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RETHINKING DIPLOMATIC IMMUNITY: A REVIEW OF REMEDIAL APPROACHES TO ADDRESS THE ABUSES OF DIPLOMATIC PRIVILEGES AND IMMUNITIES

Mitchell S. Ross*

INTRODUCTION

In December of 1987, the United States Department of State deported Floyd Karamba, a commercial attaché at the Zimbabwean mission to the United Nations, on charges that he severely abused his children while forcing his family to watch.¹ The United States did not charge Karamba with any crime because he possessed diplomatic immunity.² Karamba's victimized son Terrence remained in the United States temporarily until a State Department psychiatrist determined that the boy, who was badly injured and severely traumatized as a result of the beatings, was psychologically prepared for the journey to Zimbabwe.³ In recognition of Karamba's diplomatic immunity, the United States Supreme Court lifted the stay preventing the boy's return.⁴

Diplomatic immunity, traditionally a fundamental principle of customary international law,⁵ originated to protect representatives of for-

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1. Uhlig, *Court Won't Bar Return of Boy in Abuse Case to Zimbabwe*, N.Y. Times, Jan. 1, 1988, at 33. The New York City Human Resources Administration and Legal Aid Society submitted court papers alleging that Floyd Karamba, on several occasions, removed all of Terrence's clothing . . . tied his arms behind his back with wire or rope, tied his legs together, and hung him by his bound arms from a pipe in the basement of the case address. After doing so, the respondent has then beaten Terrence with an extension cord.

Id.

The petition also asserted that at least once, Mr. Karamba "untied his son while he was suspended from the ceiling, sending him to the floor face first and injuring his nose and lips." *Id.* A Legal Aid attorney who has worked on Terrence Karamba's case said that he was beaten so badly that "[h]is back almost looks like a venetian blind." *Id.*

2. *Id.*; see *In re Terrence K.*, 138 Misc. 2d 611, 613, 524 N.Y.S.2d 996, 998 (Fam. Ct. 1988) (recognizing that the Office of Protocol of the State Department conferred diplomatic immunity on Floyd Karamba).

3. Kamen, *Supreme Court Lifts Stay; U.S. to Return Boy to Zimbabwe*, Wash. Post, Jan. 16, 1988, at A11.

4. *Id.*

5. See United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 7, 19 (Request for the Indication of Provisional Measures of Dec. 19) (stating that diplomatic immunity is a basic prerequisite for relations among states); B. SEN, A

eign governments based abroad from retaliation in time of international conflicts and to promote civilized international relations.⁶ Today, however, diplomats, their families, personal servants, and staff abuse this privilege to escape prosecution for a variety of offenses ranging from minor traffic violations to the most heinous criminal acts, such as the child abuse example cited above. Diplomatic immunity also permits diplomats to escape civil liability in personal injury actions.⁷

To the casual observer, diplomatic immunity merely excuses diplomats from paying parking tickets. Although this presents a major problem for cities such as Washington D.C., New York,⁸ and London⁹ which house large contingents of diplomatic missions, the victims of diplomatic crime testify that the problem is far worse. Diplomats, their families, personal servants, and staff escape prosecution for crimes ranging from driving under the influence of alcohol,¹⁰ to shoplifting,¹¹

DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE 3-7 (1965) (reviewing history of diplomatic immunity); M. OGDON, BASES OF DIPLOMATIC IMMUNITY 10-30 (1936) (discussing the history of the development of diplomatic immunity among the ancients).

6. See M. OGDON, *supra* note 5, at 9-10 (noting society's early realization that granting immunity to foreign embassies provided reciprocal advantages).

7. The Vienna Convention On Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 [hereinafter Vienna Convention On Diplomatic Relations]. See *infra* notes 47-63, 100-108 and accompanying text (discussing the provisions of the Convention). The Convention codified the principle of diplomatic immunity as a matter of international law. The Diplomatic Relations Act of 1978, §§ 2-6, 22 U.S.C. §§ 254a-254e (1982 & Supp. IV 1986) incorporated the Vienna Convention On Diplomatic Relations into United States law. See *infra* notes 65-73 (analyzing the Act and distinguishing it from the Vienna Convention).

See generally C. ASHMAN & P. TRESCOTT, DIPLOMATIC CRIME (1987) [hereinafter DIPLOMATIC CRIME] (providing an account of the use of diplomatic privileges and immunities to excuse violent crimes and torts committed by diplomats, their families, servants, and staff).

8. *Congress Takes Aim at Diplomatic Immunity*, U.S. NEWS & WORLD REPORT, Sept. 4, 1978, at 34. In 1976, diplomats in Washington, D.C. answered only twenty percent of parking tickets incurred, leaving \$889,870 in parking fines unpaid. *Id.* Diplomats in New York City accumulate \$5 million in unpaid parking tickets each year. *Id.*

The attitude of the diplomat towards parking is accurately characterized by the comment of an Ecuadorean diplomat in 1926. DIPLOMATIC CRIME, *supra* note 7, at 325. In responding to a police officer when he was told that he was parked illegally, he said, "If I choose to leave my car in the middle of Sixteenth Street, it would be none of your damn business." *Id.*

9. *United Kingdom Materials on International Law 1984*, 55 BRIT. Y.B. INT'L L. 405, 479-80 (1986) [hereinafter *United Kingdom Materials*]. In the United Kingdom from 1974 to 1983, there were 706,517 parking tickets accumulated by immune diplomats that went unpaid. *Id.*

10. Lynton, *Envoy's Car Slams Into 4 Vehicles*, Wash. Post, Feb. 14, 1987, at B1. The ambassador from Papua New Guinea, Kiatro Abisinito, driving while he was obviously drunk, crashed into four cars, seriously injuring one person sitting in one of the cars. *Id.* Papua New Guinea recalled its ambassador as he was facing the possibility of unprecedented criminal charges. Oberdorfer, *Papua New Guinea Recalls Diplomat*,

assault,¹² drug trafficking,¹³ kidnapping,¹⁴ rape,¹⁵ the imposition of slavery,¹⁶ and even murder.¹⁷

Wash. Post, Feb. 21, 1987, at B1. Papua New Guinea recently settled the case with the victim. Wheeler, *Broken Spear a Symbol of Peace*, Wash. Post, July 30, 1988, at B1. See *infra* notes 201-04 and accompanying text (discussing the State Department's interpretation of the ambassador's diplomatic immunity).

11. Weiser & Knight, *Crime by Those with Diplomatic Immunity Rises*, Wash. Post, Jan. 9, 1984, at A1. Soviet Embassy personnel in Washington were implicated a number of times in shoplifting incidents. *Id.* at A16. In another case, Iran's ambassador to the United Nations was caught trying to steal a \$100 raincoat from a department store in New York City in 1986. DIPLOMATIC CRIME, *supra* note 7, at 85-86; see *id.* at 274-86 (recounting additional examples of diplomatic shoplifting).

12. Weiser & Knight, *supra* note 11, at A16. The grandson of the Brazilian Ambassador to the United States shot Kenneth Skeen three times in an altercation at a Washington nightclub. *Id.* A civil suit brought against Brazil was dismissed for lack of jurisdiction due to sovereign immunity. *Skeen v. Federative Republic of Brazil*, 566 F. Supp. 1414, 1420 (D.D.C. 1983).

13. DIPLOMATIC CRIME, *supra* note 7, at 165-89. A number of incidents involving attempts at bringing illegal drugs into the United States via the diplomatic pouch are detailed. *Id.*; see also *United States v. Chindawongse*, 771 F.2d 840, 840-41 (4th Cir. 1985) (holding that a Thai consular official convicted in a conspiracy to import and distribute heroin was not entitled to diplomatic immunity).

14. *Nigerian Kidnapping*, THE ECONOMIST, July 14, 1984, at 55-56. A highly publicized incident in Great Britain implicated Nigerian diplomats in an unsuccessful attempt to kidnap an exiled Nigerian former minister and ship him back to Nigeria in a diplomatic crate. *Id.*

15. McFadden, *Repatriation Asked for Diplomatic's Son*, N.Y. Times, Feb. 8, 1981, at 33 [hereinafter McFadden: *Repatriation*]. Manuel Ayree, the 19 year old son of a low-level Ghanaian diplomat to the United Nations in New York was positively identified as the perpetrator of at least two and possibly as many as fifteen rapes and robberies on the Upper East Side of Manhattan. *Id.* Mr. Ayree "voluntarily repatriated" to Ghana and never faced charges for the crimes. DIPLOMATIC CRIME, *supra* note 7, at 50. An unenforced judgment by a federal court in New York approved \$1,786,462 in civil damages for two of the rape victims in a suit against Mr. Ayree. *Damages Approved for Rape Victim of Diplomatic's Son*, N.Y.L.J., Aug. 4, 1982, at 1.

16. DIPLOMATIC CRIME, *supra* note 7, at 106-13. A Saudi prince living in Miami allegedly kept domestic servants in his home against their will. *Id.* A number of incidents have come to light where diplomats held foreign nationals brought to the United States as domestic slaves. *Id.* Having no money, no contact with the outside world, and speaking no English, these "domestic slaves" were helpless. *Id.* at 248-73; see also Walsh, *Ex-Maid of Somali Diplomat Given Political Asylum Here*, Wash. Post, Nov. 28, 1988, at E8 (noting that a Somali woman working as a maid had not received wages or a day off in two years from her employer, a consular secretary working from Somalia).

17. See Comment, *State Sponsored Terrorism: Libya's Abuse of Diplomatic Privileges and Immunities*, 5 DICK. J. INT'L L. 134, 134-36 (1986) [hereinafter *State Sponsored Terrorism*] (discussing the implications of diplomatic immunity in a case where a London policewoman was shot and killed; the gunfire came from inside the Libyan "People's Bureau," which was the former Libyan embassy in Great Britain); see also *United Kingdom Materials*, *supra* note 9, at 483-85 (evaluating the actions of the British Government in asserting that diplomatic immunity protected the Libyans inside the "People's Bureau" and their personal belongings); Goldberg, *The Shootout at the Libyan Self-Styled People's Bureau: A Case of State-Supported International Terrorism*, 30 S.D.L. REV. 1, 1-3 (1984) (questioning whether the Libyan "diplomats" had not lost their diplomatic status when the crime of murder was committed).

Part I of this Comment traces the history of diplomatic immunity, identifying the original purpose of the privilege and discussing its codification into international law through the Vienna Convention On Diplomatic Relations and subsequent incorporation into United States law. Part II demonstrates how diplomatic immunity functions in the United States, and describes the difficulty that local law enforcement officials encounter in dealing with diplomatic crime. Part III evaluates remedies that the United States can exercise to reprimand diplomats immune from prosecution. Part IV examines various proposals for reform, emphasizing the pending diplomatic crimes legislation in the United States Congress. Part V discusses new proposals and the policy implications of limiting diplomatic immunity, and recommends that the international community seriously rethink this policy. The analysis suggests that proper legislation can maintain the fundamental principle of diplomatic immunity while holding the personal servants and domestic staff of diplomats to account for crimes or civil wrongs in a manner consistent with current international law.

I. HISTORICAL DEVELOPMENT AND CODIFICATION OF DIPLOMATIC IMMUNITY

Ancient civilized states developed the concept and engaged in the practice of diplomatic immunity.¹⁸ Histories of the ancient Greeks, Romans, Jews, Chinese, Indians, and Europeans provide clear evidence that these states practiced diplomatic immunity.¹⁹ Recognizing that the

The principle of diplomatic immunity is greatly misunderstood. Shenon, *A Cornerstone Can Be Burdensome*, N.Y. Times, June 5, 1987, at A16. For example, a delegate to the United Nations from Barbados believed that diplomatic immunity extended to his German Shepherd when it bit several neighbors in Pelham, New York. *Id.* The diplomat warned of "possible international consequences" if any action was taken against the dog. *Id.*

Senator Robert Byrd sums up the practical implication of diplomatic immunity, as it is interpreted today in international relations:

[It] seems inconceivable to me that a relative of a diplomat can carry a gun in this country and shoot an American and cannot be arrested . . . If this can happen, they can come in, they can burn down our houses if they want to, they can shoot us in the streets, they can mug us, they can rob us, they can rape, they can murder and they cannot be arrested.

Minzesheimer, *Exceptions to the Rules*, Wash. Post, Feb. 20, 1983, at 11 (Magazine Section).

