Terrorist Kidnapping of Diplomatic Personnel

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Although Senator Joseph McCarthy charged in 1950 that "dilettante diplomats" do their fighting for us "with kid gloves in perfumed drawing rooms," our diplomatic agents have traditionally faced substantial hazards while serving our country abroad. This has been especially true in areas of political instability or upheaval, such as Latin America. Indeed, in the past two years, the issue of providing adequate protection for our diplomats has received considerable attention in the wake of a series of kidnappings of government personnel by urban guerillas. Principally responsible for these abductions have been local extremist groups, who thereby attempt to embarrass and undermine support for their nation's government. While related to aerial hijacking, this new form of political terrorism impairs the orderly conduct of diplomacy among nations and thus threatens international relations. Moreover, these abductions raise the issue of the degree of protection to which a diplomat in this situation is entitled as a matter of international law and the extent to which this obligation may conflict with practical considerations of internal security within the receiving state.

1. N.Y. Times, June 18, 1950, at 4, col. 2.
2. C. Wilson, DIPLOMATIC PRIVILEGES AND IMMUNITIES 51-62 (1967) contains a detailed listing of American diplomatic and consular personnel killed or assaulted abroad from 1946 through 1967.
In general, the duty of a receiving state toward aliens is governed by its municipal laws and is not regarded as an element of international law. Diplomatic agents, on the other hand, by custom "antedating perhaps all other rules of international law," have been accorded special privileges and immunities by the receiving state. The historical basis for these, clearly, was necessity; if any negotiation at all were to take place, the diplomat's security had to be safeguarded, particularly when the prevailing attitude towards foreigners was one of fear and distrust. The Greeks, therefore, regarded the inviolability of diplomatic agents as a fundamental principle; the Romans considered an injury to the person of the ambassador an infraction of the *jus gentium* and invoked religious sanctions as protection for the diplomat.

During the Middle Ages, the custom of diplomatic inviolability was continued, although ambassadors became more the personal messengers of princes than formal representatives of states. As relations between nations continued to grow, permanent diplomatic missions were established,
and custom developed into conventional practice. The Peace of Westphalia in 1648 ended the Hundred Years' War and confirmed the principle of a balance of power between European nations. Thus, states were obliged to keep watch on each other, and to facilitate this task, legations were established on each other's soil. The earliest legislation on diplomatic immunity appeared at this time, but it was merely an attempt to codify customary practice with respect to the inviolability of the diplomat's person. A subsequent British statute, the historic Act of Anne, introduced the concept of jurisdictional immunity from legal process for a diplomat in the host state.

The Industrial Revolution effectively ended the isolation of states and necessitated regular relations between them. It soon became obvious that agreement would have to be reached on universally binding rules concerning the rights due foreign diplomats. At the Congress of Vienna in 1815, an attempt was made "to prevent in the future inconveniences of the authority of the Pope, and this encouraged a similarly high standard of treatment for agents of states."

10. See H. Grotius, supra note 6, at 438-449.

11. In 1651, the Netherlands forbade "offending, damaging, injuring by word, act or manner, the ambassadors, residents, agents or other ministers . . . or [doing] them injury or insult." Harvard Research in International Law, Draft Convention on Diplomatic Privileges and Immunities, 26 AM. J. INT'L. LAW 19, 94 (Supp. 1932) [hereinafter cited as Harvard Draft].

12. Act of Parliament for Preserving the Privileges of Ambassadors and Other Public Ministers of Foreign Princes and States, 7 Anne ch. 12, 1 BRIT. FOR. STATE PAPERS 903 (1708). The Act of 1708 was repealed by the Diplomatic Privileges Act of 1964, whose purpose was to conform United Kingdom law regarding diplomatic privileges and immunities with the Vienna Convention, infra note 26. See 2 D. O'CONNELL, INTERNATIONAL LAW 892-93 (2nd ed. 1970).

Whether or not diplomatic immunity from a state's exercise of its jurisdiction existed at common law prior to the Act of Anne is uncertain and has been much debated by the authorities. For citations to the opposing viewpoints, see C. WILSON, supra note 2, at 27, n. 8. The personal inviolability of the diplomat at common law was clearly recognized. See I L. OPPENHEIM, INTERNATIONAL LAW 789 (6th ed. H. Lauterpacht 1955). However, this has never been specifically enacted into law in Great Britain, apparently on the theory that the usual processes of British criminal law were sufficient to protect him. Lyons, Personal Immunities of Diplomatic Agents, 31 BRIT. Y.B. INT'L. LAW 299, 305 (1954).

13. Though the term "immunity," broadly used, would subsume "inviolability," in the sense that the diplomat is or should be "immune" from physical harm or detention in the receiving state, here the term will be used more restrictively to denote immunity from a state's exercise of its legal jurisdiction.

14. Marked political inequalities, supported by the ambition of governments and the personal vanity of princes, brought about a constant struggle for the enhancement of national prestige by the relative position accorded to the diplomatic representatives of the state . . . . The matter was further complicated by the different functions performed by diplomatic agents.

C. FENWICK, supra note 4, at 556-57.
which have frequently occurred, and which may still occur, from the
claims of precedence among the different diplomatic characters" by
dividing them into three classes and establishing an order of precedence
within each class based on seniority. Although the Vienna Regulation,
as it came to be known, was signed by only eight European powers, it
became universal practice.

The next major effort to codify the rights and privileges of diplomatic
officers was made in 1928 at the Sixth International Conference of
American States, held in Havana, Cuba. The resulting agreement, while
limited to the American republics, was broader than the Vienna
Regulation of a century before, but still failed to completely state the
privileges and immunities of all members of the mission or the rights
and duties of the sending and receiving states.

At its first meeting in 1949, the International Law Commission pro-
visionally selected fourteen topics as suitable for codification, one of
which was "diplomatic intercourse and immunities." The General
Assembly, by resolution, thereafter requested the Commission to give
priority to this topic, and in 1954, the Commission decided to begin

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15. Id. at 557.
16. The three classes were: 1) ambassadors, who alone could represent their
sovereign; 2) ministers, who were accredited to sovereigns; and 3) chargés d'affaires,
who were accredited to ministers for foreign affairs. At the Congress of Aix-la-Chapelle,
in 1818, another class of ministers, also accredited to sovereigns but of lower rank,
was created—this class intended for the representatives of smaller states. Id.
17. REPORT OF THE UNITED STATES DELEGATION TO THE UNITED NATIONS CONFER-
ENCE ON DIPLOMATIC INTERCOURSE AND IMMUNITIES, 2 MARCH—14 APRIL, 1961 at 2
(1962) [hereinafter cited as U.S. Report].
18. Convention Regarding Diplomatic Officers, adopted by the Sixth International
259 [hereinafter cited as Havana Convention].
19. The Havana Convention provided:

\begin{verbatim}
Article 2.
Diplomatic officers are classed as ordinary and extraordinary.
Those who permanently represent the Government of one State before that
of another [are ordinary].
Those entrusted with a special mission or those who are accredited to
represent the Government in international conferences and congresses or
other international bodies are extraordinary.
Article 9.
Extraordinary diplomatic officers enjoy the same prerogatives and im-
munities as ordinary ones.
\end{verbatim}

