

## Espionage and the Forfeiture of Diplomatic Immunity

When nations conduct intercourse beyond their territorial boundaries, the need for transnational representation is fundamental if national objectives are to be accomplished. To accommodate this need, the world community has provided a special regime for diplomats, consuls and representatives to international organizations.<sup>1</sup> That regime accords certain privileges and immunities in the receiving state<sup>2</sup> to protect the sending state's unhampered conduct of foreign relations<sup>3</sup> and to avoid embarrassment for its government.<sup>4</sup> The sources of these privileges and immunities are found in the customary practice of nations, the domestic laws of the receiving states<sup>5</sup> and multinational<sup>6</sup> and bilateral<sup>7</sup> treaties. This diplomatic grant confers criminal and civil immunity

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<sup>1</sup>J.L. BRIERLY, *THE LAW OF NATIONS* 255 (6th ed. 1963).

<sup>2</sup>RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 63, comment c at 195 (1965):

The term "privileges and immunities" is often used in international law without differentiation between its two constituents. To the extent that any distinction is made between the two, there is a tendency to use "privilege" in referring to a right which is affirmatively described, such as the right to employ diplomatic couriers, and to use "immunity" in referring to a right which is described in a negative sense, such as freedom of diplomatic envoys from prosecution. As used in the Restatement of this Subject, the term "immunity" includes both, although the term "privileges and immunities" is retained when it conforms to existing practice.

<sup>3</sup>*Ex parte* Republic of Peru, 318 U.S. 578 (1943); *Stone Eng. Co. v. Petroleos Mexicanos*, 42 A.2d 57, 352 Pa. 12 (1945).

<sup>4</sup>*United States ex rel. Casanova v. Fitzpatrick*, 214 F. Supp. 425 (N.Y. 1963).

<sup>5</sup>I. M. BASSIOUNI & V. NANDA, *A TREATISE ON INTERNATIONAL CRIMINAL LAW* 55 (1973).

<sup>6</sup>U.N. CHARTER 59 Stat. 1031; Convention on the Privileges and Immunities of the United Nations, *opened for signature* Feb. 13, 1946, 1 U.N.T.S. No. 16 [hereinafter cited as *Privileges and Immunities Convention*]; Vienna Convention on Diplomatic Relations, *opened for signature* April 18, 1961, 500 U.N.T.S. No. 95 [hereinafter cited as *Diplomatic Convention*]; Vienna Convention on Consular Relations, *opened for signature* April 24, 1963, 596 U.N.T.S. No. 261 [hereinafter cited as *Consular Convention*]. Pursuant to the U.N. CHARTER art. 108, ¶ 3, the United States concluded the Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, June 26, 1947, 11 U.N.T.S. No. 11 [hereinafter cited as *UN Agreement*].

<sup>7</sup>U.S.-U.S.S.R. Consular Convention, June 1, 1964, 19 U.S.T. 5018, T.I.A.S. No. 6503.

upon personnel of the sending State who are accredited by the receiving State and thereby qualify for such protection.<sup>8</sup>

The blanket mandate of immunity encompasses the most serious crime against a government—espionage. This threat to national security is defined as a “. . . clandestine activity . . . by a person commissioned by a foreign government for the purpose of obtaining secret information regarding another State’s national defense . . .”<sup>9</sup> and is prohibited by law. In conducting one method of espionage operations, the sending State inserts an intelligence collector<sup>10</sup> into the diplomatic structure.<sup>11</sup> When the operative is arrested, it is routine for the sending State to invoke the shield of diplomatic immunity. As the operative cannot be punished, the receiving State retaliates by declaring the

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<sup>8</sup>The recent trend has been to recognize generally all personnel of the diplomatic and consular community as being collective recipients of privileges and immunities. But technically there is a legal distinction drawn between the privileges and immunities of diplomats, consuls and representatives to international organizations. The reason is that each category is separate and distinct in its functions and status; therefore the receiving State has granted a corresponding degree of privileges and immunities to each category. For example, diplomats historically have held a higher status than consuls, because the former’s work is principally in the political areas of foreign affairs, relations and diplomacy while the latter group is concerned with commercial transactions. With the advent of representatives to international organizations, personnel of this category have been granted a status equivalent to that of diplomats. To implement art. 105(3) of the U.N. CHARTER, art. V of the U.N. Agreement states that United Nations representatives are “. . . entitled in the territory of the United States to the same privileges and immunities, subject to corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it.” See generally, J. BRIERLY, *op. cit.*, 265 (6th ed. 1963); Lay, Comment, *The United States-Soviet Consular Convention*, 59 AM. J. INT’L L. 876 (1965); Hunsaker, *Privileges and Immunities of Representatives of the United Nations*, 6 COL. J. TRANSNAT’L L. 312 (1967); Woodliffe, *Consular Relations Act 1968*, 32 MOD. L. REV. 59, 60 (1969); *Soviet Consular Conventions: Post Vienna*, 10 HARV. L. REV. 373 (1969).

<sup>9</sup>Garcia-Mora, *Treason, Sedition and Espionage as Political Offenses Under the Law of Extradition*, 26 U. PITT. L. REV. 65, 79 (1964). See generally, ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW (R. Stanger ed. 1962); Edmondson, *Espionage in Transnational Law*, 5 VAND. J. TRANSNAT’L L. 435 (1972).

