

1988

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### Recommended Citation

Witiw, Eric Paul (1988) "PERSONA NON GRATA: EXPELLING DIPLOMATS WHO ABUSE THEIR PRIVILEGES," *NYLS Journal of International and Comparative Law*. Vol. 9 : No. 2 , Article 8.  
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# PERSONA NON GRATA: EXPELLING DIPLOMATS WHO ABUSE THEIR PRIVILEGES

## I. INTRODUCTION

*Persona non grata* is an efficient and effective means of curbing the potential abuse of diplomatic immunity. The United States State Department, in March 1986, used this means to expel twenty-five Soviet diplomats suspected of espionage.<sup>1</sup> Although criticized by the Soviets and the United Nations, an expulsion of this kind is in accordance with the applicable United Nations treaties and international law. There are three justifications for this action: one, diplomats can be expelled if they violate United Nations agreements, namely the Headquarters Agreement,<sup>2</sup> the United Nations Charter,<sup>3</sup> and the General Convention;<sup>4</sup> two, under international law, a receiving state may, for national security reasons, limit a foreign mission's size;<sup>5</sup> and three, a sovereign state possesses the fundamental right of self-defense which may be exercised by expelling foreign intelligence agents.

## II. DIPLOMATIC IMMUNITY

The roots of diplomatic immunity can be traced back two thousand years to ancient China, India and Egypt.<sup>6</sup> The modern embodiment of the law of diplomatic immunity is the Vienna Convention on

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1. Engelberg, *Expelled Russians are Termed Spies*, N.Y. Times, Sept. 19, 1986, at A1, col. 5 [hereinafter *Spies*]. Valery I. Savchenko, head of the KGB in New York City, and Vladislav B. Skvortsov, head of the G.R.U., the Soviet military intelligence agency, were among the twenty-five people expelled. Engelberg, *Aid to UN Chief Called Soviet Spy in Senate Report*, N.Y. Times, Oct. 8, 1986, at A1, col. 3 [hereinafter *UN Chief*].

2. Agreement between the United Nations and the United States of America Regarding the Headquarters of the United Nations, June 26, 1947, United States-United Nations, 61 Stat. 3416, T.I.A.S. No. 1676 [hereinafter *Headquarters Agreement*].

3. U.N. CHARTER.

4. Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, T.I.A.S. No. 6900, 1 U.N.T.S. 15 [hereinafter *General Convention*].

5. The Vienna Convention on Diplomatic Relations, *opened for signature* Apr. 18, 1961, art. 11, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 [hereinafter *Vienna Convention*]; see *infra* text accompanying note 65.

6. United States v. Enger, 472 F. Supp. 490, 504 (D.N.J. 1978); see also *Trost v. Tompkins*, 44 A.2d 226, 230 (D.C. Mun. Ct. App. 1945) where Judge Richardson noted that for centuries representatives engaged in diplomatic functions have been entitled to safe conduct to and from their countries.

Diplomatic Relations.<sup>7</sup> The Vienna Convention codifies the customary law of diplomatic relations, which includes the law of diplomatic immunity.<sup>8</sup> The United States ultimately ratified the Vienna Convention and, as codified, it represents the sole United States law on diplomatic immunity.<sup>9</sup>

Two privileges delineate diplomatic immunity: the inviolability of the diplomatic agent, and his immunity from jurisdiction.<sup>10</sup> Inviolability is one of the most ancient manifestations of international law, and it protects the person of the ambassador, his personnel, his dwelling and his documents.<sup>11</sup> Immunity from jurisdiction flows from the inviolability and gives the ambassador immunity from civil and criminal jurisdiction in the state in which he functions.<sup>12</sup> Together, these two privileges ensure a diplomat's independence from the receiving state and permit him to effectively perform his duties.<sup>13</sup> Such duties include transacting business between the sending state and the host state, maintaining relations and providing a vehicle for governments to engage in intercourse.<sup>14</sup>

Generally, diplomatic immunity is considered absolute and all-encompassing. It recognizes, however, certain necessary and logical restrictions.<sup>15</sup> One restriction obligates the diplomat to respect the host state's internal security. Because sovereigns exchange representatives out of consideration, friendship and regard for one another,<sup>16</sup> an implied understanding mandates that each state treat foreign diplomats

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7. *Enger*, 472 F. Supp. at 505.

