

Journal of Legislation

Volume 16 | Issue 1

Article 7

1-7-1990

Diplomatic Immunity and Diplomatic Crime: A Legislative Proposal to Curtail Abuses; Note

Ali M. Farahmand

Follow this and additional works at: <http://scholarship.law.nd.edu/jleg>

Recommended Citation

Farahmand, Ali M. (1990) "Diplomatic Immunity and Diplomatic Crime: A Legislative Proposal to Curtail Abuses; Note," *Journal of Legislation*: Vol. 16: Iss. 1, Article 7.

Available at: <http://scholarship.law.nd.edu/jleg/vol16/iss1/7>

This Note is brought to you for free and open access by the Journal of Legislation at NDLScholarship. It has been accepted for inclusion in Journal of Legislation by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

DIPLOMATIC IMMUNITY AND DIPLOMATIC CRIME: A LEGISLATIVE PROPOSAL TO CURTAIL ABUSES*

INTRODUCTION

There are few areas of the American justice system in more desperate need of reform than its method of dealing with the legal abuses of persons protected by diplomatic immunity. The time has come for the United States to take a strong moral stand and put an end to this era of flagrant abuse of diplomatic privileges by substantially changing the law of diplomatic immunity. It can be done. The timing is perfect, and the United States has the mechanisms to reform its system.¹ Diplomatic immunity has been a perennial problem in Washington, D.C., and New York, and has involved everything from traffic and parking violations to assault, rape and murder.²

One particularly egregious example occurred in Washington, D.C., on the morning of February 13, 1987. A car driven by the ambassador from Papua New Guinea crashed into four parked cars and seriously injured Stephen Hagan, a twenty-six year old radio newsman, who was sitting in one of the cars.³ A friend of Hagan's, seated next to him in the automobile, also sustained minor head injuries.⁴ A preliminary review indicated that the ambassador was drunk at the time of the accident.⁵ The police and State Department officials stated that the city could not prosecute the ambassador because he had diplomatic immunity.⁶ Consequently, the ambassador returned home without receiving punishment for his reckless disregard of American law.⁷ This is only one of many examples of the often outrageous crimes that diplomats commit every day, both in the United States and abroad.⁸

This note examines whether the age-old theories behind diplomatic immunity have kept pace with the realities of modern diplomacy. In doing so, this note

* The author wishes to give special thanks to Professors Barbara J. Fick and Tang Thi Thanh Trai Le of the Notre Dame Law School for their guidance in writing this piece.

1. C. ASHMAN & P. TRESKOTT, *DIPLOMATIC CRIME: DRUGS, KILLINGS, THEFTS, RAPES, SLAVERY & OTHER OUTRAGEOUS CRIMES* 347 (1987).

2. *Id.*

3. *Envoy's Car Slams into 4 Vehicles*, Wash. Post, Feb. 14, 1987, at B1, col. 6; Caplan, *Crash of Envoy's Car Focuses Attention on International Law*, Legal Times, May 4, 1987, at 20.

4. Wash. Post, Feb. 14, 1987, *supra* note 3, at B1, col. 6.

5. *Id.*

6. *Id.*

7. *Papua New Guinea Recalls Diplomat*, Wash. Post, Feb. 21, 1987, at B1, col. 1. James E. Nolan, director of the State Department's Office of Foreign Missions, stated that his aides had contacted the U.S. attorney's office after the accident "to urge a complete investigation" and to notify government prosecutors of "the potential for bringing charges" despite the ambassador's diplomatic immunity under international law. Nolan added that this intervention was due to the State Department's policy of notifying local law enforcement officials of government interest in a thorough investigation in cases of serious violations of U.S. law by foreign diplomats. *Id.*

8. C. ASHMAN & P. TRESKOTT, *supra* note 1, at 1.

pays particular attention to the criminal aspect of abuses of diplomatic immunity. The note first examines the history of diplomatic immunity and outlines the theories behind this doctrine. Next, the note analyzes the current abuses of this doctrine in order to demonstrate the severity of this problem. Finally, the note looks at the relationship between domestic law and international law and proposes model provisions to guide legislators in their efforts to adequately balance the rights of American citizens and the necessities of international diplomacy.⁹

I. HISTORY OF DIPLOMATIC IMMUNITY

Diplomatic immunity, a fundamental principle of international law, shields members of a diplomatic mission and their families and servants from a state's legal process.¹⁰ This shield consists of the freedom from local jurisdiction as accorded under international law.¹¹

Diplomatic immunity is among the most ancient doctrines of international law.¹² It arose because, during the periods of both peace and war, protecting the rights of international representatives was vital for preserving the lines of international communication.¹³ Initially, the practice of stationing diplomatic representatives abroad developed under the Roman states, the Asian states, the Greek city-states, and the Islamic countries of West Asia.¹⁴ These ancient governments sent proxies to represent their nations on a nonpermanent basis, and, while in residence, these envoys enjoyed complete personal inviolability.¹⁵ The modern body of diplomatic privileges and immunities is a product of the establishment of permanent diplomatic missions.¹⁶ As the maintenance of permanent diplomatic missions became advantageous, the law of diplomatic privileges and immunities remained customary.¹⁷ Changes in the law only began to appear in the late nineteenth century.¹⁸ Many countries signed treaties with respect to their diplomatic relations, but these treaties did not give any long-range, comprehensive guidelines.¹⁹ In 1924, the League of Nations recognized that diplomatic privileges

-
9. Caplan, *supra* note 3, at 21. The legislators must be aware of the fear of reciprocal actions against American diplomats abroad. The possibility of retaliatory actions against American diplomats could easily frustrate the effectiveness of U.S. diplomatic missions.
 10. C. WILSON, *DIPLOMATIC PRIVILEGES AND IMMUNITIES* at vii (1967). Comment, *A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978*, 54 TUL. L. REV. 661, 662 (1980) [hereinafter *New Regime*].
 11. LIBRARY OF CONGRESS, *HISTORY OF THE CONCEPT OF DIPLOMATIC IMMUNITY*, reprinted in *REPORT ON LEGISLATIVE HISTORY OF THE DIPLOMATIC RELATIONS*, 96th Cong., 1st Sess. 12 (1979). See also Comment, *Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations*, 7 LOY. L.A. INT'L & COMP. L. J. 113 (1984) [hereinafter *Diplomatic Immunity from Criminal Jurisdiction*].
 12. C. WILSON, *supra* note 10, at vii (Preface).
 13. *Id.* at 1.
 14. B. SEN, *A DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE* 3-4 (1965); see also Comment, *State-Sponsored Terrorism: Libya's Abuse of Diplomatic Privileges and Immunities*, 5 DICK. L. REV. 133, 136 (1986) [hereinafter *State-Sponsored Terrorism*].
 15. B. SEN, *supra* note 14, at 10.
 16. Young, *The Development of the Law of Diplomatic Relations*, 40 BRIT. Y.B. OF INT'L L. 147 (1964).
 17. See generally B. SEN, *supra* note 14, at 23.
 18. Young, *supra* note 16, at 150.
 19. *Id.* at 157.

and immunities required international regulation or control; however, no action was taken.²⁰

Finally, in 1961, the United Nations codified the customary international law regarding the privileges and immunities of diplomatic agents in the Vienna Convention on Diplomatic Relations ("Vienna Convention").²¹ The Vienna Convention incorporated clearly established rules of diplomatic immunity and added to established law by filling in any gaps where international practice was uncertain or inconsistent.²² The Vienna Convention is a comprehensive multilateral codification of the privileges and immunities extended to members of permanent diplomatic missions and their families, and constitutes the modern law of diplomatic privileges and immunities.²³ The Vienna Convention is universally accepted as the binding international law of diplomatic relations. The Convention extends the same privileges and immunities to nonsignatory nations as to signatory nations.²⁴

II. THE THEORIES UNDERLYING DIPLOMATIC IMMUNITY

Legal scholars have offered many theories to justify diplomatic immunity. For example, at one time diplomatic immunity was justified as a consequence of the "Sacredness of Ambassadors."²⁵ This justification is no longer valid, since bare status will not protect individuals from the consequences of their actions.²⁶ In addition to the "Sacredness of Ambassadors" theory, the most prominent theories underlying diplomatic immunity have been the following: (1) personal representation, (2) extritoriality²⁷ and (3) functional necessity.²⁸

