

Fordham International Law Journal

Volume 4, Issue 1

1980

Article 6

Compensation for “Victims” of Diplomatic Immunity in the United States: A Claims Fund Proposal

R. Scott Garley*

*

Copyright ©1980 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

Compensation for “Victims” of Diplomatic Immunity in the United States: A Claims Fund Proposal

R. Scott Garley

Abstract

This Note will briefly trace the development of diplomatic immunity law in the United States, including the changes adopted by the Vienna Convention, leading to the passage of the DRA in 1978. The discussion will then focus upon the DRA and point out a few of the areas in which the statute may fail to provide adequate protection for the rights of private citizens in the United States. As a means of curing the inadequacies of the present DRA, the feasibility of a claims fund designed to compensate the victims of the tortious and criminal acts of foreign diplomats in the United States will be examined.

COMPENSATION FOR "VICTIMS" OF DIPLOMATIC IMMUNITY IN THE UNITED STATES: A CLAIMS FUND PROPOSAL

INTRODUCTION

In 1978, Congress passed the Diplomatic Relations Act (DRA)¹ which codified the 1961 Vienna Convention on Diplomatic Relations.² The DRA repealed 22 U.S.C. §§ 252-254, the prior United States statute on the subject,³ and established the Vienna Convention as the sole standard to be applied in cases involving the immunity of diplomatic personnel⁴ in the United States.⁵

1. Diplomatic Relations Act, Pub. L. No. 95-393, 92 Stat. 808 (1978) (codified at 22 U.S.C. § 254a *et seq.*, and 28 U.S.C. § 1364 (Supp. II 1978)) [hereinafter cited as DRA]. See generally Note, *The Diplomatic Relations Act: The United States Protects Its Own*, 5 BROOKLYN J. INT'L L. 379 (1979) [hereinafter cited as *U.S. Protects Its Own*]; Comment, *A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978*, 54 TUL. L. REV. 661 (1980); 13 J. INT'L L. & ECON. 471 (1979); see also 10 CASE W. RES. J. INT'L L. 827 (1978).

2. Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, and *entered into force with respect to the United States*, Dec. 13, 1972, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95, *reprinted in* 55 AM. J. INT'L L. 1064 (1961) [hereinafter cited as Vienna Convention]. The Vienna Convention is widely acknowledged to be the authoritative statement of immunity applicable to diplomatic relations among nations. The convention may be traced indirectly to an action of the League of Nations appointing a "Committee of Experts for the Progressive Codification of International Law." The Committee named diplomatic immunity as an area appropriate for codification due to: (1) its essentially procedural character; (2) the stability of the practices and procedures of embassies; (3) the fact that it is sanctioned by a high degree of reciprocity among nations; and (4) its familiarity to the international community from long practice and extensive academic discussion. Young, *The Development of the Law of Diplomatic Relations*, 40 BRIT. Y.B. INT'L L. 141, 180-81 (1964).

3. DRA, *supra* note 1, § 3(a)(1). In its original form, 22 U.S.C. §§ 252-254 was The Crimes Act of April 30, 1790, ch. 9, §§ 25-27, 1 Stat. 112, 117-18. See notes 22-27 *infra* and accompanying text. See also S. REP. NO. 958, 95th Cong., 2d Sess. 2, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 1935, 1936 [hereinafter cited as S. REP. NO. 958].

4. Unless otherwise noted, or apparent from the context, the terms "diplomatic personnel," "mission personnel," "mission members," "diplomats," and "diplomatic representatives" are used interchangeably in this Note. Diplomatic personnel include diplomatic agents, members of the administrative and technical staffs of foreign missions, and members of the service staffs of foreign missions. See Vienna Convention, *supra* note 2, art. 1.

5. See S. REP. NO. 958, *supra* note 3, at 1; S. REP. NO. 1108, 95th Cong., 2d

The DRA also included provisions complementary to the Vienna Convention intended to establish a mechanism by which private citizens could obtain financial compensation for property damage or personal injury sustained as a result of a motor vehicle accident with a member of a foreign diplomatic mission.⁶ One complementary provision of the statute requires all foreign nationals associated with a mission to procure liability insurance for "any motor vehicle, vessel, or aircraft" they operate in this country.⁷ Another provision permits a private citizen involved in an accident with an insured diplomat to bring a direct action against the insurer to obtain compensation.⁸

The DRA, however, may not have gone far enough to provide adequate relief for the victims of the tortious and criminal acts of foreign diplomats.⁹ The DRA does significantly limit the immunity available to mission personnel for the negligent operation of a motor vehicle, and for most of their private, non-official activities.¹⁰ Nevertheless, it fails to establish a comprehensive means of recovery for private citizens who are victims of any tortious or criminal act of a foreign diplomat not otherwise covered by the Vienna Convention or the direct action provisions.¹¹

During the congressional hearings which culminated in the passage of the DRA, another proposal was promulgated, along with the liability insurance and direct action provisions, as complementary to the Vienna Convention.¹² This proposal, in essence, sought

Sess. 1, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 1941, 1941-42; H.R. REP. NO. 526, 95th Cong., 1st Sess. 1 (1977).

6. DRA, *supra* note 1, §§ 6-7. See notes 63-66 *infra* and accompanying text. See generally S. REP. NO. 1108, *supra* note 5, at 3-5.

7. DRA, *supra* note 1, § 6, 22 U.S.C. § 254e(b) (Supp. II 1978). The President is empowered to take appropriate measures to ensure that these liability insurance requirements are complied with. *Id.* § 254e(c). This responsibility has been delegated to the Secretary of State. Exec. Order No. 12,101, 43 Fed. Reg. 54,195 (1978).

8. DRA, *supra* note 1, § 7, 28 U.S.C. § 1364 (Supp. II 1978). See 13 J. INT'L L. & ECON. 471, 477-78 (1979).

9. See *Diplomatic Privileges and Immunities, Hearings and Markup Before the Subcomm. on Int'l Operations of the House Comm. on Int'l Relations*, 95th Cong., 1st Sess. 43-46 (1977) [hereinafter cited as *House Immunity Hearings*] (statement of Rep. Solarz).

10. See notes 47-58 *infra* and accompanying text.

11. See *House Immunity Hearings*, *supra* note 9, at 48 (statement of Rep. Solarz). See also 13 J. INT'L L. & ECON. 471, 480 (1979).

12. See *House Immunity Hearings*, *supra* note 9, at 43-55; H.R. 7309, 95th Cong., 1st Sess., 123 CONG. REC. 15,456 (1977). See also S. 478, 95th Cong., 1st Sess., 123 CONG. REC. 2223 (1977); S. 1257, 95th Cong., 1st Sess., 123 CONG. REC.

to establish a claims fund, administered by the Department of State, which would compensate private citizens in the United States for all personal injuries and property damage caused by the wrongful conduct of an immune foreign diplomat.¹³ Although the idea of a claims fund was ultimately excluded from the DRA, its intent merits renewed consideration.

This Note will briefly trace the development of diplomatic immunity law in the United States, including the changes adopted by the Vienna Convention, leading to the passage of the DRA in 1978. The discussion will then focus upon the DRA and point out a few of the areas in which the statute may fail to provide adequate protection for the rights of private citizens in the United States. As a means of curing the inadequacies of the present DRA, the feasibility of a claims fund designed to compensate the victims of the tortious and criminal acts of foreign diplomats in the United States will be examined.

