

ABUSE OF DIPLOMATIC IMMUNITY: IS THE GOVERNMENT DOING ENOUGH?

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I. INTRODUCTION

“Diplomatic immunity covers many things, but failing to pay \$400,000 rent is not one of them, a federal judge said as he ordered the Zaire mission to the United Nations to be evicted from its offices.”¹ However, only a few months later, the Second Circuit Court of Appeals overruled the judge by holding that diplomatic immunity does extend to this case and that the mission cannot be evicted.² In other words, the mission can lease another’s land, continue its work, refuse to pay rent, and not be evicted. What remedies does a landlord have? Does our government have a remedy that would satisfy both the American citizen as well as the well-established international law of diplomatic immunity? This note will provide an overview of the development and changes in the law of diplomatic immunity, discussing its problems and possible solutions. Then, in light of this overview, a determination will be drawn stating whether our government has taken the necessary steps to balance

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1. *Zaire's Mission to the U.N. To Be Evicted*, N.Y. TIMES, Mar. 26, 1992, at A2.

2. 767 Third Ave. Assoc. v. Permanent Mission of Zaire to the United Nations, 988 F.2d 295 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 74 (1993).

the scale of diplomatic immunity that is heavily skewed in favor of the diplomat.

The landlord's dilemma is one of many unresolved problems of diplomatic immunity. Offenses by diplomatic personnel vary from parking violations, to drug smuggling, and murder.³ The most serious problems Americans have encountered in this arena include rape by a foreign attache's son, assault by the son of a foreign Ambassador to the United States, child abuse, and sexual assault by an emissary.⁴ The United States is host to some 37,000 diplomatic personnel who are immune to nearly all civil and criminal liability.⁵ Although abuses are the exception rather than the rule, the number of abuses is alarming and has constantly been an issue of debate in Congress. With no clear guidance from Congress, the courts are left to their own reasoning and interpretations of purposely ambiguous treaties, and the considerations of foreign affairs policy.

As courts have encountered such problems previously, they have created a limited number of precedents on certain aspects of diplomatic immunity. For example, courts have unanimously upheld diplomatic immunity in criminal prosecution and civil litigation resulting from criminal behavior. In *Skeen v. Federative Republic of Brazil*, the United States District Court for the District of Columbia dismissed an action for lack of jurisdiction based on defendant's status as Ambassador to the United States.⁶ In this case, the grandson of a Brazilian Ambassador assaulted and shot an American citizen without accountability for criminal or civil liability.⁷ The court hinted that it was the function of the other two branches to provide a proper solution to such incidents.⁸

Diplomats have also been able to invoke immunity to avoid service of process. In a case representative of this precedent, a Circuit Court upheld a United States Marshal's refusal to serve compulsory process on the Ambassador of Tunisia, stating that such service would violate the Ambassador's diplomatic immunity.⁹ The court relied on the State Department's opinion that such service of process would "prejudice United States foreign relations and impair the performance of diplomatic

3. Lori Shapiro, *Foreign Relations Law: Modern Developments in Diplomatic Immunity*, 1989 ANN. SURV. AM. L. 281 (1990).

4. Carol Wallace & Michael Weiss, *The Untouchables: Diplomats in America*, PEOPLE WEEKLY, Jan. 17, 1983, at 18(4).

5. Shapiro, *supra* note 3, at 281.

6. *Skeen v. Federative Republic of Braz.*, 566 F. Supp. 1414 (D.D.C. 1983).

7. *Id.*

8. *Id.*

9. *Hellenic Lines Ltd. v. Moore*, 345 F.2d 978 (D.C. Cir. 1965).

functions."¹⁰ After weighing foreign relations interests against the benefit of such service, the court concluded that the former outweighed the latter and upheld diplomatic immunity.¹¹

Yet another precedent is the inability of courts to compel diplomatic officials to testify at trials.¹² For example, the United States District Court for the District of Columbia sided with a Canadian Ambassador to the United States who refused to testify at a perjury trial, on grounds similar to service of process.¹³ Courts generally dislike limiting immunities that are provided by the Vienna Convention and routinely side with the State Department.

These instances amply justify the Second Circuit's reasoning in *767 Third Avenue Associates v. Permanent Mission of Zaire*,¹⁴ in which the landlord could not evict his delinquent tenant. If such procedural matters as service of process or a subpoena are prohibited by the notion of diplomatic immunity, eviction would certainly not be allowed. Nonetheless, although the trial court in this case probably went too far in permitting the eviction of the mission, both the district and the appellate courts were justified in directing attention to the government and voicing their opinions that, without any revisions of diplomatic immunity law, innocent victims would continue to bear the burden of delinquent diplomats.

II. BACKGROUND OF DIPLOMATIC IMMUNITY

Acknowledged diplomatic immunity has existed since the sixteenth century when it was established in Europe as a result of the common exchange of permanent ambassadors.¹⁵ During this era, European countries realized that in order to assure the safety and efficacy of their work, ambassadors needed to be protected from criminal jurisdiction in the hosting country.¹⁶ History provides three theories for the need of such immunity. First, Hugo Grotius expressed the theory of "sacredness of

10. *Id.* at 980.

11. *Id.*

12. Shapiro, *supra* note 3, at 293.

13. *Hellenic Lines Ltd.*, 345 F.2d at 980. The court held that service of a subpoena threatens a diplomat's freedom of movement, impairs his or her ability to perform necessary functions, and thus is a violation of diplomatic immunity. *Id.*

14. 988 F.2d at 295.

