

IMMUNITIES AND PRIVILEGES OF UN AGENCIES IN ETHIOPIA: PROBLEMS AND POSSIBLE REMEDIES

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Abstract

Ethiopia is a host country for more than a hundred diplomatic missions, including United Nations agencies and the African Union headquarters. The missions and their staff are accorded the immunities and privileges under international law or through agreements entered into by the Ethiopian government. As a result, domestic courts are barred from exercising judicial jurisdiction in disputes involving diplomats and officials enjoying immunities. Lack of judicial jurisdiction of persons with immunities and privileges resulted in abuses of the rights of Ethiopian citizens. This creates a vacuum of legal remedy available for individuals seeking justice against unlawful acts committed by persons enjoying immunity. This gave room for unscrupulous officials and staff to engage in unlawful activities to promote their private and personal interests. There has been a rise in the number of incidents involving abuse of rights of persons enjoying immunities and privileges in these missions. The present article deals with abuses of the immunities and privileges of UN agencies and suggests remedies to be undertaken.

Keywords: Immunities and Privileges, UN Agencies, Convention, Mediation, Human rights

INTRODUCTION

The United Nations (UN) is an international organization primarily entrusted with the preservation of international peace and security.¹ Following the end of the Second World War major powers, originally the countries who defeated the Axis Powers, acknowledged the important role that the United Nations (UN) agencies can play in promoting international peace and cooperation. For the fulfillment of its purposes and independent exercise of the functions of its agencies in connection with the organization, the signatories of the UN Charter agreed that the UN shall enjoy in the territory of each of its members such privileges and immunities as are necessary.² The generality of the Charter necessitated a more precise and detailed Convention for practical purposes and this led to the adoption of the Convention on the Privileges and Immunities of the UN in 1946 (hereinafter ‘the General Convention’). Sections 2 and 3 of Article 2 of the Convention state that the premises of the UN shall be inviolable; its property and assets; wherever located and by whosoever held, shall enjoy

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¹ UNITED NATIONS (UN) CHARTER, 1945, Preamble.

² *Id*, Art 105.

immunity from every form of legal process except where in any particular case it has expressly waived its immunity.³ The property and assets of UN shall also be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.⁴ In addition to this, the General Convention obliges State Parties to refrain from exercising judicial jurisdiction on officials and staff of UN agencies.

Ethiopia, as a party to the Convention cannot exercise judicial jurisdiction on UN agencies and their staff who enjoy immunity under the Convention. However, in recent years there have been misunderstandings that resulted in the violation of UN staff privileges and immunities through arrest and detention in many parts of Ethiopia.⁵ As a result, UN staff feels unprotected and think their privileges are being undermined.⁶ On the other hand, the rights of Ethiopian citizens are not protected in their relations with UN agencies and their staff. Based on the Convention domestic courts are barred from adjudicating cases that involve UN agencies. Most Ethiopian nationals has only very limited means of bringing their claim before a judicial forum which is able to issue binding judgments in disputes involving the UN as a respondent.⁷ Such forum is often located outside of Ethiopia and has an arduous procedure.

The immunity and privileges granted to UN agencies by the Convention is functional in nature.⁸ They enjoy the privileges and immunities only for those acts which are closely related to their organizational purpose. However, the extent of their functional immunity and privileges are not clear. The only available convenient legal remedy to Ethiopian claimants is mediation in the Ministry of Foreign Affairs. However, the mediation processes are neither effective nor efficient and does not lead to a binding decision.⁹ This article seeks to review and examine the application of immunities and privileges of UN agencies in Ethiopia. The sources used for the article are both primary and secondary data relevant to investigate various issues through analysis and explanation of legal concepts and court decisions. Primary data was gathered through semi-structured interviews and conventions, treaties, laws, head quarter agreements and court cases are consulted. Secondary data was collected and analyzed from selected literature such as text books, journals, websites, scholarly articles, bar reviews, magazines, reports, news papers and unpublished theses. Court cases and interviewees were selected based on the purpose of the article and relevance to the issue through snowball sampling technique. The article is not concerned with diplomatic immunities and privileges of Embassies and Consular Missions governed by 1961 Vienna Convention on diplomatic relations.

The article is organized in six sections. The first section is on the definition and the theoretical basis of immunities and privileges of international organizations. The origin and

³ CONVENTION ON IMMUNITIES AND PRIVILEGES OF THE UNITED NATIONS, February 13, 1946, Art 2.

⁴ *Id.*, Art. 3.

⁵ UNDSS Report, 2012-2014.

⁶ *Id.*

⁷ August Reinisch, *UN Immunity and Access to Dispute Settlements*, International Law Seminar, Institute of International Law University of Vienna, Fall Semester 2010/11, at 1.

⁸ *Id.*, at 4.

⁹ Yibekal Mekonen, *Application of Diplomatic Immunity in Ethiopia: Problems and Possible Solutions*, Ethiopian Civil Service University, (Unpublished paper) (2014), at 29.

history of immunities and privileges of UN Agencies is the focus of the second section. It is followed by a discussion on the legal frameworks for immunities and privileges of UN Agencies in the third section. Section fourth deals with the types of privileges and immunities and persons exempted and the issues of waiver. Section five narrows down the discussion to the Ethiopian context by identifying problems of implementation of immunities and privileges of UN Agencies in Ethiopia. This is followed by a final discussion in section six on the possible remedies for abuse of immunities and privileges in Ethiopia. The paper closes by providing concluding remarks.

1. IMMUNITIES AND PRIVILEGES IN GENERAL: DEFINITIONAL AND THEORETICAL BASIS

Black's Law Dictionary defines immunity as exemption or protection from an obligation or penalty and a privilege as a special right, advantage, or benefit for a particular person or organization exempting that person or organization from a liability or obligations.¹⁰ When applied to the context of UN agencies, immunities and privileges are exemptions from national jurisdiction granted by host States.

The immunities and privileges of international organizations are recent phenomena and various theories have been developed to explain them.¹¹ The main traditional theoretical justifications for diplomatic immunity are extra-territoriality, personal representation, and functional necessity.¹²

1.1. The Extraterritoriality Theory

The theory of extraterritoriality suggests that the property of a diplomat and the person of the diplomat are to be treated as if they exist on the territory of the sending State.¹³ According to Wanyela, the diplomat legally resides on the soil of the sending State despite the fact that the diplomat lives abroad. Because the diplomat is considered to be living in the sending State, he/she remains immune from the criminal and civil jurisdiction of the host State. It is argued that this theory is ironic since the diplomat would not be immune for the same illegal conduct if committed in the sending State.¹⁴ This theory has been described as a legal fiction and received widespread support from international scholars and judicial opinion. However, recently it has been questioned because it is too expensive, excessive and it unduly prevents host States from restricting the privileges and immunities of diplomats.¹⁵

1.2. The Personal Representation Theory

¹⁰ BLACK'S LAW DICTIONARY, 778 and 587 (8th ed. 2004).

¹¹ Drazen Petrovic, *Privileges and Immunities of UN Specialized Agencies in Filed activity* (Preliminary Paper), (June 25, 2009) Practical Legal Problems of International Organizations, A Global Administrative Law on Public/Private Partnerships, Accountability, and Human Rights, at 1.

¹² Charity Simuli Wanyela, *Diplomatic Privileges and Immunities: A Critical Analysis of the Vienna Convention on Diplomatic Relations (1961)*, (Unpublished LL.M Research Paper, University of Nairobi) (2014), at 6.

¹³ *Id.*, at 4.

¹⁴ Clifton E. Wilson, *Diplomatic Privileges and Immunities*, 1967, at 32.

¹⁵ *Id.*, at 33.

The personal representation theory is premised on the idea that the diplomat is representative of a sovereign of a State - a monarch. As a representative he/she is entitled to the same privileges as the sovereign.¹⁶ This theory enjoyed its greatest popularity in the 18th and 19th centuries.¹⁷ Under this theory the diplomat assumes the role of the sending State or the sovereign power of the State. This theory, like extraterritoriality, is not widely accepted in modern diplomatic practice.¹⁸ It is essentially outdated because many States have done away with their monarchies and sovereignty has been transferred to the people and their elected officials.¹⁹ Since “the people” do not enjoy immunity from prosecution in foreign states, their representatives should not either.²⁰ In addition, the personal representation theory offers no justification for why diplomats should be immune from host State jurisdiction for their private acts.²¹ It also fails to limit the scope of diplomatic immunity; and it is against the very purpose of immunity which is to facilitate international discourse.