8. *Id.* "The person of a diplomatic agent shall be inviolable. He shall not be liable to anyone for arrest or detention . . ." Vienna Convention, *supra* note 5, art. 29. Article 31(1) states: "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state . . ." *Id.* art. 31(1). The Vienna Convention is codified at 22 U.S.C. § 254b (1982 & Supp. 1987). For an example of another statute providing immunity to international organizations, see 22 U.S.C. § 288a (1982). For a discussion of various immunities defenses, see Note, *A Comparison and Analysis of Immunities Defenses Raised by Soviet Nationals Indicted Under United States Espionage Laws*, 2 BROOKLYN J. INT'L L. 259 (1980).

9. 22 U.S.C. § 254 (1982 & Supp. 1987).

10. See *Rose v. The King*, [1947] 3 D.L.R. 618, which outlines fundamental principles of international law.

11. See *id.* at 641-42.

12. *Id.*

13. See *id.* at 642; see also Note, *supra* note 8, at 272. "Immunity . . . was granted on the grounds that the diplomatic agent must be able to perform his duties without undue hinderance [sic], and that extension of such immunity fosters good will among States." *Id.*

14. 3 D.L.R. at 641-43.

15. See *id.* at 643.

16. *Id.*

as it would treat its own. The foreign diplomat, in return, will do nothing to endanger the receiving state's safety.<sup>17</sup> Despite this understanding, a diplomat's breach of his obligation to the host state does not subject him to that state's judicial power.<sup>18</sup> Thus, the second immunity restriction may be invoked: the receiving state may declare the offending diplomat *persona non grata*<sup>19</sup> and demand that he be recalled by the sending state.<sup>20</sup> This Note analyzes the bases for declaring an indi-

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17. *Id.*; see also Note, *supra* note 8, at 263. The "inviolability of the diplomatic agent is grounded in three factors: 1. the diplomatic agent is the personal representative of a sovereign; 2. the importance of the envoy's mission; and 3. the comity of nations." *Id.* at 263 n.21 (quoting G. SCHWARTZENBERGER & E. BROWN, A MANUAL OF INTERNATIONAL LAW 558 (6th ed. 1976)). International law, pertaining to diplomatic relations, is based on comity and political expediency. *Id.* at 264. Ironically, retribution, the alter ego of comity, has at least on one occasion provided the rationale for protecting purported members of a state's diplomatic delegation. See Goldberg, *Diplomatic Immunity and Terrorism*, 1985 NEW ZEALAND L.J. 151, pointing out that the reason the British government allowed Libyan terrorists to leave the Libyan Embassy in London after shooting a police constable was that the government was concerned about the safety of the British Mission in Libya.

18. See *Rose v. The King*, [1947] 3 D.L.R. 618, 643. Consider, too, the statement of Montel Ogden that the purpose of diplomatic immunity is to enable one to efficiently represent the sovereign. "It is not to enable [him] to fulfill tasks outside of diplomatic activities." *Trost v. Tompkins*, 44 A.2d 226, 231 (D.C. Mun. Ct. App. 1945); see also Note, *supra* note 8, at 275-80 (discussing functional immunity under the laws of the United States).

19. Article 9 of the Vienna Convention, *supra* note 5, sets out the doctrine of *persona non grata*. See *infra* note 59 and accompanying text; see also 44 A.2d at 226; 3 D.L.R. at 618.

20. Declaring an individual *persona non grata* is an executive function. The American judiciary, however, is loath to allow an individual to escape punishment in espionage cases. *United States v. Enger*, 472 F. Supp. 490 (D.N.J. 1978), illustrates the American judiciary's unwillingness to grant immunity in espionage cases. The court rejected the defendant's immunity claim on three different grounds: First, the defendants did not have diplomatic status in the eyes of the United States; second, the defendants could not claim immunity under the International Organization Statute because espionage was not one of the functions performed in their official capacity; and third, immunity from general principles of international law could not be invoked. This third rejection is significant in that the court recognized the Vienna Convention on Diplomatic Relations as a codification of the customary law of diplomatic relations. The court held that:

An examination of the pertinent articles of the Vienna Convention, which I find to be declaratory of the customary international law, reveals no basis for cloaking the defendants with the protective blanket of diplomatic immunity. . . . [The defendants are not] by any standard, either codified or customary, within the class of persons traditionally entitled to the benefits of immunity from prosecution.

*Id.* at 506 (footnote omitted). In *United States v. Kostadinov*, 734 F.2d 905 (2d Cir. 1984), the court denied an immunity claim by a Bulgarian employee of the Bulgarian

vidual *persona non grata* under codified international law, and focuses on espionage and the March 1986 expulsion of Soviet nationals.