-
20. LIBRARY OF CONGRESS, *supra* note 11, at 14. See *State-Sponsored Terrorism*, *supra* note 14, at 137.
 21. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 [hereinafter Vienna Convention]. The United States ratified the Vienna Convention on September 14, 1965; the ratification was deposited on November 13, 1972, and the Vienna Convention entered into force in the United States on December 13, 1972. The U.S. Senate's ratification appears at 111 CONG. REC. 23,773 (1965).
 22. E. DENZA, *DIPLOMATIC LAW* 1 (1976).
 23. E. SATOW, *SATOW'S GUIDE TO DIPLOMATIC PRACTICE* 106 (5th ed. 1979).
 24. As of December 31, 1977, 127 states had deposited instruments of ratification of or accession to the Vienna Convention with the U.N. Secretary General. United Nations Multilateral Treaties: List of Signatures, Ratifications, Accessions as of December 31, 1977, U.N. Doc. ST/LEG/SER.D/11 51 (1977). Currently, as of March 31, 1989, 152 nations have ratified or acceded to the Vienna Convention. Telephone interview with Evelyn Kiss, Legal Assistant, International Law, Treaty Section, Depository Functions Division of the United Nations (Mar. 31, 1989); see E. DENZA, *supra*, note 22, at 135. Note, *The Diplomatic Relations Act: The U.S. Protects Its Own*, 5 BROOKLYN L. REV. 379, 384 (1979).
 25. H. GROTIUS, *DE JURE BELLI ET PACIS* 201 (W. WHEWELL trans. 1853). Grotius is recognized as the father of international law, and in his 1625 publication, *DE JURE BELLI ET PACIS*, he stated: "There are two maxims in the law of nations relating to ambassadors which are generally accepted as established rule: The first that ambassadors must be received and second that they must suffer no harm." *Id.* at 203. See also *Diplomatic Immunity from Criminal Jurisdiction*, *supra* note 11, at 664.
 26. See Lauterpacht, *The Codification of the Law of Diplomatic Immunity*, 40 THE GROTIUS SOCIETY 65, 71 (1954).
 27. The terms "extritoriality" and "extraterritoriality" have traditionally been used interchangeably when referring to this theory of diplomatic immunity. However, the more cumbersome of the two terms, "extraterritoriality," is becoming obsolete and the modern trend is toward use of the shorter version, or "exterritoriality." C. WILSON, *supra* note 10, at 5.
 28. *Id.* at 1. See also M. OGDON, *JURIDICAL BASES OF DIPLOMATIC IMMUNITY* 63-194 (1936)(for a detailed and excellent discussion of the development and status of these three theories).

The personal representation theory was very popular during the eighteenth and nineteenth centuries.²⁹ Under this theory, the diplomat is considered the "alter ego" of his ruler;³⁰ therefore, he enjoys the rights and privileges that would be accorded to his ruler by the receiving state.³¹ Scholars no longer consider the personal representation theory to be a valid justification for diplomatic immunity.³² The theory has been sharply attacked for being too broad, thereby placing the diplomat beyond the receiving state's law.³³ In addition, the theory is inadequate to determine the extent of immunities within modern systems of governments,³⁴ because the theory provides full immunity for any personal representative of the sending states without considering the scope of their authority within the receiving state. Lastly, the scope of the personal representation theory is too broad, since it does not distinguish between the private and the official acts of diplomats.³⁵

The exterritoriality theory was also used during the eighteenth and nineteenth centuries to justify diplomatic immunity.³⁶ This theory refers either to the concept of residence or to the concept of territory.³⁷ The rationale behind this theory was that a diplomat should be considered within his home state's territory because

29. M. OGDON, *supra* note 28, at 63-67. See Note, *The Diplomatic Relations Act of 1978 and its Consequences*, 19 VA. J. INT'L L. 131, 132 (1978) [hereinafter *Consequences*].

30. C. WILSON, *supra* note 10, at 3. *Bergman v. de Sieyes*, 71 F. Supp. 334, 341 (S.D.N.Y. 1946), *aff'd*, 170 F. 2d 360 (2d Cir. 1948). In *Bergman*, the court stated, "[A] foreign minister is immune from the jurisdiction, both criminal and civil, of the courts in the country to which he is accredited, on the grounds that he is the representative, the *alter ego*, of his sovereign who is, of course, entitled to such immunity" (emphasis added).

31. *Holbrook v. Henderson*, 4 Sand. Ch. 619, 628 (1839). In *Holbrook*, the court stated, "[T]he respect rendered the minister is not personal, merely, but is in truth, the respect due from one sovereign to another. . . ." *Cf.* *The Schooner Exchange v. M'Fadden*, 11 U.S. (Cranch) 116 (1812). In *The Schooner Exchange*, Chief Justice Marshall stated the rationale for the personal representation theory: "The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. . . ." *Id.* at 138.

32. C. WILSON, *supra* note 10, at 4.

33. RIEFF, *DIPLOMATIC AND CONSULAR PRIVILEGES, IMMUNITIES, AND PRACTICE* 26 (1954). Note, *Terrorist Kidnapping of Diplomatic Personnel*, 5 CORNELL INT'L L.J. 189, 198 (1972) [hereinafter *Terrorist Kidnapping*].

34. In the modern democratic nation-state, the authority is vested in the people and this authority is shared by the executive, legislative, and judicial branches. Therefore, under the personal representation theory, it is difficult to assess the status of a diplomat. C. WILSON, *supra* note 10, at 4. In addition, the United States did not have any ambassadors until the late nineteenth century since "there was the feeling that ambassadors, personal representatives of monarchs, ill-befitted the simple social democracy of America." M. OGDON, *supra* note 28, at 144.

35. Preuss, *Capacity for Legation and the Theoretical Basis for Diplomatic Immunities*, 10 N.Y.U.L.Q. REV. 170, 179-181 (1932). Professor Preuss reasoned that the personal representation theory offers no theoretical basis for exemptions enjoyed by diplomats for their private acts. Commentators tend to agree that the primary purpose of diplomatic immunity is to facilitate international discourse. Therefore, the scope of such immunity should be narrowly drawn to govern activities promoting this specific purpose rather than extended, in a blanket fashion, to cover all of the diplomat's activities in the receiving state. The personal representation theory fails to limit the scope of diplomatic immunity adequately.

36. C. WILSON, *supra* note 10, at 5; see also E. ADAIR, *THE EXTRATERRITORIALITY OF AMBASSADORS IN THE SIXTEENTH AND SEVENTEENTH CENTURIES* 25-28 (1929); *Diplomatic Immunity From Criminal Jurisdiction*, *supra* note 11, at 116-17.

37. C. WILSON, *supra* note 10, at 5.

he is acting on behalf of his country.³⁸ Consequently, the host state lacks personal jurisdiction over the diplomat and cannot compel him to appear in its courts.³⁹ Another view states that the diplomat is not subject to local law, because he is considered a resident of the sending state.⁴⁰

This theory has also been widely attacked.⁴¹ First, the term is subject to a wide variety of definitions, which have made it meaningless and artificial in providing guidelines for diplomatic immunity.⁴² Secondly, many legal scholars claimed that extritoriality was a mere fiction, since it assumes that diplomatic immunity is based on the independence of nations. In reality, the question of immunity arises not with respect to the independence of nations, but to the interdependence between nations.⁴³ Finally, the acceptance of this theory could result in dangerous consequences, since it provides unlimited privileges and immunities that would be beyond the actual privileges and immunities reasonably necessary for diplomats.⁴⁴

Both theories of extritoriality and personal representation define the scope of diplomatic immunity too broadly, since the immunity is stated in terms of individuals and not functions. Consequently, the current justification for diplomatic immunity relies upon the theory of functional necessity.⁴⁵ This theory justifies the grant of immunity to a diplomatic mission and its members only when it is functionally necessary to facilitate and protect the performance of their representative duties.⁴⁶ The theory is premised on the fact that a diplomat

