

NOTE

CONSTITUTIONAL SOLUTIONS TO THE PROBLEM OF DIPLOMATIC CRIME AND IMMUNITY

I. INTRODUCTION

No one is above the law. This principle has been a driving force throughout the great ideological experiment known as democracy. From childhood, we are told that people who commit crimes must answer for them. However, the simplistic nature of this notion fails to capture the whole truth of the nuanced system of international law. International law permits certain individuals to escape accountability for their crimes. For centuries, the principle of diplomatic immunity has enabled foreign diplomats to avoid prosecution for violations of the host country's laws.¹ The Vienna Convention on Diplomatic Relations, to which the United States is a party, has codified customary international law.² The Vienna Convention grants diplomats, their families, and diplomatic property numerous protections.³ However, of all the protections granted by the Vienna Convention, none has caused more of a stir than Article 31. Article 31 provides that diplomats "shall enjoy immunity from the criminal jurisdiction of the receiving States."⁴ There is little doubt that these core protections have existed for centuries. However, many argue that there is a need for wholesale changes to the law of diplomatic immunity to ensure justice is obtained for the victims of past diplomatic crimes and to deter diplomats from committing crimes in the future.⁵ In contrast, supporters of the status quo believe that diplomatic immunity ensures safe and open dialogue between nations so that they may work out their differences peacefully.⁶ As such, a debate as to the merits of

1. Michael B. McDonough, *Privileged Outlaws: Diplomats, Crime and Immunity*, 20 SUFFOLK TRANSNAT'L L. REV. 475, 477-78 & n.20 (1997) (noting that "abuse of privilege extends at least to sixteenth century"); see Leslie Shirin Farhangi, Note, *Insuring Against Abuse of Diplomatic Immunity*, 38 STAN. L. REV. 1517, 1518-19 & n.9 (1986) (describing early abuse of diplomatic immunity).

2. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 [hereinafter Vienna Convention].

3. *Id.* arts. 29-31, 34, 37.

4. *Id.* art. 31.

5. McDonough, *supra* note 1, at 497-99 (proposing amending the Vienna Convention on Diplomatic Relations and the Diplomatic Relations Act); Stephen L. Wright, Note, *Restricting Diplomatic Immunity to Deter Violent Criminal Acts: A Proposal for Amending the Vienna Convention*, 5 B.U. INT'L L.J. 177, 184 (1987) (proposing an "international adjudicatory mechanism").

6. See James E. Hickey, Jr. & Annette Fisch, *The Case to Preserve Criminal Jurisdiction Immunity Accorded Foreign Diplomatic and Consular Personnel in the United States*, 41 HASTINGS

continuing to provide foreign diplomats with immunity exists today. This Note will provide a constitutional method of analysis which can be used in order to solve the problem of unpunished diplomatic crime. Part II of this Note provides the historical context for diplomatic immunity, examines the existing regime of diplomatic immunity law, and provides evidence detailing the abuses of diplomatic immunity that have occurred in the past. Part III introduces numerous methods that have been suggested as ways to change the law of diplomatic immunity. The constitutionality of these methods is then analyzed. Part IV of the Note argues that the United States should refrain from taking unilateral action to deal with criminal diplomats despite the fact that doing so would be constitutional. Finally, Part V concludes that the best solution to the injustices of diplomatic crime that go unpunished as a result of the Vienna Convention is to grant jurisdiction over the matter to a special Diplomatic International Criminal Court. Allowing a Diplomatic International Criminal Court to prosecute accused diplomatic criminals is constitutional and would ensure a more just system of international law.

II. HISTORICAL UNDERPINNINGS AND THE CURRENT STATE OF THE LAW ON DIPLOMATIC IMMUNITY

A. *History and Procedure in the United States*

The practice of granting diplomatic immunity is thousands of years old. Ever since ancient Greek and Roman times, diplomats have been afforded special privileges while conducting their duties in foreign lands.⁷ The basic notion of diplomatic immunity has been continually adhered to by nations predating the codification of diplomatic law.⁸ As the centuries passed, the practice grew as European nations commonly exchanged diplomats. Diplomatic immunity was recognized as an important requirement for these exchanges.⁹ Today, the Vienna Convention on Diplomatic Relations codifies the customary practice of diplomatic immunity and is accepted world-wide as concrete international law.¹⁰

In the American system, recognition of a nation plays an important

L.J. 351, 356 (1990).

7. See, e.g., *United States v. Enger*, 472 F. Supp. 490, 504-05 (D.N.J. 1978) (detailing the history and development of diplomatic relations and immunities amongst nations).

8. McDonough, *supra* note 1, at 477.

9. See Farhangi, *supra* note 1, at 1518-19 & n.9 (describing how diplomatic immunity has been integral in the forming of diplomatic relations).

10. Hickey & Fisch, *supra* note 6, at 363-64.

role in the diplomatic process. Without recognition, there is typically no exchange of diplomats and therefore no diplomatic immunity. Under United States law, in order for a foreign state to be afforded all the rights and privileges of statehood, it must first be recognized by the United States government.¹¹ Recognition in the United States is typically a political act and can be granted or withheld for any reason.¹² The Supreme Court has deferred on recognition questions and continually held that it is the job of the Executive Branch to decide whether or not to recognize a foreign nation.¹³ Once recognition is granted, an exchange of diplomats may occur pursuant to the Vienna Convention.¹⁴ In the United States, the task of certifying the diplomatic status of various persons and resolving any future questions of their immunity is left to the State Department's Office of Protocol.¹⁵ In turn, the courts rely on the State Department's determination that an individual is entitled to immunity.¹⁶

*B. Contemporary Diplomatic Immunity Law in the United States:
The Vienna Convention on Diplomatic Relations and the
Diplomatic Relations Act*

Several multinational treaties signed in the twentieth century have codified customary international law with regard to diplomatic relations between states. The seminal treaty on the matter is the Vienna Convention on Diplomatic Relations.¹⁷ The Convention was published in 1961 and was ratified by the United States in 1972 pursuant to Article II of the Constitution.¹⁸ As a treaty, the Convention has the full force of law in the United States and is recognized as part of the supreme law of the land pursuant to Article VI of the Constitution.¹⁹ At its core, the Convention is an attempt to "ensure the efficient performance of functions of diplomatic missions as representing States."²⁰ In order to

11. See *United States v. Belmont*, 301 U.S. 324, 327 (1937).

12. *Id.* at 328.

13. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition is exclusively a function of the Executive.").

14. See Vienna Convention, *supra* note 2.

15. See *In re Terrence K.*, 522 N.Y.2d 949, 950 (App. Div. 1987); Abelardo L. Valdez, *Privileges and Immunities Under the Vienna Convention on Diplomatic Relations and the Diplomatic Relations Act of 1978*, 15 INT'L LAW. 411, 413 (1981) (offering insight into the work of the State Department's Office of the Chief of Protocol).

16. *United States v. Enger*, 472 F. Supp. 490, 506 n.19 (D.N.J. 1978).

17. Vienna Convention, *supra* note 2.

18. Valdez, *supra* note 15, at 412.

19. U.S. CONST. art VI; *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (noting that treaties are "on the same footing of supremacy as do the provisions of the Constitution and laws of the United States").

20. Vienna Convention, *supra* note 2, Introduction.

carry out the difficult task of diplomacy, there is a need to allow the diplomat uninhibited dialogue and movement.²¹ Scholars have argued that diplomacy is inhibited if diplomats are worried about jail time or trumped up charges, especially during political standoffs.²² With these concerns in mind and in order to maintain “international peace and security, and the promotion of friendly relations among nations,”²³ diplomatic immunity was codified in the Vienna Convention.

A brief discussion of relevant provisions of the Vienna Convention on Diplomatic Relations is in order so that the exact bounds of the immunity protections granted to diplomats may be understood. The core protection addressed by this Note is Article 31 which states that “[a] diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving States. . . . [And he] is not obliged to give evidence as a witness.”²⁴ It is a common misunderstanding to claim that diplomats do not have to follow the law of the United States. To the contrary, Article 41 of the Vienna Convention specifically commands that a diplomat has the duty to “respect the laws and regulations of the receiving State.”²⁵ However, if a diplomat fails to comply with American law and none of the remedies provided by the Vienna Convention are pursued, the United States lacks the enforcement jurisdiction over the diplomat.²⁶ Depending on one’s view of diplomatic immunity, this fact can represent either the strength or weakness of the current law. This immunity extends to diplomats for both civil and administrative jurisdiction.²⁷ A necessary corollary to the provisions stated in Article 31 is the notion that a diplomat’s person is inviolable and thus free from any “arrest or detention.”²⁸ Article 22 of the Convention extends inviolability to the diplomatic mission which the receiving state has a duty to protect and ensure its safety.²⁹ Full diplomatic immunity under the Vienna Convention extends to a limited group of people which includes the

21. See Hickey & Fisch, *supra* note 6, at 356.

22. *Id.* at 379 (noting that during politically tense periods the danger of false arrest is “at its greatest”).

23. Vienna Convention, *supra* note 2, Introduction.

24. *Id.* art. 31.

25. *Id.* art. 41.

26. See Terry A. O’Neill, Comment, *A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978*, 54 TUL. L. REV. 661, 662-64 (1980) (detailing the concept of enforcement jurisdiction in relation to diplomatic immunity).

27. Vienna Convention, *supra* note 2, art. 31. Article 31 of the Vienna Convention states that immunity does not apply in cases of a diplomat’s own real property, matters of succession and estates, as well as professional/commercial activity engaged in by the diplomat outside the scope of his official duties. *Id.*

28. *Id.* art. 29.

29. *Id.* art. 22.

diplomatic agent and the members of his or her family.³⁰ Finally, according to the Convention, the size of the mission and the number of persons granted diplomatic status is a decision which is to be negotiated between the sending state and the receiving state.³¹ In summary, the Vienna Convention generally places numerous obligations on the receiving state and places a premium on the requirements of respect for the person and freedom of movement of the diplomat.

The Diplomatic Relations Act of 1978³² is also an important part of the diplomatic immunity doctrine of the United States. The Vienna Convention was a self-executing treaty entitled to immediate application in United States law.³³ However, the language of the Vienna Convention persuaded Congress to pass the Diplomatic Relations Act in order to repeal a 1790 statute which gave diplomats much more protection than was required by the Vienna Convention.³⁴ The Diplomatic Relations Act also clarified that the Vienna Convention on Diplomatic Relations was “the essential United States law on the subject.”³⁵ In addition to clarifying United States immunity obligations, Congress also authorized the President to grant more or less favorable treatment than the Vienna Convention provided to diplomats whose countries reciprocated in kind.³⁶ Therefore, if another country grants American personnel greater privileges while in their country, the President may allow that nation’s diplomats operating in the United States similar benefits.