20. Summary Records of the First Session of the International Law Commission 12
(1956).
also expressed the General Assembly’s desire for the common observance of “existing
principles of international law” regarding the treatment of diplomatic repre-
work on the project.\textsuperscript{22} Four years later, the Commission adopted forty-five draft articles and recommended that they be considered by governments as the basis for a multilateral convention.\textsuperscript{23} After studying the Commission's report and recommendation, the General Assembly unanimously adopted a resolution which placed the item entitled "Diplomatic Intercourse and Immunities" on the provisional agenda for its next session and invited member states to submit comments on the draft articles.\textsuperscript{24} The following year, the General Assembly convened the conference, appropriately at Vienna, where in 1815 the law of diplomatic relations had first been formulated.\textsuperscript{25} The goal of the conference was:

to examine, in the light of present conditions, the body of law and practice which has developed since the adoption of the Vienna Regulation of 1815, and to formulate a comprehensive statement of the rights and privileges of all members of a diplomatic mission and of their families and private servants, and the rights and obligations of the State on whose territory they perform its functions.\textsuperscript{26}

The United Nations Conference on Diplomatic Intercourse and Immunities of March 2-April 14, 1961, was attended by eighty-one governments. Its product, the landmark Vienna Convention on Diplomatic Re-


The United States abstained from voting on G.A. Res. 1288, supra note 24, having "expressed a preference for a codification of international law on the subject, rather than the formulation of a multilateral convention, principally because it doubted that a convention would be widely adhered to. . . . [However] the unanimous votes by which General Assembly Resolutions 1288 (XIII) and 1450 (XIV) were adopted indicated that the convention to be formulated at the Vienna Conference would be one which would be acceptable to a majority of governments. This likelihood of general acceptance removed one of the major objections of the United States to a multilateral convention." U.S. Report, supra note 17, at 2.

\textsuperscript{26} U.S. Report, supra note 17 at 2-3. The Vienna Conference of 1961 was the first conference of its kind open to all interested parties and the first international conference to consider the issue since the 1815 Congress of Vienna and the subsequent 1818 Protocol of Aix-la-Chapelle. See notes 19-15, supra, and accompanying text.

During the interim of nearly a century and a half, provisions insuring diplomatic privileges and immunities were usually embodied in bilateral treaties. Several of these are cited in the Harvard Draft, supra note 11, at 27-30. These rights were always granted on a reciprocal basis and were rarely defined. For example: "The diplomatic representatives of each country shall enjoy in the territories of the other
lations,\textsuperscript{27} was a comprehensive, multilateral agreement, which codified and restated the law\textsuperscript{28} with regard to the status of the diplomat and all the members of his staff.\textsuperscript{29} For the many contracting states,\textsuperscript{30} the treaty


Similarly, by means of equally vague special agreements, protection was extended to public officials engaged in international activities. For instance, the Covenant of the League of Nations granted "diplomatic privileges and immunities" to representatives of members of the League when engaged in official business. \textit{League of Nations Covenant}, art. 7, para. 4. Similar immunities were granted to judges and deputy judges of the World Court by \textit{I.C.J. Stat.}, art. 19. \textit{U.N. Charter}, art. 105, paras. 1-2 provides:

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.


Bilateral treaties extending special status to non-diplomats (e.g., members of trade delegations, economic aid groups, military missions, etc.), however, have been more specific in defining the particular privileges and immunities granted. Most nations are reluctant to extend full diplomatic prerogatives to these groups in order to avoid a proliferation of foreign citizens exempt from local laws. A thorough coverage of this subject is provided in C. \textit{Wilson}, \textit{supra} note 2, at 216 ff. Wilson notes in conclusion that, unlike the situation with regard to diplomats, "there is no full crystalized body of rules regulating and protecting non-diplomats . . . ." \textit{Id.} at 269.


28. The United States delegation found that "[t]he standard of treatment required by the Vienna Convention conforms, in most respects, to the views of the United States as to what is or should be required by international law or practice . . . . The Convention constitutes an important contribution to the progressive development of international law." \textit{U.S. Report, supra} note 17, at 34.

29. The Vienna Convention, in addition to delineating the rights of the "diplomatic agent," also provides for the privileges to be granted "members of the administrative and technical staff," "members of the service staff," the "private servant," and "members of the family of a diplomatic agent forming part of his household." Each of these categories, except the last, is defined in Article 1.


As a rule, a consular official, unlike a diplomatic agent, is subject to the receiving state's criminal and civil jurisdiction, except with respect to "acts performed in the exercise of consular functions." Article 43, para. 1, Consular Convention. However, Article 40 of the Consular Convention, entitled "Protection of Consular Officers,"
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is, by its terms, law; for non-signatories, the treaty articles should at least be highly persuasive of existing international law.

The personal inviolability of the diplomat is provided for in Article 29 of the Vienna Convention, which reads:

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom, or dignity.

That this provision was considered to be in general accord with "accepted principles of international law and practice" was borne out by the fact that the text of Article 29 was approved by the conference without change from the International Law Commission's draft. Together provides:

The receiving state shall treat consular officials with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity.

While this formulation is not identical to that providing for the personal inviolability of the diplomat, see text accompanying notes 32-33, infra, clearly the abduction of either a consular official or a diplomatic agent is an equal breach of international law. See generally, L. Lee, Vienna Convention on Consular Relations 82-83 (1966).

30. At the conclusion of the Conference on April 18, 1961, the Convention was signed by 45 states, and entered into force under Art. 51, para. 1, when ratified by 22 states on April 24, 1964. Consent of the U.S. Senate to the Convention was obtained on September 14, 1965, but the Department of State recommended that the President not ratify it until Congress passed complementary legislation. Garretson, The Immunities of Representatives of Foreign States, 41 N.Y.U. L. Rev. 67, 68 (1966).

Appropriate legislation was introduced in the 90th Congress, 1st Session, as S. 1577 and passed on June 15, 1967, 113 Cong. Rec. 16062. However, the bill failed to emerge from the House Committee on Foreign Affairs, after it had been referred by the Senate on July 20, 1967, 113 Cong. Rec. 19614.

31. Vienna Convention, art. 51, para. 1.

32. "Since the provisions of the Convention thus reflect the considered judgment of so many states as to the rules which will best meet the needs of governments in the years ahead, the rules are likely to be accepted in principle and observed in practice even by those governments which fail to become parties to the Convention." U. S. Report, supra note 17, at 34.


34. In addition to Article 29, providing for absolute personal inviolability, Article 22 provides that "the premises of the mission shall be inviolable." Thus, the Convention omits the traditional exception that the diplomat's personal inviolability is not infringed if he is injured as a consequence of wilfully placing himself in a dangerous position, U.S. v. Liddle, 26 F. Cas. 956 (No. 15598) (C.C.D. Pa. 1808), or after first assaulting another, U.S. v. Ortega, 27 F. Cas. 359 (No. 15971) (C.C.E.D.Pa. 1825), aff'd 24 U.S. (11 Wheat.) 467 (1825). However, the Commentary to the text of Draft Article 27, later to become Article 29 of the Vienna Convention, seems to recognize the implicit presence of these unusual exceptions, stating: "This principle [of personal inviolability] does not exclude in respect of the diplomatic agent . . . measures of self defense . . . ." I.L.C. Report, supra note 23, at 97.

35. I.L.C. Report, supra note 23, at 97. Note that Article 29 was originally num-
with Article 31, providing for diplomatic immunity from criminal and civil suits with three exceptions, and some other subsidiary provisions, the international standards of diplomatic privilege were thus codified.

It is noteworthy that the term "all appropriate steps," appearing in...
Article 29, is nowhere defined. Nonetheless, some light may be shed on the intention of the drafters by an examination of the underlying theoretical framework for granting diplomatic privileges and immunities.