38. *Wilson v. Blanco*, 56 N.Y. Sup. Ct. 582, 4 N.Y.S. 714 (N.Y. Sup. Ct. 1889). In *Wilson*, Justice O'Gorman stated that the rule of international law "derives support from the legal fiction that an ambassador is not an inhabitant of the country to which he is accredited, but of the country of his origin and whose sovereign he represents, and within whose territory, in contemplation of law, he always resides." 56 N.Y. Sup. Ct. at 582, 4 N.Y.S. at 714. Justice O'Gorman's view has been followed in *The King v. Guerchy*, 1 Black. W. 545, 96 Eng. Rep. 315 (1965); *Taylor v. Best*, 14 C.B. 487, 517, 139 Eng. Rep. 201, 213 (1854).
39. Barnes, *Diplomatic Immunity from Local Jurisdiction: Its Historical Development under International Law and Application in United States Practice*, 43 DEP'T ST. BULL. 173, 175 (1960).
40. C. WILSON, *supra* note 10, at 5-6.
41. Note, *Ambassadors and Consuls Privileges, Immunities and Disabilities*, 25 CHI.-[]KENT L. REV. 329, 333 (1947) (this note suggests that the theory is no longer applicable due to the changes in diplomatic functions over time). See M. OGDON, *supra* note 28, at 94 (author states that the "recent and current trend is conclusively in favor of repudiating the extraterritorial concept in every form"). See also 2 C. HYDE, *INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 1266 (2d rev. ed. 1947) (Hyde refers to "complete abandonment" of the theory).
42. D. MICHAELS, *INTERNATIONAL PRIVILEGES AND IMMUNITIES* 47 (1971). See E. ADAIR, *supra* note 36, at 28; see also C. WILSON, *supra* note 10, at 12 (where the author analyzes the various meanings of extritoriality).
43. D. MICHAELS, *supra* note 42, at 49. It is impossible to interpret extritoriality strictly according to its literal meaning. It also is impossible to agree upon one of the other meanings which have become part of the vocabulary of international law. The term is a metaphor—some have said a "picturesque metaphor"—and not a legal fact, and should be discarded when determining the immunities of the different diplomatic classes. C. WILSON, *supra* note 10, at 13.
44. M. OGDON, *supra* note 28, at 101. This theory treats all diplomats as residents of the sending state; therefore, all diplomats are granted the same immunities without regard to their official position within the receiving state. D. MICHAELS, *supra* note 42, at 49.
45. See D. MICHAELS, *supra* note 42, at 49.
46. Report of International Law Commission to the General Assembly, 13 U.N. GAOR Supp. (No. 9) 11, U.N. Doc. A/3859 (1958), reprinted in 53 AM. J. INT'L L. 230, 266 (1959). See also Preuss, *supra* note 35, at 182-83.

must be immune from the enforcement jurisdiction of the receiving state in order to function efficiently.⁴⁷ The functional necessity theory places its emphasis on the functions appropriately served by the foreign diplomats, rather than emphasizing the centralized figure of the diplomat encountered under both the extritoriality and personal representation theories.⁴⁸

Legal scholars have criticized the functional necessity theory as being “disturbingly vague”, since it does not draw any guidelines for limiting the extension of immunities,⁴⁹ nor does it explain what is regarded as a necessary function of a diplomat.⁵⁰ The theory has been further criticized for implying that diplomats engage in illegal or injurious activity, since they require immunity to function properly.⁵¹ Although the functional necessity theory has some detractors, it is currently the best theory underlying diplomatic immunity. The functional necessity theory is less vague than other theories, and it does not extend a blanket immunity to diplomats.⁵²

47. See Note, *Diplomatic Immunity: A Proposal for Amending The Vienna Convention to Deter Violent Criminal Acts*, 5 B.U. INT'L L.J. 177, 200-01 (1987)[hereinafter *Restricting Diplomatic Immunity*]. See Hurst, *Diplomatic Immunities—Modern Developments*, 10 BRIT. Y.B. INT'L L. 13 (1929). Hurst stated:

[T]he purpose for which these immunities are recognized is to enable the members of a foreign mission to act effectively as the representatives of their sovereign in the maintenance of relations with the sovereign to whom they are accredited, not to enable them to fulfill tasks lying outside that primary function.

Id.

48. C. WILSON, *supra* note 10, at 17-19. See *Diplomatic Immunity from Criminal Jurisdiction*, *supra* note 11, at 118. By focusing on the functions served by diplomats, the functional necessity theory will not grant immunity to diplomats' unofficial activities.

49. C. WILSON, *supra* note 10, at 22.

50. *Id.*

51. *New Regime*, *supra* note 10, at 662-63.

52. C. WILSON, *supra* note 10, at 17-25; *Terrorist Kidnapping*, *supra* note 33, at 199-200. The functional necessity theory has allowed states under the Vienna Convention to restrict the scope of diplomatic immunity to a much greater extent than permitted under extritoriality. Under the Vienna Convention, article 31(1)(a)-(c), states may bring civil actions against diplomats. Since the trend has been toward narrower immunity, a continuation of this functional necessity theory should be expected. In addition, article 37 of the Vienna Convention contains the four possible status classifications of embassy employees and family members and their immunities:

1. The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in [a]rticles 29 to 36.
2. Members of the [a]dministrative and [t]echnical staff of the mission, together with members of their families forming part of their respective households, shall if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in [a]rticles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of [a]rticle 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in [a]rticle 36, paragraph 1, in respect of articles imported at the time of first installation.
3. Members of the service staff of the mission who are not nationals of or permanently resident in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in [a]rticle 33.
4. Private servants of members of the mission shall, if they are not nationals of or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such

III. THE APPLICATION OF THE VIENNA CONVENTION

The Vienna Convention is a comprehensive formulation of diplomatic law.⁵³ This multilateral codification of the many divergent rules of state practices covers every point on which a legal rule existed, thereby harmonizing the different practices of diplomatic relations.⁵⁴ The Vienna Convention contains fifty-three articles that govern every aspect of diplomatic immunity.⁵⁵ These articles regulate the process for accreditation of ambassadors,⁵⁶ exemption from local taxation,⁵⁷ the inviolability of mission premises,⁵⁸ and even the use of flags on diplomatic vehicles.⁵⁹ The drafters of the Vienna Convention justified such diplomatic privileges and immunities upon the functional necessity theory.⁶⁰ The abuses of diplomatic immunity have been concentrated within the following three sections: the diplomat, the mission, and diplomatic correspondence, better known as the "diplomatic bag."⁶¹

Articles 29 through 32 of the Vienna Convention apply when diplomatic immunity is abused. Article 29 provides that the diplomat shall be inviolable and is not liable to any form of arrest or detention.⁶² Article 30 provides that the private residence of the diplomat shall be inviolable.⁶³ Article 31 exempts the diplomat from the criminal jurisdiction of the receiving state,⁶⁴ although the diplomat can be prosecuted in the receiving state if his immunity is waived by

a manner as not to interfere unduly with the performance of the functions of the mission.

Vienna Convention, *supra* note 21, at art. 37.

53. E. DENZA, *supra* note 22, at 3.

54. *Id.*

55. See generally Vienna Convention, *supra* note 21.

56. Vienna Convention, *supra* note 21, at arts. 5, 6, 7.

57. *Id.* at arts. 23, 38, 34.

58. *Id.* at art. 22. The inviolability also extends to the mission's cars; however, the cars may be towed away by a receiving state. See E. DENZA, *supra* note 22, at 90.

59. Vienna Convention, *supra* note 21, at art. 20. See Note, *Insuring Against Abuses of Diplomatic Immunity*, 38 STAN. L. REV. 1517, 1522 (1986) [hereinafter *Insuring Against Abuses*].

60. Vienna Convention, *supra* note 21, at Preamble; see E. DENZA, *supra* note 22, at 8. In drafting the Vienna Convention, the International Law Commission stated explicitly in the commentary on a draft convention its intent to use the functional necessity theory. *Report of the International Law Commission on its 10th Session*, 13 U.N. GAOR Supp. (No. 9) at 17, U.N. Doc. A/3859 (1958).

