlying its decision. This Comment will focus on these unanswered questions as well as posit a more reasonable solution to this problem, a solution espoused by the *Fernandez* dissent. Lastly, this Comment will discuss what changes need be made to the Vienna Convention so that future cases can be more reasonably and uniformly decided.

II. THE *FERNANDEZ* CASE

A. *Facts*

Fernandez v. Fernandez involved the application of the Vienna Convention to an action for marital dissolution and equitable property distribution incident thereto.³² In 1987, Barbara J. Fernandez, an American citizen, brought this dissolution against her husband, Antonio Deinde Fernandez, the Ambassador to the United Nations for the People's Republic of Mozambique, in Su-

28. 208 Conn. at 329, 545 A.2d at 1036; see also *Recent Cases*, 102 HARV. L. REV. 1403 (1989) [hereinafter *Recent Cases*].

29. *Recent Cases*, *supra* note 28, at 1410.

30. *Recent Cases*, *supra* note 28, at 1410.

31. *Fernandez*, 208 Conn. at 349, 545 A.2d at 1045.

32. *Id.* at 332, 545 A.2d at 1038.

perior Court, Stamford/Norwalk Judicial District, Connecticut.³³ Incident to such dissolution, Ms. Fernandez sought an "assignment of all the defendant's right, title and interest" in the couple's Greenwich, Connecticut estate, a portion of the defendant's other assets, support payments, attorney fees, and all other relief as the court deemed proper.³⁴

"In tandem with the filing of her complaint, [Ms. Fernandez] applied for an ex parte prejudgment remedy against [her husband,]" seeking attachment of her husband's estate.³⁵ In a sworn affidavit accompanying her application, Ms. Fernandez expressed concern that her husband, an exceedingly wealthy "international businessman . . . could easily sell or transfer assets that are relevant to her claims for relief."³⁶ Specifically, Ms. Fernandez was worried that her husband would sell the Greenwich home where she and their son lived.³⁷ The trial court granted her application.³⁸

Ambassador Fernandez moved to dismiss his wife's complaint,³⁹ on the ground that he was entitled to diplomatic immunity from suit under Article 31 of the Vienna Convention.⁴⁰ The trial court recognized Ambassador Fernandez as a bona fide diplomat entitled to certain privileges, but denied his motion on two grounds.⁴¹ First, the trial court held that it had plenary jurisdiction over the ambassador's person and assets because the instant action for divorce was a "family relations" matter rather

33. See Brief for Appellant, *Fernandez* (No. 13283).

34. *Fernandez*, 208 Conn. at 332, 545 A.2d at 1038.

35. *Id.* at 332-33, 545 A.2d at 1038. Mrs. Fernandez asserted that she was the president and principal shareholder in Santa Barbara Estates, U.S.A., Inc., a shell holding corporation which purchased the home in 1974. See *id.* When she filed for divorce, however, the corporation no longer owned the property. Ambassador Fernandez executed a quitclaim deed in 1986 which conveyed title to the property from the corporation to him personally. See Brief for Appellee at 29A-31A, *Fernandez*, 208 Conn. 329, 545 A.2d 1036 (1988) (No. 13282).

36. *Fernandez*, 208 Conn. at 332, 545 A.2d at 1038-39.

37. *Id.*

38. *Id.* at 333, 545 A.2d at 1039; Brief for Appellant at 12-13, *Fernandez* (No. 13283).

39. Brief for Appellant at 16-19, *Fernandez* (No. 13283).

40. Article 31 states that diplomatic agents shall enjoy absolute immunity from civil and administrative jurisdiction, subject to certain limited and express exceptions. Vienna Convention, *supra* note 1, at art. 31. The exceptions include "real actions" relating to private, immovable property. The "real action" exception suspends a diplomat's civil immunity for a property so classified, situated in the territory of the receiving state, unless the property is held on behalf of the sending state for the purposes of the mission. Vienna Convention, *supra* note 1, at art. 31.

41. *Fernandez*, 208 Conn. at 333-34, 545 A.2d at 1039.

than a civil action.⁴² "Only the filing of a 'civil action' against diplomats is barred by the Vienna Convention," the court reasoned.⁴³ Second, the trial court asserted that even if it had no personal jurisdiction over the ambassador because of his diplomatic status, it could at least dissolve the marriage due to its in rem jurisdiction over marital relations of parties domiciled within its borders.⁴⁴

The Ambassador appealed to the Supreme Court of Connecticut. While this appeal was pending, the Ambassador drafted a partial waiver of immunity which conceded jurisdiction in Connecticut only over his wife's marital dissolution claim. Mozambique executed this limited waiver of immunity, which permitted the trial court solely "to dissolve . . . the marital status of the parties."⁴⁵ Accordingly, the only question remaining on appeal was whether the trial court would have the authority to award Ms. Fernandez the real and personal property she had sought as relief incident to the marital dissolution.