1.3. The Functional Necessity Theory

Functional necessity is the most accepted theory for the justification of diplomatic immunity.²² Under this theory, privileges and immunities should be limited to those that are necessary for the diplomat to carry out his/her official functions.²³ The justification for granting immunities to diplomatic agents is based on the need to enable normal functioning of diplomatic missions and diplomats. Indeed, functional necessity theory has been acknowledged in the *Vienna Convention on Diplomatic Relations*, *UN Charter* and the 1946 *Convention on Immunities and Privileges of United Nations*.²⁴

This theory has been proven viable under the 1946 UN Convention.²⁵ While functional immunity is the most accepted theory of diplomatic immunity, it is not without its shortcomings. For example, if functional necessity was fully implemented in the diplomatic context, who determines what, constitutes an official function? Would all official acts be covered?²⁶ Once immunity is limited to covering official acts, would other immunities be further eroded? These are questions that show the limits of the theory. However, it is the best theory so far that presents the best opportunity for limiting diplomatic immunity.²⁷

¹⁶ Joshua D. Groff, *A Proposal for Diplomatic Accountability using the Jurisdiction of the ICC: The Decline of an Absolute Sovereignty Right*, (2000), at 218.

¹⁷ See Wanyela, *Supra* note 12.

¹⁸ See Groff, *Supra* note 16, at 4.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*, at 5.

²² Grant V. Mclanahan, *Diplomatic Immunity: Principles, Problems*, JOURNAL OF AMERICAN LAW, (1989), at 6.

²³ *Id.*

²⁴ Groff, *Supra* note 16, at 216-217.

²⁵ The General Convention, *Infra* note 44, Preamble.

²⁶ Eileen Young, *The Development of the Law Diplomatic Relation*, British Year Book of International Law, (1964), at 141-147.

²⁷ *Id.*

2. THE ORIGIN AND HISTORY OF IMMUNITIES AND PRIVILEGES OF UN AGENCIES

Prior to the end of the Second World War, the concept of privileges and immunities of international organizations was not a widely considered important issue.²⁸ Privileges and immunities were often determined on a bilateral basis through headquarters agreements. It is observed that:

Historically, the present content of international immunities derives from the experience of the League of Nations as developed by the International Labor Organization when submitted to the test of wartime conditions, reformulated in certain respects in the ILO-Canadian wartime arrangements, and subsequently reviewed by the General Assembly of the United Nations at its first session in 1946.²⁹

The development of international organizations did not begin to drastically increase until the post Second World War period.³⁰ The situation created by the Second World War gave new impetus to the development of international organizations leading to the creation of many international organizations such as International Postal Union, ICA, IBRD, IMF, FAO, UNESCO, and WHO.³¹

Diplomatic immunity of officials working in international organizations gave rise to doctrinal confusion because such officials' primary duty was to represent the organization, not their home State.³² The extension of diplomatic immunity to officials of international organisations had a dual effect. First, international officials were susceptible to pressure by their own State to work toward the State's interests rather than the international organizations. Second, the extension of absolute immunity to this category of individuals risked undermining their accountability for private acts.³³ In a bid to clear the doctrinal confusion, the drafters of the UN Charter sought adopted functional immunities and privileges for the organization and its officials which culminated in the adoption of two Conventions in 1946 and 1947.³⁴

The drafting of the Convention on the Privileges and Immunities of the UN was proposed by the Preparatory Commission of the UN.³⁵ The Preparatory Commission recommended to the General Assembly that it should propose such a convention pursuant to articles 104 and 105 of the UN Charter. On February 13, 1946 the General Assembly, on the advice and counsel of the Sixth (Legal) Committee and the Sub-Committee on Privileges and Immunities, adopted Resolution 6 which approved the text of the Convention and proposed it for accession by member States.³⁶

²⁸ See Petrovic, *Supra* note 11, at 3.

²⁹ C.W. JENKS, INTERNATIONAL IMMUNITIES (London, Stevens and Sons, 1961), at 12.

³⁰ See V. McLanahan, *Supra* note 22, at 9.

³¹ *Id.*

³² *Id.*

³³ See McLanahan, *Supra* note 22, at 38.

³⁴ CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF UN SPECIALIZED AGENCIES, 21 November, 1947.

³⁵ See Wanyela, *Supra* note 12, at 3.

³⁶ *Id.*

3. THE LEGAL FRAMEWORKS FOR IMMUNITIES AND PRIVILEGES OF UN AGENCIES

3.1. The United Nations Charter

Soon after the end of the Second World War in 1945, the United Nations was established and it was entrusted with the responsibility “to save succeeding generations from the scourge of war, to reaffirm faith in fundamental human rights and to maintain international peace and security”.³⁷ The UN is the largest global international organization in terms of membership and other considerations. In order to accomplish its objectives the UN set up different subsidiary organs and specialized agencies in addition to its additional principal organs initially established by the charter in accordance with article 7 (2) of the Charter.³⁸

At the time of creation, it was considered necessary that it should enjoy the status of a legal person under domestic law of its member States.³⁹ Acquiring domestic legal personality is critical for the organization to effectively exercise its function.⁴⁰ Due to this, the UN Charter in article 104 provided that “the organization shall enjoy in the territory of each of its member such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purpose”.

These general rules required some more detailed explanation in order to make them practical in helping UN officials as well as national courts to determine whether the UN should be considered capable of entering into a specific legal transaction or is immune from a particular lawsuit directed against it.⁴¹ However, it was unclear to what extent UN officials and member State representatives to the United Nations should enjoy privileges and immunities. In article 105, paragraph 2, the drafters of the Charter opted for a functional concept where it was stated that “representatives of the member of the United Nations and officials of the organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the organization.”⁴²

3.2. The Convention on the Privileges and Immunities of UN Agencies (1946)

Articles 104 and 105 of the UN Charter provide the framework for the development of the privileges and immunities of the organization and its officials. International immunities of UN officials are premised on functional necessity as articulated in article 105(2) of the UN Charter. Including Ethiopia, there are currently 157 states parties to the convention out of 192 members of UN. This Convention sets forth the

³⁷ UN CHARTER Preamble, para.1.

³⁸ Art 7(1) of the CHARTER specifies the initial six organs of the UN.

³⁹ See Reinsch, *Supra* note 3, at 1.

⁴⁰ *Id.*

⁴¹ *Id.*, at 2.

⁴² See Reinsch, *Supra* note 7, at 1.

system of privileges and immunities of the UN organizations.⁴³ Pursuant to article 105 of the UN Charter, the UN Convention, unlike the Vienna Convention, limits the privileges and immunities of UN officials to those that are “necessary for the independent exercise of their functions in connection with the Organization.”⁴⁴ Thus, the theory of functional necessity is carried to its logical conclusion in the UN Convention.⁴⁵ By uniformly applying the functional approach to immunity, the UN Convention prevents officials from abusing immunities for personal benefit.

The main objective of the Convention is to establish a legal framework for protection of immunities and privileges for UN staff.⁴⁶ The purpose of this Convention is to give certain detailed privileges and immunities to the UN as an Organization, as well as to the representatives of Member States, officials and experts on mission for the UN. The privileges and immunities of Member representatives to the principal and subsidiary organs of the United Nations and conferences convened by the United Nations are governed by article IV of the General Convention on the Privileges and Immunities (1948).⁴⁷

3.3. The Convention on Privileges and Immunities of UN Specialized Agencies (1947)

The 1946 General Convention has had a major impact on the development of subsequent treaties dealing with privileges and immunities of international organizations.⁴⁸ On 21 November 1947, the General Assembly approved the Convention on the Privileges and Immunities of the Specialized Agencies.⁴⁹ The Convention entered into force on 2 December 1948 and applies to those UN related international organizations that have entered into special relationship agreements with the UN pursuant to article 63 of the Charter, such as the International Civil Aviation Organization, WHO, FAO, UNESCO, IMF, IBRD and others.⁵⁰ It has a total of 116 State parties. Each State party has to indicate in its instrument of accession the specialized agencies in respect of which it undertakes to apply the provisions of this convention.⁵¹ This Special Convention contains roughly the same provisions on privileges and immunities as the General Convention of the 1946.⁵² Examples of similar privileges and immunities treaties also exist at regional level including the General Agreement on Privileges and Immunities of the Council of Europe, 1949, and the Agreement on Privileges and Immunities of the Organization of American States, 1949 and African Union. Numerous “headquarters” or “seat agreements” have also been influenced by the General Convention.⁵³ Both conventions cover three types of privileges and immunities;

⁴³ *Id.*

⁴⁴ CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS, Feb.13, 1946, 21 U.S.T.1418, 1 U.N.T.S.169 (Hereinafter the General Convention).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Yu-Long Ling, *A Comparative Study of the Privileges and Immunities of United Nations: Member Representatives and Officials with the Traditional Privileges and Immunities of Diplomatic Agents*, (1976) 33 *wash. & Lee L. Rev.* 91), [Http://ScholarlyCommons.Law.Wlu.Edu/Wlulr/Vol33/Iss1/4](http://ScholarlyCommons.Law.Wlu.Edu/Wlulr/Vol33/Iss1/4).