C. The Remedies Provided for a Violation of Contemporary Diplomatic Immunity Law

In addition to understanding the protections granted to diplomats by the Vienna Convention on Diplomatic Relations, it is also important to

30. *Id.* art. 37; O’Neill, *supra* note 26, at 685 (discussing the bounds of family immunity). This Note intends to address issues dealing solely with diplomats and their families and thus is consciously omitting the myriad of rules that distinguish the immunity standards for other foreign officials such as consuls, administrative staff, and their respective families.

31. Vienna Convention, *supra* note 2, art. 11.

32. Diplomatic Relations Act, 22 U.S.C. § 254a-e (2000).

33. O’Neill, *supra* note 26, at 689-91; *see also* *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (describing a self-executing treaty as one which “operates of itself without the aid of any legislation”); *Foster v. Neilson*, 27 U.S. 253, 314 (1829) (stating that a non-self-executing treaty exists when “either of the parties engages to perform a particular act . . . and the legislature must execute the contract before it can become a rule for the Court”).

34. O’Neill, *supra* note 26, at 665 (explaining reasons for enacting the Diplomatic Relations Act). These laws, which have since been repealed, provided diplomats with absolute criminal and civil immunity. *Id.* They punished, by fine and imprisonment, any person who attempted to sue a diplomat with immunity. *Id.*

35. Statement on Signing H.R. 7819 into Law, 14 WEEKLY COMP. PRES. DOC. 1694 (Oct. 2, 1978).

36. 22 U.S.C. § 254c.

discuss the remedies the United States as a receiving state possesses to deal with diplomatic crime and misconduct. As noted, the receiving state may not criminally prosecute immunized diplomats.³⁷ However, Article 32 of the Vienna Convention allows the receiving state to request that the sending state rescind the diplomat's immunity.³⁸ If the waiver is granted, the diplomat will be forced to answer for his or her crimes in a criminal or civil court just like any other person in the country.³⁹ A different remedy is found in Article 31. This provision enables the receiving state to request the sending state to discipline the diplomat back in the sending state using their own judicial system.⁴⁰ Under this provision of the Vienna Convention, a country such as the United States would not have to worry about a potentially defective foreign justice system condemning an innocent United States diplomat abroad.⁴¹ Instead, the American diplomat would receive a trial in an American court of law and would be entitled to all the protections that the United States Constitution provides.⁴² Another remedy found in the Vienna Convention to deal with diplomatic crime is the ability of the receiving state to declare a diplomat a *persona non grata*.⁴³ This requires the diplomat to leave the country or face arrest.⁴⁴ According to the Convention, this remedy may be sought for any reason or no reason at all by the receiving state.⁴⁵ This acts as a deterrent for a diplomat because if they are declared a *persona non grata* in one country, it is unlikely that they would ever be approved as a diplomat in another country.⁴⁶ This can be a powerful remedy for a receiving state to pursue given the negative impact it would have on a diplomat's professional career.⁴⁷

More drastic measures can also be taken. The receiving state has the ability to take action aimed at punishing a diplomat's country and not just the diplomat.⁴⁸ The Vienna Convention permits the receiving state to

37. See *supra* Part II.B.

38. Vienna Convention, *supra* note 2, art. 32.

39. *Id.*

40. *Id.* art. 31.

41. See Hickey & Fisch, *supra* note 6, at 360 (demonstrating the possibility of foreign nations arresting diplomats on "trumped up criminal charges" in retaliation for an arrest of one of their diplomats).

42. See Vienna Convention, *supra* note 2, art. 31.

43. *Id.* art. 9.

44. Hickey & Fisch, *supra* note 6, at 377.

45. Vienna Convention, *supra* note 2, art. 9.

46. See Hickey & Fisch, *supra* note 6, at 377.

47. *Id.* at 378 (detailing how Great Britain cut down on diplomatic unpaid parking tickets by more than 90,000 in a three year period simply by "issuing expulsion threats against repeat offenders").

48. *Id.*

limit the size of a diplomatic mission or even shut down an individual embassy.⁴⁹ It should also be noted that 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.”⁵⁰ This broad remedy allowed by the Convention could deter a country from using their diplomats for terrorist plots or continually failing to bring their criminal diplomats to justice.

The Diplomatic Relations Act, passed by the United States in 1973, went further than the Vienna Convention to protect the general American population from the actions of immunized diplomats. The Diplomatic Relations Act grants the victims of diplomatic indiscretions some civil recourse against the perpetrator.⁵¹ The Act requires foreign diplomats to carry automobile insurance.⁵² It also provides an injured party with the right to directly sue the diplomat’s insurance provider in cases where diplomatic immunity would prevent a suit directly against the diplomat.⁵³ Since the Diplomatic Relations Act only applies to civil actions, these remedies would do little to comfort those victims who wish to see the perpetrator subjected to jail time. Nevertheless, the Act provides a bit of monetary support to an individual who suffers an automobile accident as a result of diplomatic negligence or criminal recklessness by providing them with a right of direct action against the insurer of the diplomat.⁵⁴

D. Examples of Diplomatic Crime

The possible remedies that the Vienna Convention provides for have been utilized in the past. In 1997, an Ambassador from the Republic of Georgia, legally drunk at the time and driving three times the speed limit, caused an automobile accident in Washington, D.C. leading to four injuries and the death of a sixteen-year-old girl.⁵⁵ The United States formally requested that the Republic of Georgia waive his immunity pursuant to Article 32 of the Vienna Convention on Diplomatic Relations.⁵⁶ The Republic of Georgia complied and the

49. Vienna Convention, *supra* note 2, arts. 4, 9, 11.

50. See Hickey & Fisch, *supra* note 6, at 378.

51. See O’Neill, *supra* note 26, at 662.

52. 22 U.S.C. § 254e(b) (2000).

53. See Farhangi, *supra* note 1, at 1531 n.80.

54. See O’Neill, *supra* note 26, at 662.

55. Terry Frieden, *Georgian Diplomat Convicted in Fatal Crash Goes Home*, CNN.COM, June 30, 2000, <http://archives.cnn.com/2000/US/06/30/georgia.diplomat>.

56. *Georgian President to Waive Envoy’s Immunity*, CNN.COM, Jan. 12, 1997,

diplomat was eventually convicted of involuntary manslaughter in the United States and sentenced to federal prison.⁵⁷ In 2001, a Russian diplomat to Canada caused an automobile accident which killed one pedestrian and left another severely injured.⁵⁸ The diplomat was drunk at the time and had been stopped for drunk driving twice in the past by Canadian police who were unable to prosecute him.⁵⁹ Canada requested a waiver of his immunity but was turned down.⁶⁰ Although Russia did not waive his immunity under Article 32, they did agree to process him through their own system pursuant to the provision found in Article 31.⁶¹ Eventually, he was sentenced to four years in a Russian prison for involuntary manslaughter.⁶² The Vienna Convention remedies have also led to positive outcomes in regard to civil matters. The right of the receiving state to issue expulsion threats was quite effective when employed in London to deal with the problem of traffic ticket scofflaws.⁶³ By issuing expulsion threats against diplomats who did not pay their parking and traffic tickets, England was able to cut unpaid diplomat parking tickets by over 90,000 in just three years.⁶⁴

Despite the fact that the Vienna Convention remedies have been utilized to bring criminal diplomats to justice, other well-noted diplomatic crimes have gone unpunished. Perhaps the most infamous incident occurred in 1984 at the Libyan Embassy in London.⁶⁵ During a public rally against the Libyan government, someone from within the embassy fired on the crowd with a machine gun.⁶⁶ London Police Officer Yvonne Fletcher was tragically struck and killed and eleven others were injured.⁶⁷ A tense political and diplomatic standoff between the British and Libyan governments ensued.⁶⁸ However, pursuant to the Vienna Convention and aware of the possible harm that could come to their diplomats and nationals in Libya, the British government did not arrest

<http://www.cnn.com/WORLD/9701/12/georgia.diplomat/index.html>.

57. Frieden, *supra* note 55.

58. The Jamestown Foundation, Russian Diplomat Faces Jail Term for Deadly Auto Accident, Mar. 22, 2002, http://jamestown.org/publications_details.php?volume_id=25&issue_id=2223&article_id=19257.

59. *Id.*

60. *Id.*

61. *See id.*

62. *Id.* (noting that this was a sentence “not radically different from what he would have faced in a Canadian court”).

63. *See* Hickey & Fisch, *supra* note 6, at 378.

64. *Id.*

65. *See* Rosie Cowan & Hugh Muir, *Police to Fly to Libya in New Search for PC's Killer*, GUARDIAN, Mar. 26, 2004, <http://www.guardian.co.uk/Lockerbie/Story/0,2763,1178415,00.html>.

66. *Id.*

67. *Id.*

68. *See* Farhangi, *supra* note 1, at 1524.

any suspects and eventually allowed the perpetrators to go free and return to Libya.⁶⁹ The only remedy available to the British government under the Vienna Convention was to break off diplomatic relations with Libya, which it did.⁷⁰ These events caused great damage to British-Libyan relations.⁷¹ Officer Fletcher's death, in addition to other well publicized examples of unpunished diplomatic crime set the stage for many to call for changes to the doctrine of diplomatic immunity.⁷²

Unfortunately, most of the evidence demonstrating the problem of diplomatic crime is anecdotal in nature rather than statistical.⁷³ This has caused numerous scholars to argue that diplomatic crime is not a problem.⁷⁴ However, several critical factors lead to the underreporting and misreporting of diplomatic crimes. For starters, diplomatic crimes present thorny foreign relations issues for nations who worry about the safety of their nationals and diplomats in other countries.⁷⁵ As a result, official records are not always kept as diplomatic crime is typically handled by the State Department "quietly" and . . . confidentially . . . to avoid embarrassing any mission."⁷⁶ In addition, police officers often do not submit reports for incidents involving a diplomat to the State Department since diplomatic immunity is likely to render the work meaningless.⁷⁷ While most police officers will report serious incidents to the State Department, "the system in place to report infractions [is] not very systematic," because "how they define serious varies" from one police official to another official.⁷⁸ Furthermore, the reported rate of

69. *Id.* at 1525-26 nn.46-47.

70. *Id.* at 1524.

71. See Wright, *supra* note 5, at 179-84 (detailing the events surrounding the 1984 incident).

72. See Krista Friedrich, Note, *Statutes of Liberty?: Seeking Justice Under United States Law When Diplomats Traffic in Persons*, 72 BROOK. L. REV. 1139, 1160 (2007) (detailing the fact that human trafficking for domestic servitude is prevalent among diplomats); Joshua D. Groff, Note, *A Proposal for Diplomatic Accountability Using the Jurisdiction of the International Criminal Court: The Decline of an Absolute Sovereign Right*, 14 TEMP. INT'L & COMP. L.J. 209, 218 (2000) ("Another diplomatic incident occurred in 1995, when a Nigerian diplomat's wife, after learning of her daughter's pregnancy, slashed the girl's wrist, and stabbed another daughter as she tried to intervene. In 1985, a Soviet military attaché, driving under the influence, struck and injured three pedestrians in Washington, D.C.. In 1982, the grandson of the Brazilian ambassador shot a bouncer outside a nightclub in Washington, D.C. In all of these cases no charges were brought against the offenders due to diplomatic immunity.").

