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The Case to Preserve Criminal Jurisdiction Immunity Accorded Foreign Diplomatic and Consular Personnel in the United States

by
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In September of 1988, the Senate Foreign Relations Committee voted to send Senate Bill No. S.1437 to the floor for consideration by the full Senate. This proposed legislation provides in relevant part:¹

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** Attorney, Robinson, Silverman, Pearce, Aronsohn & Berman, New York, N.Y., A.B. 1983, Barnard College, Columbia University; J.D. 1986, Hofstra University School of Law. I would like to thank Timothy Leahy, Esq. of the Office of Protocol, U.S. Department of State and Andrew L. Odell, member, Robinson, Silverman, Pearce, Aronsohn & Berman and former Deputy Commissioner/Counsel of the New York City Commission for the United Nations and Consular Corps for their helpful comments and assistance during the preparation of this Article.

1. Senate Bill No. S.1437 was introduced by Senator Helms on June 26, 1987, 100th Cong., 1st Sess., 133 CONG. REC. S8876-77 (daily ed. June 26, 1987). The Senate did not act on S.1437 before the 100th Congress ended. The Senate also did not act on an amendment to the Foreign Missions Act proposed by Senator Helms during the second session of the 100th Congress. See 100th Cong., 2d Sess., 134 CONG. REC. S16,045-47 (daily ed. Oct. 14, 1988); see also, 100th Cong., 2d Sess., 134 CONG. REC. S13,811-13 (daily ed. Sept. 30, 1988). The amendment sought to compel the State Department to declare an individual entitled to diplomatic immunity, who is believed to have committed a serious crime, *persona non grata* whenever the Foreign Ministry refuses to waive that individual's immunity from criminal jurisdiction. The proposed amendment effectively would shift the burden of proof presently imposed by law upon the receiving state to the sending state with respect to diplomatic immu-

[t]hat . . . notwithstanding . . . the Vienna Convention on Diplomatic Relations . . . and the Vienna Convention on Consular Relations . . . members of a foreign diplomatic mission (other than diplomatic agents) and members of a foreign consular post (other than consular officers) shall not be entitled to immunity from the criminal jurisdiction of the United States (or any State) for any crime of violence, . . . for drug trafficking, or for reckless driving or driving while intoxicated or under the influence of alcohol or drugs.²

Viewed narrowly, legislation such as S.1437 would remove immunity from criminal jurisdiction for all foreign diplomatic and consular personnel not classified as diplomatic agents or as consular officers and their respective family members, making them liable to arrest, detention, and prosecution.³ Viewed broadly, the enactment of S.1437 or similar

nity. See discussion *infra* text accompanying notes 84-85. It remains to be seen whether a bill similar to S.1437 will be introduced during the 101st Congress in 1989.

In 1987, S.339 also was introduced in the Senate to remove diplomatic immunity when a "member of a foreign diplomatic mission . . . use[s] a firearm to commit . . . a felony under the criminal laws of the United States or any State." S.339, 100th Cong., 1st Sess., 133 CONG. REC. 5959-60 (daily ed. Jan 20, 1987).

2. S.1437 provides in full:

To make certain members of foreign diplomatic missions and consular posts in the United States subject to the criminal jurisdiction of the United States with respect to crimes of violence.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That (a) notwithstanding any other provision of law and, particularly, the Vienna Convention on Diplomatic Relations, done on April 18, 1961, and the Vienna Convention on Consular Relations, done on April 24, 1963, members of a foreign diplomatic mission (other than diplomatic agents) and members of a foreign consular post (other than consular officers) shall not be entitled to immunity from the criminal jurisdiction of the United States (or of any State) for any crime of violence, as defined in section 16 of title 18, United States Code, or for reckless driving or driving while intoxicated or under the influence of alcohol or drugs.

(b) For purposes of this Act

(1) the term "consular officer" has the same meaning as is given to such term in Article 1(1)(d) of the Vienna Convention Consular Relations;

(2) the term "diplomatic agent" has the same meaning as is given to such term in Article 1(e) of the Vienna Convention on Diplomatic Relations;

(3) the term "members of a foreign consular post" is used within the meaning of Article 1(1)(g) of the Vienna Convention on Consular Relations; and

(4) the term "members of a foreign diplomatic mission" is used within the meaning of Article 1(b) of the Vienna Convention on Diplomatic Relations.

S.1437, 100th Cong., 1st Sess, 133 CONG. REC. 510, 790 (daily ed. Jul. 28, 1987).

3. See discussion *infra* notes 45-68. The overall intent of S.1437 seems to be to expose the family members of a diplomatic agent or consular officer to criminal jurisdiction. The legislation, however, is drafted in a way that apparently does not remove immunity for family members of diplomatic agents because family members are not included in the terms "members of a mission" or "members of a consular post." The legislation removes immunity only from "members of a foreign diplomatic mission (other than diplomatic agents) and members of a foreign consular post (other than consular officers)" and thus preserves criminal jurisdiction

legislation unnecessarily would lend support to growing criticism that in recent times the United States has disregarded its international law obligations.⁴ That disregard, whether actual or perceived, in turn invites both reciprocal disregard for international law and retaliatory action by other nations against United States diplomatic and consular personnel serving abroad.

The proposed legislation reflects an increasing, if misplaced, concern expressed by a small but vocal segment of American society about the growing number of crimes allegedly committed in the United States by foreign diplomatic and consular personnel and their dependents. Senator Helms (Republican, N.C.) stated his motivation for introducing S.1437 in simplistic terms by bluntly referring to the "37,000 individuals [living] in this country who are free to commit any crime, no matter how serious, how violent, how heinous, and remain free from prosecution."⁵ Lay authors erroneously have claimed, in tabloid fashion, that the United States is in the throes of "a minor diplomatic crime wave" that is "getting out of control."⁶ Newspaper accounts and editorials have reported crimes by diplomats ranging from assault, child abuse, weapons and drug dealing

immunity for families of diplomatic and consular post members. It is assumed the legislation eventually would be redrafted to clarify that all family members would not have immunity from criminal jurisdiction and our analysis proceeds on that assumption. Otherwise the legislation potentially would be meaningless.

4. For example, the United States' refusal to admit Yassir Arafat to address the United Nations may have violated the U.N. Headquarters Agreement, 61 Stat. 3416, T.I.A.S. No. 1676, 11 U.N.T.S. 11 (1947); Lewis, *U.N. Votes to Move Session to Geneva*, N.Y. Times, Dec. 3, 1988, at 1, col. 1 (It was reported that the General Assembly resolved for the first time to leave New York and move its session to Geneva in reaction to the United States' action, as host country, in refusing to grant a visa to Yassir Arafat.). See *Military and Paramilitary Activities In And Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27, 1986); *U.S. Terminates Acceptance of ICJ Compulsory Jurisdiction*, Oct. 7, 1985, 85 DEP'T ST. BULL. 67 (Jan. 1986), 24 I.L.M. 1742 (1985); *U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the ICJ*, Jan. 18, 1985, 86 DEP'T ST. BULL. 64 (Mar. 1985), 24 I.L.M. 246 (1985); *Mining of Nicaraguan Harbors, Security Council Draft Resolution Condemning the Mining of Nicaraguan Ports*, 39 U.N. SCOR (Apr.-June 1984) at 5, U.N. Doc. S/16463 (1984).

5. 100th Cong., 1st Sess., 133 CONG. REC. S8876-77 (daily ed. June 26, 1987). The true figure is substantially less than 37,000. The State Department reports, in fact, that as of 1987, 26,283 individuals and their dependents enjoy full criminal immunity. U.S. DEPARTMENT OF STATE BRIEFING BOOK TO CONGRESS (1988) (relevant portions on file with *The Hastings Law Journal*).

6. See the discussion of the facts of "diplomatic crime" *infra* text accompanying notes 104-115. See also Gookin, *Attacks on Immunity*, FOREIGN SERVICE J. 18 (1988) (arguing that facts of diplomatic crime do not support a broad attack on diplomatic immunity). Trescott and Ashman have written a book that is a somewhat sensationalized and anecdotal indictment of the criminal behavior of the foreign diplomatic corps. The book's allegations and assertions have been challenged by the Department of State's Associate Chief of Protocol. P. TRESCOTT & C. ASHMAN, *DIPLOMATIC CRIME* (1987). See Gookin, *supra*, at 18-20; Gookin, (Letter to the Editor), *Fairfax J.*, Dec. 3, 1987.

to rapes, shootings, manslaughter, and spying.⁷ Editorials have described provocatively the prohibition against criminal prosecution of diplomatic personnel as making "the blood boil," as "immunized outrages," and as "hard to swallow."⁸ In a 1986 speech to the American Bar Association, Secretary of Defense Caspar Weinberger said that "the idea of immunity needs to be re-examined in light of diplomats who abuse their privileges, particularly through terrorism."⁹

Legal scholars and commentators, with surprising uniformity, also have called for the arrest and prosecution of presently immunized diplomatic personnel. Former Supreme Court Justice and Ambassador to the United Nations Arthur Goldberg, responding to the 1984 shoot-out at the Libyan Embassy in London during which a police constable was killed by Libyan diplomatic personnel, suggested that the British Government should have "arrested the murderers."¹⁰ Other commentators have called for the removal of diplomatic immunity and prosecution "for criminal conduct which poses substantial probability of physical violence against individuals."¹¹ Still others urge "[p]rosecuting a [foreign] diplomat for committing serious criminal offenses."¹²

7. See, e.g., *Israel Military Aides Granted Immunity*, Newsday, Oct. 7, 1988, at 6, col. 1; *Ex-Envoy Indicted on Drugs*, N.Y. Times, May 25, 1988, at A8, col. 4; *Innocent Plea by Envoy*, Newsday, Apr. 19, 1988, at 15, col. 1; *Report on Boy Returned to Africa*, N.Y. Times, Apr. 3, 1988, A2, at 39, col. 2.; Taylor, *U.S. May Return Boy, 9, To Africa*, Court Rules, N.Y. Times, Jan. 16, 1988, at 31, col. 1; Shipp, *How a Child Abuse Case Took On International Dimension*, N.Y. Times, Jan. 10, 1988, at E36, col. 1; French, *State Dep't Awarded Custody of African Boy in Abuse Case*, N.Y. Times, Jan. 3, 1988, at A22, col. 1; Ferrigno, *How Foreign Diplomats Get Away with Crime*, Newsday, Oct. 2, 1987, at 81, col. 1; *Washington Rejects Effort to Curtail Diplomatic Immunity*, The Times, Aug. 6, 1987, at 7, col. 5; Caplan, *Crash of Envoy's Car Focuses Attention On International Law*, Legal Times, May 4, 1987, at 20, col. 1; Lewis, *Reagan says Boy Can Be Sent Home*, N.Y. Times, Jan. 7, 1987, at B6, col. 1; Engelberg, *Russian's Arrest Called Example Of Spy Threat*, N.Y. Times, Aug. 25, 1986, at A1, col. 1; Reid, *A Soviet Official Assigned To U.N. Is Seized As A Spy*, N.Y. Times, Aug. 2, 1986, at 1, col.4; Sciolino, *When Citizens of the World Break the Laws of New York*, N.Y. Times, June 8, 1986, at E24, col. 1; Griffin, *Diplomatic Impunity*, 13 STUDENT LAW., 18 (Oct. 1984).