⁴⁸ See Reinsch, *Supra note 7*, at 3.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ CONVENTION ON THE IMMUNITIES AND PRIVILEGES OF THE UN SPECIALIZED AGENCIES, November 21, 1947, No 521, Approved by the General Assembly of the United Nations, Treaty Series 262, (Hereinafter the Special Convention).

⁵² *Id.*

⁵³ See Reinsch, *Supra note 7*, at 4.

those accorded to the organization itself, to representatives of Member States and staff of the Secretariat.⁵⁴

3.4. The Vienna Convention on Diplomatic Relations (VCDR) (1961)

Diplomatic relationship between countries is governed by international law States. The particular legal instrument that governs this relationship is the Vienna Convention on Diplomatic Relations (hereinafter VCDR) of 1961 was signed on April 18, 1961 and entered into force on April 24, 1964.⁵⁵ It is the seminal treaty governing diplomatic relations.⁵⁶ The VCDR contains 53 articles that govern the behaviour of diplomats, and thirteen of which address the issue of immunity.⁵⁷ The preamble of the VCDR endorses the theory of functional necessity.⁵⁸ It states that the purpose of the Convention is “the development of friendly relations among nations, irrespective of their differing constitutional and social systems,” and that the purpose of providing privileges and immunities “is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States”.⁵⁹ While it recognizes that immunity is not for the personal benefit of the diplomat, it stops short of fully adopting the theory of functional necessity.

3.5. The Host Country Agreements (HQA)

Host country agreements are also considered as a legal regime to address problems related to immunities and privileges. In addition to the above conventions, host State agreements signed between each UN organization with host countries are also sources of immunities and privileges for many UN agencies. International organizations lack a territory of their own, and thus; depend on the sovereign State to perform their functions. When a State enters into a head quarter agreement with them, it is allowing the international organizations to operate in its territory. It then follows the hosting State is under obligation to respect the autonomy of the international organization to function in its territory.

4. TYPES OF PRIVILEGES AND IMMUNITIES AND EXEMPTED PERSONS

The first part of the 1946 Convention consists of the so called “standard clauses”.⁶⁰ The Convention sets out the category of persons who have been conferred the privileges and immunities, and types of immunities and privileges. The general Convention provides for immunities and privileges for three categories of persons crucial for the organization such as the organization itself, representatives of member states, UN officials, staff and experts on the missions for United Nations.

⁵⁴ *Id.*, at 5.

⁵⁵ VIENNA CONVENTION ON DIPLOMATIC RELATION, Apr. 8, 1961, 23 U.S.T. 3227, 500 U.N.T.S.95; Lori J. Shapiro, *Foreign Relations Law: Modern Development in Diplomatic Immunity*, 1989 Ann. Surv. Am. L.281, at 295.

⁵⁶ J. Craig Barker, *The abuse of diplomatic Privileges and Immunities: A Necessary Evil?* (1996), at 47.

⁵⁷ See Groff, *Supra* note 16, at 214.

⁵⁸ Leslie Shirin Farhangi, *Insuring Against Abuse of Diplomatic Immunity*, (1986) 38 Stan. L.Rev. pp.1517-1518.

⁵⁹ See Preamble of the VIENNA CONVENTION, *Supra* note 55.

⁶⁰ See CONVENTION ON THE IMMUNITIES AND PRIVILEGES OF THE UN SPECIALIZED AGENCIES, *Supra* note 51, Section 43.

4.1. Types and Nature of Privileges and Immunities

4.1.1. Immunity from Legal Process

The premises and property of the United Nations missions are exempted from search, seizure, confiscation and other forms of interference by the host State. In this regard, article 2 Section 2 of the 1946 Convention sets out that the premises, archive, property and asset of UN missions are immune from every form of legal process.⁶¹ The exemption implies that it is not limited to the member States only. The phrase "wherever located" may denote the extension of this obligation to non-member States.⁶² Furthermore, article 2 section 3 of this convention States the following:

The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whom ever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

This part of the clauses of the Convention was drafted in rather absolute terms. Domestic authorities can exercise their jurisdiction only if the immunity is waived by the organizations.⁶³

The rationale behind these immunities and privileges is to avoid interference by host country besides financial burden by a member State. Consequently, the host country authorities cannot enter the UN premises without the permission of the organization for whatsoever reason. In view of this, the host country is under obligation to protect the premise of the UN from interference or intrusion by third parties or its own agents. Article II, section 4 of the 1946 Convention also provides the inviolability of the archives of the United Nation Organization stipulating that 'the archives of the United Nations, and in general documents belonging to it or held by it, shall be inviolable wherever located'.

4.2. Exemption from Fiscal Regulation

As per article 2 section 5 and 7 of the Convention, UN agencies are exempted from financial regulations of a host country. These privileges and immunities include exemption from direct taxation, custom duties, and import and export restrictions, opening dollar account, and free transfer of funds. The UN can own funds, gold, or currency of any kind, and operate accounts in any currency without being restricted by financial control regulations of a host country. It can also freely transfer from one country to another and convert from one currency to another. In relation to financial restrictions, the host country should ensure that the UN enjoys favorable rates of exchange.⁶⁴ Since the underlying objective of exemption is to prohibit financial burden of the organization, the exemption is also intended to cover the

⁶¹ See the General Convention, *Supra* note 44, Arts 2 (2 & 3).

⁶² *Id.*

⁶³ See Petrovic, *Supra* note 11, at 6.

⁶⁴ See the General Convention, *Supra* note 44, Section 5.

entire fields of taxes including indirect taxes like excise tax, sales tax, VAT, stamp tax.⁶⁵ Moreover, the characterization given to a tax in a particular municipal law system cannot be used to undermine the application of the provision of the Convention on the Privileges and Immunities of the United Nations and must be interpreted uniformly in respect of all member states.⁶⁶ However, the Convention sets out some exceptions for public utility charges.

4.2.1. Freedom of Communications

UN agencies shall enjoy full freedom of communications in the territory of the host country.⁶⁷ For the purpose of communications, the UN receives papers or correspondence by courier or in sealed bags.⁶⁸ Diplomatic immunity also extends to the personal baggage of diplomatic envoys. In this regard, the 1947 Convention refers to international diplomatic law. Consequently, it can be argued that it has to be respected even in the absence of host country agreement on the basis of customary international law. Thus, host country shall not restrict communications. All UN agencies are administered centrally in terms of budget, personnel and humanitarian assistance which require immediate response. These all require the use of advanced technology. In relation to this, various head quarter agreements contain provisions relating to host country protection of the UN's unrestricted freedom of communication.

4.3. Immunities and Privileges Accorded to Representatives of Member States

4.3.1. Immunity from Legal Process

Representatives of a member State who attends a meeting convened by a specialized agency enjoy significant privileges and immunities both during their journey to and from the venue of the meeting, and also while exercising their function.⁶⁹ These include, in particular, immunity from personal arrest or detention and from seizure of personal baggage, and in respect of words spoken or written and all acts performed in their official capacity, as well as immunity from legal process of every kind which includes inviolability for all papers and documents.

4.3.2. Exemption from Fiscal Regulation

The same facilities of organization in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions. The only exception is that, they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from excise duties or sales taxes.

4.3.3. Exemption from Immigration Restrictions, Alien Registration or National Service Obligation

⁶⁵ United Nations, Juridical Year Book, 1964.

⁶⁶ *Id.*

⁶⁷ See the General Convention, Art 3, Section 9 & 10.

⁶⁸ *Id.*

⁶⁹ Members are not bound to guarantee these privileges and immunities to their nationals or representatives.

As per article 4 section 11(d) of the general Convention the representative of a member State in respect of themselves and their spouses, are exempted from immigration restrictions, registration or national obligations in the State they are visiting or through which they are passing in the exercise of their functions. In the event of violation of the privileges and immunities, the traditional diplomatic relations shall apply.⁷⁰

4.4. Immunities and Privileges Accorded to UN Staff

4.4.1. Theoretical and Legal Base

The privileges and immunities which are extended to UN staff is the continuation of autonomy of the UN organization to administer its staff. Since a legal person cannot act without human agency, the privileges and immunities granted to UN agencies are extended to the UN staff and officials. If the personality of staff is violated due to detention, this would affect the normal functions of the organization.