<sup>10</sup>A career diplomat cannot be a professional clandestine collector as incorporation is precluded by the very nature of the diplomat’s visible profession. The diplomat’s presence is not only known (as he must be accredited by the receiving State) but highly visible, which precludes his acting as a professional clandestine collector. Because of the interrelation of diplomacy and espionage, he is immediately suspect and subject to observation. The injection of an operative (see *Newsweek*, Nov. 17, 1975, at 49) into the diplomatic structure utilizes the natural shallow cover of the mission to conceal the collector’s primary mission. Having been incorporated into the diplomatic community to conduct espionage, this operative enjoys absolute criminal immunity for his act. This privilege alone explains the wide use and abuse of the diplomatic and consular community to conduct clandestine collection operations, including recruitment, training, mission targeting, recovery, debriefing, payment and the like, or taking over existing operations by handling sources which previously have been recruited. See generally, *United States v. Rhodes*, Trial by General Courts Martial, Fort McNair (D.C. 1958); *United States v. Drummond*, 354 F.2d 132, 138 (2d Cir. 1965).

<sup>11</sup>In November, 1975, the U.S.S.R. made a rare public admission that six KGB agents were assigned to their embassy in Kenya. The Soviets assign State Security personnel (KGB) for surveillance of operatives assigned by the Chief Intelligence Directorate (GPU). The United States has utilized CIA employees or those of other collection agencies. A CIA station chief in charge of all CIA operations in Greece and assigned to the American embassy as first secretary, was slain after his cover was exposed. *Los Angeles Times*, Dec. 24, 1975.

collector *persona non grata*<sup>12</sup> and directing his immediate departure,<sup>13</sup> thus terminating his diplomatic privileges and immunities.

All diplomatic privileges are subject to abuse.<sup>14</sup> When the sending State invokes immunity for espionage, an act outside of official functions, it is taking unique advantage of its diplomatic protection. It has abused the privileges and immunities recognized by the law of nations and the receiving State, with attendant repercussions on the international plane.

In such an instance, the receiving State is justified in initiating protective measures to safeguard information vital to its national security, by eliminating the privileges and immunities for the crime of espionage. The receiving State has the power to amend its domestic statutes, an act which may abrogate its treaty commitments relative to privileges and immunities. Such a denial of criminal immunity for espionage would subject the collector to domestic sanctions and serve as a deterrent against future abuses of privileges and immunities. As exceptions to immunity have been created in the area of civil law, a corresponding exception seems warranted in the criminal area.

Before abolishing immunity for espionage, such a move must be to the State's benefit. Because of the United States' dominant role within the world coupled with its superior intelligence collection capabilities, it is one of several States in a position to take such unilateral action. Successful espionage operations require extensive personnel and support capabilities which are currently provided by the diplomatic mission. By prohibiting this capability, hostile collectors targeted against the United States would be denied diplomatic privileges and immunities and be forced to operate independently of the diplomatic structure.

## I. Sources of Privileges and Immunities

### A. Domestic

Diplomatic privileges and immunities constitute a long-established part of the United States' domestic law. The authority to legislate immunity is derived

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A United States government classified summary filed in a D.C. Federal court in October, 1975, revealed the extent to which the CIA was authorized to use Foreign Service and other U.S. government agencies abroad as a cover for its clandestine activities. San Diego Union, Oct. 12, 1975 at A-4, col. 5. For an example of how the CIA utilizes journalism as a cover, see San Diego Union, Nov. 7, 1975, at A-2, col. 2.

<sup>12</sup>United States v. Butenko, 384 F.2d 554, 566 (3d Cir. 1967). See generally, Cohen, *Espionage and Immunity—Some Recent Problems and Developments*, 25 BRIT. Y.B. INT'L L. 404 (1948).

<sup>13</sup>*Id.* at 566. *E.g.*, in 1971 Great Britain expelled a host of Soviet diplomatic community personnel (diplomats and consuls) for engaging in espionage. N.Y. Times, Dec. 15, 1971, at 2, col. 8.

<sup>14</sup>An ambassador to the United Nations maintained that his dog, who had bitten eight persons, had diplomatic immunity and warned of "possible international consequence" if his dog were shot (San Diego Union, Oct. 28, 1975, at A-2, col. 1). The sending State recalled the ambassador (San Diego Union, Dec. 20, 1975, at A-2, col. 1).

from the Constitution,<sup>15</sup> with a limitation in that the inviolability of diplomatic officers is predicated upon the tenets of international law.<sup>16</sup> Pursuant to this mandate, the legislative branch has enacted Title 22 U.S.C. sections 252,<sup>17</sup> 288<sup>18</sup> which confirm the status of privileges and immunities for the diplomatic community.