On appeal, Ambassador Fernandez argued that the action was solely one for divorce, and as such, his wife's property claims were merely ancillary to the dissolution proceedings.⁴⁶ Consequently, he argued, these claims should not come within the Vienna Convention's real action exception.⁴⁷ Moreover, the ambassador argued that the Greenwich estate was exempted from the real action exception under a further Convention provision that immunized the private residence of a diplomat.⁴⁸

42. *Id.* at 333, 545 A.2d at 1039.

43. *Id.*

44. *See id.* at 334, 545 A.2d at 1039. Connecticut courts have determined that marital dissolution actions are proceedings in rem, not in personam, and therefore personal jurisdiction over the defendant is unnecessary. *See Litvaitis v. Litvaitis*, 160 Conn. 540, 545, 295 A.2d 519, 522 (1972).

45. *Fernandez*, 208 Conn. at 334, 545 A.2d at 1039. The Vienna Convention allows a sending state to waive the immunity of its envoys. The waiver must be express and cannot be held to imply a waiver of immunity in respect of the execution of a judgment. *See* Brief for Appellant, at 3 n.2, *Fernandez* (No. 13283). A more complete discussion of the waiver provisions of the Vienna Convention, as well as its implications of immunity status, may be found in both DEMBINSKI, *supra* note 7, at 211-13, and DENZA, *supra* note 7, at 183-89.

46. *Fernandez*, 208 Conn. at 336, 545 A.2d at 1040.

47. *Id.*; *see also* Vienna Convention, *supra* note 1, at art. 30.

48. *Fernandez*, 208 Conn. at 335-36, 545 A.2d at 1039-40.

B. Decision of the Supreme Court of Connecticut

1. Majority Opinion

The Supreme Court of Connecticut, in a five to two decision, held that the trial court, on remand, would have jurisdiction over Ms. Fernandez's real property claim, but would have no authority to award her support payments or other monetary relief.⁴⁹ The court first determined that the action was civil for purposes of establishing immunity under the Convention, and that the trial court had erred in classifying the action as a non-civil, family relations matter.⁵⁰ "Neither Anglo-American case law,⁵¹ nor the negotiations surrounding the drafting of the Vienna Convention, contemplated a special category of actions involving 'family relations.'"⁵² Thus, the court concluded that divorce proceedings are civil and fall within the purview of Article 31.⁵³

The court then turned its attention to the issue of the real action exception of Article 31. Ms. Fernandez had argued that her complaint had focused on the Greenwich estate, enabling her claim to be litigated as one for private immovable property under the Article 31 real action exception.⁵⁴ On the other hand, Ambassador Fernandez argued that his wife's real property claim was merely one of five remedies sought incident to the divorce and therefore unlitigable because it fell outside of the real action exception.⁵⁵ The court conceded that the real property

49. *Id.* at 335-36, 545 A.2d at 1039-40.

50. *Id.* at 338, 545 A.2d at 1041.

51. *See Recent Cases*, *supra* note 28, at 1406, *citing Fernandez*, 208 Conn. at 338, 545 A.2d at 1041, in support of this proposition. The majority cited three cases in support of its conclusion that divorce actions were indeed civil within the context of diplomatic immunity. *See Shaw v. Shaw*, 3 W.L.R. 243, 3 All E.R. 1 (1979) (a diplomat could rely on his immunity status to prevent his wife from obtaining a divorce because the court's matrimonial jurisdiction is one fact of its civil jurisdiction); *Carrera v. Carrera*, 174 F.2d 496, 498 (D.C. Cir. 1979) (diplomatic immunity is applicable to domestic relations); *Tsiang v. Tsiang*, 194 Misc. 259, 260, 86 N.Y.S.2d 556, 557 (N.Y. Sup. Ct. 1949) (United Nations representative immune from state process in a divorce action).

52. *See Recent Cases*, *supra* note 28, at 1406, *citing* 208 Conn. at 338, 545 A.2d at 1041. The *Fernandez* majority discussed the views of one drafter who noted that "a divorce action under the local jurisdiction was incompatible with . . . [a diplomat's] dignity . . ." 208 Conn. at 337-38, 545 A.2d at 1041 (quoting Summary Records of the 402nd Meeting, [1957] 1 Y.B. INT'L L. COMM'N 94, 97, U.N. Doc. A/CN.4/91, A/CN.4/98). A diplomat's mere involvement in a divorce, whether in the sending or receiving country, may impair the "dignity" of an ambassador. AKEHURST, *supra* note 5, at 116.

53. *Fernandez*, 208 Conn. at 338, 545 A.2d at 1041.

54. *Id.* at 351, 545 A.2d at 1047 (Shea, J., dissenting in part).

