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Diplomacy in the Modern World: A Reconsideration of the Bases for Diplomatic Immunity in the Era of High-Tech Communications

By JAMES S. PARKHILL

I. Introduction

On January 3, 1997, the second-ranking diplomat to the United States from the Republic of Georgia, driving home late at night, struck two cars stopped at a red light. The accident caused the death of Joviane Waltrick, a sixteen-year-old passenger in one of the cars. Police estimate that the diplomat, Mr. Gueorgui Makharadze, was traveling at close to eighty miles per hour when the accident occurred in a twenty-five miles per hour zone. A blood test given two hours after the accident showed Mr. Makharadze's blood alcohol level to be twice the legal limit.

The case caused an uproar because for several days following the accident it appeared that the Republic of Georgia would invoke Mr. Makharadze's diplomatic immunity to prevent his arrest and indictment for Ms. Waltrick's death. It was only after New Hampshire Senator Judd Gregg urged President Clinton to withhold thirty million dollars in aid that Georgia took the highly unusual step of waiving immunity.

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1. Ruben Castaneda & Karl Vick, Diplomat Unlikely to be Prosecuted in Crash, Officials Say, WASH. POST, Jan. 7, 1997 at B1 [hereinafter “Diplomat Unlikely to be Prosecuted”].

2. Id.

3. Gary Scheets, Grieving mom meets envoy Georgian vows no deal on immunity, WASH. POST, Feb. 11, 1997, at C3. A breath test was not administered due to Mr. Makharadze's diplomatic status, but a blood test was performed, apparently for medical reasons. Its results were not immediately made available to police, prosecutors or the general public. Diplomat's Medical Records Sought Prosecutors May Get Access to Data from Stay in Hospital, CHARLESTON GAZETTE & DAILY MAIL (W. Va.), Jan. 11, 1997, at P3A.

4. Id. See also Immunity's Two-way Street Protects U.S. Officials, Too, USA TODAY, Jan. 10, 1997 at 12A [hereinafter “Immunity's Two-Way Street”]. Although unusual, the waiver was not completely unprecedented. In 1989, Belgium waived immunity
which occurred in 1993 demonstrates the more common result of such incidents. There, when a U.S. diplomat in Russia struck a mother and her two children crossing the street, killing an eleven year-old girl, the United States refused to waive immunity and recalled the diplomat, effectively ending the issue.\footnote{Immunity's Two-Way Street, supra note 4.}

The invocation of diplomatic immunity by foreign governments to avoid the criminal liability of diplomatic and consular personnel is a problem confronting every nation that maintains diplomatic or consular personnel.\footnote{Note that consuls and members of both diplomats' and consuls' staffs receive a lower degree of protection than diplomats. See infra notes 83-85 and accompanying text. Although properly, "diplomats" are only those people certified as such under the Vienna Convention on Diplomatic Relations, infra, note 10, for simplicity this note may refer as diplomats to all envoys (and such staff and family members as are appropriate) described under that treaty and the Vienna Convention on Consular Relations, infra note 11.} Unfortunately, waiver of immunity remains a rare occurrence in cases of serious crime.\footnote{See e.g., U.S. State Department spokesman Nicholas Burns's statement that "[i]n more serious cases ... I don't believe there is any instance where a government has lifted ... diplomatic immunity." Diplomat Unlikely to be Prosecuted, supra note 1. Mr. Burns is not correct, but nearly so. The only other case on record is the Belgian diplomat discussed in note 4, supra.} Consequently, a great deal of criticism has been leveled at the system of immunity and a number of proposals have been put forth to hold diplomats accountable for crimes committed.\footnote{These proposals include an international criminal court with jurisdiction over diplomatic criminal issues, national and international claims fund proposals to compensate crime victims, and strict interpretation of the relevant international treaty, the Vienna Convention on Diplomatic Relations. See, e.g. Mitchell S. Ross, Note, 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 (1989) (survey of domestic U.S. and international approaches).}

At the same time, there has been a revolution in the practice of diplomacy itself. Whereas in past centuries the ambassador was the only official link between sovereign states, members of government may now easily communicate via telephone, fax machine, and increasingly, the Internet. Face-to-face meetings between heads of state (as well as between low-level government officials), once a rare occurrence due to the weeks of travel such visits often entailed, are now commonplace as well.\footnote{The practice of "summit diplomacy" by heads of state is discussed infra notes 139-145.} The diplomat's monopoly on official communication between governments, as this Note will show, has been broken into increasingly smaller pieces over the past sev-
eral decades as long-distance travel and communication have become fast and reliable. In spite of these changes, diplomatic immunity has remained a high, broad barrier to the pursuit of recompense by citizens injured by those same diplomats.

This Note will examine the logic of continuing to uphold immunity at its traditional high level in an era in which diplomats have become significantly less important in the overall scheme of international relations. It will critique the ancient practice of immunity by asking two questions. First, are diplomats so necessary to modern relations among states that they should receive special treatment? Second, if the answer to the first question is yes, what level of immunity is appropriate to reflect diplomatic importance in the modern era?

Although historic practice and current international law, codified principally by the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations grant immunity from both criminal and civil action, this note will confine itself to the narrow question of criminal immunity. Civil liability, which does not carry the threat of incarceration, may be a less intrusive form of jurisdiction and efforts to reform the system of immunity should consider all its aspects. This essay will concern itself primarily with the issues underlying governments’ ability to incarcerate foreign representatives.

In order to gain perspective on how immunity arose and how firmly established it is within the practice of international relations section II of this note will first offer an account of diplomats and their immunities throughout history. Sections III and IV will discuss the legal theories used to justify immunity before proceeding to a brief analysis of the Diplomatic Convention and the Consular Convention. Having explained how immunity developed, why it has traditionally been considered crucial to diplomacy, and what its current parameters are, Section V will then document the extent and seriousness of abuse of immunity in the modern world. Section VI will then contrast the activities of diplomats historically and in the modern world in order to determine whether modern activities are still so fundamental to international relations as to require the high degree of immunity afforded by the Vienna Conventions. Finally, Section VII will review several proposals to reform the immunity system, noting the most


common concerns of those opposed to reform as well as possible responses to those concerns.

II. The History of Diplomacy and Diplomatic Immunity

Immunity has been a feature of diplomatic relations for thousands of years.\textsuperscript{12} While the practice of listening to a messenger instead of killing him on first sight probably dates to the earliest interactions between states,\textsuperscript{13} ancient Greece is the first civilization with a record of systematic diplomatic immunity.\textsuperscript{14} The numerous small, closely-linked city-states on the Grecian Peninsula required dependable communication paths among states in order to foster alliances and prevent any state from asserting dominance over the entire area.\textsuperscript{15} The concentration of states in a relatively small geographic area and the existence of a common language and culture no doubt facilitated interaction between states.\textsuperscript{16} That, combined with the states’ need to keep abreast of developments with their neighbors, led to diplomacy as a regular feature of inter-state interactions in that era.\textsuperscript{17} Ambassadorial offices became standardized and immunity was well understood to protect the envoys from official and private interference with their duties.\textsuperscript{18} Individual missions, however, were strictly ad hoc.\textsuperscript{19} Envoys were chosen and dispatched to relay very specific messages. Envoys had power for only one negotiation and returned home as soon as their messages were delivered and responses received.\textsuperscript{20} On their return to the home state, the appointments ended.\textsuperscript{21} The envoys’ stays in the host state, therefore, were too short to give rise to substantial concerns that immunity might operate to the detriment of the local populace.

The practice of formal diplomacy failed to spread much beyond Greece due to the ascendency of the Roman Empire.\textsuperscript{22} As the hegemonic state of its era, the empire was more accustomed to using force than per-
sustained,

and diplomacy was not substantially revived in Europe almost until the Renaissance. Messengers in that era were frequently assigned multiple duties. Exemplifying both the infrequency of official diplomacy and the seriousness with which journeys were contemplated, Stephen Voivode of Moldavia once requested that a Venetian nuncio, who officially represented neither Voivode nor the Pope, not only deliver a message to the Vatican, but that he send a doctor to examine an ulcer on Voivode's leg as well.