73. See Farhangi, *supra* note 1, at 1523 n.36.

74. Hickey & Fisch, *supra* note 6, at 374-75 (stating that diplomatic crime in Washington, D.C. comprised 3/100th of 1% of the overall crime rate and is not a "significant national crime problem meriting a legislative response").

75. *Id.* at 360 (detailing possible dangers to United States diplomatic personnel abroad).

76. Farhangi, *supra* note 1, at 1523 n.36 (citation omitted); see also McDonough, *supra* note 1, at 487 n.74.

77. McDonough, *supra* note 1, at 487 n.74.

78. Mark S. Zaid, *The Question of Diplomatic Immunity: To Have or Not to Have, That Is the Question*, 4 ILSA J. INT'L & COMP. L. 623, 628 n.17 (1998) (citation omitted) (also noting that

diplomatic crime often varies from the actual rate due to the fact that many victims are unwilling or unable to come forward due to various circumstances.⁷⁹ For example, many victims stay quiet because they realize that diplomatic immunity would preclude any measure of true justice against the perpetrator.⁸⁰ In fact, diplomats have been known to use their immunity as a way to convince victims of the likely failure of a claim or to threaten their victims to stay quiet, especially in domestic settings.⁸¹ In other instances, the victims are a part of the diplomat's family or are employed by the diplomat and cannot jeopardize such a relationship.⁸² In sum, valid reasons exist to believe that the actual rate of diplomatic crime is much higher than the reported rate.

The little statistical data that does exist demonstrates that diplomatic crime is a problem. For example, in 1994, there were nineteen reported felonies committed by foreign diplomats in the United States and seventeen in 1995.⁸³ Admittedly, this is a very small number. However, if this number is anywhere close to a representative sample of reported diplomatic crimes in other countries, then there is the distinct possibility that thousands of crimes are being committed by individuals with diplomatic immunity every year around the world. For illustrative purposes, even if only two or three crimes are committed by diplomats per country per year, that is still roughly 400 to 600 crimes committed by diplomats per year. In addition, it must be remembered that these figures represent only the reported diplomatic crimes. For reasons stated above, the rate of reported diplomatic crime is often much lower than the actual rate.⁸⁴ In 1995 there were roughly 18,000 people in the United States who could claim diplomatic immunity.⁸⁵ There are thousands more worldwide.⁸⁶ Granting immunity under the Vienna Convention to such a large population has been shown to be problematic.⁸⁷ Additionally, reports of criminal diplomats escaping prosecution causes

"[m]any police officers won't even write up a traffic infraction such as running a red light, if it doesn't cause an accident, because they figure with a diplomat there's no point" (citation omitted)).

79. See Friedrich, *supra* note 72, at 1159-60, 1163 (arguing that the reported rate of diplomatic crime, specifically with regard to human trafficking among diplomats, is different from the actual rate of diplomatic crime because the crimes are often not reported at all, or not fully investigated). Further, approximately one third of domestic servitude cases involve diplomats with immunity. *Id.*

80. See *id.* at 1163.

81. See *id.*

82. See McDonough, *supra* note 1, at 488.

83. Zaid, *supra* note 78, at 627 n.15.

84. See *supra* notes 73-82 and accompanying text.

85. McDonough, *supra* note 1, at 487 n.85.

86. See O'Neill, *supra* note 26, at 673-74 (describing the worldwide growth of the diplomatic community).

87. See *supra* notes 55-82 and accompanying text.

the general public to hold a rather low opinion of diplomats, most of whom obey the law and represent the best and brightest that their respective nations have to offer.⁸⁸ As a result, a procedure to ensure that those diplomats who commit crimes face justice must be found.

III. THE CONSTITUTIONALITY OF PROPOSED SOLUTIONS TO THE PROBLEM OF DIPLOMATIC CRIME

A. *Congressional Legislation to Limit or Eliminate Diplomatic Immunity*

Changing the diplomatic immunity laws in the United States by federal legislation would be constitutional. Congress has a great deal of power when it comes to foreign affairs. Many of these powers are derived from the Necessary and Proper Clause found in Article I, § 8 of the Constitution.⁸⁹ Simply put, Congress has the power to “enact laws that are ‘necessary and proper’ to implement the President’s Article II foreign affairs powers.”⁹⁰ Furthermore, the Supreme Court has held that “power over external affairs is not distributed, but is vested exclusively in the national government.”⁹¹ The President clearly has the power to enter into treaties governing diplomatic immunity with foreign nations.⁹² Diplomatic immunity has been regarded as a core component of customary international law for thousands of years.⁹³ One of the very first statutes passed by the United States Congress was a statute that dealt with diplomatic immunity.⁹⁴ Congress also passed a statute on the subject in 1973—the Diplomatic Relations Act.⁹⁵ Furthermore, the United States has signed treaties such as the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, and the United Nations Headquarters Agreement.⁹⁶ All of these dealt

88. Zaid, *supra* note 78, at 624 (“If the perception of diplomatic immunity in the United States had to be summarized by one word, that word would likely be *misunderstood*.”). Further, “[m]isconceptions over the notion of diplomatic immunity do not stop with the average American on the street, but dangerously extend to local law enforcement personnel.” *Id.* at 626; *see also* Hickey & Fisch, *supra* note 6, at 375 (“[I]t is far more likely that a diplomat will be a *victim* of crime than a criminal *offender*.”).

89. *See* U.S. CONST. art. I, § 8.

90. CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* 151 (2d ed. 2006).

91. *United States v. Belmont*, 301 U.S. 324, 330 (1937).

92. *Id.*

93. *See supra* notes 7-10 and accompanying text.

94. *See supra* note 34.

95. 22 U.S.C. § 254a-e (2000).

96. *See* Vienna Convention, *supra* note 2; Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter *Consular Relations Convention*]; Agreement

with types of diplomatic immunity.⁹⁷ Historical practice therefore clearly dictates this is an area in which the federal government has always had the power to legislate. As a result, any law that Congress passed regarding diplomatic immunity would be necessary and proper to implement the Presidential and congressional powers to deal with foreign nations and their diplomats.

Article VI of the Constitution states that federal statutes and treaties are both a part of the supreme law of the land.⁹⁸ However, the Constitution is silent as to which of the two would apply to a situation in which there was a conflict between a treaty and a federal statute. The Supreme Court has faced this question before. Its answer was to create a judicial standard which became known as the "last in time rule."⁹⁹ The last in time rule states that "if there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control"¹⁰⁰ and "[t]he duty of the courts is to construe and give effect to the latest expression of the sovereign will."¹⁰¹ This judicially created rule of convenience was applied in *Whitney v. Robertson* to hold that a statute could override a treaty that had been passed prior to the statute.¹⁰² The Supreme Court also stated that the last in time rule can work in the opposite fashion as well.¹⁰³ As such, self-executing treaties that occur later in time may supplant federal statutes.¹⁰⁴ Therefore, even though the Vienna Convention on Diplomatic Relations and the Diplomatic Relations Act have been law in the United States for over thirty years, a federal statute aimed at limiting or abolishing diplomatic immunity could constitutionally supersede both.

Although the President has generally been regarded as having the "authority to speak as the sole organ of the government,"¹⁰⁵ it should be noted that passage of a federal statute can be accomplished with or without the signature of the President.¹⁰⁶ Changing the diplomatic

Regarding the Headquarters of the United Nations, June 25, 1945, 61 Stat. 3416, 11 U.N.T.S. 11 [hereinafter Headquarters Agreement].

97. See Vienna Convention, *supra* note 2, art. 31; Consular Relations Convention, *supra* note 96, art. 41; Headquarters Agreement, *supra* note 96, art. III, § 9, art. V, § 15.

98. U.S. CONST. art. VI.

99. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

100. *Id.*

101. *Id.* at 195.

102. *Id.* at 194-95.

103. *Id.* at 194.

104. *Id.*

105. *United States v. Belmont*, 301 U.S. 324, 330 (1937).

106. U.S. CONST. art I, § 7. The Constitution states:

Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it

immunity laws could be achieved by passage of a traditional statute with a majority of both houses of Congress which is signed by the President.¹⁰⁷ The same law could pass after overriding the veto of the President if two thirds of each House concurs.¹⁰⁸ Therefore, however unlikely, it is possible for Congress to employ Legislation which leaves the President completely out of the decision as to the status of diplomatic immunity if they chose to override his veto.¹⁰⁹

There have been attempts to change the status of diplomatic immunity in the United States by federal legislation in recent years. In 2002, the State Department enacted regulations to execute a congressional statute to grant New York City the ability to tow diplomatic vehicles and compel the diplomats to pay their parking tickets in certain circumstances.¹¹⁰ Similarly, in 1988, a bill concerning the removal of diplomatic immunity was considered by the Senate Foreign Relations Committee and passed on to the full Senate for a vote.¹¹¹ Although the proposal never became law,¹¹² it serves as an example which demonstrates how the diplomatic immunity laws of this country can be changed simply by passing federal legislation. Therefore, laws such as the 1988 proposal which stated that diplomats are not to 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”¹¹³ could be passed. Additionally, if Congress wanted to curtail the diplomatic immunity laws even more, they could opt instead to pass a law which applies the language of the Vienna

shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.

Id.

107. For an example, see Diplomatic Relations Act, 22 U.S.C. § 254a-e (2000).

108. See U.S. CONST. art I, § 7.

109. See *id.*

110. U.S. Dep’t of State, New York’s Diplomatic Parking Program, <http://www.state.gov/ofm/resource/22839.htm> (last visited Mar. 12, 2008). The parking program which went into effect on November 1, 2002, “has been designed to encourage compliance by Permanent Missions to the United Nations and the United Nations Secretariat, as well as their personnel, with New York State and City of New York parking laws, rules and regulations and thereby help to relieve congestion in the City of New York, including in particular the areas surrounding the United Nations, while at the same time facilitating the conduct of the business of the Permanent Missions and the Organization.” *Id.*

111. Hickey & Fisch, *supra* note 6, at 351-53 (describing the efforts of Senator Helms of North Carolina to punish criminal diplomats via congressional legislation).

112. McDonough, *supra* note 1, at 492 n.100.

113. Hickey & Fisch, *supra* note 6, at 352 (citation omitted).

Convention on Consular Relations¹¹⁴ to diplomats as well. Article 41 of the Convention on Consular Relations states that a consular official may be arrested or detained only in the case of a “grave crime.”¹¹⁵ The phrase “grave crimes” has been interpreted as pertaining to any felony.¹¹⁶ This would grant law enforcement a greater degree of power over a diplomat than it currently possesses.

