

2010

Does Immunity Mean Impunity? The Legal and Political Battle of Household Workers Against Trafficking and Exploitation by Their Foreign Diplomat Employers

Jennifer Hoover Kappus

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

Recommended Citation

Jennifer Hoover Kappus, *Does Immunity Mean Impunity? The Legal and Political Battle of Household Workers Against Trafficking and Exploitation by Their Foreign Diplomat Employers*, 61 Case W. Res. L. Rev. 269 (2010)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol61/iss1/11>

NOTE

DOES IMMUNITY MEAN IMPUNITY? THE LEGAL AND POLITICAL BATTLE OF HOUSEHOLD WORKERS AGAINST TRAFFICKING AND EXPLOITATION BY THEIR FOREIGN DIPLOMAT EMPLOYERS

*“To some, human trafficking may seem like a problem limited to other parts of the world. In fact, it occurs in every country, including the United States, and we have a responsibility to fight it just as others do.”*¹

Secretary of State, Hillary Rodham Clinton

INTRODUCTION

Before Badar Al-Awadi, the Third Secretary at the Kuwait Mission, departed for the United States, he promised Vishranthamma Swarna a \$2,000 monthly salary, Sundays off, and one month of paid vacation per year to visit her family in India, in exchange for working as a live-in household servant in his New York City residence.² However, upon her arrival, Al-Awadi confiscated Ms. Swarna’s visa and passport. In clear violation of the employment contract, he forced her to work seventeen hours a day, seven days a week, paid her \$200 to \$300 per month, and refused to let her take off Sundays to go to church or the month to visit her family in India.³ The Third Secretary

¹ U.S. DEP’T OF STATE, ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS, 1 (2009), available at <http://www.state.gov/g/tip/rls/fs/2009/126573.htm>

² Swarna v. Al-Awadi, 607 F. Supp. 2d 509, 511–13 (S.D.N.Y. 2009), *aff’d in part, vacated in part*, 622 F.3d 123 (2d. Cir. 2010).

³ *Id.* at 513.

also forbade Ms. Swarna from leaving the apartment unsupervised, intercepted her mail and telephone calls from her family, and prohibited her from mailing letters home or making telephone calls.⁴ Al-Awadi abused her almost daily, threatening to cut out her tongue, throwing a packed suitcase at her, calling her “dog” and “donkey,” and dragging and locking her outside the apartment while taunting her with warnings of further injury and/or arrest. The Third Secretary raped her on numerous occasions and threatened to kill her if she ever told anyone.⁵ As a result of this horrible treatment, Swarna suffered dramatic weight loss, hair loss, nightmares, fatigue, and suicidal thoughts.⁶

One day, Swarna asked to return to India instead of going with the family on their trip to Kuwait. In response, Al-Awadi threatened to hit her with an iron rod. When she screamed and warned that she would call the police, Al-Awadi angrily replied that his brother and father were “high ranking police officials in Kuwait” and that “once [they returned to] Kuwait they would ‘punish’ her.”⁷ The following day, while both Al-Awadi and his wife were out, she fled the apartment and signaled to the first taxi she saw to ask for help.⁸

Swarna’s story is only a glimpse into the countless incidents of trafficking and abuse of household workers by their foreign-diplomat employers who are officially located in the United States. In July 2008, the Government Accountability Office (GAO) submitted a report to the Senate’s Subcommittee on Human Rights and the Law describing the alleged abuse of domestic workers by foreign diplomats and urging the government to strengthen its efforts to address this problem.⁹ The GAO determined that between 2000 and 2008, a minimum of forty-two domestic workers brought to the U.S. on either an A-3¹⁰ or G-5¹¹ visa and employed by foreign diplomats

⁴ *Id.*

⁵ *Id.* at 513–14.

⁶ *Id.* at 514.

⁷ Complaint at 14, *Swarna v. Al-Awadi*, 607 F. Supp. 2d 509 (S.D.N.Y. 2009) (No. 06 Civ. 4880).

⁸ *Id.* at 14–15. For a discussion of the court’s reasoning and holding in *Swarna*, see *infra* notes 112–38 and accompanying text.

⁹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-892, U.S. GOV’T’S EFFORTS TO ADDRESS THE ALLEGED ABUSE OF HOUSEHOLD WORKERS BY FOREIGN DIPLOMATS WITH IMMUNITY COULD BE STRENGTHENED (2008), available at www.gao.gov/new.items/d08892.pdf [hereinafter GAO Report].