18. E. SATOW, *SATOW'S GUIDE TO DIPLOMATIC PRACTICE* 106 (Lord Gore-Booth 5th ed. 1979). Hugo Grotius wrote that there were two inherent rights of ambassadors abroad: the right of admission into the host country, and the right of freedom from violence. 2 H. GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* (book 1) 440 (F. Kelsey trans. 1925); see also Wesson, *300 Years of Diplomatic Immunity*, Christian Sci. Monitor, Jan. 3, 1980, at 23 (tracing the history of the privilege).

19. M. OGDON, *supra* note 5, at 10-30; E. SATOW, *supra* note 18, at 120. The

practice of protecting foreign representatives reciprocally benefits both parties, these states provided immunity for each other's ambassadors regardless of the gravity of the foreign envoy's acts.²⁰

A. THEORETICAL BASES FOR DIPLOMATIC IMMUNITY

Three theories seek to justify diplomatic immunity. As illustrated, the theoretical justification for diplomatic immunity does not survive careful scrutiny. The three theories are personal representation, the theory of extraterritoriality, and the theory of functional necessity.

The theory of personal representation was the first justification propagated to justify diplomatic immunity.²¹ Under the theory of personal representation, diplomats acting on behalf of a sovereign state embody the ruler of that state.²² An affront to the representative of a sovereign state under this theory constitutes an affront to the foreign state itself.²³

Analysis discredits this theory on three grounds. First, the foreign envoy cannot have the same degree of immunity as the sending state, because this principle places the individual diplomat above the law of the host state.²⁴ Second, the decline of the powerful monarch and the

inviolability of the ambassador was so entrenched in international practice that since the sixteenth century no instances where a receiving government authorized a breach of a diplomat's inviolability are documented. E. SATON, *supra* note 18, at 120.

But see Rafat, *The Iran Hostage Crisis and the International Court of Justice: Aspects of the Case Concerning United States Diplomatic and Consular Staff in Teheran*, 10 DEN. J. INT'L L. & POL'Y 425, 426-28 (1981) (discussing the imprisonment of 52 American diplomats as hostages in Iran in November of 1979). The government of Iran explicitly endorsed the forced imprisonment of accredited United States diplomats, a blatant violation of the principle of diplomatic immunity as codified in the Vienna Convention On Diplomatic Relations, *supra* note 7, art. 29, to which Iran is a party. *Id.*

20. Wesson, *supra* note 18, at 23. In 1562, the French government allowed the British Ambassador to leave freely even after associating with the king's enemies. *Id.* In 1584, the Spanish Ambassador to Great Britain was involved in a plot to kill Queen Elizabeth but was not punished, only expelled. *Id.* Governments have generally respected diplomatic immunity, with few exceptions, even through two world wars. *Id.* Allied forces honored the rights of representatives from Nazi Germany and Japan. *Id.* United States representatives abroad during World War II were also immune. *Id.*

21. See C. WILSON, DIPLOMATIC PRIVILEGES AND IMMUNITIES 1-5 (1967) (discussing in detail the theory of personal representation); B. SEN, *supra* note 5, at 80-83 (reviewing the different theoretical bases of diplomatic immunities).

22. C. WILSON, *supra* note 21, at 3.

23. *Id.*

24. *Id.* at 4. A review of the contemporary practice of diplomatic immunity shows that although, theoretically, diplomats are not above the law, Vienna Convention On Diplomatic Relations, *supra* note 7, art. 41, para. 1, diplomatic immunity does indeed place diplomats above the law. 133 CONG. REC. S13,797 (daily ed. Oct. 8, 1987) (statement of Sen. Helms). The mere fact that 58,000 people in the United States, comprised of diplomats, their families, servants, and staff can routinely break the law

evolution of popular rule makes it unclear exactly whom the diplomat represents.²⁵ Third, the theory extends no basis for protecting diplomats from the consequences of their private actions.²⁶

The second theoretical justification advanced to justify diplomatic immunity is the theory of extraterritoriality.²⁷ Under this rationalization, the diplomat legally resides on the soil of the sending state despite the fact that the diplomat lives abroad.²⁸ Consequently, the foreign envoy is not subject to the law of the receiving state due to a lack of a local residence.²⁹ Although this legal fiction received widespread support from international legal scholars and in judicial opinions, authorities have recently questioned and subsequently rejected the theory as a basis for a broad construction of diplomatic immunity.³⁰ Problems stem from the vagueness of the term "extraterritoriality." Extraterritoriality is subject to a number of incoherent interpretations,³¹ each providing illogical implications.³² For example, if diplomatic premises covered an entire section of a city, that part of the city would become untouchable by local law enforcement because it is not theoretically part of the territory of the receiving state.³³

The third theory, the most widely accepted current justification of diplomatic immunity, is the theory of functional necessity.³⁴ This theory provides that the diplomat is not subject to the jurisdiction of local courts, because this would hamper the functions of diplomatic rela-

and evade prosecution for serious crimes demonstrates this fact. *Id.*

25. C. WILSON, *supra* note 21, at 4.

26. *Id.* As discussed below, the provisions of the Vienna Convention On Diplomatic Relations, *supra* note 7, conflict as to whether a diplomat can be held liable for private acts. See *infra* note 64 and accompanying text (comparing the grant of immunity under articles 29-40 and the duty imposed on the diplomat to respect the laws and regulations of the receiving state under article 41 of the Convention).

27. C. WILSON, *supra* note 21, at 5-16.

28. *Id.* at 5.

29. *Id.*

30. Comment, *Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts*, 5 B.U. INT'L L.J. 177, 203-04 (1987) [hereinafter *Amending the Vienna Convention*]. The author concludes, after a review of the legislative history of the Vienna Convention, that the drafters intended to narrow, not broaden, the scope of diplomatic immunity. *Id.* at 207-10.

31. C. WILSON, *supra* note 21, at 12; see M. OGDON, *supra* note 5, at 77-84 (discussing the various interpretations of the term "extraterritoriality").

32. C. WILSON, *supra* note 21, at 14-15.

33. *Id.* at 15. The author notes that under this interpretation, based on the *franchise du quartier*, the part of the city that was subject to immunity, because it is off limits to law enforcement, would become a haven for criminals. *Id.* This interpretation was accepted in Europe until 1686, when the Pope, reacting to continued abuses of the diplomatic privilege, convinced European states to reject this practice. *Id.*

34. *Id.* at 17.

tions.³⁵ The functional necessity theory justifies immunity for the purpose of allowing diplomats to conduct their business. Accordingly, diplomatic immunity protects the diplomat's ability to carry out that work efficiently.³⁶ The privilege does not, however, afford protection and benefits to the diplomat as a person.³⁷

If a diplomat acts outside of the normal sphere of conducting international relations, a question arises as to whether immunity still applies.³⁸ Current administrative and judicial construction of diplomatic immunity illustrate that diplomats themselves are immune from prosecution even when committing criminal or tortious acts outside of their prescribed functions.³⁹ A critique of this construction of the functional necessity theory distinguishes the treatment of the individual diplomat from that of the diplomatic process.⁴⁰

In theory, diplomatic immunity originated to protect the process of furthering relations between nation states.⁴¹ The current focus of immunity on the individual diplomat is therefore unsound. The assertion that the diplomat cannot function efficiently without immunity implies that the diplomat must break the law of the receiving state in order to conduct international relations.⁴² Therefore, the current construction, providing diplomatic immunity to the individual, is inconsistent with the theoretical basis that accords protection only to the diplomatic

35. *Id.*

36. *Diplomatic Crimes Legislation: Hearings Before the Senate Committee on Foreign Relations*, 100th Cong., 1st Sess. 102 (1987) [hereinafter *Hearings on Diplomatic Crimes Legislation*] (statement of Pamela Trescott, Esq.).

37. See Vienna Convention On Diplomatic Relations, *supra* note 7, preamble (stating that the purpose of diplomatic immunity is not to benefit individuals but to ensure that diplomatic representatives are able to perform their functions efficiently). This provision of the preamble to the Convention reflects the movement against the international treatment of the diplomat as a privileged class. M. OGDON, *supra* note 5, at 220.

38. Note, *Insuring Against Abuse of Diplomatic Immunity*, 38 STAN. L. REV. 1517, 1521-22 (1986) [hereinafter *Insuring Against Abuse*]. The author uses the functional necessity theory as a basis for proposing the establishment of a mandatory insurance scheme for satisfying judgments against insurers of diplomats because that restriction would not affect the diplomatic function. *Id.* at 1522.

See *infra* note 139 for an example of a case where a diplomat was held responsible for a criminal act because it was committed outside the scope of his functional authority.

39. Comment, *A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978*, 54 TUL. L. REV. 661, 667 (1980) [hereinafter *A New Regime*]; see *infra* notes 42-43 and accompanying text (providing a critique of the functional necessity theory of diplomatic immunity).

40. *A New Regime*, *supra* note 39, at 667-72.

41. *Id.*

42. *Id.* The author notes that international relations will continue even if the diplomat fails to obey local laws. *Id.* at 670.

process.⁴³

B. THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS

The formulation of the Vienna Convention On Diplomatic Relations (Vienna Convention) was largely a reaction to the unlimited immunity historically granted to diplomats.⁴⁴ In United States law, section 25 of the Act of April 30, 1790 extended blanket immunity not only to ambassadors and their administrative staff, but also to the ambassador's personal servants.⁴⁵ This statute was so protective of diplomats that one provision made it a crime merely to bring suit against any person possessing diplomatic immunity. Sanctions for bringing suit under this provision included a fine and imprisonment for up to three years.⁴⁶

The establishment of an international convention on diplomatic immunity sought to standardize the practice of receiving diplomatic officials and establishing diplomatic missions, and to codify the customary international law of diplomatic immunity.⁴⁷ The preamble to the Vi-

43. *Id.* A more accurate interpretation of the functional necessity theory is one that protects the diplomatic process. *Id.* This imposes liability on diplomats for acts committed outside their official capacity because this burden would not interfere with diplomatic relations between the countries. *Id.*; see *Amending the Vienna Convention*, *supra* note 30, at 203-04 (noting that the functional necessity theory is misinterpreted and misapplied under the Vienna Convention On Diplomatic Relations); Recent Development, *Diplomatic Immunity: Application of the Restrictive Theory of Diplomatic Immunity*, 29 Harv. Int'l L.J. 533, 537-40 (1988) [hereinafter *Application of the Restrictive Theory*] (discussing precedent for the restrictive theory of diplomatic immunity in customary international law).

44. M. OGDON, *supra* note 5, at vii (citing a shift of world public opinion against diplomatic privileges).

45. Act of Apr. 30, 1790, ch.9, 1 Stat. 112, 117, *repealed by* The Diplomatic Relations Act of 1978, §§ 1-6, 22 U.S.C. §§ 254a-254e (1982).

46. The Diplomatic Relations Act of 1978, § 4065, 22 U.S.C. § 252 (1982). See Turan, *The Devilish Demands of Diplomatic Immunity*, Wash. Post, Jan. 11, 1976, at 11 (Potomac Section) (describing the consequences of arresting a diplomat under the 1790 act). In 1935, two policemen in Elkton, Maryland were dismissed from their police force, tried for assault and fined when they arrested the Iranian Ambassador and his chauffeur for speeding and resisting arrest. *Id.*

See also *Carrera v. Carrera*, 174 F.2d 496, 498 (D.C. Cir. 1949) (holding that a butler and chauffeur employed by the Czechoslovak Ambassador were immune from jurisdiction in a suit for separate maintenance, child custody and child support). This case illustrates the broad construction of diplomatic immunity under the 1790 statute. *Id.*

47. See Comment, *The Diplomatic Relations Act: The United States Protects Its Own*, 5 BROOKLYN J. INT'L L. 379, 385-87 (1979) (discussing the background and provisions of the Vienna Convention On Diplomatic Relations).