In summary, it was within the power of the President and Congress to sign the Vienna Convention on Diplomatic Relations.¹¹⁷ It was within the power of the President and Congress to pass the Diplomatic Relations Act.¹¹⁸ It would also be within the constitutional power of the President and Congress to abrogate the United States’ duty under both of these documents.¹¹⁹ Unilateral congressional legislation aimed at stripping foreign diplomats of their immunity would be constitutional as a result of the numerous foreign affairs powers of the federal government, traditional practices, and the judicial remedy of the last in time rule.

The role of customary international law must also be considered in analyzing the constitutionality of any congressional action abridging diplomatic immunity. Customary law practice presents an international law problem for any unilateral action taken by the United States. Customary international law has been defined as “the general and consistent practice of states followed by them from a sense of legal obligation.”¹²⁰ With the ratification of the Vienna Convention, the United States has bound itself to the principles of customary law embodied in the treaty and the various practices of states that have occurred for hundreds or thousands of years. It is worth noting that breaking these obligations would leave the United States in material

114. See Consular Relations Convention, *supra* note 96.

115. *Id.* art. 41.

116. Curtis J. Milhaupt, Note, *The Scope of Consular Immunity Under the Vienna Convention on Consular Relations: Towards a Principled Interpretation*, 88 COLUM. L. REV. 841, 853 n.82 (1988); see also BLACK’S LAW DICTIONARY 281 (2d Pocket ed. 2001) (defining felony in the United States as “a serious crime usu. punishable by imprisonment for more than one year or by death”).

117. See *supra* notes 89-97 and accompanying text.

118. See *supra* notes 89-97 and accompanying text.

119. See *Goldwater v. Carter*, 617 F.2d 697, 706-09, 715-16 (D.C. Cir. 1979) (holding that the President has the power to terminate treaties but leaving the role of Congress in the process undefined whereas the concurring opinion states that 200 years of compromise and bargaining has shown that Congress and the President share the treaty termination power), *rev’d on other grounds*, 444 U.S. 996, 997, 999, 1002 (1979); see also BRADLEY & GOLDSMITH, *supra* note 90, at 458 (describing the process known as Presidential “Unsigning” of treaties).

120. LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW 56 (4th ed. 2001) (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987)).

breach of its international duties.¹²¹ As such, unilateral United States legislation would constitute a breach of the Vienna Convention and customary international law in general.¹²² By failing to carry out its duties under a duly ratified treaty, the United States would violate customary duties of states to “perform the terms of treaties in good faith.”¹²³ This is known as *pacta sunt servanda*.¹²⁴ Nevertheless, although the United States has a strong interest in complying with these international law provisions, unilaterally breaking from the customary international law practices described in the Vienna Convention has been done before and would be constitutional for reasons previously stated.¹²⁵

Finally, it would obviously be constitutional for the United States to do nothing more than their laws and treaty obligations already call for. The idea of doing nothing has a certain simplicity to it which may lead some to overlook it as an option in the first place. However, as noted above, the Vienna Convention and the Diplomatic Relations Act provide a number of remedies that the United States could aggressively pursue to ensure that diplomatic crime does not go unpunished.¹²⁶ Therefore, in addition to progressive federal legislation, the United States government could also constitutionally stand on the status quo to guard against diplomatic crime.

B. Congressional Legislation Providing Monetary Compensation Plans for Victims of Diplomatic Crimes

Monetary compensation plans for the victims of diplomatic crime is a popular idea which would be constitutional. Some have suggested some sort of requirement for countries to take out insurance plans for their diplomats.¹²⁷ Others have said that countries should pay into an international compensation fund for the victims of diplomatic crimes.¹²⁸ Still others insist that the proper course of action would be to simply impose economic sanctions or break off relations with countries whose

121. See Hickey & Fisch, *supra* note 6, at 366-67 (noting that such obligations “may not be dispensed with unilaterally by the United States”).

122. *Id.* at 366.

123. *Id.* at 367.

124. *Id.* Hypothetically, the United States could argue that past terrorist attacks, the threat of future terrorist attacks, and the resulting need to ensure internal security could certainly constitute fundamental changes in circumstances. Should it succeed in this argument, the United States would be free to break with the Vienna Convention and it would not be considered a breach of customary international law under *rebus sic stantibus*.

125. See *supra* notes 89-119 and accompanying text.

126. See *supra* Part II.C; see also Hickey & Fisch, *supra* note 6, at 375-78 (discussing the numerous remedies currently available under the Vienna Convention).

127. See Farhangi, *supra* note 1, at 1538, 1546.

128. *Id.* at 1530-32 (giving a general description of past compensation fund proposals).

diplomats break the laws.¹²⁹ The Diplomatic Relations Act is an example which demonstrates that it is constitutional for the United States to insist that insurance plans be carried by diplomats in the United States.¹³⁰ Of the numerous monetary compensation measures mentioned above, all could be done by the United States unilaterally. Should the United States choose this course of action, any one of these monetary compensation options could be accomplished simply with the passing of federal legislation. However, it would strain the United States budget far less to try to encompass these policies into a multinational treaty in order to spread costs amongst other countries.

A monetary compensation plan that required countries to present proof that it is carrying adequate insurance to protect against any wrongdoings by its diplomats could be a precursor to any diplomatic relationship with the United States.¹³¹ Since the United States would be acting unilaterally, the statutes would have to require that victims have the right to directly sue the insurer because if they sue the diplomat, international law on diplomatic immunity would surely be invoked leading to a dismissal of the plaintiff's cause of action.¹³² Therefore, granting victims the right to seek compensation directly from the insurance companies would respect a diplomat's immunity and enable the United States to accomplish the end goal of compensating victims. These insurance plans, like many other facets of diplomatic law, could be overseen and supervised by the State Department.¹³³ The Constitution forbids delegation of its legislative powers to other branches of government.¹³⁴ However, this potential constitutional problem is solved so long as the delegation is given with an "intelligible principle to which the person or body authorized . . . is directed to conform"¹³⁵ Therefore, presuming that this statute met the intelligible principle test, there would be no constitutional delegation issue in allowing the State Department (a part of the executive branch) to monitor the compliance of foreign countries or to enact regulations for the plan's administration.

Perhaps if the United States did not wish to risk offending foreign governments with such a program, it could also unilaterally set up its

129. *Id.* at 1529-30 (discussing how nations have utilized this method in the past).

130. *See supra* notes 51-54 and accompanying text.

131. *See* Farhangi, *supra* note 1, at 1538.

132. *Id.* at 1542 (also noting that since the Vienna Convention grants diplomats the privilege of refusing to submit evidence, the risk to the insurance company who will have to defend the suit without any of the diplomats testimony can be minimized by capping liability at a reasonable level); *see also* Slater v. Biehl, 793 A.2d 1268, 1273 n.4 (D.C. 2002) (providing an illustrative example of the problem alluded to by Farhangi).

133. *See* Farhangi, *supra* note 1, at 1544.

134. *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989).

135. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

own fund to compensate American citizens who are victimized by diplomatic transgressions.¹³⁶ Like the aforementioned insurance requirements for foreign countries, this compensation fund could also be accomplished by a unilateral federal statute. The major difference between this compensation fund and insurance requirements for foreign diplomats' countries is the compensation funding for the former would come from American taxpayers while the funding for the latter would come from foreign nations.¹³⁷

C. State Legislation to Limit Diplomatic Immunity

Since the United States has a federal system of government, the ability of an individual state to change the rules of diplomatic immunity must be discussed as well. However, as will be demonstrated, individual states possess no constitutional authority to increase or decrease diplomatic immunity. One state of note, New York, has a very large population of diplomats due to the presence of the United Nations Headquarters.¹³⁸ Therefore, New York State would have an obvious incentive to decrease the amount of immunity given to diplomats. Decreasing immunity for diplomats in New York would allow more revenue from the collection of parking and traffic ticket fees to flow into the state coffers.¹³⁹ In addition, incumbents would undoubtedly like to report to their constituents that they have been tough on crime and have put diplomatic criminals in jail.

However, the Supremacy Clause of the Constitution grants Congress the power to preempt state law through federal legislation if it wishes.¹⁴⁰ The Supreme Court has also recognized that a treaty may preempt state and local law.¹⁴¹ Furthermore, the Court has stated that preemption of state law can occur in three circumstances. First, Congress can explicitly state in the statute that the law is meant to preempt state law.¹⁴² Second, Congress may preempt state law when it can be demonstrated that the intent of the legislation was to ensure that the

136. See Farhangi, *supra* note 1, at 1530-31.

137. See *id.*

138. McDonough, *supra* note 1, at 487 n.75.

139. See Martha E. Stark, Letter to the Editor, *Diplomats' Parking Debt*, N.Y. TIMES, Aug. 17, 2002, at A10 (New York City Commissioner of the Department of Finance writing that "[c]ollecting this debt has been the holy grail of diplomatic parking").

140. U.S. CONST. art. VI; see also *Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941).

141. *Clark v. Allen*, 331 U.S. 503, 508 (1947) (treaty may prevail over state law); *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (treaty may prevail over state laws and local city ordinances).

142. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990).

federal government would occupy the field exclusively.¹⁴³ The Court has noted that intent may be demonstrated by a federal law which makes it obvious “that Congress left no room for the States to supplement it” or when the legislation “‘touch[es] a field in which federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.’”¹⁴⁴ Third, in situations where it is impossible to comply with both federal and state legislation, the state law is preempted.¹⁴⁵ Although courts are inclined to overturn a law due to a “presumption against the pre-emption of state police power,”¹⁴⁶ states would have a difficult time arguing against the pervasiveness of federal law on the subject of diplomatic immunity.

Preemption of any state law regarding diplomatic immunity would clearly occur where a state statute is in conflict with a federal statute. A state could argue that neither the Vienna Convention nor the Diplomatic Relations Act preempt a state diplomatic immunity law explicitly. However, the text and application of these two documents make it clear that in the field of diplomatic immunity, Congress “left no room for the States to supplement.”¹⁴⁷ The Treaty and the Act are both highly detailed descriptions of the law on diplomatic immunity. In fact, they codify hundreds of years worth of customary practice that nations abide by.¹⁴⁸ These documents detail exactly who receives immunity, what the immunity protects, where the immunity extends, the duties of the receiving and sending states, the burdens on the diplomat, and the remedies for aggrieved nations or persons.¹⁴⁹ The complete scope of diplomatic immunity is therefore covered by the Vienna Convention and the Diplomatic Relations Act. Neither one has left any room for the states to provide their own revisions.¹⁵⁰ States cannot be allowed to

143. *Id.* at 79.

144. *Id.* (citation omitted).

145. *Id.*

146. *Cipollone v. Liggett Group*, 505 U.S. 504, 518 (1992).

