INTERNATIONAL IMMUNITIES AND FIGHTING TERRORISM – SHOULD DIPLOMATIC, CONSULAR AND UN OFFICIALS IMMUNITY FROM SEARCHES PREVENT CONDUCTING SECURITY CHECKUPS IN BORDER CROSSINGS AND AIRPORTS?

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Abstract

Diplomatic, consular and United Nations officials usually enjoy general immunity from searches conducted on their persons, belongings and official vehicles, at border crossings. Although searches are conducted at airports, official baggage is still exempt from such inspection, based on the same premise of immunity.

The argument presented by the paper is that this immunity (when applicable) should mostly not be absolute in times of proven threats of terrorism. As this is not the current state of affairs, the first sections focus on a critical analysis of the origins of the applicable legal regime and state practice. The underlying theme is the question of whether the original rationales for such immunities still exist today.

When thinking about conducting security checkups to internationally protected persons, who enjoy immunities under international law, the prevailing argument supporting such a policy is the right of a state for self defense (or its right to prevent the smuggling of explosives into its territory). The paper would briefly discuss the “self defense excuse” and its possible application when it comes to international and diplomatic, consular or UN law as enshrined in the relevant conventions.
The validity of arguing for limiting immunities from searches depends on the level of threat which emanates from those who enjoy them, as the paper would describe the various examples of such abuse and what could be learned from them. At this stage the paper would present the common way national jurisdictions, as well as international bodies, respond to these instances of abuse, focusing especially on abuses in the context of war, terrorism and national security.

When discussing international immunities, we must recognize that although these grant much protection to the protected persons, they are never absolute. The most common exception to such immunities is that the sending party (the foreign state or the United Nations) can voluntarily relinquish the immunity. The paper would analyze this exception, alongside others, developed in international customary law. This analysis would be imperative in formulating the argument in support of posing limits on international immunities from searches when there is credible suspicion for abuse, proving they were created in response to the needs of the host states and the new realities they faced (when dealing with foreign diplomats), as should be considered in the case of immunities from searches.

The final section of the paper would attempt to outline alternatives to the current international law regime concerning immunity from searches for internationally protected persons. These alternatives would establish a basis for formulating possible guidelines for security forces which are daily faced with the task of ensuring security,
and preventing the smuggling of explosives on the one hand, while respecting the
basic principles of international immunities from searches on the other.

As the paper would show, modifications of the current conventions would not be
necessary, or realistic, as the alternatives derive from different modes of
interpretation for the current international legal regime.
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Introduction

International relations usually gain wide public attention when world leaders debate issues and hold international conferences, but the fact is that the day to day activities of international officials provide the real substantive framework of relationships between states and international organizations. In order to facilitate their operations international officials, such as diplomats, consular and United Nations officials are in constant movement between countries, whether through airports, borders or sometimes internal checkpoints.

In order to facilitate such movement, international officials are provided with a variety of privileges and immunities.\(^1\) Even in past ancient times there seems to have been a consensus on the need to protect not only “friendly” diplomats, but to afford similar protections to diplomats representing enemy countries.\(^2\)

Considering that the most potentially vulnerable elements in any country are its borders and points of entry, as there is a constant risk of smuggling weaponry and explosives,\(^3\) the general immunity enjoyed by international officials (including official, and sometimes private, vehicles, and in some cases personal baggage) seems to present a danger of potential abuse for terrorism purpose.\(^4\) Not only is there potential for direct abuse, but there is also always the danger that third parties would “abuse” the immunity

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\(^{1}\) Clifton E. Wilson, Diplomatic Privileges and Immunities 17 (1967).
\(^{2}\) As was the practice of Islamic religious leaders. See M. Cherif Bassiouni, Protection of Diplomats Under Islamic Law, 74 A.J.I.L. 609, 612 (1980).
\(^{3}\) One recent example is the smuggling of explosives across the U.S.-Canadian border to be utilized for an attack in Los Angeles. See Ruth Wedgwood, Agora: Military Commissions: Al Qaeda, Terrorism, and Military Commissions, 96 A.J.I.L. 328, 338 (2002).
\(^{4}\) In any case of immunities there is always potential for abuse. For a general description when diplomatic immunities are concerned see J. Craig Barker, The Abuse of Diplomatic Privileges and Immunities – A NECESSARY EVIL 1-13 (1996).
without the knowledge or awareness of the international official.\(^5\) On the other hand these immunities (and more specifically the inviolability of the international official) are considered the fundamental core of the relations between states in international law.\(^6\)

The paper would focus on the required balance between both these two propositions, while finding a way to reconcile between the needs of international relations, expressed by the requirements of international law, and the need to limit the potential danger. The main argument presented by the following analysis is that although international law currently affords almost absolute immunity from such point of entry/exit searches, for international officials and their accompanying property or vehicles, security concerns must be recognized in some cases and such searches should be allowed when security forces have credible suspicions.

We begin by presenting a critical analysis of the different provisions in international law establishing the immunity, or lack thereof, of foreign diplomatic and consular officials as well as UN officials, from border searches. The analysis would focus on the question whether the underlying original rationales for such immunities are still relevant today. Next, we would look into the argument supporting security checkups to internationally protected persons, deriving from the right of a state for self defense (and specifically its right to prevent the smuggling of explosives into its territory). In this section of the paper we would briefly look into the general “self defense excuse” for breaching international law, and its possible application to the question of diplomatic, consular and U.N. immunity from searches.

\(^5\) This danger is especially apparent when official vehicles are concerned, but could also potentially occur when terrorist could likely place explosives in personal baggage.

The validity of arguing for limiting immunities from searches depends on the level of threat which emanates from those who enjoy them (or from possible third parties). In the third section we will look at different examples of such abuse and what could be learned from them. At this stage we will look at the current “traditional” solutions of such instances of abuse.

When discussing international immunities, we must recognize that although granting much protection to the protected persons, they are never absolute. In the fourth section we will look into possible exceptions to immunity, developed in international treaty and customary law, as this would assist us in formulating the argument in favor of limiting immunity from searches.

Finally, we will look into viable alternatives to the current international law regime concerning immunity from searches for internationally protected persons. Utilizing the different conclusions we will formulate guidelines for security forces which are daily faced with the task of ensuring security, and preventing the smuggling of explosives on the one hand, and respecting the basic principles of international immunities from searches on the other. Although changes in the relevant conventions would not be necessary, or realistic, we hope to find different modes of interpretation for the current international legal regime.

### I. International Immunities from Searches

There are several basic theories at the basis of international immunities in general. Firstly there are those who argue that the foreign official is an embodiment of the foreign
sovereign, and should be treated accordingly. Supporters of this approach argue that any action taken against that official is essentially an infringement of the rights of the sending sovereign or international organization. Others claim that the basic underlying principle for immunity of foreign officials is the principle of exterritoriality, as they support the legal fiction that such officials are not subjected to the local laws of the host states. Although both theories seem viable to some extent, not only are they not longer widely accepted (as foreign officials usually do not derive their authority from a specific monarch, but from the people of the “sending state” who themselves do not have immunity in the “sending jurisdiction”, and foreign officials are basically subject to local law) but they are less relevant to immunity from searches.