55. *Id.*

claim indeed arose in the context of a marital dissolution proceeding, and that ordinarily such actions would be barred by the Convention.⁵⁶ However, the majority held that the general grant of immunity conferred by the treaty was overshadowed by the specific language of the real action exception.⁵⁷ The court read the Article 31 exception broadly, holding that it encompassed a variety of possible proceedings.⁵⁸ According to the court's interpretation, the exception was meant to apply to any proceeding in which "the real property is itself the disputed object of the litigation."⁵⁹ The court reasoned that the very object and purpose of Ms. Fernandez's claim was to vindicate her claimed right to ownership of the Greenwich home,⁶⁰ and that this was simply not a case where she sought to satisfy a collateral judgment by forcing the sale or transfer of unrelated real property.⁶¹

The court also acknowledged the importance of the functional theory of diplomatic immunity. It was apparent to the majority that the real action exception to the Vienna Convention was an attempt by the drafters to balance the "competing factors of national sovereignty over land and diplomatic inviolability."⁶² Yet the court did not reach a conclusion as to whether the Greenwich home fell outside the real action exception because it constituted the personal residence of Ambassador Fernandez. For that determination, the court remanded to the trial term.⁶³

Finally, the court held that the trial term, on remand, would have no authority to award the plaintiff either support payments or other ancillary monetary relief.⁶⁴ The court concluded that these claims clearly fell beyond the right of access to dissolve a

56. *Id.* at 338, 545 A.2d at 1041.

57. *Id.* at 342, 545 A.2d at 1043.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 343, 545 A.2d at 1043. In a footnote, however, the court concluded that the property claims were ancillary. *Id.* at 342 n.9, 545 A.2d at 1043 n.9.

62. *Id.* at 344, 545 A.2d at 1044.

63. *Id.* at 344, 545 A.2d at 1043-44.

64. *Id.* at 345, 545 A.2d at 1044. The court reasoned that if a treaty contravened the United States Constitution, it would be void. However, the majority reasoned that *Boddie v. Connecticut*, 401 U.S. 371 (1971), merely provided court access to a litigant seeking marital dissolution, and did not specifically mandate that this right of access also included the right to have incidental relief thereto adjudicated. *Fernandez*, 208 Conn. at 345, 545 A.2d at 1044.

marriage.⁶⁵ As such, Ms. Fernandez's right to obtain such relief in a judicial forum was superceded by the importance of traditional notions of diplomatic immunity from local process.⁶⁶ Ms. Fernandez had argued that she had a fundamental right, as demonstrated in *Boddie v. Connecticut*,⁶⁷ of access to a judicial forum for the resolution of her divorce proceedings and any relief incident thereto, and that such a right took precedence over any diplomatic immunity notions.⁶⁸ The court ruled otherwise, reasoning that the right of access to a judicial forum for the purposes of obtaining a divorce did not necessarily include the right of access to obtain proprietary relief incident to the divorce itself.⁶⁹

2. Dissenting Opinion

Justice Shea, in his dissenting opinion, disagreed with the court's conclusion that the Superior Court would have jurisdiction under Article 31 to adjudicate the real property claim.⁷⁰ According to Shea, the majority improperly expanded the scope of the real action exception of the Vienna Convention.⁷¹ In his opinion, the exception did not entitle Connecticut courts to exercise jurisdiction under the state's equitable property distribution laws⁷² to assign the ambassador's Greenwich property to Ms. Fernandez.⁷³ Reading the real action exception narrowly, Shea pointed out that Ms. Fernandez' prayer for relief listed the Greenwich estate as merely one of five remedies sought, and therefore could not be considered itself the object and purpose of the litigation.⁷⁴ However, Shea felt that the trial court had the authority, *sua sponte*, to consider whether Ms. Fernandez, once

65. *Id.* at 345-46, 545 A.2d at 1044.

66. *Id.*

67. 401 U.S. at 382-83.

68. *Fernandez*, 208 Conn. at 348, 545 A.2d at 1046.

69. *Id.* at 349, 545 A.2d at 1046.

70. Justice Shea's opinion was joined by Justice Healy. *Id.* at 349-52, 545 A.2d at 1046 (Shea, J., dissenting in part).

71. *Id.* Unless the majority intended the "real action" exception to apply in actions normally immune from jurisdiction merely because real property is attached, its holding will lead to the evisceration of diplomatic immunity by providing a "loophole" through which litigants may travel to pursue otherwise nonlitigable claims. *Id.*

72. Connecticut allows a trial court hearing a divorce to award ownership of real property to either spouse, regardless of which spouse is the legal title holder. See CONN. GEN. STAT. §§ 46b-66(a), 46b-81 (1987).

73. *Fernandez*, 208 Conn. at 349-50, 545 A.2d at 1046.

74. *Id.* at 350, 545 A.2d at 1046.

the majority shareholder of the holding company that purchased the Greenwich estate, maintained an independent interest in the home.⁷⁵

III. ANALYSIS OF *FERNANDEZ*

A. *Waiver Issue*

The Supreme Court of Connecticut failed to effectively address the issue of whether it would have had the authority to dissolve the marriage and transfer title to the Greenwich estate, were it not for the partial waiver of immunity granted by the People's Republic of Mozambique. In fact, the court all but ignored the issue completely, addressing the question only in a footnote.⁷⁶ Even within the context of the footnote, there was no attempt to resolve this question. The court merely held that "we need not decide whether the trial court's in rem jurisdiction, which is ancillary to its jurisdiction over the status of the marriage, would continue if the sending state's waiver were to be withdrawn."⁷⁷