Historically, legal scholars have offered several theories to justify the grant of diplomatic privileges and immunities. However, the three theories that have, at different times, gained the greatest acceptance are: 1) the theory of "extraterritoriality," i.e., either that the ambassador is to be treated as if he were still living in the territory of the sending state, or that the premises of the diplomat's mission were an extension of the territory of the sending state; 2) the theory of "personal representation," i.e., that the diplomatic mission and its personnel personify or embody the sending state so that a slight upon the dignity of the diplomat is an insult to the sovereign he represents; and, 3) the theory of "functional necessity," i.e., that the diplomat's immunity from local jurisdiction is necessary to allow nations to carry on international relations with a minimum of interference.

All three theories have been subject to scholarly criticism, but the concept of "extraterritoriality" has been most widely condemned. The criticism has been primarily on the ground that it does not provide any legal or theoretical basis for diplomatic prerogatives. The theory is, in fact, only a fiction, and a fiction that today would produce dangerous consequences if seriously adhered to. "Extraterritoriality" would allow persons of diplomatic rank unlimited privileges and immunities in the host country, an exemption which today is not accorded anywhere in

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39. The Commentary to the text of the Draft Article that became Article 29 offers no assistance in this regard, merely stating:

This article confirms the principle of the personal inviolability of the diplomatic agent. From the receiving State's point of view, this inviolability implies, as in the case of the mission's premises, the obligation to respect and to insure respect for, the person of the diplomatic agent. The receiving State must take all reasonable steps to that end, possibly including the provision of a special guard where circumstances so required. Being inviolable, the diplomatic agent is exempted from measures that would amount to direct coercion. This principle does not exclude in respect of the diplomatic agent either measures of self-defense or, in exceptional circumstances, measures to prevent him from committing crimes or offenses."


40. See Harvard Draft, supra note 11, at 26 ff.
actual practice. However, used in a more restrictive sense, the term offers no guidance toward determining the rights of the diplomat. Moreover, the word, which has been so variously defined as to become meaningless,\footnote{Various meanings and applications of the word are listed and analyzed in C. Wilson, supra note 2, at 12.} is inherently at odds with reality. It seeks to explain diplomatic immunities on the basis of the absolute independence of states, though in fact the question of immunity arises only because of the necessity for diplomatic intercourse, i.e., a mutual realization of the interdependence of states.\footnote{A recent text succinctly expresses the modern viewpoint: A diplomat’s special position results not from the extension of the territorial jurisdiction of the sending state into the receiving state, but rather from a grant by the receiving state of a personal exemption from its normal territorial jurisdiction to the extent that usage has established this as necessary to facilitate international relations. R. Harmon, The Art and Practice of Diplomacy 146 (1971).} Clearly, diplomatic immunities are the cause, not the consequence, of this fiction.\footnote{An incisive discussion of some further shortcomings of the “extraterritoriality” fiction is found in Preuss, Capacity for Legation and the Theoretical Basis for Diplomatic Immunity, 10 N.Y.U. L. Q. Rev. 179, 182-87 (1932).}

The theory of “personal representation” is also being abandoned by legal scholars. A shortcoming it shares with “extraterritoriality” is that in placing a sovereign and his agents entirely beyond the law of the host state, it is too broad to serve as a realistic basis in formulating a diplomat’s rights. On the other hand, the theory is too narrow to be viable in that it offers no basis for the exemptions granted to diplomats for certain wholly private acts.\footnote{Preuss, noting these criticisms, id. at 179-81, is nonetheless, unwilling to discard the theory and concludes that immunities for all acts, private and public, can be explained by combining the theories of personal representation and functional necessity. Id. at 187.} The concept is also difficult to transpose to modern times, when sovereign authority has devolved upon “the people,” especially in a system such as ours where the sovereign power is shared by executive, legislative and judicial arms of government. Thus, “it might now be asked: the ambassador is the personification of whom?”\footnote{C. Wilson, supra note 2, at 4.} The most widely accepted theory is that of “functional necessity,” which is based on the need for orderly relations among states, necessitating a policy of respect for and non-interference with each other’s diplomats.\footnote{The idea of “jurisdictional immunity,” like the idea of personal inviolability, which it followed, “originated in the conviction that the absolute independence of the diplomatic agent in his dealings with the sovereign to whom he is accredited is an indispensable condition for the accomplishment of his mission.” Memorandum Prepared by the Secretariat on Diplomatic Intercourse and Immunities, supra note 38, at 134.}
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theory, which emerged in its modern form from the work of Grotius, has recently grown in importance. One reason was the establishment and growth of international organizations following World War I, necessitating the grant of diplomatic immunity to thousands of people who represented neither a "territory" nor a "sovereign." Neither "extraterritoriality" nor "personal representation" were adequate to explain this development. "Functional necessity" also explained the maintenance of diplomatic relations between communist and non-communist countries and the preservation of the rights of their respective diplomatic personnel, despite the hostilities engendered by the Cold War. Again, "extraterritoriality" and "personal representation" offered little guidance to ascertaining diplomatic prerogatives in the face of deep-seated ideological conflicts and modern security needs.

"Functional necessity" is also in greater accord with the realities of modern power politics, because, unlike the other theories, it permits the security and welfare of the host state to be taken into account in qualifying the rights of diplomats. Under this concept, diplomatic immunities rest upon what one student of the subject calls "the shifting consideration of conveniences . . . as dictated by the . . . receiving nation." Therefore, the theory is a dynamic one, capable of accounting for trends and changes of direction.

47. Grotius, emphasizing the importance of the diplomat's functions, stated that "an ambassador ought to be free of all compulsion." H. Grotius, supra note 6, at 448.

Grotius lent his authority primarily, however, to the theory of "extraterritoriality." After discussing precedents, he concluded that ambassadors "were held to be outside the limits of the country to which they were accredited. For this reason, they are not subject to the municipal law of the state within which they are living." Id. at 443. It has been suggested, though, that this formulation was not meant to serve as a theoretical basis for diplomatic immunities, but, rather, as legal shorthand to express the position of the diplomat in the receiving state. See Preuss, supra note 43, at 184, n. 43.

48. Communist nations in particular, although not exclusively, often use "security considerations" as a reason to restrict and harass diplomatic personnel. See C. Wilson, supra note 2, at 24. A well-known example of national security taking priority over diplomatic immunity is Rose v. The King, [1947] 3 D.L.R. 618, [1946] Ann. Dig. 161 (No. 76) (King's Bench of Quebec, Canada), in which documents stolen from the Russian Embassy, that ordinarily would have been privileged, were nonetheless allowed into evidence because they affected national security. See also U.S. v. Melekh, 190 F.Supp. 67 (S.D.N.Y. 1960).

49. C. Wilson, supra note 2, at 24. "Privileges and immunities accorded to diplomats is [sic] not absolute, but related to the agent's duties and dependent upon his good faith and respect for the rights of the receiving state in discharging them." R. Harmon, supra note 42, at 146. Clearly, it is the receiving state which determines the agent's "good faith" and "respect" towards itself.

50. The theory has been attacked on grounds of vagueness, because it fails to indi-
While the body of the Vienna Convention offers no explicit theoretical basis for the various rights it recognizes, the fourth paragraph of the Preamble to the Convention reads:

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. . . .