Title 22 U.S.C. section 252 states that suits against foreign diplomatic officers and consular officers and their domestics are prohibited:

Whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any ambassador or public minister or any foreign prince or State, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are restrained, seized, or attached, such writ or process shall be deemed void.<sup>19</sup>

This statute is declaratory of pre-existing principles<sup>20</sup> of international law<sup>21</sup> and was embodied in the United States' legal system early in its history.<sup>22</sup> So that, as already noted, diplomats could proceed about their business without harassment.<sup>23</sup>

The International Organization Immunities Act, Title 22 U.S.C. section 288, grants privileges, immunities and exemptions to international organizations located within the United States:

Representatives of foreign governments in or to international organizations and officers and employees of such organizations shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such representatives, officers, or employees. . . .<sup>24</sup>

The statute further specifies that “. . . their property and their assets . . . shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments. . . .”<sup>25</sup> The organization as an entity is immune,<sup>26</sup> and as its archives are immune from search, these are completely inviolable.<sup>27</sup> The purpose of such privileges and immunities is to enhance and vitalize the status of international organizations with the ultimate

<sup>15</sup>U.S. CONST. art. VI, § 2.

<sup>16</sup>Farnsworth v. Zerbst, 98 F.2d 541 (2d Cir. 1938).

<sup>17</sup>22 U.S.C. 252 (1970).

<sup>18</sup>22 U.S.C. 288 (1970).

<sup>19</sup>22 U.S.C. 252 (1970); *Hellenic Lines Ltd. v. Moore*, 354 F.2d 978 (D.C. Cir. 1965).

<sup>20</sup>Haley v. State, 88 A.2d 312 (Md. 1952).

<sup>21</sup>United States v. Melekh, 190 F. Supp. 67 (D.C.N.Y., 1960).

<sup>22</sup>1 OP. ATTY. GEN. 71 (1797).

<sup>23</sup>Fitzpatrick, *supra* note 2, at 425.

<sup>24</sup>*Supra*, note 17, at d(b); *Mpiliris v. Hellenic Lines Ltd.*, 323 F. Supp. (Tex. 1970), *aff'd*, 440 F.2d 1163 (1971).

<sup>25</sup>*Ibid.*, at a(b).

<sup>26</sup>*Ibid.*, “International organizations . . . shall enjoy the Privileges and Immunities from suit and every form of judicial process as is enjoyed by a foreign government. . . .”

<sup>27</sup>*Ibid.*, at (c).

purpose of facilitating their activities.<sup>28</sup> Therefore those who come within its embrace are entitled to the same diplomatic immunity enjoyed by the diplomatic and consular community.

The effect of these statutes on United States domestic law is to grant absolute criminal immunity to diplomats who have been properly accredited to the United States. If the United States has acknowledged the privileges and immunities, such a grant will be strictly construed and the individual will remain immune from prosecution for any crime he may commit.

## B. *Treaties*

To ensure reciprocal accord of privileges and immunities which the United States grants to foreign diplomats, the United States has entered into treaties and agreements with foreign States. The Vienna Convention on Diplomatic Relations<sup>29</sup> and the Vienna Convention on Consular Relations<sup>30</sup> provide privileges and immunities to the diplomatic and consular community. Similar grants are extended to representatives of the United Nations by the United Nations Charter<sup>31</sup> and the Convention on the Privileges and Immunities of the United Nations,<sup>32</sup> which reinforce the domestic immunity statutes. The privileges and immunities contained within these documents are relative to three areas: functions, missions, and laws and regulations.

### 1. FUNCTIONS

The United Nations Charter exemplifies the functional immunities in that "[t]he Organization shall enjoy in the territory of each of its Members such Privileges and Immunities as are necessary for the fulfillment of its purposes."<sup>33</sup> Similar provisions are provided for in the Privileges and Immunities Convention,<sup>34</sup> the Diplomatic Convention<sup>35</sup> and the Consular Convention.<sup>36</sup>

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<sup>28</sup>International Refugee Organization v. Republic S.S. Corp., 189 F.2d 858 (4th Cir. 1951).

<sup>29</sup>*Supra*, note 6.

<sup>30</sup>*Loc. cit.*

<sup>31</sup>*Loc. cit.*

<sup>32</sup>*Loc. cit.*

<sup>33</sup>*Ibid.*, art. 105, ¶ # 1; art. 105, ¶ 2: "Representatives of Members of the United Nations and officials of the Organization shall enjoy such Privileges and Immunities as are necessary for the independent exercise of their functions in connection with the Organization."

<sup>34</sup>*Ibid.*, art. IV, § 11: "Representatives of Members . . . while exercising their functions . . . enjoy the following Privileges and Immunities:"

Art. IV, § 12: "[T]he immunity from legal process . . . and all acts done by them in discharging their duties . . .";

Art. V, § 18: "Officials of the UN shall: (a) be immune from legal process in respect of . . . all acts performed by them in their official capacity."

<sup>35</sup>*Ibid.*, *Preamble*: "The State Parties to the present Convention . . . Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States. . . ."