4.4.2. Persons Exempted

All staff irrespective of rank, nationality and place of work, except those employed on hourly basis, without distinction between international staff and local staff benefit from immunity and privileges.⁷¹ A limited category of officials like the UN Secretary General and Assistant and under Secretaries General are accorded the privileges, immunities, exemptions and facilities granted in accordance with the international laws. They enjoy the highest degree of privileges and immunities.⁷²

4.4.3. Immunity from Legal Process

All officials of the organization enjoy functional immunity from legal process in respect of words spoken or written and in respect of all acts performed by them in their official capacity.⁷³ Their personal baggage is also exempted from seizure, search, and they are accorded immunity equivalent to the one granted to a diplomatic envoy. The scope of this immunity does not cease with the cessation of functions.⁷⁴ The officials' family also enjoys immunity from criminal jurisdiction. However, they are not exempted from civil jurisdiction of the host country.⁷⁵

4.4.4. Freedom of Communication, Exemption from Immigration Restriction, Registration or National Obligation

For the purpose of communication with the UN, the United Nations staff uses codes and receives papers or correspondence by courier or in sealed bags. All United Nation Staff are exempted from immigration, taxation, custom duties, currency restrictions, and national

⁷⁰ See the General Convention, Section 11.

⁷¹ See the General Convention, Art 5.

⁷² *Id.*

⁷³ *Id.*, Art 5, Section 18.

⁷⁴ See the 1958 ECA Head Quarter Agreement with Ethiopia.

⁷⁵ *Id.*

service obligations.⁷⁶ The scope of exemption from immigration restriction is also extended to the UN staff's spouses and dependants.⁷⁷ They are exempt from taxation on their salaries and emoluments paid to them by the organization, and have privileges in respect of exchange and repatriation facilities in times of international crises. Officials have the right to import their furniture and personal effects free of duty at the time of first taking up their post in the country in question.⁷⁸

4.5. Waiver of Immunities and Privileges of UN Agencies

As indicated earlier, the true bases for immunities and privileges accorded to UN organizations are that they are necessitated by the effective exercise of their functions. But if its staff involved in legal proceedings, not related to their functions, the UN may waive the above immunities and privileges.⁷⁹ The Convention specially provides the need to cooperate with appropriate authorities of member States to facilitate the proper administration of justice and to prevent any abuse in connection with the privileges and immunities. Immunity from jurisdiction of the host country does not exempt the UN staff from the obligations of respecting national laws and will be liable under the national laws.⁸⁰ If an official's act contravenes the criminal law of host country, such official is required to undergo legal process with adherence of proper procedures of waiver of immunity. For this, the UN agency has to examine whether the alleged act falls within the scope of official duties or not. If the alleged act does not fall within the official duty, the privileges and immunities will be waived. The law enforcing organ, in order to enforce law, seeks the waiver of immunity by making request through the proper channel often through the Ministry of foreign Affairs.

The request for waiver is decided by higher level upon the fulfillment of some grounds for commission of crime. In order to identify the persons who are entitled the privileges and immunities of an international organization, there is an identity card that is issued by the host country.⁸¹ In case where there is imminent and grave danger of public safety, the law enforcing organ may intervene to the extent necessary to stop the commission of such crime. A host country, again issues a distinctive plate for the UN vehicles to assist the law enforcing organ in identifying vehicles which belong to the UN and its officials.⁸² The UN agencies may be required to inform the competent authority in case they want to transfer the plate from the assigned vehicle to another.

4.6. Obligation to offer Alternative Dispute Settlement Mechanism

Article 8 Section 29 of the Convention permits the UN Organization to settle disputes with claimants in host countries. It imposes an obligation on UN agencies to arrange an alternative mode of settlement of civil disputes.⁸³ Section 29 states that:

The United Nations shall make provisions for appropriate modes of settlement

⁷⁶ The General Convention, Art 5, Section 18 (A-G).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*, Art 2, Section 2.

⁸⁰ See *Supra* note 9, at 96-98.

⁸¹ Interview with Ato Esayas Gutta, Director General of Diplomatic Privileges, Immunities and Protocol Directorate of Ministry of Foreign Affairs in Ethiopia, Addis Ababa (November 23, 2015).

⁸² *Id.*

⁸³ See the General Convention, Art 8, Section 29.

of dispute arising out of contracts or other disputes of a private law character to which the United Nations Organization is a party, and disputes involving any official of the United Nations who; by reason of his official position, enjoys immunity, if the immunity has not been waived by the Secretary-General.⁸⁴

This provision obliges the UN to create a platform for dispute settlement with regard to claims of private entities, which would otherwise, due to the absolute immunity of the UN, have no legal means of pursuing their interests.⁸⁵ But here, what does appropriate mode of settlement available for those who are injured is not clear. Although the convention does not specifically provide a mechanism to deal with claims brought against officials who have acted in unofficial capacity, and whose immunity has not been waived. It does not cover in section 29 of the 1946 convention. Thus, under the UN framework, the organization makes settlement available for claimants against UN officials who enjoy immunity.⁸⁶

When a dispute involves a UN official who has acted in a private capacity, waiver is not an issue because the official is in the same position as any other private individual. The objective of this arrangement is to balance immunities of UN against the right to access to justice of claimants. The presence of these alternative modes of settlement of disputes reduces the tension between the organization's enjoyment of immunity and the resulting unavailability of judicial remedies for the settlement of disputes between the organization and other parties. With respect to disputes arising out of contracts, there is a practice of insertion of a standard arbitration clause in such contract. The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules is widely accepted for inclusion in contracts. Tort cases can also be settled with negotiation or mediation without undergoing a host country judicial jurisdiction as it falls under the phrase 'private law character' under the Convention.⁸⁷

4.7. The Extent of Immunities and Privileges of UN Organs

The reason for granting immunities to UN agencies was to enable them to pursue their functions more effectively and to permit organizations to operate free from unilateral control over the organization by the host country. But the question is how we measure the level of immunities and privileges in light of such functional necessity? The powers and limits of UN organs depend on the constitution of the organization in which the member states entrusted to it.

The scope of the organization has been limited in the constitutive document, and thus, it cannot go beyond the limit. The UN defines the limits to their powers and functions either expressly or impliedly while creating its agencies. Thus, a UN agency operates with the ambit of powers and functions given expressly in the constitutive document or inferred from impliedly those powers which are deemed necessarily for the fulfillment of the tasks which have been assigned to it. The test to the extent of privileges and immunities will be whether

⁸⁴ *Id.*

⁸⁵ Difference relating to immunity from legal proceeding of a special reporter of the commission on human rights, advisory opinion of 29 April 1999, I. C. J. Reports, 1999, Para. 66.

⁸⁶ *Id.*

⁸⁷ United Nations General Assembly Resolutions 64/119 of 15 January 2010, 64/233 of March, 2010, and 63/253 of March, 2009.

such privileges and immunities are associated with effective performance of its functions or are only limited to the fulfillment of the purposes of the organization.

5. PROBLEMS IN IMPLEMENTATION OF IMMUNITIES AND PRIVILEGES OF UN AGENCIES IN ETHIOPIA

The immunities and privileges of UN agencies are a long established component of international law that bestows upon staff an immediate exemption from the jurisdiction of local courts and other government systems on their actions as carried out on behalf of their organizations. The formulation of immunities and privileges under the 1946 convention was a vindication of the importance of facilitating peaceful relations between hosts States and UN agencies. While these laws on immunity have been widely accepted as necessary for the conduct of functions, the apparent abuse of this immunity by officials and the apparent lack of countermeasures in this law has fostered a growing debate as to the flaws of the convention and the right to justice of individuals. This part of the article will assess the legal and practical shortcomings in implementation of immunities and privileges of UN agencies in Ethiopia and evaluates available remedies.

5.1. Legal Problems

As already discussed, section 2 & 3 of the Convention bars courts and law enforcement agencies from exercising jurisdiction over cases involving UN agencies. This creates a vacuum of alternative legal remedy available for individuals to seek justice. The inadequacy of the mediation process arranged in the Ministry of Foreign Affairs leads to two legal problems. The first is the absence of domestic immunity act towards international organizations and non domestication of the general convention. Second, it creates some practical problems such as inadequacy of effective and guaranteed alternative dispute settlement mechanisms for claims against staff and officials of the agencies and the tendency of reluctance of international organizations to take the initiative to settle the matter even where they are likely to admit liability.