15. Leslie Farhangi, Note, *Insuring Against Abuse of Diplomatic Immunity*, 38 STAN. L. REV. 1517, 1519 (1986).

16. *Id.*

Ambassadors.”¹⁷ Grotius believed that ambassadors were protected by both “divine and human law”¹⁸ and violation of such law would “not only [be] unjust but also impious.”¹⁹ Another theory was “exterritoriality”, which suggested that an ambassador, wherever he or she might be, remains on the grounds of its sending state, and therefore is not subject to another country’s laws.²⁰ A third theory, that of “functional necessity”, is the one most widely accepted.²¹ Functional necessity is based on the notion that diplomats cannot perform their duties and diplomatic functions without the protection of such immunity.²²

Rules of diplomatic immunity have remained unaltered since the time they were established. However, in time, the various and often inconsistent practices required consolidation.²³ This occurred at the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963.²⁴ The Conventions codified most modern diplomatic and consular practices²⁵ and were signed and ratified by over 140 countries, including the United States.²⁶ The 1961 Convention on Diplomatic Relations (hereinafter Vienna Convention) provides for immunity of diplomats and the diplomatic agent’s family members.²⁷ The treaty addresses numerous aspects of diplomatic immunity including approval of diplomats by the host country,²⁸ appointment of mission staff,²⁹

17. Shapiro, *supra* note 3, at 282 [*A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978*, 54 TUL. L. REV. 661, 664 (1980) (citing H. Grotius, *De Jure Belli et Pacis* 201 (W. Whenwell trans. 1853) and 2 H. Grotius, *De Jure Belli Ac Pacis* 431 (F. Kelsey trans. 1925))]. See also 767 *Third Ave. Assoc.*, 988 F.2d at 300.

18. Shapiro, *supra* note 3, at 282 [*A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978*, 54 TUL. L. REV. 661, 664 (1980) (citing H. Grotius, *De Jure Belli et Pacis* 201 (W. Whenwell trans. 1853) and 2 H. Grotius, *De Jure Belli Ac Pacis* 431 (F. Kelsey trans. 1925))].

19. *Id.*

20. Farhangi, *supra* note 15, at 1520, 1521. The note also points out that this theory has been rejected due to its dangerous consequences. *Id.*

21. Shapiro, *supra* note 3, at 282.

22. *Id.* See also Farhangi, *supra* note 15, at 1521.

23. Farhangi, *supra* note 15, at 1521.

24. Diplomatic Immunity, DEP’T ST. DISPATCH, Oct. 22, 1990, v.1 at 210(1).

25. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3230, 500 U.N.T.S. 95 [hereinafter Vienna Convention].

26. *Id.*

27. Shapiro, *supra* note 3, at 284. Limited diplomatic immunity also extends to the administrative, technical, and service staff of the foreign mission. *Id.*

28. Vienna Convention, *supra* note 25, art. 4.

29. *Id.* art. 7.

and exemption from local taxes.³⁰ In addition, the Convention offers two resolutions to problems of abuse of local laws.³¹ The treaty also provides for the inviolability of diplomatic missions in Article 22.³² However, although many concerns seem to be directly addressed by the Convention, inviolability of the mission, as it is described in the treaty, lends itself to various interpretations,³³ thus leaving room for assorted understandings.

III. THE LANDLORD'S DILEMMA

In May 1982, the Zaire Mission to the United Nations rented an entire floor in a modern Manhattan high-rise at \$19,350 per month.³⁴ Soon after it occupied the premises, the mission encountered problems keeping up with its rent payments.³⁵ After two judgements in favor of the landlord and the mission's repeated delinquency in the payment of its rent,³⁶ the landlord proceeded to reclaim what was his by evicting the mission, only to discover that it could not be done.³⁷ The mission, backed by the United States government, invoked diplomatic immunity.³⁸ Following a decision in the landlord's favor and the mission's appeal, the Second Circuit Court of Appeals held that the mission was inviolable and could not be evicted.³⁹ The landlord learned that he had no remedy against this delinquent and costly tenant other than to throw himself at the mercy of the United States government and hope that it would persuade the mission to either pay its debt or move out.⁴⁰

30. *Id.* art. 33.

31. *Id.* art. 9 & 32.

32. *Id.* art. 22.

33. *767 Third Ave. Assoc. v. Permanent Mission of Zaire to the United Nations*, 787 F. Supp. 389, 394 (S.D.N.Y. 1992). The District Court interpreted the language of the Vienna Convention not to include the situation at bar. *Id.* Cf. *767 Third Ave. Assoc. v. Permanent Mission of Zaire to the United Nations*, 988 F.2d at 298 (stating that language of the treaty is so narrow that no other interpretations are possible).

34. *767 Third Ave. Assoc.*, 988 F.2d at 296.

35. *Id.*

36. *Id.* After some pressure from the United States government, Zaire paid its debts to the landlord, but thereafter failed to make rent payments as they became due.

37. *Id.*

38. *767 Third Ave. Assoc.*, 988 F.2d at 295.

39. *Id.*

40. David Frum, *Diplomatic Immunity*, FORBES, Apr. 26, 1993, at 110. Zaire, whose dictator is a billionaire, is notorious for nonpayment of international debts. As a result, the United States cut its foreign aid to Zaire from \$31 million in 1990 to \$3.5 million in 1992.