### III. BACKGROUND

Historically, the United States and the Soviet Union have tolerated a certain amount of espionage. Ordinarily, each country merely protests and denies the other's allegations.<sup>21</sup> Nonetheless, when the United States discovers a Soviet intelligence officer within its borders, it customarily declares him *persona non grata* and demands that he leave the country.<sup>22</sup> There are two reasons for this policy: First, a large number of Soviet intelligence officers operate in the United States under diplomatic status which inhibits incarceration;<sup>23</sup> and second, counter-espionage is primarily designed to neutralize foreign espionage before it can do grave harm.<sup>24</sup> The State Department also argues that expulsion is necessary because the threat of long prison terms in the United States will not deter Soviet intelligence personnel since they are not betraying their own country when spying in the United States.<sup>25</sup> Moreover, it makes little difference whether a Soviet intelligence officer is imprisoned, asked to leave the country, or exchanged; so long as the spy networks are neutralized and the sources and chan-

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Ministry of Foreign Trade after he was indicted on espionage charges. The court held that the defendant did not have the requisite diplomatic status entitling him to immunity from prosecution. The court went on to say, however, that even if the defendant were an established mission member, he could still be deprived of immunities under Articles 9 and 11 of the Vienna Convention. See *infra* note 61 and accompanying text. Notwithstanding *Enger* and *Kostadinov*, diplomatic immunity can be invoked successfully. In *United States v. Butenko*, 384 F.2d 554 (3d Cir. 1967), an American was convicted of espionage while his two Soviet co-conspirators were not indicted because of their diplomatic status. This case demonstrates the appeal of the State Department's use of *persona non grata* to prevent espionage before it happens. For another discussion of *Kostadinov* and its handling of Articles 9 and 11, see Comment, *United States v. Kostadinov*, 7 N.Y.L. SCH. J. INT'L & COMP. L. 267 (1986).

21. Note, *Espionage in Transnational Law*, 5 VAND. J. TRANSNAT'L L. 434, 445 (1972). The author notes that international law offers little guidance to a state upon its discovery of espionage. *Id.*; see also Bank, *Espionage: The American Judicial Response, An In Depth Analysis of the Espionage Laws and Related Statutes*, 21 AM. U.L. REV. 329, 365 (1972). Both the United States and the Soviet Union have tacitly agreed to occasionally trade captured agents who do not have diplomatic immunity. *Id.* For a discussion of the trade that occurred in *Butenko*, 384 F.2d at 554, see Bank, *supra*, at 336.

22. Note, *supra* note 21, at 445.

23. Bank, *supra* note 21, at 365; see also *supra* note 20 and accompanying text.

24. Bank, *supra* note 21, at 365.

25. *Id.* The implication is that spies are heroes in their own country and that American antipathy has no effect.

nels of information blocked, national security is protected.<sup>26</sup>

The United States has occasionally expelled individual diplomats

The State Department, in addition to the espionage charges, asserted that the Soviet Mission was too large and thus posed a threat to American national security.<sup>35</sup> The decision to expel the Soviets was based largely on a concern that the Federal Bureau of Investigation (FBI) could not effectively track so many people.<sup>36</sup> A State Department spokesman defending the expulsion stated that limiting the Soviet United Nations Mission to a reasonable size was consistent with the Headquarters Agreement and international law.<sup>37</sup> The chief Soviet delegate to the United Nations responded by saying that "[w]e consider the action by the United States Government as absolutely illegal and running contrary to the agreement between the United Nations and the United States Government. . . ."<sup>38</sup>

Although the Soviets asserted that the United States had no authority to order such a reduction, they arranged for the twenty-five to leave the country.<sup>39</sup> The United Nations also questioned the expulsion's legality,<sup>40</sup> but initiated no formal proceedings to investigate the matter.<sup>41</sup> In retaliation, the Soviets reduced the size of the United States Mission in Moscow by expelling five American diplomats and by

35. Gwertzman, *U.S. Expels 25 Soviet Diplomats; Denies Link with Daniloff Affair*, N.Y. Times, Sept. 18, 1986, at A1, col. 3; Sciolino, *Russians at U.N. to Protest Order*, N.Y. Times, Sept. 18, 1986, at A12, col. 3 [hereinafter *Protest*].