I. THE DEVELOPMENT OF DIPLOMATIC IMMUNITY LAW IN THE UNITED STATES

A. General Background

Diplomatic immunity, in the modern sense, can be broadly defined as the freedom from local jurisdiction accorded the duly certified diplomatic representatives of the sending state by the receiving state under principles of international law.¹⁴ The modern law of diplomatic immunity is derived from centuries of practical dealings among nations.¹⁵ The United States has long recognized the responsibilities imposed upon individual nations by force of international custom, and treats the law of nations as the law of the land.¹⁶

The rationale for granting immunity to foreign diplomats is a practical one: "that Governments may not be hampered in their

10,644 (1977); H.R. 1536, 95th Cong., 1st Sess., 123 CONG. REC. 444 (1977). See generally *Diplomatic Immunity Legislation: Hearings on H.R. 7819 Before the Senate Foreign Relations Comm.*, 95th Cong., 2nd Sess. 21 [hereinafter cited as *DRA Hearings*]; 10 CASE W. RES. J. INT'L L. 827, 829-30 (1978).

13. See H.R. 7309, 95th Cong., 1st Sess., 123 CONG. REC. 15,456 (1977) [hereinafter cited as *Solarz Bill*], reprinted in *House Immunity Hearings*, *supra* note 9, at 50-51; notes 82-91 *infra* and accompanying text.

14. See W. BISHOP, *INTERNATIONAL LAW* 709 (3d ed. 1971).

15. See generally Young, *supra* note 2, at 141.

16. *Kansas v. Colorado*, 206 U.S. 46, 97 (1907).

foreign relations by the arrest or forcible prevention of the exercise of a duty in the person of a governmental agent or representative."¹⁷ It is well-recognized that meaningful interaction among nations depends, as a matter of practical necessity, upon the ability of the diplomatic officials of those nations to carry on their representative functions in an atmosphere of inviolability.¹⁸

The fundamental principles of modern diplomatic immunity were in active use more than 3,000 years ago.¹⁹ The ancient Greeks, for instance, recognizing that immunity of foreign diplomats was an essential element of peaceful intercourse between nations, included in their diplomatic practice the exchange of ambassadors and concomitant personal immunity.²⁰ By the end of the 17th century, the broad principles of diplomatic immunity were recognized as matters of customary international practice.²¹

17. Letter from Secretary of State Elihu Root to the Secretary of Commerce and Labor (Mar. 16, 1906), *reprinted in* 4 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 513 (1942); *see* 10 CASE W. RES. J. INT'L L. 827, 827 (1978). United States courts have recognized this policy. *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 980 (D.C. Cir. 1965); *United States ex rel. Casanova v. Fitzpatrick*, 214 F. Supp. 425, 428 (S.D.N.Y. 1963). *See also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 73, Comment a (1965).

18. W. BISHOP, *supra* note 14, at 709; *see, e.g.*, J. HALL, *TREATISE ON INTERNATIONAL LAW* 223 (8th ed. 1924):

It is in the interest of the State accrediting a diplomatic agent, and in the long run in the interest also of the State to which he is accredited, that he should have such liberty as will enable him at all times and in all circumstances, to conduct the business with which he is charged; and liberty to this extent is incompatible with full subjection to the jurisdiction of the country with the government of which he negotiates.

Id.

19. *See* Young, *supra* note 2, at 141. For an extensive account of the historical development of the principles of diplomatic immunity, *see* G. HACKWORTH, *supra* note 17, at 515-30.

20. A sampling of the immunities extended to envoys by the Greeks and Romans indicates that they practiced many of the fundamental principles of diplomatic law as they exist today. In ancient Greece and Rome, an ambassador was not subject to local jurisdiction when he committed an offense within the territory of the receiving state. The privilege of personal inviolability extended to attachés. It included the ambassador's correspondence and those things essential to the necessary performance of his duties. The immunity of ambassadors from territorial jurisdiction in both civil and criminal matters was fully recognized in Rome. A suit for breach of contract could not be brought against an ambassador before the surrender of his letters of credence. The diplomatic envoy was exempt from the jurisdiction of all courts except those of his own country. E. PLISCHKE, *CONDUCT OF AMERICAN DIPLOMACY* 3 (3d ed. 1959).

21. Young, *supra* note 2, at 157.

B. *Diplomatic Immunity Law in the United States*

The first statute governing the immunity of foreign diplomats in the United States was passed by the first Congress on April 30, 1790.²² The 1790 statute was modeled after the English Diplomatic Privileges Act of 1708.²³ In brief, the 1790 statute, following traditional international custom, granted complete civil and criminal immunity to diplomatic personnel and their families.²⁴ It was further provided that anyone attempting to sue or arrest a foreign diplomat in the United States, or to distrain his "goods or chattels,"²⁵ would be guilty of a crime.²⁶ The 1790 statute was carried forward to modern times, and was codified at 22 U.S.C. §§ 252-254.²⁷ Thus, until the DRA repealed the 1790 statute, all foreign nationals connected in any capacity with a diplomatic mission located in the United States were accorded complete freedom from the jurisdiction of both the state and federal courts of this country.²⁸

C. *Problems with the Scope of the 1790 Statute*

The broad and unqualified grant of diplomatic immunity accorded by the 1790 statute followed the traditional approach of customary international law regarding the treatment of the official representatives of foreign states.²⁹ Evolving world conditions and the proliferation of diplomatic relations in the last century led many nations to conclude that the customary grant of complete immunity

22. The Crimes Act of April 30, 1790, ch. 9, §§ 25-27, 1 Stat. 112, 117-18. *See* S. REP. NO. 958, *supra* note 3, at 2.

23. Diplomatic Privileges Act, 1708, 7 Anne, c. 12, §§ 3-4. *See* W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 256 (Andrews ed. 1889).

24. *See House Immunity Hearings, supra* note 9, at 3 (statement of Joseph L. Fisher). The immunity granted under the 1790 statute was so broad that it included even the private servants in the household of a diplomat. S. REP. NO. 958, *supra* note 3, at 2.

25. 22 U.S.C. § 252 (repealed 1978); *see* *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978 (D.C. Cir. 1965); *Carrera v. Carrera*, 174 F.2d 496 (D.C. Cir. 1949).

26. 22 U.S.C. § 253 (repealed 1978); *see* *United States v. Ortega*, 24 U.S. (11 Wheat.) 467 (1826).

27. Compare the virtually identical language of The Crimes Act of 1790, ch. 9, §§ 25-27, 1 Stat. 112, 117-18 with 22 U.S.C. §§ 252-254 (repealed 1978).

28. *See House Immunity Hearings, supra* note 9, at 5 (statement of Joseph L. Fisher). For a discussion of the diplomatic privileges and immunities accorded prior to the DRA, *see* Barnes, *Diplomatic Immunity from Local Jurisdiction: Its Historical Development under International Law and Application in United States Practice*, 43 DEP'T STATE BULL. 173 (1960).

29. *See* Preuss, *Capacity for Legation and the Theoretical Basis of Diplomatic Immunities*, 10 N.Y.U. L.Q. REV. 170, 182-83 (1933).

was no longer compatible with the realities of contemporary life.³⁰ There were numerous well-publicized instances in the United States, for example, in which abuses of the privilege of diplomatic immunity had caused private citizens financial loss, property damage, and personal injury.³¹ Prior to 1978, these aggrieved citizens were left with little or no legal recourse to obtain financial compensation for the harm they sustained.³²

30. Ling, *A Comparative Study of the Privileges and Immunities of United Nations Member Representatives and Officials with the Traditional Privileges and Immunities of Diplomatic Agents*, 33 WASH. & LEE L. REV. 91, 94 (1976). The practice of according complete and unqualified immunity to individuals associated in any capacity with a diplomatic mission was becoming increasingly unpopular. The more modern practice of bestowing immunity upon diplomatic personnel only while they are engaged in the performance of representative functions and official duties is better suited to the complexities of contemporary international intercourse. *Id.* See notes 33-37 *infra* and accompanying text.