5.2. Absence of Diplomatic Immunity Act

Ethiopia is a party to the 1961 Vienna Convention on Diplomatic Relations and has signed many host country agreements with UN and its agencies. Ethiopia is among the largest centers of multilateral diplomacy in the world next to Switzerland and USA hosting different diplomatic missions of States and international organizations.⁸⁸ Even though Ethiopia acceded to the 1961 Convention, the country lacks a comprehensive domestic immunity act which governs the relationship between its citizens with diplomatic missions including UN Agencies. A domestic immunity act is very important for countries like Ethiopia to facilitate a smooth relationship with the whole diplomatic community and to solve some legal and practical problems. Legal experts of Ministry of Foreign Affairs acknowledge that the

⁸⁸ See *Supra* note 16, at 11.

absence of a domestic immunity act in Ethiopia is a problem not only for UN agencies but also for other diplomatic missions.⁸⁹

In order to manage and solve cases that arise between diplomats and local claimants, and to protect the fundamental right to justice of Ethiopians, enacting a domestic immunity act is necessary. There is a recent effort by Ethiopian Ministry of Foreign Affairs to prepare a draft proclamation on immunities, but it is not finalized to be adopted by House of People's Representatives.⁹⁰ Some African countries are ahead of Ethiopia in this respect. Kenya and South Africa, already have domestic immunity acts to resolve issues arising with diplomatic missions they host.⁹¹

Kenya is a party to both 1946 Convention on Immunities and Privilege of UN and 1961 Vienna Convention on Diplomatic Relation.⁹² In Kenya, the Immunity and Privileges Act (cap 179) gives the force of Kenyan law to the relevant provisions of the conventions.⁹³ This applies to all foreign diplomatic and consular missions. International organizations like UN agencies negotiate diplomatic immunity and privileges for their staff under special arrangements.⁹⁴ When a dispute arises as a result of abuse of immunities and privileges it shall be solved by negotiation with parties.⁹⁵ Similarly, South Africa had the Diplomatic and Privileges Amendment Act 35 of 2008 and it is a party to the 1946 and 1947 Convention on Immunities and Privileges of UN and its Specialized Agencies.⁹⁶ According to section 24 of the Act when abuse of immunity and privileges materializes consultations shall be held between the South Africa state and the UN agency.⁹⁷

5.3. Problem of Domestication of the Convention

In addition to the lack of domestic immunity act in Ethiopia, there are problems of implementing the existing ratified conventions. As per article 9(4) of Federal Democratic Republic of Constitution, all international agreements ratified by Ethiopia are an integral part of Ethiopian law.⁹⁸ International agreements are signed by the executive branch of the government. But the question is how these international agreements are going to be part of domestic law of the country? The domestication of international treaties in Ethiopia is undertaken in two ways:⁹⁹ The first one is by ratification of the treaties by House of People's Representatives (HPR). Those treaties which impose strong political, economic, security and financial obligations on the country pass through the ratification process.¹⁰⁰

⁸⁹ Interview with Ato Besifat Gashaw and Ato Samson Abebe, Legal Experts at Ministry of Foreign Affairs in Ethiopia, Addis Ababa (November 25, 2015).

⁹⁰ See, *Supra* note 81 and 89.

⁹¹ Kenya Law Reports, Cap 179 Privileges and Immunities Act.

⁹² Kenya Immunity Act, forth schedule, Sections 9 and 11, part 1.

⁹³ *Id.*

⁹⁴ *Supra* note 22, at 15.

⁹⁵ *Id.*

⁹⁶ South Africa, Diplomatic Immunity and Privileges Amendment Act 37 of 2008, 30 October 2009, proc/70/32655/, 2009.

⁹⁷ Diplomatic immunity and privileges Amendment Act 37 of 2008, 30 October 2009.

⁹⁸ CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995.

⁹⁹ Interview with Ato Besifat Gashaw, an officer of International Law Affaires Directorate, in Ministry of Foreign Affairs of Ethiopia, Addis Ababa (March 15, 2016).

¹⁰⁰ *Id.*

The treaties pass through many steps before they become part of Ethiopian law. First the legal experts at the Ministry of Foreign Affairs prepare explanatory notes on the convention; then the Ministry will send the treaty together with the notes to the Council of Ministers. After deliberating on it, the Council of Ministers sends it to the HPR legal standing committee for further debate. Finally upon ratification by the HPR, the ratifying law of the treaty is published on Federal Negarit Gazette proclamation.

The second way of domestication of international treaties is by simple signature. For those treaties which do not carry strong legal and political obligation on the country, they can be part of the law of the country only by signature and does not go through the ratification process of the HPR.¹⁰¹ Agreements to establish diplomatic relations, bilateral trade and loan agreements and host country agreements are the main examples of treaties that do not go through the whole ratification process involving the HPR.¹⁰² These two procedures were not followed in the case of the Convention on Immunities and Privileges Ethiopia acceded in 1947 during the imperial regime. The Convention was not published (domesticated) on the then Negarit Gazette or the current Federal Negarit Gazetta proclamation.

One of the main legal problems in the enforcement of the convention on Immunities and Privileges of UN agencies in Ethiopia is lack of awareness and judicial notice on the Convention by law enforcing organs due to the non-publication of the Convention on the official law Gazzete.¹⁰³ The Convention is deposited in HPR and MoFA is not yet disseminated to justice organs. It is also not translated in to the working languages of local courts. Nor is it published in the Federal Negarit Gazette as prescribed under article 2(2) of the Federal Negarit Gazette proclamation No 3/1995.¹⁰⁴ Since the full text of the General Convention is not published on the proclamation, it is difficult for judges and the public to access it as part of Ethiopian law.¹⁰⁵

Practically, when UN agencies involved in different disputes with local claimants in Ethiopia and sued by individuals before the law courts, they invoke immunity from any legal process by basing their argument on the Convention. However, judges do not have the relevant law at hand and cannot ascertain whether they have immunity or not simply because the Convention is not published in the Ethiopian official law gazette.¹⁰⁶ For the Courts to have a judicial notice on of the 1946 Convention, it needs to be published on Federal Negarit Gazette. Some judges are of the view that perhaps the convention on immunities and privileges of UN agencies was not published on the Federal Negarit Gazette to deny it the status of law of the country.¹⁰⁷

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Supra* note 12, at 30.

¹⁰⁴ A Proclamation to Provid for the Establishment of Federal Negarit Gazeta, Proclamation No 3/1995 (22nd August 1995) 1/1, *Federal Negarit Gazeta* (Addis Ababa), Arts 2 (2) and (3).

¹⁰⁵ See *Supra* note 11, at 156.

¹⁰⁶ *Infra* note 107.

¹⁰⁷ An interview with Judge Girma Gebeyehu, a Supreme Court Judge, in Benshingul Gumuze Regional State, Assosa (February 1, 2016).

5.4. Host Country Agreement Problems

In addition to the 1946 Convention on the Immunities and Privileges of UN, each agency signs a host country agreement with the host state before they enter to the country. When a state enters in to a head quarter agreement with UN agencies, it is allowing the organizations to operate in its territory. Examples of such agreements are the agreement of July 7, 1966 between the office of the United Nations High Commissioner for Refugees (UNHCR) and the government of Ethiopia concerning a regional liaison office for Africa of the High Commissioner in Addis Ababa and the February 26, 1981 agreement between the government of Ethiopia and the United Nations Development Program (UNDP). Pursuant to these agreements, Ethiopia is under obligation to respect the autonomy of the UN agencies to function in its territory. Host country agreements are often signed between international organization and the Ministry of Foreign Affairs or foreign office of the host country.¹⁰⁸

There have been different problems in the application of the immunities and privileges of the staff of the missions of international organisations in different parts of the country. According to United Nation Safety and Security report from 2012 up to 2014, 53 UN staff were arrested and detained by Ethiopian judiciary and law enforcement authorities.¹⁰⁹ An interview conducted with legal officers of United Nation Development Program (UNDP), United Nation High Commissioner for Refugees (UNHCR) and International Organization for Migration (IOM) revealed that arrest and detention of UN staff happened without following the proper procedures.¹¹⁰ The privileges and immunities which are granted to UN are extended to UN staff. In civil cases to be discussed below, courts applied Ethiopian laws on UN System Organizations. The Courts relied on article 70 (1) of the Civil Procedure Code, which allows *ex-parte* hearing. This procedure does not apply to these cases as the issue is not the defendant's failure to appear but rather the immunities and privileges being invoked.¹¹¹

5.5. Lack of Awareness

A major practical problem in enforcement and protection of immunities and privileges of UN agencies in Ethiopia is lack of awareness on immunities and privileges by law enforcing organs like police, prosecutors, courts, and other government organization.¹¹² This is, as discussed above, due to the non domestication of the Convention which led to the violation of the Convention.¹¹³

5.6. Absence of Effective and Guaranteed Dispute Settlement Mechanism

While immunity from any legal processes, the Convention on article 8 sections 29 obliges the UN and its agencies to settle disputes with claimants of host country. It imposes

¹⁰⁸ See *Supra* note 11, at 156.

¹⁰⁹ *Id.*, at 12.

¹¹⁰ *Id.*, at 6.

¹¹¹ *Id.*

¹¹² *Id.*, at 152.