Ms. Fernandez' property claim must be analyzed in light of the fact that if she had been unable to obtain a divorce, she would have had no claim to the marital home under the property laws of a common law jurisdiction such as Connecticut.⁷⁸ This is especially significant because her pleadings did not address the issue of the quitclaim deed, executed before the dissolution proceedings commenced, which transferred ownership of the Greenwich estate from the fictitious shell corporation, of which she was the president and principal shareholder, to her husband.⁷⁹ Moreover, the Connecticut court must have in per-

75. Justice Shea suggested that Mrs. Fernandez may have had an independent claim to the house because her husband had "managed to have title to the residence transferred to his name." *Id.* at 351-52, 545 A.2d at 1047-48. Hence, her claim alleged a separate and independent real action claim, demonstrating a present interest in the Connecticut estate. *Recent Cases*, *supra* note 28, at 1408, citing *Fernandez*, 208 Conn. at 351-52, 545 A.2d at 1047-48.

76. *Fernandez*, 208 Conn. at 342 n.9, 545 A.2d at 1043 n.9.

77. *Id.*

78. Although Justice Shea raised this argument in his dissenting opinion, the majority chose not to focus on this issue. It concluded only that "[t]he dissent suggests a ground for jurisdiction that was not argued by either party in this court. In our view, we lack either a factual or legal basis for exploring it in this case." *Id.* at 345-46 n.11, 545 A.2d at 1044 n.11.

79. *See supra* note 35. Mrs. Fernandez asserted that she was the president and principal share holder of the corporation when it purchased the home. *Fernandez*, 208 Conn.

sonam jurisdiction over Mr. Fernandez in order to provide remedies, such as spousal support, against him.⁸⁰

The case must therefore be analyzed from two perspectives: the circumstance in which a waiver is granted and that in which no waiver is granted. Under the first scenario, no personal jurisdiction is granted to the court. The court has only the authority to dissolve the marriage itself, because of its quasi in rem jurisdiction over the marital status of the parties.⁸¹ Domestic Relations laws in the United States give a court the power to enter a valid dissolution order, even in the absence of personal jurisdiction over the defendant.⁸² Otherwise, the court would be powerless to grant Ms. Fernandez other relief incident to this dissolution proceeding, such as alimony, child support, or other general property distribution.⁸³ This result seems quite unfair and suggests that Ms. Fernandez could be left without a meaningful remedy.

The confusion arises from the question of whether the granting of such a waiver by the sending state, in and of itself, allows the courts of the receiving state to assert in personam jurisdiction over the individual requesting the waiver. If the granting of a waiver confers upon Connecticut in personam jurisdiction over Ambassador Fernandez, then Ms. Fernandez should be entitled to both the marital dissolution itself and the ancillary remedies incident thereto. Yet, if such a waiver does not confer upon the court in personam jurisdiction over the ambassador, the waiver, in effect, is meaningless. The court may still grant the divorce because it has in rem jurisdiction over the marital status of the Fernandezes, but cannot grant relief in the forms of the remedies which typically accompany such a proceeding. Connecticut, in this scenario, has no more authority to adjudicate the matter with the waiver in this instance than it would have without such a waiver. Hence, Ms. Fernandez would be in no better position than she would be absent such a waiver.

The *Fernandez* holding is troublesome because the majority

at 332, 545 A.2d at 1038.

80. See generally *supra* note 44. A court must have in personam jurisdiction over a defendant if it is to exercise authority in providing meaningful remedies incident to marital dissolution proceedings, such as property distribution, maintenance, and child support. *Fernandez*, 208 Conn. at 334, 545 A.2d at 1039.

81. *Id.*

82. *Id.*

83. *Id.* at 348, 545 A.2d at 1044.

appeared to favor the position that Mozambique's waiver did not confer upon it in personam jurisdiction over Ambassador Fernandez. However, the court never directly addressed the issue. Briefly, the Republic of Mozambique agreed to a partial waiver of immunity "to permit the Superior Court. . .to enter an order dissolving the marital status only between Ambassador Antonio Deinde Fernandez and his wife, Barbara J. Fernandez . . ." ⁸⁴ The waiver expressly limited the court's authority to dissolve the marriage and was "not to be construed as encompassing any waiver whatsoever of Ambassador Antonio Deinde Fernandez' diplomatic immunity from in personam, in rem, or any other type of jurisdiction whatsoever . . ." ⁸⁵ Mozambique intended to prohibit the Connecticut court from using the partial waiver as a springboard from which it could then claim in personam jurisdiction over Ambassador Fernandez. The dissent agreed with this proposition, reasoning that such a partial waiver was "effective only for the purpose of dissolving the marriage, [and could not] serve as a vehicle upon which to predicate any of the relief normally attendant upon a dissolution of marriage under [Connecticut] statutes." ⁸⁶ The majority did not touch upon this question.