8. Anderson, *When Immunity May Not a Full Diplomat Make*, Newsday, June 6, 1988, at 58, col. 1; *Undiplomatic Immunity*, Wash. Post, Aug. 10, 1987, at A14, col. 1.

9. Sciolino, *supra* note 7, at E24 (quoting speech by Caspar Weinberger).

10. Goldberg, *The Shoot-Out at The Libyan Self-styled People's Bureau: A Case of State-Supported Criminal Terrorism*, 30 S.D.L. REV. 1, 4 (1984). The British Government, rather than arresting the killers, allowed them to leave England because they had immunity from local criminal jurisdiction. *Id.*

11. Note, *Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts*, 5 B.U. INT'L L.J. 177, 184 (1987) (authored by Stephen L. Wright).

12. Note, *Diplomatic Immunity From Criminal Jurisdiction: Essential To Effective International Relations*, 7 LOY. L.A. INT'L & COMP. L.J. 113, 137 (1984) (authored by Robert A. Wilson).

The purpose of this Article is twofold: first, to place the perception of "diplomatic crime" in the United States in a proper factual and legal perspective, and second, to oppose any unilateral legislative attempts, in contravention of both international and domestic law, to remove immunity from criminal jurisdiction presently accorded to foreign diplomatic and consular personnel and their dependents residing in the United States.¹³ Specifically, the Article suggests that enactment of legislation such as S.1437, would contravene existing United States and international law; that U.S. diplomatic and consular personnel serving at posts abroad would be exposed unnecessarily to the reciprocal risks of retaliatory measures taken by foreign states; that there is no factual justification for such legislation; that present legal remedies, if vigorously pursued when necessary, are more than adequate to deter "diplomatic crime"; and that preservation of existing criminal jurisdiction immunity accorded to foreign diplomatic and consular personnel serves both the short term and long term foreign policy interests of the United States. Under present law, the United States has the burden to prove that immunity from criminal jurisdiction, once asserted, does not exist.¹⁴ This Article also rejects any attempt to undercut the existing right to criminal jurisdiction immunity by legislatively shifting the present burden of proof from the United States government to an accused diplomat's sending

13. This Article is not intended to provide a comprehensive reprise of the current law on diplomatic and consular relations as this has been amply and admirably accomplished elsewhere. See generally RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 464-70 (1987); D. BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* 348-62 (4th ed. 1984); I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 345-63 (3d ed. 1984); E. DENZA, *DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS* (1976); L. LEE, *VIENNA CONVENTION ON CONSULAR RELATIONS* (1966); C. LEWIS, *STATE AND DIPLOMATIC IMMUNITY* (2d ed. 1985); E. SATOW, *SATOW'S GUIDE TO DIPLOMATIC PRACTICE* (L. Gore-Booth ed. 5th ed. 1979); B. SEN, *A DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE* (3d rev. ed. 1988); M. WHITEMAN, 7 *DIGEST OF INTERNATIONAL LAW* 253-447, 716-870 (1970); Barnes, *Diplomatic Immunity From Local Jurisdiction: Its Historical Development Under International Law and Application in United States Practice*, 43 DEP'T ST. BULL. 173 (1960); Brown, *Diplomatic Immunity: State Practice Under the Vienna Convention on Diplomatic Relations*, 37 INT'L & COMP. L.Q. 53 (1988); Davidson, Freestone, Lowe & Warbrick, *Treaties, Extradition and Diplomatic Immunity: Some Recent Developments*, 35 INT'L & COMP. L.Q. 425 (1986); Fox, *Enforcement Jurisdiction, Foreign Property and Diplomatic Immunity*, 34 INT'L & COMP. L.Q. 115 (1985); Garretson, *The Immunities of Representatives of Foreign States*, 41 N.Y.U. L. REV. 67 (1966); Valdez, *Privileges and Immunities Under The Vienna Convention on Diplomatic Relations and the Diplomatic Relations Act of 1978*, 15 INT'L LAW. 411 (1981); Note, *The Scope of Consular Immunity Under the Vienna Convention on Consular Relations: Toward A More Principled Interpretation*, 88 COLUM. L. REV. 841 (1988) (authored by Curtis J. Milhaupt); Comment, *A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978*, 54 TUL. L. REV. 661 (1979).

14. See *infra* notes 84-85.

state to show that immunity exists.¹⁵ This Article also rejects suggestions that the United States should establish either a victims' compensation fund or an insurance scheme to compensate victims of "diplomatic crime."¹⁶

I. Unilateral Removal of Criminal Jurisdiction Immunity Under International Law, Theory, Custom, and Treaties

In general, diplomatic and consular personnel provide primary communications and the essential negotiating links between sending and receiving states.¹⁷ To facilitate those communications and links, diplomatic and consular personnel are accorded privileges and immunities in the receiving state that are not enjoyed by other aliens. Immunity from local criminal jurisdiction is primary among these privileges and immunities conferred as a matter of right on certain foreign diplomatic and consular personnel by customary international law, by multilateral convention, or by special bilateral treaty. In addition, the United States is in the special position of host nation to certain international organizations, such as the United Nations and the Organization of American States (OAS).¹⁸ As host nation, the United States accords certain representatives to those organizations, and representatives to their member states, privileges and immunities similar to those enjoyed by members of foreign diplomatic missions or consular posts, including criminal jurisdiction immunity.¹⁹

The removal of criminal jurisdiction immunity by legislation like S.1437 is aimed at two classes of personnel: (1) members of a foreign

15. See 100th Cong., 2d Sess., 134 CONG. REC. S16,045-47 (daily ed. Oct. 14, 1988) (Senator Helms' remarks and introduction into the record of the "Diplomatic Immunity Abuse Prevention Act"). Helms introduced legislation that would shift the burden of proof from the United States to show that immunity does not exist, requiring instead that sending states demonstrate that immunity *does* exist.

16. In his proposed amendment to the Foreign Missions Act, Senator Helms cited as an important element of the amendment the establishment of "liability insurance requirements which can reasonable [sic] be expected to afford adequate compensation for injury to person or property resulting from or arising out of the activities of the mission." *Id.* at S16,046. These requirements are intended to "set in motion" safeguards to ensure that future victims of diplomatic crime will be compensated at some minimum level.

17. The host state of foreign diplomatic and consular personnel is the receiving state and the state represented by those personnel is the sending state.

18. See *infra* notes 55-57 and accompanying text.

19. See *infra* notes 55-60 and accompanying text.

diplomatic mission other than diplomatic agents, and (2) members of a foreign consular post other than consular officers.²⁰

A. Removal of Criminal Jurisdiction Immunity for Members of a Diplomatic Mission Other Than Diplomatic Agents Violates Theories Underlying Diplomatic Immunity

Proponents of the unilateral removal of immunity from criminal jurisdiction²¹ for foreign diplomatic personnel, conferred as a matter of right by international law, argue that there is no theoretical justification for that immunity. The argument rests on the erroneous assumption that the sole justification for diplomatic immunity is to assure that foreign diplomatic personnel function effectively in the receiving state.²² Having thus limited the theory of diplomatic immunity, it is relatively easy to argue that criminal behavior is outside the proper function of diplomatic personnel and thus, that there is no theoretical justification for immunity from criminal jurisdiction. That argument errs for two reasons. First, immunity from receiving state criminal jurisdiction rests not on functional necessity alone, but on a number of theories, each of which is contravened by unilateral removal of criminal jurisdiction immunity.

20. See *supra* notes 2-3 and accompanying text.

21. For purposes of this Article reference to immunity from criminal jurisdiction includes inviolability from arrest and detention even though inviolability and immunity are the objects of separate articles in the Vienna Convention on Diplomatic Relations, *done* April 10, 1961, 23 U.S.T. 3227, T.I.A.S. No. 5702, 500 U.N.T.S. 95 [hereinafter Diplomatic Convention]. Article 29 of the Diplomatic Convention provides in relevant part: "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention." 23 U.S.T. at 3240, T.I.A.S. No. 5702, at 14, 500 U.N.T.S. at 110. Article 31 (1) provides in the first sentence: "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State." 23 U.S.T. at 3240, T.I.A.S. No. 5702, at 14, 500 U.N.T.S. at 112. There seems to be some confusion about whether these provisions overlap or are distinct. Professor Brownlie views "inviolability [as] distinct from the immunity from criminal jurisdiction." I. BROWN-LIE, *supra* note 13, at 353. However, Professor Denza observes that "[i]mmunity from criminal jurisdiction was originally regarded as an aspect of inviolability" E. DENZA, *supra* note 13, at 149, and Professor Brown states that the "nature of diplomatic immunity, and in particular its scope, cannot be considered independently of the fundamental rule of inviolability." Brown, *supra* note 13, at 72. That confusion does not disturb the net effect of articles 29 and 31 that a receiving state may not arrest or detain diplomatic personnel and that diplomatic personnel are immune as a matter of right from a receiving state's criminal jurisdiction. Taken together, these provisions make clear that present international law confers absolute immunity on qualifying diplomatic personnel from local criminal jurisdiction and categorically forbids, in most cases, their arrest or detention by the receiving state.

22. For example, recent writers advocating removal of immunity from criminal jurisdiction for diplomatic personnel refer to "the theory of 'functional necessity' as the only acceptable theory" for diplomatic immunity, Note, *supra* note 13, at 201 n.136, and to functional necessity as "the most widely accepted current justification of diplomatic immunity." Ross, *Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities*, 4 AM. U.J. INT'L L. & POL'Y 173, 178 (1989).

Second, unilateral removal of immunity from criminal jurisdiction does, in any event, inhibit the effective functioning of diplomatic personnel.

Immunity from criminal jurisdiction does not rest solely on functional necessity. Rather, it depends on several complementary theoretical premises, including the representation of states, the sovereign equality of states, and the important associated principle of reciprocity, as well as functional necessity. The underlying rationales for the existing law on diplomatic privileges and immunities were characterized accurately by Professor Brownlie as depending on no single theory and especially not on functional necessity alone.

The existing legal position in truth rests on no particular theory or combination of theories, though in a very general way it is compatible with both the representative theory, which emphasizes the diplomat's role as agent of a sovereign state, and the functional theory, which rests on practical necessity. The latter theory is fashionable but somewhat question-begging.²³

Anyone attempting to unilaterally change the nature and scope of immunity from criminal jurisdiction presently afforded by the law of diplomatic relations should consider the effect that change would have on each of the interrelated premises upon which immunity is founded.

Diplomatic immunity inherently facilitates the representation of the sovereign sending state's interests in the receiving state. The primary duty of a diplomatic agent is to represent the sending sovereign state and the sending state cannot function except as through its representatives. Indeed, the preamble to the Diplomatic Convention explicitly recognizes that "the purpose of [diplomatic] privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as *representing States*."²⁴

In addition, immunity from local criminal jurisdiction reflects both the preservation of the sovereign equality of the sending and receiving states and the important related notion of reciprocity. Again the preamble to the Diplomatic Convention explicitly acknowledges that it has "in mind" a "concern [for] the sovereign equality of States."²⁵ Indeed, the unilateral assertion of criminal law prescriptive and enforcement jurisdic-

23. I. BROWNLIE, *supra* note 13, at 345. It should be noted there is agreement that the theory of extraterritoriality under which diplomatic premises are said to constitute an extension of the sending state's territory is no longer an accepted justification for affording diplomatic immunity. See *Radwan v. Radwan*, 3 W.L.R. 735, 55 I.L.R. 579 (1972); SWEENEY, OLIVER & LEECH, *THE INTERNATIONAL LEGAL SYSTEM* 933 (3d ed. 1988).