36. Gwertzman, *U.S. Is Hopeful Summit Plans Will Go Ahead*, N.Y. Times, Mar. 9, 1986, at A1, col. 2 [hereinafter *Summit*]. In the Soviet Union, the Government's Committee for State Security, the KGB, similarly keeps track of the movements of American personnel. *Id.*

37. *Id.* at A11, col. 1.

38. Sciolino, *Soviet Not Prepared to Cut Off U.N. Staff, Envoy Says*, N.Y. Times, Sept. 13, 1986, at A4, col. 2; *What the U.N. Rules Say About Expelling Diplomats*, N.Y. Times, Sept. 19, 1986, at A8, col. 1; *Spies*, *supra* note 1, at A1, col. 5.

39. *UN Chief*, *supra* note 1, at A1, col. 3. The State Department said it had decided to name the Soviet Mission members to be expelled because Moscow had not cooperated in reducing the Mission's size voluntarily. Gwertzman, *supra* note 35, at A12, col. 3.

40. Sciolino, *supra* note 38, at A4, col. 2; *What the U.N. Rules Say About Expelling Diplomats*, N.Y. Times, Sept. 19, 1986, at A8, col. 1; *Spies*, *supra* note 1, at A1, col. 5. The General Convention states: "The United Nations shall cooperate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities in this article." General Convention, *supra* note 4, art. V, § 21. Despite this obligation, the United Nations questioned the legality of the expulsion. A United Nations official stated that no country had ever made a formal complaint about Soviet espionage activity. "Unless people wear a sign saying 'I am a K.G.B. spy,' how do you want us to know?" the officer asked. *UN Chief*, *supra* note 1, at A11, col. 1.

41. The Soviets neither asked the Committee to condemn the order nor asked the General Secretary to convene a tribunal to resolve the dispute. *Protest*, *supra* note 35, at A12, col. 5; see *infra* text accompanying note 61.

ordering fifty more to leave the country.<sup>42</sup> Although much of this sparing is no more than superpower politicking,<sup>43</sup> the question remains whether the United States may indeed legally expel diplomats under the United Nations Headquarters Agreement, the United Nations Charter, and international law.

#### IV. AGREEMENTS

The United Nations Headquarters Agreement was executed by the United States and the United Nations in 1947. Its purpose is "to carry out the resolution adopted by the General Assembly to establish the seat of the United Nations in New York City and to regulate questions arising as a result thereof."<sup>44</sup> Although the Headquarters Agreement provides for freedom of transit for United Nations officials, this and other privileges are qualified throughout the Agreement.<sup>45</sup> For example, even though Section 11 states that "[t]he federal, state or local authorities of the United States shall not impose any impediments to transit to or from the headquarters district of (1) representatives of Members or officials of the United Nations . . .," and Section 13(a) requires that visas shall be granted without charge and as promptly as possible, Section 13(b) of the Agreement provides that in cases "of abuse of such privileges of residence by any such person in activities in the United States outside his official capacity . . .,"<sup>46</sup> Section 11 shall not be construed to grant him exemption from the laws and regulations of the United States regarding the continued residence of aliens. . . ."<sup>47</sup>

The United States contends primarily that the expelled Soviet diplomats engaged in activities outside their official United Nations ca-

42. Schemann, *Moscow Expels 5 and Bars U.S. Use of 260 Soviet Aides*, N.Y. Times, Oct. 23, 1986, at A1, col. 6.

43. A White House official said that the decision to expel the twenty-five mission members, and to do it publicly, was related to a desire to appear tough and to show that the United States was ready to effectuate retaliatory measures until Mr. Daniloff, an American journalist accused of spying, was given safe passage home. Gwertzman, *supra* note 35, at 1, col. 3; see Schemann, *supra* note 42, at A12, col. 6.

44. See Headquarters Agreement, *supra* note 2, preamble. The resolution was adopted by the General Assembly during the second part of the first session from Oct. 15 to Dec. 15, 1946.

45. *Id.*; see *id.* § 13(b), 13(b)(1) & 13(b)(3). The Headquarters Agreement requires that the United States ensure the tranquility of the headquarters district, and implies a duty to safeguard against disruption by those engaging in espionage. Headquarters Agreement, *supra* note 2, art. VI, § 16(a).

46. See *United States v. Enger*, 472 F. Supp. 490, 502 (D.N.J. 1978), stating that espionage, the crime with which the defendants are charged, is not one of the functions performed in the defendants' official capacity. *Id.* at 502.