147. *English*, 496 U.S. at 79.

148. *See, e.g., Hickey & Fisch, supra* note 6, at 363-64.

149. *See supra* Part II.B-C.

150. *See Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 380-81 (2000) (noting that it is the federal government which must speak for the foreign affairs of the nation and not the states); *see also De Canas v. Bica*, 424 U.S. 351, 352-53, 356 (1976) (California successfully defended a provision in its labor code on the grounds that the subject of the law was wholly within their police powers to regulate employment and worker protections. The federal government had sought to overturn this law because it dealt with illegal aliens, a field in which it felt it should have exclusive jurisdiction.). Similar to *De Canas v. Bica*, the argument a state could make to save its law repealing diplomatic immunity from pre-emption is that criminal law statutes as well as many civil rules have traditionally been matters of state power and concern. Therefore, a state might argue that it is exercising its police powers and enacting these laws to protect its citizens from diplomatic crime. However, for the aforementioned reasons, this argument is likely to fail in court.

endanger the national government's ability to fulfill its obligations under customary international law. As a result, it is clear that state legislation would not be able to cut diplomatic immunity in any meaningful way.

In addition, state legislation on diplomatic immunity would indeed touch an area in which the federal government is dominant. Foreign affairs and diplomatic relations are fields of law in which the federal interest dominates. The federal government exclusively possesses the foreign affairs power in this country.¹⁵¹ Allowing the states to interfere and meddle with diplomatic immunity would lead to disastrous results. It would be against the national interest to have both federal laws and state laws on immunity. Conflicting laws could hurt America's image and reputation in the world and could also lead to retaliatory action being taken against American diplomats abroad.¹⁵² State laws would hamper the ability of the United States to present a unified and coherent policy on diplomatic immunity to the world.¹⁵³ In addition, state diplomatic immunity laws would clearly weaken the President's ability to grant greater or fewer diplomatic privileges to various nations pursuant to the Diplomatic Relations Act.¹⁵⁴ This would significantly weaken his constitutional duty to "take Care that the Laws be faithfully executed."¹⁵⁵ The federal government's interest in maintaining its exclusive supervision over the laws of diplomatic immunity is clear and would therefore preclude state laws on the subject. It should be noted that a state law on diplomatic immunity would also make it impossible for law enforcement, foreign countries, and diplomatic agents themselves to comply with both a federal law granting immunity and a state law prohibiting it. In summary, a state law curtailing diplomatic immunity would be preempted by the Vienna Convention and the Diplomatic Relations Act pursuant to the Supremacy Clause of the Constitution because it would interfere with foreign policy and hinder the President's ability to faithfully execute the laws of the United States.

D. A Multinational Treaty Granting a Special Diplomatic International Criminal Court Jurisdiction over Diplomatic Crime

One possible solution to the problem of diplomatic crime is to provide for a special diplomatic tribunal within the International Criminal Court ("ICC").¹⁵⁶ This Note argues that such a solution would

151. *United States v. Belmont*, 301 U.S. 324, 330 (1937).

152. *Cf. Hickey & Fisch*, *supra* note 6, at 359-60.

153. *Crosby*, 530 U.S. at 382 & nn.17-18.

154. 22 U.S.C. § 254c (2000).

155. U.S. CONST. art II, § 3.

156. The constitutionality of the ICC as applied to ordinary United States citizens and United

be constitutional. This tribunal would place diplomats accused of criminal actions on trial and punish them accordingly.¹⁵⁷ The Diplomatic International Criminal Court ("DICC") could be set up to mirror the ICC, which was established in 1998 by a treaty signed by over 120 nations, many of them close American allies.¹⁵⁸ However, the proposed tribunal would be separate from the ICC. A DICC could be enacted by a multinational treaty much like the Rome Statute and the Vienna Convention.¹⁵⁹ The Vienna Convention on Diplomatic Relations could also be amended for the DICC to operate within the bounds of international law.¹⁶⁰ In order for the treaty to bind the United States, it would have to be ratified in accordance with the constitutional guidelines found in Article II, § 2.¹⁶¹ As noted above, historical practice and the powers granted to Congress and the President indicate that treaties on diplomatic immunity are constitutional.¹⁶²

Like the ICC, the proposed DICC should exist to complement the current regime of diplomatic law and not replace it.¹⁶³ Past incidents of diplomatic crime and their subsequent prosecutions demonstrate that the remedies found in the Vienna Convention do work.¹⁶⁴ In addition, the centuries old principle of respect for state sovereignty dictates that affected nations should be allowed to prosecute the criminal actions of a diplomat through the use of remedies already provided for by the Vienna Convention or through their special bilateral agreements with other countries.¹⁶⁵ Vienna Convention supporters point to examples of successful outcomes under the treaty but some criminal diplomats may still fall through the Convention's cracks.¹⁶⁶ This can occur when a

States political leaders is outside the scope of this Note. This Note concerns itself only with the constitutionality of a special ICC tribunal to handle diplomatic crime. Therefore, the only American citizens who would be subject to jurisdiction of the diplomatic ICC would be United States diplomats who have allegedly committed crimes in other nations.

157. Groff, *supra* note 72, at 211-12.

158. *Id.* at 225, 227.

159. *Cf. id.* at 225 (noting that the original ICC was created as a result of a multinational treaty).

160. *Id.* at 223.

161. U.S. CONST. art. II, § 2 (stating that the President "shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur").

162. *See supra* notes 117-19 and accompanying text.

163. *See* Groff, *supra* note 72, at 226 (noting that a complimentary model "where ICC would only have authority when national systems themselves were unwilling or unable to act" was adopted at the Rome conference).

164. *See supra* notes 37-64 and accompanying text.

165. *See* John A. Perkins, Essay, *The Changing Foundations of International Law: From State Consent to State Responsibility*, 15 B.U. INT'L L.J. 433, 435 (1997) (explaining the history of state sovereignty in greater detail); *see also* Hickey & Fisch, *supra* note 6, at 358.

166. *See supra* notes 65-88 and accompanying text; Hickey & Fisch, *supra* note 6, at 376

sending state that refuses to waive its diplomat's immunity or refuses to try the diplomat under its own laws and thus prevents justice from being exercised.¹⁶⁷ In addition, there is always the possibility that a weaker or dependent nation would fail to bring action against the diplomat of an important ally or trade partner for fear of being cut off from aid or other essentials. The DICC could exist to fill in the cracks that currently exist in the Vienna Convention. As such, much like the ICC, the proposed DICC should have jurisdiction to prosecute an accused diplomat only if the affected nation chooses to enlist the court's help.¹⁶⁸ For example, if a British diplomat were to be accused of a crime within the United States, the American government should have the option of pursuing existing remedies under the Vienna Convention, pursuing remedies existing in special bilateral agreements with the United Kingdom, or submitting the matter to the proposed DICC. This model would enable the international community to close possible loopholes enabling a criminal diplomat to avoid justice that currently exist under the Vienna Convention.

A treaty that gives the proposed DICC jurisdiction over crimes committed by American diplomats abroad and crimes committed by foreign diplomats while in the United States is unquestionably constitutional despite institutional and due process contentions. It has been said that "[j]ustice requires that there may be no crime or punishment without a preexisting law that prohibits the conduct and sets the penalty."¹⁶⁹ As such, the constitutional due process requirement of notice should be ensured, and the scope of the court's jurisdiction must be determined by any treaty that implements the DICC. International law has already recognized that there are certain peremptory norms of civilized society "from which no derogation is permitted."¹⁷⁰ These peremptory norms include genocide, war crimes, crimes against humanity, torture, and slavery.¹⁷¹ Peremptory norms limit absolute state sovereignty and individual freedoms even in the absence of a treaty.¹⁷² The peremptory norms simply cannot be violated by anyone for any reason whether they have signed a treaty to do so or not.¹⁷³ Currently,

(arguing that current international law remedies are "more than adequate to address existing 'diplomatic crime' in the United States").

167. See Wright, *supra* note 5, at 179-84 (detailing the tragic 1984 incident at the Libyan Embassy in London, England).

168. Bryan F. MacPherson, *Building an International Criminal Court for the 21st Century*, 13 CONN. J. INT'L L. 1, 34-38 (1998) (detailing the pros and cons of a complimentary judicial system).

169. *Id.* at 51.

170. Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 830 (1988).

171. See Groff, *supra* note 72, at 225-26.

172. *Id.* at 233; Randall, *supra* note 170, at 830.

173. See Groff, *supra* note 72, at 233; Randall, *supra* note 170, at 830.

violations of these norms provide the ICC with jurisdiction over the matter.¹⁷⁴ This is worth noting because it demonstrates that international agreement can be reached on the subject of crime and punishment. It must also be noted that a diplomat's immunity does not shield him or her from prosecution in the ICC for a violation of a peremptory norm.¹⁷⁵ Since diplomats are already subject to these peremptory norms of international law, a diplomatic court which prosecuted these offenses alone would be redundant and unnecessary.

The task for any DICC is to define a criminal code for non-peremptory criminal offenses that a majority of nations could agree on. At the very least, the DICC could hold diplomats accountable for violent crimes such as homicide, rape, armed robbery, assault, and child abuse as well as acts of terrorism and conspiracy to commit acts of terrorism.¹⁷⁶ In addition, the drafters of the treaty could consider punishing crimes such as voluntary and involuntary manslaughter, including DUI manslaughter, arson, kidnapping, and burglary. Although the crimes that diplomats would be prosecuted for in the proposed DICC and their associated definitions may be difficult to agree upon, it is surely not impossible. Certain actions are almost universally declared to be criminal.¹⁷⁷ Satisfactory definitions for these crimes and relevant criminal procedures can be achieved by treaty drafters and signatory nations employing the traditional methods of treaty drafting, namely, negotiation and compromise. Admittedly, convincing 192 nations of the world to agree to a criminal code would be a tremendous undertaking. However, complex multinational treaties combining and shaping together the various laws of numerous states have been completed before.¹⁷⁸ Although it would be difficult, it is entirely possible for a general consensus to be achieved determining which crimes diplomats will be held accountable for.¹⁷⁹ Therefore, a treaty clearly stating the

174. See Groff, *supra* note 72, at 225.

175. See MacPherson, *supra* note 168, at 27.

176. See Wright, *supra* note 5, at 184.

177. See Randall, *supra* note 170, at 829 (describing the recent growth of universal jurisdiction for numerous crimes).

178. See generally Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; Vienna Convention, *supra* note 2.

179. Groff, *supra* note 72, at 234 ("[A]s a threshold question, the drafters of a diplomatic crime code could examine what crimes are universally prohibited in every country. Similarly, after commission of an act, the international court could examine whether such conduct committed in the host country is outlawed in the sending country. If the court finds that the diplomat would be guilty of the act if committed in the sending country, he would be guilty of the crime under international law."); see also Wright, *supra* note 5, at 207-10 (noting that the original intent of the Treaty drafters was not to grant criminal immunity and that granting diplomats immunity from criminal prosecution was closely debated throughout the drafting of the Vienna Convention). Wright states that throughout the drafting, numerous proposals to limit diplomatic immunity in regards to criminal

offenses diplomats could be prosecuted for and which then defined the elements of those offenses and their respective punishments would meet requirements of due process by providing diplomats with fair notice.¹⁸⁰ In addition, it is reasonable to believe that such an accord could be agreed upon by the international community.