31. *E.g.*, on April 20, 1974, two prominent Washington doctors, Dr. Halla Brown and her husband, Dr. Arthur Rosenbaum, were seriously injured when an uninsured Panamanian diplomat, Mr. Alberto Watson-Fabrega, ran a red light and struck their vehicle. As a result of the accident, Dr. Brown was rendered a quadriplegic and is now totally incapacitated. She requires attendance and nursing care 24 hours each day. Needless to say, she was forced to give up her lucrative practice. As of June 1, 1976, Dr. Brown's medical expenses had exceeded \$200,000, and her annual nursing care costs were estimated at approximately \$50,000. Although Dr. Brown's insurance covered part of her loss, she was unable to recover anything from Mr. Watson-Fabrega or the Panamanian mission because of the privilege of full diplomatic immunity accorded by the 1790 statute for even the acts performed in the diplomat's private capacity. See *House Immunity Hearings*, *supra* note 9, at 80-82. For other examples, see *id.* at 48, 50. See also *Diplomatic Immunity, Hearings Before the Subcomm. on Citizens and Shareholders Rights and Remedies, Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 32-36 (1978) [hereinafter cited as *Senate Claims Hearings*] (statement of Lawrence S. Blumberg). Mr. Blumberg's testimony concerned a 1974 automobile accident, in which he and his wife were injured. The accident involved a secretary employed by the Brazilian mission in Washington, D.C. Despite the fact that the secretary had valid insurance coverage, the Blumbergs were denied recovery for their injuries because the secretary was deemed entitled to diplomatic immunity. *Id.* For an exhaustive recount of the many incidents involving immune diplomatic personnel which resulted in uncompensated loss or injury to private citizens under the 1790 statute, see G. HACKWORTH, *supra* note 17, at 515-30.

32. The avenues of recourse potentially open to those persons who had been caused physical or monetary damage in the United States by a diplomat entitled to immunity were limited under the 1790 statute. If the damage had been caused by an automobile accident, the aggrieved citizen was often able to obtain compensation through the diplomat's insurance policy. Although, prior to 1978, there was no law requiring diplomats to procure liability insurance, they were expected to carry insurance, and many did. This, however, was a strictly voluntary obligation on the part of the diplomat, and was often ignored. *House Immunity Hearings*, *supra* note 9, at 212.

Widespread sentiment in the international community to modernize the practice of diplomatic relations precipitated an evolving emphasis upon protecting the *function* of the diplomatic mission rather than the person of the diplomat himself.³³ This modern trend resulted in a redefining and narrowing of the limits of traditional diplomatic immunity.³⁴

For those individuals involved in an automobile accident with a diplomat who was uninsured, or who suffered loss or injury due to any other tortious act of a diplomat, another recourse was to file a written claim with the Office of Protocol, Department of State, in Washington. Whenever Protocol deemed such action was warranted, it would prevail upon the mission involved to bring about a just settlement of the dispute. The mission could either waive the diplomat's immunity, thereby subjecting him to the jurisdiction of the courts, or it could make a suitable *ex gratia* payment to the victim. The payment would be based solely on compassionate grounds and would imply no acknowledgement of legal liability on the part of that government. *Id.*

Most recently, another statute has furnished a possible remedy in certain situations where the diplomat was acting within the scope of his office or employment when he engaged in harmful conduct. This statute, The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.* (1976), provides a basis for a claimant in certain cases to obtain jurisdiction over a foreign government in United States courts where the defense of sovereign, as distinguished from diplomatic (*i.e.*, personal) immunity has in the past proved a bar to effective legal action. A foreign state is not immune from the jurisdiction of U.S. courts in cases "in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment. . . ." 28 U.S.C. § 1605(a)(5) (1976).

33. See Garretson, *The Immunities of Representatives of Foreign States*, 41 N.Y.U. L. REV. 67, 70 (1966). At the meeting of the International Law Commission in 1958, two traditional theories of diplomatic immunity were recognized. The first, the "extra-territoriality theory," viewed the premises of the mission as an extension of the territory of the sending state where certain diplomatic activities are conducted. Under the second theory, the "representative theory," the diplomatic mission and its members are regarded as representing, in the sense that they personify, the sending state.

The Commission observed that both these traditional theories of diplomatic immunity were being replaced by a third theory, the "functional necessity theory," which justifies the grant of immunity to a diplomatic mission and its members only when it is functionally necessary to facilitate and protect the performance of their representative duties. Report of the International Law Commission to the General Assembly, 13 U.N. GAOR, Supp. (No. 9) 11, U.N. Doc. A/3859 (1958), reprinted in 53 AM. J. INT'L L. 230, 266 (1959). For an extensive discussion of the various theories underlying the privilege of diplomatic immunity, see Preuss, *supra* note 29.

34. Garretson, *supra* note 33, at 69-74. See also *DRA Hearings*, *supra* note 12, at 11 (statement of Sen. Metzenbaum).

II. THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS

The Vienna Convention on Diplomatic Relations codified the modern practice of nations under customary international law with respect to the treatment of foreign representatives and mission personnel.³⁵ In brief, the Vienna Convention adopted the more modern functional³⁶ approach to the bestowal of immunity upon foreign diplomats.³⁷ Under the terms of the convention, no longer would foreign nationals associated in any capacity with a diplomatic mission be accorded complete and unqualified immunity for their actions.³⁸

35. Vienna Convention, *supra* note 2; see *U.S. Protects Its Own*, *supra* note 1, at 385-87. The Vienna Convention codified the customary law of diplomatic relations in existence since ancient times. In addition, it resolved many of the inconsistencies of state practice, including those relating to the scope of immunities and the persons to whom they apply. Most of the Vienna Convention is binding as customary law even upon nations that have not ratified it, and many of the treaty articles are declaratory of existing international law. The remaining articles are persuasive as evidence of existing international law. Garretson, *supra* note 33, at 69. See generally Kerley, *Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities*, 56 AM. J. INT'L L. 88 (1962).

36. See note 33 *supra* and accompanying text. Professor Ling provides an extensive analysis of the "functional necessity" theory of immunity and the practical considerations underlying it. Ling, *supra* note 30. Ling regards this approach as "the most appropriate for modern times." *Id.* at 94. He explains:

Due to the complexity of international affairs, nations have expanded the size of their diplomatic missions. Consequently, there has been a tremendous increase in the number of persons claiming diplomatic immunity. For the sake of security, host states have endeavored to keep the number of people enjoying privileges and immunities to a minimum. The functional necessity theory can be utilized to effect the most desirable balance between privileges and immunities and the requirements of host states.

Id.

37. The introductory language of the Vienna Convention states that "the purpose of diplomatic privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States . . ." Vienna Convention, *supra* note 2, preamble (emphasis added).

For an excellent account of the debates that took place at the convention regarding which theory of immunity should be adopted, see Kerley, *supra* note 35, at 90-92.

38. The highest ranking "diplomatic agents" and their families still enjoy complete immunity from civil, criminal, and administrative liability under the Vienna Convention, subject to some limitations. Vienna Convention, *supra* note 2, art. 37. See notes 49-52 *infra* and accompanying text.