<sup>36</sup>*Ibid.*, art. 43, § 1: "Consular Officers and consular employees are not amenable to jurisdiction

The specific functions are nowhere defined within the United Nations Charter but are delineated within the conventions or by agreement between the sending and receiving State. One notable commitment is found in the Consular Convention<sup>37</sup> and the Diplomatic Convention,<sup>38</sup> the latter of which provides:

The function of a diplomatic mission consists . . . in . . . ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State.<sup>39</sup>

As long as the diplomatic officer engages in an activity which is in furtherance of the function of the sending State as acknowledged in the treaty by the receiving State, he is immune from the jurisdiction of the receiving State.<sup>40</sup>

## 2. MISSIONS

As pertains to the buildings, offices and residences connected with the diplomatic missions, the treaties provide that the premises of the organization, mission or post should not be misused. The purpose in establishing a mission determines its function which in turn will justify how the premises are to be used. A typical provision is reflected in the Diplomatic Convention:

The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by any other rule of general international law or by any special agreement in force between the sending and the receiving State.<sup>41</sup>

The Consular Convention states the same concept more precisely: "The premises shall not be used in any manner incompatible with the exercise of

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in respect to acts performed in exercise of consular functions.";

Art. 53, § 4 with reference to the beginning and ending of consular privileges and immunities: "However, with respect to acts performed by a consular officer or a consular employee in the exercise of his functions, immunity from jurisdiction shall continue to subsist without limitation of time."

<sup>37</sup>*Ibid.*, art. 5: "Consular functions consist in: (c) ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested."

<sup>38</sup>*Ibid.*, art. 3, ¶ 1(d).

<sup>39</sup>*Loc. cit.*

<sup>40</sup>Under the Diplomatic Convention (art. 31, par. 1), diplomats remain protected by absolute immunity for any criminal act. Additionally art. 29 states that the "person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention." The Privileges and Immunities Convention, art. IV, ¶ (a) declares: "Representatives of Members . . . enjoy . . . immunity from legal process of every kind." Article 41, ¶ (1) of the Consular Convention provides that "Consular Officers are not liable to arrest except in the case of a grave crime and pursuant to a decision by competent, judicial authority," yet Title 22 U.S.C. § 252 exempts even grave crimes.

<sup>41</sup>*Ibid.*, art. 41, § 3.

consular functions.”<sup>42</sup> Therefore, privileges and immunities will be recognized by the receiving State provided there is no abuse of the diplomatic grant.

### 3. LAWS AND REGULATIONS

The third area that pertains to privileges and immunities is the requirement that the diplomatic and consular community respect the laws and regulations of the receiving State. This requirement is specifically set out in the Diplomatic Convention: “Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such Privileges and Immunities to respect the laws and regulations of the receiving State.”<sup>43</sup> An identical provision likewise is contained in the Consular Convention.<sup>44</sup> This duty to obey the laws is not a moral obligation but a duty imposed by a treaty which has the force of law. Because the drafters have separated the duty from the privileges and immunities, if a diplomat violates this duty, his privileges and immunities would not be jeopardized thereby. Yet a required mode of conduct has been agreed to by the sending State.

## II. Espionage and Immunity

It is in this legal framework that the problem of espionage must be viewed. All modern States have laws proscribing espionage; in the United States it is prohibited by Title 18 U.S.C. section 793,<sup>45</sup> which protects only information pertaining to national defense, as such classified documents are normally the exclusive goal of the collector. To ensure maximum protection, both the collection and dissemination of classified information by nationals and aliens are prohibited. To deter violators and emphasize the seriousness of the crime, the law provides the death penalty as maximum punishment during wartime and lesser penalties in peacetime.<sup>46</sup>

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<sup>42</sup>*Ibid.*, art. 55, ¶ 2.

<sup>43</sup>*Ibid.*, art. 41, ¶ 1.

<sup>44</sup>*Ibid.*, art. 55.

<sup>45</sup>18 U.S.C. § 793 (1970).

<sup>46</sup>The Soviet statute on espionage provides the same maximum punishment, in Law on Criminal Responsibility for State Crimes, art. 2:

The giving away, theft or collection with the intention of conveying to a foreign Power, a foreign organization, or their agents, of information constituting a State or military secret, as well as the giving away or collection on the institutions of foreign intelligence agencies of other information to be used against the interests of the U.S.S.R., if the espionage is committed by a foreigner or by a stateless person—is punishable by deprivation of liberty for a period of from seven to fifteen years with confiscation of property, or by death and confiscation of property.

See generally, Banks, *Espionage: The American Judicial Response. An In-Depth Analysis of the Espionage Laws and Related Statutes*, 21 AM. U.L. REV. 329, 339 (1972).

When a State's counterespionage branch discovers an espionage operation<sup>47</sup> involving diplomatic personnel of the sending State,<sup>48</sup> the investigative stage will be prolonged so as to identify an optimum number of intelligence collectors. When the participants are arrested, the protection of diplomatic immunity immediately is sought by the sending State. At the criminal trial, any participating nationals of the injured host State will be charged with espionage<sup>49</sup> or conspiracy to commit espionage.<sup>50</sup> The other co-conspirators, citizens of the sending State, are cloaked with immunity and can be named only as co-conspirators,<sup>51</sup> not as defendants.<sup>52</sup> Having successfully invoked immunity, the foreign agents will be declared *persona non grata* and returned to the sending State. The trial will proceed against the remaining defendants with resultant convictions of death,<sup>53</sup> life imprisonment,<sup>54</sup> or lesser sentences up to forty years.<sup>55</sup>

### III. Conflict and Abuse of Privileges and Immunities

Diplomatic and consular personnel remain immune from prosecution for espionage because of their privileged status, a protection which encourages the illegal act. If the receiving State is to remedy the situation, it first must be warranted in revoking the privileges and immunities. Under existing international law, the receiving State sufficiently must demonstrate that the diplomatic collectors have abused their status. Such a showing could create a conflict with domestic statutes and would be in itself a breach of treaty law.