Protections like those found in the original Rome Statute authorizing the ICC could be contained in any treaty enacting the proposed DICC. This would further ensure its constitutionality. The United States would be submitting jurisdiction over American diplomats to a court whose judges would be voted on by all signatory nations. The judge's rulings would be based on neutrality and respect for established and recognized doctrines of law negotiated by all treaty participants.¹⁸¹ Numerous due process protections would exist for any diplomat accused of a crime. These protections include the prohibition against double jeopardy, protection from *ex post facto* crimes, the privilege against self incrimination, the right to remain silent, a right to an attorney, the right to be presumed innocent until proven guilty by proof beyond a reasonable doubt, shields from warrantless arrests or searches, a right to attendance at trial to answer for a written declaration of the charges, the right to cross examination, and the right to a public and speedy trial.¹⁸²

Various legal theories of jurisdiction demonstrate that American participation in the proposed DICC would be constitutional. The DICC treaty would closely resemble that of an extradition treaty with a foreign nation.¹⁸³ The power to extradite citizens and non-citizens within the United States to a nation in which a crime was committed is within the power of the Article III treaty clause.¹⁸⁴ Furthermore, the United States government is under no constitutional obligation to exercise jurisdiction over all crimes in which it may do so.¹⁸⁵ Finally, the Supreme Court has also noted that the United States does not even have to prosecute a crime that occurs within the borders of the United States itself.¹⁸⁶ Therefore, a citizen or a non-citizen could constitutionally be extradited to the nation

actions were suggested. Wright, *supra* note 5, at 207-10. Wright also argues that the Convention enlarged the original scope of the customary law with regards to immunity. *Id.*

180. See MacPherson, *supra* note 168, at 51-52.

181. See Groff, *supra* note 72, at 228-29; Wright, *supra* note 5, at 207-10.

182. Rome Statute, *supra* note 178, arts. 20, 22, 55, 66, 58, 64, 67; see also Audrey I. Benison, *International Criminal Tribunals: Is There a Substantive Limitation on the Treaty Power?*, 37 STAN. J. INT'L L. 75, 86 (2001) (listing the ICC due process protections).

183. See Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73, 104-07 (1995) (comparing the law of extradition to the provisions of the Rome Statute).

184. See *id.* at 107.

185. *Id.* at 114.

186. *Id.* at 117.

where the alleged crime occurred to be prosecuted. Based on these precedents, it can be deduced that all diplomatic crime scenarios could be referred to the proposed DICC.¹⁸⁷ Extraditing individuals for trial in the DICC is just as constitutional as extraditing them to a foreign nation for trial. Extradition has been established as an acceptable practice in the United States.¹⁸⁸ There simply is no constitutional difference between extraditing someone to face trial in a foreign country and extraditing someone to an international court for trial. If the United States has the power to do one, it stands to reason that it has the power to do the other. The United States extradites individuals to foreign nations because the individuals have been accused of breaking the laws of that nation. Analogously, diplomats could be extradited to the DICC because they are being charged with violations of international law.¹⁸⁹ Scholars argue persuasively that this would eliminate any Article III complaints because the DICC is simply not a part of the United States court system.¹⁹⁰ Therefore, the extradition precedent demonstrates that sending diplomats to be tried before the DICC would be constitutional.

Further support for the notion that a DICC would be constitutional is that it could meet the Supreme Court's requirements for removing a case from Article III courts. The Supreme Court has held that in certain circumstances, Congress's removal of cases from Article III courts is constitutional so long as the power and independence of the judicial branch will not be endangered.¹⁹¹ In balancing the various issues at play, the Court examines "the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III."¹⁹² The argument running against the DICC is that it was not mentioned in Article III and state and federal court

187. The most obvious scenarios are as follows: (1) the American diplomat who commits a crime within another country, (2) the American diplomat who commits a crime within another country and flees to the United States, (3) the American diplomat who commits a crime in the United States and the effects of that crime befall another nation, (4) the foreign diplomat who commits a crime in the United States, (5) the foreign diplomat who commits a crime abroad and flees to the United States for protection, and (6) the foreign diplomat who commits a crime in the United States and the effects of that crime befall another nation.

188. Marquardt, *supra* note 183, at 104-05.

189. *Cf. id.* at 118-19.

190. *Cf. id.* 126-28 (Marquardt makes this point with reference to the ICC.). *Contra* Lee A. Casey, *The Case Against the International Criminal Court*, 25 FORDHAM INT'L L.J. 840, 852 (2002) (arguing that Supreme Court precedent would make ratification of the ICC unconstitutional because it would create non-Article III courts and would strip the President of certain powers).

191. Benison, *supra* note 182, at 102.

192. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986).

jurisdiction over criminal offenses has a long and unquestioned history.¹⁹³ However, the particular offenses that diplomats would be charged with would be violations of international law and not United States law.¹⁹⁴ The fact that states and the federal government have normally prosecuted individuals for similar crimes would be irrelevant if this was the case. As demonstrated above, numerous due process protections would exist in the DICC and the structure of the DICC would cause it to act much like a typical Article III court anyway.¹⁹⁵ These factors all demonstrate that the DICC would actually be complementing an Article III court and not compromising the independence of the judiciary branch.¹⁹⁶ The obvious concern driving Congress away from the requirement of Article III courts here is that the American legal system currently does not have jurisdiction to try these criminal and terrorist diplomats because of the Vienna Convention.¹⁹⁷ To that end, it should be noted that Congress has a great deal of power under Article I, § 8.¹⁹⁸ The Constitution states that Congress shall have power to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”¹⁹⁹ The argument could therefore be made that Congress is choosing to adopt the DICC interpretation of offenses against the law of nations.²⁰⁰ In adopting the proposed DICC as an alternative to an Article III court,²⁰¹ Congress would simply be alleviating the concerns of criminal diplomats going free. Furthermore, assuming that a DICC treaty was constitutional and had been signed, ratified, and executed by the United States, granting DICC jurisdiction over diplomatic crime could be declared within Congress’s power to make laws necessary and proper to give effect to the treaty.²⁰² This too could assuage Article III concerns. Finally, the jurisdiction of numerous other international tribunals created by treaties has been upheld throughout the last fifty years.²⁰³ For example, no

193. Cf. Marquardt, *supra* note 183, at 127 (Marquardt’s point is in reference to the ICC but could also be applied to the constitutional analysis of the proposed DICC).

194. Cf. *id.*

195. Cf. Benison, *supra* note 182, at 103 (Benison’s point is in reference to the ICC but could also be applied to the constitutional analysis of the proposed DICC.).

196. *Id.*

197. Cf. MacPherson, *supra* note 168, at 27 (MacPherson’s point is in reference to the ICC but could also be applied to the constitutional analysis of the proposed DICC.).

198. See U.S. CONST., art. I § 8 (listing the enumerated powers of Congress).

199. *Id.*

200. Cf. Marquardt, *supra* note 183, at 127.

201. *Id.* at 127-128 (the procedure that the author notes as a means to adopt the ICC as defined by the 1998 Rome Statute would be identical to the procedure used in the adopting of a DICC).

202. *Id.* at 127 & n.223.

203. Benison, *supra* note 182, at 105-06.

challenge to the constitutionality of the International Court of Justice or NAFTA tribunals has been successful.²⁰⁴ Although neither deals with questions of individualized criminal conduct that the DICC would decide, the apparent constitutionality of the two demonstrates that the basic principle of United States participation in an international court is constitutional notwithstanding Article III of the Constitution.²⁰⁵

Still, critics argue that American citizens who happen to be diplomats abroad present special problems.²⁰⁶ They argue that individual due process and adherence to the Bill of Rights is still required by the Constitution in this situation.²⁰⁷ This is clearly an incorrect reading of court precedent, historical practice, and of the Constitution itself. A treaty which forces American diplomats serving abroad to submit to DICC jurisdiction to answer for their crimes is constitutional.²⁰⁸ Currently, an American diplomat who commits a crime in a foreign land has immunity and may not be prosecuted because of the Vienna Convention.²⁰⁹ However, if Vienna Convention immunity were to be complemented, as it would be with the creation of a DICC, an American diplomat could be prosecuted for those crimes listed in the treaty. With no special immunity privileges, an American diplomat serving in a foreign country would be equivalent to an ordinary American citizen who is abroad. The Supreme Court has made it clear that any American committing a crime in a foreign land cannot make the claim that his prosecution under the laws of that country would be unconstitutional.²¹⁰ The individual would not have a claim even if the laws and procedures of these countries did not live up to American constitutional standards.²¹¹ Simply put, according to the Supreme Court, the Bill of Rights just does not follow the American citizen anywhere he or she goes in the world.²¹² Therefore, a United States citizen-diplomat who commits a crime abroad could be subject to that state's laws and its participation in the DICC. Additionally, the Vienna Convention on Diplomatic Relations, expressly notes that American diplomats may be subject to foreign jurisdiction

204. *Id.*

205. *See id.*

206. *See* Casey, *supra* note 190, at 863 (arguing that the ICC's lack of the right to trial by jury makes United States participation unconstitutional).

207. *Id.* at 860-61, 863.

208. *See supra* notes 183-205.

209. *See supra* notes 24-31 and accompanying text.

210. *Neely v. Henkel*, 180 U.S. 109, 122-23 (1901).

211. *Id.* *But see* Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960) (noting in dicta that there may be a case in which the defendant is being extradited to a nation and "would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination of the principle set out above").

212. *Neely*, 180 U.S. at 122-23.

should the United States government waive a particular diplomat's immunity.²¹³ If the foreign state in question was a treaty participant, the American diplomat could be tried by a DICC instead of the foreign state. There would be no constitutional difference. The extradition precedents and the due process precedents compel this result. The diplomat would simply be tried in the manner chosen by the receiving state that manner being a Diplomatic tribunal in the ICC.

Critics have argued ratifying the more general ICC adopted in 1998 would be an unconstitutional exercise of the treaty power for numerous reasons.²¹⁴ Although this ICC treaty would likely be found constitutional, its ratification would be unlikely due to the political forces operating within the United States. The possibility of submitting to the jurisdiction of an international tribunal is simply not something that a majority of American voters or representatives would approve.²¹⁵ In fact, federal law currently forbids the United States's entry into the International Court without ratification of a treaty made under Article II of the Constitution.²¹⁶ In contrast, a treaty aimed at unpunished diplomatic crime is likely to be widely embraced by the American electorate and their governmental representatives. The possible losers in the equation would be American diplomats accused of crimes abroad.²¹⁷ However, the American diplomat accused of a crime is only a "loser" to the extent that one believes he or she would receive a trial in the DICC that would be less fair than its American version. This is unlikely, given the vast number of protections that currently exist in the general ICC and which could be embodied into the DICC.