61. See *infra* notes 62-70 and accompanying text. See *Insuring Against Abuses*, *supra* note 59, at 1522-23.

62. *Id.* at 1522. Article 29 also states: "The receiving state shall treat the diplomats with due respect and shall take all appropriate steps to prevent any attack on his person, freedom, or dignity." Vienna Convention, *supra* note 21, at art. 29.

63. In addition, article 30 provides inviolability to the diplomat's papers, correspondence, and property except as otherwise provided in article 31. *Id.* at art. 30.

64. *Id.* Article 31 immunizes diplomats against the civil and administrative jurisdiction of the receiving state, with three exceptions:

1) A real action relating to private immovable property situated in the territory of the receiving state, unless he holds it on behalf of the sending state for the purposes of the mission.

2) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending state.

3) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions.

Vienna Convention, *supra* note 21, at art. 31(1)(a)-(c).

the sending state⁶⁵ or in his home state.⁶⁶ Article 32 covers the procedure for waiver of immunity. This article states that only the sending state may waive immunity and that such a waiver must be expressly conveyed to the receiving state. Article 41 requires that the diplomat respect the laws and regulations of the receiving state, and prohibits him from interfering in the internal affairs of the receiving state. Article 41 is essentially unenforceable because the previous three articles immunize the diplomat from the jurisdiction of the receiving state.⁶⁷ Consequently, these articles provide a safe-conduct for diplomats.⁶⁸

Similar to the diplomat, the mission itself is inviolable. Article 22 forbids local authorities to enter embassy grounds without the invitation of the head of the mission.⁶⁹ In addition, article 24 specifically states that the archives and documents of the mission shall be inviolable at any time and wherever they may be.⁷⁰

Article 27 sets forth the procedures for handling the diplomatic bag. This article states that the "diplomatic bag must bear visible external marks of their [sic] character and may contain only diplomatic documents or articles intended for official use."⁷¹ Subsection 27(3) further states that "the diplomatic bag shall not be opened or detained."⁷²

The availability of these immunities, coupled with the increasing number of diplomats in the United States⁷³, has led to the large number of abuses of

65. *Id.* at art. 32.

66. *Id.* at art. 31(4).

67. *Insuring Against Abuses*, *supra* note 59, at 1522.

68. Article 30 addresses the inviolability of the residence and property of the diplomat. Vienna Convention, *supra* note 21, at art. 30. See *Insuring Against Abuses*, *supra* note 59, at 1522.

69. Vienna Convention, *supra* note 21, at art. 22.

70. *Id.* at art. 24. The Convention's drafters left the term "archives" undefined but, in view of the diversity of modern methods of recording and storing information, it is important that the term should be given a wide construction. E. DENZA, *supra* note 22, at 110.

71. Vienna Convention, *supra* note 21, at art. 27(4). While the official papers of the mission are inviolable, the receiving state may search the ambassador's personal luggage. However, as a rule of courtesy, the receiving state does not search the ambassador's luggage. See E. SATOW, *supra* note 23, at 117. The Vienna Convention created a more absolute protection for the diplomatic bag than had ever existed under the previous customary law. Originally, two attempts were made to codify the divergent rules of diplomatic law. They were the Havana Convention on Diplomatic Officers in 1928, and the Harvard Research Draft Convention on Diplomatic Privileges and Immunities in 1932. See *Research in International Law*, 26 AM. J. INT'L L. 1, 50 (1932).

72. Vienna Convention, *supra* note 21, at art. 27(3). The drafters of the Vienna Convention faced some difficulty in balancing the opposing considerations of protection for diplomatic communications and safeguards against possible abuses by the receiving state. By drafting article 27 paragraphs (3) and (4), they shifted this balance in favor of greater protection for the diplomatic bag. E. DENZA, *supra* note 22, at 125.

73. More than 118,000 persons in the United States are entitled to some degree of special privilege under international law. OFF. OF PROTOCOL & OFF. OF FOR. MISSIONS, GUIDANCE FOR LAW ENFORCEMENT OFFICERS: PERS. RTS. & IMMUNITIES OF FOR. DIPLOMATIC & CONSULAR PERSONNEL 1 (State Dep't Publication No. 9533, 1987). In Washington, D.C., there are about 27,000 diplomats with criminal immunity, and in New York, there are about 10,000 diplomats with criminal immunity. See Appendix. Moreover, there are countries with which the United States has concluded treaties extending broader immunities for consular personnel. These bilateral agreements include the Soviet Union, the People's Republic of China (P.R.C.), Bulgaria, the German Democratic Republic (G.D.R.), Hungary, Poland, Romania, and the Philippines. American consular employees in the U.S.S.R. and the P.R.C. have full criminal immunity, and the United States is obligated to provide the same immunities to consular employees of those nations. BUREAU OF PUB. AFF., OFF. OF PUB. COMM., U.S. DEP'T OF STATE, CURRENT POLICY NO. 993: DIPLOMATIC IMMUNITY AND U.S. INTERESTS 2-3 (August 5, 1987); see also

diplomatic privileges and immunities.⁷⁴ Even when a diplomat breaks the law,⁷⁵ no matter how severe the crime, Article 9 is the receiving state's only available recourse. Article 9 allows the receiving state, at any time and without explanation, to notify the sending state that its ambassador or his employees are *persona non grata*.⁷⁶ Once notified, the sending state must either recall the diplomat or terminate his functions with the mission.⁷⁷

IV. CURRENT ABUSES OF DIPLOMATIC IMMUNITY

Current abuses of diplomatic immunity can be divided into three categories: 1) the commission of violent crimes by diplomats;⁷⁸ 2) the illegal use of the diplomatic bag;⁷⁹ and 3) the promotion of state terrorism by foreign governments through the involvement of their embassies in the receiving state.⁸⁰ Many nations have been plagued by diplomats abusing their privileges and immunities; however, the United States has seen a larger share of these abuses than most nations, since foreign diplomats are stationed both in New York, which hosts the members of the United Nations, and Washington, D.C., which contains the embassies of all our diplomatic friends.

The following incidents demonstrate the broad scope of diplomats' criminal activities. As these examples show, the problem of diplomatic abuse is a global problem that must be attacked by joint international cooperation.

One of the most publicized recent incidents of abuse of diplomatic immunity was the 1984 shooting of policewoman Yvonne Fletcher in front of the London Libyan "People's Bureau" in St. James' Square.⁸¹ On April 17, 1984, Libyan

U.S. DEP'T OF STATE, STUDY AND REPORT CONCERNING THE STATUS OF INDIVIDUALS WITH DIPLOMATIC IMMUNITY IN THE UNITED STATES 43-52 (Mar. 18, 1988).

74. See generally C. ASHMAN & P. TRESKOTT, *supra* note 1. This book relates many incidents in which rapes, brutal beatings, drug smuggling, killing and many other crimes have been uncovered with sufficient evidence to mount successful court actions; yet, in almost every instance, the guilty diplomats have walked free because of diplomatic immunity.
75. American diplomats have a great record of following the receiving state's laws. Comment, *The Effect of The Diplomatic Relations Act*, 11 CAL. W. INT'L L.J. 354, 374 (1981)[hereinafter *Diplomatic Relations Act*]. The United States instills the importance of the nonabuse of diplomatic privileges and immunities in its personnel, as provided in Section 225.1 of the *Foreign Affairs Manual*. U.S. DEP'T OF STATE, FOREIGN AFF. MANUAL § 225.1 (1987).
76. Vienna Convention, *supra* note 21, at art. 9. The problem with the enforcement of article 9 is the issue of reciprocity. Once the United States declares a diplomat *persona non grata*, in almost every instance the sending state will retaliate by declaring one of the U.S. diplomats *persona non grata*. See B. SEN, *supra* note 14, at 192-93.
77. Vienna Convention, *supra* note 21, at art. 9. Another option available to the sending state is to waive the immunity of its representatives, but this option is usually not exercised, since the sending state would rather prosecute its nationals itself.
78. See generally C. ASHMAN & P. TRESKOTT, *supra* note 1, at 22-190.
79. *Id.* at 190-224.
80. *The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience*, 79 AM. J. INT'L L. 641, 643 (1985) [hereinafter *Recent Experience*]. See generally *State-Sponsored Terrorism*, *supra* note 14, at 133.(close attention to the Appendix, which contains a chronology of Libyan support for terrorism from 1979-1985). Libya has been responsible for many terrorist activities. Goldberg, *The Shoot-Out at the Libyan Self-Styled People's Bureau: A Case of State-Supported International Terrorism*, 30 S.D.L. REV. 1, 7 (1984) [hereinafter *The Shoot-Out*]. See also U.S. DEP'T. OF STATE BUREAU OF PUB. AFF., LIBYA UNDER QADDAFI: A PATTERN OF AGGRESSION, SPECIAL REP. No. 138, at 6 (Jan. 1986)[hereinafter QADDAFI].
81. On February 18, 1984, Libyan students, allegedly with the support of Col. Muammar Qaddafi, took control of the Libyan embassy and renamed it the "Libyan People's Bureau." *Timetable of Past Incidents*, *The Times* (London), Apr. 18, 1984, at 1, col. 1.