According to a member of the United States delegation to the Vienna conference, this paragraph represents a compromise between those delegations favoring the "functional necessity" theory and those supporting the "representative character" (or "personal representative") theory as a conceptual basis for the Convention.51 The arguments against a clearer expression in the Preamble of "functional necessity" were, in essence, that the sending state would then, perhaps, be obliged to waive diplomatic immunity in certain instances where the receiving state could establish that a particular diplomatic function did not require immunity.52 As it stands, however, the Preamble is confusing. The reference to "missions as representing States" is the classical formulation of the "representative character theory, and this leaves the intention of the drafters somewhat equivocal. Accordingly, it becomes difficult to interpret the meaning of "all appropriate steps," required under Article 29 to be taken by the host state in safeguarding the personal inviolability of a foreign diplomat.53
Logically, it would seem that if the diplomat is due a higher degree of protection than a national, then any act violative of or infringing upon his dignity should be punished more severely than would otherwise be the case. In fact, special laws have been enacted by most nations to provide special penalties, over and beyond those provided by local criminal assault statutes, for attacks against foreign ambassadors. Some of these enactments also define and extend the diplomat’s immunities. Since the earliest days of the United States, for example, a specific penalty has been provided by Federal law for assaulting an envoy’s person. Also, by statute, diplomatic agents accredited to the United States are granted much broader immunity from civil and criminal jurisdiction than is afforded by the Vienna Convention.

sumably be irrelevant. As stated in an early case:

The person of a public minister is sacred and inviolable. Whoever offers any violence to him not only affronts the Sovereign he represents, but also hurts the common safety and well-being of nations; he is guilty of a crime against the whole world.

Respublica v. Longchamps, 1 Dall. 111, 116, 1 L.Ed. 59, 62 (Ct. of Oyer & Term. at Phil. 1784). See Part III (c) for an argument that the “functional necessity” theory represents the more logical approach to deal with the problem of kidnapped diplomatic personnel.

54. E. SATOW, A GUIDE TO DIPLOMATIC PRACTICE 178 (4th ed. N. Bland 1957). For a recent listing of such laws, see 7 U.N. LEG. SER., LAWS AND REGULATIONS REGARDING DIPLOMATIC AND CONSULAR PRIVILEGES AND IMMUNITIES, U.N. Doc. ST/LEG/SER.B/7 (1958) and Supp., U.N. Doc. ST/LEG/SER.B/13 (1963). Of course, it is unlikely that even extraordinary punishments would deter revolutionaries, in a repressive state, who were determined to kidnap an ambassador, if the rebels were subject to execution on capture regardless of whether they perfomed the abduction or not.

55. The current statute, 18 U.S.C. §112 (1970) provides:

Whoever assaults, strikes, wounds, imprisons, or offers violence to the person of a head of foreign state or foreign government, foreign minister, ambassador or other public minister, in violation of the law of nations, shall be fined not more than $5000, or imprisoned not more than 3 years, or both.

Whoever, in the commission of any such acts, uses a deadly or dangerous weapon, shall be fined not more than $10,000, or imprisoned not more than 10 years, or both.

The statute was first passed as the Act of April 30, 1790, ch.9, §28, R.S. §4062 and covered only the person of a “public minister.” It was subsequently broadened to include “ambassador or other public minister” (Act of June 25, 1948, ch. 645, 62 Stat. 688), and, finally, in 1964, to its present coverage (Act of Aug. 27, 1964, P.L. 88-495, §1, 78 Stat. 610). Early in the statute’s history, it was held that it is no defense to an indictment for an assault on a foreign minister that the defendant was ignorant of his public character. U.S. v. Ortega, supra note 35.

56. Compare 22 U.S.C. §§ 252-54 (1970), derived from Act of April 30, 1790, ch. 9, §§ 25-27, R.S. §§4063-66, which grants diplomats full immunity from civil and criminal jurisdiction, with Article 31 of the Vienna Convention, which grants full criminal immunity but contains three exceptions to civil immunity. See note 36
While there is an obligation of special protection due a diplomat, nevertheless, a state may omit from its criminal law special provisions on the subject. The general view appears to be that "though a State incurs some risk in not enacting such provision, it is under no obligation to do so, provided that it ensures that the normal processes of the criminal law are adequate and are employed to ensure the punishment of those who commit acts injurious to foreign diplomatic representatives."57

II

SCOPE OF THE CURRENT PROBLEM

A. Recent Abductions and Their Ramifications

During the twentieth century, the diplomat, despite his supposed inviolability, has often been subject to abuse. Occasionally, the government of the host state has been responsible, but more frequently, nationals have acted independently.68 Though political kidnapping is by no means a new tactic, it has never before been a systematic practice.69 Apparently, guerillas of all political ideologies, and Marxists in particular,69 have realized that abducting diplomatic representatives can

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58. C. WILSON, supra note 2, at 55.
59. One theory correlates the increase in political kidnappings with the fall into disrepute of the Guevara-Debray theory of revolution, emphasizing guerilla activity in the jungles and mountains surrounding the cities, and the consequent shift in focus of the revolutionary struggle to the major urban centers. O'Mara, Snatching the Diplomats, 210 NATION 518, 519 (May 4, 1970).
60. "Diplomat snatching" is by no means limited to left-wing revolutionaries. For instance, two celebrated cases last year were the seizure of a West German consul by Spanish Basque nationalists, note 64 infra, and the seizure of the British Trade
be a highly effective weapon in their war against usually superior military and police forces.61

The brutal inaugural of the current wave of diplomat kidnappings was the 1968 seizure and murder of United States Ambassador John Gordon Mein by Guatemalan terrorists.62 However, the tactic did not become widespread until the kidnapping of United States Ambassador C. Burke Elbrick in Brazil a year later and the successful ransoming of fifteen jailed radicals for his life.63 In the ensuing two years, abductions occurred not only in Latin American countries, principally, Uruguay, Brazil, Argentina, and Guatemala, but in such other areas as Spain,64 Canada,65 and Turkey.66 This demonstrated that political kidnapping, like aerial hijacking, was a weapon that could be employed indiscriminately against democratic governments and authoritarian regimes alike.

Commissioner by French-Canadian separatists, note 65 infra.

61. See note 54 supra.

62. N.Y. Times, Aug. 29, 1968, at 1, col. 2. Urban guerillas in Guatemala were also responsible that year for the murder of two U.S. military attachés, N.Y. Times, Jan. 17, 1968, at 1, col. 4, and in 1970, for the murder of West German Ambassador Karl von Spreti, after the Government refused to release a group of political prisoners as ransom for his life. N.Y. Times, April 6, 1970, at 1, col. 6.

63. N.Y. Times, Sept. 6, 1969, at 1, col. 6. Within little more than a year after the ransoming of Elbrick, three other diplomats, representing Switzerland, Japan, and again, the United States, were kidnapped by Brazilian terrorists and were freed only after 150 left-wing guerillas held by Brazilian authorities were released. N.Y. Times, Jan. 17, 1971, at 8, col. 1.

64. A West German consul to Spain was kidnapped by Basque nationalists, in connection with a trial of 15 Basque separatists by the Franco regime and was released 5 days later. N.Y. Times, Dec. 26, 1970, at 1, col. 6. While there was no indication at the time that the kidnappers had received any special assurances as to the outcome of the trial, the court's sentence was substantially reduced by Generalissimo Franco a week after the consul's release. N.Y. Times, Dec. 31, 1970, at 1, col. 1.

65. On October 5, 1970, a cell of Canadian revolutionaries, members of the Quebec Liberation Front, kidnapped James Cross, the British Trade Commissioner, and held him captive for 59 days before his negotiated release. During this period, another extremist group of French Canadians kidnapped Pierre Laporte, Minister of Labor and Immigration in the Quebec Provincial Government, and strangled him to death, apparently because the first group's demands for $500,000 ransom and the release of "political prisoners" were not met. These incidents resulted in Prime Minister Trudeau invoking the War Measures Act, a stringent emergency power, and sending federal troops to Quebec. The Front was also outlawed. N.Y. Times, Mar. 14, 1971, at 1, col. 1.