Such nunci, non-permanent diplomatic messengers used from medieval times until the fifteenth century, were viewed as mere mouthpieces of their rulers and were given no authority to negotiate whatsoever. The European procurators of the mid-to-late Middle Ages, on the other hand, existed specifically to negotiate and might be given free reign to negotiate and conclude agreements.

The rise of the Italian city-states in the fifteenth century gave rise to conditions similar to those existing in Greece two thousand years prior, and the increases in travel, trade and the lack of a single powerful state once again demanded the use of official envoys. The maintenance of permanent embassies began as a formal practice in Venice, occasioned by the growth in number in the fifteenth and sixteenth centuries of small, sovereign states in Europe, each too small to survive without negotiating with its neighbors. Rulers then quickly became aware of the information-gathering potential of the resident ambassador in the host state, adding to the ambassador's importance. By the middle of the seventeenth century, resident ambassadors could be found throughout Europe. Ambassadors' duties included the relaying of information from the home court, negotiation, surreptitious information gathering and occasional acts of deceit and intrigue.

23. Id.
24. Id. at 30.
25. Id. at 25.
26. Id.
27. Id. at 24.
28. Id. at 26-27.
29. Id.
32. Id. at 35.
33. Id.
A level of immunity became *de rigeur* in this era. As travel between even nearby states remained both dangerous and time-consuming, sovereigns found it mutually beneficial to pardon the occasional infraction committed by a diplomat to their courts in order that the sovereigns' own emissaries might receive the same treatment. However, until the seventeenth century, ambassadors and their staffs accused of serious crimes such as robbery, murder, rape or political acts against the host state were routinely stripped of immunity and handed over to local authorities. Grotius, one of the most influential legal scholars of the sixteenth and seventeenth centuries, began to argue for full immunity as a matter of course in the 1620s. He reasoned that the security of ambassadors was essential to the diplomatic system and that this security could be achieved only by making ambassadors accountable to their own sovereigns alone. Grotius's theory of complete immunity was debated heavily during the seventeenth century and did not become widespread until the eighteenth. In 1708 the British Diplomatic Act was the first modern law to codify the principle in an act regarded declarative of existing "international common law," not as the creation of a new law. The United States and many other nations enacted laws of their own defining immunity, but national laws varied in the range of immunities provided. A uniform set of rules was not achieved until the Diplomatic Convention came into force in 1964.

34. *Id.* at 41.
35. *Id.* at 42.
36. *Id.* at 44.
37. Grotius is considered by many the father of modern international law. See, e.g., 1 ELIHU LAUTERPACHT, INTERNATIONAL LAW: THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 75 (1970), GERHARD VON GLAHN, LAW AMONG NATIONS, AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 26-27 (7th ed. 1996).
39. *Id.*
40. *Id.* at 45.
41. *Id.*, at 27.
44. See Diplomatic Convention, *supra* note 10.
III. Theories of Immunity

As the nature and authority of diplomats changed over the centuries from mouthpiece to negotiator and occasional spy, so naturally did the legal basis for diplomatic immunity in Anglo-European and in modern international law. The three principal theories used to justify immunity are personal representation, extraterritoriality and functional immunity.

Personal Representation. This was the earliest theory on which immunity was based. In the medieval era before permanent embassies, the envoy (the term “ambassador” did not come into common parlance until the sixteenth century) was viewed as the mouthpiece of the sovereign he represented and was granted the same privileges as would obtain to that sovereign. More contemporary jurists have advocated the theory as well, on theoretical bases ranging from the idea that the emissary was the “alter ego” of the sovereign, entitled to all of the sovereign’s rights and privileges in the host country, to the proposition that the envoy personified the state itself and derived immunity from the sovereign right of the state. The principle has been recognized by U.S. courts, but falls short in a number of important respects. Most notably, modern representative governments derive their power not from the supreme authority of a single sovereign, but from the people themselves, who are decidedly not immune from foreign court jurisdiction. In such a government, it is not clear just whom the envoy personifies, nor why that personification should entail a grant of immunity. Further, the personal representation theory might offer some basis for immunity from official acts, but is much less persuasive in exempting envoys from the legal repercussions of private actions. Accordingly, this basis for immunity has been largely discredited in the modern world.

Extraterritoriality. This second theory is premised on the fiction that, for legal purposes, the envoy (and his embassy) remain in the territory of the sending state. It arose in the seventeenth century as permanent em-

45. HAMILTON & LANGHORN, supra note 14, at 32.
46. WILSON, supra note 43, at 1-2. This was also the theory underlying the immunity of ancient Greek as well as Indian envoys. Id.
47. Id. at 3.
48. See e.g., The Schooner Exchange v. M’Faddon, 11 U.S. (7 Cranch) 116, 123 (1812).
50. Id.
51. Id.
bassies became well established and ambassadors’ actions centered on the embassy premises. The new theory had the added advantage of offering protection to the ambassador’s goods as well as his person. The prior theory offered immunity to the ambassador, but not to his premises or his possessions, a particularly sore point for many underfunded missions in that era. According to the theory, all actions performed by the ambassador were considered, legally, to have occurred in the emissary’s home state within the control of the home state’s laws, police force and judicial system. The theory has been discarded by modern scholars, most notably due to conceptual difficulties incurred by judges in finding that the actions of a diplomat, although nominally on domestic soil, must be considered to have occurred elsewhere. The theory also permitted substantial abuse, such as the franchises du quartier established in seventeenth century Rome and Madrid: entire areas surrounding the embassies in both cities which (utilizing the broadest possible interpretation of the extraterritorial principle) were declared immune from all police attention and in which commerce in illicit goods and services predictably flourished.

Functional Necessity. The theory of choice in the modern era, the concept of functional necessity, dates at least to the seventeenth century, although it did develop substantially until the nineteenth century, when the extraterritorial theory began to break down. Functional immunity reflects the idea that the diplomatic agent must have freedom of movement and communication in order to perform his duties. One great advantage of this theory is that it may apply equally to permanent embassies and ad hoc missions. It is thus well-suited to the modern era, in which specialized negotiations are often conducted by non-diplomatic personnel. The theory does not explain, however, why all diplomatic agents should receive identical treatment. A short-term envoy’s mission might be so critical and the envoy’s particular role within the mission so crucial that the send-
ing state could not possibly achieve its goals without full immunity, but the same need not always be true for permanent representative within a large embassy.

IV. Codification of Law on Diplomatic Immunity

The Vienna Convention on Diplomatic Relations, to which 178 states have currently acceded,\textsuperscript{65} represents current international law on the subject of immunity and other privileges granted to diplomatic personnel. It establishes basic principles to guide states in their treatment of such persons.\textsuperscript{66} Much of the convention (thirteen of forty-seven articles) is devoted to the subject of immunity.

Most importantly, Article 3 lays out the functions of a diplomatic mission.\textsuperscript{67} These include representation of the home state within the foreign state, protecting the home state’s interests, negotiating with the host government, ascertaining conditions and developments in the host country and promoting friendly relations between the two states. Article 14 classifies the head of a mission as an ambassador or nuncio, an envoy, minister or internuncio, or a chargé d’affaires.\textsuperscript{68} From these two articles, it is clear that the convention’s drafters intended to encompass both permanent representatives (ambassadors) and temporary emissaries (envoys, ministers or internuncios). Section VII of this Note will question the convention’s equal grant of immunity to these two types of governmental representatives.

Article 31 establishes the basic immunity of the diplomat, exempting her from the host state’s criminal jurisdiction, from the obligation to appear as a witness in any action and from civil jurisdiction, albeit with some exceptions.\textsuperscript{69} As an added measure, Article 31 provides that no “measure of execution” may be exercised against a diplomat.\textsuperscript{70} This means, in theory at least, that even if immunity from jurisdiction is waived, the diplomat


\textsuperscript{66} See e.g., the 1790 Act, supra note 42, which made it illegal to file a criminal or civil suit naming a protected person as defendant. The Diplomatic Relations Act, id., eliminated this rule when it brought U.S. law into conformity with the Vienna Conventions.