A. *The Functional Approach to the Grant of Immunity*

Under the functional approach, all mission personnel, other than the highest-ranking "diplomatic agents,"³⁹ are granted civil, criminal, and administrative immunity only for acts performed within the scope of their official duties.⁴⁰ Each individual is entitled to a degree of immunity commensurate with his particular rank at the mission.⁴¹ In this way, the grant of privileges and immunities to foreign diplomats is justified only to the extent necessary to enable a mission to perform its representative functions in the receiving state.⁴² Thus, the focus is no longer upon the *person* of the diplomat, but upon his *function* in the mission to which he is accredited.⁴³ Under the functional approach, it has been stated that, "it is the work rather than the official which is protected,"⁴⁴ with the result that such officials "must obey all ordinary laws governing their private actions."⁴⁵

B. *The Scope of Immunity Granted Under the Vienna Convention*

The immunity now accorded the various mission members under the Vienna Convention can be briefly summarized.⁴⁶

39. Vienna Convention, *supra* note 2, art. 1(e) defines a "diplomatic agent" as "the head of the mission or a member of the diplomatic staff of the mission."

40. Vienna Convention, *supra* note 2, art. 37. Neither the State Department nor the courts have issued any definitive pronouncement as to what constitutes the "official duties," *i.e.*, the duties performed in the course and scope of employment, of a mission member. Several Congressmen expressed concern that failure to delineate the occasions when a diplomat is acting in his "official capacity," as opposed to his private capacity, could frustrate effective enforcement of the DRA. *See DRA Hearings, supra* note 12, at 24-27. The State Department concurs with the apparent intent of the authors of the Vienna Convention that such a determination cannot be made on a uniform basis, and should therefore be left to a case-by-case analysis. *Id.*

41. Vienna Convention, *supra* note 2, art. 37.

42. Garretson, *supra* note 33, at 70. Article 3(1) of the Vienna Convention sets forth the recognized legitimate functions of a diplomatic mission as follows: (a) representing the sending state in the receiving state; (b) protecting in the receiving state the interests of the sending state and of its nationals, within the limits permitted by international law; (c) negotiating with the government of the receiving state; (d) ascertaining by all lawful means conditions and developments in the receiving state, and reporting thereon to the government of the sending state; and (e) promoting friendly relations between the sending state and the receiving state, and developing their economic, cultural and scientific relations. Vienna Convention, *supra* note 2, art. 3(1).

43. *See* Vienna Convention, *supra* note 2, art. 3(1).

44. Ling, *supra* note 30, at 129.

45. *Id.*

46. *See generally* House Immunity Hearings, *supra* note 9, at 175.

The highest ranking diplomats, the diplomatic agents, still enjoy complete civil, criminal and administrative immunity, as they did under the 1790 statute.⁴⁷ These individuals are those most actively and intimately involved in carrying on the affairs of the sending state in a true representative capacity.⁴⁸ The immunity granted diplomatic agents is subject to three limitations.⁴⁹ No civil or administrative immunity may be successfully invoked in cases involving private real property located in the receiving state,⁵⁰ cases relating to private inheritance matters in the receiving state,⁵¹ and cases arising from the diplomat's private professional or commercial activities in the receiving state.⁵²

The mission personnel who are employed in an administrative or technical position⁵³ enjoy full criminal immunity under the Vienna Convention, but are entitled to civil and administrative immunity only for those acts performed in the course of their employment.⁵⁴ Service staff members of the mission, who essentially perform domestic and custodial functions,⁵⁵ are entitled to immunity only for acts performed in the course of their employment.⁵⁶ They have no civil, criminal, or administrative immunity for their private acts. Finally, the private domestic servants⁵⁷ employed by the individual members of a diplomatic mission are accorded no diplomatic privileges and immunities other than exemption from tax liability upon the wages paid to them by their mission member employer.⁵⁸

47. Vienna Convention, *supra* note 2, art. 29; *see* notes 24-27 *supra* and accompanying text.

48. *See* 13 J. INT'L L. & ECON. 471, 473 (1979).

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

50. *Id.* art. 31(1)(a).

51. *Id.* art. 31(1)(b).

52. *Id.* art. 31(1)(c).

53. Vienna Convention, *supra* note 2, art. 1(f) defines the "administrative and technical staff" as "the members of the staff of the mission employed in the administrative and technical service of the mission"

54. Vienna Convention, *supra* note 2, art. 37(2).

55. Vienna Convention, *supra* note 2, art. 1(g) defines the "service staff" as "the members of the staff of the mission in the domestic service of the mission"

56. Vienna Convention, *supra* note 2, at 37(3).

57. Vienna Convention, *supra* note 2, art. 1(h) defines a "private servant" as a "person who is in the domestic service of a member of the mission and who is not an employee of the sending State"

58. Vienna Convention, *supra* note 2, art. 37(4).

III. THE DIPLOMATIC RELATIONS ACT OF 1978

A. *United States' Ratification of the Vienna Convention*

The Vienna Convention was a self-executing treaty,⁵⁹ so it at once became operative as customary international law in the United States upon its ratification by the President in 1972.⁶⁰ Despite the fact that Congress had recommended signing the Vienna Convention as early as 1965,⁶¹ formal implementation was delayed to enable Congress to promulgate additional legislation which would complement the provisions of the treaty.⁶² The DRA included these complementary provisions in its formal codification of the Vienna Convention.

B. *The Complementary Provisions of the DRA*

The complementary provisions of the DRA require all foreign nationals associated with a mission to procure and maintain⁶³ liability insurance as a prerequisite to their obtaining diplomatic license plates and registration for the motor vehicles they operate in the United States.⁶⁴ The statute further provides that aggrieved private citizens who have been involved in an accident with an insured

59. See S. REP. NO. 958, *supra* note 3, at 2. For a brief overview of what makes a treaty self-executing, see Evans, *Self-Executing Treaties in the United States of America*, 30 BRIT. Y.B. INT'L L. 178, 185 (1953).

60. See S. REP. NO. 958, *supra* note 3, at 2.

61. 111 CONG. REC. 23,778 (1965) (remarks of Sen. Fulbright).

62. See H. REP. NO. 526, 95th Cong., 1st Sess. 2 (1977). See generally 13 J. INT'L L. & ECON. 471, 473 (1979).

63. Note the problems that can arise when a diplomat allows his insurance policy to expire or be cancelled prior to an accident. See note 72 *infra* and accompanying text; 13 J. INT'L L. & ECON. 471, 480 (1979).

64. DRA, *supra* note 1, § 6 (codified at 22 U.S.C. § 254e (Supp. II 1978)). While the approaches vary, almost every country requires some form of liability insurance for motor vehicles. Of the 116 nations which responded to a State Department survey in late 1977, 89 countries have mandatory liability insurance laws for all motor vehicles and 11 others require diplomatic personnel to be insured although there are no mandatory requirements generally. See Letter and Analysis of Responses to Department of State Inquiry on Automobile Liability Insurance, *reprinted in Senate Claims Hearings*, *supra* note 31, at 103-18.

In Europe, approximately 15 nations are parties to the European Convention on Compulsory Insurance Against Civil Liability in Respect of Motor Vehicles, which requires that each signatory nation enact compulsory insurance laws which permit a direct claim by an insured party against the insurer. The European Convention on Compulsory Insurance Against Civil Liability in Respect of Motor Vehicles, Apr. 20, 1959, Annex I, art. 6(1), 720 U.N.T.S. 119 (1970).

diplomat may bring a direct action against the insurer to seek financial redress.⁶⁵ Thus, with respect to the harm caused by the negligent operation of a motor vehicle by a diplomat in the United States, the direct action provision of the DRA created a remedy for private citizens which was unavailable under prior United States law.⁶⁶

C. *Shortcomings of the Present DRA—Necessity
For a Claims Fund*

The present DRA may be seen as inadequate to protect the rights of private citizens in the United States for two main reasons: (1) there remain numerous situations under the present DRA in which a private citizen cannot recover for the damages occasioned by the tortious or criminal acts of a diplomat; and (2) there are many problems encountered in enforcing and administering the liability insurance and direct action provisions of the DRA which may frustrate their effectiveness.