The most relevant theory to the question of searches, and also the most acceptable today in understanding international immunities, is the theory of functional immunity. This theory basically sets out the principle that a foreign official must have some level of immunity (in varying degrees) in order to fulfill his mission in the host state with minimal interference from the authorities of the host government. This principle is

8 Wilson, supra note 1, at 3.
9 This can be derived from the theory that the premises of the foreign mission is considered foreign territory. See David Foster Bartlett, Note: 767 Third Avenue Associate v. Permanent Mission of the Republic of Zaire: an Uncompensated Governmental Taking, 45 DEPAUL L. REV. 165, 174 (1995).
11 One example is the explicit provision to this affect in the Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes of 1961, Apr. 18, 1961, art. 41, 23 U.S.T. 3227, 500 U.N.T.S. 95. (hereinafter: the Diplomatic Convention).
12 This theory of immunity could also be defined as “functional necessity”. See Curtis J. Milhaupt, Note: The Scope of Consular Immunity Under the Vienna Convention on Consular Relations: Towards a Principled Interpretation, 88 COLUM. L. REV. 841, 848 (1988).
highlighted by the emphasis on providing the foreign official with immunities from the moment he enters the host country,14 i.e. at the border/entry point. Without such immunities foreign officials could potentially be subjected to harassment by local authorities,15 as it is clear that entry/exit points and internal roadblocks present many, and daily, opportunities to do so. The immunity from searches is also perceived as part and parcel of the general inviolability of the foreign official himself,16 alongside the inviolability of the “foreign” property.17

Acknowledging these vital considerations it is not surprising to find many provisions granting such immunity to international officials. Where diplomats are concerned, the diplomatic bag (carrying official diplomatic correspondence or articles);18 their own person,19 their private property,20 and the official vehicle,21 are basically protected from searches by the local authorities of the host state. As a general sense U.N. officials enjoy similar immunities to limited extent, although still pretty wide in scope. The U.N. diplomatic bag is also protected from inspection and search,22 as well as its property, including official U.N. vehicles.23 Unlike their counterparts, probably resulting from a much more generally limited immunity,24 consular representative only enjoy a limited

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14 For an example concerning diplomatic officials see Diplomatic Convention, supra note 11, art. 39.
15 Leslie Shirin Farhangi, Note: Insuring Against Abuse of Diplomatic Immunity, 38 STAN. L. REV. 1517, 1521 (1986).
18 Diplomatic Convention, supra note 11, art. 27(3).
19 Id, art. 29 – the inviolability of the diplomat’s person seems to imply that he can not be searched.
20 Id, art. 31(2).
21 Id, art. 22(3).
23 Id, art. 3.
24 The reasoning for this limited version of immunities is that unlike diplomats consular officials are entrusted with less official duties, as their capacity and roles are more limited and subject to the permission of the host state. See James E. Hickey & Annette Fisch, The
protection from inspection of the consular bag, or personal property, as the consular vehicles are not immune from search.

The fact that there are such similar provisions in these, and in similar, international legal regimes, seems to imply that they reflect pre treaty customary international law. This proposition corresponds with the fact that the Diplomatic Convention as a whole is considered as a codification of pre existing international law, and that the international consensus has always been that the property of the diplomat was immune from search. However, at least when the absolute immunity from search of the diplomatic bag is concerned, this is not the case, as it seems that there was no international consensus about the rules pertaining to its inspection, and states could claim that the content was suspicious and in some case open it. Until today there are states (such as Saudi Arabia and Kuwait) which reserve the right to open the diplomatic bag in the presence of the diplomat. This, complemented by the fact that states now concede to subject diplomat’s personal baggage to scrutiny and screening in airports, supports the argument that states

\[\text{Case to Preserve Criminal Jurisdiction Immunity Accorded Foreign Diplomatic and Consular Personnel in the United States, 41 Hastings L.J. 351, 368-369 (1990).}\]
\[\text{The authorities of the host state can require consular officials to open the consular bag, and failure to do so could result the return of the bag to the sending state. See Vienna Convention on Consular Relations, Apr. 24, 1963, Art. 35(3) (b), 21 UST 77, 596 UNTS 261. (hereinafter: the Consular Convention).}\]
\[\text{ISRAEL MINISTRY OF FOREIGN AFFAIRS, DAVID- DIPLOMAT AND LAWYER FOR ISRAEL – COMMEMORATING THE TENTH ANNIVERSARY OF DAVID BEN-RAFAEL’S DEATH FOLLOWING A TERRORIST ATTACK AT THE ISRAELI EMBASSY IN ARGENTINA 107 (2002). (hereinafter: Ben Rafael).}\]
\[\text{Such as the provisions about immunities from search for assets as stipulated by the Articles of Agreement of the International Bank for Reconstruction and Development (The World Bank) art.IV, 60 Stat. 1440, 2 U.N.T.S. 39 (Dec. 27, 1947).}\]
\[\text{EILEEN DENZA, DIPLOMATIC LAW – COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 142 (1976).}\]
\[\text{SATOW’S GUIDE TO DIPLOMATIC PRACTICE (Lord Gore-Booth, 5th ed. 1979) as quoted in Ben Rafael, supra note 26, at 98.}\]
\[\text{MALCOM SHAW, INTERNATIONAL LAW 530 (4th ed. 1997).}\]
\[\text{Denza, supra note 29, at 220.}\]
do not necessarily perceive the immunity from searches at points of entry/exit as linked to the functional necessities of diplomatic work.

It could of course be argued that in this regard states have just learned “to live” with the requirements of airlines and aviation security, and that security personal do not represent the authorities of the host state.\textsuperscript{33} However, it is much more viable to assert that states are in agreement that even if the checkups present some sort of impediment on the movement of foreign officials than they are acceptable. This also corresponds with the fact that some argue that as long as the diplomatic bag is not opened than it can be screened and tested.\textsuperscript{34} Arguably, the only real functional justification in this case would be to limit the host state authority to look at diplomatic correspondence and documents in the diplomatic bags or the personal baggage of the diplomat.\textsuperscript{35}

So, we see that according to the functional theory there seems to be no real problem with allowing security searches of diplomats in points of exit/entry as long as the official correspondence and the documents are protected. This conclusion is does not only fit in with the functional theory, but does not also seem to contradict the theory of reciprocity.

According to this theory governments provide diplomatic immunities and privileges because they expect other governments to do the same.\textsuperscript{36} Diplomatic immunity is clearly based on the principle of reciprocity, as some claim it developed only because an early recognition that granting such immunities would be mutually beneficial for sending and

\begin{footnotesize}
\textsuperscript{33} Id, id.
\textsuperscript{34} Michael B. Mcdonough, *Note: Privileged Outlaws: Diplomats, Crime and Immunity* 20 SUFFOLK TRANSNAT’L L. REV. 475, 483 (1997).
\textsuperscript{35} The host state is in any case limited at looking into such correspondence, as it enjoys inviolability.
\end{footnotesize}
host states, as manifested by the fact that generally governments abided by reciprocal obligations when foreign emissaries and representatives were concerned. Although countries are likely to fear that imposing closer scrutiny on the diplomatic bag, such as demanding to declare its contents or asking the diplomatic courier to open it, would lead to similar demands by other countries (and to possible exposure to diplomatic correspondence), it seems less problematic when the personal baggage is concerned. This could be true not only when airports and borders are concerned, but also in internal road blocks, as it does not seem that stopping and searching the diplomatic vehicle (as long as it is a reasonable search) is likely to contradict the obligation to facilitate the performance of diplomatic duties.

Finally, what seems to be the most convincing argument in favor of asserting that the expanded diplomatic immunities from searches are not required by functional necessity is the previously described regime regulating searches of consular officials and consular property. Even though it could be claimed that the reason for lack of such immunities is the more ambiguous, controversial, and vague nature of consular immunity, it is more reasonable to assume that such immunity from searches was not provide because states did not see it necessary to performing consular duties. If we agree that the transport of illegal substances in vehicles or in personal baggage (whether intended or not) is not

37 William McHenry Franklin, Protection of Foreign Interests – A Study in Diplomatic and Consular Practice 11 (1946).
39 Diplomatic Convention, supra note 11, art. 25. In the same way that towing a diplomatic vehicle is not usually considered a violation of diplomatic immunity. See Mark S. Zaid, Contributor: Diplomatic Immunity: To Have or not to Have, That is the Question, 4 ILSA J. Int'l & Comp. L. 623, 628 (1998).
connected to the function of the consular mission and is of course unreasonable, than the functional argument does not apply.

Bearing in mind that the same functional considerations apply when U.N. officials are concerned, dating back to the immunities provided to representatives of the League of Nations aimed at allowing them to operate freely and in an “equal footing” with diplomatic and consular officials, we can ask the same questions about immunity afforded to U.N. officials from searches (especially for U.N. vehicles).