\textsuperscript{67} Diplomatic Convention, supra note 10, art. 3.

\textsuperscript{68} Id. art. 14(1).

\textsuperscript{69} Id. art. 31(1).

\textsuperscript{70} Id. art. 31(3).
could still be protected from execution of the judgment.\textsuperscript{71} In practice, however, it seems unlikely that immunity would be preserved against execution once it is waived as to the court's jurisdiction (one can imagine the public outcry if Gueorgui Makharadze is found guilty at his trial but authorities are unable to carry out the sentence).

Article 29 provides important insurance against harassment of diplomats by local authorities by exempting them from any form of arrest or detention,\textsuperscript{72} which has been interpreted to include such compulsory actions as search, breathalyzer alcohol testing or taking blood or other samples.\textsuperscript{73}

Articles 37 and 38 codify what had previously been the area in which state practice was most inconsistent.\textsuperscript{74} Those articles create four categories of varying immunity for the diplomats' families, junior staff and service personnel.\textsuperscript{75} The categories are families, administrative and technical staff, service staff and privately hired staff of the mission's members.

Families receive all of the immunities of the diplomat herself.\textsuperscript{76} Although the term "family" is not clearly defined, it has been interpreted to include spouses, minor children and any other members that the sending and receiving states agree to include.\textsuperscript{77}

Administrative and technical staff, designations new to the Convention,\textsuperscript{78} and official service staff all receive immunity for acts performed "in the course of their duties."\textsuperscript{79} This phrase is also undefined in the Convention and practice has been to interpret it broadly, as discussed in section

\textsuperscript{71} Eileen Denza, Diplomatic Law 171 (1976). The provision is a relic of international customary law from prior eras. It was rarely treated by scholars and it is unclear when waiver of jurisdiction implied automatic waiver of execution as well. Id.

\textsuperscript{72} Diplomatic Convention, \textit{supra} note 10, art. 29.

\textsuperscript{73} Encyclopedia of Public International Law 1042 (1995). Note that Gueorgui Makharadze benefited from this provision, if only briefly. Because of his diplomatic status, Mr. Makharadze was neither arrested nor tested for intoxication at the scene of the accident. His blood was tested at the hospital, however, presumably out of medical necessity. Police Book Diplomat in Traffic Death, L.A. Daily News, Feb. 21, 1997, at N15. Without waiver of immunity, use of evidence of Mr. Makharadze's intoxication, to the extent that it made him liable for arrest or detention, would have violated Article 29 of the convention.

\textsuperscript{74} Denza, \textit{supra} note 71, at 226.

\textsuperscript{75} Diplomatic Convention, \textit{supra} note 10, art. 37-38.

\textsuperscript{76} \textit{Id.} art 37(1).

\textsuperscript{77} Denza, \textit{supra} note 71, at 224.

\textsuperscript{78} \textit{Id.} at 226.

\textsuperscript{79} Diplomatic Convention, \textit{supra} note 10, art. 37(2)-(3).
Finally, private staff receive immunity only when states permit it by separate agreement. The functional immunity is reflected in the Diplomatic Convention's hierarchy of immunities for diplomats and their various staffs by placing emphasis on the individuals and their abilities to perform their duties. The convention attempts to evaluate the level of immunity required by each member of the diplomatic mission and grant her immunity which will permit her to do her job effectively, while simultaneously considering the desire of the home state and its populace to prevent crime. It is in the spirit of such focus on the relative importance of diplomats, their staff and personnel that this note will proceed, in sections VI-VII to reevaluate diplomats' current need for immunity.

The other major treaty on immunity of foreign envoys, the Vienna Convention on Consular Relations, provides much more limited immunity for consuls and their staffs. Consuls may be arrested in the event of a "grave crime" and imprisoned following judicial decision (thus, no immunity from execution of judgment). Even more restrictive, consuls and their consular staff are immune from local court jurisdiction only for acts "performed in the exercise of consular duties." This provision denies immunity to consuls' families and limits the activities under which immunity might obtain to a narrower range than the "duties" of the Diplomatic Convention.

An indication of the reason for the lesser immunity of consuls may be found by comparing the functions of diplomats and consuls in the two conventions. Article 5 of the Consular Convention describes the consul's duties to include protecting sending state interests, furthering commercial, economic, cultural and scientific relations between the two countries, assisting sending state nationals, issuing passports, and otherwise supervising the sending state's interests in the receiving state. In short, while the diplomat represents and negotiates with the receiving state, the consul more frequently supervises and monitors sending state affairs. The consul is deemed less critical to interstate relations, hence receives less protection. It remains to be seen whether either diplomats or consuls remain so important in the modern world to receive the protection they do.

80. See notes 130-31 and accompanying text.
81. Diplomatic Convention, supra note 10, art. 37(4).
82. See WILSON, supra note 43, at 18.
83. Consular Convention, supra note 11.
84. Id. art. 41(1)-(2).
85. Id. art. 43(1).
86. Id. art. 5.
One must, of course, examine the interpretation of these provisions. According to one career consul, diplomats and consuls receive identical treatment in the real world, populated by foreign offices concerned with friendly relations among states, as well as by police and other officials versed in the details of international relations and treaties.\(^8\) For example, in one case a U.S. court granted immunity to a consular officer following his arrest for assault and battery on a police officer committed as the consul left his mission to attend a cultural gathering.\(^8\) The court found that the officer was immune based on an extremely broad interpretation of the phrase "furthering the development of ... cultural ... relations" from Article 5(b) of the Consular Convention.\(^9\) The decision has been criticized for its very liberal reading of the phrase,\(^9\) but it serves nevertheless as a good example of the broad latitude given to diplomatic and consular officials even under a strict set of rules.

The third important aspect of international law on immunity is the existence of bilateral treaties expanding the provisions of the Vienna Conventions. Both conventions contain provisions which permit states party to conclude outside agreements "confirming or supplementing or extending or amplifying the provisions" contained within the conventions.\(^9\) In other words, the Vienna Conventions establish a set of minimum standards for the treatment of diplomatic and consular personnel, and states are free to enter other agreements which extend immunity beyond the limits prescribed in the conventions. It would be difficult (and pointless) to describe in detail the precise nature of each such agreement, but two examples of bilateral U.S. treaties will offer a sense of their scope. In one, the United States agreed with China in 1981 to extend full criminal immunity to members of consulates and their families,\(^9\) expanding on the Consular Convention's grant of immunity only in the course of official acts.\(^9\) In the other treaty, the United States and Canada mutually agreed in 1993 to extend full immunity to one another's administrative and technical embassy

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89. Id. at 458-59.
91. Diplomatic Convention, supra note 10, art. 47(2)(b); Consular Convention, supra note 11, art. 73(2).
93. Consular Convention, supra note 11, art. 41(1)-(2).
people who would have immunity under the Diplomatic Convention only for acts performed in the course of their duties. The point in both cases is that even within the scheme created by the Vienna Conventions, wide latitude exists for states to modify the scope of immunity granted. This certainly adds to the confusion of law enforcement personnel regarding how to treat law-breaking envoys (it almost suggests that police, judges and other officials charged with enforcing the law should carry handbooks or “cheat sheets” outlining what level of immunity applies to whom). Efforts to reform the immunity system should bear in mind that the problem arises not only from the Vienna Conventions, but from these other agreements as well, and proposals for change will be ineffective if they do not deal with such agreements.

Given the wide scope of formal and de facto immunity granted to both diplomatic and consular staff, it is not surprising that abuse of this immunity is an ongoing problem for host governments and their citizens. Some of this crime is accidental, as was Mr. Makharadze’s car accident and the resultant death of Joviane Waltrick. Some of it however, as the next section demonstrates, appears to have occurred solely because the perpetrators felt confident that they could not be held responsible for their actions—immunity encouraged the criminal behavior.