1. *There Is No Recovery Where Immunity is Still in Force*

Although the DRA authorizes revocation of immunity for certain private acts of a diplomat, there remain numerous instances in which immunity for the wrongful conduct of a diplomat remains intact. For example, high ranking diplomatic agents and their families still enjoy complete immunity for both their private and their official acts.⁶⁷ Mission members employed in administrative and

65. DRA, *supra* note 1, § 7 (codified at 28 U.S.C. § 1364 (Supp. II 1978)). The constitutionality of direct actions against the insurer was upheld by the U.S. Supreme Court in *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954). Representatives of the insurance industry were, understandably, vehemently opposed to the inclusion of a direct action provision in the DRA. Mr. Leslie Cheek, Vice President-Federal Affairs of the American Insurance Association, asserted that the direct action provision of the DRA could be "invidiously discriminatory in its effect." *Claims Against Persons Entitled to Diplomatic Immunity: Hearing on H.R. 7679 Before the Subcomm. on Administrative Law and Governmental Relations of the House Judiciary Comm.*, 95th Cong., 1st Sess. 44, 46 (1977) (statement of Leslie Cheek) [hereinafter cited as *House Claims Hearings*]. Discussing the practicability of a direct action mechanism, Mr. Cheek opined:

I doubt that any insurer would be willing to commit its assets to a contract in which it would agree to be held liable for the tortious acts of another who is entirely immune from such liability and who cannot be compelled to help defend the insurer against its vicarious obligation.

Id. at 45.

66. See note 32 *supra* and accompanying text.

67. Vienna Convention, *supra* note 2, art. 29. The immunity accorded diplo-

technical positions are completely immune from prosecution for any crimes they commit.⁶⁸ In addition, the administrative and technical personnel, as well as the members of the service staff of the mission, are entitled to civil and administrative immunity for acts performed in their "official capacity."⁶⁹ Very often the line between official and non-official conduct is difficult, if not impossible, to distinguish.⁷⁰ In the above situations, an aggrieved private citizen may be left without a legally enforceable remedy against the offending diplomat.

2. Problems with the Liability Insurance and Direct Action Provisions

While the liability insurance and direct action provisions of the DRA do, ostensibly, provide a remedy for private citizens, as well as a deterrent to foreign diplomats who disregard motor vehicle and traffic laws in the United States, these provisions are beset

matic agents is subject to the three limitations set forth in Article 31 of the Vienna Convention. *See* notes 49-52 *supra* and accompanying text. The diplomatic agents are the mission members who are most actively involved in the representative functions of the mission. To better facilitate the effective performance of these essential duties, the Vienna Convention bestows upon them the broadest grant of immunity. In general, diplomatic agents are not subject to the "scope of employment" restrictions of the "functional necessity" approach as are the members of the other categories of mission personnel. The Article 31 limitations, however, achieve virtually the same effect by disallowing immunity to the diplomatic agent for many of his private dealings.

68. Vienna Convention, *supra* note 2, art. 37(2).

69. Vienna Convention, *supra* note 2, art. 37(2) and (3). Note that while these individuals can not be held *personally* accountable for the acts they perform in their official capacity, the mission they represent may be held vicariously liable under the Foreign Sovereign Immunities Act of 1976. *See* note 32 *supra*. This statute allows recovery against a foreign state for the tortious acts committed by its representatives in this country while acting within the scope of their employment. 28 U.S.C. § 1602 *et seq.* (1976). It further permits execution against any insurance policy held by the foreign nation covering any such acts, including auto accidents. Although the Foreign Sovereign Immunities Act can provide some relief for private citizens injured by a diplomat while he is acting within the scope of his employment, it has two significant loopholes in its coverage: (1) there is no requirement that the foreign nation obtain insurance for its diplomatic representatives in this country; and (2) the statute does not cover those situations where the injurious acts are committed outside the mission member's official duties. *See House Immunity Hearings, supra* note 9, at 14.

70. *See* note 40 *supra*. It should be noted that the State Department does not consider the driving of a motor vehicle by a diplomat to be an "official act." *DRA Hearings, supra* note 12, at 31 (statement of Horace F. Shamwell, Jr., Deputy Asst. Legal Advisor for Mgmt., Dep't of State).

with administrative and enforcement difficulties which limit their effectiveness.⁷¹

There remains no remedy under the DRA against an immune diplomat who carries no insurance or whose policy has expired or is cancelled prior to a motor vehicle accident.⁷² The denial by the State Department of applications for diplomatic license plates, and the waiver of registration fees, may not be adequate compulsion to ensure that diplomats will comply with the regulations.⁷³ If a diplomat simply chooses to pay the normal registration fees as any private citizen, he can avoid the need to procure State Department approval of his registration application, and can thus circumvent the liability insurance requirement altogether.⁷⁴

Finally, the victim of a motor vehicle accident involving an insured foreign diplomat can only sue the immune tortfeasor for a recovery within the policy limit.⁷⁵ The DRA stipulates only that the insurance provide the minimum limits of liability specified in the financial responsibility law of the jurisdiction where the vehicle is kept.⁷⁶ But these minimum levels are inadequate to fully compensate victims with serious and protracted physical injuries, or with major property damage claims.⁷⁷

71. For a concise summation of the administrative and enforcement difficulties, see 13 J. INT'L L. & ECON. 471, 478, 480 (1979). An insurance industry spokesman who testified at the DRA hearings estimated that in New York, for example, it costs between \$10 and \$15 million a year to enforce the "tightest so-called compulsory insurance laws in the country." *DRA Hearings, supra* note 12, at 72 (statement of John J. Nangle, Nat'l Ass'n of Independent Insurers). Despite this annual expense, the average number of uninsured motorists in the State has remained about the same. *Id.*

72. 13 J. INT'L L. & ECON. 471, 480 (1979). During consideration of the DRA, Senator Javits pointed out that New York had encountered problems with diplomats who acquired insurance only to register their vehicles and subsequently allowed the policies to lapse. The Foreign Relations Committee recommended that federal regulations on the proposed legislation provide for the expulsion of diplomats who fail to comply with the Act. This recommendation, however, was not implemented in the rules proposed by the State Department. See S. REP. NO. 958, *supra* note 3, at 3-4; 43 Fed. Reg. 57,159-60 (1978).

73. See 13 J. INT'L L. & ECON. 471, 480 (1979).

74. *Id.*

75. *Id.*

76. 43 Fed. Reg. 57,160 (1978) (proposed 22 C.F.R. § 151.4). The State Department had recommended minimum limits of liability of \$100,000 per person, \$300,000 per incident for bodily injury, and \$50,000 per incident for property damage. *Id.* (proposed 22 C.F.R. § 151.5). The only required minimum limits now in force are those mandated by the applicable law of the jurisdiction where the vehicle is kept. *Id.*

77. See 13 J. INT'L L. & ECON. 471, 480 (1979). For example, under the appli-

It is therefore evident that the present DRA not only fails to provide a basis for relief for victims of certain tortious and criminal activities of a foreign diplomat unconnected to the operation of a motor vehicle, but the statute may also fail to provide relief in many situations that *do* involve the negligent operation of a motor vehicle.⁷⁸

IV. CLAIMS FUND PROPOSAL

Under the terms of the present DRA, there remain numerous instances in which immunity will prevent a private citizen in the United States from obtaining compensation for loss or damages caused by the wrongful conduct of a diplomat.⁷⁹ This fact was a point of concern to several members of Congress during the hearings on the proposed DRA.⁸⁰ Several bills were introduced which would have provided a measure of relief in situations in which the diplomat involved was properly entitled to immunity under the Vienna Convention, or in which the direct action provision did not apply.⁸¹ These proposed bills, in one form or another, sought to establish a claims fund, a pool funded by the United States government, which would compensate injured private citizens who could not otherwise bring a successful action under the DRA.