When one compares the United States domestic immunity statutes in the instance of espionage, a conflict emerges. Immunity is offered so that the sending State can perform its functions and the privilege will prevail so long as the acts performed are within the official functions. When the diplomat engages in espionage, the reasons for and the results of the protective statutes become contradictory.

Title 2 U.S.C. section 252 was enacted so that the sending State's diplomatic effort would not be interfered with. When the sending State has incorporated espionage as a function of its diplomacy, the purpose of the statute and its

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<sup>47</sup>Butenko, *supra* note 12 at 557-61.

<sup>48</sup>*Supra*, note 45 § 794; Boeckenhaupt v. United States, 392 F.2d 24 (2d Cir.), *cert. denied*, 393 U.S. 896 (1968); Drummond, *supra* note 10 at 132.

<sup>49</sup>*Supra* note 45.

<sup>50</sup>*Loc. cit.*

<sup>51</sup>Butenko, *supra* note 12 at 557.

<sup>52</sup>*Loc. cit.*

<sup>53</sup>Rosenberg v. United States, 364 U.S. 273 (1953).

<sup>54</sup>Drummond, *supra* note 10 at 132.

<sup>55</sup>Boeckenhaupt, *supra*, note 48 at 24. West Germany sentenced an agent to thirteen years, which was the most severe sentence in West German espionage history. San Diego Union, Dec. 16, 1975, at A-2, col. 1.

resultant immunity ceases. If clandestine collection is one of the sending State's objectives, the United States is justified in interfering with and terminating the illegal function. When the United States declares the diplomat *persona non grata*, it acknowledges immunity—a sign that the sending State may continue its acts of espionage. In so doing, is the United States enforcing a statute which is in furtherance of an illegal function?

Secondly, as promulgated by Title 22 U.S.C. section 288, immunity for representatives to international organizations prevails if the act is within the function of the organization. Thus, before immunity can be granted under this section, the sending State must show that the official accused of espionage was performing an official function. Does it follow that when immunity is granted for an act of espionage, the United States—or any other nation—admits that espionage is an official function? Yet the Espionage Law (Title 18 U.S.C. section 793) specifies espionage as a crime which cannot be an official function of any mission or member of a mission to the United Nations.<sup>56</sup>

As repeatedly emphasized in this paper, the purpose of diplomatic immunity is to ensure efficient performance of the functions of the sending State's mission.<sup>57</sup> When a diplomatic officer commits espionage and then utilizes the omnipresent shield of criminal immunity, the sending State, by invoking immunity for the act, is postulating that the act falls within the scope of those activities protected by the diplomatic status, i.e., that it is a proper function. Such a position may be the unannounced intent of the sending State, but it can hardly be shared by the injured State whose national security has been damaged and whose classified information has been compromised. If espionage is not a proper and recognized function of the mission in the host country, the sending State deliberately has violated its treaty terms. Such a violation would not have occurred had not the sending State abused its privileges and immunities.

Another treaty requirement is that the mission will not be misused.<sup>58</sup> When a diplomatic officer is assigned to conduct espionage out of the mission in the receiving State, he is assigned to perform his activities from the mission. As he is utilizing the cover<sup>59</sup> of the mission to engage in espionage, he reports to the

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<sup>56</sup>Fitzpatrick, *supra* note 4.

<sup>57</sup>*Loc. cit.*

<sup>58</sup>*Supra* note 39.

<sup>59</sup>Cover for Status: "Cover" is best described as a fabricated shell under which the operative is placed. Its purpose is to conceal his true mission (espionage) by giving him a protective guise in the form of an already existing organization (the diplomatic mission). Such a procedure is termed "shallow cover." Deep cover is more suited for long-range, high level collection missions. In this instance, the shell is constructed specifically to conform to a certain situation. For example, Rudolph Abel, a colonel in Soviet intelligence, was arrested in 1957 after posing nine years as a photographer in New York. A more sophisticated example was West German Chancellor Willy Brandt's personal secretary, Guenther Guillaume, who was exposed after being infiltrated in the early fifties. Los Angeles Times, Dec. 16, 1975.

Cover for Action: This is the cover story arranged to provide the collector with a plausible

mission daily, utilizing its office space and staff.<sup>60</sup> Within this protective structure he plans and conducts the collection operation, retreats to the mission when he has obtained the desired information and uses the security of the mission for storage of the classified information. The intelligence product will remain in this inviolable enclave until it can be relayed to the sending State where the information will be analyzed and utilized. In communicating the information, the diplomatic operative will either use existing communication facilities within the mission or take advantage of the diplomatic pouch as a vehicle to courier the information out of the receiving State. Collectively, such utilization of the premises is incompatible with the function of the mission and the sending State has abused and violated its treaty provisions.<sup>61</sup>

As pertains to the treaty requirement that the sending State will obey the laws and regulations of the receiving State,<sup>62</sup> it is evident that conducting espionage operations may be construed as a violation of this duty. When a diplomat commits espionage, the liability for the breach of that duty is nonexistent in terms of criminal punishment. Since the diplomat is clothed with absolute criminal immunity, he is not inhibited from violating the duty. While the diplomat is authorized to collect information by lawful means, espionage clearly is not within this category. We are, of course in the presence of a treaty violation by the diplomatic officer, under the express direction and approval of the sending State.