The goal of the United Nations Conference on Diplomatic Intercourse and Immunities was to establish a comprehensive compilation of the rights and privileges of members of diplomatic missions in light of developments in diplomatic law and practice since the standards set by the Congress of Vienna in 1815 and the Conference of Aix-la-Chapelle in 1818. *United Nations Conference on Diplomatic Intercourse and Immuni-*

enna Convention reflected the international concern of giving unlimited immunity to all classes of diplomats. The stated purpose of the Convention is to enable diplomatic missions to represent their sending state.⁴⁸ The drafters did not design it for the individual's benefit.⁴⁹

The Vienna Convention establishes four categories of diplomatic personnel, with different levels of immunity allotted to each. The diplomatic agent is the head of the mission or a member of the diplomatic staff of the mission.⁵⁰ Diplomatic agents are not subject to arrest or detention.⁵¹ They are completely immune from the criminal jurisdiction of the receiving state,⁵² as well as from civil jurisdiction for acts committed within their official capacity.⁵³ They are, however, subject to local jurisdiction for certain private acts.⁵⁴ The family of the diplomatic agent enjoys the same immunity status as the agent.⁵⁵

The administrative and technical personnel⁵⁶ employed by the mission possess the same immunity as the diplomatic agents with respect to criminal jurisdiction.⁵⁷ The Vienna Convention limits the immunity of administrative and technical personnel with respect to civil jurisdic-

ties: Report of the Delegation of the United States of America, 88th Cong., 1st Sess. 2-3 (1963) [hereinafter *United Nations Conference*].

Also in 1963, similar steps were taken to define the privileges and immunities of Consular officials. Vienna Convention On Diplomatic Relations, *supra* note 7. These steps resulted in the Vienna Convention On Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261. Because the Consul largely functions in the protection of nationals and interests of nationals in the receiving state, an analysis of Consular immunity is outside the scope of this Comment. For a discussion of consular immunity issues, see generally Comment, *Consular Immunity From Service of Process Under The Vienna Convention On Consular Relations*, 8 FORDHAM INT'L L.J. 96 (1984).

48. Vienna Convention On Diplomatic Relations, *supra* note 7, preamble.

49. *Amending the Vienna Convention*, *supra* note 30, at 204.

50. Vienna Convention On Diplomatic Relations, *supra* note 7, art. 1, para. e.

51. *Id.* art. 29.

52. *Id.* art. 31. *But see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 461 comment d and reporters note 7 (Tent. Draft No. 4, 1983) (approving the detention of a diplomatic agent for the agent's own safety or for the safety of others).

53. *See* Vienna Convention On Diplomatic Relations, *supra* note 7, art. 31, para. 1(a)-(c) (delineating that the diplomatic agent is subject to civil jurisdiction in cases relating to: (1) real property situated in the receiving state; (2) actions where the diplomatic agent is involved privately as administrator, executor, heir, or legatee; and, (3) actions relating to professional or commercial activity outside the official functions of the diplomatic agent).

54. *Id.*

55. *Id.* art. 37, para. 1. *Cf. Privileges and Immunities of the Diplomatic Family*, 25 INT'L & COMP. L.Q. 329, 330-32 (1976) (examining how different countries interpret article 37, and discussing various reservations entered to this provision of the Vienna Convention On Diplomatic Relations).

56. Vienna Convention On Diplomatic Relations, *supra* note 7, art. 1, para. f.

57. *Id.* art. 37, para. 2.

tion, however, to acts performed within the course of their duties.⁵⁸

The service staff, who performs domestic services for the mission,⁵⁹ is only immune for acts performed in the course of their domestic duties.⁶⁰ The final category is the private servant, who provides domestic service for a member of the mission and who is not an employee of the sending state.⁶¹ Private servants have only the immunity that the receiving state concedes, with the caveat that the receiving state must exercise its jurisdiction over private servants in a manner that does not interfere with the performance of the functions of the mission.⁶²

In addition to the immunities provided for in the Vienna Convention, article 41 imposes a duty, although it is without prejudice to the diplomatic immunity conferred in article 31, on the persons who benefit from such privileges and immunities to obey the laws and regulations of the receiving state.⁶³ This paradoxical provision is superfluous, because a diplomat who does not respect the laws and regulations of the receiving state is immune from any legal recourse due to a lack of any enforcement provision in the Vienna Convention.⁶⁴ Therefore, a provision requiring those with immunity to obey the laws of the receiving state without an enforcement mechanism is meaningless.

C. THE DIPLOMATIC RELATIONS ACT OF 1978

Under United States law, the broad definitions of diplomatic immu-

58. *Id.*

59. *Id.* art. 1, para. g.

60. *Id.* art. 37, para. 3.

61. *Id.* art. 1, para. h.

62. *Id.* art. 37, para. 4. *But cf.* 4 AM. JUR. 2D *Ambassadors and Consuls* § 10 (1962) (stating that the domestic servant or employee of the diplomat may not plead diplomatic immunity; the sending state must assert immunity for that employee).

The ambassador's family and nondiplomatic staff commit most of the offenses that immunity excuses. 133 CONG. REC. S13,801 (daily ed. Oct. 8, 1987) (testimony of Chuck Ashman, author of *DIPLOMATIC CRIME*). "It is not the Ambassador who rapes. It is more likely his son. It is not Ambassador [sic] who kills. It is more likely his chauffeur." *Id.*

63. Vienna Convention On Diplomatic Relations, *supra* note 7, art. 41, para. 1.

64. *See Insuring Against Abuse*, *supra* note 38, at 1522 (discussing that the nature of the conflict between article 41, paragraph 1 of the Convention and the provisions granting immunity is irreconcilable). When the diplomat violates the laws of the receiving state, article 31 renders the diplomat totally immune from jurisdiction. *Id.* Although article 41 imposes a duty on the diplomatic official, this duty is without prejudice to diplomatic immunity. *Id.* With the two conflicting provisions, the Convention contains no legal remedies to compel diplomats to respect the laws of the receiving state. *Id.* The Convention only provides limited options to address the abuses of an individual diplomat. Note, *State Sponsored Terrorism*, *supra* note 17, at 133-34. *See infra* notes 100-28 and accompanying text (discussing the limited remedial measures, short of terminating diplomatic relations, that are available against undesirable diplomats under the Vienna Convention).

nity were codified in the Act of 1790. These definitions conflict with the more limited classifications of immunity in the Vienna Convention.⁶⁵ Public expression of hostility toward diplomats and frustration generated from a lack of accountability for criminal acts,⁶⁶ as well from an absence of civil remedies for injuries inflicted by diplomats,⁶⁷ prompted Congress to pass the Diplomatic Relations Act of 1978.⁶⁸

The Diplomatic Relations Act of 1978 repealed the 1790 Act and brought United States diplomatic immunity law into conformity with the Vienna Convention.⁶⁹ In addition, the Act added two provisions in an attempt to provide victims of torts committed by diplomats with adequate compensation.⁷⁰ First, the Act requires members of diplomatic missions to purchase liability insurance.⁷¹ Second, the Act provides a direct right of action for injured parties against the insurer of an immune diplomat.⁷² These attempted reforms, however, lack adequate enforcement mechanisms, and therefore unequivocally fail to compensate the innocent victim.⁷³

Three major inadequacies in the implementation of the Diplomatic

65. Comment, *The Diplomatic Relations Act*, 19 HARV. INT'L L.J. 1019, 1020 (1978).

66. See Comment, *The Effect of the Diplomatic Relations Act*, 11 CAL. W. INT'L L.J. 354, 357 (1981) [hereinafter *The Effect of the Diplomatic Relations Act*] (noting that the hostility expressed by the American public manifested itself in a large crime wave against foreign diplomats in the United States); see also *Hearings on Diplomatic Crimes Legislation*, *supra* note 36, at 65-100 (discussing that while Congress considered legislation to address the issue of diplomatic crime, the testimony of a victims' panel during recent hearings before the Senate Foreign Relations Committee reflected similar public sentiment against what is seen as an unlimited and unjustified privilege).

67. See *id.* at 354, 356-57 (1981) (stating that the United States was one of the most lenient countries in the world in interpreting diplomatic immunity).

68. The Diplomatic Relations Act of 1978, §§ 2-6, 22 U.S.C. §§ 254a-254e (1982 & Supp. IV 1986).

69. *Id.* See B. SEN, *supra* note 5, at 83-91 (discussing how other countries treat diplomatic immunity as a matter of their domestic law).

70. The Diplomatic Relations Act of 1978, § 6(b), 22 U.S.C. § 254e (1982 & Supp. IV 1986).

71. *Id.*

72. *Id.* §§ 2-6, 22 U.S.C. §§ 254a-254e (1982 & Supp. IV 1986). There are various examples of unsuccessful lawsuits brought under this provision against the insurers of negligent diplomats. See *Madoo v. Globe Am. Casualty Co.*, 650 F. Supp. 855, 857 (D. Md. 1986) (holding that the court lacked subject matter jurisdiction over the case because the Nicaraguan diplomat's immunity at the time of the accident had expired before the plaintiff had filed a complaint); *Windsor v. State Farm Ins. Co.*, 509 F. Supp. 342, 347 (D.D.C. 1981) (holding that the Diplomatic Relations Act of 1978 does not apply retroactively).

73. Compare *A New Regime*, *supra* note 38, at 694-97 (outlining the inadequacies of the insurance provisions of the Diplomatic Relations Act) with Comment, *The Diplomatic Relations Act*, 13 J. INT'L L. & ECON. 471, 478-80 (1979) [hereinafter Comment, *The Diplomatic Relations Act*] (discussing the lack of enforcement mechanisms under the Diplomatic Relations Act).

Relations Act contribute to its failure. First, there is no remedy when the diplomat is immune from jurisdiction and does not carry insurance.⁷⁴ Second, aside from the State Department withholding diplomatic license plates, there is no mandatory monitoring scheme that forces foreign missions to obtain insurance.⁷⁵ Third, even if the violating diplomat is insured, the Act limits coverage to \$300,000 for personal injury and \$50,000 for property damage.⁷⁶ The damage limitations are insufficient to cover extensive medical expenses resulting from severe injuries caused by diplomats.⁷⁷

II. HOW DIPLOMATIC IMMUNITY FUNCTIONS IN THE UNITED STATES

The executive branch possesses exclusive jurisdiction to determine whether an alien in the United States has diplomatic immunity.⁷⁸ President Jimmy Carter delegated this function to the Secretary of State in 1978.⁷⁹ The Secretary of State's power to confer or deny immunity is strictly a political determination and is not subject to judicial review.⁸⁰

74. Comment, *The Diplomatic Relations Act*, *supra* note 73, at 480.

75. *Id.*

76. Compulsory Liability Insurance for Diplomatic Missions and Personnel, 22 C.F.R. § 151.4 (1988); *see also* 133 CONG. REC. S13,796 (daily ed. Oct. 8, 1987) (evaluating the Senate's passage of an amendment to the Diplomatic Relations Act that increases the minimum liability coverage to \$1,000,000 and requires the Director of the Office of Foreign Missions to take steps to ensure compliance with the higher liability insurance requirements). *But see infra* notes 178-80 and accompanying text (noting that the reform fails to address the major flaw of the Diplomatic Relations Act, that it lacks enforcement mechanisms to ensure adequate compensation).

77. *See* Turan, *supra* note 46, at 10 (describing how, in 1974, a cultural attaché at the Panamanian Embassy ran a red light and crashed into Dr. Halla Brown, then a clinical professor of medicine at George Washington University). The accident left Dr. Brown a quadriplegic and forced her to relinquish her lucrative medical practice. *Id.* The Panamanian Embassy offered condolences, but no compensation. *Id.* Even if the diplomat was properly insured under the Act, the most Dr. Brown could have received was \$300,000. Compulsory Liability Insurance for Diplomatic Missions and Personnel, 22 C.F.R. § 151.4 (1988).

78. *See* U.S. CONST. art. II, § 3 (stating that the President "shall receive ambassadors and other public ministers"); The Diplomatic Relations Act of 1978, § 4, 22 U.S.C. § 254c (1982 & Supp. IV 1986) (describing the implementation of this provision).