66. On May 17, 1971, members of an extremist group calling itself the Turkish People's Liberation Army, seized the Israeli Consul-General, Ephraim Elrom, and threatened to execute him unless imprisoned members of the group were freed. When the Turkish Government rejected their demands, Elrom was shot to death by his kidnappers. The incident was the third in a series of abductions of foreigners in Turkey in 1971 and the first culminating in the death of the hostage. N.Y. Times, May 23, 1971, at 1, col. 5.
Unquestionably, one of the terrorists' primary goals in kidnapping diplomats has been to use them as pawns for barter to obtain the release of political prisoners. At first, it was believed the objective was to free only captured guerrilla leaders and fellow terrorists, but this has not always been the case. For example, in August 1970, the Tupamaro terrorists of Uruguay demanded the freedom of 150 persons convicted, not of political offenses, but of common crimes, in return for the life of a United States' advisor to the government of Uruguay. Guerillas have also demanded financial ransom, but the increasingly inflated and unrealistic demands for money and prisoner release underscore that the aim of the terrorists is not only to procure these, but equally, to harass the government they desire to overthrow. Invariably, the diplomats seized have represented nations with which the host state has important ties, such as treaty alliances and investments.

In the words of a young Brazilian terrorist, himself involved in several political kidnappings:

We orient our armed actions in such a way as to make them politically profitable. For instance, the kidnapping of a foreign diplomat creates political problems for the regime. Either the regime agrees . . . not to give in and allows the diplomat to be killed—which creates difficulties with the foreign power the diplomat represents . . . or the regime meets the demands of the kidnappers and the diplomat is set free; then the army and the police criticize the leniency of the Government, and that creates dissension within the regime.

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67. Under Uruguayan law, however, the President did not have the power to procure the prisoners' release, and when the Government rejected the terrorist demands, the advisor, Dan A. Mitrione, was shot to death. U.S. News & World Report, Aug. 24, 1970, at 22.

68. For example, the Tupamaros demanded 1 million dollars ransom apiece for the lives of Brazilian Consul-General to Uruguay Aloysio Dias Gomide, and Claude Fly, an American agronomist, both seized toward the end of 1970. Gomide was released after his wife paid $250,000, which she collected during a fund-raising tour of Brazil. N.Y. Times, Feb. 22, 1971, at 4, col. 4. Fly was released without any payment after seven months' captivity when he suffered a heart attack and his captors feared he might die in their hands. N.Y. Times, Mar. 4, 1971, at 9, col. 1. Throughout, the Uruguayan Government refused to bargain with the guerrillas.

69. In order to obtain the safe release of Swiss Ambassador Giovanni Bucher, the Brazilian Government released 70 prisoners, a substantial increase over the 15 prisoners obtained by the terrorists from the same government for the release of the first diplomat to be kidnapped in Brazil, U.S. Ambassador C. Burke Elbrick. N.Y. Times, Jan. 17, 1971, at 1, col. 2. The Brazilian Government did, however, reject 22 names on the original list of prisoners to be released, refusing to free anyone convicted or accused of "serious crimes," a position accepted by the terrorists, who released Ambassador Bucher on those terms. Newsweek, Jan. 25, 1971, at 44.

70. The countries whose diplomats and consuls have been most involved in the reported abductions are the United States, Great Britain, and West Germany.

71. de Gramont, How One Pleasant, Scholarly Young Man From Brazil Became a
When the terrorists' primary goal has been only to publicize their grievances or shame the authorities, diplomatic personnel have been released unharmed following rejection of the kidnappers' demands. For example, when four United States airmen were abducted in Turkey in March 1971, the Turkish Government rejected a demand for $400,000 ransom, and leftist spokesmen agreed that the airmen would not be killed, stating: "The kidnappers have accomplished their purpose . . . They have disgraced the Government, shown up police incompetence, stirred up student violence. They would only lose in public opinion by killing the Americans." 72

Although these airmen were soon freed, refusal to negotiate with the guerillas can be a dangerous course of action, and tragic consequences have occasionally resulted. Only three months after the four United States airmen were released unharmed in Turkey, for instance, the Israeli Consul General was seized and murdered by members of the same extremist group, following a rejection of their demands by the Turkish Government. 73

The abductions have created numerous repercussions, both within the countries where they have taken place and without. Not only have large numbers of released terrorists filtered back across the border to reinforce the guerillas, 74 but reprisals launched by the affected governments against the revolutionaries and suspected supporters result in new waves of local repression. 75 Economic effects felt locally include a drying-up of the tourist trade 76 and a reluctance of foreign investors to aid national industry. 77

Internationally, these kidnappings often strain relations between the nations involved. For example, when West Germany's ambassador to Guatemala was murdered by terrorists in April 1969, following Guatemala's refusal to release twenty-two prisoners, West Germany immedi-

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73. See note 66 supra. On March 26, 1972, three radar technicians, a Canadian and two Britons, working for N.A.T.O. at a Turkish Air Force base, were seized by leftist terrorists. They were held as barter for the release of three extremists who were condemned to death by a martial law court for the murder of Consul-General Elrom. The hostages were murdered by their abductors when the Turkish Government flatly refused to bargain. The terrorists were themselves slain when the police closed in on their hideout. N.Y. Times, Mar. 31, 1972, at 1, col. 2.
74. See note 71 supra, at 136.
76. N.Y. Times, Mar. 7, 1971, at 3, col. 3.
ately recalled its staff from Guatemala City and advised Guatemala's ambassador to leave Bonn.\textsuperscript{78} While such consequences do not invariably follow,\textsuperscript{79} a government which refuses to accede to terrorist demands and risks the life of an innocent diplomatic hostage unquestionably exposes itself to censure.

B. Principles of State Responsibility

The national and international reactions provoked by these kidnappings disrupt the host state's government internally and discredit it in the eyes of the world, but these sanctions, while powerful, are of an informal nature. In a formal sense, however, can the acts of the revolutionaries be \textit{legally} imputed to the government of the host state under principles of international responsibility by an arbitral or adjudicatory tribunal?

In general, a state is obliged to give aliens within its boundaries the same personal protection accorded its own citizens.\textsuperscript{80} Traditionally, an alien who was injured by a private person could pursue his remedies, like an ordinary citizen, only against that person; the state became implicated only if the actor was an agent of the state or if the state denied the alien justice either by not affording a remedy or by failing to enforce it.\textsuperscript{81} The acts of insurgents or rioters were considered the same as acts of private individuals and, similarly, could not be imputed to the state. Again, state responsibility was limited to providing access to its civil and criminal courts for appropriate redress;\textsuperscript{82} since the state would bear

\textsuperscript{78} U.S. News & World Report, April 20, 1970, at 22.
\textsuperscript{79} For example, in the Mitrione incident, note 67 and accompanying text, a State Department spokesman explained following the abductee's murder, that the United States had not pressured Uruguay in any way to meet the terrorists' demands because it felt this might create "great risks for all Americans overseas" by encouraging further kidnappings. \textit{N.Y. Times}, Aug. 11, 1970, at 3, col. 6. Similarly, the Israeli Government expressed no displeasure over Turkish handling of the Elrom incident, note 66 \textit{supra}, because Turkey displayed the firmness that the Israelis themselves had urged other governments to adopt against Arab plane hijackers and other terrorists. \textit{N.Y. Times}, May 24, 1971, at 6, col. 2.

\textsuperscript{80} Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization. Secretary of State Elihu Root, quoted in W. Bishop, \textit{supra} note 3, at 750.

\textsuperscript{81} \textit{Id.} at 744.