Looking at the basic fundamental principles of U.N. immunity, established by art. 105 to the U.N. Charter, we understand that the underlying principle of such immunities is identical to the underlying rationales of consular immunity. Its important to not that this functional immunity is usually utilized towards explaining the immunity of U.N. officials from local court jurisdiction, rather than to rationalize immunity from searches. However, the immunity from searches for U.N. vehicles, corresponds with the perception that the immunities are intended to benefit the U.N. organization itself, rather than the individual officials. It also seems to accommodate a broad interpretation of functional immunity supported by both the drafters of the U.N. Charter and naturally the U.N. itself. Some even argue that the absolute nature of the immunity of U.N. property

42 MARTIN HILL, IMMUNITIES AND PRIVILEGES OF INTERNATIONAL OFFICIALS 4 (1947).
43 U.N. Charter, art. 105, providing privileges and immunities for the U.N. organization, as well as for its officials.
45 U.N. Immunities Convention, supra note 22, art. 3.
47 Rawski, supra note 16, at 112. In cases of doubt the U.N. position is that functional immunity should apply. See UNITED NATIONS JURIDICAL YEARBOOK 32 (2000); Ithai Apter & Ronit Rosenstein, Israel
has never been disputed.\(^{48}\) Still, it seems that searching vehicles is an example of a breach of U.N. immunity which would not affect the independence of the organization.\(^{49}\) the most basic reasoning for immunities.

The analysis so far provides us with a pretty clear argument that the only legitimate theory of immunity for international officials is in fact the theory of functional necessity. As demonstrated it does not seem that conducting such searches would conflict with the rationales of such immunity. However, because of the legal provision in place it would still be considered a violation by the host state of the inviolability of the foreign officials or the property itself.\(^{50}\) The host state must ensure that the inviolability remain intact.\(^{51}\)

It would seem that despite their customary law nature privileges and immunities of foreign officials are a “peacetime” luxury, and therefore in times of war states are allowed to violate them. One example is the capture of Iranian diplomats (suspected of assisting Iraqi insurgents) by U.S. forces in Northern Iraq, storming a building which functioned as an Iranian Consulate.\(^{52}\) Although somewhat viable, this argument is not compatible with the specific provisions in the Diplomatic Convention, which expressly stipulate that the host state must abide by the same privileges and immunities even in

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\(^{49}\) The member states are obligated to preserve the independence of the organization. See Brian D. Tittemore, Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations, 33 STAN. J INT'L L. 61, 92 (1997).

\(^{50}\) This would be considered an objective internationally wrongful act. See Franciszek Przetacznik, Protection of Officials of Foreign States According to International Law 160 (1983).

\(^{51}\) Id, at 164.

times of armed conflict. The ICJ emphasized this point when deciding that Iran violated international law by not protecting U.S. diplomats in the U.S. Embassy in Tehran in 1979.

This leads to the conclusion that self defense could not be used as an excuse to violate international immunities; however, there is still room for discussion whether the protection of security interests during peace and war times can be a viable argument in limiting immunity from searches and security checkups, and this will be the focus of the following discussion.

II. Self Defense as a Basis to Limit International Immunities from Searches

It is quite clear that preservation of immunity in general, and specifically immunity from searches of diplomatic materials such as the diplomatic bag, is not totally absolute if there is a specific clear danger to human life. One such example is the decision by the British Ministry of Foreign Affairs to allow the opening of a diplomatic crate, because of a suspicion (which later turned out to be true) by a customs official that human beings were hidden inside it.

Before discussing the specific question of violating immunities from searches during war time (as part of the general question of violating international immunities) it would be imperative to look into the question whether a state can violate international law when

53 The obligation continues to exist even if there are no diplomatic relations between the states. See the Diplomatic Convention, supra note 11, articles 44 & 45.
54 The Consular Staff Case, supra note 6, at 40.
acting in self defense, as it clear that states can act to defend themselves as part of the framework of the “Just War Theory”.

According to international law when a state wants to engage in self defense it is not only limited by principles of proportionality, but it generally has to act as a response for an armed attack or to an imminent threat. In a similar fashion to individual self defense a state can only act when it is necessary to do so. However, these principles usually apply when the acts of self defense include actual use of force, usually a military response. The more interesting and relevant question to our debate is the permissibility of the use of non-combat measures as self defense, as violations of international immunities tend to be (at least when violations of immunities from searches are concerned). Arguably, we could claim that non-combat measures are similar to peaceful measures and therefore there is no legal problem with engaging in them since their exhaustion is considered a pre-requisite of resorting to use of force in self defense.

56 DAVID RODIN, WAR AND SELF-DEFENSE 103 (2002).
57 U.N. Charter, art. 51. For an elaborate discussion on the framing of art. 51 see THOMAS FRANCK, RECOURSE TO FORCE 45-51 (2002).
58 This is widely regarded as anticipatory self defense. See William Bradford, In the Minds of Men: A Theory of Compliance with the Laws of War, 36 ARIZ. ST. L.J. 1243, 1326 (2004).
59 Rodin, supra note 56, at 107, 111.
60 Such a military response is considered not only legal but also morally justified, as it was “forced” upon the injured state. See Ronald J. Rychlak, Just War Theory, International Law, and the War in Iraq, 2 AVE MARIA L. REV. 1, 7 (2004).
61 One example of such measures is the building of the security fence between Israel and the West Bank, See Barry A. Feinsein & Justus Reid Weiner, Israel’s Security Barrier: an International Comparative Analysis and Legal Evaluation, 37 GEO. WASH. INT’L L. REV. 309, 466 (2005). Although the ICJ did hold it to be illegal (Legal Consequences of a Wall in the Occupied Palestinian Territory, 2004 I.C.J., 43 I.L.M. 1009, para. 5 (July 9), it seems that if it would have been built on the internationally recognized pre-1967 border there would have been no legal problem with its construction.
62 There are of course cases when diplomatic immunity is clearly violated by acts involving the use of force, but these seem to be rather extreme and unique cases. One famous example is of course the U.S. diplomats and consuls held hostage in Iran following the 1979 revolution. For a description of the events see the Consular Staff Case, supra note 6, at 12-16.
However, it is also clear that peaceful measures are usually considered as negotiations (or consultations)\(^\text{64}\) and similar steps, rather than such measures, as unilateral economic sanctions which are directed at injuring the state even when not involving actual use of force. Some argue that such measures do not include use of lethal forces and are therefore permitted by the U.N. Charter,\(^\text{65}\) while others claim that even if this is true economic sanctions are usually not effective, while leading to the punishment of innocent people, and so are morally unjust.\(^\text{66}\) When trying to implement these arguments to the violations of international immunities we have to remember not only is there not a lethal element, without specific injuries to the sending state, but that in many cases violating immunities is required to protect the citizens of the host state, and in the context of searches at points of entry, to preserve its territorial integrity, regarded as a core value of international relations.\(^\text{67}\) Still, we should also bear in mind that international officials are not considered combatants,\(^\text{68}\) and therefore it could be argued that they should be protected from any acts by the host state even if they are affiliated with enemy states, or there is a potential that their immunity would be abused for conducting terrorist activities. This line


\(^{65}\) As they are not considered subject to the prohibition on the use of force established by art. 2(4) to the Charter. See Lloyd N. Cutler, *The Internationalization of Human Rights*, 1990 U. ILL. L. REV. 575, 578 (1990).

\(^{66}\) Those who support this argument claim that in some cases military operations would cause less damage, and be much more effective, than economic sanctions. See Justin D. Stalls, *Economic Sanctions*, 11 U. MIAMI INT'L & COMP. L. REV. 115, 171 (2003).


of thought corresponds with the argument that diplomatic inviolability is a rule of general international law, and by implication also the inviolability of U.N. property (vehicles).

Firstly it also seems well established that the Diplomatic Convention continues to apply in wartime as there is no specific exclusion in it, and this could imply that the U.N. Immunities Convention is also not limited to peacetime. Considering that the Diplomatic Convention affords a singular remedy for potential abuse of immunity, in the form a declaration of a diplomat as persona non grata (as a state could presumably request that a suspected U.N. official leave its territories), it would be hard to claim that other remedies (external to the Diplomatic Convention), even in wartime, are available. Moreover, in wartime declaring most of the sending state diplomats as persona non grata (thus limiting the size of the foreign mission) is usually conducive to facilitating the operations of respective embassies in the belligerent countries.