24. Diplomatic Convention, *supra* note 21, 23 U.S.T. at 3230, T.I.A.S. No. 7502, at 4, 500 U.N.T.S. at 96 (emphasis added).

25. *Id.*

tion (as opposed to civil jurisdiction)²⁶ by a receiving state over the sending state's diplomatic representative in every case involves a clash of sovereign state interests and upsets the theoretical sovereign equality between the sending and receiving states because one state's institutional machinery (the criminal process) is exercised *ab initio* over another state's representative without that state's permission. Sovereign equality would be especially upset if the exercise of criminal jurisdiction were a manifestation of receiving state policy.²⁷

Related to the preservation of sovereign equality is the notion of reciprocity.²⁸ The United States, as a receiving state, understandably is concerned with the behavior of diplomats on United States soil. As a sending state, it reciprocally desires maximum protection for its diplomats serving around the world.²⁹ In addition, the precise scope of diplomatic duties, absent special bilateral agreements, usually is determined on an *ad hoc* basis by mutual negotiations between the sending and re-

26. Of course, the question of a clash of state interests over diplomatic and consular relations is not as great in civil matters in which, for the most part, private rather than state interests are involved. Sending state civil jurisdiction over diplomatic personnel rarely entails concerns over the sovereign equality of states or the representation of state interests. In that context, functional necessity is arguably the primary concern that must be addressed. See *Bergman v. DeSieves*, 170 F.2d 360, 362-63 (2d Cir. 1948) (indignity to the sovereign is of much less consequence in a civil action than in a criminal prosecution). Article 31(2) of the Diplomatic Convention in providing for exceptions to civil jurisdiction immunity explicitly recognizes the lesser threat to sovereign equality posed by civil actions and appropriately alludes to functional necessity as grounds for restricting immunity from civil and administration receiving state jurisdiction Diplomatic Convention, *supra* note 21, 3227 U.T.S. at 3244, T.I.A.S. No. 5702, at 14-15, 500 U.N.T.S. at 116.

27. It is interesting to observe that while the Diplomatic Convention restricts somewhat the *civil* jurisdiction immunity in article 31, it does not disturb the absolute *criminal* jurisdiction immunity contained in articles 29 and 31(1). The distinction between criminal and civil jurisdiction may not matter as much conceptually when viewed from a general jurisdiction perspective because ultimately civil jurisdiction might require enforcement procedures that include criminal sanctions. See I. BROWNLIE, *supra* note 13, at 299; D. BOWETT, *supra* note 13, at 555-56; Bowett, *Jurisdiction: Changing Patterns of Authority Over Activities and Resources in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 556 (1983) ("What matters is . . . whether the jurisdiction is a matter of state policy.").

28. Both the Diplomatic Convention in article 47 and the Vienna Convention of Consular Relations in article 72 provide that a receiving state may restrictively apply any of the Convention's provisions when its mission reciprocally has been subject to a restrictive application by the sending state. These provisions codify the notion that receiving states need only accommodate a foreign mission to the extent that its mission receives comparable treatment in the host state, thereby implicitly recognizing a basis for retaliation in appropriate circumstances. Diplomatic Convention, *supra* note 21, 23 U.S.T. 3249-50, T.I.A.S. No. 5702, at 22-23, 500 U.N.T.S. at 122-24; Vienna Convention on Consular Relations, *done* April 24, 1963, 21 U.S.T. 77, 120-21, T.I.A.S. No. 6820, at 44-45, 596 U.N.T.S. 261 [hereinafter Convention on Consular Relations].

29. The United States currently has more than 30,000 diplomats serving in foreign countries around the world. See Gookin, *supra* note 6, at 20.

ceiving states.³⁰ Indeed, the refusal of the British government to arrest the Libyan diplomats who killed Constable Fletcher surely must have been to deny Libya an opportunity to reciprocate by arresting British diplomats on trumped up criminal charges.³¹ If the United States unilaterally were to subject a diplomat of a foreign state to local criminal jurisdiction, on a reciprocity basis the sending state would be entitled or even compelled, if sovereign equality is to be maintained, to subject United States diplomats to its local criminal jurisdiction.³²

The exposure of United States diplomatic and consular personnel to foreign state criminal jurisdiction, as a reciprocal response to enactment of legislation such as S.1437, would have several adverse practical consequences. First, any action and reaction cycle of reciprocal criminal prosecutions of diplomatic and consular personnel by sending and receiving states that might ensue squarely contradicts the promotion of friendly relations among nations recalled in both the Diplomatic Convention and Convention on Consular Relations.³³ Second, if a sending State does not respond by reciprocally exercising criminal jurisdiction over the United States diplomatic and consular personnel fundamental notions of sovereign equality would be upset. Third, even the potential for sending and receiving state retaliatory actions against diplomatic and consular personnel unnecessarily could foster bilateral tensions.³⁴ Fourth, the prospect that criminal jurisdiction immunity may be removed by foreign receiving states will discourage individuals from entering the already depleted United States foreign service.³⁵ Finally, the existing foreign service corps understandably may be reluctant to accept posts in states where local criminal laws, procedures, and customs do not follow United States notions of due process and concern for individual rights. The risks

30. RESTATEMENT, *supra* note 13, § 464.

31. See *supra* notes 10, 28. Elihu Lauterpacht, who served as the Secretary of the British Committee on State Immunity, the work of which led to the adoption of the Diplomatic Immunity Act of 1955 by Great Britain, recalled that the Committee attached great importance to ensuring reciprocal treatment for British diplomats serving in foreign countries. Letter from E. Lauterpacht to J. Hickey (May 22, 1989) (a copy is on file with the *Hastings Law Journal*.)

32. See *supra* note 28 and accompanying text.

33. Diplomatic Convention, *supra* note 21, 23 U.S.T. at 3230, T.I.A.S. No. 5720, at 4, 500 U.N.T.S. at 96; Convention on Consular Relations, *supra* note 28, 21 U.S.T. at 79, T.I.A.S. No. 6820, at 3, 500 U.N.T.S. at 262.

34. See Gordon, *U.S., Saying It Hopes to End Expulsions, Ousts Soviet Trade Envoy*, N.Y. Times, Mar. 24, 1989, at A10, col. 1; *Soviets Denounce Expulsion Of a Diplomat From the U.S.*, N.Y. Times, Mar. 11, 1989, at 6, col. 4; *China Faults U.S. in Dispute On Diplomats' Travel Rights*, N.Y. Times, Dec. 30, 1988, at A3, col. 5.

35. See Sciolino, *Dollars v. Diplomacy: Austerity at State Dep't*, N.Y. Times, Nov. 15, 1987, at A1, col. 1; Perry, *Requiem for Diplomats*, N.Y. Times, Aug. 30, 1986, at A25, col. 1.

of arbitrary arrest, manufactured charges of criminal activity, and unduly harsh punishment would be enhanced.³⁶

The International Court of Justice in the *Iranian Hostages Case* cogently articulated the foundational interrelationship and relevance of sovereign equality and reciprocity to the present international law on criminal jurisdiction immunity in the light of the history of diplomatic law as a whole:

[t]here is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose. . . . [T]he obligations thus assumed, notably those for assuring the personal safety of diplomats and their freedom from prosecution, are essential, unqualified, and inherent in their representative character and their diplomatic function.³⁷

In the *Iranian Hostages Case*, the United States successfully claimed that Iran was obligated under international law to afford "the diplomatic and consular personnel of the United States the protection, privileges and immunities to which they are entitled, including immunity from any form of criminal jurisdiction" and to "ensure that no such personnel shall be obliged to appear on trial or . . . at any proceedings" conducted by the Iranian Government.³⁸ The Iranian Government in part justified its seizure and detention of United States diplomatic and consular personnel on grounds that those personnel had committed crimes against Iranian law.³⁹ It is at least questionable whether, because of the reciprocity premise for immunity, the United States' claim of criminal jurisdiction immunity in the *Iranian Hostages Case* would have been successful if United States law had provided, even in a limited way, for the detention, arrest, and criminal prosecution of foreign diplomatic personnel.

A recent example of United States' reliance on the related theories of reciprocity and sovereign equality was the State Department's complaint regarding China's restrictions on the travel of Americans at the United States Consulate in the city of Shenyang in northeast China.⁴⁰

36. See Roosevelt, *Immunity is Necessary for Diplomacy*, Wall St. J., Nov. 23, 1987, at A-11, col. 1; ROOSEVELT, *DIPLOMATIC IMMUNITY AND U.S. INTERESTS*, U.S. Dep't of State, Bureau of Public Affairs, Current Policy No. 993, (Aug. 1987), at 1, col. 1.

37. United States Diplomatic and Consular Staff in Tehran, (U.S. v. Iran), 1979 I.C.J. 7, 19 (Provisional Order of Dec. 15), cited with approval in United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J. 3, 42 (Judgment).

38. U.S. v. Iran, 1980 I.C.J. at 7.

39. U.S. v. Iran, 1980 I.C.J. at 9.

40. See *China Faults U.S. in Dispute On Diplomats' Travel Rights*, N.Y. Times, Dec. 30, 1988, at A3, col. 5.

The basis for the State Department's complaint was that the Chinese restrictions were "unreasonable since they go well beyond restrictions" on Chinese diplomats in the United States.⁴¹ The United States responded by issuing a reciprocal ban on officials at the Chinese Consulate at Chicago from traveling beyond the city and its suburbs without permission.⁴²

Even if functional necessity *were* the sole theoretical premise for criminal jurisdiction immunity, the unilateral subjection of foreign diplomats to receiving state criminal jurisdiction would not be justified. If foreign diplomats faced either the possibility of criminal prosecution under receiving state law for carrying out normal diplomatic functions, or exposure to misapplication of a receiving state's criminal justice system (for example, by having false criminal charges brought against them), their ability to function effectively in "the orderly and effective conduct of friendly relations between states" would be seriously hampered.⁴³ It is axiomatic that nothing is more important to the effective functioning of a diplomat than the ability to engage in uninhibited discourse. A receiving state law that subjects foreign diplomatic personnel to criminal jurisdiction creates an unacceptable potential that a foreign diplomat bearing an unsavory message might be criminally prosecuted. In such circumstances, the atmosphere for uninhibited discourse is polluted. In addition, "the diplomat's own immunity would be meaningless if his family residing with him did not have the same immunities [because] [t]he threat of [criminal] actions could be used to intimidate the diplomat."⁴⁴

B. Unilateral Removal of Criminal Jurisdiction Immunity from Diplomatic Personnel Under Customary International Law and the International Treaty Obligations of the United States

S.1437 would remove criminal jurisdiction immunity conferred as a matter of right by general and specific international law, from diplomatic personnel who are "members of a foreign mission (other than diplomatic agents)" as defined by "Article 1(e) of the . . . [Diplomatic] Convention."⁴⁵ Although the meaning of the foregoing phrase is far from clear, arguably S.1437 would operate to remove the criminal jurisdiction immunity presently accorded by international law to a wide range of diplo-

41. *Id.*

42. *Id.*

43. RESTATEMENT, *supra* note 13, introductory note to §§ 464-66 (Diplomatic and Consular Immunities); *see also supra*, text accompanying notes 28-42.