A. District Court's Reasoning

Upon review of relevant treaties and documents, the New York District Court decided that provisions for inviolability of missions were not prompted by concerns of eviction due to failure to pay rent.⁴¹ Article 22 of the 1961 Vienna Convention on Diplomatic Relations,⁴² which speaks of inviolability of foreign missions, states that, with no exception, agents of the receiving State may not enter the mission's premises unless they are authorized by the head of the mission.⁴³ In addition, the Article states that the receiving State has a special duty to protect the mission's premises from "any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity."⁴⁴ Read together, the judge interpreted this language to be based on two considerations: "first, a perceived need to protect the sovereign from mob violence and other harassment; and second, recognition that the premises of the sovereign are entitled to protection from unannounced seizures or other invasions of privacy."⁴⁵ The court thought it unlikely that "the treaties intended to protect diplomats from injuries sustained from a party's lawful efforts to recover its own property."⁴⁶ In addition, the court stated that eviction would not be an "unannounced . . . invasion", since the mission has received ample notice.⁴⁷

Moreover, in response to the mission's argument that eviction will hinder its function, the court replied that the mission should have looked for alternate housing if it was not able to meet its financial obligations; further, the only hinderance to the mission's function was its own inability to make the required rent payment.⁴⁸ Finally, the court rejected the notion proffered by the Department of State that a single landlord should carry the burden of our nation's foreign policy,⁴⁹ especially when there was no proof that American diplomats abroad would feel the consequences of such eviction.⁵⁰ The court stated that if the State Department is concerned with

41. *767 Third Ave. Assoc.*, 787 F. Supp. at 389.

42. Vienna Convention, *supra* note 25.

43. *Id.*

44. *Id.*

45. *767 Third Ave. Assoc.*, 787 F. Supp. at 394.

46. *Id.*

47. *Id.*

48. *Id.* at 395.

49. *Id.* at 396.

50. *767 Third Ave. Assoc.*, 787 F. Supp. at 394.

the consequences of such action, it should have insured the landlord's rent payments, possibly by providing an escrow fund for the rent payments.⁵¹

Reviewing the history of wrongful possession of property by diplomatic personnel and their missions, one realizes that Judge Sand, from the Southern District of New York, took a new approach to this problem. Up to this point, courts avoided speaking out on this issue and dismissed suits without looking into the merits of their arguments. For instance, in September of 1991, a Manhattan civil court dismissed an action attempting to evict a Congo mission counselor for failing to pay rent, declaring that it had no jurisdiction over diplomatic proceedings, and therefore deferred to the federal judicial system.⁵² In light of the rise in diplomatic personnel in this country such disputes may become more common and serious. For example, in October of 1991, a landlord sought a judgment from a federal court to evict a press attache of the Pakistani mission from his penthouse apartment.⁵³ The court held that, although the press attache himself was immune to the suit,⁵⁴ the mission was not.⁵⁵ The court cited a Foreign Sovereign Immunities Act provision which explains that a foreign state is not immune from jurisdiction in cases where rights in immovable property located in the United States are at issue.⁵⁶

The District Court demonstrated a new approach and reasoning in the *Zaire* case when it interpreted the treaty not to protect the mission from a civil remedy which would secure a landlord's own property.⁵⁷ There is no precedence to the court's ruling, and the Vienna Convention does not explicitly call for protection of a mission when wrongfully possessing another's property.⁵⁸ The court felt that the mission purposely invoked

51. *Id.* at 396.

52. Edward Adams, *Diplomat Declared Immune from Eviction, Federal Court Suit Required for Jurisdiction*, 206 N.Y. L.J. 51 (1991) See also 28 U.S.C. § 1351 (1993) (which provides that only federal courts hold jurisdiction over members of a diplomatic mission).

53. Deborah Pines, *Diplomatic Immunity No Bar to Eviction*, 209 N.Y. L.J. 43 (1991).

54. *York River House v. Pakistan Mission to the United Nations*, 820 F. Supp. 760, 762 (S.D.N.Y. 1993) (explaining that the press attache was dismissed from the suit by a lower court on the grounds of diplomatic immunity under art. 31(a) of the Vienna Convention because he was found to be "the mission's current diplomatic agent in residence").

55. *Id.* at 760 (stating that the lease to the apartment was in the name of the mission, not the attache).

56. Pines, *supra* note 53 (citing Judge Leval of the New York Civil Court). This case came to an end following the Second Circuit's announcement that foreign missions cannot be evicted. Thus, the district court followed this rule expanding it to include private residences of mission personnel. *Id.*

57. *767 Third Ave. Assoc.*, 787 F. Supp. 389.