79. Exec. Order No. 12,101, 43 Fed. Reg. 54,195 (1978), *amended by* Exec. Order No. 12,608, 52 Fed. Reg. 34,617 (1987).

80. *See* United States v. Lumumba, 741 F.2d 12, 15 (2d Cir. 1984) (stating that diplomatic status is only conferred by the executive branch); *Carrera v. Carrera*, 174 F.2d 496, 497 (D.C. Cir. 1949) (asserting that immunity is established when recognized by the State Department and transmitted to the court); *United States v. Enger*, 472 F. Supp. 490, 500-01 (D.N.J. 1978) (holding that defendants, Soviet citizens who were employees of the United Nations in New York City, charged with espionage offenses, were not immune from prosecution under the Vienna Convention); *Trost v. Tompkins*, 44 A.2d 226, 229 (D.C. 1945) (holding that conferring diplomatic status is

Critics question the administration of the State Department over diplomatic status determinations. The State Department held secret proceedings to evaluate handling of past cases of diplomatic crime.⁸¹ The Department feared that adverse publicity would strain relations with the countries involved.⁸² This policy portrays the insensitivity of the State Department towards victims of violent crime, bringing adverse publicity upon the Department.⁸³

*Abdulaziz v. Metropolitan Dade County*⁸⁴ illustrates how a State Department retroactive grant of diplomatic immunity attempted to prevent potential strains in international relations.⁸⁵ Responding to newspaper reports alleging that the servants of a Saudi Prince living in Florida were forced to work twenty hours a day without contact with the outside world and for slave wages, State attorneys for Dade County

a political question that is not challenged by courts). The court also considered whether the defendants had an intimate association with the permanent diplomatic mission's business. *Id.* at 506-07; see also *Haley v. State*, 200 Md. 72, 82-83, 88 A.2d 312, 317 (1952) (rejecting a claim of diplomatic immunity from an American servant to an attaché of a foreign embassy where the State Department asserted that the foreign embassy did not formally notify the United States of the diplomatic status).

81. See Weiser & Knight, *supra* note 11, at A16 (quoting Richard Gookin, Associate Department of State Chief of Protocol, that with reference to the handling of incidents involving diplomats, "[w]e want to handle them quietly; we believe it is in the interest of our relations with embassies and foreign governments"). Chief of Protocol Selwa Roosevelt noted that "... the principle we're upholding is not to protect the guy that's going through the stoplight, obviously, but to protect one of our people who might be in a country ... where he could be framed if he were not protected by diplomatic immunity." *Id.*

Responding to a Freedom of Information Act request, an investigation uncovered an internal State Department memorandum regarding the Kenneth Skeen incident, discussed *supra* note 12. The memorandum disclosed that officials from the State Department went to visit the Brazilian who committed the assault to express "sorrow and concern," but did not express similar regrets with the victim of the assault. *Hearings on Diplomatic Crimes Legislation*, *supra* note 36, at 62 (statement of Chuck Ashman, author of DIPLOMATIC CRIME); see also *Crime and Diplomatic Immunity*, Wash. Post, Jan. 10, 1984, at A16 (criticizing diplomatic immunity and stating that "[c]rimes by diplomats should be documented and publicized as if no diplomatic immunity existed"). "Our government should not be covering them up." *Hearings on Diplomatic Crimes Legislation*, *supra* note 36, at 113 (statement of Arthur Rovine, former Chairman of the American Bar Association's Section on International Law and Practice) (arguing that greater publicity of diplomatic crime would deter future crime by embarrassing the diplomat's government).

82. Weiser & Knight, *supra* note 11, at A16.

83. See *id.* (noting that complaints inundate the State Department when an incident involving diplomatic immunity is publicized).

84. *Abdulaziz v. Metro. Dade County*, 741 F.2d 1328 (11th Cir. 1984).

85. See *Abdulaziz v. Metro. Dade County*, 741 F.2d 1328, 1332 (11th Cir. 1984) (dismissing a counterclaim brought against a plaintiff who acquired diplomatic immunity status retroactively); see also *supra* note 16 (discussing the facts of the above cited case).

began investigating the matter.⁸⁶ Police officers, with a search warrant, went to the Prince's home and upon entrance were assaulted by bodyguards, the Prince's mother-in-law, and the Prince himself.⁸⁷ The police officers found no evidence of the slavery charges.⁸⁸

The Prince,⁸⁹ who at the time of the incident did not have diplomatic immunity, filed a \$210 million civil rights suit against Dade County law enforcement officials.⁹⁰ Four police officers counterclaimed for damages in tort.⁹¹ Responding to a request from the Saudi Government, the State Department conferred a full retroactive grant of diplomatic immunity on the Prince.⁹²

The United States Court of Appeals for the Eleventh Circuit upheld the dismissal of the counterclaims against the prince basing its decision on the retroactive grant of immunity.⁹³ The actions of the State Department incensed Florida law enforcement officials, bringing into question whether this retroactive grant of immunity abused the privilege.⁹⁴ Diplomatic crime cases, such as this, illustrate the dilemma con-

86. DIPLOMATIC CRIME, *supra* note 7, at 107-08.

87. *Id.* at 108-09.

88. *Id.* at 109.

89. *See id.* at 110-11 (stating that the Prince was the former Saudi Defense Minister).

90. *Id.* at 110; *see also* Abdulaziz v. Metro. Dade County, 741 F.2d 1328, 1330 (11th Cir. 1984) (explaining the history of the case).

91. DIPLOMATIC CRIME, *supra* note 7, at 110. *See also*, Abdulaziz v. Metro. Dade County, 741 F.2d 1328, 1330 (11th Cir. 1984) (explaining the basis of the counterclaim).

92. DIPLOMATIC CRIME, *supra* note 7, at 110; Abdulaziz v. Metro. Dade County, 741 F.2d 1328, 1330 (11th Cir. 1984).

93. Abdulaziz v. Metro. Dade County, 741 F.2d 1328, 1331-32 (11th Cir. 1984). Although the court held that the Prince's original bringing of a complaint did not constitute a waiver of diplomatic immunity, article 32 of the Vienna Convention On Diplomatic Relations provides that once a diplomatic agent initiates judicial proceedings, he cannot invoke this immunity with respect to any counterclaim connected with the original claim. Vienna Convention On Diplomatic Relations, *supra* note 7, art. 32. Under this provision, it appears that the Prince's lawsuit arguably constitutes a waiver of his future diplomatic status. *Id.*

94. DIPLOMATIC CRIME, *supra* note 7, at 111. Janet Reno, the Florida State Attorney protested in a letter to the State Department: "All the evidence indicates that the State Department took that action in response to pressure from the Saudi government which wanted to keep one of the members of the royal family from being embarrassed." *Id.* Sergeant John Collins, one of the law enforcement officials involved in the incident, said, "Something has got to be done to protect Americans in this country from their own State Department." *Id.*

See also J. Anderson & D. Van Atta, *The Long Arm of Diplomatic Immunity*, Wash. Post, June 6, 1988, at C15 (discussing an alleged retroactive grant of diplomatic immunity by the State Department to a daughter of a deceased Lebanese leader following the institution of a civil suit against her).

Cf. infra note 95 and accompanying text (explaining State Department reactions to negative public sentiment resulting from its handling of similar incidents involving dip-

fronting local law enforcement. Police officers are trapped between the international obligations of the United States to excuse offenses committed by diplomats, and their oath to uphold the law.⁹⁵

Problems exist when police officers fail to investigate crimes after the offender claims diplomatic immunity.⁹⁶ In some cases, the offender may not have diplomatic immunity for the act committed.⁹⁷ Reforms currently pending in Congress arguably assist police officers in handling these sensitive incidents.⁹⁸ These reforms do not alleviate the basic con-

lomatics and discussing the efforts of the Department to assist law enforcement officers in handling incidents involving diplomatic crime).

Pending legislation in the United States House of Representatives would prohibit State Department officials from interfering in local law enforcement prosecution of aliens and their family members who are members of a foreign mission, and who are not immune from criminal jurisdiction under the Vienna Convention. H.R. 3036, 100th Cong., 1st Sess. § 3 (1987).

95. OFFICE OF PROTOCOL AND OFFICE OF FOREIGN MISSIONS, U.S. DEPARTMENT OF STATE, PUB. NO. 9533, GUIDANCE FOR LAW ENFORCEMENT OFFICERS: PERSONAL RIGHTS AND IMMUNITIES OF FOREIGN DIPLOMATIC AND CONSULAR PERSONNEL (1987) [hereinafter GUIDANCE FOR LAW ENFORCEMENT]. Written to assist law enforcement officials in ascertaining the status of individuals asserting the diplomatic privilege, the booklet also guides the handling of these incidents. *Id.* at v.

A State Department representative testified that the guide emphasizes the necessity for a complete police investigation following the incident in order to lay the basis for possible future prosecution if immunity were terminated. *Hearings on Diplomatic Crimes Legislation*, *supra* note 36, at 16 (statement of Selwa Roosevelt, Chief of Protocol of the United States Department of State).

96. *Hearings on Diplomatic Crimes Legislation*, *supra* note 36, at 16-17 (statement of Selwa Roosevelt). See *Afghan Diplomat Accused of Auto Attack on Woman*, N.Y. Times, July 17, 1987, at B1 (describing how a high ranking Afghan diplomat to the United Nations was accused of running over a woman with a car in a dispute over a parking space). New York City police did not continue investigating into the incident, assuming the driver was immune. *Id.* The police never consulted United Nations or State Department officials before making this determination. *Id.*; see, e.g., *United States v. Chindawongse*, 771 F.2d 840, 848-49 (4th Cir. 1985) (maintaining that allegations of serious crimes can lead to the arrest of consular officials); *United States v. Kostadinov*, 734 F.2d 905, 911 (2d Cir. 1984) (stating that the Bulgarian defendant's position in the trade office of the Bulgarian mission did not entitle him to immunity without explicit State Department recognition); *United States v. Enger*, 472 F. Supp. 490, 500-01 (D.N.J. 1978) (holding that United Nations political affairs officials accused of espionage were not entitled to immunity because the acts alleged occurred outside of their official capacity).

97. GUIDANCE FOR LAW ENFORCEMENT, *supra* note 95, at 7. The guide notes that only a court of law can determine what constitutes an official act. *Id.* It does not empower either a law enforcement officer or a State Department official to make such a determination. *Id.* In addition, the guide cautions that diplomatic passports, tax exemption cards, automobile registration, diplomatic license plates, and drivers licenses do not conclusively reflect a diplomat's degree of privileges and immunities. *Id.* at 11-13.

98. H.R. 3036, 100th Cong., 1st Sess. § 3 (1987). Pending legislation in the House of Representatives, if enacted, would require the Director of the Office of Foreign Missions of the Department of State to educate law enforcement officials as to the extent of immunity provided to members of foreign missions. *Id.* This legislation would also require the director of the Office of Foreign Missions to encourage local law enforce-

flict between the police officers' duty to uphold the law and diplomatic immunity excusing unlawful conduct.⁹⁹

III. EXISTING REMEDIES IN RESPONSE TO DIPLOMATIC CRIME

There are few effective remedies available to prosecute diplomats immune from United States civil or criminal jurisdiction. Without the imposition of meaningful sanctions, the problem of unaccountable diplomatic crime will continue. Presently, there are four alternatives that are available to the United States.

A. THE *Persona Non Grata* PROCEDURE

Article 9 of the Vienna Convention allows the receiving state to declare the person in question *persona non grata* (PNG).¹⁰⁰ The PNG procedure enables the receiving state to declare a member of the mission unacceptable.¹⁰¹ This requires expulsion of that member from the United States.¹⁰² The United States infrequently utilizes this remedy,¹⁰³ as critics argue that its use could conceivably create tension between the nations involved.¹⁰⁴

Under the present scheme, the victim is left with no reasonable means to secure compensation. Recovery would require the victim to bring suit against the offending diplomat in the sending state. Insurmountable financial, cultural, logistical, and political limitations severely limit the possibilities of success in a foreign forum.¹⁰⁵

ment officials to prosecute members of foreign missions that commit crimes, in a manner consistent with international law. *Id.*

99. See *Hearings on Diplomatic Crimes Legislation*, *supra* note 36, at 76-78, 83-88 (statements of Peter Christiansen, a retired New York City police detective, and Dennis Martin, National President of the American Federation of Police Officers) (discussing the effects of diplomatic immunity on effective law enforcement and public opinion).

100. Vienna Convention On Diplomatic Relations, *supra* note 7, art. 9.

101. *Id.* The State Department does not need to offer any reason when making a *persona non grata* declaration. *Id.*

102. *Id.*

103. *The Effect of the Diplomatic Relations Act*, *supra* note 66, at 362.

104. Note, *Sovereign Immunity: Liability for a Violent Tort Committed by a Diplomat - Skeen v. Federative Republic of Brazil*, 25 HARV. INT'L L.J. 506, 510 (1984). Conversely, advocates claim that greater use of the *persona non grata* procedure is an effective way to prevent the criminal from committing further crimes in the United States. *Hearings on Diplomatic Crimes Legislation*, *supra* note 36, at 112 (statement of Arthur Rovine, Former Chairman of the American Bar Association Section of International Law and Practice).