These are implications dictated by the Diplomatic Convention (and again could be potentially applied to U.N. officials and vehicles), but we must bear in mind that the preamble of the Convention, referring to “the rules of customary international law”,

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71 Diplomatic Convention, supra note 11, art. 9. The declaration of a diplomat as “persona non grata” is usually associated with expelling diplomats for engaging in criminal activity or espionage. See Krista Friedrich, Note: Statutes of Liberty? Seeking Justice Under United States Law When Diplomats Traffic in Persons, 72 Brook. L. Rev. 1139, 1162 (2007) (suggesting that diplomats who are suspected of trafficking in persons be expelled by the host state); Ingrid DeLupis, Foreign Warships and Immunity for Espionage, 78 A.J.I.L. 53, 59 (1984) (the common remedy for diplomats suspected of spying is to expel them from the host state).
73 According to the preamble of the Convention, “rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention”. See Diplomatic Convention, supra note 11, preamble.
could be interpreted to mean that because the question of self defense as an exception to immunities is not regulated in the Convention customary international law applies.74

Looking into relevant customary international law we can find conflicting approaches. First we see that the basic notion, and almost wide consensus, is that as a rule diplomatic immunity as a whole derives from international customary law.75 Diplomatic immunity is translated into absolute inviolability for the premises of the diplomatic mission, with no exceptions whatsoever,76 and so the same could apply to inviolability for the diplomatic vehicles and personal diplomatic baggage. Some argue that the leaving room for any exception to inviolability is likely to lead us to a “slippery slope” as states would potentially extend the justification for violating diplomatic immunity, if we allow “emergency” (such as an outbreak of a fire) exceptions .77 This could imply that if situations of emergency are not regarded as exceptions to diplomatic immunity than surely self defense is not a viable exception.78 However, it is possible to argue that even if this is true, the inviolability is absolute only in regards to the mission premises itself, and not applicable to searches of diplomatic baggage or vehicles. This conclusion could be drawn from the fact that although the principle of mission inviolability of the premises of the consular mission is well entrenched,79 it still does not afford immunity from

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77 It seems that in cases of emergency there would be no real fear of danger since it is very likely that the sending state would waive the immunity of the mission premises in order to allow rescue forces to enter. See MICHAEL HARDY, MODERN DIPLOMATIC LAW 44 (1968), as quoted in Beaumont, supra note 74, at 396.
78 Beaumont, supra note 74, at 396.
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searches.\textsuperscript{80} Still, bearing in mind that consular immunity is mostly limited compared to diplomatic immunity, this does not seem a plausible argument.

What does seem more viable is to try and recognize a “public safety” exception to diplomatic immunity (and to immunity in general) in times of war. Such recognition could serve as a basis for arguing that a self defense exception to diplomatic immunity does exist. Looking at historical precedents, we can see examples of states that clearly asserted criminal jurisdiction over diplomats suspected of acts against the host state. These examples include the arrest of a Swedish ambassador by English authorities in 1917 (suspected of conspiring against the king);\textsuperscript{81} and more recently the 1999 arrest of a U.S. diplomat in Moscow (suspected of working for the C.I.A);\textsuperscript{82} the capture of Iranian diplomats in Iraq (suspected of acts against U.S. forces)\textsuperscript{83} and the arrest of a British diplomat in Eritrea (suspected of spying).\textsuperscript{84} Although these cases are not necessarily linked to wartime, we can perceive that some states do view self defense (as part of the larger framework of public safety) as a viable exception to diplomatic immunity.

Even so, it is rather arguable that these, and other, arrests of diplomats do in fact correspond with international diplomatic law. It seems more likely that although diplomats can be stopped when they present a danger to the public, the host state is not allowed to detain them for a lengthy period of time.\textsuperscript{85} This permissible limited breach of

\begin{itemize}
\item \textsuperscript{80} See section I of the paper.
\item \textsuperscript{81} Beaumont, supra note 74, at 395.
\item \textsuperscript{82} Igor Trifonov, US woman diplomat arrested on espionage charges, ITAR - TASS NEWS WIRE, Nov 30, 1999 (New York).
\item \textsuperscript{83} Landay, supra note 52.
\item \textsuperscript{84} Eritrean authorities free British diplomat arrested over "illegal" activities, BBC MONITORING NEWSFILE, Jul 12, 2007 (London).
\item \textsuperscript{85} This is the case for example of diplomats suspected of driving under the influence are concerned. See Ben Rafael, supra note 26, at 104. In the U.S. a diplomat’s license can be revoked in such cases, but he can not be arrested, see a circular note issued by the U.S. State Department to foreign missions, Resolution of Motor Vehicle Law Violations, Diplomatic Note 04-38, February 24, 2004, p. 6-8.
\end{itemize}
diplomatic immunity corresponds with the question of what kind of searches can be justified by public safety, or more relevant, self defense. One example for a wide interpretation of such justification is the decision by U.S. forces to search a residence in Panama City (looking for weapons) despite claims that it was the residence of the Nicaraguan ambassador.\(^{86}\) Some argue that this wide interpenetration is not legitimate, as even if more extreme circumstances, such as shots fired from with the embassy, were concerned, entering the premises of a diplomatic mission (or for that matter the premises of a U.N. mission) is prohibited.\(^{87}\)

Even if we purport to the narrow approach of self defense as a justification for violating diplomatic (or even U.N.) immunities, it could correspond to searching diplomats themselves and their vehicles. This was the approach taken by the British authorities when they searched the staff leaving the Libyan Embassy after a British police officer was shot to death from inside the embassy.\(^{88}\) The authorities explained the search as justified by principles of self defense in international law.\(^{89}\) Although some argue that it could be more than diplomatic immunity which lead to the British government’s decision in the case to limit itself to searching the diplomats, without arresting possible suspects,\(^{90}\) the action still supports a narrow construction of diplomatic immunity even when the host state is faced with an attack or a potential threat. In the same vein, even if that search was not preventive in nature, it seems pretty viable to assert that if there is

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\(^{87}\) Beaumont, supra note 74, at 394.

\(^{88}\) The shots were fired following a 1984 demonstration near the Libyan Embassy in London. See Higgins, supra note 102, at 644.

\(^{89}\) Beaumont, supra note 74, at 396. It is important to note that as a general matter U.S. courts have decided in the past that even when diplomats are concerned, individual self defense (if the diplomats were first to attack) is legally justified. See United States v. Liddle 26 F. Cas. 936, 2 Wash. C. C. 205 (1808).

\(^{90}\) There are some who claim that there could have been possible domestic reasons for the decision. See Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939, 967 (2005).
suspicion that the diplomatic, or U.N., baggage or vehicle presents a potential threat to security (mainly the fear that arms would be smuggled into the territory of a state), than as a matter of self defense, such searches are not only allowed but are also required in some situations.91

Coming back to the general discussion of self defense in international law, it seems that searching international officials, when there is credible suspicion of smuggling explosives (including possible use of the immunity by third parties) is the most fitting solution, according to the components of the proportionality requirement.92 The search is the most adequate solution (searching would reveal any explosives); the search would result in a minimal injury to the diplomat or to the U.N. official (or to international relations) and the resulting damage is much less substantial than the benefits, in preventing the explosives from entering the territory of the state.93

Recognizing that there is a possible theoretical basis for using self defense as a justification for searching international personnel at border crossings, as well as in internal roadblocks, there is still the question of whether there is a need to utilize it. The answer lies with the assessment of the potential abuse of the immunity provisions by the diplomats and the U.N. officials (which we have lightly touched upon previously), and

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91 Ben Rafael, supra note 26, at 104.
92 Which are defined, at least under Israeli constitutional jurisprudence, as the prongs of the proportionality test, and seem to be very relevant to our discussion. The proportionality test ((the means which were chosen are the most adequate, the injury to the individual must be minimal, and the benefits from the action must (legislative or administrative) outweigh the damages)) is usually used to scrutinize legislative acts of the Israeli Parliament. See Amnon Reichman, "When We Sit to Judge We are Being Judged " The Israeli GSS Case, Ex Parte Pinochet and Domestic/Global Deliberation , 9 CARDOZO J. INT'L & COMP. L. 41, 51 (fn. 31) (2001).
93 Although the prongs of the proportionality requirement were originally used to “check” legislative actions, they can also be utilized towards looking at administrative actions taken by the executive, such as conducting the searches. See Marcia Gelpe, Constraints on Supreme Court Authority in Israel and the United States: Phenomenal Cosmic Powers; Itty Bitty Living Space, 13 EMORY INT'L L. REV. 493, 525 (1999).
we now turn to discuss it, while attempting to focus on relevant potential abuses for the question of the searches, as well as current traditional solutions.