58. *Id.* at 394.

diplomatic immunity while in the wrong, thus abusing its welcome and its grant of immunity.⁵⁹ Consequently, the court resorted to equity considerations in an attempt to provide a remedy that would restore the landlord to the same or similar condition he was in prior to the mission's violations.⁶⁰ The only remedy under the existing circumstances seemed to be eviction, as it was dictated by the District Court. Although the court's interpretation may have stretched the meaning of the Vienna Convention beyond the treaty's intent, the court did so in the name of equity, knowing that if the mission is to stay, the landlord's right to its property would not be upheld by the government.⁶¹

B. Circuit Court's Reasoning

The Second Circuit Court of Appeals interpreted Article 22 of the Vienna Convention to include immunity from eviction. Article 22 states that the premises of a mission are inviolable, and that receiving states officials cannot enter the premises without explicit consent of the mission's head.⁶² The court held that this includes eviction. In its reasoning, the court pointed to previous examples in which United States officials were not permitted to enter foreign missions without explicit permission even though its occupiers were endangered.⁶³ The court feared that violation of the Vienna Convention may have grave consequences for American diplomats abroad.⁶⁴

The Circuit Court correctly pointed out the treaty's statement of the mission's inviolability, and the requirement of explicit consent before entering the mission's premises.⁶⁵ The Vienna Convention provides that "[t]he premises of the mission . . . shall be immune from search, requisition, attachment, or execution."⁶⁶ Some commentators interpret these provisions to unquestionably prescribe inviolability even when the

59. *Id.* at 390.

60. *Id.* at 391.

61. *Id.* at 396.

62. Vienna Convention, *supra* note 25, art. 22.

63. *767 Third Ave. Assoc.*, 988 F.2d at 301 (referring to an incident in 1979 when the Soviet mission to the United States was bombed and the FBI was not allowed entry until the mission head consented).

64. *Id.* at 300.

65. Vienna Convention, *supra* note 25, art. 1 (providing that regardless of ownership, all ancillary land is to be part of the mission's premises).

66. Vienna Convention, *supra* note 25, art. 22.

mission is involved in an unlawful act.⁶⁷ Such contentions are based on the explicit refusal of the treaty's drafters to include exceptions to inviolability despite evident abuses of local laws.⁶⁸ Since the treaty lists no exceptions to the consent requirement, the court interpreted the treaty to signify that no exceptions were intended. Therefore, the United States Marshall could not enter the premises to evict the mission.⁶⁹ In light of other opinions on this issue, the court's rationale for such strict interpretation is not a blind adherence to a rule of law in an international treaty uncaring of justice at home, but that by upsetting existing treaty relationships, American diplomats abroad may well be denied lawful protection of their lives and property to which they would otherwise be entitled. That possibility weighs so heavily on the scales of justice that it militates against enforcement of the landlord's right to obtain possession of its property for rental arrears.⁷⁰

The court thus adopts from the State Department the argument that eviction of the delinquent mission will expose diplomats abroad to harm:

The risk . . . is of course that American missions abroad would be exposed to incursions that are legal under a foreign state's law. Foreign law might be vastly different from our own, and might provide few, if any, substantive or procedural protections for American diplomatic personnel. Were the United States to adopt exceptions to the inviolability of foreign missions here, it would be stripped of its most powerful defense, that is, that international law precludes the nonconsensual entry of its missions abroad.⁷¹

The judge explains that the only way to guarantee the protection of American diplomats abroad "is through blanket immunities and privileges without exceptions".⁷² Finally, the court points out that in recent years, many reforms to various diplomatic immunities have been suggested and

67. See Rosalyn Higgins, *The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience*, 79 AM. J. INT'L L. 641, 647 (1985).

68. *Id.*

69. *767 Third Ave. Assoc.*, 988 F.2d at 301.

70. *Id.* at 296.

71. *Id.* at 300-01.

72. *Id.* The judge also discussed the fact that even after an exception to the inviolability provision was proposed, the drafters of the Vienna Convention declined to adopt it and the exception never resurfaced. *Id.*

implemented, but none concerning mission inviolability.⁷³ The court agrees that reform is in order and even suggests taking a second look at the Vienna Convention, but the court is of the opinion that it is not the courts' terrain to take a second look at the Convention.⁷⁴ Instead, the court avidly points to Congress for action.⁷⁵ Although the outcome of this case does not incite any enthusiasm, one must agree with the court's position, particularly after reviewing the government's foreign affairs policy on the issue of diplomatic immunity.

IV. DEPARTMENT OF STATE POLICY

In cases involving diplomatic immunity, judges inevitably turn to the Department of State (Department) for clarification, opinion, or solution. Whether directly or indirectly, the Department is invariably involved in every action arising out of diplomatic immunity. In 1990, the Department clarified the nature of diplomatic immunity, the Department's practices, and future trends and practices around the world. In its opinion, "immunity protects the channels of diplomatic communication by exempting diplomats from local jurisdiction so that they can perform their duties with freedom, independence, and security."⁷⁶ Due to the large number of American diplomatic and consular personnel stationed in countries where individual rights do not enjoy the same protection as in the United States, the United States considers the Vienna Conventions to be of extraordinary importance.⁷⁷ Therefore, the Department insists, a slight variation from the treaties in dealing with diplomatic immunities could lead to harsher treatment of our diplomats abroad.⁷⁸

In 1987, the Department promptly intervened in Congress' debate on the passage of a bill that intended to limit diplomatic immunity. In light of its policy, the Department of State's Chief of Protocol, Ambassador Selwa Roosevelt, voiced concerns and represented the Department's position and policy on this issue before the Senate Foreign Relations Committee.⁷⁹ Ambassador Roosevelt noted that diplomatic immunity

73. *Id.* at 302.

74. *767 Third Ave. Assoc.*, 988 F.2d at 302.