V. The Extent of Diplomatic Crime

It must be pointed out at the start that only a small fraction of diplomats are ever involved in crimes. A recent State Department report found that nationwide in 1995 there were only fifteen reported “serious” offenses involving less than one tenth of one percent of the 18,350 diplomats in the United States accorded full criminal immunity. Another State Department study found that, out of a diplomatic population (fully and partially immune) approaching 50,000 in Washington D.C. and New York City, there were 147 reported incidents involving diplomats in Washington and

95. Diplomatic Convention, supra note 10, art. 37(2)-(3).
96. Note that the United States does not have any agreement with India expanding diplomatic or consular immunity. Thus, when Avinash Pandey explained that in the real world consuls received the same treatment as diplomats, he was describing a non treaty-based enlargement of the scope of immunity.
97. Immunity’s Two-Way Street, supra note 4.
forty four incidents in New York between 1982 and 1985.\footnote{98} In addition, according to one New York Times report, the ratio of crimes committed against diplomats compared to those committed by diplomats during the years 1981-1987 was thirty to one.\footnote{99} While none of these statistics include parking violations, one of the most common forms of abuse of diplomatic privilege,\footnote{100} and cannot include crimes committed by unknown assailants,\footnote{101} it is important to bear in mind that most diplomats are law-abiding citizens of their host states for whom immunity is never a serious issue (hence, most diplomats would be largely unaffected by changes in the scope of immunity granted).

Despite the relative infrequency of serious crime committed by immune diplomats, the results of such crime are extremely severe. The most egregious examples of criminal activity that have gone unpunished are the cases of two apparent serial rapists who received no more sanction than return to their home countries.\footnote{101} Manuel Ayree, the son of a Ghanaian ambassador to the United Nations in the early 1980s, was arrested in the presence of one of his victims and identified by another victim before embassy officials appeared to escort him home.\footnote{102} Police believed that, had they been able to hold Mr. Ayree in custody longer, “a couple of dozen” additional rape victims might have also identified Mr. Ayree as their assailants.\footnote{103} However, Ghana refused to waive immunity and police were forced to release Mr. Ayree, who then “voluntarily repatriated” to Ghana before more victims could be contacted.\footnote{104}

A second case occurred in London in 1984.\footnote{105} The unidentified assailant lured at least three women into his car in the space of two months, then beat and raped them.\footnote{106} Following the third rape, police learned that

\footnote{99. Id. at 375 (citing Howe, Reduction Seen in Political Violence at U.N., N.Y. TIMES, Oct. 30, 1988 at 54, col. 1).}
\footnote{100. See infra notes 117-20 and accompanying text.}
\footnote{102. Id. at 43-47.}
\footnote{103. Id. at 51.}
\footnote{104. Id. at 50-51.}
\footnote{105. Id. at 64-65.}
\footnote{106. Id. at 65-66.}
the car had diplomatic plates. Although the attacker’s identity was never discovered, the attacks ceased after the Foreign Office distributed a letter to all embassies demanding their help in finding the assailant.

While these cases represent some of the worst abuses of diplomatic immunity and of the failure of justice, they are far from the only ones. More frequent cases involve diplomats stopped in their cars for speeding and/or reckless driving. One such case involved a Haitian consul-general who, when stopped on the highway for reckless driving, responded that he would “have to do ninety miles an hour the rest of the way” to make up for time lost due to the stop and that “[t]he safety of citizens isn’t as important as the meeting I’m going to.”

A recent case which highlights the political sensitivities inherent in diplomatic relations is that of two diplomats, a Russian and a Belarusan, cited in New York City on December 29, 1996 for parking too close to a fire hydrant. On interviewing the men, police believed them to be too intoxicated to drive and asked them to exit the car. The police, backed by witnesses, claimed that the diplomats then attacked them. The diplomats, for their part, argued that they were not drunk and that police initiated the attack, which allegedly resulted in torn clothes, broken glasses and a dislocated elbow for the Russian, Mr. Boris Obnossov. The diplomats’ respective governments then demanded an apology from the city and full payment of Mr. Obnossov’s medical expenses. The case is unusual in that it resulted not in an apology, as similar incidents have in the past, but in an outburst by Mayor Rudolph Giuliani in which he claimed that the

107. Id. at 66.
108. Id.
109. Id. at 322-23.
113. Kennedy, supra note 110.
114. See e.g., ASHMAN & TESCOTT, supra note 101, at 92-93. A similar, more humorous case involved Ghaffar Khan Djalal, Minister from Iran, who was stopped and ticketed for speeding and reckless driving in Elkton, Maryland in the 1930s. After much protest by the Saudi government, the minister received an apology from Secretary of State Cordell Hull and the governor of Maryland. The officer was dismissed following a report in which the officer is reported to have told the minister, “I’ve heard of Baptist ministers and Presbyterian ministers but never of Iranian ministers.” WILSON, supra note 43, at 95.
diplomats were lying. Mayor Giuliani then demanded repayment by Belarus of $41,100 in unpaid parking tickets accumulated during the previous year.

This last demand demonstrates the area in which diplomatic immunity is used most frequently to flout local law. While not as pressing an issue as violent crime, parking problems cause enormous discontent on all sides. In 1995, Russia’s U.N. mission accumulated 24,467 parking citations in New York City. It was followed by Indonesia, Nigeria, Bulgaria, Israel, Ukraine, Egypt, Brazil and Iran, each with several thousands of tickets, and Liberia, the per vehicle citation leader with 1,391 tickets for an average of 108 per car in its mission. The expenses incurred in issuing citations and in revenue lost from failure to collect on the tickets are quite high: New York City police handed out 67,011 tickets to diplomats in the first six months of 1996, amounting to $3.4 million in fines. Only the Canadian and British embassies paid their fines. More substantively, each ticket represents a potential risk to citizens when, as in the Russian example above, offenders block fire hydrants, fire lanes, or park double on the street.

The examples above are all from the United States and England. As major diplomatic centers, New York, Washington and London bear the bulk of diplomatic abuses, but the problem is by no means confined to those cities. A dramatic case occurred in Ottawa, Ontario, Canada in 1982. There, a Nicaraguan embassy official accidentally left a bag containing thirty five ounces of cocaine and a revolver at a car wash. When arrested, he asserted his immunity, but the case was complicated by the

115. Claffey & McFarland, supra note 111.
116. Giuliani to Belarus: No Apology and Pay Up, NEWSDAY, Jan. 7, 1997, at A8. Thus a bad situation was made worse. In apparent retaliation for the incident, the Russian government announced “Operation Foreigner,” in which it began to crack down on traffic violations by cars in Moscow with plates indicating foreign ownership. On the first day of the campaign, January 17, traffic police stopped 1,000 cars and issued over 200 citations. Nationality is easily determinable from the plates and U.S. citizens were discovered committing the most violations. Michael R. Gordon, Russia and U.S. Are at War (But Only if You’re Driving), N.Y. TIMES, Jan. 20, 1997, at A8.
118. Id.
119. Bob Liff, Goin’ Tow-to-Tow on Scofflaw Diplos, DAILY NEWS, Jan. 6, 1997, at 17 (this figure, significantly higher than the total number of 1995 citations, may also point to a worsening of the situation).
120. Id.
121. ASHMAN & TRESCTOR, supra note 101, at 174.
122. Id.
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The fact that he had been replaced thirteen days earlier and was preparing to return to Nicaragua. Normally, the Vienna Convention on Diplomatic Relations provides immunity for a "reasonable period" to an ambassador leaving his post. In this case, however, the ambassador had taken a four day vacation to the United States between the time of his resignation and his arrest. Technically, because he had already been replaced, he was no longer a diplomat at the time of his arrest. The prosecutor argued that the ex-ambassador's trip outside Canada, being a personal vacation and not an official trip, ended the grace period for leaving his post and with it all immunity. The magistrate, however, gave a broad interpretation to the "reasonable period" and, ruling that immunity effectively extended until the ex-ambassador departed for his home country, refused jurisdiction in the case.