105. *Insuring Against Abuse*, *supra* note 38, at 1532-33. The author notes that diplomats are only immune to trial in the receiving state; they can be prosecuted

B. WAIVER OF IMMUNITY

Article 32 of the Vienna Convention allows the sending state to waive the diplomat's immunity.¹⁰⁶ The drafters included this provision to allow a sending state to contest civil claims in domestic courts when waiver would not impede the daily performance of the foreign mission.¹⁰⁷ The Vienna Convention requires the sending state to make an express waiver of this privilege.¹⁰⁸ One commentator has argued, however, that a diplomat's lawbreaking activity can constitute a constructive waiver of diplomatic immunity.¹⁰⁹

As a matter of practice, the sending state will not subject its diplo-

abroad. *Id.* The author also notes, however, the financial, cultural, logistical, and political problems such lawsuits pose to the prosecuting victim. *Id.* Few victims possess the resources to pursue such an action. *Id.*

106. Vienna Convention On Diplomatic Relations, *supra* note 7, art. 32, para. 1.

107. *United Nations Conference*, *supra* note 47, at 49.

108. Vienna Convention On Diplomatic Relations, *supra* note 7, art. 32, para. 2. In order to waive diplomatic immunity, a foreign envoy must obtain the sending state's consent. 4 AM. JUR. 2D *Ambassadors and Consuls* § 10 (1962). One court in Great Britain has held, however, that the diplomat may waive immunity where there is no interference with the diplomatic function. *Id.*; see *Fatemi v. United States*, 192 A.2d 525, 528 (D.C. 1963) (stating that diplomatic authorities may waive an embassy's diplomatic immunity and request local police to enter the building for purposes of law enforcement).

109. See Goldberg, *supra* note 17, at 2-3 (arguing that Libyan "diplomats" in Great Britain had forfeited their right to be recognized as *bona fide* diplomatic agents when they engaged in terrorist activities); see also *State Sponsored Terrorism*, *supra* note 17, at 150-51 (asserting that because Libya's actions had violated the "functional premise" of the Vienna Convention On Diplomatic Relations). Specifically, article 41, paragraph 3, prevents using the diplomatic mission in any manner incompatible with the functions of the mission. *Id.* By undertaking terrorist activities, which are incontrovertibly outside of a reasonable diplomatic function, the "diplomats" had forfeited their diplomatic status. See *supra* notes 37-44 and accompanying text (discussing the functional necessity theoretical base of diplomatic immunity).

But see *Insuring Against Abuse*, *supra* note 38, at 1533-34 and accompanying notes (criticizing Justice Goldberg's assertion as lacking support both in state practice and in international law). Justice Goldberg's belief that unlawful acts breach diplomatic status and permit receiving states to arrest offending diplomats is not supported as a matter of state practice in international law. *Id.* But Justice Goldberg properly raised the question: Should civilized nations tolerate this kind of behavior on the ground that it is the diplomat's *work and functions* that are protected? *Id.*; see *infra* notes 193-94 and accompanying text (suggesting that the traditional notion of diplomatic immunity should be the subject of a new international debate).

Under article 60, paragraph 2 of the Vienna Convention On The Law Of Treaties, opened for signature May 23, 1969, U.N. Doc. A/Conf. 39/27, reprinted in 8 I.L.M. 679, 701 (1969), a party affected by a material breach of a multilateral treaty can invoke the breach as a ground for suspending the operation of the treaty. Applying the principle of diplomatic immunity, as codified in the Vienna Convention On Diplomatic Relations, crimes committed by diplomats could breach article 41. Note, *The Limits of International Legal Privilege*, 58 AUSTRALIAN L.J. 531, 532 (1984). The aggrieved state could suspend the immunity provisions of the treaty, allowing that state to prosecute the offending diplomat. *Id.*

mats to the criminal or civil jurisdiction of the receiving state.¹¹⁰ Although the sending state may not opt to waive the immunity of its diplomats in the receiving state, this does not preclude the sending state from prosecuting the crime.¹¹¹ Little information, however, is available on whether foreign countries hold their diplomats accountable for their crimes and torts committed in the United States.¹¹²

C. TERMINATION OF DIPLOMATIC RELATIONS

The receiving state can break relations with the sending state. Following the murder of British policewoman, Yvonne Fletcher, by gunfire that came from inside the Libyan "People's Bureau," Great Britain terminated diplomatic relations with Libya.¹¹³ Similarly, the United States, after much internal debate, broke diplomatic relations with Iran after terrorists seized the United States Embassy in Tehran and held 52 United States nationals hostage.¹¹⁴ These two incidents provide examples of the extreme conditions necessary for governments to terminate diplomatic relations. Governments will not, as a matter of course, resort to such a drastic measure.¹¹⁵

110. *Hearings on Diplomatic Crimes Legislation*, *supra* note 36, at 113 (statement of Arthur Rovine, former chairman of the American Bar Association's Section of International Law and Practice). Mr. Rovine also suggested establishing bilateral waiver agreements with certain countries. *Id.* The United States could choose countries with which to mutually agree to waive immunity. *Id.* These agreements could contain an escape clause allowing a country to opt out when waiver threatens national security. *Id.* Bilateral agreements enlarging the scope of immunity exist between the United States and the Soviet Union, East Germany, and China. *Id.*

In one unique case, the State Department negotiated the waiver of diplomatic immunity with the government of Guatemala to enable prosecution of two Guatemalan diplomats implicated in the kidnapping of a former Salvadoran Ambassador's wife. Werner, *4 More Held in Abduction of Ex-Envoy's Wife*, N.Y. Times, July 16, 1983, at 2.

111. *Insuring Against Abuse*, *supra* note 38, at 1532-33.

112. *Hearings on Diplomatic Crimes Legislation*, *supra* note 36, at 35-36 (statement of Sen. Spector). United States diplomats, with some exceptions, are well-behaved abroad. *Id.* In Great Britain, the behavior of the United States diplomatic corps is described as exemplary. Cowper, *Diplomacy Old and New*, N.Y.L.J., July 30, 1985, at 2. For examples of United States diplomats abusing diplomatic immunity abroad, see DIPLOMATIC CRIME, *supra* note 7, at 114-27. United States diplomats who commit offenses abroad, and for whom immunity is asserted, are still subjected to criminal, civil, and military jurisdiction in the United States. *Id.* The United States has prosecuted several offenders in the United States, handing out harsh sanctions in certain instances for crimes committed abroad. *Id.*

113. *State Sponsored Terrorism*, *supra* note 17, at 134-36.

114. See G. SICK, *ALL FALL DOWN: AMERICA'S TRAGIC ENCOUNTER WITH IRAN*, 288-89 (1985) (describing the reluctance with which governments break relations). It was not until five months after the seizure of the United States Embassy in Tehran, along with 52 American hostages, that the United States terminated diplomatic relations with Iran. *Id.*

115. *Id.*; cf. *State Sponsored Terrorism*, *supra* note 17, at 159-65 (questioning

D. STATE DEPARTMENT MEASURES

The State Department possesses wide policy determining powers which include the mediation of relations between the United States government and foreign missions.¹¹⁶ The State Department Chief of Protocol, Selwa Roosevelt, testified before a Senate committee on a number of sanctions available to curtail abuses of diplomatic immunity.¹¹⁷ The first measure bars the serious offender from reentering the United States.¹¹⁸ The State Department attempts to accomplish this through an automated visa lookout system.¹¹⁹ The State Department acknowledges, however, that on at least three occasions, this system failed to work.¹²⁰

The second sanction addresses the issue of juvenile perpetrators of crime. Under this sanction, expulsion of the entire family from the United States is possible. Selwa Roosevelt's testimony cites instances where the Department had expelled entire families from the United States when the child of the diplomat perpetrated the crime.¹²¹ This

whether after the Libyan "People's Bureau" incident the civilized world should continue to diplomatically recognize nations such as Libya and Iran which sanction criminal behavior as a matter of state policy); Goldberg, *supra* note 17, at 1-2 (noting that international law is not a suicide pact for civilized nations).

116. See *supra* notes 78-95 and accompanying text (explaining the powers delegated to the State Department to determine immunity and citing an example of how a retroactive grant of immunity is possible); see *infra* notes 117-28 and accompanying text (assessing different policy options at the disposal of the State Department).

117. *Hearings on Diplomatic Crimes Legislation*, *supra* note 36, at 6-20 (statement of Hon. Selwa Roosevelt, Chief of Protocol of the United States Department of State).

118. *Id.* at 14.

119. *Id.* Entry visas are revocable for violations of local or federal law. *Id.* If the violator attempts to obtain another visa to reenter the United States, the consul authorized to grant the visa and United States ports of entry will delay the immigration procedure, while seeking State Department advice on allowing entrance. *Id.*

120. *Id.* at 15. One particular example illustrates the procedure. The Saudi Arabian diplomat's son, who had diplomatic immunity, voluntarily left the United States after committing rape. 133 CONG. REC. S13,799-80 (daily ed. Oct. 8, 1987) (statement of "Judy", mother of sixteen year old victim of rape perpetrated by the son of a Saudi Arabian diplomat and the son of a World Bank official on January 29, 1983). Some months later, the victim encountered the perpetrator at her place of employment. *Id.* Responding to a State Department inquiry, the Saudi Arabian Embassy claimed that it was the perpetrator's brother the victim saw, and that the perpetrator was out of the country. *Id.* The rapist's mother then moved to a house directly across the street from the victim, where the rapist continued to torment the victim. *Id.* The Saudi Embassy maintained throughout that the rapist was not in the country. *Id.* Prior to a private investigator photographing the rapist, no one offered any conclusive proof to the State Department that the perpetrator was indeed in the United States. *Id.* The rapist finally left the country. *Id.*

121. *Hearings on Diplomatic Crimes Legislation*, *supra* note 36, at 17 (statement of Hon. Selwa Roosevelt).

policy seeks to ensure that diplomats, as parents, are fully accountable for the acts of their children.¹²²

A third tactic used since 1984 monitors diplomatic traffic violations.¹²³ The Office of Foreign Missions of the State Department uses a standardized point system to evaluate diplomats' observance of traffic regulations.¹²⁴ If a diplomat accumulates eight points over a two year period, or drives even once under the influence of alcohol, the State Department revokes the diplomat's driving privileges.¹²⁵

The issuance of identity cards facilitates determinations of a diplomat's immunity status.¹²⁶ These cards, along with providing basic identity information about the person in question, identify the immunity status of the foreign national.¹²⁷ If issued uniformly to all foreign diplomats, this measure could help to eliminate problems in assessing whether the diplomat has immunity or not.¹²⁸

IV. PROPOSALS FOR REFORM

A. A CLAIMS FUND

Theorists have proposed the establishment of a claims fund to compensate those injured by diplomats.¹²⁹ Under this proposal, victims who could not successfully bring actions under the Diplomatic Relations Act could draw compensation from a United States government funded financial pool.¹³⁰ This proposal sought to provide compensation for in-

122. *Id.*

123. *Id.*

124. *Id.* The State Department uses the standardized point system of the American Association of Motor Vehicles Administrators. *Id.*

125. *Id.* Prior to the Senate hearings, the State Department permanently suspended fifteen drivers licenses. *Id.* From the standpoint of the victim, this reactive policy does not assist at all in compensation. *Id.* Such a system, however, may prevent future incidents involving particularly reckless or careless diplomats. *Id.*

126. *Id.* at 18.

127. *Guidance for Law Enforcement*, *supra* note 95, at 13. There are three types of identification cards. *Id.* Cards with a blue border identify diplomats, red bordered cards identify consular officials, and green bordered cards identify employees. *Id.* The guide recommends verification of diplomatic status where there is doubt as to the validity of the card or to the claim of diplomatic status. *Id.* The guide provides twenty-four hour phone numbers to assist in verification. *Id.* at 13-14.

128. *See id.* (indicating that the police guide provides no indication as to how these cards are distributed); *see also Hearings on Diplomatic Crime Legislation*, *supra* note 36 (offering no distribution guidance).