A. *Proposals for a Claims Fund Provision in the DRA*

The idea of a claims fund was first included in several of the direct action and liability insurance bills that were proposed for the DRA.⁸² It was intended that the fund would provide a remedy of last resort for victims whose claims for compensation were pre-

cable law in the District of Columbia, Dr. Halla Brown, *see* note 31 *supra*, would have recovered at most \$10,000 for her injuries had the diplomat who was involved obtained an insurance policy with minimum coverage. *See* D.C. CODE ANN. §§ 40-435, 40-436 (1973 & Supp. II 1975).

78. *See generally* House Immunity Hearings, *supra* note 9, at 43-46 (statement of Rep. Solarz).

79. *See* notes 67-70 *supra* and accompanying text.

80. *See generally* House Immunity Hearings, *supra* note 9, at 16, 43-46, 87-88. Referring to this situation, Rep. Solarz remarked, "I don't think that it is appropriate in 1977 to have a protected class of individuals who are free to do whatever damage they want without giving the American people who might suffer from their negligent activities the right to collect." *Id.* at 45.

81. *See* note 12 *supra*.

82. *See* S. 478, S. 1257 & H.R. 1536, *supra* note 12. For a brief summary of the various claims fund proposals, *see* 10 CASE W. RES. J. INT'L L. 827, 829 (1978).

cluded or deemed void by reason of diplomatic immunity, or because liability insurance had not been procured or properly maintained by the diplomat.⁸³ These claims fund proposals were apparently limited in their scope to compensate only for damages resulting from motor vehicle accidents.⁸⁴

Representative Stephen J. Solarz of New York expanded the claims fund idea in an attempt to fill the gaps in the coverage of the DRA.⁸⁵ His broad proposal⁸⁶ would have established a Bureau of Claims "charged with the responsibility for awarding full and just compensation to persons injured by foreign diplomats and for reimbursing local governments for revenues lost because of their inability to collect parking fines from foreign diplomats."⁸⁷ The Solarz bill would have provided a remedy for private citizens injured by *any* tortious or criminal act of a diplomat where immunity law otherwise prevented a recovery.⁸⁸ Thus, the scope of coverage was not limited exclusively to situations involving the diplomat's negligent use of a motor vehicle.⁸⁹

The Solarz bill ultimately died in committee. It was not in-

83. See 10 CASE W. RES. J. INT'L L. 827, 829-30 (1978).

84. *I.e.*, these proposals only applied to situations which normally involve liability insurance coverage. In the context of the congressional hearings on the subject of diplomatic immunity, it is clear that the legislators generally referred to *motor vehicle* insurance when they spoke of "liability insurance" requirements. See, e.g., *DRA Hearings, supra* note 12, at 9, 13, 33, 59. It has been suggested however, that the direct action provision of the DRA may have broader application. 13 J. INT'L L. & ECON. 471, 480 n.55 (1979). For example, it may be possible for a victim to bring suit against the insurer if a diplomat voluntarily carries homeowner's coverage against injury to third persons. *Id.*

85. Rep. Solarz was the chief proponent in Congress of establishing a claims fund which would compensate any legitimate claim against a diplomat for which, because of immunity, a remedy was otherwise unavailable. See *House Immunity Hearings, supra* note 9, at 43-45.

86. Solarz Bill, *supra* note 13.

87. *Id.* at 50.

88. *House Immunity Hearings, supra* note 9, at 46. The Solarz Bill would also provide compensation to victims of a motor vehicle accident involving a diplomat where the damage sustained exceeds the maximum limit of the applicable insurance policy. *Id.* at 43-44.

89. On the contrary, the scope of coverage was quite broad. It even provided for reimbursing local governments for revenues lost because of their inability to collect parking and traffic fines issued to diplomat motorists. Mr. Solarz stated the broad purpose of his bill was to "establish the principle that whenever any person is injured or suffers financial loss due to action by a foreign official covered by the immunity statute, that person can apply for redress from the United States Government." *Id.* at 47.

cluded in the DRA, nor were any of the other claims fund proposals.⁹⁰

Mr. Solarz' proposal may have been too ambitious in its scope.⁹¹ The underlying rationale of placing primary responsibility upon the United States government to ensure that private citizens have a remedy for loss or damage caused by an immune diplomat is, however, sound.⁹² In light of the shortcomings of the DRA the establishment of a claims fund is necessary to afford such a remedy. The following is an alternative proposal for a claims fund.

B. *The Proposal*

1. Administration of the Fund

There should be established within the Department of State a bureau or agency charged with the responsibility of administering the Claims Fund.⁹³ This administrative body would be called the Bureau of Claims Against Foreign Diplomats (Bureau of Claims).⁹⁴

90. The reasons for exclusion of a claims fund provision from the DRA are not entirely clear. Perhaps the main reason was the State Department's misgivings about the establishment of a "judicial or quasi-judicial apparatus" within the department for the determination of disputes involving diplomats. See *House Immunity Hearings*, *supra* note 9, at 219.

Under this author's proposal, the hearing before the Director of the claims fund, see text accompanying notes 96-99 *infra*, would be ministerial rather than "judicial or quasi-judicial." There is no attempt to impose sanctions upon the offending diplomat. The purpose of the hearing is simply to substantiate the existence of the claim, and determine the amount of compensation to which the applicant citizen is entitled. *Id.*

91. The Solarz Bill not only purported to provide a remedy to individuals who suffered loss or damage as a result of the misconduct of a diplomat, but also to reimburse local governments for unpaid parking and traffic tickets issued to diplomats. Such a system of reimbursement to municipalities would no doubt be difficult to administer and monitor. Alternative means of attempting to curb the diplomatic community's general disregard of local parking and traffic laws would probably be more effective. See *DRA Hearings*, *supra* note 12, at 53-55.

92. There is some precedent, at least at the state level, for placing primary responsibility upon the government to compensate victims of crimes. At present, about 20 states, including New York and California, have a fund to which victims of a crime can apply for compensation for their damages. *House Claims Hearings*, *supra* note 65, at 57.

93. It is the responsibility of the State Department to deal with matters concerning foreign diplomatic missions in the United States, as well as American missions abroad. See T. ESTES & E. LIGHTNER, JR., *THE DEPARTMENT OF STATE 193-96* (1976).