\textsuperscript{82} L. \textit{Oppenheim, supra} note 12, at 367. The author, \textit{id.}, notes: 
[T]he responsibility of States does not involve the duty to repair the losses
An exception to the traditional rule was recognized where a state had been negligent in failing to take reasonable precautions to maintain internal order and had thereby jeopardized the safety of the alien. An other widely-recognized exception was reserved for the case of a successful insurrection, in which event the state's new government was held liable for injuries to an alien if these resulted from measures taken by the former insurgents. There was even authority for the proposition that a state should make reparation, whether or not it is incultuted, when violence was directed against the alien as such. Several states have in fact paid damages for losses of this nature, but political reasons and not a sense of obligation under international law may well have been the motivation. However, at least one authority has commented that

which foreign subjects have sustained through acts of insurgents and rioters, provided due diligence was exercised by the State concerned. Individuals who enter foreign territory must take the risk of an outbreak of insurrections and riots no less than the risk of the outbreak of other calamities.

83. "The reparation provided to an alien or to the state of which he is a national for the wrong which has been done to him is, in the generality of cases, damages." Baxter, Reflections on Codification in Light of the International Law of State Responsibility for Injuries to Aliens, 16 SYR. L. REV. 745, 750 (1965).

84. See, e.g., García Amador, International Responsibility, [1958] 2 Y. B. INT'L. COMM'N 47, 72, U.N. Doc. A/CONF.111/47, 72 (1958). Note the difficulty, under the traditional view, in distinguishing between when the breakdown in internal order is attributable to the state and when it is beyond the power of the state to prevent. In the latter case, "the state cannot have imputed to it the violent acts of revolutionaries who have escaped beyond its responsible control." 2 D. O'CONNELL, supra note 12, at 966.

85. Amador, supra note 84, at 72.

86. See, e.g., Sarropoulos v. Bulgarian State, [1927-28] Ann. Dig. 245 (No. 162) (Greco-Bulgarian Mixed Arbitral Tribunal 1927), which stated that the principle is one "recognised by the great majority of writers . . . and by international jurisprudence."

More recently, however, the World Court held that a state cannot be held liable for an injury suffered by an alien merely because the injury occurred within the state's territory. The Court said:

It is clear that knowledge of the minelaying cannot be imputed to the Albanian Government by reason merely of the fact that a minefield discovered in Albanian territorial waters caused the explosion of which the British warships were victims . . . This fact, by itself and apart from other circumstances, neither involves prima facie responsibility nor shifts the burden of proof.


87. 1 L. OS'NEILL, supra note 12, at 368. For example, the Israeli Government acknowledged responsibility for the murder of Count Folke Bernadette, United Nations mediator in the Palestine dispute, by Jewish terrorists in 1948, despite the fact that the Government was in no way implicated in the assassination. In fact, the Government had not at that point even been recognized and was only in de facto control of
"the emphasis in modern jurisprudence . . . is in the direction of liability without fault. . . . If the State claims plenary internal jurisdiction, it must incur primary responsibility."

The theory of "strict liability" seems especially appropriate for diplomatic personnel, who, by custom and international law, are entitled to special protection. Even the traditional rule took account of the elevated status of diplomats by raising a rebuttable presumption of state responsibility when harm befell them. The concept may even have been embodied in the Vienna Convention, for it states: "[The diplomat] shall not be liable to any form of arrest or detention" — the sentence not specifying by whom the diplomatic agent shall not be arrested or detained. The language, while ambiguous, probably does not intend to establish this concept as a solid doctrine of international law, however, at least in the area of diplomatic intercourse and immunities. Not only have a majority of writers on the subject rejected the approach of strict liability for injury to aliens generally, but the Special Rapporteur on this subject for the International Law Commission, which drafted the Convention, has done so as well.

the area where the shooting occurred. Wright, Responsibility for Injuries to United Nations Officials, 43 AM J. INT'L LAW 95, 99-100 (1949).

88. 2 D. O'CONNELL, supra note 12, at 943 and citations appended.

89. See text accompanying notes 32-33 supra.

90. The presumption was rebuttable by a showing that the state had exercised the degree of diligence in protecting the official which his position required. Wright, supra note 87, at 98. O'Connell notes that the only practical distinction between the state being liable or a private tortfeasor being liable is that the claimant can demand redress from the state in the former case "instead of pursuing a man of straw." 2 D. O'CONNELL, supra note 12, at 942. This approach overlooks the fact that, historically, when a diplomat was injured, the sending government could demand reparations not only for indemnification of the individual and his family, but for the injured prestige of the sending state. Unrealistic demands in this very situation, in fact, often led to war. See Wright, supra note 87, at 102-03.

91. This issue was not discussed at the Vienna Conference, and no reported cases to date have grappled with the interpretation of Article 29.

92. See authorities cited in 1 L. OPPENHEIM, supra note 12, at 367-68. A relatively recent convention on "The International Responsibility of States for Injuries to Aliens," prepared under the auspices of Harvard Law School, failed to accept strict liability also, holding a state liable only "for an act or omission which, under international law, is wrongful, attributable to that State, and causes an injury to an alien." With regard to an unsuccessful revolution or insurrection, "an act or omission of an organ, agency, official or employee of a revolutionary or insurrectionary group is not, for the purposes of this Convention, attributable to the State." Sohn & Baxter, Responsibility of States for Injuries to the Economic Interests of Aliens, 55 AM J. INT'L LAW 545, 548, 577 (1961).

93. Between the years 1956-61, the International Law Commission's Special Rapporteur on the subject of "State Responsibility", Garcia Amador, prepared six drafts on the more limited topic of "The Responsibility of States for Damage Caused to the Person or Property of Aliens", each of which also rejected this approach. The
The general lack of support for the idea of strict liability for injury to aliens is probably due to the fact that in the context of international relations, and especially with regard to diplomats, it has little relevance. Its social policy — to shift the burden of loss to the party best able to bear it94 — is not pertinent here, for the countries within whose borders these incidents have occurred are almost invariably poorer and, therefore, less able to bear the burden of reparations than the sending state.95

Even beyond this consideration, though, money damages make little sense. Viewed as compensatory damages, they seem an unsatisfactory and inadequate means of "making whole" the sending state. Viewed as punitive damages, they seem quite ineffective as a deterrent compared to the damage inflicted on the receiving nation's economy by, for example, the reluctance of tourists to visit the country or of investors to contribute capital to national industry, following a series of diplomatic abductions.96 In short, the stigma attached to these kidnappings lies in the political instability these acts manifest to the world, not in a breach of international obligations.97

III

PROPOSED SOLUTIONS

How, then, are diplomats to be protected from a tactic which host governments are unable, though not unwilling, to combat? Three types
of solutions are plausible:

A) A diplomatic solution envisaging a multilateral pact which would deny asylum to both kidnappers and any released prisoners;
B) Short-term measures chiefly involving increased security; and
C) Adoption of a uniform policy among victimized governments of refusing to bargain with terrorists.