¹¹³ *Id.*

obligation on UN agencies, their officials who enjoy immunity, and host country claimants to settle civil disputes of private law character. The objective of this arrangement is to balance immunities of UN agencies against the right to access to justice of Ethiopian claimants. Judge Girma Gebeyehu¹¹⁴ explains that many individuals are denied their rights from due to the implementation of immunities and privileges of UN agencies in Ethiopia.

Judge Girma, states that many citizens brought their cases before courts to seek justice but courts are barred by the 1946 Convention from exercising cases that involve UN agencies. So, the only option available for them is to seek their claim from UN agencies or officials through mediation processes arranged by the Immunities, Privileges and Protocol Protection Directorate of the Ministry of Foreign Affairs.¹¹⁵ The mediation mechanism is an informal process and lacks legal ground and does not render any written enforceable awards to complainants.¹¹⁶ Mostly tort (compensation), house rent, private employment relations, illegal parking, traffic accidents and tax cases can be settled with mediation without undergoing a host country judicial jurisdiction as these are covered by the phrase *private law character* under the Convention.¹¹⁷

The involvement of the Ministry of Foreign Affairs in settling disputes between UN Agencies and individuals raise different questions. The first one is the legal ground for the Ministry of Foreign Affairs to do such activities? The Ministry is part of the executive branch of the government. However, the issue of resolving individual claims that involve UN agencies and its officials is an issue that falls under the judicial functions of the courts. The Ministry of Foreign Affairs a part of executive is exercising judicial powers and this raises legal and possibly constitutional questions as the powers of the executive and the judiciary is kept separate under the Ethiopian Constitution.¹¹⁸

The Ministry of Foreign Affairs lacks explicit legal basis for mediation processes to solve the disputes. There is no standard and formal procedure for the mediation processes.¹¹⁹ In order to fill the gap created by the absence of any mechanism to provide a remedy to individuals, the disputes resolution takes place using informal processes developed by the practice in the Ministry.¹²⁰ The purpose is to help Ethiopian citizens by a dispute resolution mechanism in the absence of alternative venues or formal court litigation.

On the other side, it is argued that even though there is no direct relevant law on this, the Ministry of Foreign Affairs has the power to do similar activities under the broad powers and responsibilities given to it by Proclamation of Foreign Service No 790/2013 article 3 (7).¹²¹ According to this proclamation, the Ministry has the following power:

¹¹⁴ An interview with Girma Gebeyehu, Supreme Court Judge, Benshangul Gumuz Regional State, Assosa, Ethiopia, May, 2016.

¹¹⁵ See *Supra* note 11, at 153.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ FDRE CONSTITUTION, Art 37 (1).

¹¹⁹ An interview with Ato Samson, *Supra* note 89.

¹²⁰ See *Supra* note 11, at 163.

¹²¹ An interview made with Ato Besifat, *Supra* note 89.

Respond to issues and concerns raised in relation to the implementation of the international and regional human rights instruments ratified by Ethiopia, in consultation, as appropriate, with the relevant executive bodies; preparing the national implementation reports on these instruments, by coordinating the relevant executive bodies and stakeholders, and submit them to the appropriate international and regional bodies.¹²²

The proclamation which provides the power and duties of MoFA No 4/ 1995 article 25 (9) states that, "the Ministry has the duty to ensure the privileges and immunities of foreign diplomatic missions and representatives of international organizations under international law and treaties to which Ethiopia is a party are respected".¹²³

Apart from the lack of formal legal power to mediate the dispute, the other issue is the question of effectiveness and accessibility of the mediation process itself. It is observed that the mediation mechanism is not effective and accessible like court decisions.¹²⁴ It mainly depends on the consent of the immunity holder to respond to the claim. MoFA has no power or administrative mechanism to compel UN agency officials or staff if they are not willing to either respond to or negotiate with claimants.¹²⁵ Since the mediation processes is only found in MoFA main office in Addis Ababa, it is not easily accessible for claimants from different parts of the country outside of Addis Ababa.¹²⁶ The mediation is somewhat led by the Ethiopian Civil Procedure Code but not as such formal. In general, due to the absence of skilled manpower in the mediation processes, absence of cooperation on the side of UN agencies, insufficiency of compensation or redress, lack of awareness by individuals and difficulty to execute the outcome of the case, the mediation processes does not offer effective and efficient remedy for Ethiopian citizens.¹²⁷

6. POSSIBLE REMEDIES FOR ABUSE OF IMMUNITIES AND PRIVILEGES IN ETHIOPIA

6.1. Mediation

The vast majority of protected persons do not abuse their immunity. However, when abuse takes place affecting the rights of individuals, the main available remedy for claimants is the disputes mediation processes in MoFA. The Immunity, Privileges and Protocol Protection Directorate in MoFA is given the task to entertain civil disputes between diplomatic missions and international organizations with Ethiopian citizens.¹²⁸ The mediation process starts when a complainant brings his/her application in written form to the mediation

¹²² *Id.*

¹²³ A proclamation to provide for the definition of powers and duties of the executive organ of the federal democratic republic of Ethiopia, No 4/1995 (23rd August 1995), *Federal Negarit Gazeta* (Addis Ababa) Art 25 (9).

¹²⁴ Interview with Ato Samson and Ato Besifat, *Supra* note 89.

¹²⁵ *Id.*

¹²⁶ See *Supra* note 11, at 145 and 143.

¹²⁷ *Id.*

¹²⁸ *Id.*

section of the Directorate mentioned above.¹²⁹ The written application must be in English and the claimant should state the circumstances giving rise to his claim, the damage sustained, and the nature and amount of the claim. Evidence should also be attached to prove the case.¹³⁰ After receiving complaints, the mediator assesses the claim and the attached evidence, and then, writes a letter to concerned UN agencies or official requesting them to give response on the case. Most of the time, UN agencies are not willing to give response in written form; they prefer to give response orally.¹³¹

The goal is to help Ethiopian citizens to get some sort of redress through the mediation process.¹³² The first attempt is to negotiate and settle the claim amicably with the claimant and if the parties fail to do so, the mediation processes will continue. If the conflicting parties resolve the case, no mediation will take place. However, the conflicting parties sometimes fail to agree. When the two parties cannot resolve the dispute themselves, the mediation section will arrange a schedule to mediate the parties.¹³³ The mediation arrangement is applicable only in civil private law cases since, in criminal cases, they are immune from any legal process by 1961 Vienna convention.

When UN agencies or their officials are sued by individuals in courts, they ask the Ministry of Foreign Affairs to intervene and stop courts from entertaining the case. Then the Ministry writes a letter to courts to close the case which raises the issue of acting against judicial independence.¹³⁴ However, it may be understood that such letters seem to serve only for the purpose of informing the court about the defendant status as an immunity holder. Once the case is thrown out of court for lack of jurisdiction, MoFA will take over and attempt the mediation.

The important question here is what happens if both parties fail to agree by the mediation process?

Often many cases are solved by the negotiation and only few cases are delayed and/or not solved. The mediator cannot give a binding decision when the parties fail to agree but it can propose a solution regarding the amount of compensation and submit its proposal to the directorate of international law affairs in MoFA; it may also refer the case to the Ministry for final decision that may still be difficult to execute. There is no appeal system like court's decision because mediation is like an Alternative Dispute Resolution (ADR) mechanism which results in a win-win solution. The mediation process is not an effective and efficient solution to Ethiopian citizens. However, it is preferred to fill the gap created by the absence of a formal court litigation.¹³⁵

The following cases entertained through mediation illustrate how it is difficult for Ethiopian citizens.

Case 1

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² An interview with Bitannia Tilaye, an officer of International Law Affairs in Ministry of Foreign Affairs, (December 23, 2016).

¹³³ *Id.*

¹³⁴ *Medina Hussein vs. UNHCR*, (Civil File No, 05488 BGRS Supreme Court, January 14, 2015), (UN published).

¹³⁵ See *Supra* note 11, at 155.