¹⁰ See 8 U.S.C. § 1101(a)(15)(A) (2006) (noting that A-3 visas are available to “attendants, servants, [and] personal employees [. . . of] an ambassador, public minister, or career diplomatic or consular officer who has been accredited by a foreign government, recognized de jure by the United States.”); *Temporary Visitors to the U.S.: Diplomats and Foreign Government Officials*, U.S. DEP’T OF STATE, http://travel.state.gov/visa/temp/types/types_2637.html#.

alleged that their diplomat employers abused them.¹² The GAO cautioned that the actual number of incidents was likely greater,¹³ though the director of the GAO's section of international affairs and trade stated, "[n]obody expected a number this big."¹⁴

Both the U.S. and the United Nations (U.N.) recognize that the involuntary servitude of domestic workers falls within the definition of trafficking in persons. The Victims of Trafficking and Violence Protection Act of 2000¹⁵ defines "severe forms of trafficking in persons" as "the recruitment, harboring, transportation, provision, or obtaining a person for labor or services through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery."¹⁶ Similarly, the U.N. Protocol to Prevent, Suppress, and Punish Trafficking in Persons¹⁷ states that trafficking includes "forced labour or services, slavery or practices similar to slavery [. . . and] servitude" and can be instigated by means "of coercion . . . of deception, of the abuse of power or of [. . . placing the person in] a position of vulnerability . . . for the purpose of exploitation."¹⁸

Currently, foreign diplomats are able to traffic domestic servants inside their diplomatic residences in the United States with little to no legal repercussions because of the almost absolute immunity granted to diplomats under the Vienna Convention on Diplomatic Relations (VCDR).¹⁹ Without any consequences, there is no incentive for diplomats to stop engaging in this form of modern slavery. Because diplomatic immunity is adamantly prized and guarded by all parties to

¹¹ See 8 U.S.C. § 1101(a)(15)(G) (2006) (G-5 visas are available to "attendants, servants, and personal employees" of individuals who are permanent mission members of a recognized government to a designated international organization and representatives of governments who are attending meetings of a designated international organizations.); U.S. DEP'T OF STATE, *supra* note 10.

¹² GAO Report, *supra* note 9, at 3.

¹³ *Id.* at 13–16 (explaining that the victims' fear of being deported and of law enforcement, the inability to leave the residence, the refusal to identify themselves or their diplomat employers in addition to the government's policy of not disclosing details of criminal investigations, and the lack of an effective way of searching across the various agencies' databases make it very likely that the actual number of cases is greater than the forty-two reported incidents).

¹⁴ Sarah Fitzpatrick, *Diplomatic Immunity Leaves Abused Workers in the Shadows*, WASH. POST, Sept. 20, 2009, at A4.

¹⁵ Pub. L. No. 106-386, 114 Stat. 1464 (codified in scattered sections of 22 U.S.C.).

¹⁶ 22 U.S.C. § 7102(8)(B) (2006).

¹⁷ Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. Doc A/RES/55/25 (Jan. 8, 2001).

¹⁸ *Id.* at art. 3(a).

¹⁹ Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 [hereinafter VCDR].

the VCDR, States typically resist any attempts to whittle away these protections for their own diplomats. While some victims are able to obtain a measure of legal redress by waiting to bring suit against their diplomat employers until after the diplomat's term in the U.S. ends (or by wrangling an occasional settlement), these remedies are often limited and difficult to obtain. Therefore, a more comprehensive approach involving various institutional solutions, such as improving internal procedures at embassies, consulates, and international organizations, in conjunction with using tools already present in the VCDR, such as bringing suit under residual immunity and expanding the use of *persona non grata*, may be the most productive and successful way to alleviate the problem.

This Note breaks down the overarching problem of human trafficking inside diplomatic residences into three main topics and offers solutions specific to the issues within these areas. Part I provides an overview of the origins and nature of diplomatic immunity. Part II analyzes the issues domestic-worker litigants face in trying to seek judicial relief for the abuse and discusses the limited nature of judicial remedies. Part III explores immigration and institutional policies and initiatives, along with various additional mechanisms, to prevent domestic workers from entering into abusive situations and to provide assistance resources for them if they are in an abusive environment. Lastly, Part IV discusses the diplomatic process and the measures the U.S. Department of State (State Department) has taken to combat trafficking inside diplomatic residences located on American soil. It also lays out several steps that the State Department may take in the future to combat this problem.

I. DIPLOMATIC IMMUNITY OVERVIEW

Though the exploitation of domestic workers by foreign diplomats clearly falls within the definition of trafficking in persons accepted by the U.S. and U.N.,²⁰ diplomats have remained largely immune from suits brought by their employees because of the almost absolute nature of diplomatic immunity. Diplomatic immunity from criminal and civil suits has been an established international practice for centuries²¹ and was codified as international law in the VCDR, which

²⁰ See *supra* text accompanying notes 15–18.