47. Headquarters Agreement, *supra* note 2, art. IV, § 13(b).

capacity, namely espionage. To use this as justification for expelling the Soviets, however, the State Department must adhere to proper expulsion procedures. Section 13(b)(3) of the Headquarters Agreement states that persons entitled to privileges and immunities under Section 15, or under the General Convention, shall not be required to leave the United States other than in accordance with the customary procedure applicable to diplomatic envoys accredited to the United States.<sup>48</sup> This procedural requirement will be more fully discussed below.

Similarly, the General Convention on Privileges and Immunities of the United Nations, which supplements the Headquarters Agreement,<sup>49</sup> provides that a United Nations member be accorded privileges and immunities *only* to safeguard the independent exercise of his functions *in connection with* the United Nations.<sup>50</sup> Article 105(2) of the United Nations Charter states that representatives of the members and officials of the United Nations similarly shall enjoy such immunities as are necessary for the independent exercise of their functions *in connection with* the organization.<sup>51</sup>

The provisions of these documents provide the flexibility necessary to protect the receiving state from the wolf in sheep's clothing. Privileges like those provided by Sections 11 and 13(c) of the Headquarters Agreement do not apply when a United Nations member acts outside his official capacity. The immunity extended to diplomats to safeguard their functions in connection with the organization specified in the General Convention and the United Nations Charter is also consistent with the receiving state's right to expel those who possess diplomatic status.<sup>52</sup> Therefore, notwithstanding the privileges, immunities

48. *Id.* § 13(b)(3). Section 15 of the Headquarters Agreement defines resident representative and lists four different categories of individuals. For example, Section 15(1) states "[e]very person designated by a Member as the principal resident representative to the United Nations of such Member or as a resident representative with the rank of ambassador or minister plenipotentiary. . . ." *Id.* § 15(1).

49. See *id.* art. I, § 1(c), which makes the General Convention supplemental to the Headquarters Agreement.

50. General Convention, *supra* note 4, art. IV, § 14. "Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations." *Id.*

51. U.N. CHARTER, *supra* note 3, § 105(2). Under the United Nations Charter, both officials of the United Nations and members of representative states shall have the immunity necessary for the fulfillment of functions performed within their official capacities, and shall be accorded functional immunity. See Note, *supra* note 8, at 280.

52. See Note, *supra* note 8, at 280-84, for an analysis comparing functional immunity with absolute immunity; see also cases cited *supra* note 20, which outline the basis of functional immunity under United States statutes. Individuals are not given immunity for acts performed outside their official diplomatic capacity unless they are recognized as

and freedoms granted to foreign diplomats attached to the United Nations, the receiving state may expel diplomats who engage in espionage.<sup>53</sup>

The State Department, by expelling the Soviets, has complied with the Headquarters Agreement and has observed the customary procedure applicable to diplomatic envoys accredited to the United States.<sup>54</sup> The fundamental process governing the law of diplomatic privileges and immunities is the Vienna Convention on Diplomatic Relations, which sets forth the customary procedure applicable to diplomatic envoys accredited to the United States.<sup>55</sup> Article 9 of the Vienna Convention provides:

1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission . . . is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.
2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission.<sup>56</sup>

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diplomats by the State Department under 22 U.S.C. § 254 (1982).

53. The reasoning of *United States ex rel. Casanova v. Fitzpatrick*, 214 F. Supp. 425, 437 (S.D.N.Y. 1963), applies here. To allow a member state to the United Nations to send to the United States members cloaked with immunity "would open the flood gates for the entry of saboteurs, agents provocateur and others. . . ." *Id.* at 437.

54. See Headquarters Agreement, *supra* note 2, art. IV, § 13(b)(2).

55. *United States v. Enger*, 472 F. Supp. 490, 505 (D.N.J. 1978). The fundamental governing process regarding the law of diplomatic privileges and immunities is the Vienna Convention on Diplomatic Relations which "is widely acknowledged as the authoritative statement of immunity applicable to relations among nations." *Id.* at 505 n.15. "Most of the Vienna Convention is binding as customary law even upon nations that have not ratified it, and many of the treaty articles are declaratory of existing international law." *Id.* at 505. The Vienna Convention was ultimately ratified by the United States on Dec. 13, 1972 and codified under 22 U.S.C. § 254 to represent the sole United States law on the subject. *Id.* at 506. The Headquarters Agreement, *supra* note 2, art. V, § 4, refers to corresponding conditions and obligations the United States accords to diplomatic envoys accredited to it. The General Convention, *supra* note 4, art. V, § 19, provides that officials shall be accorded privileges and immunities accorded to diplomatic envoys, in accordance with international law. These provisions therefore provide for the adherence to and inclusion of the Vienna Convention regarding United Nations officials.