84. See *supra* note 45; the waiver stated in full:

Pursuant to Article 32 of the Vienna Convention on Diplomatic Relations, the People's Republic of Mozambique hereby waives the immunity extended by the United States of America to Ambassador Antonio Deinde Fernandez under the provisions of the Vienna Convention on Diplomatic Relations to the following limited and restricted extent only, viz: to permit the Superior Court for the Judicial District of Stamford/Norwalk at Stamford, Connecticut, U.S.A. to enter an order dissolving the marital status only between Ambassador Antonio Deinde Fernandez and his wife, Barbara J. Fernandez, in a civil action presently pending in said court, encaptioned Fernandez v. Fernandez, docket number FA-87-0085485-S. This limited and restricted waiver of diplomatic immunity does not encompass, and shall not be construed as encompassing, any waiver whatsoever of Ambassador Antonio Deinde Fernandez' diplomatic immunity under said Vienna Convention on Diplomatic Relations from in personam, in rem or any other type of jurisdiction whatsoever with respect to his person or property or any property in which he may have or claim to have an ownership interest including, without limiting the generality of the foregoing, his immunity from any awards of property and/or alimony that might otherwise be appropriate in any such matrimonial proceeding. The limited purpose of this waiver of diplomatic immunity is solely to permit the marital status only between the parties to be dissolved without Mrs. Fernandez having to institute an action for divorce in the People's Republic of Mozambique.

Fernandez, 208 Conn. at 336, 545 A.2d 1040 n.7.

85. Brief for Appellant at 1, *Fernandez* (No. 13283).

86. *Fernandez*, 208 Conn. at 349, 545 A.2d at 1045 (Shea, J., dissenting).

While Mozambique's argument, espoused by Justice Shea in his dissent, is tenable, there is nonetheless highly persuasive evidence supporting the proposition that Ambassador Fernandez' initiation of a partial waiver, as well as his day to day activities within the State of Connecticut, made him amenable to the in personam jurisdiction of United States courts. Article 32 of the Vienna Convention provides, in part, that diplomatic immunity may not be raised as a defense to jurisdiction in proceedings initiated by the diplomat.⁸⁷ The record clearly indicates that Ambassador Fernandez chose to draft this partial immunity waiver, executed by his government, so that his wife could litigate her claim without having to travel to Mozambique, and that this waiver was approved by his government.⁸⁸ Perhaps Ambassador Fernandez feared the public embarrassment and exposure which could result from a divorce action involving a public figure, and hoped that this waiver would persuade his wife to quietly accede to his terms of settlement. Alternatively, perhaps Mozambique sought to avoid the public humiliation of watching its United Nations Ambassador become embroiled in such a "frivolous" civil suit. Finally, Mozambique may not have wanted the Ambassador and his wife to return to the country to litigate such an action. Often, a sending state will prefer to waive immunity "to avoid public embarrassment over relatively minor incidents, to prevent unnecessary and time-consuming suits that strain the resources of its own courts, to preserve its reputation and that of its diplomatic corps, and to accommodate the interests of its own diplomats who may desire to litigate where they are posted."⁸⁹ In any event, it is apparent that Ambassador Fernandez and his government both agreed to the waiver so as to allow the ambassador's wife to litigate her divorce action in Connecticut. The court could have easily concluded that Ambassador Fernandez had waived any immunity from personal jurisdiction he may have otherwise maintained by explicitly requesting that the courts of Connecticut become involved in dissolving his mar-

87. Vienna Convention, *supra* note 1, at art. 32(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.

Id.

88. See Brief for Appellant at 3 n.2, *Fernandez* (No. 13283).

89. See *Recent Cases*, *supra* note 28, at 1410.

riage.⁹⁰ The court chose not to address this issue. Hence, it is uncertain whether the court viewed the waiver as an acknowledgement by Ambassador Fernandez that he was making himself amenable to the courts of Connecticut. Consequently, the decision has given future courts little guidance in determining whether in personam jurisdiction is granted to a sending state as a result of a partial waiver of immunity, so that litigants may be afforded meaningful remedies incident to this type of proceeding.

B. Interpreting the Scope of the Real Action Exception

The majority's broad interpretation of the scope of the real action exception serves as one of the cornerstones of its holding. However, the majority improperly expanded the scope of the exception beyond that which the dissent was willing to permit and therefore serves as a source of confusion to the reader. It is apparent that Justice Shea's interpretation of the exception serves as a more reasonable reading of the rule and prevents the evisceration of the notion of diplomatic immunity.

Article 31 provides, in part, that a diplomat shall enjoy immunity from civil and administrative jurisdiction of the receiving state, except in the case of a real action relating to private immovable property located within the territory of the receiving state, unless that individual holds it on behalf of the sending state for the purposes of the mission.⁹¹

The majority interpreted this rule broadly and held that the exception was meant to encompass a wide array of cases, not merely traditional Anglo-American in rem actions.⁹² According to the majority, the language of the exception eschewed any technical focus on the form of action brought and instead raised the sole question of whether the real property itself is the disputed object of the litigation.⁹³ The majority was hard pressed to find support for its interpretation. There was no discussion of the meaning or scope of the real action exception "at any stage of preparation of the Vienna Convention."⁹⁴ Nor are there any cases published analyzing this provision.⁹⁵ Consequently, the

90. See *supra* note 87.

91. See Vienna Convention, *supra* note 1, at art. 31.

92. *Fernandez*, 208 Conn. at 332, 545 A.2d at 1043.