III. **Potential Abuse of Diplomatic and U.N. Immunity by International Officials and “Traditional” Solutions**

In democratic societies, it seems quite clear that in general immunity is a “foreign” concept and that basically no one should enjoy immunity, whether from legitimate judicial litigation or even from justifiable searches.\(^{94}\)

When a legal system decides to provide immunities to certain classes of people or officials, there is always potential for abuse of such legal immunity. Such is the case for example of common law immunity from tort actions provided to government officials for acts done in the performance of their duties.\(^{95}\) This kind of immunity, in a similar vain to diplomatic and U.N. immunity is also provided to the officials in order to allow for “effective government” and prevent the practical, as well as psychological, difficulties which could result from litigation in courts.\(^{96}\)

When immunity from searches is concerned, there are those who argue that the immunity afforded to members of the House of Representatives also included immunity from executive search warrants.\(^{97}\) Although eventually the court limited such immunity to


\(^{97}\) This was the argument made by a congressman suspected of taking bribes after FBI agents found 90,000$ in a freezer in his congressional office. See *In re Search of the Rayburn House Office Bldg. Room No. 2113, D.C. 20515, 432 F. Supp. 2d 100, 111 (D.D.C. 2006)*. Even though the court rejected this argument, there are those who claim that this was a valid argument, see John P. Moore, *Comment: In...*
legislative materials, and it seems that such an argument is rather problematic (to say the least), this example of the possible abuse of legislative immunity from searches shows that potential for abuse is always present when a general framework of immunity is provided.

Abuse of Diplomatic or U.N. “personal” immunity, like other types of immunity, is not such a widespread phenomenon. In the U.S. such cases are very rare, and come to about 15 each year, mostly involving minor offenses.

Even so, host states do seem to have concerns about diplomats immunity “shield” from local law, and local law enforcement. In 1987, for example the U.S. State Department issued a circular note to all foreign missions in the U.S. expressing its concerns with the increase in the involvement of diplomats and their family members (as they also enjoy immunity) in criminal activity.

Usually when discussing abuses of diplomatic immunity, the tendency is to divide the discussion to the two most common types; criminal acts committed by diplomatic personnel and the smuggling of illegal goods using the diplomatic bag or in some cases

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100 Barker, supra note 4, at 11-12 the


102 See for example the description of the report issued by a UK parliamentary committee on the issue, Rosalyn Higgins, Comment: UK Foreign Affairs Committee Report on Abuse of Diplomatic Immunities and Privileges: Government Response and Report, 80 A.J.I.L. 135 (1986). At the same time it is noteworthy that the states make an effort to preserve the immunities by instructing law enforcement officials to observe the rights of international officials. The U.S. Department of State distributes the Dept. OF State, Pub. No. 9533, Guidance for Law Enforcement Officers (1987) and posts a rather simple charter of immunities on its website. See http://www.state.gov/m/ds/immunities/c9127.htm.

the personal baggage itself.\footnote{Farhangi, supra note 15, at 1523.} In the same sense we can imagine that similar abuse could potentially take place when U.N. vehicles are concerned. For our purposes it seems that examples of both types of abuse could be considered as relevant, as they both can lead to the smuggling of explosives into the territory of the state, a concern which has been the focus of international legal discussion focusing on the diplomatic bag.\footnote{Barker, supra note 4, at 166.}

There are many examples of diplomats, or family members, involved in criminal acts. In one case a diplomat’s wife stabbed both her daughters, while in another a diplomat drove on the wrong side of the road injuring three people.\footnote{Brian Blomquist, PG Officials Seek Lifting of Immunity in Slashing, WASH. TIMES, Aug. 31, 1995, at C6, as quoted in McDonough, supra note 34, at 487 (a Nigerian diplomat’s wife stabbed both her daughters); Soviet Diplomat Immune From Charges in Crash, CHI. TRIB. June 20, 1985, at C18 as quoted in McDonough, id.} In another case, greatly fueling public anger over diplomatic immunity, a foreign diplomat driving while intoxicated killed a teenage girl in Washington D.C.\footnote{Bill Miller, Crash Victim’s Mother Seeks Damages from Georgian Diplomat, Others, WASH. POST, Jan. 1, 1998, at D04.}

More relevant to our discussion are the incidents of diplomats abusing immunity from searches. Other than the example of the smuggling of a former Nigerian minister in a diplomatic crate already mentioned,\footnote{Howe, supra note 55, at 285-286.} there have been other examples of using diplomatic immunity to hide forbidden goods. One such example is the attempted smuggling of ivory from Somalia to New York using diplomatic bags,\footnote{Peter Smerdon, Kenya to Pursue Alleged U.N. Ivory Smugglers, REUTERS NORTH AMERICAN WIRE SERVICE, Mar. 3, 1995, as quoted in McDonough, supra note 34, at 489.} as some claim that diplomats sometimes use diplomatic bags in order to hide forbidden artifacts,
smuggling them out of the country of origin without permission or knowledge of local authorities.\textsuperscript{110}

These examples of “criminal” smuggling allegedly create the picture that when diplomats are abusing the shield from searches they engage in criminal, rather than terrorist activity.\textsuperscript{111} However, we cannot ignore the fact that there have been suspicions about the use of such immunity for smuggling in weapons. It is reasonable to assume that in the Libyan Embassy case, already discussed, the weapons used were smuggled into the UK, as there have also been suspicions concerning the smuggling of explosives and weapons by Iraqi diplomats into the Philippines.\textsuperscript{112}

The presence of U.N. officials in foreign territories is indeed quite sparse, however it seems that there could potentially be great potential danger of abuses of U.N. immunity by peacekeepers. Although the immunity provided for these peacekeepers originates from Status of Forces Agreements (SOFAs), they enjoy the same type of immunity accorded to U.N. officials, as well as to mission vehicles.\textsuperscript{113} One such general example of abuse are the allegations against U.N. peacekeepers for participating in the trafficking of women into Bosnia.\textsuperscript{114} We cannot of course know if any official vehicles were used for perpetrating these acts, but this seems a pretty viable possibility.

\textsuperscript{113} Tittemore, supra note 49, at 78.
\textsuperscript{114} Murray, supra note 46, 503-506.
There seem to have been no proven incidents of the use of such “shields” from searches by U.N. officials to smuggle explosives, but in light of the recent example of explosives found in a truck (albeit belonging to a Palestinian) carrying humanitarian aid to Gaza, it does not seem to far fetched to assume that such abuse is possible, especially by third parties (without the awareness of U.N. officials or peacekeepers).\textsuperscript{115}

As mentioned earlier, it seems that this is only very anecdotal evidence, and it might be the case that the potential for abuse is usually low. This might lead to the conclusion that the traditional means of combating diplomatic abuse of this kind are sufficient. If we choose to ignore the psychological affects of such breaches of diplomatic immunity,\textsuperscript{116} than if the “traditional means” are adequate there might be no need for finding new mechanisms and violating the immunities from searches.

The question is whether such solutions are complete when the goal is to avoid the smuggling of explosives into the state and preventing threats to its territorial integrity.

The first possible traditional remedy for such abuses could be a diplomatic protest by the host state to the sending state concerning the abuse.\textsuperscript{117} Following the finding that explosives which were used in a terrorist attack were smuggled using diplomatic or U.N. immunity, the host state can send a diplomatic note to the sending state.\textsuperscript{118} This outcome

\begin{footnotes}
\footnote{\textit{Israel Says Finds Explosive Chemicals in E.U. Aid Bags}, \textsc{Reuters}, Dec. 29, 2007.}
\footnote{Which can be extremely negative, if we consider the great public uproar over relatively minor violations of local law. See Zaid, supra note 39, at 625.}
\footnote{This could also be done as a preventive measure, when the host state sends circular notes to the foreign missions to ensure respect for local laws and regulations. One such example is the U.S. State Departments policy of circulating regulations concerning employment of domestic workers by diplomats. See Amy Tai, \textit{Comment: Unlocking the Doors to Justice: Protecting the Rights and Remedies of Domestic Workers in the Face of Diplomatic Immunity}, 16 Am. U.J. Gender Soc. Pol'y & L. 175, 184 (2007).}
\footnote{It should be noted that when violations of diplomatic immunity are concerned, the injured states tend to take much harsher steps, such as the expulsion of the ambassador of the host state by the sending state of the injured diplomat. See Jack L. Goldsmith & and Eric A. Posner, \textit{A Theory of Customary International Law}, 66 U. Chi. L. Rev. 1113, 1155 (1999).}
\end{footnotes}
is of course absurd as it would not do anything to prevent the consequences of the attack, or even serve as a deterrent for such future abuses of immunity.