129. Comment, *Compensation for "Victims" of Diplomatic Immunity in the United States: A Claims Fund Proposal*, 4 FORDHAM INT'L L.J. 135, 149-59 (1980) [hereinafter *Claims Fund Proposal*]; Recent Development, *Diplomatic Immunity: Implementing the Vienna Convention on Diplomatic Relations*, 10 CASE W. RES. J. INT'L L. 827, 829-31 (1978).

130. *Claims Fund Proposal*, *supra* note 129, at 149.

jured citizens where the diplomats who caused injury were both immune from jurisdiction and carried no liability insurance.¹³¹

The proposal required the State Department to establish a "Bureau of Claims" to ascertain causation of injuries stemming from instances involving a diplomat.¹³² The bureau would then determine the amount of compensation due to the victim.¹³³ The success of this proposal requires the diplomat's participation in the compensation procedure. The diplomat becomes a "witness" in the determination of liability, without affecting diplomatic immunity status.¹³⁴

Under the proposal, the United States government finances the claims fund.¹³⁵ After settling with the victim, the State Department would then seek reimbursement from the mission.¹³⁶ Among the tactics proposed to encourage voluntary reimbursement from the foreign mission are to extend bilateral immunity agreements to participating countries,¹³⁷ to implement the *persona non grata* procedure,¹³⁸ and to apply political and economic pressure against the sending states of offending diplomats.¹³⁹

131. *Id.* at 149-50.

132. *Id.* at 152-53. The author proposes that the Director of the Bureau of Claims make two determinations. *Id.* First, the Director determines whether a diplomat, entitled to immunity, caused the injury. *Id.* Second, the Director ascertains whether the victim has a remedy under the Diplomatic Relations Act. *Id.* If the Director finds that both conditions are satisfied, compensation is awarded from the claims fund. *Id.*

133. *Id.*

134. *Id.* at 157-58.

135. *Id.* at 153-54. There is an ongoing debate as to who should "pay" for our international obligations. *Id.* The author gives two reasons why the United States should finance the claims fund. *Id.* First, the State Department has a much better chance of obtaining reimbursement from the foreign mission. *Id.* The State Department is conceivably better equipped to conduct international diplomacy than an injured plaintiff's tort attorney. *Id.* Second, by financing the claims fund, the United States government incurs the expense necessary to insure effective diplomatic relations. *Id.* at 154-55. Uncertainty exists as to whether a policy of allowing diplomats to go unprosecuted for crimes actually contributes to the domestic security in the United States. *Id.*

136. *Id.* at 154.

137. *Id.* at 155. The agreements could extend more or less favorable treatment depending on the country's willingness to compensate victims. *Id.* The United States has special bilateral agreements with the Soviet Union, China, and East Germany. *Guidance for Law Enforcement, supra* note 95, at 6 n.4. These agreements extend the immunity normally only available to diplomatic agents to all members of the embassy staff. *Id.* These agreements, however, have no provisions for reimbursement. *Id.*

138. *Claims Fund Proposal, supra* note 129, at 155-56. See *supra* notes 103-05 and accompanying text (discussing the governmental reluctance to use the *persona non grata* sanction).

139. *Claims Fund Proposal, supra* note 129, at 156. Exercising political and economic pressure might amount to a viable tactic in encouraging compensation, but past State Department practice, clearly demonstrates that pressure is only exerted in particularly egregious cases. Nossiter, *North Korean Envoy Pleads Guilty to Sex Abuse Charge*, N.Y. Times, July 27, 1983, at B3. The State Department refused to accord

The claims fund proposal contains some fundamental flaws. In all probability, foreign missions will not voluntarily reimburse the claims bureau. If the mission refuses to compensate the Bureau of Claims for damages expended to compensate a victim of a diplomat's wrongdoing, the State Department has limited avenues of recourse.¹⁴⁰ Furthermore, American taxpayers are unlikely to support a proposition requiring the United States government to assume financial responsibility for a foreign diplomat's wrongdoing.¹⁴¹

B. A MANDATORY INSURANCE SCHEME

One commentator advocates the implementation of a mandatory insurance scheme to solve the problem of diplomatic immunity abuse.¹⁴² The proposed scheme requires embassies to obtain insurance for their diplomats and staff as a prerequisite to maintain diplomatic relations with the United States.¹⁴³ Consequently, this type of plan imposes an affirmative duty on the private insurance industry in the United States to insure diplomats.¹⁴⁴ The commentator argues, however, that the legislation is not enforceable unless there is a right of direct action against the insurer.¹⁴⁵ In response to these concerns, current legislation contains such a provision.¹⁴⁶

diplomatic immunity in a case of sexual abuse committed by a North Korean diplomat, O Nam Chol. *Id.* Because North Korea has only observer status at the United Nations and does maintain diplomatic relations with the United States, State Department officials contend that Mr. O was only immune for acts arising out of his official duties. *Id.* Mr. O took refuge in the North Korean mission for 10 months before pleading guilty to charges of sexual abuse. *Id.* The court dismissed the case after Mr. O agreed to leave the United States without the right of return. *Id.*

In another case, after positive identification implicated Manuel Ayree, the 19 year old son of a low ranking Ghanaian diplomat, in at least two rapes in New York City, the State Department asked Ghana's mission to the United Nations to either send Mr. Ayree home or waive his diplomatic immunity and consent to criminal charges. McFadden: *Repatriation*, *supra* note 15, at 33; *see supra* note 15 (providing a further description of this incident).

140. *Claims Fund Proposal*, *supra* note 129, at 156-57.

141. *See* McFadden, *The U.N. and the City: Obligation, Opportunity and Irritation*, N.Y. Times, Sept. 20, 1983, at A10 (noting that New Yorkers feel that diplomatic immunity represents a license for United Nations personnel to park illegally, ignore bills, summonses, and criminal charges, and generally to act insensitively).

142. *See Insuring Against Abuse*, *supra* note 38, at 1537-47 (recommending a mandatory insurance scheme to address abuses of diplomatic immunity).

143. *See id.* at 1538 (discussing the consequences of an existing embassy refusing to obtain the proper insurance, or refusing to obtain any insurance at all).

144. *Id.* at 1539-42.

145. *Id.* at 1542.

146. The Diplomatic Relations Act of 1978, §§ 2-6, 22 U.S.C. §§ 254a-254e (1982 & Supp. IV 1986).

Anticipating reluctance from the insurance industry,¹⁴⁷ the proposal borrows two facets from nuclear power plant insurance schemes. The plan utilizes an insurance pool, to spread the risk of insuring countries likely to abuse the privilege.¹⁴⁸ The plan also places caps on the insurers' liability, protecting insurance companies from unlimited liability.¹⁴⁹ Damages resulting from an incident involving significant personal injury illustrates the potential heavy burdens placed on the insurance industry if Congress approved an unlimited liability policy.

Regardless of the proposed limitations on liability for insurance companies, this proposal is defective because it assumes that the insurance industry would willingly insure foreign embassies.¹⁵⁰ This is a highly unrealistic assumption.¹⁵¹ The insurance industry legitimately fears that juries will view insurers as possessing unlimited funds and return high damage awards to plaintiffs.¹⁵² Therefore, insurance companies may not readily participate in this scheme.

C. A PERMANENT INTERNATIONAL DIPLOMATIC CRIMINAL COURT

One commentator has proposed the establishment of a Permanent International Diplomatic Criminal Court (court) with mandatory jurisdiction over diplomats accused of committing criminal acts.¹⁵³ This proposal places the court in an inquisitorial mode, with the court acting as both the prosecution and the defense.¹⁵⁴ This court would have the power to impose monetary fines and, if necessary, to imprison diplomats in its own penal facilities.¹⁵⁵

The practical advantages of this proposal are twofold. First, the court could operate free from the potential unfair bias of local proceedings.¹⁵⁶ Second, the use of a court outside a bilateral relations structure

147. See *Insuring Against Abuse*, *supra* note 38, at 1542 n.131 (examining the contention that compensating victims of abuses of diplomatic immunity is a social and governmental problem, placed on the government and not on the private insurance industry).

148. *Id.* at 1541.

149. *Id.*

150. *Id.* at 1540.

151. *Hearings on Diplomatic Crimes Legislation*, *supra* note 36, at 125 (statement of Ronald Sol Mlotek, Chief Legal Counsel, Office of Foreign Missions, United States Department of State) (emphasizing that no insurance carrier would write policies insuring policyholders for the commission of intentional torts). See also *Insuring Against Abuse*, *supra* note 38, at 1542 n.131 (noting insurance industry opposition to an insurance plan for foreign embassies).

152. *Insuring Against Abuse*, *supra* note 38, at 1542 n.131.

153. *Amending the Vienna Convention*, *supra* note 30, at 185-88.

154. *Id.* at 186.

155. *Id.* at 187.

156. *Id.* at 187-88.

precludes the termination of diplomatic relations in extreme cases.¹⁵⁷ This proposal has some distinct advantages and is one worth further examination.

D. THE PENDING DIPLOMATIC CRIMES LEGISLATION

In response to controversy in the United States over abuses of the diplomatic privilege, Senator Jesse Helms introduced the Diplomatic Immunity Abuse Prevention Act (the Act) into the Senate on October 8, 1987.¹⁵⁸ In addition, various members of the House of Representatives introduced similar measures.¹⁵⁹ The Senate initially approved the Act as part of an authorization bill for the State Department, but the proposal is currently stalled in Congress.¹⁶⁰ Although the Act favorably addresses some of the problems associated with diplomatic crime, the refusal of both the Senate and the House to narrow the scope of diplomatic immunity in any significant way hampers its effectiveness.

The Act imposes certain duties on the Director of the State Department's Office of Foreign Missions in order to assist local law enforcement. The Director must maintain records on every incident involving an immune diplomat and submit annual reports on these incidents to Congress.¹⁶¹ The legislation requires the Director to educate local law enforcement officials on the levels of immunity different diplomats possess¹⁶² and to assure the prosecution of diplomats within the limitations imposed by the Vienna Convention.¹⁶³ To ensure vigilant police procedure, the Act prohibits State Department officials from influencing any

157. *Id.* at 185.

158. Diplomatic Immunity Abuse Prevention Act, *reprinted in* 133 CONG. REC. S13,795, S13,795-97 (daily ed. Oct. 8, 1987) [hereinafter Abuse Prevention Act]. The Act, as suggested by Senator Helms, is a first step in the direction of curtailing the abuses of diplomatic immunity. *Id.* at S13,797.

159. H.R. 3036, 100th Cong., 1st Sess. (1987).

160. Dewar, *Senate Votes Immunity Deterrent*, Wash. Post, Oct. 9, 1987, at A20.

161. Abuse Prevention Act, *supra* note 158, § 2(a), at 13,796. This measure will force the State Department to publicize incidents of diplomatic crime, which arguably will embarrass the sending states and have a deterrent effect. *Hearings on Diplomatic Crimes Legislation*, *supra* note 36, at 113 (statement of Arthur Rovine, former chairman of the American Bar Association's Section on International Law and Practice). See Dewar, *supra* note 160 (quoting a spokesperson for the Senate Foreign Relations Committee who stated that the legislation could have a significant deterrent impact without violating the principle of diplomatic immunity).

162. Abuse Prevention Act, *supra* note 158, § 2(b)(1), at S13,796. See GUIDANCE FOR LAW ENFORCEMENT, *supra* note 95 (stating in layman's terms the different types of diplomatic immunities and suggested police procedures for incidents involving diplomats).