94. This was the title suggested by Mr. Solarz in his bill. Solarz Bill, *supra* note 13, in *House Immunity Hearings*, *supra* note 9, at 50. In H.R. 1257, *supra* note

The Bureau of Claims would be headed by a Director appointed by the President.⁹⁵

Upon receipt of an application for relief, a field investigator would conduct a preliminary investigation to determine whether the claim is legitimate and properly before the Bureau.⁹⁶ The Director should conduct a hearing to decide the merits of the claim. The Director's role would be that of fact-finder or mediator rather than judge. That is, his function is not to decide the issue of the diplomat's guilt or innocence per se, but rather to make findings on the following questions: (1) whether the injury of the private citizen applicant has in fact been caused by the wrongful conduct of a diplomat entitled to immunity for that act; and (2) whether the aggrieved citizen has no available remedy under the DRA⁹⁷ or any other applicable statute.⁹⁸

If the Director answers these two questions affirmatively, he would next determine the amount of compensation to which the

12, the same administrative body was entitled the Office of Claims Against Foreign Diplomats. *House Immunity Hearings*, *supra* note 9, at 50. While the head of the claims fund would have the title "Director" under the Solarz Bill, he would be an "Assistant Secretary" under S. 478. *Id.*

95. See Solarz Bill, *supra* note 13, in *House Immunity Hearings*, *supra* note 9, at 50-51.

96. There is an existing mechanism within the Department of State to conduct these preliminary investigations. The Department of Protocol routinely investigates any claim or complaint against a foreign diplomat or mission that is brought to its attention. See Report on State Department Protocol Office's Handling of Complaints Lodged Against Diplomatic Missions, in *DRA Hearings*, *supra* note 12, at 52. In the past, upon a determination that the claim or complaint was valid, the Department of Protocol would initiate negotiations with the offending mission to persuade the mission to compensate the claimant for his injury. But if, for some reason, the Department did not seek compensation from the mission, or the mission refused to make any payment, the victim had no redress for the harm he has suffered. *Id.*

Under the present claims fund proposal the Department of Protocol would conduct the preliminary investigation to determine that the claim is legitimate and properly before the Director of the Bureau of Claims. After conducting a hearing, compensation would be paid to a successful claimant regardless of whether the offending mission chose to reimburse the fund. See notes 103-04 *infra* and accompanying text.

97. The only actual remedy provided by the DRA is the authorization of a direct action by the injured party against the diplomat's insurer. 28 U.S.C. § 1364 (Supp. II 1978); note 65 *supra*. It is important to note, however, that if the offending diplomat is not entitled to immunity for his wrongful conduct under the Vienna Convention, he is subject to the jurisdiction of the courts to the same extent as any private citizen. In this situation, of course, the aggrieved party may choose any remedy to which he is normally entitled for the particular cause of action.

98. See, e.g., The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.* (1976).

applicant is entitled. An award from the claims fund to the applicant for the full amount would then be made. The decision of the Director could be appealed by the applicant to the Secretary of State. The Secretary of State's decision with respect to a claim for compensation would, on appeal, be subject to judicial review.⁹⁹

The Secretary of State should be empowered to issue such further regulations, and to determine the nature and procedure of the claims hearing, so as to best effectuate the purpose and intent of the claims fund legislation.¹⁰⁰

2. Financing the Claims Fund

Perhaps the major point of concern with a claims fund proposal is the question of who should bear the financial burden of sustaining the fund.¹⁰¹ This proposal contends that the initial re-

99. The Secretary of State's decision with respect to an application for compensation would be subject to judicial review in accordance with 5 U.S.C. §§ 701-706 (1976).

100. President Carter delegated to the Secretary of State the authority to enact the liability insurance provision of the DRA. Exec. Order No. 12,101, 43 Fed. Reg. 54,195 (1978).

101. See generally *DRA Hearings*, supra note 12, at 21, 64.

102. Mr. Richard C. Gookin, Assistant Chief of Protocol, Testifying on behalf of the State Department, expressed a contrary view. He asserted that the initial, and ultimate, responsibility for the compensation of injured parties rests with the individual diplomat. *Id.* at 21. He related the State Department's general view on the idea of a claims fund as follows:

We think it would be a mistake in principle to impose liability upon the American public for the tortious conduct of foreign diplomats through establishing an office within the Department of State with the quasi-judicial responsibility of considering and awarding compensation for claims arising from allegations of such conduct. Instead, we believe the objective can best be accomplished by legislation restricting immunity in keeping with the Vienna Convention and requiring diplomatic missions and their personnel to carry appropriate liability insurance against third-party risks.

Id.

Despite the State Department's endorsement of the DRA, this Note has indicated that the Vienna Convention and the complementary provisions of that statute alone are insufficient to ensure that an aggrieved citizen would have a remedy in many situations involving the tortious or criminal acts of a diplomat.

The State Department's view that the American public should not automatically have to bear *ultimate* financial responsibility for a diplomat's wrongful conduct concurs with the view expressed in this proposal. This proposal, however, contends that the sanctions provided by the Vienna Convention can be utilized to compel the mission or diplomat involved to voluntarily reimburse the claims fund for any payments made to victims on their account. In this way, it is hoped, the U.S. government will have only the *initial* responsibility to compensate victims, while the *ultimate* responsibility, as the State Department urges, would be upon the mission or diplomat.

sponsibility for furnishing money to the fund should rest with the United States government.¹⁰²

The idea of a claims fund must be premised upon the principle that a person injured in the United States by a foreign diplomat entitled to immunity could apply directly to the United States government for redress.¹⁰³ All legitimate claims for compensation should be satisfied. The State Department should then use its influence and "good offices" to seek reimbursement from the mission involved for the claim paid from the fund on that mission's behalf.¹⁰⁴ But, payment of a legitimate claim from the fund should not be contingent upon the receipt, or the likelihood of receipt, of reimbursement from the offending mission. This is because an offending mission's obligation to reimburse the fund is strictly voluntary. Once it has been determined that the particular diplomat involved is entitled to immunity for the injurious act, neither he nor his mission can be compelled by legal means to make restitution to the victim.¹⁰⁵

In sum, where immunity law prevents an otherwise valid cause of action against the offending diplomat, the victim should be made whole. The onus of procuring reimbursement from the mission should, as a matter of equity, be upon the United States government, not the aggrieved citizen, for several reasons. In the first place, the State Department has a much better chance of obtaining reimbursement from the mission than would a private citizen who

Ultimate responsibility would be imposed upon the U.S. government only where a request for reimbursement was refused by the offending diplomat or his mission.

103. See *House Immunity Hearings*, *supra* note 9, at 47 (prepared statement of Rep. Solarz). Senator Charles Mathias, Jr., of Maryland, stated that "[o]ne of the primary goals of reform of our diplomatic immunity law is to guarantee that persons injured in accidents involving diplomatic personnel are not left without a means of obtaining fair compensation." *DRA Hearings*, *supra* note 12, at 90.

104. Prior to the passage of the DRA, this was the standard practice of the Department of Protocol when presented with a damage claim against a foreign diplomat. See note 96 *supra*. This system, however, was not always successful. *Id.*

Under the present proposal, the U.S. government would provide compensation for the victim *before* it sought contribution from the offending mission. Under these circumstances, it is likely that the State Department would be more vigilant in pressing its claims. In addition, in compelling the offending mission to reimburse the fund, the State Department would be able to utilize the sanctions provided by the Vienna Convention in the DRA. See notes 106-08 *infra* and accompanying text.

105. Where the diplomat is entitled to immunity for his actions under the Vienna Convention, he is completely "inviolable" and exempt from "any form of arrest or detention." Vienna Convention, *supra* note 2, art. 29.

sought compensation from the mission on his own for his injuries. Secondly, it may be argued that since effective diplomatic relations with foreign nations is a desirable and necessary goal in the interest of preserving the security and welfare of the United States, the unreimbursed claims fund awards could be seen as a necessary item of expense incurred by the government in the course of attaining that goal.¹⁰⁶

Following this reasoning, the costs involved in establishing equitable relations with foreign nations should properly be absorbed by the United States government.

3. Means of Compelling Reimbursement to the Fund by a Foreign Mission

Reimbursement of the claims fund by the offending mission is voluntary. Therefore, if the mission involved refuses to make restitution to the claims fund, or reimburses only part of the costs of the claim compensated by the fund, the United States government is without an absolute means of legally compelling reimbursement in those cases where immunity is properly invoked.¹⁰⁷ Under the provisions of the Vienna Convention in the DRA, however, the United States government is not entirely without recourse to compel the cooperation of the recalcitrant mission in these matters.