44. ROOSEVELT, *supra* note 36, at 5.

45. *See supra* note 2 and accompanying text.

matic personnel.⁴⁶ These personnel might include the administrative and technical staffs of embassies, members of the U.N. Secretary General's Office, representatives of the member states to the U.N., the OAS, the Commission of the European Commission, the Commission and staff members of the U.S-Mexico International Boundary and Water Commission, and the embassy employees of the U.S.S.R., several Eastern European states, and the People's Republic of China.⁴⁷ It would also remove any immunity presently enjoyed by family members of diplomatic agents.⁴⁸ Subjecting those presently-immune persons to criminal jurisdiction would contravene existing customary international law and treaties to which the United States is a party.

The Vienna Convention On Diplomatic Relations (Diplomatic Convention) to which the United States is a party,⁴⁹ codifies customary international law⁵⁰ on immunity from local criminal jurisdiction dating from antiquity.⁵¹ The Diplomatic Convention has been accepted as law and

46. In general, persons listed by the Department of State as diplomatic officers and their families, or as administrative and technical staff of diplomatic missions and their families, presumptively are considered to have diplomatic rank and to enjoy full immunity from criminal jurisdiction.

47. See *infra* notes 53 and 55-68 and accompanying text.

48. See *infra* note 54 and accompanying text.

49. The Diplomatic Convention was concluded in 1961 and came into force in 1964. As of 1987, 148 States (including the United States) were parties to the Convention. 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

The domestic law of the handful of states that have not acceded to the Diplomatic Convention is nevertheless consistent with the Convention's provisions. See Brown, *supra* note 13, at 53 n.3.

The 1961 Convention On Diplomatic Relations was the product of the work of the International Law Commission (ILC). The ILC began work on the subject of "diplomatic intercourse and immunities" in response to Resolution 685 adopted on December 5, 1952, in which the United Nations General Assembly expressed its desire for the common observance by all governments of existing principles of international law and practice on the treatment of diplomatic representatives and requested that the ILC give priority to the topic. G.A. Res. 832, 7 U.N. GAOR Supp. (No. 20) at 62, U.N. Doc. A/2361 (1952). The ILC eventually adopted a draft set of articles and referred them to the Vienna Conference for consideration. The Vienna Conference unanimously (Tunisia abstaining) adopted the present Convention that articulates the current rules for the conduct of diplomatic relations. Vienna convention on Diplomatic Relations, U.N. Doc. No. A/Conf. 20/13 (1961) (entered into force Apr. 24, 1964).

50. The term "customary international law" is used in its usual sense to mean the general practice of states accepted as law. See article 38(1)(b) of the Statute of the International Court of Justice, appended to U.N. CHARTER, June 26, 1945, 59 Stat. 1003, T.S. No. 993, at 3 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, at 1030 (compiled by C. BEVANS) [hereinafter BEVANS] 59 Stat. 1055, 1060, T.S. No. 993, at 997; *id.* at 1187 (referring to "international custom, as evidence of a general practice accepted as law"); see also H. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 53-56 (1972); Hickey, *Custom and Land-Based Pollution Of The High Seas*, 15 SAN DIEGO L. REV. 409, 413-20 (1978).

51. The notion that foreign diplomats are immune from local criminal jurisdiction ex-

successfully applied by virtually all states for nearly a quarter of a century without amendment or alteration. In addition, the Diplomatic Convention is fully incorporated into the law of the United States by the 1978 Diplomatic Relations Act (DRA).⁵²

The Diplomatic Convention confers criminal jurisdiction immunity as a matter of *right* on the head of a diplomatic mission (e.g., ambassadors, nuncios, envoys, ministers, and *charges d'affaires*), diplomatic staff (e.g., mission members of diplomatic rank such as *attachés*, counsellors, and diplomatic secretaries), and members of administrative and technical staff who are not nationals or permanent residents of the receiving state (e.g., archivists, clerical staff, librarians, researchers and technical staff).⁵³ Immunity from criminal jurisdiction also extends to family

tends to "ancient times." See Preamble to the Diplomatic Convention, *supra* note 21, 3227 U.T.S. at 3230, T.I.A.S. No. 7502, at 4, 500 U.N.T.S. at 96. The "inviolability of the diplomat [that he is not subject to any form of arrest or detention] is the oldest and the most fundamental rule of diplomatic law." C. LEWIS, *supra* note 13, at 172. "The immunity of an ambassador from the criminal jurisdiction of the receiving State was, after inviolability, the earliest of the basic rules of diplomatic law to be established." *Id.* at 174.

Foreign envoys were accorded certain immunities, including immunity from local jurisdiction, by, among others, the Hittites, the Babylonians, the Assyrians, the Hebrews, the Greek city-states, the ancient Chinese, Egyptians, Indians, and Romans. Barnes, *supra* note 13 at 173-74. In ancient Greece and Rome it "was an established rule that the representatives of foreign sovereigns and communities were not amenable to the local jurisdiction." C. PHILLIPSON, *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME* 330 (1979).

In the fifteenth century, with the emergence of the modern State and of permanent diplomatic missions, the notion of immunity from local jurisdiction became more firmly accepted and immunity was extended to a permanent diplomatic mission's staff and a diplomatic envoy's family members. By the end of the sixteenth century, "the inviolability of the ambassador was firmly . . . established as a rule of customary international law." E. DENZA, *supra* note 13 at 135; see also Barnes, *supra* note 13 at 174, which refers to the firm establishment of the theory of diplomatic immunity for criminal jurisdiction in "the treatises of Grotius, Zouche, and Bynkershoek in the 17th century." By no later than the eighteenth or early nineteenth century, the practice of states reflected acceptance of the principle of immunity from local criminal jurisdiction as a binding customary international law obligation. See generally E. ADAIR, *THE EXTRATERRITORIALITY OF AMBASSADORS IN THE SIXTEENTH AND SEVENTEENTH CENTURIES* (1929); C. CARTER, *THE WESTERN EUROPEAN POWERS, 1500-1700* (1971); A. GENTILI, *THREE BOOKS ON EMBASSIES* (1594 ed.) (Laing trans. 1964); H. GROTIUS, *THE LAW OF WAR AND PEACE* (Loomis trans. 1949); G. MATTINGLY, *RENAISSANCE DIPLOMACY* (1988); M. OGDON, *JURIDICAL BASES OF DIPLOMATIC IMMUNITY* (1936); J. PUENTE, *INTERNATIONAL LAW AS APPLIED TO FOREIGN STATES* (1928); G. STUART, *AMERICAN DIPLOMATIC AND CONSULAR PRACTICE* (2d ed. 1952); C. VAN BYNKERSHOEK, *A MONOGRAPH ON THE JURISDICTION OVER AMBASSADORS IN BOTH CIVIL AND CRIMINAL CASES* (Laing trans. 1964); Barnes, *supra* note 13.

52. 22 U.S.C. § 254(a)-(e) (1982). The Diplomatic Relations Act replaced the Act of 1790, 1 Stat. 117, 22 U.S.C. § 252 (repealed 1978), which was based on the English Statute of Queen Anne of 1708.

53. See articles 1, 14, 29, 31 and 37 of the Diplomatic Convention, *supra* note 21, 23 U.S.T. at 3230-44, T.I.A.S. No. 7502, at 4-18, 500 U.N.T.S. at 96-117. Administrative and technical staff provide embassies with services ranging from clerical assistance to highly classi-

members, including the immune person's spouse, minor children, and other household dependents.⁵⁴

In addition to the immunity afforded diplomatic personnel under general international law, the United States confers criminal jurisdiction immunity on additional personnel as a matter of *lex specialis* with particular states and international organizations.

Under section 15 of the Headquarters Agreement between the United States and the United Nations, the United States is required to accord to representatives of United Nations member states "the same privileges and immunities . . . as it accords to diplomatic envoys accredited to it."⁵⁵ Similarly, section 11 of the Convention on the Privileges and Immunities of the United Nations, to which the United States is a party, accords representatives of principal international organizations the same privileges and immunities as diplomatic agents.⁵⁶ OAS member representatives also have immunity from criminal jurisdiction under the Agreement Relating to Privileges and Immunities of 1975 between the United States and the OAS.⁵⁷ Permanent observers to the OAS and their

fied activities involving encoding and other technologically complex matters. Their numbers may be expected to expand as a result of a heightened need for such personnel in an age of rapidly advancing technology. As asserted by the Department of State's Chief of Protocol before the Senate Foreign Relations Committee:

The members of the administrative and technical staff of an embassy must have full criminal immunity in order to perform their jobs effectively. These personnel perform tasks fundamental to the operation of the embassy. Many of them, including communicators who transmit encoded messages and secretaries who type the mission's classified documents, engage in very sensitive work.

ROOSEVELT, *supra* note 36, at 5. Members of domestic service staff, who are not nationals or permanent residents of the receiving state (for example cooks, maids, drivers, and gardeners) are entitled only to immunity for their official acts, that is, "acts performed in the course of their duties." Article 37(3), Diplomatic Convention, *supra* note 21, 3227 U.T.S. at 3244, T.I.A.S. No. 5702, at 18, 500 U.N.T.S. at 116. Here it should be noted that the U.S.S.R., the People's Republic of China, Bulgaria and the German Democratic Republic embassy employees, by mutual agreement with the United States, have criminal jurisdiction immunity. See *infra* notes 61, 62, 65, and 66 and accompanying text.

54. Article 37(1), Diplomatic Convention, *supra* note 21, 3227 U.T.S. at 3244, T.I.A.S. No. 5702, at 18, 500 U.N.T.S. at 116, provides that immunity extends to "members of the family . . . forming part of . . . [the] household" of those entitled to immunity from criminal jurisdiction. The rather flexible term "household" in practice may include persons that fulfill the social duties of hostess to a diplomatic agent, or an unemployed parent or grandchildren of a diplomat who live in the diplomat's home. See E. DENZA, *supra* note 13, at 223-25.

55. U.N. Headquarters Agreement, June 26, 1945, 61 Stat. 3416, 3429; 12 BEVANS, *supra* note 50, at 963.

56. Convention on Privileges and Immunities of the United Nations, adopted Feb. 13, 1946, 21 U.S.T. 1418, 1427-28, T.I.A.S. No. 6900, 6910-11, 1 U.N.T.S. 15, 21-22 (in force for 120 states).