75. *Id.*

76. Diplomatic Immunity, *supra* note 24.

77. *Id.*

78. *Id.*

79. Ambassador Selwa Roosevelt's statement, Dept. of St. Chief of Protocol, before the Senate Foreign Relations Committee in DEP'T ST. BULL., Oct. 1987, v. 87 at 29 [hereinafter Roosevelt].

existed "to assure that diplomatic representatives are able to carry out the official business of their governments without undue influence or interference from the host country. [Immunity] enables them to work in an environment of freedom, independence, and security."⁸⁰ The Chief of Protocol then stated that, in light of the function of diplomatic immunity, the Department of State could not support a bill which would narrow diplomatic immunity.⁸¹ Such efforts would endanger American diplomats abroad and greatly interfere with the United States foreign affairs.⁸² However, Ambassador Roosevelt pointed out that steps have been taken to curb abuses of diplomatic immunity, particularly criminal offenses.⁸³ For example, a system to bar reentry of serious offenders has been initiated. The Department circulated written guidance to police on how to handle incidents involving diplomatic and consular personnel and urged law enforcement officers to pursue possible charges.⁸⁴ In addition, the Chief of Protocol promised that in particularly outrageous incidents involving juvenile offenders, the entire family would be expelled.⁸⁵ The Department of State also assured the Committee that traffic offenses were closely monitored and driving while under the influence laws strictly enforced with diplomatic and consular personnel.⁸⁶ Moreover, failure to comply with local firearm laws would expose a diplomat to expulsion.⁸⁷ Finally, Ambassador Roosevelt announced that foreign personnel would be required to carry identification cards which list types of immunities a particular individual enjoys, and provide a 24-hour telephone number to answer questions about the particular person or issue.⁸⁸ The Department of State vowed that it stands ready to take action in any situation in which a person with immunity violates American law.⁸⁹

In addition to her address to the Senate Foreign Relations Committee, Ambassador Roosevelt circulated a note to the Chiefs of Mission at Washington in which she reminded them of the "serious concern of the United States Government at alleged criminal activity by

80. *Id.*

81. *Id.* at 29.

82. *Id.*

83. *Id.* at 30.

84. Roosevelt, *supra* note 79, at 30-31.

85. *Id.* at 31. This should promote parents' accountability for their children's conduct.

86. *Id.*

87. *Id.*

88. *Id.*

89. Roosevelt, *supra* note 79, at 32.

certain members of diplomatic missions or members of their families.”⁹⁰ The note pointed out that neither the Department of State nor the community tolerate criminal violations, and reminded the missions of the corrective measures available under international law.⁹¹ The Ambassador reiterated that the Department, in case of a criminal violation, requests from the mission a waiver of immunity in order to prosecute the offender.⁹² In case such waiver is not granted the Department requires expulsion of the offender.⁹³ Further, the note stated that “in all cases involving injury to persons or damage to property, the Department pursues vigorously the interests of the aggrieved parties in obtaining prompt restitution by individual offenders or by their governments.”⁹⁴

It appears that the Department of State is willing to address abuses when they are particularly grave. However, abuses that do not involve a threat to another’s life or are equally damaging seem to attract less of the Department’s attention. There may be room for a bit of optimism; a change in the State Department’s approach to less severe abuses might be occurring. In 1992, a French news agency reported the United States government’s direct involvement in rent disputes between two American landlords and two foreign missions.⁹⁵ The agency related that the State Department threatened to expel two Zairian and two Congolese diplomats if their delinquent rent was not paid within thirty days.⁹⁶ The report also stated that it was the first time in Department of State’s history that it threatened expulsion of diplomats due to an abuse of “privilege of residence” in either New York City or Washington D.C.⁹⁷ Although the government later argued that eviction in this situation is not a valid solution under applicable treaties,⁹⁸ the government at least made an effort to address the landlord’s complaint - a step the government had not been willing to take in the past. It remains to be seen whether this trend will continue into the future. Moreover, would the Department be willing to take the next step and expel the delinquent tenants upon non-payment? In

90. Marian N. Leich, *Crimes by Foreign Mission Personnel: Corrective Measures*, 82 AM. J. INT’L L. 106 (1988).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 107.

95. *Washington Threatens to Expel U.N. Diplomats over Back Rent*, AGENCE FRANCE PRESSE, Mar. 26, 1992, available in LEXIS, World Library, Allnws File.

96. *Id.*

97. *Id.*

98. *767 Third Ave. Assoc.*, 988 F.2d at 295.

other words, will our government flex its muscle at issues that concern the economic well-being of our citizens?

V. RELATED LEGISLATION

Each time a court delivers its opinion on the issue of diplomatic immunity, it urges Congress to address the issue.⁹⁹ In response, Congress enacted several statutes. In 1978, Congress passed the Diplomatic Relations Act ("Act") to replace a 1790 statute which was inconsistent with the diplomatic relations provisions of the 1961 Vienna Convention.¹⁰⁰ In addition to codifying the necessary provisions of the Vienna Convention, Congress included in the Act, *inter alia*, a requirement that diplomatic personnel carry automobile liability insurance.¹⁰¹ This specific provision came as a direct response to other countries' requirement that American diplomats carry liability insurance.¹⁰² In 1983 Congress amended the Act to hold embassies responsible for full liability insurance coverage for their diplomats.¹⁰³ This provision provides a plaintiff with a right to sue the insurer directly. The Act also confers power on the President of the United States to specify greater or lesser immunity protection for certain diplomats, based on reciprocity.¹⁰⁴ This accords the President wide discretion for the grant of diplomatic immunity.