Although domestic law and treaties provide for privileges and immunities in furtherance of diplomatic functions, espionage is not a fundamental purpose of the community. And while espionage may in reality be a concomitant of diplomacy, one cannot analogize that such a practice *de facto* makes it acceptable. When the receiving State consents to host a foreign diplomatic and consular community, it is not agreeing that espionage becomes an acceptable objective. If the receiving State does not consent to a proposition which is adverse and injurious, it is justified in modifying its position as relates to domestic and treaty law.

#### IV. Suggested Solution

Immunity from prosecution for espionage is an instance of the futility of domestic penalties inasmuch as any sanction is defeated by the privileges and

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reason for being where he is at the exact moment of collecting or passing the information, that is when he has "his hand in the safe." Subsequent to the collection or "pass," he reverts back to his cover for status. Cf. Butenko at 562 for the defendant's "cover for status."

<sup>60</sup>Newsweek, Nov. 17, 1975, at 49.

<sup>61</sup>The receiving State assists in this abuse as it is required to provide facilities in which espionage is conducted as the Diplomatic Convention, art. 24 maintains, "The receiving State shall accord full facilities for performance of the functions of the mission."

<sup>62</sup>*Supra*, note 43.

immunities provisions. A serious violation of domestic law has occurred, yet the sole remedy is one of protocol. Such deterrence is ineffective, as it temporarily neutralizes the espionage operation, but it does nothing to eliminate the source of the problem which allows espionage to continue. Therefore any reevaluation of the receiving State's domestic procedure must effectively restrict the diplomat's license to commit espionage, if that is possible.

Such an approach would involve a change in existing laws to deny immunity in cases where members of the diplomatic and consular community have abused their privileges and immunities by conducting espionage. The amendment should clearly posit that espionage is not a proper diplomatic function. This kind of revision in United States domestic procedure would curtail the diplomat's license to commit espionage, thereby enhancing the capability of the United States to safeguard its national defense information. Admittedly, the proposition requires a delicate balancing of which interests are more important to the United States—national security or a continuance of immunity for an act which is extraneous to the legal function of the diplomatic community.

A second basis of justification is that under the Vienna Diplomatic Convention, an exception has been specifically engrafted upon the civil immunity of diplomatic officers between the absolute criminal immunity and the numerous civil exceptions to immunity.<sup>63</sup> When considered collectively, the civil exceptions pertain to private commercial acts which are determined to be outside the officer's official functions. Since immunity has been reduced in the civil area, the precedent has been set for an exception to criminal immunity. Such an exemption to immunity would act as at least some deterrent to commit espionage, and persuade the diplomatic and consular community of the sending State to remain within the diplomatic functions as acknowledged by the receiving State.

Should a member of the diplomatic community nonetheless persist in and be arrested for committing espionage, he would be subject to the sanctions of the United States espionage law — Title 18 U.S.C. section 793. Within this law an additional distinction would be imperative as pertains to diplomats. The diplomatic and consular community should continue to be permitted to collect information by overt means.<sup>64</sup> The normal avenues of acknowledged collec-

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<sup>63</sup>Diplomatic Convention, *supra* note 6 at art. 31, ¶ (1): "He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of. . . ." The Convention further proclaims that there is no immunity for issues relating to real property (art. 31(1)(a)), Executor proceedings (art. 31(1)(b)), professional or commercial activity which is outside the scope of official functions (art. 31(1)(c)), and personal profit (art. 42). The Consular Convention grants immunity from jurisdiction (art. 43, ¶ 1) but excludes civil actions (art. 43, ¶ 2) in contracts (art. 43(2)), vehicle, vessel or aircraft accidents (art. 43(2)), or private gainful employment (art. 46(2) and art. 57).

<sup>64</sup>The Soviet espionage law prohibits any information to be used against the interest of the U.S.S.R.

tion are monitoring and collating information from public communications media,<sup>65</sup> including newspapers, trade journals, magazines, radio, TV and from non-recruited sources as encountered in the course of official and social pursuits, such as foreign diplomats assigned to the Capitol.<sup>66</sup> What would be expected to is the area of covert collection or clandestine operations. This would restrict the diplomat should he personally attempt to gather defense information or contract with a citizen who has access<sup>67</sup> to the information.<sup>68</sup>

Unilateral revision of domestic United States' laws is one pragmatic solution to the abuse of immunities. As subsequent domestic legislation superseded preexisting treaty law, such action would be recognized, within the United States as a legally enforceable mandate. On the other hand, the preferred approach would be at the multipartite conference level to obtain a treaty consensus which would formalize the prohibition on a recurrent abuse. Convening a conference<sup>69</sup> specifically tailored to the issue of espionage and the current immunity enjoyed could result in amendment and modification<sup>70</sup> of existing treaties in force.<sup>71</sup>

Another possible remedy might be through the use of unilateral reservations<sup>72</sup> to any future treaties which may be germane to the matter of diplomatic and consular immunity.<sup>73</sup> Treaty enforcement through adjudication could provide an appropriate international solution. Were a receiving State to believe

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<sup>65</sup>The Soviets maintain that economic information collected from newspapers is classified as espionage. See, Lay, Comment, *The United States-Soviet Consular Convention*, 59 AM. J. INT'L L. 876, 880 (1965).