93. *Id.*

94. See generally DENZA, *supra* note 7, at 161.

95. See generally DENZA, *supra* note 7, at 161. See also *Fernandez*, 208 Conn. at

court used the interpretive guidance of several commentators in deciding upon the meaning of the exception.⁹⁶

One commentator defined the exception as encompassing actions in which "the relief sought is either a declaration of title to the property, an order for sale by authority of the court, or an order for possession."⁹⁷ Another commentator noted that such an exception existed merely where "ownership or possession of immovable property is claimed."⁹⁸ Both the majority and dissent utilized these definitions, but differed in interpreting their applicability and scope.

The majority reasoned that the very object and purpose of Ms. Fernandez's complaint was a vindication of her claimed right of ownership of the Greenwich estate.⁹⁹ The court noted that "[t]he substance of her claim is that she is entitled to the home as an immediate and essential consequence of her marital dissolution. This is simply not a case where the plaintiff seeks to satisfy a collateral judgment in her favor by forcing the sale or transfer of unrelated real property."¹⁰⁰ It did not matter to the majority that Ms. Fernandez's claim arose within the context of a marital dissolution proceeding. Nor did it influence their reasoning that her real property claim was merely one of five claims of relief sought. The majority instead focused solely on the nature and importance of that individual claim, and concluded that it fell within the real action exception. Perhaps the majority incorrectly focused on the property claim as being the essence of Ms. Fernandez's suit because she sought an ex parte prejudgment order to attach the value of the property. Yet Ms. Fernandez sought attachment only because she was afraid that her husband would sell the home during the course of the proceedings, and not because she believed that her claim for the home was at the core of her complaint.

Justice Shea, in his dissenting opinion, properly interpreted the intentions of the drafters of the exception by holding that it

335, 545 A.2d at 1039.

96. See generally DENZA, *supra* note 7, at 159-61.

97. DENZA, *supra* note 7, at 160.

98. ERNEST M. SATOW, GUIDE TO DIPLOMATIC PRACTICE § 15.13, at 125 (5th ed. 1979).

99. *Fernandez*, 208 Conn. at 342, 545 A.2d at 1043.

100. *Id.* In cases where the plaintiff seeks to satisfy a collateral judgment in her favor by forcing the sale or transfer of unrelated real property, the court was concerned that applying the "real action" exception would indeed lead to the evisceration of the principles of diplomatic immunity. However, the court reasoned that this case did not present such a concern. *Id.*

applied only in very limited cases.¹⁰¹ He refused to expand the exception broadly enough to allow litigants to apply it in any suit merely by claiming immovable property as a sought-after remedy. He correctly pointed out that Ms. Fernandez's suit sought five remedies, only the second of which dealt with an assignment of her husband's right, title and interest in the Greenwich estate.¹⁰² "This cornucopia of demands," Shea reasoned, "appears to have been overlooked by the majority in declaring that '[t]he very object and purpose of the plaintiff's complaint is a vindication of her claimed right of ownership of the real estate.'"¹⁰³

Shea interpreted the exception as encompassing only those claims requiring the court to settle disputes of present interests or title in real property, rather than in the transfer of title to such property.¹⁰⁴ Where present interests are concerned, he reasoned, the court is asked to declare title, rather than transfer such title.¹⁰⁵ Ms. Fernandez, Shea concluded, had not sought such a declaration, but was interested in a transfer of her husband's right, title and interest in the property.¹⁰⁶ Shea suggested that the covert transfer of title to the property accomplished through a quitclaim deed without the plaintiff's knowledge, gave rise to the question of an independent basis for Ms. Fernandez to claim a present, declaratory interest in the property itself.¹⁰⁷

However, Justice Shea recognized that although Ms. Fernandez had not raised such an independent claim, Connecticut courts could nonetheless act sua sponte upon grounds of which the parties were not previously apprised in determining the existence of such a present interest.¹⁰⁸ Yet, Shea argued that adherence to the majority's interpretation of the exception would lead to an evisceration of the Convention. Instead, litigants would simply invoke the real action exception by attempting to attach real immovable property, or seeking a remedy of such property in their complaint in order to avoid the harsh results which accompany Article 31.¹⁰⁹ Shea's interpretation appears more

101. *Id.* at 349-50, 545 A.2d at 1046.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. See *supra* note 35.

108. *Fernandez*, 208 Conn. at 350, 545 A.2d at 1046 (Shea, J., dissenting in part).

109. *Id.* at 351, 545 A.2d at 1047.

reasonable.