²¹ See EILEEN DENZA, DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 280–83 (3d ed. 2008) (explaining that immunity from criminal jurisdiction can be traced back to sixteenth century practices and immunity from civil suit was a “well established rule” by the early eighteenth century); *Schooner Exch. v. M’Faddon*, 11 U.S. (7 Cranch) 116, 143 (1812) (“It is impossible to conceive . . . that a Prince who sends an ambassador or any other minister can have any intention of subjecting him to the authority of a

is almost universally adopted.²² The purpose of the VCDR “is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.”²³ Under the VCDR, diplomats and their families have immunity from the receiving State’s civil and administrative jurisdiction.²⁴ Congress later enacted the Diplomatic Relations Act of 1978,²⁵ which provides that “[a]ny action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations . . . shall be dismissed.”²⁶ The Act further provides that a defendant can establish diplomatic immunity by simply filing a motion or suggestion claiming such immunity.²⁷ Courts rely on the State Department’s formal recognition of the defendant as a diplomat and accept the government’s confirmation of the emissary’s diplomatic status as conclusive.²⁸

U.N. representatives are entitled to the same level of full immunity as diplomats.²⁹ U.N. representatives’ immunity is derived from the Headquarters Agreement,³⁰ which established the U.N. headquarters in New York City and governs the relationship between the U.N. and the United States.³¹ Article V, section 15 provides that U.N. representatives “shall, whether residing inside or outside the headquarters district, be entitled in the territory of the United States to the same privileges and immunities, subject to corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it.”³²

foreign power” (quoting EMMERICH DE Vattel, *THE LAW OF NATIONS OF THE PRINCIPLES OF LAW OF NATURE* 471 (1797)).

²² See Denza, *supra* note 21, at 1 (noting that 185 states are parties to the VCDR, which “is close to the entire number of independent States in the world”).

²³ VCDR, *supra* note 19, at pmb1. cl. 4.

²⁴ *Id.* art. 31(1) (“A diplomatic agent shall enjoy immunity from [the receiving State’s] civil and administrative jurisdiction.”); *id.* art. 37 (“The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in article 29 to 36.”).

²⁵ 22 U.S.C. §§ 254a–254e (2006).

²⁶ *Id.* § 254d.

²⁷ *Id.*

²⁸ *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187, 192 (D.D.C. 2007).

²⁹ *Ahmed v. Hoque*, No. 01 Civ. 7224(DLC), 2002 WL 1964806, at *4 (S.D.N.Y. Aug. 23, 2002) (“Both the United States and the United Nations agree that permanent representatives and ministers of foreign nations to the United Nations are entitled to full diplomatic immunity, that is, the immunities codified in the Vienna Convention.”).

³⁰ Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations, U.S.-U.N., June 26, 1947, 61 Stat. 756.

³¹ *Id.*

³² *Id.* art. V, § 15(4).

Representatives of the U.N. and other international organizations, such as the World Bank and the International Monetary Fund (IMF), also are afforded a more limited immunity under the International Organizations Immunity Act (IOIA).³³ The IOIA provides that officers, employees, and representatives of foreign governments to international organizations “shall be immune from suit and legal process relating to acts performed by them *in their official capacity* and falling within their functions as such representatives, officers, or employees,” unless the sending State or international organization waives the immunity.³⁴

II. LEGAL OBSTACLES AND JUDICIAL REMEDIES

Over the past decade, domestic-worker litigants have presented a wide gamut of arguments for why the trafficking of domestic workers inside the diplomat’s residence falls outside of the activities covered by diplomatic immunity. They have argued that: employing a domestic worker falls within the commercial-activities exception;³⁵ human trafficking is a *jus cogens* exception to diplomatic immunity;³⁶ involuntary servitude is a tort in violation of internationally recognized norms of international law;³⁷ human trafficking violates the Thirteenth Amendment right to be free from slavery;³⁸ and defrauding the American government should not be covered by diplomatic immunity.³⁹ However, because of the strict adherence to full diplomatic immunity for a current diplomat or state representative in international organizations, courts have consistently remained unsympathetic to these arguments and found in favor of the diplomat.⁴⁰ Only when the domestic worker waited until the diplomat’s term inside the United States expired and brought suit under the residual immunity theory have litigants experienced any form of judicial relief.⁴¹

³³ 22 U.S.C. § 288d (2006).

³⁴ *Id.* § 288d(b) (emphasis added).

³⁵ See discussion *infra* Part II.A.1.

³⁶ See discussion *infra* Part II.A.2.