In 1982 Congress passed the Foreign Missions Act ("FMA").¹⁰⁵ The FMA established a duty in the government to oversee the activities of all foreign missions in the United States.¹⁰⁶ This act was passed largely in response to reports that certain foreign countries placed restrictions on American missions in connection with office space and/or housing accommodations.¹⁰⁷ The intent of the FMA is to ensure that our diplomatic

99. The doctrine of non-justiciability, applicable in this area of law, does not permit courts to meddle in foreign affairs. The doctrine addresses courts' authority to hear cases. Specifically, the issue addressed is whether a case involves a political or legal question. Although it is not yet completely clear what comprises a political question, most courts recognize the area of foreign relations as a political question that is non-justiciable. See *Baker v. Carr*, 369 U.S. 186 (1961).

100. David H. Goodman, *The U.S. Needs To Play Hard Ball*, 11 HOUS. J. INT'L L. 395, 399-400 (1989).

101. *Id.*

102. *Id.*

103. *Id.*

104. Shapiro, *supra* note 3, at 286.

105. Foreign Missions Act, 22 U.S.C. §§ 4301 (1993). See, e.g., Andrew Odell, *Foreign Governments as Tenants*, 56 N.Y. ST. B.J. 28, 29 (1984).

106. Odell, *supra* note 105, at 29.

107. *Id.*

missions abroad are treated the same way as their counterparts in the United States. Accordingly, the act established the Office of Foreign Mission with the responsibility of approving foreign missions' transactions involving real estate in the United States.¹⁰⁸ This creates a duty in the foreign missions to report to the Office when such a transaction is planned.¹⁰⁹ Consequently, if a foreign mission fails to comply with this requirement, the Secretary of State has the authority to dispossess the mission of its premises in the United States.¹¹⁰ Although this act satisfies informational needs, it provides little protection to Americans once its requirements are met.

The Foreign Sovereign Immunities Act of 1976 (FSIA)¹¹¹ vests authority in the judiciary to decide when a foreign state is immune from a lawsuit and when immunity does not apply.¹¹² However, the act also provides that it operates "[s]ubject to existing international agreements to which the United States is a party."¹¹³ The FSIA grants immunity only to public acts, but such immunity does not apply in commercial or private transactions.¹¹⁴ Thus, although the act seems to expand the basis of liability for foreign states, it parallels directly the diplomatic immunity provisions of the Vienna Convention since such immunity applies only when a diplomat acts within the scope of his or her function. Furthermore, since an act within the scope of a diplomat's function is also a public/governmental act, it is excluded from FSIA's applicability. Therefore, when a diplomat breaks the law and diplomatic immunity applies, the FSIA will not be able to strip it away. Accordingly, the FSIA applies mostly to private foreign undertakings, not to diplomatic personnel and missions.¹¹⁵

Another bit of legislation on the issue of immunity is the Alien Tort Claims Act.¹¹⁶ This act provides a United States forum for civil litigation against another country's national in cases of injury to American

108. *Id.*

109. *Id.*

110. *Id.*

111. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1988).

112. *Id.* In its definition of "foreign state", the FSIA includes a political subdivision or agency or instrumentality of the state. *Id.* at §1603.

113. *Id.* §1609.

114. *Id.* §1603.

115. *767 Third Ave. Assoc.*, 988 F.2d at 297.

116. Alien Torts Claims Act, 28 U.S.C. §1350 (1993). The act provides federal jurisdiction in civil actions "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id.*

citizens. Although only a few courts have recognized such actions,¹¹⁷ the Alien Tort Claims Act could eventually open the door for cases against persons with diplomatic immunity after their departure, which previously could not be litigated in the United States.

Other acts concerning administration of and arrangements with international entities have been passed, but very few apply directly to abuses of diplomatic immunity. In 1987, Senator Helms introduced a bill entitled the "Diplomatic Immunity Abuse Prevention Act" which would vastly curb abuses by foreign diplomats.¹¹⁸ This bill would subject "certain members of foreign diplomatic missions and consular posts in the United States . . . to the criminal jurisdiction of the United States with respect to crimes of violence."¹¹⁹ Upon consultation, the Department of State announced that it could not support the proposed bill because it would be detrimental to United States' interests abroad.¹²⁰ The bill proposed eliminating immunity for crimes of violence, a large category of crimes, and the Department of State feared that other countries would eliminate immunity on a broader scale and thus expose American diplomatic personnel to arrest and detention without bail.¹²¹ Although the bill proposed to cover only members of the administrative, technical, and service staff, the Department explained that such team members must have full criminal immunity in order to effectively perform their work.¹²² The bill also proposed to lift immunity from family members of diplomats, which provoked a negative response from the Department to this provision, because a diplomat could not properly perform his or her duty knowing that a family member is being prosecuted.¹²³ In addition, the Department argued that lifting immunity from family members might encourage false charges as a technique of intimidation.¹²⁴ The bill was

117. *Von Dardel v. U.S.S.R.*, 623 F. Supp. 246 (D.D.C. 1985); *see also Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988). Most cases are usually dismissed on the basis of the well recognized forum non-convenience doctrine.

118. S. Doc. No. 1437, 100th Cong., 1st Sess. (1987).

119. Leich, *supra* note 90, at 107.

120. *Id.*

121. *Id.* at 108.