C. Policy Considerations

Several policy considerations, while not specifically enunciated in the case, underlie the court's decision. "Specific concerns of fairness may explain the court's willingness to find in favor of Ms. Fernandez. The case involved an American citizen looking for relief in an American court from a marriage consecrated in this country."¹¹⁰ If the court had ruled differently, Ms. Fernandez, a United States citizen would have been required to return to the People's Republic of Mozambique to litigate her claims for personal property and spousal support. The court's decision, while expanding traditional notions of in personam jurisdiction over diplomats, gave Ms. Fernandez some measure of meaningful remedy incident to the dissolution of her marriage.

Moreover, the state of "Connecticut possessed a strong interest in resolving the dispute over ownership, and in distributing property incident to the divorce," and maintaining the marketability of property located within its borders.¹¹¹ If the court had no power to regulate claims for property located within its borders, foreign diplomats could effectively "tie-up" otherwise marketable property indefinitely. Hypothetically, such a practice of "tying-up" property extends not only to the transfer of such title, but theoretically to the activities that could occur on that property. A diplomat would be free to engage in a variety of illicit activities within his home and on the surrounding property without fear that the local authorities could punish him for such activities. The state's law enforcement officials would be powerless to prohibit these activities. Such a result is both inequitable and unwanted.

Furthermore, Ambassador Fernandez, a recognized diplomat, owned property within the state of Connecticut. He expected to be protected by the services afforded him as a homeowner by the state (for example, fire, police, ambulance and hospital services), and therefore should have expected to have been amenable to suit in Connecticut.¹¹² His ties to the state

110. *Recent Cases*, *supra* note 28, at 1409.

111. *Recent Cases*, *supra* note 28, at 1409; *Fernandez*, 208 Conn. at 340, 545 A.2d at 1042 (noting Connecticut's interest in maintaining the marketability of property located within its borders, *citing* *Shaffer v. Heitner*, 433 U.S. 186, 208 (1977)).

112. *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Hanson v. Denckla*, 357 U.S. 235 (1958).

were significant enough that his being amenable to personal jurisdiction in the state would not interfere with his ability to carry out his diplomatic function and therefore did not violate traditional notions of justice and fairness.¹¹³

Traditional notions of state sovereignty also highlighted the importance of Connecticut's ability to provide Ms. Fernandez with both a divorce and a meaningful ancillary remedy.¹¹⁴ If the court had limited its authority to the extent of the partial waiver, the court, in effect, would have permitted a foreign government to dictate the extent of its jurisdiction. Although the court recognized the importance of upholding international treaties (*pacta sunt servanda*),¹¹⁵ it was unwilling to allow Mozambique free reign over the limits of its jurisdiction in matters traditionally reserved to it, such as domestic relations proceedings.¹¹⁶ Such a free reign by Mozambique would lead to the erosion of Connecticut's powers in this area of the law, an area traditionally reserved to the states. The majority refused to allow the government of the People's Republic of Mozambique to render the final decision as to whether Ms. Fernandez, a Connecticut resident and United States citizen, could obtain a meaningful divorce in Connecticut's courts.

D. Fernandez: Effect of Fernandez on the Principles Established at the Vienna Convention

The *Fernandez* court broadly interpreted the goals and objectives of the Vienna Convention. The overriding emphasis of the Convention is functional.¹¹⁷ The Convention's preamble

113. See *supra* note 112.

114. The court noted that, but for diplomatic immunity, the plaintiff's claim for real property and support payments incident to marital dissolution would "readily be entertained by our courts." *Fernandez*, 208 Conn. at 342, 545 A.2d at 1043. The court cited several cases in support of the proposition that domestic relations has long been a field regarded as the exclusive province of the states. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *Carabetta v. Carabetta*, 182 Conn. 344, 346, 438 A.2d 109, 111 (1980) (citing these cases for the proposition that such "plenary state power encompasses not only the regulation of marital status, but also the distribution of property and protection of offspring"); *Williams v. North Carolina*, 317 U.S. 287, 298-99 (1942) ("federal courts decline to exercise jurisdiction over petitions for divorce or alimony, even where diversity of citizenship exists, out of respect for this zone of the state authority.")

115. See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 8-11 (1987) for a discussion of *pacta sunt servanda*.

116. *Fernandez*, 208 Conn. at 345, 545 A.2d at 1044.

117. *Id.* at 343, 545 A.2d at 1043; see also preamble which states in part: "Realizing that the purpose of such privileges and immunities is not to benefit individuals but to

states that the "purpose of such privileges and immunities is not to benefit the individual personally, but to ensure the efficient performance of the functions of the diplomatic mission."¹¹⁸ This functional theory departs substantially from the two classical theories of diplomatic immunity, the "territoriality" theory and the "personification" theory.¹¹⁹ Both theories contained an inflexible presumption for protected diplomats.¹²⁰

The functional theory of immunity was designed to strike a balance between the needs of protecting the diplomat from the harassment of frivolous suits, with the goal of providing a forum for those cases involving claims where the plaintiff may have no other forum in which to adjudicate such a claim.¹²¹ It was also designed in response to abuses of immunity by diplomats in matters that had nothing to do with their functional responsibilities.