opponents of Colonel Muammar Qaddafi's government held an orderly demonstration in front of the "People's Bureau."⁸² Libya had warned both the foreign office in London and the British ambassador in Tripoli that if the demonstration were allowed, Libya "would not be responsible for its consequences."⁸³ Without warning, submachine gunfire from the embassy struck the crowd. The gunfire killed Constable Fletcher and wounded eleven others.⁸⁴ The Libyan government claimed diplomatic immunity for its nationals within the Libyan embassy.⁸⁵ The British government's only remedy under the Vienna Convention was to declare the Libyan diplomats *persona non grata* and to expel them from Great Britain.⁸⁶ Later, Great Britain severed diplomatic ties with Libya.⁸⁷

Perhaps the most outrageous exploitation of the diplomatic bag is the case of Alhaji Umaru Dikko, the former Nigerian minister of transportation. While in Great Britain, in July of 1984, Dikko was kidnapped, drugged, manacled, and placed inside a crate addressed to the Ministry of External Affairs, Federal Republic of Nigeria.⁸⁸ In addition to Dikko, the crates contained the Israeli mercenaries who had kidnapped him. An attache of the Nigerian high commission accompanied the crates.⁸⁹ Since the crates did not have any official markings or an official seal, as required by Article 27 of the Vienna Convention,⁹⁰ the customs officers opened the crates and discovered Dikko and the mercenaries.⁹¹ The Nigerian government refused to waive immunity for their attache; therefore, once again, the only option for Great Britain was to declare the attache *persona non grata* and to expel him.⁹² These are only a few of the many attempts to use the diplomatic bag for abduction purposes.⁹³

82. The Times (London), Apr. 18, 1984, at 1, col. 1.

83. *Recent Experience*, *supra* note 80, at 643.

84. Nordheimer, *Gunmen in London in Libyan Embassy Fires into Crowd*, N.Y. Times, Apr. 18, 1984, at A1, col. 6; Hamilton, *London Embassy Shots Kill Policewoman*, The Times (London), Apr. 18, 1984, at 1, col. 1.

85. Taylor, *Laws Restrict British Action against Libya*, N.Y. Times, Apr. 18, 1984, at A5, col. 1.

86. Apple, *Libyans Leave Embassy in Britain and Fly Home, Ending Seige*, N.Y. Times, Apr. 28, 1984, at A1, col. 3. Apple, *The London Embassy Seige: Unheeded Warnings?*, N.Y. Times, Apr. 30, 1984, at A6, col. 4. In retaliation for the expulsion of its nationals, the Libyan government ordered its police to besiege the British embassy in Tripoli, and 35 people, including the British ambassador, were held within the embassy. Apple, *Libyans Permit Britons to Leave Tripoli Embassy*, N.Y. Times, Apr. 19, 1984, at A1, col. 2; Stanhope, *Diplomats Released From Tripoli Embassy Detention*, The Times (London), Apr. 19, 1984, at 1, col. 2.

87. Great Britain officially broke diplomatic relations with Libya on April 22, 1984. Feder, *British Break off Libyan Relations over London Seige*, N.Y. Times, Apr. 23, 1984, at A1, col. 6; Stanhope, *Libyans Given a Week to Leave Britain*, The Times (London), Apr. 23, 1984, at 1, col. 2. The Qaddafi government welcomed home the Libyan embassy staff upon their arrival at Tripoli. *Libyans Receive a Vociferous Welcome Home*, N.Y. Times, Apr. 28, 1984, at A3, col. 1.

88. C. ASHMAN & P. TRECSCOTT, *supra* note 1, at 204-05. The Times (London), July 7, 1984, at 1, col. 2.

89. The Times (London), July 13, 1984, at 1, col. 6 and July 27, 1984, at 3, col. 2.

90. *See supra* notes 71-72 and accompanying text.

91. C. ASHMAN & P. TRECSCOTT, *supra* note 1, at 204-08.

92. In retaliation, the Nigerian government detained a British Caledonian airplane and expelled two British diplomats. The Times (London), July 7, 1984, at 1, col. 5 and July 13, 1984, at 1, col. 6.

93. In one incident, customs authorities in Rome realized that a large diplomatic "bag" destined for Cairo was emitting moans. The authorities seized and opened the bag and found that it contained a drugged Israeli who had been kidnapped. E. SATOW, *supra* note 23, at 117. The

The United States has had its shares of violent diplomatic crimes, such as rape, theft, murder, slavery and drug dealing.⁹⁴ On May 25, 1985, the chancellor at the Belgian embassy in New Delhi, India, entered New York's La Guardia airport. He was carrying a large green canvas bag bearing the Belgian seal; therefore, the bag was considered an official diplomatic bag and immune from search.⁹⁵ The next day, the U.S. Drug Enforcement Administration apprehended the chancellor in a "sting" operation. He was arrested and detained for smuggling twenty-two pounds of pure heroin, with a street value in excess of \$40 million, into the United States.⁹⁶ Another example of blatant abuse of diplomatic immunity is the case of Manuel Ayree, the nineteen-year old son of the third attache to the Ghanaian delegation.⁹⁷ Ayree allegedly committed rape, sodomy, assault and an array of other crimes during his stay in New York City during 1980 and 1981. The New York police arrested Ayree for the alleged rapes of two women. Both women positively identified Ayree as their rapist, but the police released Manuel due to his diplomatic immunity. The State Department's only remedy was to declare Ayree *persona non grata* and expel him from the United States.⁹⁸ Later, one of the women stated, "A man raped me and he got away with it, because he is not a citizen and because he is a relative of a diplomat. He claimed he has the right to rape me and I, as an American citizen, am not given the right to get justice."⁹⁹

crate had been specially fitted out to contain a human body. It was lined with leather, had a small chair, a helmet for the head, and metal clamps for the ankles and neck. Apparently, the crate had been used in the past. *The Times* (London), July 7, 1984, at 2, col. 6. The managing director of Nigerian airways was also rumored to have left London in a crate. *Id.*, Sept. 1, 1984, at 1, col. 5.

94. See generally C. ASHMAN & P. TRECOTT, *supra* note 1.

95. One incident of smuggling drugs in a diplomatic bag occurred in July of 1980. A clerk stationed at the Moroccan embassy in Pakistan was caught smuggling \$975,000 of marijuana at the port of Harwich in Great Britain. The marijuana was placed inside several large crates, which were marked "diplomatic household effects" and were addressed to the Moroccan embassy in London. During his trial, the clerk testified that he was a courier for a Pakistani drug ring that used only diplomats to ship its drugs. They shipped heroin and marijuana around the world under the diplomatic seal. Cloug, *Untouchable Diplomatic Bags*, *The Times* (London), Apr. 24, 1984, at 2, col. 4.

96. C. ASHMAN & P. TRECOTT, *supra* note 1, at 165-66. The Belgian chancellor tried to claim diplomatic immunity, but, because he was not accredited to the United States, he was not entitled to immunity on United States soil. He entered a plea of guilty and was sentenced to six years in prison.