57. Agreement on Privileges and Immunities of OAS Personnel, Mar. 20, 1975, 26 U.S.T. 1025, T.I.A.S. No. 8089.

diplomatic staffs were accorded criminal jurisdiction immunity by Executive Order of President Gerald Ford on August 3, 1976.⁵⁸ By Executive Order of December 5, 1972, Richard Nixon extended diplomatic privileges and immunities to the representatives to the Mission of the Commission of the European Commission to the United States.⁵⁹ Finally, diplomatic privileges and immunities are accorded to the commissioners, family members, and certain staff members of the International Boundary and Water Commission by article 2 of the treaty between the United States and Mexico.⁶⁰

The United States, by special bilateral agreements, also confers immunity from criminal jurisdiction to consular officers, family members, and in most cases, to the embassy employees (including those not normally entitled to immunity) of the USSR,⁶¹ the Peoples Republic of China,⁶² Hungary,⁶³ Poland,⁶⁴ Bulgaria,⁶⁵ the German Democratic Republic,⁶⁶ the Philippines,⁶⁷ and Romania.⁶⁸

Thus, the international law obligations of the United States to afford immunity from criminal jurisdiction to the foreign diplomatic personnel described above are clear as a matter of customary international law, multilateral convention, and special international agreement. These international law obligations may not be dispensed with unilaterally by the United States. Of course, immunity may be removed at any time by mu-

58. Exec. Order No. 11,931, 3 C.F.R. 140 (1976), *reprinted in* 22 U.S.C. § 288g app. at 124 (1982).

59. Exec. Order No. 11,689, 3 C.F.R. 732 (1972), *reprinted in* 22 U.S.C. § 288h app. at 124 (1982).

60. Utilization of Waters of Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, 59 stat. 1219, 1222-25, 9 BEVANS, *supra* note 50, at 1169-71.

61. See Agreement on Privileges and Immunities of Embassy Staffs, Dec. 14, 1978, U.S.-USSR, 30 U.S.T. 2341, T.I.A.S. No. 9340.

62. See Consular Convention, U.S.-China, Sept. 17, 1980, *modified* Jan. 17, 1981, 33 U.S.T. 2973, T.I.A.S. No. 10209.

63. See Consular Convention, U.S.-Hungary, July 7, 1972, 24 U.S.T. 1141, T.I.A.S. No. 7641 (as to embassy employees, only the Administrative and Technical Staff have full criminal immunity).

64. See Consular Convention, U.S.-Poland, May 31, 1972, 24 U.S.T. 1231; T.I.A.S. No. 7642 (criminal immunity for employees only for official acts).

65. See Consular Convention, U.S.-Bulgaria, Apr. 15, 1974, 26 U.S.T. 687, T.I.A.S. No. 8067.

66. See Consular Convention, U.S.-German Democratic Republic, Sept. 4, 1979, T.I.A.S. No. 10061.

67. See Consular Convention, U.S.-Philippines, Mar. 14, 1947, T.I.A.S. No. 1741.

68. See Consular Convention, U.S.-Romania, July 5, 1972, 24 U.S.T. 1317; T.I.A.S. No. 7643.

tual agreement of the United States and the States or international organizations involved.⁶⁹

In addition to violating the substantive international law of diplomatic privileges and immunities, a unilateral abrogation by the United States of its multilateral and bilateral treaty commitments to afford criminal jurisdiction immunity described above also would violate at least two fundamental precepts of the law of treaties.⁷⁰ The fundamental obligation of states entering into international agreements is to perform the terms of treaties in good faith (*pacta sunt servanda*).⁷¹ Arguably, a unilateral abandonment by the United States of treaty obligations to afford criminal jurisdiction immunity to foreign diplomatic and consular personnel violates this good faith performance duty.⁷² In addition, an abrogation of such a fundamental obligation would constitute a material breach of treaty⁷³ that is justified neither by the facts,⁷⁴ nor by a fundamental change of circumstances (*rebus sic stantibus*).⁷⁵ This would entitle foreign sending states to suspend or terminate diplomatic and consular privileges and immunities enjoyed by United States personnel abroad under bilateral treaty or multilateral convention.⁷⁶

69. See Diplomatic Convention, *supra* note 21, 23 U.S.T. at 3241, T.I.A.S. No. 7502, at 15, 500 U.N.T.S. at 112.

70. See generally the Vienna Convention On the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/CONF.39/27 [hereinafter Law of Treaties]; I. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* (2d ed. 1984); Kearney & Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L LAW 495 (1970).

71. Law of Treaties, *supra* note 70, at art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

72. *Id.*

73. *Id.* at art. 60(3)(a),(b) ("A material breach of a treaty consists [of] a repudiation of the treaty . . . or the violation of a provision essential to the accomplishment of the object or purpose of the treaty.").

74. See the discussion of the present facts on "diplomatic crime" in the United States, *infra* notes 104-15 and accompanying text.

75. See Law of Treaties, *supra* note 70, at art. 62; Fisheries Jurisdiction, (U.K. v. Ice.) 1973 I.C.J. 3, 20-21 (a change of circumstances that gives rise to an entitlement to revoke a treaty obligation must constitute a radical transformation of the extent of the treaty obligation still to be performed). The United States is a signatory to the Vienna Convention but it has not yet been acted upon by the United States Senate. Nevertheless, the Law of Treaties' provisions on *pacta sunt servanda* and *rebus sic stantibus* merely articulate customary international law. Law of Treaties, *supra* note 70, at arts. 60, 62. In addition, the Department of State considers the Vienna Convention as codifying binding customary international law. See U.S. DEP'T OF STATE, PUB. NO. 8756, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1973, 307, 482-83 (1974).

76. See Law of Treaties, *supra* note 70, at art. 60(1), (2).

C. Removal of Criminal Jurisdiction Immunity for Members of Foreign Consular Posts Other Than Consular Officers Under Special Bilateral International Agreements⁷⁷

Consular relations among states have an unsettled and vague history in contrast to the unambiguous evolution of customary international law regarding diplomatic privileges and immunities. Historically, in the absence of governing bilateral or regional treaties, criminal jurisdiction immunity for consular personnel was considered more likely as not a matter of nonobligatory usage than a requirement of customary international law.⁷⁸ Nonetheless, in 1963, on the heels of the Diplomatic Convention, the Vienna Convention on Consular Relations (Consular Convention) was concluded. It entered into force in 1967⁷⁹ and the United States adopted the convention in 1969. The Consular Convention broke new ground in converting mere usages into binding treaty obligations. It is generally recognized today, however, that the Consular Convention reflects the basic obligations of consular relations among states, subject to change by bilateral treaty.

Consular relations between states differ fundamentally from diplomatic relations. Consular personnel, in contrast to diplomatic personnel, usually are not responsible for providing official communications between the sending and receiving states. For that reason receiving states

77. See generally RESTATEMENT, *supra* note 13, § 465 (discussing immunities of consular personnel); L. LEE, *supra* note 13, at 115-411 (discussing immunity of consular personnel from criminal jurisdiction).

78. I. BROWNIE, *supra* note 13, at 359-60, accurately refers to the status of consuls as historically "based upon general usage rather than law" and to the "existence of fairly uniform practices (whatever the customary law might be), evidenced by a large number of bilateral treaties" Brownlie specifically refers to the "differences of opinion [among authorities] concerning the personal inviolability of consular officials" *Id.* at 360. L. LEE, *supra* note 13, at 15-16, distinguishes between the tasks that faced the consular convention conferees and the diplomatic convention conferees: "Unlike the Diplomatic Conference of 1961, which . . . had the relatively simpler task of restating the principle of absolute criminal jurisdiction immunity which had so characterized the diplomatic status for centuries, the consular conference was under the necessity of breaking new ground" (footnote omitted). See also do Nascimento e Silva, *The Vienna Conference on Consular Relations*, 13 INT'L & COMP. L.Q. 1214, 1216 (1964), who refers to consular law as "not ripe for codification" before 1939. He also refers to consular law in the post-World War II period as "a reasonable international custom." *Id.* at 1218.

79. Convention on Consular Relations, *supra* note 28, 21 U.S.T. at 77, T.I.A.S. No. 6820, at 1, 596 U.N.T.S. at 261. The 1963 Consular Convention, like the Diplomatic Convention, was the work product of the ILC, which began its work in 1955 and finally referred a set of draft articles to the Vienna Conference convened in 1963. Ninety-two governments participated in the conference, which on April 23, 1963, adopted the present Vienna Convention on Consular Relations. See L. LEE, *supra* note 13, 205-19 (1966). As of 1987, 110 states (including the United States in 1969) were parties to the Convention. See L. HENKIN, INTERNATIONAL LAW, CASES AND MATERIALS 340 (Basic Documents Supp.) (2d ed 1987).

generally grant substantially fewer privileges to consular personnel. In general, consular personnel carry out functions assigned to them by the sending state that are permitted by the receiving state. Normally, those functions include safeguarding the interests of the sending state and those of its nationals in the receiving state, developing commercial, cultural, and scientific ties, issuing travel documents (passports and visas), and assisting private individuals and corporations of the sending state present in the receiving state on a variety of problems such as estate and inheritance matters, representation before receiving state courts and tribunals, and authentication of marriage and divorce documents.⁸⁰

Absent special agreement otherwise, the personal inviolability of consular personnel is limited to their job-related functions and there is no immunity from federal or state criminal jurisdiction.⁸¹ Normally all consular officers (heads of consular posts, vice-consuls, or any person entrusted by the sending state with the exercise of consular functions), employees (administrative or technical staff), and service staff (domestic help) are subject to arrest, detention, and criminal process.⁸² Ordinarily, the only qualification is that consular officers are immune from pretrial arrest and detention "except in the case of a grave crime [*i.e.*, a felony] and pursuant to a decision by the competent judicial authority [*i.e.*, a court-issued warrant]."⁸³

80. See Convention on Consular Relations, *supra* note 28, 21 U.S.T. at 82-85, T.I.A.S. No. 6820, at 6, 596 U.N.T.S. at 208-70; RESTATEMENT, *supra* note 13, § 465 reporters' note 4; L. LEE, *supra* note 13, at 51-73.

81. The Diplomatic Relations Act in § 8(a)(1), 28 U.S.C. § 1351 (1982), amended the United States Code so as to restrict exclusive federal court jurisdiction against "consuls or vice consuls of foreign states" to "civil actions and proceedings" only, thus permitting state courts to exercise jurisdiction over criminal actions. See *State v. Killeen*, 39 Or. App. 369, 592 P.2d 268 (1979) (§ 1351 does not divest state court from jurisdiction over consular official charged with traffic infractions occurring outside the performance of official consular duties); RESTATEMENT, *supra* note 13, § 465 reporters' note 12 (discusses modern interpretation of § 1351, allowing states to enforce criminal laws against foreign consular officials).

82. See Convention on Consular Relations, *supra* note 28, art. 1(d)-(f), 21 U.S.T. at 80, T.I.A.S. No. 6820, at 4, 596 U.N.T.S. at 264, for definitions of consular officers, employees, and service staff.