The magistrate's decision above highlights the final flaw in the system of criminal immunity - the grant of full immunity to ineligible people based on political concerns or due to bullying of uninformed law enforcement officials. Complete immunity under the Vienna Conventions extends only to ambassadors, while consuls and other mission staff may receive immunity only for acts committed in the course of their duties (with the exception of the states which have concluded bilateral agreements conferring additional immunity), the scheme is not always followed in practice. The U.S. State Department has been liberal in interpreting the scope of consular duties and persuasive in convincing local authorities to drop charges. Indeed, the New York City police have traditionally accorded full immunity to all consular officials as a matter of course. In one case, the State Department confirmed the full immunity of a man arrested late one night after intentionally driving his car onto a sidewalk in pursuit of a pedestrian. It was later discovered that the man was a secretary to the

123. Diplomatic Convention, supra note 10, art. 39(2).
124. ASHMAN & TRESCOTT, supra note 101, at 175.
125. Id.
126. Id. This case ended on a note of high courtroom drama. The prosecutor, expecting a verdict of immunity, had prepared an appeal before the decision was handed down. Service on the defendant would have precluded his flight from the country pending the appeal. The defendant had also considered this possibility, however, and escaped service by having an accomplice block the prosecutor from approaching the defendant, thus preventing service and allowing the man to escape the courtroom and the country. Id.
127. See Diplomatic Convention, supra note 10, art. 37-38.
128. Id., art. 38; Consular Convention, supra note 11, art. 43.
129. ASHMAN & TRESCOTT, supra note 101, at 104.
130. Id. at 93-95.
Italian military attaché, thus more likely entitled to immunity only for official acts, which could not reasonably be read to include the attaché’s night on the town.\textsuperscript{131} It is certainly understandable that the State Department would want to minimize the consequences of incidents with potentially serious ramifications for international relations, but the example demonstrates again the fact that even narrowly defined rules may be expanded at the expense of innocent victims.\textsuperscript{132} In light of the practice of granting immunity beyond the scope of what the Vienna Conventions impart, attention must be turned to the role played by modern diplomats in order to determine whether they are so important to modern international relations that the crimes they commit should be ignored by their host governments.

\textbf{VI. Historic and Modern functions of Diplomats}

As discussed previously, sovereigns in centuries past invested a great deal of time and effort in getting envoys to foreign courts, and reciprocal measures of protection developed quickly throughout the world to protect those investments.

In the modern era, that situation is significantly less true. Telephones, fax machines and email have made instantaneous communication a daily occurrence. Airplanes, railroads and highway networks make personal international visits a relatively safe and simple prospect. In this modern world, the wide-ranging function of the diplomat as sole communicator (of official information, at least) between states has been supplanted by a variety of alternatives ranging from television to private or “people’s to peo-

\begin{itemize}
\item[131.] \textit{Id.} at 95.
\item[132.] An example from the Makharadze case cuts the other way and highlights the problem in an amusing fashion. A few days after Mr. Makharadze’s arrest, before the blood test results were released, State Department spokesman Nicholas Burns was quoted criticizing the Washington, D.C. police for failing to test Mr. Makharadze’s blood, stating wrongly that police could have legally performed the test. Police Detective JC Stamps corrected Mr. Burns, citing police guidelines which explain that officers should politely inform diplomats of their freedom to leave. Detective Stamps ends his explanation, however, by stating that “[i]f we go beyond that, we are violating not only our guideline orders, but we’d by violating the Geneva Convention Treaty.” Walden Siew & Refet Kaplan, \textit{Evidence sufficient to try diplomat But U.S. needs immunity waiver}, \textit{WASH. POST}, Jan. 9, 1997, at A1. The example presents two errors. Mr. Burns should be criticized for misquoting the law; if he did not know better, he certainly should have. Most likely, he made the statement in order to show official sympathy toward the innocent victim in a highly publicized case involving two highly mismatched countries, the United States and the Republic of Georgia. Detective Stamps on the other hand, while commendable for getting the law precisely right, misidentified the convention even though apparently reading from a police manual: the relevant treaty is, of course, the Vienna Convention, not Geneva.
\end{itemize}
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The first step, then, in a reconsideration of diplomatic immunity must be an examination of what diplomats do in the modern world.

Article 3 of the Vienna Convention on Diplomatic Relations lists five functions of a diplomatic mission: representation of the sending state to the host government, protection of sending state interests in the host state, negotiation with the host government, collection of information on conditions and developments in the host state, and promotion of friendly interactions between sending and host nations. All of these have been impacted by modern freedoms of travel and communication.

Of these five duties, negotiation has been hit hardest by modern changes in methods of communication. An example from the last century will demonstrate the extent of differences in diplomats' working environments between the current and previous eras. James Monroe and Robert Livingstone went to Paris in 1803 to negotiate the purchase of New Orleans and its surrounding territory. Although the men had been instructed not to spend more than ten million dollars, neither thought it necessary to write back to Washington (thus incurring a four month wait for a return communication), when the French offered the entire Louisiana Territory for fifteen million dollars.

The above examples demonstrate the two principal approaches to the time and distance problem. On one hand, the time required to update a distant emissary as to changed conditions invited trouble if the person was given too much latitude to negotiate. On the other hand, tying an emissary's hands too tightly incurred the risk of missing opportunities such as that presented to Monroe and Livingstone in the Louisiana Purchase. The task, then, was to give the diplomat enough rope to bind the state to its benefit, but not so much that the envoy could hang her sovereign by entering agreements rendered undesirable by circumstances which had changed following the envoy's departure from her home state.

In the modern era, telephone lines go a long way toward eliminating this difficulty. A negotiator can quickly report back on any unexpected demands and then return to the table armed with a strong sense of how her government will officially react. Likewise, new information and directives may be easily communicated from home to the diplomat. The diplomat's job is thus facilitated in one sense but also made more difficult by the

134. Diplomatic Convention, supra note 10, art. 3.
speed with which decisions may now be made. Keeping up with changing circumstances is nearly a full-time job in itself.\textsuperscript{136}

The diplomat's function is constrained by the new technology as well. Where before she would have been required, without assistance from home, to "weigh the meaning of words exactly" and quickly draft a counterproposal,\textsuperscript{137} the modern envoy may--indeed often must--report back for instructions on how to proceed. Modern communications have thus largely curtailed her job as negotiator.\textsuperscript{138}

Several factors play into the narrowing of diplomatic function. One of the most important is the rise of "summit diplomacy" in the twentieth century.\textsuperscript{139} As national leaders have become more active as negotiators, diplomats have become less crucial to the decision-making process. Although the term summit diplomacy was not coined until a speech by Winston Churchill in 1950\textsuperscript{140} and examples of leaders negotiating for themselves may be found throughout recorded history,\textsuperscript{141} heads of state began to meet regularly to negotiate issues in the first half of the twentieth century. One particularly notable itinerant leader from the 1930s was Neville Chamberlain, whose doomed efforts to stave off World War II led him to Munich, Berchtesgaden and Bad Godesberg in 1938.\textsuperscript{142} While the reasons for these unprecedented efforts may well go beyond the mere ease of air, train and ship travel,\textsuperscript{143} it is undoubtable that such peregrinations would have been impossible if they had kept Britain's Prime Minister away from his post for more than a few days at a time.