The incident demonstrates how easy is it for diplomats to smuggle drugs, or other contraband, into the United States under the guise of diplomatic immunity. Such conduct must be of great concern to the American drug enforcement agencies in their battle against drug traffickers. Authors Ashman and Trecott stated this problem well:

A diplomatic passport is usually the magic wand through customs. Usually diplomats are simply waved through with few formalities, their personal luggage almost never subjected to inspection. Diplomats can also carry larger containers into a country under diplomatic seal which, under the Vienna Convention, cannot be opened at all, only sent back to the originating country if they are suspected of containing contraband. For most drug traffickers who are caught, the penalties are severe. But for those with diplomatic immunity, the worst that can happen is a loss of face and possible expulsion from their country's diplomatic service. More and more diplomats seem ready to take that risk, in light of the potential rewards.

Id. at 171.

97. *Id.* at 22-51.

98. *Id.*

99. New York City police detective Sgt. Pete Christiansen was in charge of both women's cases.

Finally, in November 1982, Frank Sanchez, the son of the Brazilian ambassador in Washington, D.C., assaulted and shot the bouncer of a nightclub, Kenny Skeen. Again, the State Department's only remedy was to expel Sanchez due to his diplomatic immunity. Skeen was left with large medical bills, while his assailant walked free.¹⁰⁰

These incidents demonstrate both the severity of the abuse of diplomatic immunity and that the only remedies available to the receiving state and its citizens are to expel the diplomat or to sever diplomatic relations. The Vienna Convention simply places the diplomats beyond the law of the receiving state and leaves them without fear of punishment for their actions.¹⁰¹ Consequently, diplomats will continue to abuse their status in order to gain considerable profits or simply to carry out their violent behavior. Once a diplomat commits any wrong, he must be made aware that he is not above the law and that he will be prosecuted for his actions.¹⁰² The following section discusses the different means available to address this problem, including an examination of the interaction of domestic and international law.

V. A PROPOSAL FOR AMENDING THE VIENNA CONVENTION

As the incidents in the preceding section demonstrate, diplomatic immunity has too often become a convenient vehicle for abuse. Foreign diplomats have

After Ayree was released because of his diplomatic immunity, Christiansen stated:

The situation was particularly heartbreaking, because the two complainants were there and I know we had this guy dead to rights, that there was no way he would walk away. But he did it and there was absolutely nothing I could do about it. We could not even hold him long enough to put him in a lineup for enough of the women, we could have closed a couple of dozen files, but we couldn't.

Id. at 51.

In another incident, a high school sophomore was raped by two of her classmates who were the sons of a Saudi Arabian diplomat and an Egyptian official at the World Bank. Both boys evaded prosecution because of diplomatic immunity. *Id.* at 54-64.

100. Kenny filed suit against the ambassador and Brazil, but all charges were dismissed on grounds of diplomatic immunity. *Skeen v. Federative Rep. of Brazil*, 506 F. Supp. 1414, 1420 (D.D.C. 1983).
 101. William Macomber, the U.S. Ambassador to Turkey, stated that "[d]iplomatic immunity is not a license to commit a wrong and those who use it as such abuse the hospitality which has been extended to them [and] strain rather than improve relations." Kenneth Turan goes on to say that "the hard facts remain that abuse of the privilege is an all-too-common fact of life." Turan, *The Devilish Demand of Diplomatic Immunity*, Wash. Post, Jan. 11, 1976, at 6, col. 1. See also Gupte, *Privileges for Diplomats Stir Resentment and may be Curbed*, N.Y. Times, July 18, 1978, § II, at 8, col. 4.
 102. The only recent case in which a foreign government has waived the immunity of one of its diplomats did not involve the application of the Vienna Convention, but, instead, involved two countries purposefully avoiding the Treaty and settling the dispute through independent negotiation. On January 8, 1989, Rudy Van Den Borre, a 25-year old soldier assigned as a clerk at the Belgian Embassy in Washington, D.C., confessed to the murders of Michael J. Egan, a gay airline reservations clerk, and Gerald Simons, a gay cab driver, within 20 hours of each other. Van Den Borre told the police that the murders were a form of revenge against his former homosexual partner. Noting that Van Den Borre was entitled to immunity from criminal prosecution under international law, the State Department requested a total immunity waiver in this case. Consequently, the Belgian government waived diplomatic immunity for Van Den Borre, while in return, the U.S. prosecutors agreed not to seek the death penalty against Van Den Borre. Richard Gookin, associate chief of protocol for the U.S. State Department, stated that if Van Den Borre is convicted of first-degree murder, he will be the first person with diplomatic immunity to be convicted of murder in the United States.
- United Press International, Regional News, *Belgian Government Waives Diplomatic Immunity for Murder Suspect* (Feb. 2, 1989, BC Cycle)(LEXIS, Nexis library wires file).

been titled "the most elite of the human species."¹⁰³ In order to curb these abuses and to reduce public pressure, the U.S. Congress enacted the Diplomatic Relations Act of 1978.¹⁰⁴ The Act was passed to clarify and reform the conflicting American laws of diplomatic immunity. The law also decreased the number of diplomats in United States entitled to diplomatic immunity.¹⁰⁵ Moreover, the Act assisted in reducing hostilities exhibited by American citizens toward diplomats¹⁰⁶ by allowing personal recourse by individual citizens against diplomatic tortfeasors.¹⁰⁷

In the United States, as far as the interaction between domestic and international law is concerned, the Constitution is the supreme law of land.¹⁰⁸ All acts of Congress and treaties of the United States are inferior to the Constitution. A statute inconsistent with the Constitution is invalid; however, a treaty inconsistent with the Constitution may be valid internationally, but will not be enforced as law in the United States.¹⁰⁹

The language of the supremacy clause of the Constitution¹¹⁰ implies that treaties and laws of the United States are of equal status and authority, and are supreme over state law.¹¹¹ In case of an inconsistency between a statute and a

103. Anderson & Whitten, *The Diplomatic Immunity Charade*, Wash. Post, Nov. 14, 1975, § C, at 18, col. 1.

104. Diplomatic Relations Act of 1978, Pub. L. No. 95-393, 92 Stat. 808 (1978) (codified at 22 U.S.C. § 254(a-e), 28 U.S.C. § 1364)[hereinafter Act]. The Act took effect on December 29, 1978, ninety days after its enactment on September 30, 1979. The Act brought the United States' law of diplomatic immunity into the twentieth century by superseding the preexisting federal statute on diplomatic immunity (the Act of April 30, 1790, ch. 9, §§ 25-27, 1 Stat. 112, 117-18) (amended by 22 U.S.C. §§ 252-254 (1976) (repealed 1978)).

105. Act, *supra* note 104, at § 254(a); the Act follows a "functional necessity theory," thereby granting immunity based on the diplomats' capacity within the embassy. Therefore, only the highest ranking diplomats have complete immunity, while lower ranking diplomats have limited immunity.

106. One incident was the severe beating of a Liberian diplomat by a gang of youths in New York City in 1973. Wash. Post, Sept. 19, 1978, at 17, col. 1.

107. Act, *supra*, note 104, at § 254(e). In addition, the Act contains a direct-action statute, which allows the victims to directly proceed against the insurance company of a diplomat. *Id.* at § 1364. The Supreme Court endorsed the validity of the direct-action statute in *Watson v. Employers Liability Corp.*, 348 U.S. 88 (1954). The Act allows the President to establish the minimal amount of required insurance coverage. *Id.* at § 254(e)(b). These insurance requirements are implemented within the Department of State's regulations on liability insurance. Compulsory Liability Insurance for Diplomatic Missions and Personnel, 22 C.F.R. § 151 (1978).

As of February 21, 1989, the Office of Foreign Missions of the Department of State proposed to amend 22 C.F.R. § 151.4, which sets minimum limits of liability for motor-vehicle insurance of foreign diplomatic missions. The State Department proposed to change the minimum limits from "not less than \$300,000 combined single limit for all bodily injury liability and property damage liability arising from a single incident," to "not less than \$100,000 per person and \$300,000 per incident for bodily injury liability and \$100,000 per incident for property damage or \$300,000 combined single limit for all bodily injury liability arising from a single incident." Compulsory Liability Insurance for Diplomatic Missions and Personnel, 54 Fed. Reg. 7449 (1989) (proposed Feb. 21, 1989).

108. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

109. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 721, comment a and reporter's note 1 (1986) [hereinafter RESTATEMENT 3RD]. In *Reid*, Judge Black held constitutional prohibitions apply to acts of the United States abroad as well as at home, for, wherever the United States acts, "it can only act in accordance with the limitations imposed by the Constitution." *Reid v. Colvert*, 354 U.S. 6, 77 (1957).

110. U.S. CONST. art. VI, cl. 2.

111. The Supreme Court established the relationship between statutes and treaties about one hundred years ago. See *Taylor v. Morton*, 23 F. Cas. 784, 785 (C.C.D. Mass. 1855) (No. 13,779) (Curtis, Circuit Justice), *aff'd*, 67 U.S. (2 Black) 481 (1862). Justice Curtis' opinion was cited

treaty, the judicial and legislative branches will give effect to the one later in time.¹¹²

Due to the ineffectiveness of the Diplomatic Relations Act of 1978¹¹³ in reducing the abuse of diplomatic immunity, the United States Congress has been reviewing legislation to try to balance the equities of diplomatic immunity with the interests of American citizens. These efforts have not had much success.¹¹⁴ Due to the sensitivity of the issues underlying diplomatic immunity, a unilateral action by the United States, as opposed to a multilateral action by convention of signatories, would send a negative message to both signatory and nonsignatory nations, and would lead to retaliatory actions against American diplomats abroad.¹¹⁵ Consequently, this note recommends that the President seek amendment of the most abused articles of the Vienna Convention.¹¹⁶ In order for any amendments to the articles to be effective, all signatory nations to the Convention must agree to the amendments and must unite to face the problem of abuse of diplomatic immunity.

This proposal focuses on amendments needed to end the criminal abuse of diplomatic immunity. The proposal is divided into three categories: 1) the criminal acts of diplomats; 2) the abuse of the diplomatic bag and 3) the use of the mission to support terrorism. These recommendations concentrate on limiting the scope of immunity granted to diplomats in order to protect American citizens.

with approval by the Supreme Court in both the Head Money Cases, 112 U.S. 580, 597-98 (1884), and the Chinese Exclusion Case, 130 U.S. 581, 602 (1889).

112. See L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (2d ed. 1975). See also Diggs v. Shultz, 470 F. 2d 461, 466 (D.C. Cir. 1972); Comm. of U.S. Citizens in Nicaragua v. Reagan, 859 F. 2d 929, 936-37 (D.C. Cir. 1988). *RESTATEMENT 3RD*, *supra* note 109, at § 115, comment a and reporter's note 1. See generally Henkin, *International Law As Law in the United States*, 82 *MICH. L. REV.* 1555 (1984) (for a complete analysis of international law in relation to domestic U.S. law).

113. See *supra* note 104 and accompanying text. The Diplomatic Relations Act has had limited success, but it still allows for abuse of diplomatic privileges and immunities. See generally *Diplomatic Relations Act*, *supra* note 75; *New Regime*, *supra* note 10, at 662-68.

114. S. 339, 100th Cong., 1st Sess. (1987), was introduced by Sen. Arlen Specter (R-Pa.) to protect the internal security of the United States against international terrorism by making the use of a firearm to commit a felony by foreign diplomats in the United States a federal felony. Whoever violates the section shall be punishable by a fine of \$10,000 or by imprisonment for ten years or both. Also, an accompanying Senate Resolution urged the President to pursue renegotiation of the Vienna Convention in order to incorporate the bill into the Vienna Convention. S. Res. 74, 100th Cong., 1st Sess. (1987).

Sen. Jesse Helms (R.-N.C.) introduced a bill to make certain members of foreign diplomatic missions and consular posts in the United States subject to the criminal jurisdiction of the United States for crimes of violence (as defined in section 16 of title 18, United States Code), for drug trafficking, or for reckless driving, driving while intoxicated, or driving under the influence of alcohol or drugs. S. 1437, 100th Cong., 1st Sess. (1987).

Rep. Stephen Solarz (D-N.Y.) introduced another bill to provide redress for crimes committed by diplomats. The bill provided for the increase of minimum insurance coverage carried by diplomats to \$1,000,000 per incident and the review of the treatment accorded to diplomatic bags by the President of the United States. H.R. 3036, 100th Cong., 1st Sess. (1987).

115. The possibility of retaliation by foreign nations is very real, especially when, in a number of countries like Belgium, France, Luxembourg and the Netherlands, treaties prevail over inconsistent statutes, even when the treaties are signed earlier in time. In Italy and Germany, customary international law takes precedence over domestic legislation, even if the latter is later in time. See Sasse, *The Common Market: Between International and Municipal Law*, 75 *YALE L.J.* 695, 742-53 (1966).

116. See *supra* notes 64-77 and accompanying text.

Initially, the basic premise behind any treaty must be a good faith effort by all parties involved to abide by the treaty and honor all of its articles. All of the nations involved must abide by the spirit of the articles of the Vienna Convention in order for the amendments to be effective in reducing the abuse of the diplomatic privileges.

A. Criminal Acts

The first stage of this proposal is meant to limit the criminal immunity of diplomats. In order to achieve this end, there must be international agreement on a list of criminal acts that all nations would exempt from the rules of diplomatic immunity. The list could be labelled the "universal crimes list."¹¹⁷ The proscribed conduct should include all violent behavior against another person, such as murder, assault, battery and drunk driving.¹¹⁸ Acts done in self-defense would be exempt from this list. In addition, property crimes would be placed on the universal crimes list.¹¹⁹ Diplomats should retain immunity to parking and traffic violations, since the receiving state could easily harass diplomats through excessively strict enforcement of motor vehicle regulations.¹²⁰ The next phase would be the process of adjudicating the offenses committed by diplomats.¹²¹ Signatory nations must make it clear that once a diplomat commits a crime proscribed by the universal crimes list, the receiving state would have jurisdiction to adjudicate the case in accordance with local law.¹²² Once diplomats are aware that the receiving state can criminally prosecute them for their criminal acts, it is highly probable that such criminal activity would be reduced.

B. Diplomatic Bag

Article 27 of the Vienna Convention must also be amended in order to reduce the abuse of diplomatic bag.¹²³ Currently, the diplomatic bag provides diplomats with a license to smuggle drugs, guns and even people.¹²⁴ First, the Convention should be amended to limit the diplomatic bag to a standard size. This standard size should allow the diplomats to carry their confidential, official documents without interference from the host nation. Moreover, special considerations should be made for embassy equipment or items of such nature, whereby

117. The crimes included within the "universal crimes list" should be those crimes that have occurred repeatedly and that are so egregious that they offend common notions of morality.

118. See *Restricting Diplomatic Immunity*, *supra* note 47, at 184.

119. *Id.*

120. The current system for parking and traffic tickets should be left alone since, under the current point system, diplomats are adequately monitored. Under the system, the State Department assesses points for traffic infractions using standards set by the American Association of Motor Vehicle Administrators, and if any diplomat, during a two year period, accrues eight or more points, the State Department reviews whether driving privileges should continue or should be suspended. See Brown, *Diplomatic Immunity: State Practice Under the Vienna Convention on Diplomatic Relations*, 37 INT'L & COMP. L.Q. 53, 81-83.

121. One writer proposes an international adjudicatory mechanism called the "Permanent International Diplomatic Criminal Court," to adjudicate diplomats who commit crimes. *Restricting Diplomatic Immunity*, *supra* note 47, at 185.

122. The fear of being subject to the local jurisdiction of the receiving state should help to deter criminal activity by diplomats. *Id.* at 184.

123. See *supra* notes 88-93 and accompanying text.

124. See *supra* notes 86-96 and accompanying text.

the host nation can make special arrangements to search such items. Second, the host nation must be allowed to use electronic scanning or remote examination by equipment or dogs. Third, if the receiving state has strong doubts as to the contents of the bag, then it should be entitled to request the search of the bag in the presence of an official representative of the sending state, and if the diplomat refuses to allow the search, the receiving state should be allowed to require the return of the diplomatic bag to the sending state.¹²⁵ Lastly, if any diplomat is apprehended for abusing the diplomatic bag, the receiving state should have jurisdiction to prosecute that diplomat to the full extent of the law. These proposed amendments to Article 27 of the Vienna Convention should provide the adequate enforcement mechanism necessary to reduce the abuse of diplomatic bag.