163. Abuse Prevention Act, *supra* note 158, § 2(b)(2), at S13,769. See *supra* notes 94-97 and accompanying text (describing the problems of police failure to fully investigate crimes committed when the suspect claims diplomatic immunity).

police investigation of a diplomatic crime.¹⁶⁴

The Act also mandates the development of procedures to identify members of foreign missions in the United States who actually have immunity.¹⁶⁵ Upon initiating the criminal prosecution of an individual covered under this Act, the foreign minister of the sending state must explicitly assert immunity in the form of a message to the chief of the United States mission in the sending state, who then relays the message to the Secretary of State.¹⁶⁶ These provisions attempt to address the uncertainty of a diplomat's immunity status, unwarranted interference by the State Department,¹⁶⁷ and other problems local law enforcement faces when a diplomat commits a crime.¹⁶⁸

The legislation also contains provisions requiring the State Department to formally request a waiver of immunity. Under the Act, when a diplomat commits a crime of violence,¹⁶⁹ and a court issues a summons for that person to appear in court, the Secretary of State must request the waiver of immunity from the diplomat's sending state. If the sending state does not waive immunity, the Secretary must immediately de-

164. Abuse Prevention Act, *supra* note 158, § 2(c)(1), at S13,796. The legislative history suggests that Congress inserted this provision to avoid similar misfortune resulting from the past interference of the State Department in the investigation process. *Id.* at S13,797. See *supra* notes 84-95 and accompanying text (portraying an incident where the State Department granted retroactive immunity to a former Saudi defense minister). The actions of the State Department in that case appeared as a deliberate interference in the duties of local law enforcement officials. *Id.*

If the Secretary of State determines that important foreign policy considerations or national security concerns demands such action, he can waive this provision. Abuse Prevention Act, *supra* note 158, § 2(c)(2), at S13,796. The Act mandates reports to Congress explaining each waiver. *Id.*

165. Abuse Prevention Act, *supra* note 158, § 3, at S13,796. See *supra* notes 129-30 and accompanying text (describing the use of identification cards by foreign diplomats). This provision directs the State Department to develop and implement registration and departure procedures for members of foreign missions. *Id.* This provision could complement the identification card scheme, by creating a computer database for rapid identification of those that have immunity. *Id.*

166. Abuse Prevention Act, *supra* note 158, § 11, at S13,796.

167. See *supra* notes 84-94 (citing an example of State Department interference in a judicial proceeding through the granting of retroactive diplomatic immunity).

168. 133 CONG. REC. S13,804 (daily ed. Oct. 8, 1987) (statement of Sen. Pell).

169. Crimes and Criminal Procedure, 18 U.S.C. § 16 (1982 & Supp. IV 1986) defines a crime of violence as:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Id. The proposed legislation adds the following crimes which are particularly applicable to the conduct of diplomats: "Reckless driving or driving while intoxicated or under the influence of alcohol or drugs." Abuse Prevention Act, *supra* note 158, § 13(1), at S13,797.

clare the individual *persona non grata* and require the individual to leave the United States.¹⁷⁰ In addition, the deported individual cannot return to the United States.¹⁷¹ If enacted, this provision would force the State Department to use the waiver and *persona non grata* provisions more extensively.

The legislation restricts the statutory definition of a diplomatic family member.¹⁷² The Act amends the relevant provision of the Diplomatic Relations Act which defines the family of the member of a foreign mission.¹⁷³ Furthermore, the proposal restricts coverage to the members of the family forming the diplomat's household.¹⁷⁴ The Act defines family members as spouses of members of the mission under the age of twenty-one, unmarried children under the age of twenty-three provided these children are full-time college students, and under special circumstances with State Department permission, other persons who reside exclusively in the mission member's household.¹⁷⁵ The more restrictive definition denies the immunity defense to older children of diplomats stationed in the United States.¹⁷⁶

In addition, the Act increases the minimum amount of insurance coverage that foreign missions are required to carry.¹⁷⁷ The insurance coverage requirements will increase from \$300,000 to \$1,000,000 per incident.¹⁷⁸ To assure enforcement of this provision, the Act compels the Director of the Office of Foreign Mission to implement regulations ensuring compliance with the new limits.¹⁷⁹

The proposed legislation fails to address two of the main problems concerning insurance coverage under the Diplomatic Relations Act. Like the Diplomatic Relations Act, the Act contains no means for the victim to recover when a foreign mission does not carry insurance.¹⁸⁰

170. Abuse Prevention Act, *supra* note 158, § 4(a)(2), at S13,797. An identical provision was introduced in the House. H.R. 3036, 100th Cong., 1st Sess. § 5 (1987).

171. Abuse Prevention Act, *supra* note 158, § 4(c), at S13,796.

172. *Id.* § 8, at S13,796.

173. The Diplomatic Relations Act of 1978, § 2(2), 22 U.S.C. § 254a(2) (1982 & Supp. IV 1986).

174. *Id.*

175. Abuse Prevention Act, *supra* note 158, § 8, at S13,796.

176. *Hearings on Diplomatic Crimes Legislation*, *supra* note 36, at 18. According to the State Department, this measure is currently utilized in practice. *Id.*

177. Abuse Prevention Act, *supra* note 158, § 9, at S13,796.

178. *Id.* The House provision is identical. H.R. 3036, 100th Cong., 1st Sess. § 8 (1987).

179. Abuse Prevention Act, *supra* note 158, § 10, at S13,796.

180. See *The Diplomatic Relations Act*, *supra* note 65, at 480 (stating that the legislation only increases the minimum amount of coverage, but does not make coverage mandatory for foreign missions because of the absence of enforcement provisions). The House version, however, makes victims of crimes committed by diplomats with

Also, the proposed legislation does not prescribe a mandatory enforcement mechanism that penalizes a foreign mission for not obtaining insurance.¹⁸¹ While raising the minimum standard for insurance coverage to \$1,000,000 may help to compensate adequately victims of accidents caused by diplomats, lack of an enforcement component limits the effectiveness of the provision.¹⁸²

Finally, the proposed legislation authorizes the President to take necessary steps to prevent illegal use of the diplomatic pouch, such as transporting weapons or illegal narcotics.¹⁸³ This provision is consistent with international law, as the Vienna Convention limits the contents of the diplomatic pouch to documents and articles intended for official diplomatic use.¹⁸⁴ There are two possible measures to prevent unlawful use of the diplomatic pouch while at the same time ensuring the confidentiality of diplomatic correspondence.¹⁸⁵ Customs officials pass diplomatic pouches through a magnetometer,¹⁸⁶ an X-ray machine that detects weapons, without breaching the confidentiality of the documents contained in the pouch. This process takes only seconds and strikes a balance between excessively delaying the arrival of the pouch from abroad and exercising the inalienable right of the sovereign to protect itself from the importation of illegal weapons or drugs.¹⁸⁷

immunity from criminal jurisdiction eligible to receive victim compensation and assistance under the Victims of Crime Act of 1984, § 1403, 42 U.S.C. § 10602 (1982 & Supp. IV 1986). H.R. 3036, 100th Cong., 1st Sess. § 2 (1987).

181. See *supra* notes 72-73 and accompanying text (discussing why the lack of enforcement provisions in the Diplomatic Relations Act render it ineffective).

182. *Id.*

183. Abuse Prevention Act, *supra* note 158, § 12, at S13,797. The House version is similar. H.R. 3036, 100th Cong., 1st Sess. § 10 (1987). See *Thorny Issue: Peeking into a Privileged Pouch*, N.Y. Times, Aug. 1, 1988, at B6 (discussing disputes over possible implications of permitting inspection of the diplomatic pouch).

184. Vienna Convention On Diplomatic Relations, *supra* note 7, art. 27, para. 4.

185. See *Insuring Against Abuse*, *supra* note 38, at 1535 n.95 (citing in contrast, Higgins, *The Abuse of Diplomatic Privileges and Immunities: The Recent United Kingdom Experience*, 79 AM. J. INT'L L. 641, 647-48 (1985) that X-ray machines could ascertain the sensitive information about the types of ciphers used to send messages). By allowing only the customs official to conduct the search, it minimizes the concern over disclosure of sensitive methods of communication. *Id.* A customs official will not ordinarily have knowledge of different types of communications devices. *Id.*

The fundamental principle underlying the diplomatic pouch, which was to protect the communications between the foreign government and its representative abroad, was formulated in a less sophisticated era of communications. Griffin, *Diplomatic Impunity*, 13 STUDENT LAW. 18, 20 (1984). Modern methods of instantaneous telecommunication antiquate the protectionist need for the diplomatic pouch. *Id.*

186. W. LAFAVE AND J. ISRAEL, CRIMINAL PROCEDURE § 3.9(h), at 197-98 (1985). Airports, penal institutions, military installations, and government buildings commonly use a magnetometer to detect weapons. *Id.*

187. *United States v. Ramsey*, 431 U.S. 606, 624 (1977). The Court in *Ramsey* noted that border searches are made pursuant to the sovereign's right to take protec-

Custom agents can also utilize the services of a narcotics detection dog to sniff for the presence of contraband.¹⁸⁸ As with the X-ray machine, the dog sniff is a rapid, unobtrusive procedure that preserves the confidentiality of documents inside the pouch.¹⁸⁹ If either procedure exposed the presence of weapons or narcotics, customs officials could require the opening of the pouch in the presence of an official from the sending foreign nation. If the foreign representative refuses to allow inspection of the pouch, customs officials could decline the pouch entrance into the United States.¹⁹⁰

Both methods would not violate article 27(3) of the Vienna Convention,¹⁹¹ which prevents opening or detaining the diplomatic pouch.¹⁹² Neither of the suggested methods physically opens the diplomatic pouch, nor do they substantially delay the entrance of the pouch. These methods enable a nation state to protect its interests and to promote diplomatic relations.

As a whole, the bill is a small step toward alleviating problems connected with the abuses of diplomatic immunity. Enactment of the bill would send a message to foreign missions conducting diplomatic relations in the United States that the American people will not tolerate a privileged class of diplomats who are above the law. Unfortunately, this message was sent in the past, without much success. The fundamental flaws of the bill are a lack of enforcement provisions for the insurance scheme and a failure to address the permissible scope of diplomatic immunity. Congress still needs to enact the significant reforms.¹⁹³

tionist measures to protect itself. *Id.* at 616. Scanning the diplomatic bag with an X-ray machine is a wholly appropriate limited means by which the United States can exercise the right to ensure its own safety. *Id.*

188. LAFAYE AND ISRAEL, *supra* note 186, § 3.2(b), at 101. Police have recently made use of the trained dog to detect the presence of narcotics or explosives. *Id.*

189. *See United States v. Place*, 462 U.S. 696, 707 (1983) (describing the limited nature of the canine sniff). The Court noted that use of the canine sniff does not require opening the luggage or exposing items inside the luggage. *Id.* The Court reasoned that the canine sniff discloses only the presence of contraband narcotics. *Id.* The Court stated that a canine sniff does not constitute a search in the context of the fourth amendment. *Id.*

190. Goldberg, *supra* note 17, at 4. As Justice Goldberg noted in commenting on the reluctance of British officials to open the Libyan diplomatic pouch during the Libyan "People's Bureau" incident, "It defies reason to interpret the [Vienna] Convention so as to prevent the opening of the diplomatic bag where there is substantial evidence that it contains murder weapons or, for example, conventional or nuclear bombs." *Id.*

191. *See Higgins*, *supra* note 185, at 647-49 (stating that the transportation of nondiplomatic material in the diplomatic bag abuses the privilege of the diplomatic bag and requires forfeiture of the protections of the convention).

192. Vienna Convention On Diplomatic Relations, *supra* note 7, art. 27, para. 3.

193. 133 CONG. REC. S13,798 (daily ed. Oct. 8, 1987) (statement of Sen. Helms). Senator Helms, cosponsor of the Diplomatic Crimes legislation, stated that this ap-

V. THE POSSIBILITY OF CHANGE

Today diplomatic immunity often contradicts fundamental principles of justice in civilized countries. Defenders of diplomatic immunity maintain that the trade-off between preserving harmonious international relations and protecting American diplomats abroad while allowing those who have engaged in wrongdoing to escape sanction is acceptable.¹⁹⁴ The consequences of the trade-off is justification for the international community to reevaluate the principle of diplomatic immunity.

A. UNILATERAL MEASURES

A proposed Senate bill¹⁹⁵ removes the immunity from the administrative, technical, and service staff of the foreign missions. The bill subjects these staff members to United States criminal jurisdiction for crimes of violence.¹⁹⁶ Diplomatic immunity is granted only to diplomatic agents.¹⁹⁷ Although the Senate rejected the bill¹⁹⁸ in favor of a compromise measure,¹⁹⁹ the basic approach of the bill addresses a significant loophole in the principle of diplomatic immunity. Specifically, the bill removes immunity from those who are not diplomats.²⁰⁰ Be-

proach was a compromise to an earlier proposed bill, S. 1437, 100th Cong., 1st Sess. (1987), that subjected members of foreign missions and consulates other than the diplomatic agents and consular officers themselves to the criminal jurisdiction of the United States for crimes of violence. *Id.* Senator Helms stated that this measure would be appropriate until the Senate limits diplomatic immunity. *Id.* See *infra* notes 202-06 and accompanying text (discussing the benefits of adopting a more narrow definition of immunity).