122. *Id.* Such work includes transmitting encoded messages and preparing classified documents. *Id.* Therefore, it would be unjust to afford immunity to the ambassador, the FBI or military attache, or other personnel engaged in work such as fighting terrorism, and expose those who do their clerical work and transmit classified communications to interrogation and jail by hostile authorities. *Id.*

123. *Id.*

124. Leich, *supra* note 90, at 108.

approved in the Senate but rejected in the House of Representatives.¹²⁵ A revised version of the bill was introduced the following year.¹²⁶ The new proposal called for stringent enforcement of available solutions,¹²⁷ and for mandatory liability insurance carried by foreign missions for compensation of injuries to persons or property.¹²⁸

Other bills to curb diplomatic immunity have been and are still introduced in Congress, but most do not pass. Such bills either demand too much modification to existing treaties, which threatens our diplomats' freedom abroad, or propose unreasonable solutions to existing problems. One such bill proposed that the United States form a claims fund for awarding full compensation to victims of diplomatic immunity abuses.¹²⁹ This bill was rejected due to its high cost and lack of incentive to foreign diplomats to abstain from abuses of immunity.¹³⁰ It is evident that Congress has been struggling to pass legislation that will both accommodate victims of diplomatic abuse and discourage foreign diplomats from violating American laws. However, it seems almost impossible to achieve both goals, especially if most legislation on the issue is written in response to events in other States, not as a consequence to occurrences in our own country.

VI. THE CIRCUIT COURT'S REASONING JUSTIFIED BY OTHER OCCURRENCES

The problem of diplomatic immunity abuses is common to other countries of the world, as well. The unanticipated phenomena is that other governments, like the United States at times, apply a "hands-off" policy, shying away from retaliation of diplomatic immunity abuses. This practice, although unexpected at first glance, is quite understandable in light of the policy previously voiced by the Department of State. Events in England, for example, required the British government to take a close look at the provisions of the Vienna Convention granting diplomatic immunity to decide whether some amendments or local provisions limiting immunity were necessary.¹³¹ This scrutiny of international law stemmed from events in 1984, when shots were fired from the Libyan Embassy, killing British

125. Shapiro, *supra* note 3, at 304.

126. 134 CONG. REC. S16,036, S16,045 (daily ed. Oct. 14, 1988).

127. See Shapiro, *supra* note 3, at 306.

128. *Id.*

129. See Goodman, *supra* note 100, at 410.

130. *Id.*

131. Higgins, *supra* note 67, at 645.

citizens demonstrating in front of it.¹³² When the British government petitioned Libya to vacate the premises so that police could search the Embassy for weapons, the request was refused.¹³³ The United Kingdom then proposed a safe exchange of Libyan diplomatic personnel for British diplomatic personnel, and requested assurance that all weapons and explosives be removed from the Libyan Embassy.¹³⁴ These proposals were similarly refused.¹³⁵ Finally, following a terrorist explosion in Heathrow International airport which injured twenty five people, the United Kingdom terminated diplomatic relations with Libya and, its Embassy in London was evacuated.¹³⁶ In response to public outrage about such blunt abuse of immunity, the British government formed a committee to look into diplomatic immunity laws and suggest proposals for ensuing actions.¹³⁷ Specifically, it was felt that diplomats who act inconsistently with their diplomatic status should not be immune from prosecution, that suspicious diplomatic bags should be searched and that premises which are the site of unlawful acts should not be afforded inviolability.¹³⁸ Following an investigation, the committee pointed out that a serious consideration to any amendments must be the safety of British diplomats in foreign countries - a familiar concern.¹³⁹ The committee then stated that, in all of the three specific respects, existing remedies were sufficient, and did not recommend further action.¹⁴⁰ The British government implemented the committee's advice, leaving diplomatic immunity laws unchanged.¹⁴¹ The United States Department of State pointed to the United Kingdom study while debating the downside of S. 1437, Senator Helms' proposed bill to curb diplomatic immunity.¹⁴² Similarly, when the Second Circuit Court examined Department of State policy and saw that the government looked to other countries for trends in coping with immunity problems, the court was encouraged to rule in favor of our foreign affairs policy, acknowledging it as a political problem common to countries with similar

132. *Id.* at 643.

133. *Id.* at 644.

134. *Id.*

135. *Id.*

136. Higgins, *supra* note 67, at 647.

137. *Id.* at 645. See Leich, *supra* note 90, at 109.

138. Higgins, *supra* note 67, at 644.

139. *Id.* at 645.

140. *Id.*

141. *Id.*

142. Leich, *supra* note 90, at 109.

political structure. Thus, the United States is not alone "putting down its stubborn foot" in refusing to change the law of diplomatic immunity.

What, then, are the possible remedies for abuse of diplomatic immunity? Solutions to the dilemma of diplomatic abuses are as frequently discussed as the problem itself. The Vienna Convention provides guidelines for dealing with such abuses.¹⁴³ Article 9 of the Convention enables the receiving State to declare any member of the mission a *persona non grata*, upon which the sending State must either recall that person or terminate his or her function with the mission.¹⁴⁴ In addition, the Convention provides in Article 32 that immunity of a diplomatic agent may be waived by the sending state.¹⁴⁵ Both provisions are rarely utilized. Furthermore, the *persona non grata* provision does not compensate the victim of abuse and does little to deter such abuse, since diplomats know that their most threatening punishment could be expulsion. In theory, the waiver provision serves the needs of the hosting governments; in practice however, it is almost impossible to attain. It is neither required that a sending state waive its diplomat's immunity, nor does the Convention provide an enforcement mechanism to compel such waivers.¹⁴⁶ Thus, although, in theory, the waiver clause provides a perfect solution to the problem of diplomatic abuses of local law, in practice it is merely another remedy to which one cannot resort, particularly for offenses of smaller magnitude, such as traffic violations or landlord-tenant disputes.