In the previous section we already mentioned the remedy of “persona non grata”, by which the host state can declare a diplomat as an unwanted person and expel it from its territory. This seems quite a good remedy for expelling a suspected “diplomatic spy”, as the host state does not even have to explain its demand. However, for our purposes, much like the diplomatic protests, it seems to be a pretty much “ex-post facto” remedy with little usefulness or any sense of deterrence.

Other more general traditional remedies include requesting the sending state to waive the immunity of the offending diplomat, or limiting the size and capacity of the mission of sending state. These solutions, like the ones mentioned before, are once again defunct at solving the problem of possible abuse of the immunities from searches by diplomats and U.N. officials.

As we can see from the brief description of the abuses of diplomatic immunity, and the failures of the traditional solutions, there is a need to find a framework to prevent the use of such immunities in order to perpetrate terrorist attacks. However, the fact that the traditional solutions are inadequate does not mean that we can not try and find the basis for solving the problem in the existing mechanisms established by the different conventions, and this would be the focus of the next section.

119 Diplomatic Convention, supra note 11, art. 9.
121 Groff, supra note 10, at 229.
122 Diplomatic Convention, supra note 11, art. 32(1). In any case, such waivers are considered to be rare, see Chanaka Wickermasinghe Immunities of State Officials and International Organizations, in INTERNATIONAL LAW (Malcolm D. Evans, ed., 2nd ed. 2006).
123 Hickey & Fitch, supra note 24, at 377.
IV. Exceptions from International Immunities of International Officials

Like any other kind of immunity, diplomatic or U.N. officials’ immunity is not absolute, and there are some clear exceptions. For example, diplomatic immunity from jurisdiction does not apply when private property, inheritance issues or commercial activity are concerned.124 As already mentioned U.N. and Consular officials enjoy immunity only from legal actions relating to activities performed in the functions of their mission.125

When discussing searches generally, we can identify a similar pattern, as it is very common to find exceptions to the right to privacy, allowing authorities to conduct searches when matters of national security justify doing so.126

This is echoed in the conventions themselves, as the most obvious example is the fact that the Diplomatic Convention allows to inspect the diplomatic baggage when “there are serious grounds for presuming that it contains articles not covered by the exemptions…or articles the import or export of which is prohibited by the law…. Such inspection shall be conducted only in the presence of the diplomatic agent…”.127 Allegedly, this provision could be deemed as enough, at least when diplomats are concerned, for allowing the host state to conduct security searches on diplomatic baggage to prevent the smuggling of

124 Diplomatic Convention, supra note 11, at article 31(1).
125 U.N. Immunities Convention, supra note, 22, at article 18; Consular Convention, supra note 25, art. 43.
127 Diplomatic Convention, supra note 11, art. 37(2).
explosives into the host state.\textsuperscript{128} This also seems to provide a basis for states in deciding to require diplomats to undergo such checkups when boarding airplanes.\textsuperscript{129} However, this solution does not provide us with a remedy for the diplomatic bag,\textsuperscript{130} and also requires the presence of the diplomat at the time of the search. Even if the latter does not seem problematic in itself, security forces are likely to object (especially when vehicle inspection considered) since this would expose security methods.

Another kind of exception to immunity for international officials can be termed as “waiver” exception (briefly discussed in the preceding section), as the basic premise is that since the immunity belongs to the sending state it can waive the immunity of its officials.\textsuperscript{131} This “waiver” exception is of course problematic at best, as it is entirely up to the discretion of the sending state to make the decision to apply it or not.\textsuperscript{132} There are of course some cases when such waiver is perceived to be mandatory as when breaches of international humanitarian law are concerned,\textsuperscript{133} but this is of course not the case here (although the use of diplomats for the purposes of smuggling weapons during war could be considered as such a violation). In other cases, states usually waive diplomatic immunity, in the instances they choose to do so, in cases of a foreign state or diplomatic

\begin{thebibliography}{9}
\bibitem{Denza} Denza, supra note 29, at 220.
\bibitem{UKCircular} As stated for example in the UK Circular Note to foreign missions published in \textit{(1983) 54 B.Y I.L. 439}.
\bibitem{Airport} As it is still enjoys absolute inviolability in airports despite some support for reevaluating this rule and allowing for examination in certain specific circumstances when it is suspected of containing inappropriate materials. See Virginia Morris & M. Christiane Bourloyannis, \textit{Current Development: The Work of the Sixth Committee at the Forty-Seventh Session of the UN General Assembly}, 87 A.J.I.L. 306, 319 (1993).
\bibitem{Mand} Id, id.
\end{thebibliography}
personal facing court proceedings, and never as a general matter, as would be required in our case.

The Secretary General can waive the immunity of the U.N. Allegedly this is could be a very viable solution, since the general requirement is for the U.N. (and the Secretary General) to waive its immunity when its not being asserted in order to fulfill the function of the organization. The Secretary General alone is authorized to make such determination, which is binding on the member states. The problem in our case is that not only that the Secretary General is not likely to view the movement of U.N. vehicles as not a part of fulfilling the function of the missions, but a specific waiver would not be sufficient.

Admittedly, in some cases the U.N., by allowing its vehicles to be inspected, was perceived to agree, albeit for a limited time, that UNTSO (United Nations Truce Supervision Organization) vehicles be searched by Israeli forces in the West Bank and Gaza. In another similar case UNRWA (the United Nations Relief and Works Agency) has agreed to subject its privileges and immunities under the U.N. Immunities Convention to “considerations of military security”. This agreement has been

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134 This is usually done by a declaration by the ambassador of the foreign state. See Andrew B. Pittman, *Note: Ambassadorial Waiver of Foreign State Sovereign Immunity to Domestic Adjudication in United States Courts*, 58 WASH & LEE L. REV. 645, 664 (2001).

135 U.N. Immunities Convention, supra note 22, article 29.


137 Letter sent by the Legal Advisor of UNTSO to the Deputy Commander of the Liaison to the Multinational Force (March 22, 1990), as quoted in Ben Rafael, supra note 26, 110. UNTSO enjoys U.N. immunity, as it was formed by S.C. Res. 49 (S/773), U.N. Doc S/773 (May 22, 1948).

construed by Israeli authorities as allowing border agents (or Israeli soldiers) to inspect UNRWA vehicles at border crossings.\textsuperscript{139}

However these exceptions seem to satisfy the need for examining at least some of the U.N. vehicles in Israel, they of course have no implication to any other kind of U.N. vehicle in Israel or around the world for that matter, and can also not be construed as providing a general waiver of immunity from checkups. It can also be argued the U.N. Immunities Convention requires express waiver (in each and every case the host authorities would like to conduct the checkups), and that this type of advanced “contractual” waiver is invalid.\textsuperscript{140} This corresponds with the more general approach towards waiver of immunity by governments or states (or international organizations), which has to be expressly worded, rendering it impossible to interpret it in any other reasonable way.\textsuperscript{141}

In lieu of generally waiving immunity, which mostly for psychological reasons there is a slim chance would ever occur,\textsuperscript{142} the U.N. has been trying, for the past two decades, to provide assurances for member states that it would provide compensation for damages caused by its officials through insurance schemes.\textsuperscript{143} Even if this could generally help to limit the adverse affects of U.N. jurisdictional immunity, it seems that it would not really help the dilemma we are facing, as it would not prevent potential smuggling of explosives or allow for searching U.N. vehicles.

\textsuperscript{139} Ben Rafael, supra note 26, 114.
\textsuperscript{142} The immunity is perceived essential for the organization’s independence, especially in conflict situations. Singer, supra note 140, 87.
Alongside these exceptions, which can also be termed as “framework” general exceptions to immunity, we can find particular exceptions in the conventions themselves.