<sup>66</sup>San Diego Union, Oct. 5, 1975, at A-2, col. 2.

<sup>67</sup>On September 23, 1975, an American citizen was charged with failing to report the copying of national defense documents which he transmitted to an agent of the Soviet Union. His placement was as a government mathematician who had access to top secret national defense information. San Diego Union, Sept. 24, 1975 at A-2, col. 1.

<sup>68</sup>The academic distinction between overt and covert collection is difficult, but when translated in terms of what acts the collector has taken, the delimiting line between the modes of collection becomes readily discernible as to its legality. See McDougal, Laswell & Reisman, *The Intelligence Function and World Public Order*, 46 TEMPLE L.Q. 364, 394 (1973).

<sup>69</sup>Convening an assembly would be an unprecedented move in a field which traditionally has not been a subject of international discussion.

<sup>70</sup>Vienna Convention on the Law of Treaties, art. 39, opened for signature May 23, 1969, by the United Nations Conference on the Law of Treaties, U.N. DOC. A/CONF. 38/27 at 389 (1971): The general rule is that a treaty may be amended by agreement between the parties. If a State were to request amendment of multinational treaties as between all parties, such a proposal would need to be advanced to all the signatories to insure that the parties could negotiate the proposed change. A party already a member, which did not agree to the amendment, naturally would not be bound by the change.

<sup>71</sup>On December 17, 1974, the United Nations General Assembly voted to establish a thirty-two nation working group to review the United Nations Charter. The purpose was to study suggestions for amendments which would better accommodate changing world conditions. This framework presents a vehicle ideally suited for introducing the issues of privileges and immunities as they relate to espionage. See INTERNATIONAL LAW PERSPECTIVE, vol. 1, No. 1, Jan. 1975.

<sup>72</sup>Law of Treaties, *supra*, note 70 at art. 21(d), which defines reservations to treaties.

<sup>73</sup>*Ibid.*, art. 20(2).

that a signatory party was not observing the privileges and immunity provisions by engaging in espionage, such an injured State could pursue its course of action in the international forum. The premise is naturally that the sending State has violated the terms by not acting in good faith.<sup>74</sup> Again, the most optimistic view would be adjudication by the International Court of Justice as the judicial arm of the United Nations.<sup>75</sup> Other bilateral methods of litigation, such as arbitration, are alternative remedies.<sup>76</sup>

## V. Effect of Denying Immunity

Since a State legally is entitled to abolish immunity for espionage, it is a prerequisite that such a move be to its advantage. The national security posture of the State is directly linked to the security of its national defense information.<sup>77</sup> By abolishing immunity for espionage in the receiving State, the State may effectively thwart espionage by foreign diplomatic officials, but reciprocally it relinquishes one of its modes of intelligence collection.

The United States is in a favorable position to abolish immunity for espionage. Since successful espionage operations are sophisticated, difficult and costly, the sending State's diplomatic community provides an ideal vehicle. By making immunity unavailable to the sending State, the United States closes this widely used avenue of clandestine collection.

Secondly, the United States has directed its primary collection effort against the Communist Bloc. The social structure in which the United States diplomatic community operates is basically a closed society in that the conduct, freedom of movement, exposure and free intercourse with the local populace are inherently restricted<sup>78</sup> by the host nation.<sup>79</sup> In contrast, Com-

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<sup>74</sup>*Ibid.*, art. 26: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

<sup>75</sup>Although the International Court of Justice has not been confronted with the specific issue of espionage, one realistically cannot discount its future possibility. The Soviets attempted to have the Gary Powers U-2 incident presented before the court but for reasons other than espionage. A major difficulty here is from the traditional State reaction to a charge of espionage—non-acknowledgement or plausible denial. When the injured State exposes the clandestine effort, the sending State simply does not respond by retreating into total silence. Naturally a State would be admitting responsibility were it to agree to any method of adjudication; therefore the ICJ has never been a forum. The United States did acknowledge the U-2 incident but not the espionage aspect. See generally Wright, *Legal Aspects of the U-2 Incident*, 54 AM. J. INT'L L. 836 (1960).

<sup>76</sup>Arbitration is considered by some to be the best method for treaty interpretations. Busby, *Arbitrating Pollution Disputes*, 5 CALIF. W. INT'L L.J. 350, 362 (1975).

<sup>77</sup>Senator Goldwater maintained that nine Senate offices have been infiltrated by Soviet agents. Los Angeles Times, Oct. 2, 1975, at A-19, col. 1.