83. Convention on Consular Relations, *supra* note 28, art. 41(1), 21 U.S.T. at 103, T.I.A.S. No. 6820, at 27, 596 U.N.T.S. at 296. Several comments are in order here. The State Department considers "grave crime" to mean a felony. See OFFICE OF PROTOCOL AND THE OFFICE OF FOREIGN MISSIONS, U.S. DEP'T. OF STATE, PUB. NO. 9533, GUIDANCE FOR LAW ENFORCEMENT OFFICERS, PERSONAL RIGHTS AND IMMUNITIES OF FOREIGN DIPLOMATIC AND CONSULAR PERSONNEL 7 (rev. ed. 1988) [hereinafter GUIDANCE FOR LAW ENFORCEMENT OFFICERS]; see also, L. LEE *supra* note 13, at 129-33 (difficult to arrive at a uniform definition of "grave crime," given its relatively conceptual nature). Article 41 of the Convention on Consular Relations, *supra* note 28, 21 U.S.T. at 103-04, T.I.A.S. No. 6820, at 27-28, 596 U.N.T.S. at 296, addresses the personal inviolability of consular officers as follows:

1. Consular officers shall not be liable to arrest or detention pending trial, except in

Unlike the blanket criminal jurisdiction immunity afforded diplomatic personnel as a matter of presumptive right, the sending states have

the case of a grave crime and pursuant to a decision by the competent judicial authority.

2. Except in the case specified in paragraph 1 of this Article, consular officers shall not be committed to prison or liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect.

3. If criminal proceedings are instituted against a consular officer, he must appear before the competent authorities. Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position and, except in the case specified in paragraph 1 of this Article, in a manner which will hamper the exercise of consular functions as little as possible. When, in the circumstances mentioned in paragraph 1 of this Article, it has become necessary to detain a consular officer, the proceedings against him shall be instituted with the minimum of delay.

Article 42 requires the receiving state, in the event that consular personnel are arrested or detained, to notify the head of the consular post or the sending state as appropriate. *Id.*, 21 U.S.T. at 104, T.I.A.S. No. 6820, at 28, 596 U.N.T.S. at 296.

Article 43(1) sets out the limited functional immunity accorded to consular personnel:

1. Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving state in respect of acts performed in the exercise of consular functions.

Id., 21 U.S.T. at 104, T.I.A.S. No. 6820, at 28, 596 U.N.T.S. at 298.

It is fair to read the functional immunity mentioned in article 43(1) as not extending to crimes committed by consular officers and employees, but rather as limited to civil acts. To interpret the functional immunity provision otherwise would appear to require reading article 43 as the controlling provision and article 41 as subordinate to it. However, such a preeminence for article 43 seems inconsistent with other articles of the Convention on Consular Relations and with United States practice. For example, article 55(1) requires consular personnel to "respect the laws and regulations of the receiving State," *id.*, 21 U.S.T. at 113, T.I.A.S. No. 6820, at 37, 596 U.N.T.S. at 308, and article 5(m) limits consular functions to functions "which are not prohibited by the laws and regulations of the receiving State . . ." *Id.*, 21 U.S.T. at 85, T.I.A.S. No. 6820, at 9, 596 U.N.T.S. at 270. Article 5 contains several other references to the limitation of consular functions to only legal acts. Subsection (c) of article 5 refers to "lawful means" of collecting and reporting information, subsection (h) requires that the safeguarding of the interests of minors and others lacking full capacity be carried out "within the limits imposed by the laws and regulations of the receiving State," and subsection (j) mandates that the taking of evidence by consular personnel for the courts of the sending state be accomplished in a "manner compatible with the laws and regulations of the receiving State." *Id.*, 21 U.S.T. at 83-84, T.I.A.S. No. 6820, at 7-8, 596 U.N.T.S. at 268, 270. It is difficult to imagine that a receiving state would ever acknowledge that a criminal act under receiving state law committed by a consular officer or employee was nevertheless a consular function. See L. LEE, *supra* note 13, at 115-29. Moreover, there already exists the "grave crime" standard for the inviolability of consular officers in article 41(1). Nevertheless, the two standards, grave crime and consular function, exist and arguably each standard might apply to criminal acts of consular personnel.

The State Department refers to consular officers as having "official acts or functional immunity in respect of both criminal and civil matters" and elaborates on the criminal aspect as follows:

A person enjoying official acts immunity from criminal jurisdiction may always be prosecuted if the responsible host government authorities believe that the criminal act is outside the scope of the individual's official duties, and may in this connection always be required to appear in court (in person or through counsel). At this point,

the burden of demonstrating the existence of such immunity for their consular personnel.⁸⁴ With regard to diplomatic personnel, the receiving state has the burden of proving that immunity from criminal jurisdiction, once asserted, does not apply in a given case.⁸⁵ With consular personnel, however, the burden of proving consular status is on the officer or employee claiming it.⁸⁶ The allocation of burden of proof between sending and receiving states reflects that immunity from criminal jurisdiction is a

however, such person may assert as an affirmative defense that the actions complained of arose in connection with the performance of official acts. If, upon examination of the circumstances complained of, the court agrees, then the court is without jurisdiction to proceed and the case must be dismissed.

GUIDANCE FOR LAW ENFORCEMENT OFFICERS, *supra*, at 7-8. The current U.S. state practice is to enter special bilateral treaties in order to confer criminal jurisdiction immunity on consular personnel. See *supra* notes 61-68; *infra* notes 90-94. The United States would not need to do this if it considered that the Consular Convention itself extended immunity to crimes. State Department officials recently have expressed the view that its practice is to treat foreign consular personnel, in the absence of special treaty or agreement, as not having immunity from criminal jurisdiction. Differing treatment by some local law enforcement agencies is usually a result of local misunderstanding and confusion rather than an official United States practice endorsing criminal jurisdiction immunity. Perhaps the best explanation for the inclusion in the Convention on the Consular Relations of the two standards regarding criminal jurisdiction immunity is that the conferees were "aiming at reaching as widely acceptable an agreement as possible." L. LEE, *supra* note 13, at 133.

84. See *infra* note 86. Proposals also have been made to shift the burden of proof for diplomatic personnel. 134 CONG. REC. S16,045-46 (daily ed. Oct. 14, 1988) (Statement of Sen. Helms). Not only is this shift in burden of proof logically inconsistent, but to compel a person, immune as a matter of right, to establish legal entitlement to what already is granted her by law, directly contravenes the Diplomatic Convention, the Diplomatic Relations Act, and customary international law. See *supra* notes 49-54 and accompanying text.

85. RESTATEMENT, *supra* note 13, § 465 reporters' note 1. See *In re Baiz*, 135 U.S. 403 (1890) (when defendant is not accredited as a diplomat, he has the burden of showing immunity from prosecution); *Carrera v. Carrera*, 174 F.2d 496 (D.C. Cir. 1949) (motion to dismiss granted when State Department certified defendant's diplomatic immunity); *Bergman v. De Sieyes*, 170 F.2d 360 (2d Cir. 1948) (once the diplomat in transit claimed immunity, the only inquiry was whether he was entitled to the same immunity as a diplomat *in situs*); *Arcaya v. Paez*, 145 F. Supp. 464 (S.D.N.Y. 1956) (the State Department's determination of diplomatic immunity is binding in a libel action where the defendant moved for summary judgment); *United States v. Coplon*, 84 F. Supp. 472 (S.D.N.Y. 1949) (defendant is subject to jurisdiction of court when he fails to show State Department accreditation and fails to prove immunity as employee of the U.N.); *In re Terrence K.*, 138 Misc. 2d 611, 524 N.Y.S.2d 996 (N.Y. Fam. Ct. 1988) (diplomatic agent's son ordered returned to the foreign mission when the court recognized the claim of immunity made on behalf of the diplomat and his family).

86. As to the pleading of consular immunity, see generally *Gerritsen v. Hurtado*, 819 F.2d 1511 (9th Cir. 1987) (court rejected immunity, determining that the acts of the consular officials did not constitute consular functions); *Heaney v. Government of Spain*, 445 F.2d 501 (2d Cir. 1971) (consul was deemed immune from suit only after court determined that he had exercised appropriate consular functions); *Silva v. Superior Court*, 52 Cal. App. 3d 269, 125 Cal. Rptr. 78 (1975) (whether the Consul of Mexico was immune because acting within the scope of his official duties was a question of fact); *Commonwealth v. Jerez*, 390 Mass. 456, 457 N.E.2d 1105 (1983) (official acting within his official capacity was immune from prosecution).

legal right for diplomatic personnel while, to the extent that it exists, it is a privilege for consular personnel.⁸⁷

The limited functional immunity and personal inviolability accorded to consular personnel, in contrast to diplomatic personnel, does not extend to family members. In addition, the special category of honorary consuls, who are noncareer, part-time representatives of the sending state, enjoy no personal inviolability or immunity from criminal jurisdiction.⁸⁸

Legislative proposals to remove criminal jurisdiction immunity for consular personnel (other than consular officers) would not affect ordinary consular relations because there is, as a general matter, no "immunity" from local criminal jurisdiction.⁸⁹ The United States, however, has negotiated several special bilateral consular arrangements that do confer immunity from criminal jurisdiction on foreign consular personnel and that would be affected by unilateral removal of criminal jurisdiction immunity. For example, the 1968 Consular Convention between the United States and the USSR accords to consular personnel who are not nationals of the United States full criminal immunity jurisdiction.⁹⁰ Similar bilateral consular agreements granting criminal jurisdiction immunity exist between the United States and Hungary,⁹¹ the Peoples Republic of China,⁹² the Philippines,⁹³ and Poland.⁹⁴ The S.1437 proposal to deny immunity for members of consular posts in the United States would violate these specific bilateral treaty arrangements.⁹⁵

87. See *supra* notes 84-88 and accompanying text.

88. Article 63 of the Convention on Consular Relations, *supra* note 28, 21 U.S.T. at 116, T.I.A.S. No. 6820, at 40-41, 596 U.N.T.S. at 314, provides that "[i]f criminal proceedings are instituted against an honorary consular officer, he must appear before the competent authorities."

89. See *supra* notes 81-83 and accompanying text.

90. Consular Convention, U.S.-U.S.S.R., June 1, 1964, 19 U.S.T. 5018, 5031, T.I.A.S. No. 6503, at 14. Under article 73 of the Convention on Consular Relations, *supra* note 28, 21 U.S.T. at 121, T.I.A.S. No. 6820, at 45, 596 U.N.T.S. at 320, states may grant greater privileges and immunities than provided for in the Convention. See RESTATEMENT, *supra* note 13, § 465 reporters' note 3; GUIDANCE FOR LAW ENFORCEMENT OFFICERS, *supra* note 83, at 7 n.5.

91. Consular Convention, U.S.-Hungary, *supra* note 63, 24 U.S.T. at 1152-53, T.I.A.S. No. 7641, at 12-13.

92. Consular Convention, U.S.-China, *supra* note 62, 33 U.S.T. at 2896-97, T.I.A.S. No. 10209, at 14-15.

93. Consular Convention, U.S.-Philippines, *supra* note 67.

94. Consular Convention, U.S.-Poland, *supra* note 64.

95. See *supra* note 25 and accompanying text.

Thus, by any measure, a unilateral legislative removal of existing criminal jurisdiction immunity by the United States conflicts with fundamental international law theory, custom, and treaties.