A. Diplomatic Solution

Since the kidnapping of diplomatic personnel has occurred with greatest frequency in Latin America, joint action by all governments party to the Organization of American States (O.A.S.) has been proposed. An international agreement was suggested to the effect that no nation would give refuge to the abductors of diplomats or to those released from jail as ransom for the hostage.98

When the issue was raised at the 1970 meeting of the O.A.S., however, some governments, notably Chile and Mexico, felt that such an agreement would infringe on the traditional Latin American principle of political asylum as codified by a number of inter-American treaties.99

The meeting finally adopted a compromise resolution, sponsored by the United States, that condemned terrorism, political kidnapping, and extortion as "crimes against humanity and the principles of international relations"100 and further called on the Inter-American Juridical Committee to prepare a draft treaty that would declare kidnappings of foreign diplomats to be international crimes analogous to air piracy and, thus,
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not subject to political immunities.\footnote{101}

The convention was subsequently written and approved by the 11-nation Inter-American Juridical Committee\footnote{102} and was submitted for approval in early 1971 to a conference of Western Hemisphere foreign ministers. The draft's most controversial provision called for the extradition of all those accused of political terrorism, terming all terrorist acts "common" crimes rather than "political" crimes. This designation would bring such acts within the provision of the Inter-American Convention on Diplomatic Asylum of 1954, currently in force, which denies the right of asylum to those on trial for or convicted of "common" crimes.\footnote{103}

Several delegations to the conference of foreign ministers felt that an agreement on the extradition of all persons accused of political terrorism would conflict with the provision of the 1954 Convention which provided: "It shall rest with the State granting asylum to determine the nature of the offense or the motives or the persecution."\footnote{104} This article affirmed the sovereignty of the granting state to offer asylum as it chooses by allowing the government to distinguish for itself "political" from "common" crimes.\footnote{105}

101. \textit{Id.} The U.S. Representative to the O.A.S., recognizing the difficulty in branding political kidnapping a "common," rather than a "political" crime, declared that he recognized the need "to distinguish between these criminal and unpardonable acts [i.e., the kidnapping of foreign diplomatic officials] and the legitimate expression of discontent with injustice and of a desire for change prevalent in our hemisphere today." \textit{O.A.S. Asked to Consider Problem of Kidnapping and Terrorism: Statement by Joseph John Jova, 62 Dep't State Bull. 662 (1970).}

The United States practice has long been to distinguish the injury to a national official of high rank in a foreign country from "political offenses," i.e., those crimes excepted from extradition. Since the assassination of President Garfield, the United States has customarily included in its extradition treaties a provision that actual or attempted assassination of the President, certain other high officials, and members of their families, shall not be deemed a "political offense." See generally 4 J. Moore, supra note 38, at 352 ff.

102. \textit{N.Y. Times, Sept. 28, 1970, at 16, col. 8}. Chile and Peru voted against the draft; Mexico and Columbia abstained. \textit{Id.}

103. The kidnapping of diplomatic personnel has aspects of both "common" and "political" crimes. Neither term, however, is defined in the 1954 Convention, and may or may not be covered under the terms of that Convention. The pertinent provision reads:

It is not lawful to grant asylum to persons who, at the time of requesting it, are under indictment or on trial for \textit{common} offenses or have been convicted by competent regular courts and have not served the respective sentence . . . , save when the acts giving rise to the request for asylum, whatever the case may be, are clearly of a political nature. (Emphasis added.)

1954 Convention, art. 3.

104. \textit{Id. Art. 4.}

105. The view that such a conflict would arise was particularly prevalent among those countries with left-leaning governments, \textit{e.g.}, Peru, Chile, Bolivia, and Mexico. \textit{N.Y. Times, Feb. 2, 1971, at 5, col. 1.}
Most of the other delegations, including the United States, desired a more restricted convention covering only the kidnappings of diplomats and foreign officials. On the other hand, this diluted version was unacceptable to several delegations that walked out of the Conference because the majority was unwilling to accept their demands for the adoption of the draft version requiring the extradition of all persons accused of "political terrorism."

The meeting, by one vote more than required for adoption, finally approved the weakened convention. In pertinent part, it provided:

For the purposes of this convention, kidnapping, murder, and other assaults against the life or personal integrity of those persons to whom the state has the duty to give special protection according to international law, as well as extortion in connection with those crimes, shall be considered common crimes of international significance, regardless of motive.

None of the provisions of this convention shall be interpreted so as to impair the right of asylum.

Unfortunately, the instrument appears too weak to alleviate the problem which it addresses. Not only did it fail to meet with the approval of ten of the twenty-three Western Hemisphere governments participating in the conference, but it seems to conflict significantly with several provisions of the 1954 Convention. Moreover, it should be noted that

106. These delegations represented, primarily, those countries under military-dominated regimes, and not coincidentally, included the nations most severely plagued by terrorist activities—Brazil, Argentina, Paraguay, Guatemala, Ecuador, and Haiti. Id.

107. The final vote was 13-1, with Chile casting the negative vote, Peru and Bolivia abstaining, and the six delegations listed in note 106, supra, not present at the vote. N.Y. Times, Feb. 3, 1971, at 2, col. 4. The slender margin by which the convention was adopted is in contrast to the 22-0 vote (U.S. abstaining) by which the foreign ministers decided to postpone discussion of the draft convention to hear Ecuador's charge that the U.S. had violated the O.A.S. charter by suspending arms sales in a dispute over fishing rights. See N.Y. Times, Jan. 28, 1971, at 1, col. 6.


Secretary of State Rogers noted a "general understanding" that Article 2, id., applies not only to diplomatic agents, consular officials, and members of their families, but also to other officials of foreign governments and officials of public international organizations. 64 DEPT STATE BULL. 230.

110. See 1954 Convention, arts. 12, 4. In addition, Art. 2 of the 1954 Convention provides, "Every state has the right to grant asylum." Art. 3 of the 1954 Convention prohibits the grant of asylum for "common" as opposed to "political" crimes; but, of course, the abductors of diplomats in every case have been motivated by clearly political considerations.
Cuba, which trains and exports most Latin American guerillas, did not participate in the conference.

If adopted internationally, a pact of this nature would indeed make the kidnapping of diplomats and other acts of terrorism meaningless, but it would seem all but impossible to achieve the complete international cooperation necessary. After all, would Marxist countries refuse shelter to those accused of activities on behalf of the Marxist revolution?

B. Increased Security Measures

Article 29 of the Vienna Convention, dealing with the personal inviolability of the diplomatic agent, directs the receiving state to take all necessary precautions to protect the official, and, in accordance with this mandate, a number of states have taken multiple measures to tighten diplomatic security. For example, after a rash of seizures culminated in bloodshed during the summer of 1970, the United States Department of State sent all U.S. embassies in Latin America a directive calling for drastic reductions in travel, secrecy in planning any essential trip, closer cooperation with local security officers, and a tighter embassy guard. Diplomatic personnel were also urged to change their daily routine, such as the times they went to and from work, since guerillas generally study a potential victim's habits before abducting him. Additionally, embassy cars began to travel in convoys, picking up entire staffs at their homes in the morning and returning them in the evening.

Reportedly, the size of the potential target was being reduced too, by decreasing the size of embassy staffs. However, the State Department has not yet withdrawn the dependents of remaining staff personnel, and the measures listed above would appear to be of limited utility so long as wives and children of diplomatic agents are present.
Another tactic being tested in fifteen Latin American countries is for the state to improve the training of local police and their relations with the public, thus helping to counter public unwillingness to cooperate with police in capturing kidnappers.\textsuperscript{117} Obviously, this plan is of dubious short-run benefit; and, meanwhile, as one Brazilian terrorist notes in describing how both passersby and police failed to intervene in a diplomatic kidnapping taking place before their eyes: "One of our advantages is that the police are not motivated against us. We are ready to give up our lives, but they are not."\textsuperscript{118}

The Convention enacted at the 1971 meeting of Western Hemisphere foreign ministers\textsuperscript{119} in pertinent part provides:

To cooperate in preventing and punishing the crimes contemplated, the contracting states accept the following obligations:

a. To take all measures within their power, and in conformity with their own laws, to prevent and impede the preparation in their respective territories of the crimes [of diplomatic kidnapping and extortion] that are to be carried out in the territory of another contracting state.

b. To exchange information and consider effective administrative measures for the purpose of protecting [foreign officials to whom protection is owed]. . . .

d. To endeavor to have the criminal acts contemplated in this convention included in their penal laws, if not already so included.

e. To comply most expeditiously with the requests for extradition concerning the criminal acts contemplated in this convention.\textsuperscript{120}