Other proposed solutions are numerous. What follows is a summary of the most prominent ones. One answer to abuse is to allow the plaintiff to bring suit in the sending state.¹⁴⁷ This would provide a victim with a chance for compensation when it is not possible to sue the party in the United States. An attempt to bring suit in the sending state may appear to be a good solution; nonetheless, it is very impractical. Such an attempt would be hindered by the high costs of litigating in a foreign state, by the difference in legal systems, and by the possibility of a hostile national climate towards the United States.¹⁴⁸ Another popular recommendation is an amendment of the Vienna Convention.¹⁴⁹ However, the treaty does not

143. Vienna Convention, *supra* note 25.

144. *Id.* art. 9.

145. *Id.* art. 32.

146. *Id.*

147. Shapiro, *supra* note 3, at 297.

148. *Id.*

149. See Goodman, *supra* note 100, at 407.

provide for a formal procedure to amend its provisions.¹⁵⁰ In addition, amending the Vienna Convention would require reaching an agreement among 140 countries,¹⁵¹ a task easier said than done.

Some of the more viable solutions include creating a limited federal claims fund enforced by the government.¹⁵² The rationale for this proposal is that it is “[t]he government and U.S. diplomats abroad [who] reap the prime benefits of diplomatic immunity, not the average citizen. Therefore . . . the burden of diplomatic immunity . . . ‘should not be borne by people who are really just innocent third parties.’”¹⁵³ This solution seems reasonable and might even be workable. In order to facilitate this idea, a proposal has been made to establish an agency within the Department of State for administering a limited fund for the compensation of victims.¹⁵⁴ Once the agency would make a decision to compensate and awards the applicable amount to the victim, the agency would be in the best position to pursue reimbursement of such an amount from the offending diplomat’s country.¹⁵⁵ The key to this solution would lie in the government’s ability to compel reimbursement to the limited fund.¹⁵⁶ Although this solution would not provide complete compensation, it is very workable and quite realistic.

The most popular solution to the problem is the implementation of an insurance scheme.¹⁵⁷ Such plan would require embassies and missions to carry liability insurance coverage as a prerequisite to diplomatic relations in the United States,¹⁵⁸ augmenting the insurance provision of the Diplomatic Relations Act of 1978¹⁵⁹ which requires foreign diplomats to carry liability automobile insurance.¹⁶⁰ The beauty of this solution is that the victim can sue the insurance carrier directly, without involving the foreign party. The augmented version of the insurance scheme would place a requirement on the foreign mission to carry liability insurance for

150. *Id.* at 408.

151. *Id.*

152. *Id.* at 410.

153. Goodman, *supra* note 100, at 411 (quoting Senator Hathaway).

154. *See* Goodman, *supra* note 100, at 407.

155. *Id.*

156. *Id.*

157. Farhangi, *supra* note 15, at 1538.

158. *Id.*

159. Goodman, *supra* note 100, at 400.

160. *Id.*

injury to persons or property.¹⁶¹ The insurance would provide restitution to the injured party and would not discourage private citizens from further commercial transactions with foreign parties. The difficulty with such provisions is the lack of an enforcement mechanism. Maintenance of such an insurance requirement would necessitate enforcement on the level of Vienna Convention provisions, i.e. declaring a noninsured or underinsured diplomat as a *persona non grata*.¹⁶² Until the Department of State finds an efficient way to enforce the insurance requirement, such provisions and unenforceable plans will remain useless.

Numerous other solutions have been avidly recommended, but only a few were implemented by Congress. Should Congress ever decide to reform the area of diplomatic immunity in the future, it will find a vast pool of new suggestions, and even though any particular solution might not be suitable, a combination of several might prove useful and effective. Thus, it is not for the lack of ideas that the law has not been reformed.

VII. CONCLUSION

Although solutions to abuses of diplomatic immunity and their effectiveness are controversial, one matter is clear: the government sees the weaknesses of the current law, and has the ability, if not always the will, to improve the situation. Unfortunately for the landlord, in this instance, he/she is left without a remedy. The landlord can only hope that the government will pursue his/her interests and will persuade the offender to withdraw. Our government's policy is consistent with the purposes of diplomatic immunity and the practices of other nations. Therefore, although it is now understandable why courts are reluctant to act against foreign diplomats, the government should use all means in its power to assure the United States citizen's rights and fully compensate him or her. Anything short of that would only create more bad feelings towards our "guests" from abroad, and inhibit any sort of transactions among United States citizens and foreign diplomats. Since the government has once before shown a hint of improvement in demanding due compensation from delinquent diplomats, we can only hope that it will continue down this path, and that it was not a mere exception to its usually disinterested demeanor.

161. Shapiro, *supra* note 3, at 300.

162. Farhangi, *supra* note 15, at 1538.