\textsuperscript{136} Interview with Avinash Pandey, \textit{supra} note 87.
\textsuperscript{137} HAMILTON & LANGHORNE, \textit{supra} note 14, at 72 (quoting Cardinal Richelieu of France).
\textsuperscript{138} Interview with Avinash Pandey, \textit{supra} note 87.
\textsuperscript{139} HAMILTON & LANGHORNE, \textit{supra} note 14, at 221.
\textsuperscript{140} \textit{Id.} at 221.
\textsuperscript{141} Meetings occurred for much of recorded history between leaders of neighboring countries, frequently in places which could be easily defended against sabotage. HAMILTON & LANGHORNE, \textit{supra} note 14, at 26. For example, a scholar writing about twelfth century England and France describes an "ancient trysting place" under an elm tree in Gisors, France used by Henry Plantagenet and Philip Augustus, the Frankish King. AMY KELLY, ELEANOR OF AQUITAINE AND THE FOUR KINGS 182 (1950). It should be noted that Henry, architect of a kingdom scattered across England and parts of France, spent most of his life on the move trying to consolidate his power. \textit{See generally id.} An in-the-field meeting seems more routine than extraordinary for such a ruler.
\textsuperscript{142} HAMILTON & LANGHORNE, \textit{supra} note 14, at 167.
\textsuperscript{143} \textit{Id.} at 167-68. Hamilton and Langhorne cite the then-recent horror of WWI and the failure of the League of Nations to solve the problem of aggressive states as the exigency driving the personal efforts of Chamberlain and others. \textit{Id.}
Summit diplomacy has become an accepted part of international relations. Since the historic meetings of Churchill, Stalin and Roosevelt at Teheran, Yalta and Potsdam in 1944,\textsuperscript{144} momentous negotiations have been marked by the presence of the heads of state of the parties involved. The U.S.-brokered meetings between Yitzhak Rabin and Shimon Peres of Israel and the PLO's Yasser Arafat are among the latest in a long string of such meetings.\textsuperscript{145}

The situation is certainly not limited to heads of state. The United States' Secretary of State appears to have taken on the role of roving ambassador, but that too is a fairly recent development. John Foster Dulles traveled a total of 56,000 miles in his six years as Secretary of State between 1953-1959.\textsuperscript{146} By contrast, Henry Kissinger, in three years between 1973-1976, flew 650,000 miles\textsuperscript{147} and Warren Christopher flew 758,142 miles between 1992-1996.\textsuperscript{148}

Another means of negotiation possible in the modern world is direct communication between non-diplomatic experts. As the details of peace and war have become increasingly complex in the modern age, the ability of career diplomats to address the full range of issues has suffered. Thus, experts in the arcana of modern warfare, disarmament, economic theory, etc., have been drafted into diplomatic duty.\textsuperscript{149} The European Union's Council of Ministers exemplifies the importance of such experts in modern international relations. That group, one of the primary lawmaking bodies in the EU, is made up of the member state ministers relevant to any issue under consideration.\textsuperscript{150} In negotiating monetary issues, each state sends its finance minister; for health issues, the ministers of health deliberate; for environmental concerns, the environmental ministers, etc. The important distinction from the career diplomat is that these experts are non-resident. The ministers fly in to negotiate agreements, then leave when their missions end. They need not be career diplomats and, although granted diplomatic protection under the Diplomatic Convention,\textsuperscript{151} they stay in the

\textsuperscript{144} Id. at 221.
\textsuperscript{145} See e.g., Mark Fineman & Robin Wright, Israel, PLO Agree to May 4 Signing Mideast: Two Sides Resolve Key Issues in Breakthrough Brokered in Cairo by Christopher and Egypt's Mubarak, L.A. Times, April 29, 1994, at 1.
\textsuperscript{146} HAMILTON & LANGHORNE, supra note 14, at 225.
\textsuperscript{147} TRAN, supra note 133, at 101.
\textsuperscript{148} Telephone call to U.S. Department of State Bureau of Public Affairs, Office of Public Information, Mar. 5, 1997.
\textsuperscript{149} HAMILTON & LANGHORNE, supra note 14, at 240.
\textsuperscript{151} Diplomatic Convention, supra note 10, art. 14.
host state for much shorter periods than permanent envoys. Their interactions with the host country populace, for better or worse, are much less than permanent envoys. This raises the question, addressed in section VII, of whether these envoys should be granted different immunity from permanent representatives.

The second Article 3 function in which diplomats have lost their monopoly is the area of protecting the home state’s interests abroad. Although diplomats certainly do make speeches and advocate in the host state for their home interests, the speed of modern communications has made it possible for the home government to respond more directly to foreign developments through a variety of channels from telephone to television.

Likewise, Article 3’s promotion of friendly relations is now accomplished through a wide range of means, both official and private. Cultural interactions among groups of private citizens of different nations are too legion to list, but two notable examples are 1983’s “US Festival” and the “pianas for Havana” campaign by Benjamin Treuhaft, a private citizen of the United States. In the first case, a satellite link provided a live interchange between concertgoers in San Bernadino, California and 300 Soviet youths in Moscow. The event emphasized similarities between the groups despite official government animosity. Treuhaft’s aims are similar. His ongoing program of sending old, restored pianos to Cuba stresses common interests in music between citizens of the United States and Cuba. These examples are important because they demonstrate the ease with which private actors in the modern era can take steps to promote friendly interactions between citizens of even geographically distant nations.

The least affected of Article 3’s diplomatic purposes is probably representation, at least when viewed in its narrowest sense as a person who may stand before host government representatives to deliver messages and receive official notification of host government reactions to sending state action. Telephones are certainly available for this purpose, although they do not have the immediacy and the sense of formality of a live body. While personal representatives would be preferable on the whole, telephones lines could suffice in an emergency.

153. TRAN, supra note 133 at 119-20.
154. Id.
155. Pianos to Cuba, supra note 152.
Similarly, even in the age of high-resolution spy satellites, there is no substitute for permanent envoys when it comes to gathering information on the host state. Diplomats, at least when given access to the general public, are uniquely situated to test the pulse of the country, and possibly to gather covert information.

One ironic aspect of modern travel and communications is that, though they have made diplomats less uniquely situated to perform many duties, they have resulted in an increase in the number of diplomats in the world. The United Nations' General Assembly is the best example of a body which would be completely ineffective without near-instantaneous communications. Without speedy communications, states would be forced to rely on one of the two solutions to the time/distance problem discussed above: broad delegation of authority to the diplomat or no delegation. It seems unlikely that delegates would be given the wide latitude to conclude agreements that Monroe and Livingstone had in the example above. The range of potential issues and permutations on agreement language would be far greater in the General Assembly's 180 plus member body than in the relatively simple purchase agreement between two states negotiated by Monroe & Livingstone, and the risk of being undesirably bound would likely be intolerable to most governments. The other alternative, no delegation of authority, would require frequent long breaks to allow delegates to explain the latest proposal and request authorization to proceed. This would be so painfully slow as to be completely ineffective as well.

Amendment, although necessary at times, is not to be taken lightly. It is

156. Diplomats in the Soviet Union, for example, were given no access to the general public and only limited contact with government officials, especially during the 1940s and 1950s. HAMILTON & LANGHORNE, supra note 14, at 193. One amusing anecdote arising from these restrictions concerns a U.S. diplomat who made an unauthorized stop for lunch. He was approached by a vigilant policeman and cited, for apparent lack of a better crime, with "molesting a pig." ASHMAN & TRESCHOTT, supra note 101, at 126-27.

157. Surreptitious information gathering has been a factor of diplomacy throughout history. Prince Metternich, for example, integrated a strong secret service into Austria's diplomatic corps in the early nineteenth century. HAMILTON & LANGHORNE, supra note 14, at 122-23. Although the Diplomatic Convention permits only information gathering through "lawful means," spy activity is widely believed to go on regularly through diplomatic and consular channels. See, e.g., reports of extensive spy activity by the C.I.A. in Austria, Germany, France, Italy and India, Tim Weiner, U.S. Official Leaves Austria After Being Caught Wiretapping, N. Y. TIMES, November 6, 1997, at A7.

158. See notes 27-134 and accompanying text.

159. Efforts at drafting the Diplomatic Convention, for example, began in 1956, but the final product was not signed until 1961 and did not go into force until 1964. DENZA, supra note 71, at 1-2. One can only imagine how long it would have taken under the conditions described in the second alternative above.
probable that bodies such as the General Assembly could not exist at all in their modern incarnations without the ability to communicate rapidly across the world. At best, perhaps, multinational organizations could convene periodically to address specific issues and draft agreements which had already been largely laid out beforehand.

In summary, then, air travel and speedy communications have permitted the creation of new diplomatic posts and new fora in which diplomats may represent their home states. Thus, while the unique duties of diplomats have lessened (and with them the rationale for complete diplomatic immunity), their numbers have increased, adding to the problems of abuse.