Ato Tizazu Tarkgne who was employed as a driver in UNHCR claimed that he was unlawfully expelled from work. He applied to the mediation section of Ministry of Foreign Affairs on September 23, 2014. He requested to get severance pay and compensation as per Proclamation No 377/2003. At the end of the mediation process, UNHCR agreed to pay severance pay only. Hence, the other claims of the claimant couldn't be settled.¹³⁶

Case 2

The International Organization for Migration (IOM) rented a house for office from an Ethiopian woman called Almaz Belay. Once the term of the contract was over, the house was transferred to the owner. However, in her application submitted on 31/5/2013, the owner claims that the organization failed to repair the damages it caused to the house. Moreover, she claimed that due to the damage caused by the IOM, she couldn't rent the house for four months. Therefore, the woman in her application to the mediation section requested a total of 106,517 Birr as compensation from the organization. The mediation section contacted the agency and mediated the two parties to solve the case. However, IOM refused to pay the requested amount of money. Therefore, the owner of the house was unable to get a redress.¹³⁷

Case 3

An official working in UNICEF injured a pedestrian while driving his car. The medical report confirmed that the victim has sustained 20% permanent disability. The victim claims that he has not received a proper treatment and he still suffers from the injury. The insurance company has paid 37,000 Birr for the treatment. However, the claimant insisted that he needs to be compensated for the 20% permanent disability he sustained. The insurance company refused to fully compensate the claimant by asserting that the official caused the damage while discharging his obligation. Therefore, the claimant resorted to the UNICEF official demanding the payment of the remaining compensation. However, the claimant has not been compensated yet because of unwillingness of the official for mediation.¹³⁸

6.2. Requesting for waiver of Immunity

The second mechanism to secure remedy to claimants is waiver of immunity in order to entertain the claim by domestic courts. When UN agency staff committed grave crimes and violated social norms, the Ministry of Foreign Affairs can request UN Secretary General to waive immunity as per article 2 of the Convention.¹³⁹ Waiver is an important mechanism used by the Convention to assure accountability. It adds another layer of protection to potential litigants.¹⁴⁰ They are first protected by the doctrine of functional immunity itself, in addition, waiver is available remedy when justice so requires. Waiver is requested in rare instances but it was not employed due to the reluctance of the Ethiopian government to make the request.

6.3. Declaration of *Persona Non Grata* Principle

¹³⁶ *Id.*, at 140.

¹³⁷ Interview with W/ro Almaz Belay, April,14, 2016.

¹³⁸ Interview with Ato Ayite Abdi, March, 25, 2016.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

The Vienna Convention provides for a host state to declare a diplomat *persona non grata* in the event of grave violations of diplomatic privilege and immunity.¹⁴¹ Usually, grave crimes committed by diplomatic agents and other staff of missions lead to a declaration, if waiver is not granted.¹⁴² If the UN didn't waive the immunity or did not give response to our request, the last measure of the hosting state is to declare the person "*persona non grata principle*"¹⁴³ to expel the official from the country. This principle is not found in the 1946 Convention, but it is found in 1961 Vienna Convention on Diplomatic Relations which got the status of customary international law.

6.4. Adjudication of Abuses of immunity by Courts in Ethiopia

The right of access to justice is a fundamental human right. The effective exercise of this right means, individuals can bring a suit before a court of law to get any remedy. Immunity of UN agencies, however, prevents individuals from getting any kind of remedy from a court of law or administrative tribunal by protecting officials and other staff of agencies from the jurisdiction of the receiving state. The only available avenue for the aggrieved parties is to resort to the MoFA in case of traffic accidents and illegal parking. Recently due to lack of effective dispute settlement mechanism available to claimants, Courts are entertaining disputes that involve UN agencies. Some scholars describe this ongoing process as a "radical approach", because of such Courts gave meticulous consideration to the examination of the human right impact.¹⁴⁴ The judgment in the cases of *Medina Hussein vs UNHCR* and *Alemayhu Olana vs. UNDP* are manifestations of such a human right approach.¹⁴⁵

6.4.1. *Medina Hussein Vs UNHCR*

UNHCR Assosa field office car code No 0583 killed an Ethiopian engineer called Ahmed Sied on 1 August, 2012 on the main road in Assosa town. Due to the death of her husband by the car accident, the deceased's wife, W/o Medina Hussein sued both UNHCR Assosa field office and the driver Ato Tarekegne Teferi jointly and severally at Assosa Zone High Court to pay compensation of birr 2,069,925 for death of her husband. When he died, he was 32 years of age and earns 6899.75 birr per month. UNHCR did not respond to the Court even though it received the summons. The Assosa Zone High Court then proceeded with case in the absence of the defendant as per article 70 of the Civil Procedure Code which allows the ex-parte hearing if it is proved that the summons was duly served to the defendant.¹⁴⁶ Finally the Court on April 8, 2014 gave judgment on UNHCR to pay Birr 666, 331 compensation to Medina Hussein.

On June 5, 2014 Medina Hussein brought her application for execution of the judgment rendered by Assosa Zone High Court by her lawyer based on article 378 of the civil

¹⁴¹ The Vienna Convention, Art 9.

¹⁴² Mekenan *Supra* note 9, at 44.

¹⁴³ *Persona Non Grata Principle* is a Principle under Art 9 of Vienna Convention in which applies in the event of grave Violation of Immunities and Privileges.

¹⁴⁴ Reinisch *Supra* note 7, at 285.

¹⁴⁵ See *Supra* note 12, at 12-13.

¹⁴⁶ See *Supra* note 11, at 135.

procedure code of Ethiopia.¹⁴⁷ After receiving her application for execution of the judgment, the Court orders Commercial Bank of Ethiopia Assosa branch to pay 666, 311 birr to Medina Hussein from deposit account of UNHCR Assosa field office. The bank was not willing to pay the money because the Ministry of Foreign Affairs ordered the bank not to pay the money by official letter. On June 28, 2014 MoFA wrote a letter to the Court which says UNHCR is one of the UN agencies and has immunity and privileges under the 1946 Convention to which Ethiopia is a party. MoFA mentioned that the Court has no jurisdiction to entertain the case brought by Medina Hussein. It also asks orders the Court to stop adjudicating the case by referring to mediation in MoFA.

After receiving the letter, the Court closes the case on October 29, 2014 by majority vote ruling that they are immune from any legal processes based on article 2 (2) & article 8 section 29 of the Convention. On the other hand, the dissenting judge argued that it is against the fundamental human right to fair trial and the right to justice enshrined in article 37 (1) of FDRE Constitution. W/o Medina Hussein brought her appeal to the Regional State Supreme Court that struck the decision of the majority vote of the High Court and rendered a judgment favouring the dissenting judge's opinion on January 14, 2015. The Supreme Court reasoned that even though UN agencies are immune from any legal processes by the Convention, the purpose is not to deny justice and effective remedy available to an Ethiopian citizen. The bank was not willing to pay the money from UNHCR deposit account. The Assosa High Court continued the execution process passing a six month imprisonment on the Manager of the bank for his reluctance to honour the Court's instructions.

Finally the Court ordered a UNHCR car to be sold by public auction to pay for the compensation. Then UNHCR started to negotiate with W/o Medina Hussein to pay the money and finally agreed to pay the money without even the need to go back to MoFA for the mediation process.

Despite the apparent lack of jurisdiction to adjudicate the case, the national court used a strong reasoning applying the law of the land in particular the supreme law, the Constitution to enforce the rights and protection that a citizen is entitled. From this judgment, we can understand that the Court gave precedence to the citizen's fundamental right to justice over the immunity of UNHCR. This is a rare case of judicial activism in Ethiopia and what makes it interesting is that it is just a regional court that gave a decision that could serve as a precedent for the whole country. The Court's decision is in line with the functional theory of immunities and privileges that the UN itself espouses. The lessons from this case will reverberate not only at the national level but right through the UN system itself. The willingness of the UNHCR to settle the matter without any further procedure indicates that the UN agency has learned the lessons.

6.4.2. *Alemayheu Olana Vs UNDP*

An Ethiopian employee of the UNDP, Ato Alemayheu Olana, was unlawfully fired from his job in 2013. He initiated his case to Yabelo Wereda Court and claimed to be reinstated to his job, get severance payment, compensation and certificate of work as per the Labor

¹⁴⁷ *Id.*

Proclamation No 377/2003.¹⁴⁸ The Wereda Court rendered decision in favor of him in the absence of UNDP to return him to his job and to be paid different payments according to the Labor Proclamation. He applied for the execution of the decision by the Wereda Court. However, the Wereda Court finds out that it has no jurisdiction to entertain the case dismisses the case by invoking article 2 (3) of the 1946 Convention. Ato Alemayehu Olana brought his appeal to the Borena Zone High Court but, the court declines his appeal by confirming the decision of the Wereda Court. Then, the case was brought to the Cassation Bench of Oromia Supreme Court. In his petition, Ato Alemayehu Olana argued that a fundamental error of law has been committed by the lower courts. The Cassation Bench confirmed the ruling given by the Borena High Court rejecting his petition.

Finally Ato Alemayehu brought the case before the Cassation Division of the Federal Supreme Court in 2014 arguing that, though UN agencies are immune from any legal process, it will be against the Constitutional right to justice when they invoke the immunities and privileges without any recourse to a dispute settlement mechanism either within the UNDP itself or with the intervention of a third party like the one provided by MoFA. The Court rejected the petition and confirmed the judgment of the lower Courts on November 19, 2015. The Cassation Division reasoned that, UN agencies are immune from any legal processes by the 1946 Convention to which Ethiopia is a party. The Division decided that employment relations between Ethiopian citizens and foreign diplomatic missions or international organisations operating within the territory of Ethiopia is not governed by the Labor Proclamation as per article 3 (3) (a).¹⁴⁹ However, the decision emphatically advised that to avoid injustice to Ethiopian citizens, there is a mediation arrangement in MoFA and the petitioner Ato Alemayehu should avail himself of this procedure.