II. Unilateral Curtailment of Criminal Jurisdiction Immunity Under United States Law

The customary international law and treaty provisions assuring immunity from United States criminal jurisdiction set out in section I also form part of the law of the United States. As the Supreme Court stated in *The Paquete Habana*:⁹⁶ "International law is part of our [United States] law and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."⁹⁷ Moreover, article VI of the United States Constitution provides that "all treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land."⁹⁸

In addition, the customary and treaty law set out above specifically has been made a part of United States law by the Diplomatic Relations Act of 1978 (DRA).⁹⁹ The first law on diplomatic immunity in the United States was the act of April 30, 1790,¹⁰⁰ which was based on an earlier English statute.¹⁰¹ The 1790 statute essentially provided diplomats with absolute immunity from United States criminal and civil juris-

96. 175 U.S. 677 (1900).

97. *Id.* at 700; see also RESTATEMENT, *supra* note 13, § 111(3).

98. *Reid v. Covert*, 354 U.S. 1, 17 (1957) (quoting *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890)) ("The Treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and that of the States."); *United States v. Minnesota*, 270 U.S. 181, 207-08 (1926) ("Of course, all treaties and statutes of the United States are based on the Constitution; and, in a remote sense, what is done by or under them is done under it. . . . The decisions of this Court generally have regarded treaties as on much the same plane as acts of Congress, and as usually subject to the general limitations in the Constitution . . ."); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other."); *Head Money Cases*, 112 U.S. 580, 598 (1884) ("The Constitution of the United States places such provision, as these in the same category as other laws of Congress by its declaration that [article VI] . . . [a] treaty, then, is a law of the land as an act of Congress is . . .").

99. 22 U.S.C. § 254(a)-(e) (1982). Subsection (d) provides that "[a]ny [criminal] action or proceeding brought against an individual who is entitled to immunity" under the Diplomatic Convention shall be dismissed.

100. Law of April 30, 1790, ch. IX, § 25, 1 Stat. 117, 22 U.S.C. § 252 (1976), *repealed by* Diplomatic Relations Act of 1978, § 3, 92 Stat. 808, 808.

101. 7 Anne, ch. XII (1708).

diction. The DRA replaced the 1790 statute.¹⁰² The DRA implements the Diplomatic Convention's provisions on criminal immunity and requires such immunity as a matter of United States law for both parties and nonparties to the Diplomatic Convention. Under the DRA, the President may treat members of a diplomatic mission and their families less favorably than provided for in the Diplomatic Convention only "on the basis of reciprocity."¹⁰³ Thus, any unilateral legislation like S.1437 that eliminates existing criminal jurisdiction immunity, both violates United States' law in the form of the DRA and invites or compels reciprocal foreign legislation against United States' diplomatic and consular personnel serving abroad.

III. The Facts Do Not Merit a Change in Existing Immunity Law

Legislative proposals to limit immunity from criminal jurisdiction impliedly are premised on the misperception that "diplomatic crime" is a significant national problem.¹⁰⁴ In the past decade the number of foreigners entitled to some measure of diplomatic and consular privileges and immunities in the United States has more than doubled from a 1977 total of 23,569¹⁰⁵ to 55,971¹⁰⁶ in 1987, of which roughly 27,000¹⁰⁷ were entitled to complete immunity from criminal jurisdiction. That increase, however, has not translated into a significant national crime problem meriting a legislative response.¹⁰⁸ First, to the extent a diplomatic crime

102. 22 U.S.C. § 254(a)-(e) (1982).

103. *Id.* § 254(e).

104. See *supra* notes 5-12 and accompanying text.

105. See *Claims Against Persons Entitled to Diplomatic Immunity: Hearings on H.R. 7679 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 5 (1977) reprinted in Cong. Information Serv. No. H521-17 (1978). Of the 23,569 persons, 19,000 formed the diplomatic community in Washington, D.C. alone. *Id.*, 123 CONG. REC. 25, 204 (1977) (Statement of Rep. Fascell). Diplomatic Relations Act: House Debate on July 27, 1977, 95th Cong., 1st Sess., reprinted in SENATE COMM. ON FOREIGN RELATIONS, 96TH CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE DIPLOMATIC RELATIONS ACT at 35 (1979).

106. BRIEFING BOOK, *supra* note 5, at 1. Mr. Timothy E. Leahy, Protocol Officer, Office of Protocol, Department of State in September 1988, advised in a telephone interview that as of 1987, 3,070 diplomats excluding dependents and administrative and technical staff in Washington, D.C. alone had immunity from criminal jurisdiction compared with 2,246 in 1978.

107. BRIEFING BOOK, *supra* note 5, at 2. The precise number of persons entitled to diplomatic immunity at any particular moment is not known, largely because there are a certain number of diplomats and their dependents, and diplomatic and consular personnel, arriving and departing their posts, or in transit through the United States to other areas. The largest estimate of those with criminal immunity as of March 18 1988 was 26,282; with official acts immunity, 29,689. *Id.*

108. See *infra* note 112.

problem exists, it is narrowly-confined to the New York City and Washington, D.C. metropolitan areas.¹⁰⁹ Second, the "diplomatic crime" that occurs in these areas is statistically insignificant. During a recent four year period (1982-1985) there were a total of only 147 "diplomatic crime" incidents in Washington, D.C. and forty-four such incidents in New York.¹¹⁰ In 1988, the 29,000 diplomatic and consular personnel residing in the Washington, D.C. metropolitan area committed twenty-three crimes out of the total reported crimes committed of 78,855.¹¹¹ That represents a de minimus proportion (3/100th of 1 percent) of the reported crimes in that area.¹¹² In addition, of those twenty-three crimes, only five were serious offenses of the type that are the primary concern of S.1437. The rest of the "crimes" were of the shoplifting variety that would not be covered by the "felony" standard of S.1437.¹¹³ In New York from September 1987 to September 1988 there were only "11 crimes committed by diplomatic personnel or family members: 6 assaults, 1 shoplifting incident, 1 case of child abuse and 3 cases of drug abuse."¹¹⁴ This hardly presents the factual occasion to enact legislation unilaterally that disregards existing international law.

Thus, the facts of "diplomatic crime," quite apart from existing international and United States law, clearly do not justify enactment of legislation such as S.1437. In fact, it is far more likely that a diplomat will be a *victim* of crime than a criminal *offender*. For example, in New York City during the 1981-87 period "the ratio of crimes against diplomats, compared with those committed by them, was 30 to 1."¹¹⁵ If anything, the facts support legislation expanding rather than reducing U.S. protection of foreign diplomats and consular personnel as proposed by S.1437.

IV. Present Remedies for "Diplomatic Crimes"

It should be noted that the immunity from criminal jurisdiction accorded is immunity only from local jurisdiction; it does not dispense with

109. See *infra* note 110.

110. *Study and Report Concerning the Status of Individuals with Diplomatic Immunity in the United States; Foreign Relations Authorization Act for Fiscal Years 1988 and 1989 (FRAA)*, Pub. L. No. 100-204, Sec. 137, prepared by the United States Department of State, Exhibits B-1(a)-(c)-B-2(a)-(c) (1988).

111. Gookin, *supra* note 6, at 18.

112. Even accepting a reporting factor error of ten times, "diplomatic crime" expressed as a percentage of total crime remains a statistically insignificant three-tenths of 1%.

113. See *supra* note 110.

114. *Id.*

115. Howe, *Reduction Seen in Political Violence at U.N.*, N.Y. Times, Oct. 30, 1988, at 54, col. 1.

the firm obligation of foreign diplomatic and consular personnel to obey local criminal laws in the receiving state.¹¹⁶ That obligation remains intact under existing law. A foreign diplomat who violates local criminal law is subject to the full range of remedies available under United States and international law. Those remedies, if diligently pursued, are more than adequate to address existing "diplomatic crime" in the United States.

Consistent with the obligation to obey local criminal laws and with the underlying theories behind jurisdictional immunity,¹¹⁷ there are clear and unambiguous sanctions that may be applied by the United States as a receiving state against criminal offenders entitled to immunity. First, the receiving state may request that the sending state waive the immunity of the persons who have committed crimes.¹¹⁸ Once the sending state waives immunity, the receiving state may exercise criminal jurisdiction and prosecute offenders to the full extent of local criminal law. Second, the sending state—on its own initiative or at the urging of the receiving state—may itself prosecute offending persons under its own criminal laws.¹¹⁹ Third, the receiving state may remove offenders from society by declaring them to be *persona non grata*.¹²⁰ This means that offenders no

116. Article 41(1) of the Diplomatic Convention, *supra* note 21, provides: "Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State." 23 U.S.T. at 3247, T.I.A.S. No. 7502, at 21, 500 U.N.T.S. at 120. The Convention on Consular Relations has a similar provision in article 55. *Supra* note 28, 21 U.S.T. at 113, T.I.A.S. No. 6820, at 34, 596 U.N.T.S. 308-09. The International Law Commission commented on article 41 that "[i]mmunity from jurisdiction implies merely that the agent may not be brought before the [local] courts if he fails to fulfill his obligations." *Report of the International Law Commission to the General Assembly* 13 U.N. GAOR Supp. (No. 9) at 26, U.N. Doc. A/3859 (1958), reprinted in 2 Y.B. INT'L COMM'N 78, U.N. Doc. A/CN.4/SER.A/1958/Add.1 (commentary 1 on draft art. 41). See *Report of the International Law Commission to the General Assembly*, 12 U.N. GAOR Supp. (No. 9) at 11, U.N. Doc. A/3623 (1957), reprinted in 2 Y.B. INT'L L. COMM'N 131 U.N. Doc. A/CN.4/SER.A/1957/Add.1 (commentary 1 on draft art. 33); see also Dinstein, *Diplomatic Immunity from Jurisdiction Ratione Materiae*, 15 INT'L COMP. L. Q. 76, 81 (1966) (diplomatic immunity merely exempts agents from local jurisdiction, but does not absolve them of legal liability).

117. See *supra* notes 22-44 and accompanying text.

118. Article 32(1) of the Diplomatic Convention provides that the "immunity . . . of diplomatic agents and of persons enjoying immunity . . . may be waived by the sending state." *Supra* note 21, 23 U.S.T. at 3241, T.I.A.S. No. 7502, at 15, 500 U.N.T.S. at 112. Article 32(2) requires that the waiver "must always be express" and may not be implied. *Id.*

119. Article 31(4) of the Diplomatic Convention provides that the "immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State." *Id.*

120. Article 9(1) of the Diplomatic Convention provides that the "receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff . . . is *persona non grata*. . . ." *Id.*, 23 U.S.T. at 3233-34, T.I.A.S. No. 7502, at 7-8, 500 U.N.T.S. at 102.

longer are welcome in the receiving state and must leave, or if they do not leave, the receiving state does not have to treat them as immune persons.¹²¹ This remedy removes offenders from society more effectively than domestic imprisonment and at no cost to the American taxpayer. Further, this may have the added punitive effect of ending offenders' diplomatic careers or at the very least, of subjecting them to international opprobrium. Finally, it should be mentioned that once immunity is withdrawn, offenders can then be subjected to criminal jurisdiction after a reasonable period of time (usually thirty days) has elapsed.¹²²

In addition to the offender-specific sanctions mentioned above, the receiving state may take steps against a particular state delegation. That is, under existing law the receiving state may unilaterally place any restriction it chooses on the size and qualification of diplomatic and consular delegations that are permitted to reside in receiving state territory.¹²³ Of course, the receiving state may also reduce the risk that foreign diplomatic and consular personnel will commit crimes in the receiving state by insisting on a bilateral basis that states send better-qualified, less criminally-inclined personnel to the receiving state.