56. Vienna Convention, *supra* note 5, art. 9.

The United States notified the Soviets that members of its Mission were *persona non grata*, and therefore adhered to proper expulsion procedure.

Moreover, the Vienna Convention is a codification of international relations and is United States federal law. Besides setting forth the customary procedure, the Convention provides the final legal justification for expelling an offending diplomat. Under Article 9, the receiving state may *at any time and without explanation* declare any diplomat *persona non grata*. This procedure in and of itself constitutes sufficient legal justification for expulsion, and has been so interpreted by the International Court of Justice in the Case Concerning United States Diplomatic and Consular Staff in Iran.<sup>57</sup> In that case, the court rejected the Iranian assertion that it was justified in holding American Embassy personnel hostage because the United States had committed criminal acts in Iran, and the court maintained that even if the alleged criminal activity of the United States in Iran were established, it was unable to accept that the activities constituted a justification for Iran's conduct:

This is because diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions.

The Vienna Conventions of 1961 and 1963 contain express provisions to meet the case when members of an embassy staff, under the cover of diplomatic privileges and immunities, engage in such abuses of their functions as espionage or interference in the international affairs of the receiving State.<sup>58</sup>

The court interpreted the Vienna Convention to mean that the receiving state may, at any time and without having to explain its decision, notify the sending state that any particular member of its mission is *persona non grata* or unacceptable.<sup>59</sup>

## V. REDUCTION

The State Department expulsion order was also designed to reduce the Soviet Mission's size. The State Department argued that the Mission's size jeopardized national security,<sup>60</sup> and asserted that the Soviet Mission was larger than necessary to perform its diplomatic func-

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57. United States Diplomatic and Consular Staff in Teheran Judgment (United States v. Iran), 1980 I.C.J. 3, 38.

58. *Id.*

59. *Id.*

60. *Protest, supra* note 35, at A12, col. 3.

tions.<sup>61</sup> The United Nations legal department, in response, opined that "any disputes over the size of a mission must be resolved through negotiations between both sides; if they fail this issue can be brought before three arbiters."<sup>62</sup> The Americans and the Soviets, however, have never asked the Secretary General to convene a tribunal to resolve the dispute.<sup>63</sup> Moreover, it is unlikely that the Americans desired such a tribunal since the United Nations questioned the expulsion's legality. Additionally, the State Department was confident that the Soviets would comply with the expulsion order.<sup>64</sup> United Nations lawyers, however, have also opined that the receiving state may, based on national security and other considerations, set some size limits on a foreign mission.<sup>65</sup>

The Headquarters Agreement, the General Convention, and the United Nations Charter do not address the size requirement of a United Nations mission.<sup>66</sup> Section 7(b) of the Headquarters Agreement provides that "[e]xcept as otherwise provided in the agreement, or in the General Convention, the federal, state or local law of the United States shall apply within the headquarters district."<sup>67</sup> Article 11 of the Vienna Convention, codified as United States law, provides that

[i]n the absence of specific agreement as to the size of the mission, the receiving State may require that the size of a mission be kept within limits considered by it to be reasonable and normal, having regard to the circumstances and conditions in the receiving State and to the needs of the particular mission.<sup>68</sup>

The principal issue thus is whether the United States' restriction is "reasonable and normal" in light of the surrounding circumstances.

The United States, in March 1986, reported that 275 officials were in the three missions comprising the Soviet delegation.<sup>69</sup> The next largest delegations to the United Nations are the United States Mission,

61. *Spies*, *supra* note 1, at A8, col. 3.

62. *Protest*, *supra* note 35, at A12, col. 4.

63. *Id.* at A12, col. 6.

64. *Id.*

65. *Id.* It appears that the United Nations lawyers based their opinion on Article 11 of the Vienna Convention, *supra* note 5. See *infra* note 66 and accompanying text.

66. After reviewing the appropriate documents, one will find that the size of a mission is not addressed. See *Protest*, *supra* note 35, at A12, col. 4.