VII. Alternatives to Present System of Immunity

In light of the crimes, both large and small, committed by diplomats (many seemingly inspired by the existence of immunity) and the decreased role of permanent envoys today compared to the eras in which diplomatic immunity developed, it is only logical to question whether the cost of immunity is worth the benefit conferred by diplomats. There is no doubt that diplomats still fill many important roles in international relations, such as the representational and information-gathering functions described above. It is almost certain that some level of immunity is still appropriate for some types of envoys. For example, diplomatic immunity could be cut back to the levels currently enjoyed (on paper at least) by consuls. Diplomats would receive immunity for acts performed in the course of their duties, but no further. This proposal would, of course, run up against the current problem that the "scope of duties" may be read overbroadly at times, thus the proposal might require universal consensus to enforce the rules strictly in order to be fully effective. Even if it were not strictly enforced, however, the change would go a long way toward eliminating flagrant abuses of immunity as exemplified by Manuel Ayree\textsuperscript{160}.

On the other side, it may be argued that so limiting diplomatic immunity would give states room to harass diplomatic guests within their borders.\textsuperscript{161} One rationale for such action might be that the host government, unhappy with the sending government, might fabricate charges in order to arrest and prosecute diplomats and thus gain negotiating leverage over the sending state. Alternatively, a state could bring trumped-up charges in order to expel an envoy performing work of which the host government does not approve. Such a situation occurred in 1996 in Cuba, when U.S. human

\begin{footnotesize}
\footnote{160. See notes 102-04 and accompanying text.}
\footnote{161. See, e.g., Hickey & Fisch, supra note 98, at 379.}
\end{footnotesize}
rights officer Robin Meyer was accused of "subversive activities" and expelled from Cuba. Without immunity, it is possible that she might have been arrested and tried in Cuba.

Reciprocity should provide a means to rein in this type of harassment, however. Governments are extremely sensitive to interference with their diplomats and they frequently respond to affronts, real or imagined, with reciprocal measures. Russia's "Operation Foreigner" campaign to ticket U.S. diplomatic vehicles is a perfect example of this tit-for-tat mentality. When Russia perceived that members of its diplomatic staff in New York had been unfairly treated it quickly responded with its own countermeasures. Harassment is a poor choice of action as it almost certainly rebounds to harm the harasser. It seems likely that, in the Cuban case above, Cuba would have viewed the situation entirely differently if the remedy for "subversive measures" was a Cuban trial. Trumped-up charges and expulsion might be an annoyance for the parties affected, but trial of a foreign citizen would be a far bigger issue and would almost certainly provoke an international dispute.

Because the maintenance of embassies is seen by even the most radical of states as an important measure of sovereignty, it seems unlikely that reciprocity would result in an escalation of arrests, prosecutions or expulsions so as to make the preservation of embassies impossible. All states have a common interest in interaction that would keep a lid on the escalation of tit-for-tat reprisals.

Reciprocity seems to hold much promise as a deterrent of government mistreatment of diplomats and as an alternative to immunity. It has the advantage of being self-enforcing: states think carefully before acting against foreign diplomats because their own citizens are equally vulnerable in other countries. It is far from a perfect solution, however, as states do not all share the same ability to take countermeasures. In the Russian/Belarusan parking dispute discussed above, for example, Russia was able to retaliate by ticketing U.S. diplomats in Russia, but Belarus did not. Reciprocity would not suffice as a sole deterrent of harassment, but it may be highly useful as part of a larger scheme to protect both diplomats and the general public.

Another argument to preserve immunity is the contention that if immunity is not guaranteed, many people would decline to join the diplo-

162. Immunity's Two-Way Street, supra note 4.
163. See note 116 and accompanying text.
164. HAMILTON & LANGHORNE, supra note 14, at 233.
165. See notes 110-116 and accompanying text.
matic corps from fear of prosecution in countries perceived to be lacking in the protection of defendants' rights to due process and fair trial. According to one source, as many as sixty percent of the U.S. diplomatic corps would refuse to serve in certain countries without guarantee of immunity.

This is a serious problem. It does not appear to be an insurmountable one, however. First, one must question the statistic's inherent bias: the degree to which the sentiments expressed by diplomats reflect their inability to imagine life without immunity. When presented with a choice between immunity and subjection to the laws of even a perfectly fair, impartial system of law, most people would certainly be expected to pick the former. If the choice offered to diplomats is changed, however, from (a) immunity or no immunity, as the reflected in the survey cited above, to (b) no (or limited) immunity or no work in the diplomatic arena, many who raised concerns might reconsider and take a chance. As the statistics cited in section III showed, very few diplomats are ever involved in serious crime. The odds are low against any one becoming involved in a criminal action. Statistically speaking, most diplomats would find their decisions to "chance it" by accepting posts without immunity validated by the lack of any legal problems in the host state.

Not wishing to appear insensitive toward legitimate concerns of due process and fair treatment in foreign fora, it should be noted that a number of proposals exist to reform the immunity system which would take into account, to varying degrees, both crime victims' interest in pursuing remedies and diplomat's justifiable fears of being haled into court in foreign jurisdictions. These include proposals to create a claims fund or funds to compensate victims of diplomatic crime, to enforce the Vienna Conventions quite strictly, and to give the emerging International Criminal Court jurisdiction over crimes by diplomats. It is certainly beyond the

166. Hickey & Fisch, supra note 98, at 360.
168. See notes 97-99 and accompanying text.
170. See, e.g., Milhaupt, supra note 90.
171. See, e.g., Shapiro, supra note 169, at 297, Wright, supra note 12, at 185-88.
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scope of this Note to comprehensively address all of these proposals, but a brief overview of issues and concerns related to each is appropriate.

Claims fund proposals have been suggested on both domestic and multilateral bases. A domestic fund has the advantage of being relatively simple to operate. A country, such as the United States, would create a department within its government dedicated to maintaining the fund and investigating reports of diplomatic abuse of U.S. citizens.\(^{172}\) The fund could be financed either by the U.S. Federal Government\(^{173}\) (or alternatively by visiting diplomats), and would pay out compensation to injured individuals without disturbing the diplomat's immunity.\(^{174}\) An international fund would operate in similar fashion, but would be administered by a multinational body such as the International Court of Justice, (or the proposed International Criminal Court), and would be funded through bonds posted by all states agreeing to the proposal.\(^{175}\) These ideas have merit in that they propose a solution which need not require revision of the Vienna Conventions. They would be a particularly neat solution to the traffic citation problem, which is largely a monetary issue. Municipalities would recoup their expenses in issuing citations. States, if required to actually pay the citations out of funds already deposited with the administrative body, might take a dimmer view of their citizens who racked up excessive numbers of citations. States would have incentive to crack down on flagrant violators, which would (presumably) reduce the total number of infractions and with it the danger to local citizens posed by speeding, double- or triple-parking, blocking fire hydrants, etc.

Claims funds would fall short of a complete solution in several important ways, however. First, as the funds could only provide monetary compensation, they would not be able to offer an adequate remedy in all situations. Many victims, especially victims of violent crime such as Mr. Ayree committed, would presumably be left unsatisfied by a remedial system which offered only monetary compensation. Second, administration of such programs could be quite difficult. For an international fund, a mediator would have to exist, states would have to agree on standards of conduct, and an enforcement mechanism would be required to ensure that states paid their share into the fund.\(^{176}\) The domestic proposal has an advantage in that the United States (or other state) could unilaterally decide

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173. *Id.* at 153-55.
174. *Id.* at 157-58.
175. See Shapiro, *supra* note 169, at 299.
176. *Id.*
how to address all of the above issues. However, a domestic fund by its terms would fall short of a comprehensive global solution. Non-U.S. citizen victims would have no recourse unless similar funds were created throughout the world. In that event, the cost of posting bonds in each country in which a state maintains diplomatic personnel might become prohibitive and make the entire system unfeasible.

The second proposal, strict interpretation of the Vienna Conventions, has potential as a limited effort to offer some recourse to victims of diplomatic crime. Such a scheme, if it encompassed both conventions, would require officials to interpret narrowly terms such as "in the exercise of consular functions." The proposal would help to narrow the scope of actions from which a person might claim immunity and narrow as well the ranks of people entitled to such immunity. It would not, however, affect diplomats receiving complete immunity under the Diplomatic Convention at all. In addition, although it would not require amendment of the conventions (a sobering prospect), it would require almost universal consensus to apply the convention's terms strictly, which is a proposition only slightly less daunting than actual amendment. Thirdly, the proposal would fail to address diplomats' concerns regarding fair procedure and due process in unfamiliar court systems.