Following the rejection of his petition by the Cassation Division of the Federal Supreme Court, Ato Alemayehu resorted to the Ministry of Foreign Affairs mediation section for negotiation with UNDP. He brought the case to mediation section by stating that he was unlawfully fired from his work and seeks to get severance pay, compensation, and unpaid salary of seven months.¹⁵⁰ After prolonged negotiations, UNDP was willing to pay 20,000 Ethiopian birr only.¹⁵¹ After he exhausted his options to protect his right to justice, Ato Alemayehu was dissatisfied with the decision of Courts and the outcome of the MoFA mediation.

Ato Alemayehu was not willing to give up on his quest for justice. He pursued the case to the highest organ in the country that is entrusted with the interpretation of the supreme law of the land - Constitutional Inquiry Commission in House of Federation. In his application he pointed out that he is denied his Constitutional right to get justice and fair trial in Ethiopia under article 37(1) of the FDRE Constitution on the excuse of the immunity of UN agencies.¹⁵² Ato Alemayehu argued that the decision of courts and the mediation process

¹⁴⁸ *Alemayehu Olana vs. UNDP*, (Federal Supreme Court Cassation Division, November 19, 2014), Federal Supreme Court Cassation Division, Vol. 17, P. 258

¹⁴⁴ The Labor Proclamation No, 377/2003, (26th February, 2004), Federal Negaret Gazeta (Addis Ababa).

¹⁴⁹ *Id.*, Art 3(3) a.

¹⁵⁰ See *Supra* note 11, at 152.

¹⁵¹ *Id.*

¹⁵² *Id.*

in MoFA are unconstitutional. The issue is currently pending in House of Federation of Ethiopia and will certainly be a landmark case when concluded.¹⁵³

6.5. The Implication of Adjudication of Disputes Involving UN Agencies by Courts

UN agencies are under obligation to provide a dispute settlement mechanism to local claimants as per section 29 of the Convention. In the absence of internal dispute settlement mechanism within the agencies and ineffective and gratuitous mediation to Ethiopians, seeking redress against UN agencies in courts is currently a costly if not unsuccessful attempt. Without a check on the immunities and privileges of the agencies, it leads to a system of absolute immunity, which is not in line with the functional theory of immunity that underpins the immunity of UN agencies. In the above two cases, both UNDP and UNHCR neither agency provided an internal alternative dispute settlement mechanism nor did they otherwise deal with the claims before them as required in the Convention though these remedies are available theoretically.

This ongoing development in Ethiopian courts regarding the application of UN agencies immunity demonstrates that the right of local claimants is evolving away from absolute immunity. It is further shifting towards the position that the availability of dispute settlement mechanisms should be guaranteed to claimants. The choice of courts as venues for disputes settlement of Ethiopian claimants seeking relief from UN agencies will probably lead to stretching the law too far.¹⁵⁴ However, it is remarked that reasonable protection of the weaker individual against overwhelmingly powerful entities like UN agencies is also the principle and purpose of the UN itself and this neither be underestimated nor fully forgotten. As discussed above in relation to the case of W/o Medina Hussein, the appropriation of jurisdiction by domestic courts sends a strong message to the UN system and it might as well expedite the ongoing review process within the UN agencies about providing effective legal remedies for non-staff members and perhaps extending to all local claimants.¹⁵⁵

6.6. Availability of UN Internal Dispute Settlement Mechanisms

UN agencies are obliged under Section 29 of the Convention to provide alternative dispute settlement mechanisms to individuals for the purpose of countering lack of judicial redress which arises in connection with the immunity of UN agencies and their staff. A considerable part of the claims lodged against UN agencies are employment related claims, i.e. claims by UN personnel against the UN agencies as employers. In order to accord this group of individuals with a method of dispute settlement, an internal judicial system was created.¹⁵⁶ However, it is important to note that these internal dispute settlement mechanisms are only accessible to staff members of UN agencies. The reason why the internal justice system is only available to staff members is primarily a question of funding.¹⁵⁷ The legal

¹⁵³ *Id.*

¹⁵⁴ An interview with Ato Asrat Babile a private advocate, in Benishagul Gumuze Regional State Assosa, February 15, 2016.

¹⁵⁵ *Id.*

¹⁵⁶ Establishment of a United Nations Administrative Tribunal, A/RES/351(IV) of 24 November 1949.

¹⁵⁷ Establishment of a United Nations Administrative Tribunal, A/RES/351(IV) of 42 November 1949, Statute of the Administrative Tribunal of the United Nations, Art 2.

officers at UNDP, UNHCR and IOM explain that all UN agencies in Ethiopia have internal dispute settlement mechanisms available for internal staff only.¹⁵⁸ The only available dispute settlement mechanism for non-staff members is ad hoc arbitration tribunals with limited scope covering only some commercial and contract issues.¹⁵⁹ Until July 2009, the UN Administrative Tribunal (UNADT) assumed jurisdiction over disputes between staff members and the administration. The UNADT's statute did not encompass jurisdiction concerning non-staff members.¹⁶⁰ In some cases, the tribunal assumed jurisdiction because non-staff members had no other means of remedying their claims.

In July 2009, a new two-tiered internal justice administration mechanism replaced the UNADT. The United Nations Dispute Tribunal and United Nations Appeal Tribunal were created establishing a faster, cheaper and more flexible system.¹⁶¹ This change effectively narrows the scope of jurisdiction in comparison to former system with regard to non-staff members. This is true because the assertion of the United Nations General Assembly concerning the restrictive interpretation of the statute has led the newly created tribunals to reject all claims of non-staff applicants.¹⁶² Arbitration is the only recourse to justice of non-staff members of UN agencies. This leaves non-staff members with limited possibility to approach possible conflicts with the administration of UN agencies.

CONCLUDING REMARKS

In the past, the immunity of UN agencies was regarded as absolute and unchallengeable. However, a slow and creeping process has changed the general understanding of the immunity from absolute to relative upon certain criteria. An important role in understanding this process is the fact that the drafters of the Charter envisioned the UN's immunity to be of only functional nature. In the ensuing process of specification which was inherent to the establishment of the UN, the immunity changed to become of *de facto* absolute nature. While this view is still respected in some jurisdictions and forms the basis of some judgments, the prevailing view today is based upon the consideration of human rights, especially the individual right to judicial redress and the right of due process.

As the seat of the political capital of Africa and a host country of different diplomatic missions, it is necessary for Ethiopia to have a comprehensive immunity act that regulates and supports a smooth relationship with diplomatic missions. A host country is under obligation to respect the autonomy of the international organizations once it has concluded a treaty that permits the presence of the organizations in its jurisdiction. However, implementation of immunities and privileges of UN agencies in Ethiopia has led to a number of legal and practical problems. The problems are compounded by the lack of awareness on the Convention and Head Quarter Agreements (HQA) by justice organs and other administrative bodies, non-publication of the conventions and HQA to have judicial notice and absence of an effective dispute settlement mechanism for claimants. The infringement of

¹⁵⁸ See *Supra* note 11, at 149.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Administration of justice at United Nations, A/RES/61/261 of April 2007.

¹⁶² Administration of Justice at United Nations, A/RES/63/253 of 17 March 2009, Annex I, Statute of the UNDT, Art 3.

human rights as a result of the application of the immunities and privileges is an issue that should be resolved by the UN itself and is not to be left to host countries alone.

The mechanisms used in Ethiopia to secure an effective remedy to claimants, including the mediation in MoFA are inadequate. The reluctance of the national judiciary to challenge the UN's once undisputed immunity is now showing signs of change. The process of judicial reform within the UN agencies has gained considerable momentum and that seems to have been partly inspired by the challenges from the national judiciary. However, the status quo being that non-staff members may only seek legal recourse through rather costly arbitration proceedings, it can't be expected that the "*radical approach*" of some national courts will bring about an abrupt change. Rather, it should be expected that courts will continue to hold in favor of individuals who otherwise would be confronted with the denial of justice. It is also possible that national courts will continue to erode the UN's immunity in favor of further enhancing the chances for judicial redress for individuals.

Ethiopia, in collaboration with other countries, should diligently push for the reform of the Convention to ensure that immunities and privileges will not be open for abuse leading to the denial of the rights of citizens of the host countries. Ethiopia should actively participate in multilateral forums that work on the review and amendment of the general Convention to uphold the principles that the UN and host countries declare to promote: the respect for human rights including the right of access to justice.