67. Headquarters Agreement, *supra* note 2, art. III, § 7(b).

68. Vienna Convention, *supra* note 5, art. 11.

69. There are three missions: the Soviet Mission, and the smaller contingents from the Ukrainian and Byelorussian Republics of the Soviet Union. Under the special arrangements dating from the beginnings of the United Nations, the Soviet Union has been represented by three missions. Gwertzman, *supra* note 35, at A12, col. 4.

with 125 staff members, and the Chinese Mission, with 116.<sup>70</sup> The reduction order, however, does not affect over 400 Soviet citizens who are employed by the United Nations as civil servants.<sup>71</sup> Thus, the United Nations contingent of Soviet nationals is approximately five times the size of the next largest mission. According to American officials, the approximately 700 Soviets with United Nations related jobs pose a great risk to national security.<sup>72</sup> The concern that the FBI could not effectively track such a large number of people weighed heavily in favor of the reduction order.<sup>73</sup> That concern, however, seemed to focus on particular individuals suspected of espionage since the State Department originally pressed for the original twenty-five members' expulsion, and an official stated that if it was found that the total dropped below 218, more could be added later.<sup>74</sup> In light of these circumstances, the twenty-five person reduction order was not an unreasonable or abnormal request. Furthermore, the order was not arbitrary, but was aimed at a potentially dangerous group, and although the list was not made public, the State Department identified specific Soviet members alleged to be spies.

## VI. SELF-DEFENSE

An additional argument that supports the State Department's action is grounded in a sovereign state's fundamental right to protect itself from intrusions by foreign nationals under the veil of diplomacy.<sup>75</sup> International reality makes it inevitable that foreign nations, friend and foe, will attempt to probe American industrial technologies and political intentions.<sup>76</sup> American security authorities estimate that of the hundreds of Soviet officials stationed in the United States, over fifty percent engage in collecting intelligence information or recruiting Americans to collect such information on their behalf.<sup>77</sup>

The reality of international espionage, however, leads to a conflict

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70. *Id.*

71. *Id.* at A12, col. 5.

72. *Summit, supra* note 36, at A1, col. 2.

73. *Id.*

74. *Protest, supra* note 35, at A12, col. 6.

75. M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 60 (1961); see also U.N. CHARTER, *supra* note 3, art. 51, which states "nothing in the Present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs." Although this limits the right of self-defense to a response to an armed attack, espionage presents the same inherent threat to a state's security and provides an equal justification. The means of self-defense, however, must be limited to expulsion pursuant to the Vienna Convention. See *infra* note 82 and accompanying text.

76. *Bank, supra* note 21, at 329.

77. *Id.* at 330.

between two fundamental rights. The diplomat has the right to be free from local jurisdiction and to conduct the business with which he is charged,<sup>78</sup> and the state has the right of self-defense.<sup>79</sup> The diplomatic right, enunciated in the Vienna Convention, is accorded by the receiving state.<sup>80</sup> A state, however, has a right to accord itself a first privilege, that of its own security.<sup>81</sup> To decide otherwise would mean that a right exists superior to the duty a state owes to its own citizens independently of its foreign duties: a duty to assure its own security and to repress crimes against the security of the country.<sup>82</sup> Plato stated two thousand years ago that the indispensable precondition of a happy life is that we commit no sin against ourselves and suffer no wrongs from others.<sup>83</sup> Hobbes professed that the *end* of a sovereign is the defense of all his subjects, and the sovereign has the discretion to do what it thinks necessary to preserve the security of the state by preventing discord at home and hostility from abroad.<sup>84</sup> Contemporary international theorists also recognize the right of self-defense.<sup>85</sup> The exercise of this fundamental right, however, must be limited in intensity and magnitude to what is reasonably necessary.<sup>86</sup> Even with this limitation, the expulsion outlined above passes scrutiny since it was a benign response to a most malevolent threat.

To illustrate the potential danger, this author points to an event which occurred in England. Diplomatic privileges and immunities protected Libyan terrorists who shot a police constable from the windows of the Libyan Embassy in London.<sup>87</sup> The perpetrators were allowed to leave the country, and it is believed that the weapon was smuggled out in a diplomatic bag.<sup>88</sup> This was possible because of their purported dip-

78. *United States v. Enger*, 472 F. Supp. 490, 504 (D.N.J. 1978) (construing *W. BISHOP, INTERNATIONAL LAW* 447 (1953) and *W. HALL, TREATISE ON INTERNATIONAL LAW* 223 (8th ed. 1924)).

79. *M. McDUGAL & F. FELICIANO, supra note 75, at 67.*

80. *See supra note 20 and accompanying text.* The primary weapon used by the judiciary in denying diplomatic immunity claims is that the individual was not properly recognized by the United States.