The court effectively applied the Convention principles in concluding that its decision would not in any way interfere with Ambassador Fernandez's ability to carry out his diplomatic mission. This divorce action was not in the nature of a time-consuming, frivolous suit. Nor was it Ms. Fernandez's intention to harass her husband.¹²² The ambassador had not used his Greenwich home for diplomatic purposes, such as a meeting place for official conferences or meetings, and had moved out of the home before the action was filed.¹²³ Hence, the court's decision did not interfere with the ambassador's diplomatic functions, and allowed his wife to adjudicate the claim without having to travel to Mozambique. The decision effectively struck a balance between the political and judicial interests in state sovereignty over land within a state's borders and the regulation of marriage, with the competing policy of respecting international treaty agreements.

secure the efficient performance of the functions of diplomatic missions." Vienna Convention, *supra* note 1, at pmb1.; WILSON, *supra* note 5, at 5.

118. See *supra* note 6; Fernandez, 208 Conn. at 348, 545 A.2d at 1043.

119. See *supra* note 5; Fernandez, 208 Conn. at 343, 545 A.2d at 1043; see also *supra* note 87, WILSON, *supra* note 5, at 2 nn.10-11. ("Diplomats as if by a kind of fiction are considered to represent those who sent them. Envoys are endowed with what is called the representative character, . . . entitled to the same honors to which their constituent would be entitled, were he personally present.")

120. See *supra* note 41.

121. See generally WILSON, *supra* note 5, at 1.

122. Fernandez, 208 Conn. at 343, 545 A.2d at 1043.

123. See Brief for Appellee at 2, Fernandez (No. 13282); Brief for Appellant at 1, Fernandez (No. 13283).

E. Implications for Future Decisions

Although the Vienna Convention is commendable for its adoption of a more workable, functional notion of international diplomacy, its real action exception needs to be more clearly defined. As written and interpreted, it will allow a court to adjudicate any matter involving a diplomat, so long as the suit involves property as a primary consequence of the action. This broad reading of the exception, adopted by the *Fernandez* majority, impermissibly expands the scope of the exception. Although there were no discussions at the Convention involving limitations on this exception,¹²⁴ it is doubtful that the Convention drafters intended such a broad interpretation of the exception. It is a loophole through which future litigants will be able to pursue otherwise nonlitigable claims. A more clear explanation of the limitations of the exception would seal this loophole.

One commentator has noted that "[c]onceivably, the *Fernandez* ruling could cause foreign nations to refrain from granting even partial waivers for fear that courts in the United States will use [such waivers] to claim jurisdiction over issues those nations never intended to adjudicate outside their borders."¹²⁵ However, it appears that "the practice of granting waivers will continue."¹²⁶ Perhaps notions of diplomacy should be reshaped so that immunity would only apply in those instances in which a diplomat's ability to carry out official responsibilities is compromised. The drafters of the Vienna Convention, perhaps realizing this idea, "passed a resolution at the close of the proceedings recommending that sending states 'should waive the immunity of members of [their] diplomatic mission[s] in respect of civil claims.'"¹²⁷ In the specific sphere of marital relations, actions for divorce rarely interfere with a diplomat's ability to function effectively. These individuals utilize the resources of the states in obtaining marriage licenses and expecting the protections afforded by state agencies. Consequently, it is neither unfair nor inequitable to require that such an individual be amenable to the process of a state that provides that person with so much in the way of protections and services. Only in those instances in

124. See *supra* note 94.

125. *Recent Cases*, *supra* note 28, at 1409.

126. *Recent Cases*, *supra* note 28, at 1409.

127. *Recent Cases*, *supra* note 28, at 1409, citing a resolution passed at the close of the Vienna Convention proceedings. 2 U.N. CONFERENCE ON DIPLOMATIC INTERCOURSE & IMMUNITIES 90, U.N. Doc. A/CONF.20/14/Add.1, U.N. Sales No. 61.XI.1 (1961).

which an action can be said to truly affect a diplomat's functioning, may diplomatic immunity render a suit against that individual nonjusticiable.

IV. CONCLUSION

The *Fernandez* decision successfully balances the competing needs of adherence to notions of international diplomacy and a state's interest in regulating both marital relations and property distribution. The decision also supports the functional goals embodied in the Vienna Convention and allows a plaintiff in a divorce action some measure of meaningful remedy. However, even though the court reached an equitable conclusion, it left open several important questions which must be effectively dealt with before United States courts can begin to make uniform decisions in cases involving diplomatic immunity.

Both courts and commentators must determine whether a partial waiver of immunity grants a court personal jurisdiction over a diplomat, or whether the scope of the court's jurisdiction will continue to be dictated by foreign governments in their granting of explicit waivers. Moreover, the scope of the real action exception to Article 31 must be more clearly defined in order to prevent the evisceration of the Vienna Convention ideals. If more courts do not adopt the reasonable approach taken by Justice Shea, the loophole through which litigants may pass to litigate otherwise nonjusticiable claims will grow as large as the body of water which separates us from the People's Republic of Mozambique.

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