First, pursuant to section 4 of the DRA, the President may compel reimbursement by extending more, or less, favorable treatment to the diplomatic representatives of the mission involved commensurate with the mission's willingness to assume financial responsibility for their actions.¹⁰⁸ Secondly, as a means of com-

106. This point was raised by several speakers at the congressional hearings on the DRA. See *DRA Hearings*, *supra* note 12, at 48, 64-65.

107. See note 105 *supra*.

108. 22 U.S.C. § 254c (Supp. II 1978). This provision of the DRA derives its authority from art. 47 of the Vienna Convention, which provides as follows:

1. In the application of the provisions of the present Convention, the receiving state shall not discriminate as between states.
2. However, discrimination shall not be regarded as taking place:
 - (a) where the receiving state applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending state;
 - (b) where by custom or agreement states extend to each other more favourable treatment than is required by the provisions of the present Convention.

Vienna Convention, *supra* note 2, art. 47. For the U.S. policy regarding the allocation

elling the offending mission to cooperate in making restitution to the fund, the State Department could declare the offending diplomat a *persona non grata*, strip him of his diplomatic accreditation, and demand his withdrawal from the country.¹⁰⁹ Finally, the State Department may exert varying degrees of political and economic pressure on the offending country to persuade it to accept the financial responsibility for the harm its appointed representatives cause in the United States.¹¹⁰

While these means of compulsion may not, admittedly, be as effective as actual legal sanctions, they may be sufficient to ensure the cooperation of the mission involved. In any event, it is clear that when immunity is properly in force, the State Department has considerably greater influence and negotiating leverage under the Vienna Convention in seeking reimbursement than does an aggrieved individual.

4. Voluntary Cooperation by the Foreign Missions

The previous discussion proceeded upon the assumption that the offending mission would be unwilling to make restitution to the fund. In actual practice, such a pessimistic assumption may be inaccurate and largely unwarranted in the majority of cases.

It seems unlikely, for practical purposes, that a foreign nation which seeks to establish and maintain beneficial diplomatic relations with the United States would make it a practice to condone or acquiesce in the irresponsible activities of its diplomatic representatives in this country. Similarly, it seems unlikely that a mission cognizant of its representative role in this country would jeop-

of financial responsibility for the harm its diplomats cause abroad, see note 112 *infra*.

109. Vienna Convention, *supra* note 2, art. 9, § 1, provides as follows:

The receiving state may at any time and without having to explain its decision, notify the sending state that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending state shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving state.

110. Such action could be justified not only under art. 47 of the convention, see note 107 *supra*, on the grounds of reciprocity, but also on the grounds that the offending diplomat has violated his duty "to respect the laws and regulations of the receiving state" pursuant to art. 41 of the convention, see note 111 *infra*.

ardize its good standing by permitting its members and employees to continuously engage in conduct violative of United States law.¹¹¹

It would, therefore, seem entirely possible that a mission confronted with a request for reimbursement to the claims fund would compel the individual diplomat involved to personally make restitution to the fund for the harm he has occasioned.¹¹² Such a practice by the mission would relieve it of any financial responsibility to the fund, while placing the burden of reimbursement upon the offending diplomat.

The sending state may also, under the Vienna Convention, decide to waive the offending diplomat's right to immunity if it finds that such a step is warranted.¹¹³ In this situation, the sending nation would thus submit the diplomat to the normal process and jurisdiction of the United States' courts.

5. Effect of the Claims Fund Upon the Diplomat's Immunity

The principal benefit of a claims fund is that the rights of private citizens can be preserved and protected without unduly impinging upon the diplomat's ability to carry out the true representative functions of the mission.¹¹⁴ It must be recalled that compensation from the claims fund would only be paid following a determination that no other remedy is available to the applicant either under the DRA or another statute because of the diplomat's immunity.¹¹⁵ It is therefore a prerequisite to recovery from the fund that the diplomat involved is immune from legal process for the act complained of.¹¹⁶ Thus, the claims fund proposal would not

111. The Vienna Convention imposes on foreign diplomats an obligation to respect and abide by the laws of the receiving state. Art. 41 provides in part as follows: "Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving state. They also have a duty not to interfere in the internal affairs of that state." Vienna Convention, *supra* note 2, art. 41.

112. The United States, for example, follows such a policy with respect to its diplomats stationed in foreign nations. See *DRA Hearings*, *supra* note 12, at 33-34.

113. Vienna Convention, *supra* note 2, art. 32. For a brief summary of the U.S. policy, see Dep't of State, Waiver of Immunity of U.S. Diplomats Abroad, *DRA Hearings*, *supra* note 12, at 34.

114. This point was asserted by Representative Solarz when he introduced his claims fund bill. *House Immunity Hearings*, *supra* note 9, at 45.

115. *Id.* at 53.

116. *Id.*

abrogate the individual diplomat's right to immunity when that privilege is properly invoked.

A diplomat who appears before the Director at a Bureau of Claims hearing would do so voluntarily, and without prejudice to his right of immunity. He would be present strictly as a witness, not as a defendant.¹¹⁷ It would not even be necessary for the diplomat involved to appear at all, as he has no direct personal stake in the outcome of the hearing. In addition, because the proceedings before the Director would be ministerial rather than judicial in nature, claims could be resolved summarily. In this respect, the system would be more efficient in terms of time and expense than normal judicial proceedings.

Any direct limitation on a diplomat's privilege of immunity, other than the limitations imposed by the DRA, would be imposed, if at all, by the mission to which he is accredited.¹¹⁸ There would be no additional restrictions placed on diplomatic immunity by the State Department in administering the claims fund. Whether fearful of jeopardizing relations with the United States, or simply unwilling to bear the financial responsibility for the misconduct of its members, a foreign mission, under the claims fund system, would be more likely to exercise greater care in supervising the activities of its employees in the United States. It is hoped, in turn, that the mission would also impose greater accountability for misconduct upon the individual diplomat involved. In this way, the mission would not only avert subsidizing the tortious and criminal conduct of its employees, through reimbursement to the claims fund, but would deter its diplomatic personnel from engaging in such irresponsible and careless behavior in the United States.

Thus, the claims fund would play a significant role in deterring irresponsible conduct on the part of foreign diplomats in the United States. More importantly, it would have this effect without directly restricting or impinging upon their ability to carry on their official affairs.

CONCLUSION

The implementation of a claims fund to compensate United States' citizens for the financial loss, property damage, and per-

117. Under art. 31(2) of the Vienna Convention, *supra* note 2, a diplomat entitled to immunity could not be legally compelled to appear as a witness.

118. See text accompanying notes 111-13 *supra*.

sonal injuries they sustain as a result of the tortious and criminal conduct of a foreign diplomat is necessary to provide a remedy to private citizens in those situations not otherwise covered by the DRA. The claims fund would protect the rights of United States citizens without interfering with the diplomat's ability to carry out his duties as the representative of the sending state in this country. A proper balance of the conflicting interests involved could thus be struck.

The claims fund would provide compensation to injured private citizens while properly imposing upon the nation involved to assume financial responsibility for the harm its mission employees cause in the United States. The Vienna Convention (incorporated in the DRA) provides ample sanctions to compel the sending state to make restitution to the fund for any disbursements made on its behalf. In addition, the State Department is in a much better position to exert influence upon the offending mission to compel reimbursement than is the individual private citizen. The claims fund would thus complete the process begun by the DRA of facilitating the effective functioning of foreign diplomatic missions in the United States without abrogating the rights of the private citizens of this country.

R. Scott Garley