81. *Rose v. The King*, [1947] 3 D.L.R. 618, 646.

82. *Id.*

83. *PLATO, Laws VIII*, in *COLLECTED DIALOGUES*, 1935 (1982). There is grave difficulty in compassing a power to protect oneself from suffering wrongs. It is only to be fully achieved by training members of society for warfare. *Id.*

84. *HOBBS, Leviathan*, in *23 GREAT BOOKS OF THE WESTERN WORLD* 102 (N. Fuller ed. 1952).

85. *M. McDUGAL & F. FELICIANO, supra note 75, at 217-18.*

86. *See id.* at 220 for a discussion of when self defense is permissible.

87. *Denning on Diplomacy*, N.Y.L.J., June 13, 1984, at 2, col. 3 [hereinafter *Denning*].

88. *Id.*

lomatic status. The British have been much criticized for their handling of the situation, and at least one commentator argued that when diplomats act as terrorists, they are not diplomats at all, and thus cannot benefit from those immunities to which diplomats are entitled.<sup>89</sup> The same argument applies to diplomats engaged in espionage, a crime for which American legislative and judicial systems have exacted some of the harshest peacetime penalties.<sup>90</sup>

These crimes are compounded by the circumstances in which they are perpetrated: under the veil of diplomatic status. Moreover, the diplomat has countervailing duties in response to the privileges accorded him. The Vienna Convention, Article 41(3), states that "[t]he mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by the other rules of general international law. . . ."<sup>91</sup> Harboring spies fails to comport with the mission's function of contributing "to the development of friendly relations among nations."<sup>92</sup>

The American response to this threat, expulsion of the Soviets, did not exceed reasonably necessary measures. The United States perpetrated no inclemency and no diplomat was incarcerated. Even though their diplomatic status was questionable, the alleged spies remained immune from prosecution. The offending diplomats were merely sent home.

Even assuming that the twenty-five expelled Soviets were genuine diplomats, contrary to the argument made against the Libyans, the contention that a diplomatic envoy may do whatever he chooses is unsupported in the law. A precondition to the privileges he enjoys is that he act and behave in a manner that harmonizes with the receiving state's internal order.<sup>93</sup> "A diplomatic envoy cannot make it a point of complaint if injured in consequence of his own unjustifiable behavior, as for instance in attacking an individual who in self-defense retali-

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89. Higgings, *The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience*, 79 AM. J. INT'L L. 641, 649 (1985).

90. Werner, *American Gets Life for Giving Secrets to Israel*, N.Y. Times, Mar. 5, 1987, at A1, col. 2. Jonathon Jay Pollard, who pleaded guilty to spying for Israel, was given a life sentence even though the Justice department did not ask for one. John A. Walker, Jr. was sentenced to life in prison with a recommendation from the judge for no parole. Walker also pleaded guilty; he provided classified Navy documents to the Soviet Union. *Id.*; see also Bank, *supra* note 21, at 331.

91. Vienna Convention, *supra* note 5, art. 41(3).

92. Goldberg, *The Shoot-out at the Libyan Self Styled People's Bureau: A Case of State Supported Terrorism*, 30 S.D.L. REV. 1 (1984).

93. L. OPPENHEIM, *INTERNATIONAL LAW* 458 (2d ed. 1912); *Rose v. The King*, [1947] 3 D.L.R. 643.

ates."<sup>94</sup> If an ambassador attacks a man, the man may lawfully defend himself.<sup>95</sup> Similarly, the receiving state has the fundamental right to protect itself, and expelling spies is a reasonable means of achieving that end.

## VII. CONCLUSION

Diplomatic immunity can and has been successfully pleaded to charges of espionage.<sup>96</sup> Diplomatic immunity from prosecution, however, does not extend to immunity from expulsion. Expulsion is permitted under international law, and under the laws of the United States. To a great extent, expulsion eliminates the need to agonize over the potential abuse of diplomatic status because expulsion is used as a preventive. There is no need to anticipate the immunity defense as there is in a prosecution. *Persona non grata* is therefore superior to prosecution as a means of discouraging espionage since it allows the receiving state to prevent serious damage to its national security, rather than relying on retribution as its sole remedy.

*Eric Paul Witiw*

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94. *Denning, supra* note 87.

95. L. OPPENHEIM, *supra* note 93, at 460.

96. *Denning, supra* note 87.