Given the statistical insignificance of "diplomatic crime,"¹²⁴ the existing array of remedies and sanctions described above are an effective deterrent to the commission of "diplomatic crimes." If "diplomatic crime" increases in the future, then the United States should vigorously pursue the available remedies outlined above. Indeed, strict application of these existing remedies to respond to an increase in crimes committed by diplomatic and consular personnel in general, or by members of a

121. *Id.* art. 9(2), 23 U.S.T. at 3234, T.I.A.S. No. 7502, at 8, 500 U.N.T.S. at 102.

122. Article 39(2) of the Diplomatic Convention provides that "[w]hen the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or an expiring of a reasonable period in which to do so" *Id.*, 23 U.S.T. at 3245, T.I.A.S. No. 7502, at 19, 500 U.N.T.S. at 118. Article 39 nevertheless recognizes the continuation of immunity in connection with the individual's performance of official acts. *Id.* See generally Larsehan, *The Abisinito Affair: A Restrictive Theory of Diplomatic Immunity*, 26 COLUM. J. OF TRANSNAT'L L. 283 (1988) (discussing the scope of diplomatic immunity under U.S. and international law).

123. While the State Department consistently follows the Diplomatic Convention's designations of those entitled to diplomatic status, it need not do so. Article 4(2) of the Diplomatic Convention, *supra* note 21, 23 U.S.T. at 3232, T.I.A.S. No. 7502, at 6, 500 U.N.T.S. at 100, provides that "[t]he receiving state is not obliged to give reasons to the sending for a refusal" to accredit a head of mission. Article 11(2) provides that the receiving state "may refuse to accept officials of a particular category" from the sending state. *Id.*, 23 U.S.T. at 3235, T.I.A.S. No. 7502, at 9, 500 U.N.T.S. at 102. No explanation or justification need be provided by the receiving state for it to act against particular persons or delegations under either article 4 or article 11.

124. See *supra* notes 104-15 and accompanying text.

particular sending state mission, can be quite effective in assuring obedience to local law. For example, the British Foreign Office recently reduced unpaid parking tickets by the 18,000 member foreign diplomatic corps residing in Great Britain from 108,845 in 1984 to 14,437 in 1987.¹²⁵ It achieved this dramatic reduction of disregard for local law, not by legislatively removing immunity from jurisdiction but by issuing expulsion threats against repeat offenders. It would seem that a similar vigorous use of the remedies outlined above are more than adequate to address any future "diplomatic crime" problems in the United States.

As a last resort, if the receiving state does not have the cooperation of the sending state in applying the above sanctions or if the crimes committed by immune persons are especially egregious and offensive to the receiving state, it may break diplomatic relations with the sending state.

Finally, a word is in order on the victims of "diplomatic crime." One unfortunate effect of all violent crime, whether committed by United States citizens or aliens, is that victims rarely are made whole or compensated for harm done to them. In the rare instances of "diplomatic crime," however, victims often fare better than they would if they had been victimized by a nondiplomat. It is not unusual for a foreign embassy to voluntarily compensate victims of crimes committed by their personnel.¹²⁶ In other cases of crimes committed by foreign diplomatic and consular personnel, whether immune or not, the State Department, through direct negotiations with the offender's embassy or consulate, has successfully obtained an adequate measure of compensation for the victims of diplomatic crime.¹²⁷

Alternative victim remunerative measures such as an insurance scheme funded by foreign missions should, however, be rejected. Pay-

125. *Fewer Envoys Scoff at a Threat by Britain*, N.Y. Times, May 1, 1988, at 22, col. 1.

126. See U.S. State Dep't Reply to Congress, Policy for Security *Ex Gratia* Payments (June 24, 1988).

127. For example, the State Department, in the publicized case of an alleged shooting of an employee of a Washington, D.C. bar by the son of a foreign diplomat, obtained from the embassy the full amount of compensation sought by the victim notwithstanding that the victim's domestic Workmen's Compensation claim was denied initially and then only settled 4 years after the *ex gratia* payment was made. Similarly, the State Department, in a property damage claim, yielded a substantial sum in just 2 weeks after the claim was made. See U.S. State Dep't Reply to Congress, Policy for Securing *Ex Gratia* Payments (June 24, 1988). The State Department also has been successful in negotiating resolutions of cases in which the appropriate redress is not monetary compensation. See *In re Terrence K.*, 138 Misc. 2d 611, 524 N.Y.S.2d 996 (N.Y. Fam. Ct. 1988) (An attaché to the Zimbabwean Mission, who was alleged to have abused his minor child, was asked to, and did in fact, leave the United States. Here the State Department extracted assurances from the Zimbabwean government that the child would be protected and that the attaché would face child protection proceedings upon return to Zimbabwe.).

ment of insurance premiums by foreign missions might reduce the sense of responsibility for the behavior of individual foreign diplomatic or consular personnel. In addition, sending states that could be compelled to underwrite insurance schemes would have the right, on reciprocity and sovereign equality grounds, to insist that the United States similarly underwrite such schemes in their countries. Given the global diplomatic and consular presence of the United States, this could involve a significant federal budget allocation and could encourage deep-pocket claims against these funds.¹²⁸

V. Existing Law Should Not Be Changed as a Matter of Policy

There are sound domestic and foreign policy reasons for not unilaterally subjecting segments of the presently immune foreign diplomatic and consular community in the United States to criminal jurisdiction.

First, unilateral removal of criminal jurisdiction immunity puts the United States diplomatic and consular corps at substantial risk. The United States currently has over 30,000 American diplomats, including their family members, living abroad.¹²⁹ On the basis of sovereign equality, reciprocity, and existing international law, these personnel enjoy the same immunity from criminal jurisdiction presently enjoyed by the foreign diplomatic and consular personnel residing in the United States. If S.1437 or similar legislation were unilaterally enacted, other states, at a minimum, could be expected to enact similar legislation subjecting United States diplomatic and consular personnel to local criminal jurisdiction. The danger of fabricated charges against U.S. diplomatic corps is greater in foreign legal systems that have fewer procedural safeguards and less concern for the rights of those accused of criminal acts. It should be noted also that in politically tense periods, when the need for uninhibited diplomatic discourse is especially great, the danger of false criminal arrest and detention may be at its greatest, as the Iran hostage crisis made abundantly clear.¹³⁰

Second, any unilateral legislation of the type represented by S.1437 threatens the entire body of international law on diplomatic privileges

128. Telephone conversation with Timothy Leahy, Protocol Officer, Office of Protocol, Dep't of State, June 20, 1989. Mr. Leahy stated that the State Department looked into a proposed insurance scheme and rejected any such approach as not feasible, primarily because of the apparent noninsurability of criminal acts.

129. See *supra* note 29.

130. See *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (Judgment).

and immunities. Such a unilateral abrogation of the Diplomatic Convention may provide an occasion for states that do not presently share the Western view of diplomatic relations to insist upon a complete reexamination of the Diplomatic and Consular Conventions. That reexamination, by itself, let alone the potential for dramatic change in diplomatic and consular rights and duties, would introduce an unacceptable uncertainty to diplomatic law and diplomatic relations.

Third, the United States' status as host nation for the United Nations, the OAS, and other international organizations would be threatened.¹³¹ These organizations are likely to reexamine closely their continued presence in the United States if their representatives are to have their present diplomatic status and rights unilaterally reduced. On the assumption that being host nation is in the overall long term foreign policy interests of the United States, the legislation should be rejected for this reason alone.

Finally, the community of nations has undergone a dramatic change since World War II that must be digested over the coming decades. For example, United Nations membership has more than tripled since 1945.¹³² The majority of these new states are third world, developing states many of which were former colonies of the West. They understandably may view the diplomatic law to which they are presently bound, which was developed by European state practice and codified by Western states, as a vestige of colonialism designed to preserve and protect Western presence in their lands. As such, they may be more ready than is appreciated by advocates of the proposed legislation to jettison the law of diplomatic privileges and immunities with minimum provocation. Of course, it also is likely that as these states mature and develop economically, they increasingly will appreciate the stability and value of the longstanding law of diplomatic privilege and immunities to their continued development, economic well being, and uninhibited participation in the family of nations.

Given the present political, cultural and economic diversity among states today, the value of the present time-tested body of rules governing criminal jurisdiction immunity for diplomatic and consular personnel is greater than ever.

131. The recent action of the U.N. General Assembly to hold a session in Geneva rather than New York when the U.S. refused to admit Yassir Arafat to address the General Assembly illustrates the sensitivity of the United Nations to uninhibited discourse and to interference in that discourse by unilateral action of the United States. *See supra* note 4.

132. United Nations membership, which now accounts for over 98 percent of the world's population, rose from 51 in 1945 to 159 in 1989. *See* XXVI U.N. Chron No. 2, Back Cover (June 1989).

Conclusion

Congress should reject any legislative proposal to unilaterally remove or limit the immunity from criminal jurisdiction presently enjoyed by foreign diplomatic and consular personnel residing in the United States. Unilateral removal or limitation of existing criminal jurisdiction immunity violates customary international law, multilateral and bilateral treaties to which the United States is a party, and existing United States law. Legislation like S.1437 is inconsistent with the theoretical underpinnings for criminal jurisdiction immunity—state representation, sovereign equality, reciprocity, and functional necessity. As a practical matter enactment of S.1437 or a similar law would expose the diplomatic and consular corps of the United States to unwarranted risk. From a foreign policy perspective, unilateral removal or limitation of criminal jurisdiction immunity from the foreign diplomatic and consular corps would invite or even require the reciprocal removal of such immunity presently enjoyed by American diplomats and their families living abroad. Removal of such immunity would create a threat of false criminal prosecution, especially in periods of political tension when the need for uninhibited discourse is particularly valuable. The exposure of the diplomatic and consular corps to such unnecessary risks ultimately may result in a personnel shortage of individuals willing to serve at foreign posts.

There is no factual justification for the removal of criminal jurisdiction immunity. The number of crimes committed by immune foreign diplomatic and consular personnel in the United States is statistically insignificant and these offenses are, for the most part, misdemeanors. In the rare instance that an immune alien commits a serious crime, adequate remedies exist under domestic and international law. A strict application of the existing remedies should effectively address the problem of "diplomatic crime" and serve as a potent deterrent. In addition, there is no need for a specialized compensation or insurance fund for victims of "diplomatic crime" because this might reduce the sense of individual responsibility of a foreign diplomatic personnel, and because the few seriously harmed victims of diplomatic crime presently receive expeditious and generous compensation as a matter of practice by foreign missions with the encouragement of the State Department.

A unilateral legislative assault on this oldest and most settled area of international law might be viewed by some members of the international community as a confirmation of the view that the United States no longer takes its international law obligations seriously, a perception that would be detrimental in this time of concentrated and growing global interdependence.

United States lawyers are sometimes described as rather more effective at suggesting what the law *ought* to be, than at determining what the law *is*. Here, existing international and domestic law *is* adequate and *is* effective to address the criminal behavior of foreign diplomatic and consular personnel. That law should not be tampered with lightly.