IV. THE CASE AGAINST UNILATERAL ACTION AND ADHERENCE TO THE STATUS QUO

Unilateral action by the United States through congressional legislation to dissolve diplomatic immunity would be a mistake. The United States has the constitutional power to unilaterally change its treaty obligations,²¹⁸ but this would not be a prudent course of action to take. Any unilateral action taken would be a blatant disregard for international laws.²¹⁹ The principle of diplomatic immunity is thousands

213. See Vienna Convention, *supra* note 2, art. 32.

214. See *supra* notes 192, 206-07 and accompanying text.

215. See Marquardt, *supra* note 183, at 77-78.

216. 22 U.S.C. § 7401(a) (Supp. V 2006).

217. Hickey & Fisch, *supra* note 6, at 379 (describing the harm that could come to American diplomats abroad should they lose their immunity privileges).

218. See *supra* Part III.

219. Hickey & Fisch, *supra* note 6, at 362-67 (analyzing the illegality of unilateral action because it breaks international law obligations that the United States has committed to, specifically

of years old and has been codified in numerous international treaties.²²⁰ Unilateral action reducing diplomatic immunity would therefore violate customary international law as well as codified international law embodied in the Vienna Convention to which the United States is a party.²²¹ The Supreme Court has noted that “the United States has a vital national interest in complying with international law.”²²² Acting unilaterally and pursuing a remedy through a congressional statute would be contrary to international law and would alienate the United States from the global community. This sort of unilateral action would cause great harm to the reputation of the United States abroad. In addition, and perhaps more seriously, a unilateral piece of legislation that eliminated diplomatic immunity would harm the freedom of United States diplomats abroad. If the United States does not grant immunity to diplomats of other nations, those nations will reciprocate and withhold immunity from American diplomats.²²³ The United States would in essence, be allowing its own diplomats to be arrested and arbitrarily prosecuted in nations which do not share its due process and human rights concerns. No matter how horrific a foreign diplomat in America behaves, one must also remember that there is a large United States diplomat population abroad.²²⁴ The chances that American diplomats would be subject to harm under these circumstances would increase dramatically. America is already suffering abroad in the court of public opinion.²²⁵ Arresting and trying foreign diplomats who are suspected of criminal or terrorist activities may do nothing more than make them out to be martyrs in their own lands and encourage more hate and venom to be directed at the United States by those countries and their people.

In its assent to the Vienna Convention, the United States also adopted the Optional Protocol, which gives the International Court of Justice (“ICJ”) compulsory jurisdiction over all claims of treaty violation.²²⁶ Unilaterally violating the Vienna Convention would give

with regards to the customary international law duty of *pacta sunt servanda*).

220. *Id.* at 363-64.

221. *See supra* notes 120-25 and accompanying text.

222. *Boos v. Barry*, 485 U.S. 312, 323 (1988).

223. *See Hickey & Fisch, supra* note 6, at 360, 379.

224. *Id.* at 379.

225. *See, e.g.,* Associated Press, *China More Popular than U.S. Overseas*, MSNBC.COM, June 23, 2005, <http://www.msnbc.msn.com/id/8324290/> (detailing the fact that communist China is currently viewed more favorably than the United States in many countries, in part due to international perception of the Iraq War and President George W. Bush); THE PEW RESEARCH CTR. FOR THE PEOPLE AND THE PRESS, *A YEAR AFTER IRAQ WAR: MISTRUST OF AMERICA IN EUROPE EVEN HIGHER, MUSLIM ANGER PERSISTS* 1, 3, 6 (2004), <http://people-press.org/reports/pdf/206.pdf> (nine country survey detailing world opinions with regards to the United States).

226. *See* Vienna Convention on Consular Relations, Optional Protocol Concerning the

foreign nations the grounds needed to drag the United States to the ICJ under the compulsory jurisdiction provisions of the Optional Protocols.²²⁷ Although the United States could simply withdraw from the compulsory jurisdiction of the ICJ, as it has done before in cases of adverse judgments,²²⁸ such an action, in addition to the unilateral action to suspend the Vienna Convention in the first place, would invite even more worldwide scorn and further damage the reputation of the United States. Therefore, although the breach of customary law in this instance would be constitutional, the side effects of abrogating the Convention could lead to disastrous diplomatic and foreign relations results for the United States's foreign affairs image and reputation abroad.

Pursuing current remedies provided by the Vienna Convention and Diplomatic Relations Act is of course constitutional. However, they do not provide a lasting solution to the problem of diplomatic crime and the possibility of diplomatic terrorism. First, the Diplomatic Relations Act is flawed because it does not provide Americans with enough recourse in the event that a diplomatic crime occurs.²²⁹ Of primary concern is the fact that, since it only provides relief for car accidents, the Diplomatic Relations Act offers the American citizen absolutely no recourse for criminal actions committed by a diplomat against them.²³⁰ It only deals with civil matters.²³¹ When there is a valid civil cause of action under the Diplomatic Relations Act, there is often no remedy available to the American citizen due to the Act's failure to provide the State Department with necessary enforcement mechanisms.²³² There is the potential for lack of an available remedy to an aggrieved party because the Diplomatic Relations Act does nothing to punish or force diplomats to renew cancelled or expired policies.²³³ As such, the victims can be left with nothing. The same is true for the Vienna Convention. In certain circumstances, the Convention's immunity provisions offer a private citizen victim and a government prosecutor little recourse against an outlaw diplomat.²³⁴ In fact, unless the sending state waives the diplomat's immunity or agrees to put him on trial in his home state, the

Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 326, 596 U.N.T.S. 487.

227. *See id.*

228. *See* Benison, *supra* note 182, at 105 & n.200 (noting events surrounding the *Nicaragua v. United States* trial before the International Court of Justice in which the Reagan administration simply withdrew from the compulsory jurisdiction of the court rather than face adverse judgment for the United States).

229. *See* Groff, *supra* note 72, at 220.

230. *Id.*

231. *See* O'Neill, *supra* note 26, at 662, 691.

232. *See id.* at 695.

233. *See* Farhangi, *supra* note 1, at 1531 n.80.

234. *See supra* Part II.C-D.

diplomat can walk free.²³⁵ He may be declared a *persona non grata* and lose his career in the process, but losing one's career is simply not the type of penalty that suits certain crimes. Therefore, simply staying the course does not solve the actual problem of diplomatic crime. Some have cited the relatively low numbers of crimes committed by diplomats as a reason for continuing to look to the Vienna Convention as the sole source of remedies.²³⁶ However, the argument that there is a relatively low diplomatic crime rate has been contested by numerous scholars offering evidence substantiating claims that diplomatic crime is in fact a problem.²³⁷ In addition, as noted above, the very same diplomatic crime statistics relied upon by scholars touting low diplomatic crime rates are often unreliable due to a lack of adequate and uniform reporting standards and the delicacy of foreign diplomatic relations.²³⁸

Requiring foreign nations to provide proof of insurance in order to cover any possible crimes that their diplomats may commit is another example of unilateral legislation that would not solve the problem either. It is true that such a plan would give victims some monetary relief for their troubles. However, there would be many costs which on the whole would severely undercut the plan's benefits. It is quite obvious that foreign nations would penalize the United States for such an action.²³⁹ Any nation that the United States plans on continuing diplomatic relations with will almost certainly reciprocate American legislation and impose insurance requirements of its own to cover all American diplomats abroad.²⁴⁰ The United States has a very large diplomatic presence in the world today.²⁴¹ As such, this move would end up costing the United States the most of any other nation. Even if it is assumed that United States personnel will be well-behaved, keeping premium costs down, the sheer number of diplomats would raise the cost to an intolerable level.²⁴² In addition, the history of the Diplomatic Relations Act demonstrates how difficult it is for insurance plans to be enforced consistently.²⁴³ If there can be no real enforcement of this law, like the

235. See *supra* Part II.C-D.

236. Hickey & Fisch, *supra* note 6, at 374-75.

237. See *supra* notes 65-88 and accompanying text.

238. See *supra* notes 65-68 and accompanying text.

239. See Farhangi, *supra* note 1, at 1544-45 (describing retaliatory effects against the United States should an insurance plan be put into practice).

240. *Id.*

241. Hickey & Fisch, *supra* note 6, at 379 (noting that the "United States currently has over 30,000 American diplomats, including their family members, living abroad").

242. But see Farhangi, *supra*, note 1, at 1544-45 (noting that American diplomats are unlikely to misbehave enough to raise insurance premiums too high).

243. O'Neill, *supra* note 26 at 693-96 (explaining the failure of Diplomatic Relations Act in further detail); Farhangi, *supra* note 1, at 1530.

Diplomatic Relations Act, it will do nothing more than annoy foreign nations. More specifically, the plan would not allocate justice properly at all. The diplomats who commit crimes will not be the ones forced to pay for them. Instead, their sending states will bear the burden. Finally, the insurance legislation would not give victims and their families any measure of true justice. Instead, victims will get nothing more than a payment of blood money to “compensate” them for horrendous crimes such as kidnappings, rapes, and even cold-blooded murders.

Setting up a federal fund to compensate United States citizens who are victimized by diplomatic transgressions would likewise be a mistake both nationally and internationally. Unless the United States could convince other nations to pool their resources into an international compensation fund, this would have to be done unilaterally, meaning all of the financing for it would have to come from the federal government.²⁴⁴ To do so, the federal government would either have to increase the deficit, cut funding to other programs, or increase the taxes of Mr. and Mrs. John Q. Taxpayer. It would not take a degree in political science to know that most people are not going to appreciate having their taxes raised so that some foreign diplomat can commit crimes in the United States at the taxpayers’ expense. Therefore, although it would be a constitutional way to deal unilaterally with diplomatic crime, the avalanche of criticism and scorn a compensation fund proposal like this would bring makes it an unlikely remedy to be implemented. Furthermore, a unilateral plan to compensate the victims of diplomatic crime sends the wrong message to the international community.²⁴⁵ A compensation fund would indicate that if a diplomat comes to the United States and commits crimes, neither the diplomat nor the diplomat’s country will be held accountable.²⁴⁶ Instead the United States and specifically the taxpayers (the very victims of the crimes) will be forced to shoulder the burden. If all the other countries in which the United States currently engages in foreign relations with were to act to establish unilateral compensation funds, then perhaps this would be different. The cost spreading among nations and ability of the home state to deter its diplomats from costing its government money would make this solution a possibility. However, as it currently stands, a United States unilateral compensation fund would be a no-win situation both domestically and internationally.