The Diplomatic Convention provides three of these exceptions; a real action related to immovable property in the territory of the host state; an action relating to succession in which the diplomatic agent is involved; and an action relating to a commercial or professional activity executed by the diplomatic agent.\textsuperscript{144} Despite the fact that these exceptions are primarily designed to protect the interest of host state,\textsuperscript{145} it is quite clear that these provisions are irrelevant to the question of searches. Also unhelpful in this regard is the clear principle that a diplomatic emissary loses his, or hers, diplomatic immunities once the mission terminates.\textsuperscript{146} It would of course help prosecution (if the diplomat stays in the host country or is tried in absentia), but again not in prevention.

The fact that these exceptions imply that immunity also applies when the diplomat is acting in a private capacity (unless one of the exception applies), reflects the notion that the exceptions are not enough to limit the criminal/potential terrorist activity of a diplomat.\textsuperscript{147} Following this line of thought these exceptions would not allow to search a diplomat, including in cases when he is not performing official duty. Even if we apply a restrictive theory to diplomatic immunity,\textsuperscript{148} and attempt to interpret the convention as limited to the diplomats’ fulfillment the mission,\textsuperscript{149} the diplomatic vehicle would still

\textsuperscript{144} Diplomatic Convention, supra note 11, article 31. 
\textsuperscript{147} Even those who advocate limiting civil immunity for diplomatic personal support providing immunity from criminal prosecution, and presumably from criminal investigation. Id, 698.
\textsuperscript{148} O’Neil, supra note 145, 689.
\textsuperscript{149} This interpretation could be viable if we consider that the preamble to the Diplomatic Convention, supra note 11, explicitly refers to the protection of “the functions of diplomatic missions”. Id, 689-690.
enjoy immunity from search (if it is of course, like the diplomat, registered at the foreign ministry of the host state\textsuperscript{150}, as it is inviolable as the mission premises.\textsuperscript{151}

The same problem applies when considering the “private” exception to immunity of U.N. officials, which, as we remember, is also based on the principles of functional immunity.\textsuperscript{152} Even if the U.N. official is driving the U.N. vehicle while off duty, the “private” exception would not provide the authorities of the host state with the right to examine it at border crossing or an internal checkpoint.

Of all the relevant exceptions, we can mostly benefit from the arrangement provided by the Consular Convention. Despite the fact that it too establishes functional immunity for Consular officials,\textsuperscript{153} and the perception that the protection afforded to diplomatic property is similar to the protection afforded to consular property,\textsuperscript{154} it does seem to establish a viable exception in excluding immunity from searches for the “means of transport” of the consulate.\textsuperscript{155} This supports the notion that consular vehicles can be inspected at road blocks or border checkpoints.

Still, it is unlikely that the arrangements affording immunity from searches for diplomatic and U.N. vehicles would be changed according to the consular model. The analysis of the exceptions from immunity also shows that that the current mechanisms are inadequate in combating the possible threat posed by the general immunity provided for

\begin{itemize}
  \item \textsuperscript{150} A. John Radsan, \textit{The Unresolved Equation of Espionage and International Law}, 28 MICHAEL. J. INT’L L. 595, 621 (2007).
  \item \textsuperscript{152} U.N. Immunities Convention, supra note 22, at art. 18. See also Maginnis, supra note 36, at 1013.
  \item \textsuperscript{153} Consular Convention, supra note 25, article 43.
  \item \textsuperscript{155} The exact wording of art. 31(4) to the Consular Convention is that “its means of transport shall be immune from any form of requisition for purposes of national defense or public utility”.
\end{itemize}
diplomats, U.N. officials (and to some extent consular officials). This is why there is a need to look for alternative mechanisms, and this would be the focus of the next section.

V. Alternative Mechanisms for International Immunity from Searches

When considering changes in the field of diplomatic and U.N. immunity, there is always the argument that despite possible abuse, immunity is an important element in the protection of diplomatic functions and should not be modified.\(^\text{156}\) The supporters of preserving this status quo claim that calling for a change of the current immunities regime would be an overreaction.\(^\text{157}\) In our case this allegedly means that states would refrain from inspecting suspected diplomatic or U.N. vehicles or property, and accept the risks involved.

This could also mean that when faced with emergency situations, the security authorities in the host states are likely to carry on the inspections despite diplomatic or U.N. protests.\(^\text{158}\) This is very similar to the idea of making new customary international law by breaching current international law.\(^\text{159}\) When states feel that the benefits of violating international law outweigh the costs, they sometimes take the risk and act against it.\(^\text{160}\) In 1987, for example, the U.S. Congress considered adopting more flexible

\(^{156}\) Barker, supra note 4, at 243.

\(^{157}\) Zaid, supra note 39, at 629.

\(^{158}\) In the same way that states sometimes violate other diplomatic immunities when faced with security concerns. See for example the capture of U.S. diplomats during the Cold War by the U.S.S.R. due to a suspicion that they were in contact with Soviet dissidents. See E. Michael Myers, UNITED PRESS INTERNATIONAL, July 6, 1984.

\(^{159}\) In a very similar way to how common law is created and dynamically develops. See George Norman & Joel P. Trachtman, The Customary International Law Game, 99 A.J.I.L. 541, 547 (2005).

\(^{160}\) Id, id.
rules for routine searches of diplomats.\textsuperscript{161} However, this does not seem such a viable alternative. Even if we choose not to limit such international legal development to international customary law (as in our case we are concerned with treaty law),\textsuperscript{162} international cooperation in this case, the fact that some states would allow for such inspections,\textsuperscript{163} would not seem to indicate the existence of a new international legal norm.\textsuperscript{164} Admittedly, states could conclude bilateral agreements, which would allow for searches, of diplomatic baggage or vehicles based on the principle of reciprocity. However, if international law currently prohibits such searches of baggage, without serious suspicion, and completely bans searches of vehicles, than such treaties could potentially be considered as violating international law.\textsuperscript{165}

A second alternative, which would be in the framework of the existing conventions, and international legal regimes, is to require the sending state or the U.N. to provide background information on diplomats and U.N. officials to the receiving state.\textsuperscript{166} Since a host state has a right to refuse diplomatic accreditation,\textsuperscript{167} or to accredit U.N. officials,\textsuperscript{168}

\textsuperscript{162} Trachtman, supra note 159, at 547.
\textsuperscript{163} When the consent is given as a general matter, rather than in ad-hoc cases. States do in fact sometimes allow host states to examine the contents of diplomatic cargo in specific instances. See for example the consent by the U.S.S.R. to allow West German customs agents to inspect diplomatic cargo, William Drozdiak, \textit{Dispute Over Truck's Cargo Is Settled in Bonn}, THE WASH. POST, July 24, 1984, at A17.
\textsuperscript{164} As is sometimes the case in other matters of international law. See Jun-shik Hwang, \textit{A Sense and Sensibility of Legal Obligation: Customary International Law and Game Theory}, 20 TEMP. INT'L & COMP. L.J. 111, 129 (2006).
\textsuperscript{165} Watson, supra note 161, at 816 (1994).
\textsuperscript{166} Zaid, supra note 39, at 632.
\textsuperscript{167} The Diplomatic Convention requires the host state consent to the identity of the head of the diplomatic mission, and this implies that the host state can refuse accreditation of diplomats. See Diplomatic Convention, supra note 11, article 4. Article 2 to the Diplomatic Convention stipulates that “The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent”. Usually, accreditation is refused on the basis of political, racial or religious reasons, but we can imagine that prior criminal history could also be viable grounds for refusal. See Geraldo E. Nasciemento, \textit{Diplomatic and Consular Relations, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS} 437, 440 (Mohammed Bedjaoui ed., 1991).
in cases where such background information would arise suspicion the host state could refuse to accept the international official. Although this solution appears to hold some merit, and could potentially prevent the potential danger of using diplomatic immunity to smuggle explosives, it is still rather inadequate. First, this would not prevent third parties from possibly using this immunity for terrorist activity, as it would also be very difficult to predict what kind of criminal history should preclude accreditation, and the sending state is not likely to expose incriminating information.\footnote{\textsuperscript{169}} Secondly, the refusal of diplomatic accreditation could lead to grave disputes between countries, such as the recent example of Switzerland’s refusal to accredit the ambassador appointed by the Commonwealth of Dominica to the U.N. institutions in Geneva.\footnote{\textsuperscript{170}}

The third possible alternative could be to formulate a new convention to regulate the issue of conducting searches of diplomatic, consular or U.N. vehicles and baggage. Such a suggestion was proposed concerning the diplomatic bag. Even though this seems at first glance to be not such a controversial question, despite the fact that the International Law Commission (ILC) worked on the issue for 12 years (from 1977-1989),\footnote{\textsuperscript{171}} the best it could do was to draft an article (as part of a more general convention regulating the matter) providing the host states with the possibility of examining only the consular bag (when there is suspicion for forbidden articles), while the diplomatic bag remains

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\textsuperscript{168} It should be noted that refusing to accredit U.N. officials could be somewhat problematic as the U.N. Immunities Convention provides the officials immunity from immigration restrictions. See U.N. Immunities Convention, supra note 22, article 18(d).