The United States moved quickly to meet its obligation under this provision, and on August 5, 1971, the Department of Justice and the Department of State sent to Congress proposed legislation to provide expanded protection against attacks on United States and foreign officials and their families which occur domestically.\textsuperscript{121} In a letter accom-
panying the proposed legislation, Attorney General Mitchell and Secretary of State Rogers noted:

Of late, express and implied threats of militant activists and terrorists to commit acts of physical violence against the persons of members of the diplomatic corps, other foreign officials, and officials of the United States have created grave concern in our respective Departments. The lesson from the recent distressful experiences of other nations with terrorist seizures of diplomatic and governmental officials for use as pawns in 'political disputes' is clear.122

C. Adoption of a "Hard-Line" Policy

One means of combating the abduction of diplomatic and other foreign officials already in practice on a limited scale is a decision by the diplomatic corps and certain governments that the demands of terrorists would not be granted under any circumstances, even if it might mean death for the hostage.123 Since the tactic of seizing diplomats for barter did not become widespread until the successful ransoming of Ambassador Elbrick in Brazil,124 ostensibly, this policy would convince guerillas of the unprofitability of this strategy.

At the recent meeting of the Organization of American States which produced the Convention on Terrorism, the delegates agreed not to incorporate such a policy in that agreement.125 The United States delegation reported that: "It was the sense of the meeting that this delicate decision should be left to the responsibility of the states concerned and that no language need be included in the agreement on that point. The United States Government supports this view."126

122. 65 DEPT STATE BULL. at 269. Earlier in 1971, six persons, including Reverend Philip Berrigan, were indicted on Federal charges of plotting to kidnap Henry A. Kissinger, Presidential-advisor on national security affairs, and to blow up heating systems of federal buildings in Washington, D.C. According to F.B.I. Director Hoover, the plotters' purpose was to disrupt government operations, demand an end to the war in Southeast Asia, and seek the release of all "political prisoners." N.Y. Times, Jan. 13, 1971, at 1, col. 2.

123. Cogent defenses for this strategy are set forth in What to Do About Diplomat Snatching?, 22 NAT'L REV. 397 (Apr. 21, 1970) See also O'Mara, supra note 59, at 519.

124. See note 63, supra, and accompanying text.

125. 64 DEPT STATE BULL. 231. Of course, considering the wide variety of views as to the acceptability of the Convention on Terrorism, see notes 105-07 supra, it would probably have been impossible to reach agreement on how to deal with the terrorists once an abduction has taken place.

126. Id. United States policy has consistently been not to apply pressure to the host government to negotiate with the terrorists for the release of kidnapped per-
Nonetheless, Argentina, Uruguay, Guatemala, and Paraguay have already pledged not to bargain with kidnappers, whatever the cost in human lives.\textsuperscript{127} The U.S. State Department, apparently more concerned with discouraging future kidnappings than protecting unfortunate captives, has also adopted a policy of "no tribute."\textsuperscript{128} The same determination has been made elsewhere.\textsuperscript{129}

This position, needless to add, is a risky one, requiring a good deal of callousness on the part of decision-makers. Several slayings, in fact, have already occurred immediately after the rejection of abductors' demands.\textsuperscript{130} The "hard-line" policy may also overlook the fact that the payment of ransom is frequently only secondary to the goal of embarrassing the government of the host state.\textsuperscript{131} Even on the assumption, however, that ransom is the primary objective of the guerillas, this policy of firmness fails to consider that terrorists select their victims with care.\textsuperscript{132}

sonnel abroad. For example, during the March, 1971 crisis involving the four U.S. airmen kidnapped in Turkey, see notes 71-72, supra, President Nixon stated:

\ldots We've had [this] situation with several other governments, and I would not suggest that the Turkish Government negotiate on this matter because I believe that's a decision that that Government must make having in mind its own internal situation.


\textsuperscript{128} Following the release of the four kidnapped airmen in Turkey, see notes 72-73, supra, the U.S. State Department said the Administration had adopted a policy of not paying ransom in cases of political kidnapping, noting: "Painful experience has convinced the Government that payment of ransom to kidnappers would only encourage terrorist groups to kidnap other Americans all over the world." N.Y. Times, Mar. 9, 1971, at 14, col. 1. Prior to this statement of policy, a number of U.S. diplomatic agents abroad had reportedly left private instructions that if they were kidnapped, their captors' demands were not to be met under any circumstances. \textit{Time}, Mar. 22, 1971, at 31.

\textsuperscript{129} For example, when British Trade Commissioner James Cross and Quebec Minister of Labor Pierre Laporte were kidnapped by two different groups of French-Canadian separatists, \textit{supra} note 65, the Canadian Government offered the kidnappers free passage to Cuba and the broadcast of their "manifesto," but nothing more. Though this firm policy resulted in the murder of Laporte, a Gallup poll released after the incident revealed that Canadians supported by nearly 8 to 1 their government's decision. \textit{Time}, Mar. 22, 1971, at 31.

\textsuperscript{130} See, e.g., note 62, \textit{supra} (Ambassador von Spreti); note 65, \textit{supra} (Minister Laporte); note 66, \textit{supra} (Consul-General Elrom); and note 67, \textit{supra} (U.S. Advisor Mitrione).

\textsuperscript{131} See notes 68-72, \textit{supra}. This policy does, however, reduce the potential political gains for the terrorists. Not only is the flow of released prisoners to reinforce guerilla ranks reduced, but the responsibility for the hostage's wellbeing, in the eyes of the public, is shifted to the kidnappers. The Tupamaros, for example, lost a great deal of popular support by murdering Dan Mitrione, \textit{supra} note 67 and accompanying text, a fact reflected by their overwhelming defeat in the subsequent Uruguayan national elections. N.Y. Times, Nov. 30, 1971, at 23, col. 1.

\textsuperscript{132} One urban guerilla in Brazil stated: "We only carried out kidnappings when
Furthermore, it is possible that this position violates international law. Arguably, it does not because, as noted, the implicit theoretical basis for the Vienna Convention on Diplomatic Relations is most likely "functional necessity," which takes account of the security of the host state in formulating the privileges and immunities of diplomats. Thus, so long as the receiving state takes "all appropriate steps to prevent any attack on his person, freedom, or dignity" by maximizing the diplomat's personal security prior to an abduction, it has fulfilled its obligation. If a kidnapping unavoidably occurs after these steps have been taken, the state need not jeopardize its internal security or the safety of future victims by negotiating with the revolutionaries or complying with their demands. This interpretation of the obligation of the host state with regard to the diplomatic agent's personal inviolability is bolstered by that paragraph of the Preamble to the Vienna Convention on Diplomatic Relations which reads: "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. . . ." (emphasis added).

CONCLUSION

Political kidnapping, while a thoroughly despicable tactic, is apparently a strategy of growing importance, endemic to countries squeezed by leftist revolution and rightist reaction. Brutal, authoritarian repression in response to the actions of the urban guerillas, however, only plays into their hands, for their end objective is governmental repression so severe as to provoke general discontent and, ultimately, revolution. The only effective countermeasure is probably the outright rejection by host states of what amounts to blackmail. While this is far from an ideal solution, as evidenced by the deaths of innocent hostages, it offers the best hope of eventually curbing political kidnapping, by gaining its practitioners little for their trouble.

Ira Stechel

we were fairly sure that our demands would be met. We chose diplomats from countries on which Brazil is dependent and we knew the Minister of the Interior was not in a position to adopt a tough stance." de Gramont, supra note 71, at 140.

133. See notes 48-53, supra, and accompanying text.

134. Vienna Convention, art. 29, 500 U.N.T.S. 95.