V. THE CASE FOR GRANTING JURISDICTION OVER DIPLOMATIC CRIME

244. See Farhangi, *supra* note 1, at 1531.

245. *Id.*

246. See *id.*

TO THE INTERNATIONAL CRIMINAL COURT

The best solution to the problem of diplomatic crime is to amend the Vienna Convention to allow a diplomatic tribunal within the ICC to try and punish diplomats who are found guilty of committing a crime. This proposition is constitutional and would benefit the United States and its citizens. In cases in which the remedies provided by the Vienna Convention are inadequate, the United States government (as well as any other nation who is party to the treaty) would have the ability to seek justice on behalf of its citizens for a wide variety of crimes committed against them by foreign diplomats. Furthermore, in addition to seeking justice for crimes such as rape or murder, the proposed DICC would present the United States with a forum to prosecute foreign diplomats who have engaged in, or conspired to engage in, terrorist activities.²⁴⁷ If a foreign diplomat is sent to the United States with the sole task of committing terrorism, the sending state is surely not going to waive his immunity or prosecute him in his own country. Should they be expelled from the United States, these diplomats may even receive a parade or accolades for terrorist actions taken at the behest of a hostile regime, such as Iran or Venezuela, against the United States.²⁴⁸ The United States currently has too many enemies around the world to allow this to be a possibility.²⁴⁹ If the United States is truly serious about ensuring justice and security, it must be willing to grant jurisdiction to a neutral DICC so that the diplomat who commits a criminal or terrorist act in the United States is brought to justice instead of possibly wiggling off the hook as a result of immunity. Although the United States government may be concerned with allowing its diplomats to be subject to the proposed DICC's jurisdiction, the fact of the matter is, if the official did something wrong he should be punished, American or not. If the United States government wants foreign diplomats to be punished for their crimes in America, it has to accept that its diplomats will be punished for their crimes abroad as well. The proposed DICC provides a forum that punishes diplomats and protects them with due process rights at the same time. Most importantly, allowing the DICC to work in such a way could go a long way towards curing the apprehensions regarding criminal diplomats and the possibility of future terrorist diplomats by ensuring they face justice.

One concern in allowing the ICC jurisdiction over diplomatic crime

247. See Groff, *supra* note 72, at 235.

248. See Farhangi, *supra* note 1, at 1524 (noting the "hero's welcome" given to Libyan diplomats by their President after the shooting death of London Police Officer Yvonne Fletcher).

249. See *supra* note 225.

is the observation that it would necessarily include jurisdiction over American diplomats who are accused of crimes abroad. Nevertheless, these concerns can be minimized if the United States takes an active role in the drafting of the treaty to ensure that the trial is fair and due process is preserved.²⁵⁰ The Rome Statute provides many of the due process considerations that are found in the American system.²⁵¹ Writing them into an amended Vienna Convention or an additional treaty to deal with diplomatic crime likely would not be hard given the support they received in the original ICC treaty.²⁵² As noted above, the DICC would include numerous due process protections on par with those granted in the United States.²⁵³ In addition, the universal acceptance and recognition of the crimes for which the proposed court would have jurisdiction would provide all diplomats with fair notice.²⁵⁴

More protections could be included to prevent a group of countries whose judicial system is the polar opposite to that of the United States from manipulating the system to produce an unfair result.²⁵⁵ One such protection that could be inserted would be to require that a certain percentage of the judges share citizenship with the accused. Therefore, if an American diplomat were to be tried, it could be required that a certain number of judges also be American. Another protection could be the right of the diplomat's country to protest the charges before the trial even begins. This would be akin to a pretrial hearing in the American legal system and would prevent spurious accusations from even coming before the court.²⁵⁶ In addition, diplomats could be given the option of serving any prison time they receive in their home states. This would go a long way to preventing any jailhouse "accidents" that could befall the imprisoned diplomat. Finally, since the proposed court would be based on a treaty, the United States (along with any other nation) could at any time, repudiate the treaty should it feel that its diplomats were being treated unjustly or constantly singled out for punishment.²⁵⁷ A system of checks and balances, common in the United States government, could therefore be applied to the proposed DICC as well. However, if the

250. BRADLEY & GOLDSMITH, *supra* note 90, at 458 (noting that President Clinton signed the Rome Statute because it would put the United States "in a position to influence the evolution of the court").

251. See Benison, *supra* note 182, at 86.

252. See Groff, *supra* note 72, at 227 & n.171 (noting that some of America's closest allies such as "England, Germany, France, indeed all of western Europe, Russia, Canada, Australia, New Zealand, Argentina, Chile, South Korea, and South Africa signed' the treaty" (citation omitted)).

253. See *supra* note 182 and accompanying text.

254. See Groff, *supra* note 72, at 232.

255. See Casey, *supra* note 190, at 862-63.

256. See Benison, *supra* note 182, at 86.

257. See BRADLEY & GOLDSMITH, *supra* note 90, at 463-64.

United States wants to ensure that as many protections as possible are included in the diplomatic tribunal for the ICC, it should take an early and active role in the process. Only then would it be in position to influence the rights afforded to the accused. This was President Clinton's advice when he signed the more general Rome Statute authorizing the original ICC.²⁵⁸ The United States is the world's sole superpower and employs more foreign diplomats than any other country. As a result, its participation in the treaty would be vital to its success. Should the United States participate in this endeavor, the ills of diplomatic crime can be remedied and deterred.

A DICC would recognize the realities of the modern world while also upholding international law and the equality of nations. Given increased technological innovations, the ability of leaders to interact has grown enormously and has decreased the necessity of posting diplomats abroad.²⁵⁹ Diplomats can and should still play a role in the foreign relations among nations. However, there should be changes to their immunity and this can be done legally and respectfully. Such changes could be made by nations granting the DICC jurisdiction over diplomatic crime voluntarily. As a result, international law would be respected due to this cooperation and assent to the treaty by the various nations.²⁶⁰ Additionally, the voluntary nature of a DICC would preserve the equality of nations. Each nation would be treating the other as an equal. The states would be submitting jurisdiction over diplomats to a court whose judges would be voted on. The judges' rulings would depend on established and recognized doctrines of law negotiated by treaty participants.²⁶¹ Activating this plan ensures that international law would be followed and all nations involved would be treated equally.

Finally, the fact that the proposed DICC would complement rather than replace the existing regime found in the Vienna Convention ensures two important results. First, it would ensure that diplomatic criminals face justice. The diplomat would have to answer for his or her crimes if the nations involved agreed that a resolution to the matter could be worked out using the Vienna Convention remedies.²⁶² However, should the remedies provided for in the Vienna Convention be inadequate in a certain situation, the proposed DICC, with its complementary criminal jurisdiction, ensures that the diplomat could still be brought to justice. Second, it would ensure a more peaceful resolution to many incidents.

258. *Id.* at 458; *see also supra* note 250.

259. Groff, *supra* note 72, at 230-31.

260. *Id.* at 227-28.

261. *Id.* at 228-29.

262. *See supra* Part II.C.

Diplomatic crimes and claims for immunity have led to animosity between nations and their peoples in the past.²⁶³ This has been true even when remedies provided by the Vienna Convention are followed.²⁶⁴ However, the DICC would provide a neutral forum with a pre-agreed upon set of legal rules and procedures for an aggrieved nation to present its accusations. This same neutral panel decides what, if any, punishment will apply as well. A judgment declared by the DICC therefore, would lessen the ill will that a sending state would have for a host state seeking to prosecute its diplomats under the Vienna Convention.²⁶⁵ It would also lessen the animosity that a host state would have toward a sending state that refused to take action against its diplomats under the Vienna Convention.²⁶⁶ Therefore, the matter would be taken out of the hands of the interested and angry parties and placed in those of capable, neutral judges which would go a long way to eliminate animosity amongst nations engaged in a diplomatic dispute.

In summary, the creation of a DICC would be constitutional and would solve the main problems associated with each of the aforementioned proposals. First, this solution would not require the United States to engage in unilateral action against other countries or break existing customary international law in order to punish criminal diplomats. Second, congressional legislation to remove diplomatic immunity or require foreign states to take out insurance plans for their diplomats would only alienate the United States and subject its diplomats serving abroad to arbitrary arrest and punishment. However, creation of a DICC by multinational treaty which provides for a fair judicial proceeding would eliminate these concerns completely. Third, this plan does not require the tremendous expense and investment that the United States would need to undertake alone to set up a monetary compensation fund for victims of domestic diplomatic crime. Finally, and perhaps most importantly, providing the aggrieved state the opportunity to request that a visiting diplomat be placed on trial and punished would force diplomats to answer for their crimes. It would also encourage the victims of unreported crime to come forward, safe in knowing that the perpetrator will not be able to hide behind immunity rendering their accusations meaningless. Granting the proposed DICC complementary jurisdiction over diplomatic crime and punishment

263. See, e.g., Wright, *supra* note 5, at 179-84 (describing the tensions between Great Britain and Libya following the tragic shooting of Officer Yvonne Fletcher).

264. *Id.* (noting that the diplomatic standoff ended when Britain allowed Libyan diplomats to leave London pursuant to the Vienna Convention).

265. *Id.* at 189.

266. See *id.*

would therefore serve as a real and serious deterrent to both criminal diplomats and terrorist diplomats. This sort of remedy is one which the Vienna Convention currently cannot guarantee.

VI. CONCLUSION

It is constitutional for the United States to grant a DICC jurisdiction to prosecute and punish diplomats who commit crimes. Diplomatic immunity has protected outlaw diplomats for thousands of years. These protections continue to operate under American law as a result of the Vienna Convention and the Diplomatic Relations Act. There are clearly many options which the United States government has to choose from in order to deal with outlaw diplomats. Some of these options would force the United States to act unilaterally and pass federal statutes. However, as it has been demonstrated, unilateral action is simply not the best way to approach this problem. Unilateral action violates customary international law embodied in the Vienna Convention, and many negative consequences would befall United States interests, diplomatic personnel, and citizens as a result of reciprocal action that would be taken by other nations. Diplomatic crime affects every nation and is a worldwide problem that must be dealt with. As such, the United States should work with the international community to solve this problem and provide for a more just system of global order. The United States should grant a DICC jurisdiction over matters which cannot be solved by the Vienna Convention so that diplomatic criminals are no longer able to hide behind the shield of immunity when they harm others. None of the options that the United States has are perfect. However, allowing a neutral DICC, with numerous due process protections in place to try and punish diplomatic criminals would ensure a proper balance between justice, international law, and the equality of nations. "If men were angels no government would be necessary."²⁶⁷ The same rationale of this oft quoted maxim also applies to diplomats. Sadly, not all diplomats are angels, and the proposed DICC is necessary to make certain that they face justice for their crimes.

267. THE FEDERALIST NO. 51 (James Madison).

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