The third proposal concerns the International Criminal Court (hereinafter "ICC" or the "Court"). Although such a body does not exist currently, recent developments indicate that it may be more than a pipe dream. In 1994, the United Nations International Law Commission created a draft statute for an international criminal court, which was subsequently modified and adopted again in 1996. Concurrently, in 1995 the U.N. General Assembly established a Preparatory Committee ("PrepCom") to further evaluate and refine the draft statute. The PrepCom met two times in 1996, three times in 1997 and has one final meeting scheduled for April 1998. A diplomatic conference is planned for 1998 to draft an

177. See Milhaupt, supra note 90, at 846.
182. Establishment of an International Criminal Court, supra note 180.
official statute. Thus, the specifics of the statute are yet to be determined, but several aspects are fairly clear from the perspective of possible jurisdiction over diplomatic criminal cases.

The subject matter jurisdiction of the court will most likely be limited to three basic crimes: genocide, crimes against humanity and serious violations of the laws and customs applicable in armed conflict. The 1994 Draft Statute also included crimes of aggression and crimes established under certain treaties which "constitute exceptionally serious crimes of international concern," but these categories have been dropped by the PrepCom and are unlikely to make it into the final statute.

From the perspective of diplomatic criminal jurisdiction, there is little cause for hope that the ICC will form an effective remedy in the near future. The ICC's primary function will be to address large scale acts against large groups of people, such as occurred in the ethnic conflicts in Rwanda and the former Yugoslavia. Individual criminal acts by diplomats simply does not measure up. There is a possibility that some egregious acts, such as Manuel Ayree's serial rapes, could pass muster as "crimes against humanity," but even that might be a marginal case depending on the definition of "crimes against humanity" adopted by the drafters and the nascent court. Needless to say, isolated event such as Gueorgui Makharadze's traffic accident would not interest the court at all, and the idea of bringing traffic citations before the ICC is simply ludicrous.

Apart from jurisdictional problems stemming from the Draft Statute, the Court would face a number of pragmatic obstacles as well in attempting to try diplomats. Principal among these is the question of what substantive law to apply. A single body of international criminal law would be equitable, but not possible in all situations. It would ensure that all diplomats everywhere faced the same standards of proof and the same punishments for any given crime. Crimes with ideological or political ramifications would be highly problematic, however. On the other hand, it would be ambitious indeed to ask the ICC to learn and apply national substantive law. The Court would be required to learn and apply the substantive law of every state acceding to the Court's jurisdiction.

Although many obstacles stand in the way of using the ICC to handle prosecutions of diplomats accused of criminal activity, the idea has much

183. Id.
185. 1994 Draft Statute, supra note 178, art. 20(b), 20(e).
186. See Shapiro, supra note 169, at 297.
appeal as well and should not be dismissed out of hand merely because it seems unfeasible at present. First, the Court's multinational composition would make it relatively immune to political issues related to harassment of "enemy" governments through their envoys. Additionally, ICC prosecutions might help to prevent termination of diplomatic relations in cases of extreme disagreement between states. For all that the ICC is not currently oriented toward jurisdiction over diplomats, an international court could offer substantial assistance in preventing abuse of immunity. One possible approach might be to grant an international court (perhaps the ICC, should its authority and mandate grow over time, or else some other similar body) jurisdiction over diplomatic prosecutions not as a trial court, but as a court of last resort. This would prevent the court's caseload from becoming clogged with diplomatic prosecutions, eliminate the need for the court to develop a truly comprehensive body of substantive criminal law (the court could even be limited to ensuring that no bias of failures of due process occurred), and still provide guarantees to diplomats that their cases would be reviewed by an impartial body.

The problem of abuse of diplomatic immunity is clearly a complex and multifaceted one. The range of crimes committed runs the gamut from the relatively trivial (traffic violations), to the extremely serious (rape, murder, and even slavery). All proposed remedies have serious drawbacks and none seems up to the task by itself, but a synthesis of proposals might be quite effective. For example, the Vienna Conventions could be amended to provide immunity only for acts committed in the course of their duties (and amended as well to eliminate bilateral agreements providing different levels of immunity), an international claims fund could exist to handle routine cases easily resolved through monetary remedies and the an international could be granted jurisdiction over criminal prosecutions at an appellate level. This would be an ambitious effort, to be sure, but it has merits. Such a proposal would require less drastic changes to existing treaty structures than if any one element of the merged proposal were offered as a complete solution. Immunity, as embodied in the Vienna

187. Wright, supra note 12, at 186.
188. See id. at 185. Such disagreement has occurred in the past, as when the United Kingdom broke off diplomatic ties with Libya in 1984 after a Libyan embassy staffer shot and killed a British policewoman from within the Libyan embassy building in London, then escaped to Libya under the protection of diplomatic immunity. ASHMAN & TRES scott, supra note 101, at 128-55.
189. Cases exist in which diplomatic personnel have kept domestic help enslaved within the diplomats' homes, forcing the people to work long hours for little or no pay. Ashman and Trescott devote an entire chapter in their book to the problem. ASHMAN & TREScott, supra note 101, at 248-73.
Conventions would be changed only slightly. The only people whose status would actually change would be diplomats' and their families, who would lose their full-time immunity.\footnote{199} However, under the new regime all diplomatic and consular staff, as well as law enforcement personnel and judges, might come to accept that no one should be entitled to full immunity any longer. This change could have a subtle psychological effect, encouraging courts (as well as the U.S. State Department and its counterparts in other countries) to enforce the conventions' terms strictly. The adjustment to life without full immunity might be easier for diplomats if they knew that an impartial court existed which would sit in judgment over the host state's decisions, ensure fair process and guard against bias toward home-state victims. Finally, the claims fund would offer easy relief to victims where the damage is essentially monetary. By reserving the fund for such purposes, it would not need to be as large as if it were the only remedial mechanism available. Each state's contributions would be smaller, hence more palatable.

This mix-and-match proposal is only one of many possible ideas of course, and many problems exist with it, to be sure. Most notably, enforcement could be quite difficult if a state decided to cease payments to the claims fund. Worse, if a state chose to ignore a reversal of conviction by the court and keep a diplomat in prison in the host state serious complications could arise (although the reciprocity principle should help keep such problems to a minimum). Nevertheless, the example serves to demonstrate a way to answer many concerns without making drastic changes to any one institution. Many other such permutations are possible and should be explored. Most saliently, comprehensive review of diplomatic immunity should also consider proposals to permit civil actions against diplomatic personnel in appropriate cases.

\textbf{VIII. Conclusion}

In summary, although the career diplomatic corps has lost its monopoly on official communication between states, it still fills many important roles. It is true that to a significant degree instantaneous communications devices, "jet planes . . . presidents, national security assistants and secretaries of state [have] restricted ambassadors['"] duties, but not quite to the level of mere ritual, public relations and "inkeep[ing] for itinerant con-
gressmen” as at least one source has described the situation. Diplomats’ roles in negotiating, in representing their government and as cultural liaisons are still extremely important to the conduct of international relations. They are no longer so important, however, that their freedom of movement and action should necessarily require crimes by official envoys to go unpunished. The diplomat’s role has shrunk significantly during the twentieth century, but her immunity from criminal prosecution has changed only slightly. Abuses of immunity that were tolerated in past centuries due to the diplomat’s important duties need no longer be endured. International law should reflect this fact. Reform should begin by scaling back the broad grants of immunity in the Vienna Conventions and should continue by utilizing existing national judicial structures, emerging international structures and specially created institutions such as a claims fund to set the proper balance between immunity and accountability in the modern world.

191. HAMILTON & LANGHORNE, supra note 14, at 226 (quoting George Ball on why he refused an embassy post in the Carter administration).