194. *Hearings on Diplomatic Crimes Legislation*, *supra* note 36, at 7-13 (statement of Mrs. Selwa Roosevelt) (discussing how diplomatic immunity ensures the security of United States diplomats based abroad and changing this policy undermines United States international obligations).

195. S. 1437, 100th Cong., 1st Sess. (1987).

196. *Id.*; see *supra* note 153 (providing a statutory definition of a crime of violence).

197. Vienna Convention On Diplomatic Relations, *supra* note 7, art. 1, para. e. The legislation defines diplomatic agents as the heads of the foreign mission and their diplomatic staff. *Id.* The bill continues the Convention's extension of diplomatic immunity to the families of the diplomatic agent. *Hearings on Diplomatic Crimes Legislation*, *supra* note 36, at 10 (statement of Mrs. Selwa Roosevelt).

198. Dewar, *supra* note 160, at A20.

199. Abuse Prevention Act, *supra* note 158, §§ 1-13, at S13,795-797; see *supra* notes 156-91 and accompanying text (discussing the provisions of the proposed legislation).

200. Vienna Convention On Diplomatic Relations, *supra* note 7, art. 1, para. g-h. Both the service staff and the private servant provide only domestic services for the mission and in no way engage in the conduct of international relations. *Diplomatic Crime*, Wall St. J., Sept. 30, 1987, at 36. Immunity from prosecution for criminal acts should not extend to nondiplomats. *Id.* As the Wall Street Journal mused in an editorial, "... why extend [diplomatic immunity] to people whose closest link with foreign

cause low-level staff and personal servants of the foreign mission perpetrate many of these crimes,²⁰¹ this measure would, conceivably, alleviate a great deal of the problem.

A second approach is a more restrictive interpretation of diplomatic immunity. Following a recent drunk driving incident involving the ambassador to the United States from Papua New Guinea, the State Department made an unprecedented request to the United States Attorney to prepare a criminal case against the ambassador.²⁰² The move of the State Department suggests a new, narrower interpretation of diplomatic immunity.²⁰³ Although the ambassador retains immunity because of absolute immunity granted to diplomatic agents in international law,²⁰⁴ the charge means that if the ambassador left the country, the former diplomat could not reenter as a diplomat, and upon reentry, the former diplomat becomes vulnerable to prosecution on the criminal charge.²⁰⁵ The action of the State Department, if put into practice as policy, at least sends a message to the diplomatic community that criminal offenses are intolerable.²⁰⁶

B. A MULTILATERAL APPROACH TO THE PROBLEM OF RECIPROCITY

The main practical reason cited for continuing diplomatic immunity in the face of constant abuse of the privilege is the political reality of

policy may be chauffeuring an ambassador about town?" *Id.*

It was recently asserted that the proposed bill is consistent with the Vienna Convention On Diplomatic Relations. *Hearings on Diplomatic Crimes Legislation, supra* note 36, at 803-04 (statement of Pamela Trescott, Esq.). Because the Convention focuses on the function of the diplomat and also mandates good behavior, enforcing the Convention is accomplished by prosecuting service staff and private servant personnel. *Id.*

201. 133 CONG. REC. S13,801 (daily ed. Oct. 8, 1987) (testimony of Chuck Ashman, author of DIPLOMATIC CRIME).

202. Barker, *Criminal Charge Possible for Envoy*, Wash. Post, Feb. 15, 1987, at B1. See *supra* note 10 (describing the Abisinio incident).

203. *Id.*; see Larschan, *The Abisinio Affair: A Restrictive Theory of Diplomatic Immunity?*, 26 COLUM. J. TRANSNAT'L L. 283, 291-95 (1988) (confirming that the State Department has adopted a more restrictive view of diplomatic immunity). The author concluded from the Abisinio incident that the United States will prosecute foreign diplomats so long as the accreditation of the diplomat is no longer valid. *Id.* at 285. Further, the author argues that this position is inconsistent with the policy considerations underlying diplomatic immunity. *Id.* at 294-95. Such State Department actions, however, may have the effect of alerting foreign governments to the problems presented by diplomatic immunity. *Application of the Restrictive Theory, supra* note 43, at 540 (arguing that "exemption from legal process in even the most egregious circumstances creates a privileged class incompatible with the democratic climate of the democratic state, as well as antithetical to the ends of diplomacy").

204. *Vienna Convention On Diplomatic Relations, supra* note 7, arts. 29, 31.

205. Barker, *supra* note 202, at B1.

206. *Id.* (statement of Joseph E. DiGenova, then United States Attorney for the District of Columbia); *Application of the Restrictive Theory, supra* note 43, at 540.

reciprocity.²⁰⁷ Some commentators fear direct foreign governmental responses in the form of fabricated charges against United States foreign service officers abroad if the United States prosecuted foreign diplomats at home.²⁰⁸ Before limiting the scope of diplomatic immunity, Congress must weight the seriousness of this potential harm.²⁰⁹

The logic behind the functional necessity theory holds that in the absence of diplomatic immunity, the receiving state could conduct an official campaign of harassment against the foreign envoy. This could either disrupt relations or place political pressure on that foreign state to change its stance on critical issues.²¹⁰ The receiving state could also bring charges against foreign representatives in reprisal for actions

207. C. WILSON, *supra* note 21, at 32-38. For example, when the Long Island town of Glen Cove rescinded recreational privileges for Soviet diplomats who lived there, the Soviets took reciprocal action against the American mission by rescinding the embassy's beach privileges on the river at Nikolnaya Gora. Griffin, *supra* note 185, at 21.

When British officials implicated and subsequently arrested Nigerian diplomats for kidnapping a Nigerian exile and attempting to smuggle him out of Great Britain through the diplomatic pouch, Nigeria retaliated by detaining a British Caledonian flight out of Nigeria and holding three British citizens in detention. DIPLOMATIC CRIME, *supra* note 7, at 204-13.

In 1964, when District of Columbia police ticketed illegally parked diplomats, 87 Americans received moving violations outside the United States Embassy in Manila, Philippines in one day. Turan, *supra* note 46, at 20.

A long history of reciprocity exists between the United States and Soviet Union: reciprocity in the area of espionage. Gwertzman, *U.S. Plans Anti-Soviet Measures if American Reporter is Not Freed*, N.Y. Times, Sept. 1, 1986, at 1. Most recently, the Soviet Union arrested American journalist Nicholas Daniloff following the arrest of Gennadi F. Zakharov in New York on espionage charges. *Id.* Critics believe that the Soviet arrest of Daniloff was in direct retaliation for the Zakharov arrest. *Id.* See also Note, *A Comparison and Analysis of Immunities Defenses Raised by Soviet Nationals Indicted Under United States Espionage Laws*, 6 BROOKLYN J. INT'L L. 259, 287-88 (1980) (evaluating espionage and diplomatic immunity).

See *Insuring Against Abuse*, *supra* note 38, at 1544-45 (noting that reciprocity is the reason why nations agree to diplomatic immunity).

208. *Hearings on Diplomatic Crimes Legislation*, *supra* note 36, at 11-13; *Government Workers at Home . . . and Abroad*, Wash. Post, Aug. 10, 1987, at A13. It is estimated that 60% of the United States diplomatic corps would not serve abroad in certain countries if diplomatic immunity did not protect them. Griffin, *supra* note 185, at 20.

209. *Id.* But see *Hearings on Diplomatic Crimes Legislation*, *supra* note 36, at 103-04 (stating that only moderate international repercussions would result in the event that S.1437 was passed). Under the Helms approach, the President still has the constitutional power of pardon, which the President could tailor to individual cases involving serious foreign policy implications. *Id.*

Aside from the reaction in international public opinion, technically, nothing prevents a foreign state from fabricating charges against United States diplomats abroad. 133 CONG. REC. S13,804 (daily ed. Oct. 8, 1987) (testimony of Pamela Trescott, Esq.). Recently, the Cuban government made "ridiculous" charges against American diplomatic officials. *Id.* The Cubans did so without any investigation by the United States for prosecuting Cuban officials. *Id.*

210. *A New Regime*, *supra* note 39, at 668.

brought against its representatives abroad.²¹¹ Some critics fear that because of the interdependent nature of international relations, the United States would risk reciprocal action if it were to unilaterally limit or abolish diplomatic immunity. A multilateral approach would avoid possible retaliation against the United States in response to its unilaterally limiting diplomatic immunity.²¹² The United Nations is the proper forum in which to hear the case for reform of the current practice of diplomatic immunity.²¹³ The likelihood, however, of the United Nations taking steps toward reform of diplomatic immunity remains unclear.²¹⁴

If the international community refuses to come to terms with the vexing problems associated with diplomatic immunity, the elected representatives of the United States government must decide whether to continue to tolerate abuses of the diplomatic privilege. The types of abuses detailed throughout this Comment, which are excused because of diplomatic immunity, are far removed from the original intentions of the drafters of the Vienna Convention.²¹⁵ As a result, the true inten-

211. *Id.* at 668-69.

212. Caplan, *Crash of Envoy's Car Focuses Attention on International Law*, *Legal Times*, May 4, 1987, at 21.

213. DIPLOMATIC CRIME, *supra* note 7, at 346-50. The authors suggest that the United Nations reinforce the principle of diplomatic immunity for diplomatic needs, and to refrain from using diplomatic immunity as a shield against criminal behavior, allowing those who commit violent crimes to go unpunished. *Id.*

An amended Vienna Convention On Diplomatic Relations, which would allow diplomatic immunity for acts committed within diplomats official capacity, could appear with the following changes:

With regards to the diplomatic bag, article 27(3) could be amended as follows:

"The diplomatic bag shall not be opened or UNREASONABLY detained. The diplomatic bag shall be subject to reasonable, nonintrusive methods of inspection." (emphasis added).

With respect to the inviolability of the diplomat, article 29 could read:

The person of a diplomatic agent shall be inviolable with respect to acts performed in the course of the diplomat's official duties. In investigating acts committed outside the scope of the duties of the diplomatic agent, 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.

The first sentence of article 31, "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state," would be deleted.

214. *See Insuring Against Abuse*, *supra* note 38, at 1536-37 (emphasizing the possible difficulty in coordinating 113 countries to amend the Vienna Convention).

215. *See United Nations Conference*, *supra* note 47, at 48 (noting that the Conference concluded that limiting the traditional scope of immunity for diplomats was necessary); *see also Vienna Convention On Diplomatic Relations*, *supra* note 7, preamble (stating that the purpose of diplomatic immunity is not to benefit individuals but to ensure efficient performance of the diplomatic function). If an international consensus cannot be reached on the problem of diplomatic crime, the costs and benefits of relations with states who, by their practices, eschew a fundamental disregard for the value of human life must be weighed. DIPLOMATIC CRIME, *supra* note 7, at 348. The value of

tions of the Vienna Convention are not attained and relations among the nation states continue to deteriorate.

CONCLUSION

Diplomatic immunity, as the majority of the international community interprets the principle, protects diplomats in an attempt to ensure diplomatic relations. This protection essentially amounts to a license to break the law. Diplomatic immunity protects violators from punishment for failing to obey the law of the receiving state.²¹⁶ The international community must seriously rethink this policy which places not only diplomats, but their families, staff, and personal servants above the law.

The international community, through a forum such as the United Nations, must reevaluate the ancient principle of diplomatic immunity. The United Nations needs to establish new guiding principles that could preserve the basic concept of diplomatic immunity while defining reasonable limits as to who is entitled to immunity. The participants in this international debate must consist not only of international legal scholars and those who conduct diplomacy, but also the victims of diplomatic crime.²¹⁷

In the interim, the diplomatic crimes legislation that is pending in the United States Congress is a small step in attempting to confront the abuses of the diplomatic privilege. This legislation, however, does not address the fundamental problems inherent in the current application of diplomatic immunity. The current interpretation of diplomatic immunity requires fundamental change. No justification exists in international law, or in any other principle of law or principle of justice, for murder, rape, robbery, and assault to go unpunished.

having diplomatic relations with states which allow their diplomatic representatives to commit crimes with no hint of responsibility for their actions and no intention to compensate the victims of diplomatic crime for injuries suffered is questionable. *Id.*

216. Vienna Convention On Diplomatic Relations, *supra* note 7, art. 41.

217. See Trooboff, *Diplomatic Immunity*, Wash. Post, Feb. 22, 1987, at C8 (arguing for a focus on the victims of wrongful conduct at the hands of diplomats).