<sup>78</sup>J. SCHECTER, *AN AMERICAN FAMILY IN MOSCOW* (1975).

<sup>79</sup>Surveillance is omnipresent and the opportunity for conducting a lucrative intelligence operation is minimized. The intelligence product derived from utilization of the diplomatic community is less beneficial than other means of collection employed by the United States. Therefore, the United States can easily divorce espionage from diplomacy.

munist Bloc nations' diplomatic personnel assigned within the United States are exposed to an open society. By comparison, their degree of access to the populace is quite unrestricted.<sup>80</sup> With such free access within the United States, foreign diplomatic and consular personnel derive a more lucrative intelligence product when compared with the United States diplomatic collection effort abroad. This advantage could be critical.

Since the United Nations is located within the United States and access to the Headquarters to all personnel having legitimate business with the organization is required,<sup>81</sup> it is to the United States' benefit to exercise more control over the multitude of foreign representatives. A large number of United Nations' personnel have been involved in clandestine collection operations,<sup>82</sup> and the United States is entitled to protect itself against the admission of persons likely to engage in activities subversive of its national interests and internal security.<sup>83</sup>

A final observation in favor of the United States adopting an exception to the immunity rule is the *modus operandi* of espionage itself. By imposing an additional barrier to the sending State's clandestine collection effort, the collector is forced to operate under more restraints. Consequently it becomes more difficult for the State to implement its program. More preparation<sup>84</sup> is necessary, precaution,<sup>85</sup> security and counter-surveillance<sup>86</sup> must be refined, additional personnel<sup>87</sup> must be assigned to the effort<sup>88</sup> and technical support must be provided.<sup>89</sup>

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<sup>80</sup>The possibility can not be excluded that the KGB has infiltrated the halls of the U.S. Congress. TASS, the official Soviet news agency, is also allowed to assign its correspondents to Capitol Hill. San Diego Union, Oct. 5, 1975, at 1, col. 2.

<sup>81</sup>Fitzpatrick, *supra* note 4, at 425.

<sup>82</sup>United States v. Melekh, 190 F. Supp. 67 (D.C.N.Y. 1960); United States v. Drummond, 354 F.2d 132, 139 (2d Cir. 1965); United States v. Butenko, 384 F.2d 554, 564 (3d Cir. 1967). With reference to the United Nations and the Soviet personnel assigned there, former CIA Director Allen Dulles wondered, ". . . whether the Soviets are not using the UN for the schooling of their intelligence officers." THE CRAFT OF INTELLIGENCE 103 (1963).

<sup>83</sup>Fitzpatrick, *supra* note 4, at 425.

<sup>84</sup>Butenko, *supra* note 12 at 561.

<sup>85</sup>*Ibid.*, at 560.

<sup>86</sup>*Ibid.*, at 554, 558.

<sup>87</sup>In the personnel field, spotters are necessary to screen, isolate and identify prospective leads who may have placement and access to intelligence targets. A recruiting team is required to make initial contact with leads in an attempt to recruit their services. When the lead has been successfully recruited, primary and secondary case officers are assigned to the daily mechanics of handling and controlling the newly acquired source. If instruction in the use of sophisticated equipment or techniques is necessary, trainers must be provided. And finally supervisors over the various operations must be infiltrated into the United States.

<sup>88</sup>To support the espionage operation, the team must establish accommodation addresses to which the operative can communicate prearranged messages with his case officers. When the agent or his case officer needs to transfer information or materials and personal meetings are unwise, deaddrops or places of concealment must be located and tested. Safe houses must be arranged and cover organizations which appear as legitimate enterprises must be created and staffed.

<sup>89</sup>Technical support such as photography (Drummond at 139, Butenko at 561), microfilm and

Today, all the collection requirements conveniently are contained within the capability of the sending State's diplomatic and consular community. By removing this immunity from diplomacy and forcing the operative to work independent of the diplomatic community, the sending State's entire intelligence collection cycle is slowed down. The diplomatic clandestine effort will be forced into another mode of collection, that of the traditional espionage agent not shielded with immunity. Working outside the realm of immunity and without the convenient support that the diplomatic mission provides, the collector will be burdened by the United States' counterespionage effort and will be confronted with a new deterrence—the threat of imprisonment if exposed and convicted.

## **VI. Conclusion**

When the sending State commits espionage, it is conducting an activity which the United States does not recognize as a proper function of diplomacy and therefore should not be protected. Such abuse of privileges and immunities is in conflict with treaty provisions as well as domestic immunity statutes, and is detrimental to national security. Accordingly, the United States would seem to be warranted in abolishing immunity for the criminal act by initiating remedial measures. By excising privileges and immunities for espionage, the United States would be adopting an effective sanction against the sending State by subjecting its diplomats to criminal penalties. Such unilateral domestic action would revoke the exclusive diplomatic license for espionage, force the diplomatic and consular community out of clandestine collection and restore diplomacy to the role for which it was intended.

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microdot capability (Rhodes at 338), flash and water dissoluble papers (Drummond at 139), electronic and concealment devices (Drummond at 139, Butenko at 561) all must be provided. A sophisticated communications link (Drummond at 141) must be established along with a courier system.