\textsuperscript{169} It would also be hard to believe that states would send diplomats with substantial past criminal histories to serve in foreign states. It could also be that despite a “clean record” diplomat (or a member of the “administrative and technical staff”) would engage in criminal (or terrorist) activities in the future.

\textsuperscript{170} The Commonwealth of Dominica has filed an application to institute proceedings against Switzerland in the ICJ concerning this matter. See Application Instituting Proceedings, Status vis-à-vis the Host State of a Diplomatic Envoy to the United Nations (Commonwealth of Dominica v. Switzerland), 26 April 2006.

}
inviolable in the proposed draft articles. This result is of course highly problematic, as it did not correspond with the states legitimate concerns about the possible abuse of the diplomatic bag. This failed process of changing international law concerning the diplomatic bag indicates how difficult it would be to draft new conventions, or to amend the current one, pertaining to the inviolability of “international” vehicles and personal baggage of international officials.

A fourth possible alternative for possible abuse of inviolability from searches is to mandate sending states to carry insurance for the damages resulting from the activities of the diplomatic (or consular) officials. In the same vein, as already mentioned, the host states could require the U.N. to carry insurance for the damages caused by U.N. officials. This could serve as a prerequisite for any states wishing to conclude diplomatic relations with the host state. In our case, the insurance policy would cover any damages resulting from the smuggling of the explosives into the territory of the host state.

The problem with this alternative is not only that it would not prevent the smuggling of the explosives into the territory of the host state by the international official, or by third parties, but it would also not provide any deterrence from such future acts. In this context it is worth mentioning that any alternative (which would not allow for searches to

174 Farhangi, supra note 15, at 1538.
175 Id. id.
176 Id. id.
177 It seems that only subjecting diplomats to the jurisdiction of an international court could serve as some sort of deterrence. See Groff, supra note 10, at 212.
be conducted) is not likely to achieve deterrence if the international official is willing to sacrifice his own life in committing the act of terrorism.\footnote{178}{It would be of course hard to believe that such possibility exists, but we must remember that in every embassy (consular post or U.N. missions) there are wide variety of officials (of all levels and ranks) and conceivably terrorist organization can recruit them to perform suicide missions. In such a case even imprisonment of the international official for criminal activity would not serve as deterrence. See Stephen L. Wright, *Note: Diplomatic Immunity: A Proposal to Amend the Vienna Convention to Deter Violent Acts* 5 B.U. INT'L L.J. 177, 189 (1987).}

Considering all these alternative mechanism, we seem to have one final possible option, which although not perfect, seems to reflect the necessary balance between preserving the basic ideas of immunity and the need to prevent abuse of the “shield” from searches in entry and exit points and in internal roadblocks.

The basic principle should correspond with the idea, highlighted throughout the paper, that generally diplomats and international officials enjoy immunity from searches under international law (for baggage and vehicles). However, in corresponding with the trend to limit such immunities (exemplified by the exceptions to immunity), this must not be an absolute privilege but only a presumptive one.\footnote{179}{It should be noted that absolute rights are a very problematic legal concept. Even the right to life, conversely the most basic of all human rights, is relative in peace or in war times. See Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 A.J.I.L. 1, 33 (1994).}

Under this proposed alternative security officials of the host state would not be allowed to conduct random searches of baggage and vehicles, unless there is a well founded state of emergency and intelligence info indicating that diplomatic or U.N. immunity from searches would be abused for smuggling explosives.\footnote{180}{This is not to mean that a host country could just claim that it is in a permanent state of emergency (which is a rather problematic determination, especially when it is used to restrict human rights, or in our case international immunities. See Adam Mizock, *The Legality of the Fifty-Two Year State of Emergency in Israel*, 7 U.C. DAVIS J. INT'L L. & POL'Y 223, 245 (2001).} In such cases the security officials must inform the Ministry of Foreign Affairs (or other relevant authorities) in the host state of this need, and it would in turn inform the foreign missions and the representatives
of international organizations of the temporary need for conducting the searches. This would allow international officials to decide whether they are willing to undergo closer scrutiny, or to postpone their entry to the host state (or travel inside the state, in cases of roadblocks). The search would not be conducted in the presence of the international official, as this would be unacceptable to security officials, but it would be conducted as efficiently and quickly as possible.\footnote{This would correspond with the requirement of the Diplomatic Convention, supra note 11, article 25 to “accord full facilities for the performance of the functions of the mission (of the sending state).”} However, the security officials would be under strict orders not to search through any kinds of official documents, in keeping with the strict immunity of mission archives.\footnote{Diplomatic Convention, supra note 11, article 24.}

At first glance, as illustrated by the previous discussions, this alternative could be construed as a breach of international law. Still, a closer glance reveals that if we opt for a purposeful interpretation of the different provisions in the different international conventions,\footnote{This is not a novel idea in national or international law, as the trend is to move away from strict textual interpretation of international instruments towards a more dynamic reading of the legal texts, according to ever changing circumstances. See Thomas M. Franck, \textit{Symposium: UN Reform: Collective Security and UN Reform: Between the Necessary and the Possible}, 6 CHI. J. INT’L L. 597, 603 (2006).} it does correspond with the functional element at the heart of the immunity framework.\footnote{Fernandez v. Fernandez, 208 Conn. 329, 545 A.2d 1036, 1043 (1988).} If the searches would be conducted only on a temporary basis, and in a reasonable matter, it seems that they would cause minimal interference to the function of the international officials and the international missions.

\textbf{Conclusion}

The fear from abuse of international immunities from searches could be dismissed as just another unjustified “agenda” of security officials. It could be argued that the fact that we seldom hear of such incidents renders this problem as insignificant and miniscule.
However, as has been demonstrated throughout the paper, the potential for such abuse (alongside the actual cases of criminal abuse of the immunity from searches) is ever present. At any given moment, numerous of international officials pass through points of entry and exit around the world, and security officials are not allowed to conduct security checks to vehicles or to search the baggage (unless an airport is concerned) or diplomatic bag. Although we can not deny that such immunity is understandable, and as we have seen, well grounded in international treaty and customary law, a balanced alternative must be sought to accommodate the legitimate concerns of security officials and prevent the potential of abusing immunity from searches by international personnel or (and more likely) by third parties.

Looking at the different exceptions from immunity, we saw that in no way are they absolute, as the drafters of the different conventions seem to have understood that even if there is a dire need to preserve the independent function of international officials in host states, they can not be provided with absolute immunity. The analysis of these exceptions provides us with the insight that the international community decided to provide host state with measures to deal with cases of abuse of diplomatic immunity. Still, these measures fail to establish adequate means of preventing the smuggling of explosives, as they tend to be of a punitive, rather than a preventive, nature.

Out of all of the available alternatives, described in the last section of the paper, it seems that the most adequate one is to interpret the different conventions as creating a presumptive, rather than an absolute, immunity from searches of vehicles and baggage of international officials in points of entry into the host state. This presumptive nature would not only preserve the immunity as a general matter, and will not be considered as a
violation of international law, but also addresses legitimate security concerns of the host state, as the threat from new, and unexpected, means of smuggling weapons and explosives constantly looms ahead.