C. The Mission

Article 22 of the Vienna Convention provides that “[t]he premises of the mission shall be inviolable. The agents of the receiving state may not enter them, except with the consent of the head of the mission.”¹²⁶ In addition, the premises of the mission are immune from requisition, attachment or execution.¹²⁷ Although the original drafters of the Vienna Convention felt that inviolability had to be absolute in order to prevent abuses by the receiving state,¹²⁸ it seems that the increasing use of embassy premises for terrorism requires the amendment of this article.¹²⁹ As far as the embassy is concerned, Article 22 must be amended to include the following language: First, the alleged crime connected to the embassy personnel must be proscribed by the “universal crimes list” in order for the receiving state to have the authority to require the search of the embassy premises.¹³⁰ Second, the receiving state must show “probable cause”¹³¹ as to the questionable conduct within the embassy. If these requirements are met, the receiving state’s officials, accompanied by selected representatives of other signatory nations, must be allowed to search the embassy.¹³² The standard to be applied in identifying “probable cause” requires the receiving state to show that embassy grounds contain: 1) property constituting evidence of the commission of a criminal offense; 2) contraband, the fruits of crime, or things otherwise

125. This safeguard is similar to that found in article 35(3) of the Convention on Consular Relations. Vienna Convention on Consular Relations of 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 (1963).

126. Vienna Convention, *supra* note 21, at art. 22. See *supra* note 58 and accompanying text.

127. *Id.*

128. E. DENZA, *supra* note 22, at 80.

129. See generally *The Shoot-Out*, *supra* note 80, at 1.

130. Under the customary international law, an embassy is viewed as an extension of the sending state’s territory; thereby, a search of the embassy grounds by the receiving state could be considered an invasion of the sending state’s territory. By creating the “universal crimes list,” if the crime committed is contained in this list, the receiving state would be justified in invading the sending state’s territory in order to protect its citizens and to combat international terrorism.

131. The requirement of probable cause should be the same standard applied for federal search warrants. Because there is a high burden of proof to establish probable cause, its application should balance the interests of the receiving state and the sending state. FED. R. CRIM. P. 41(b).

132. The presence of neutral parties during the search of the embassy should be helpful in reducing the possibility of abuse by the receiving state. Also, the sending state’s official documents would be protected by the presence of the neutral parties.

criminally possessed; 3) property designated or intended for use, or which is being or has been used, as the means of committing a criminal offense or 4) a person for whose arrest there is probable cause, or who is unlawfully restrained.¹³³ In addition, the host nation must show a nexus between items to be searched and criminal behavior.¹³⁴ Although the possibility for abuse by the receiving state is high, it must be remembered that the premise behind the Vienna Convention is the good faith efforts of the signatory nations in the implementation and the enforcement of the Vienna Convention.

Finally, the proposal should include a clear message from the United States to the other nations that if, after the enactment of these amendments, diplomats continue to abuse their privileges and immunities, then the United States will not hesitate to use the ultimate sanction, which is to break off diplomatic relations entirely with the sending state. Diplomatic personnel must learn to obey and follow the laws of the receiving state. If the sending state cannot control its own diplomats then "they must suffer the consequences of not being able to deal with civilized nations."¹³⁵

VI. CONCLUSION

The shortcomings of diplomatic immunity under the Vienna Convention are apparent. This proposal sets forth attempts to remedy these shortcomings yet safeguard the age-old principles of diplomatic immunity. It is obvious that these age-old principles of diplomatic immunity cannot cope with the current changes in the diplomatic process. The main problem with the Vienna Convention is the overbroad scope of the immunity that it has created. Diplomatic immunity under the Convention is broad because the immunity is stated in terms of individuals and not functions, thereby shielding many unnecessary diplomatic functions from prosecution. This overbroad immunity must be restricted.

This proposal attempts to diminish the current problems of abuse of diplomatic immunity in three ways. First, it allows for criminal prosecution of diplomats who commit violent criminal acts within the receiving state. Second, the proposal calls for specific size requirements of diplomatic bags and the allowance of electronic scanning of these bags. Lastly, the diplomatic mission of the sending state could be searched if the receiving state meets the requisite burden of proof.

The proposal set forth herein is compatible with both the theory underlying diplomatic immunity and the intent of the drafters of the Vienna Convention. In addition, the changes in the diplomatic world and the increasing number of diplomats in the United States requires this type of solution. By amending the Vienna Convention, the United States could provide specific solutions to the

133. See Gaffney, *The Warrant Requirement* (Seventeenth Annual Review of Criminal Procedure: U.S. Supreme Court and Courts of Appeals, 1986-1987) 76 GEO. L.J. 541, 542 (1988).

134. See *Warden v. Hayden*, 387 U.S. 294, 307 (1967)(for a discussion of nexus).

135. C. ASHMAN & P. TRESCOTT, *supra* note 1, at 348. For an example of nations breaking diplomatic relations, see 53 B.Y.I.L. 417 (1982)(U.K. break with Argentina after invasion of Falkland Islands); 55 B.Y.I.L. 459 (1984)(U.K. break with Libya after "People's Bureau" shooting); 74 A.J.I.L. 663-65 (1980) (U.S. break with Iran after hostage-taking of diplomatic staff in Tehran).

abuse of diplomatic immunity, while keeping international channels of communication open and free from interference.

*Ali M. Farahmand**

* B.S., University of Colorado at Denver, 1986; J.D. Candidate, Notre Dame Law School, 1990.

APPENDIX**FAMILY MEMBERS ENTITLED TO IMMUNITY — WASHINGTON, D.C.
(AUGUST 1987)**

<i>Category Embassy</i>	<i>Type of Immunity</i>	<i>Number</i>
Diplomatic Family Members	Full Criminal and Civil	6,878
Administrative & Technical Staff Family Members	Full Criminal/No Civil	5,609
Soviet Employees Family Members	Full Criminal and Civil	219
China Employees Family Members	Full Criminal and Civil	5
<i>Organization of American States</i>		
Diplomatic Family Members	Full Criminal and Civil	494
<i>International Organizations</i>		
Principal Resident Representatives Family Members	Full Criminal and Civil	<u>98</u>
TOTAL		13,308

FAMILY MEMBERS ENTITLED TO IMMUNITY — NEW YORK CITY

<i>Category</i>	<i>Type of Immunity</i>	<i>Number</i>
UNITED NATIONS		
Diplomatic Family Members	Full Criminal and Civil	3,304
CONSULATES		
<i>Bilateral Consuls</i>		
China Family Members	Full Criminal/No Civil	34
Hungary Family Members	Full Criminal/No Civil	7
Poland Family Members	Full Criminal and Civil	28
<i>Bilateral Consular Employees</i>		
Hungary Family Members	Full Criminal/No Civil	<u>7</u>
TOTAL		3,089

**FAMILY MEMBERS ENTITLED TO IMMUNITY OUTSIDE
WASHINGTON AND NEW YORK CITY**

<i>Category</i>	<i>Type of Immunity</i>	<i>Number</i>
<i>Bilateral Consuls</i>		
Soviet Family Members	Full Criminal/No Civil	11
China Family Members	Full Criminal/No Civil	52
Poland Family Members	Full Criminal and Civil	28
Philippines Family Members	Full Criminal/No Civil	75
<i>Bilateral Consular Employees</i>		
Soviet Family Members	Full Criminal/No Civil	18
China Family Members	Full Criminal/No Civil	1
<i>International Boundary & Water Commission</i>		
Family Members	Full Criminal and Civil	4
TOTAL:		399
TOTAL (ALL FAMILY MEMBERS):		16,693

U.S. DEP'T OF STATE, FOR. REL. AUTH. ACT—FISCAL YEARS 1988 & 1989: STUDY & REPORT CONCERNING THE STATUS OF INDIVIDUALS WITH DIPLOMATIC IMMUNITIES IN THE U.S., Appendix O (Mar. 18, 1988).