³⁷ See discussion *infra* Part II.A.2.

³⁸ See discussion *infra* Part II.A.3.

³⁹ See discussion *infra* Part II.A.4.

⁴⁰ See, e.g., *Tabion v. Mufti*, 877 F. Supp. 285 (E.D. Va. 1995), *aff’d*, 73 F.3d 535 (4th Cir. 1996); *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187 (D.D.C. 2007); *Sabbithi v. Al Saleh*, 605 F. Supp. 2d 122 (D.D.C. 2009); *Ahmed v. Hoque*, No. 01 Civ. 7224 (DLC), 2002 WL 1964806 (S.D.N.Y. Aug. 23, 2002).

⁴¹ See, e.g., *Swarna v. Al-Awadi*, 607 F. Supp. 2d 509, 516 (S.D.N.Y. 2009), *aff’d in part, vacated in part*, Nos. 09-2525-cv (L), 09-3615-cv (XAP), 2010 WL 3719219 (2d Cir. Sept. 24, 2010) (holding that, because defendant’s “diplomatic duties in the United States had terminated and he had departed the country,” he is no longer entitled to the privileges he once

A. Suits Brought Against the Diplomat While the Diplomat Is an Accredited Diplomat in the United States

1. Commercial-Activities Exception

An important exception to the general rule of absolute immunity for current diplomats is the commercial-activities exception. Article 31(1)(c) of the VCDR states that a diplomat is not immune from suit arising from actions “relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.”⁴² The VCDR expressly prohibits diplomats from engaging in any professional or commercial activity for personal profit within the receiving State.⁴³ In their litigation, domestic workers have unsuccessfully relied on the theories that the employment relationship,⁴⁴ false imprisonment,⁴⁵ and trafficking⁴⁶ all fall “outside [diplomats’] official functions.” This section explains the U.S. government and federal courts’ reasoning in consistently rejecting this use of the commercial-activities exception to diplomatic immunity.

The VCDR does not provide a concrete definition of “commercial activities,” so the courts and the government have looked to the negotiating history of the VCDR to determine its meaning. The United Nations International Law Commission (ILC), a group of international-law experts, prepared an initial draft of the VCDR, which was considered at a formal U.N. conference in 1961.⁴⁷ It was not until the ILC’s Ninth Session that Alfred Verdross of Austria proposed an amendment creating an exception to immunity for acts “relating to a professional activity outside [the diplomatic agent’s] official duties.”⁴⁸ Though many members of the Commission thought that the clause was redundant and unnecessary because diplomats were barred from participating in professional and business activities,

retained as a Kuwaiti diplomat); *Baoanan v. Baja*, 627 F. Supp. 2d 155, 161 (S.D.N.Y. 2009) (holding that, as a former diplomat, defendant was entitled to a much more limited form of immunity than that of a current diplomat).

⁴² VCDR, *supra* note 19, art. 31(1)(c).

⁴³ *Id.* art. 42.

⁴⁴ *Tabion*, 877 F. Supp. at 287–88; *Gonzalez Paredes*, 479 F. Supp. 2d at 190.

⁴⁵ *Tabion*, at 287–88; *Gonzales Paredes*, 479 F. Supp. 2d at 190.

⁴⁶ *Sabbithi v. Al Saleh*, 605 F. Supp. 2d 122, 126 (D.D.C. 2009).

⁴⁷ United Nations Conference on Diplomatic Intercourse and Immunities, 1 Official Records 79–82, U.N. Doc. A/CONF.20/14, U.N. Sales No. 61.X.2 (1961).

⁴⁸ Statement of Interest of the United States at 8, *Sabbithi v. Al Saleh*, 605 F. Supp. 2d 122 (D.D.C. 2009) (No. 07-115) [hereinafter Gov’t Statement, *Sabbithi*] (quoting *Summary Records of the 402nd Meeting*, [1957] 1 Y.B. Int’l L. Comm’n 97, U.N. Doc. A/CN.4/SER.A/1957).

the Commission decided to include the amendment. In addition, the Commission added the adjective “commercial,” based on the rare, but possible, occurrence of diplomats engaging in commercial activities outside their official functions.⁴⁹ When an Australian member suggested that the term “commercial activity” needed an explanation, the Special Rapporteur responded that “the use of the words ‘commercial activity’ as part of the phrase ‘a professional or commercial activity’ indicates that it is not a single act of commerce which is meant, by [sic] a continuous activity.”⁵⁰ The ILC was concerned that if the exception encompassed single transactions, then “the door would be open to a gradual whittling away of the diplomatic agent’s immunities from jurisdiction.”⁵¹

The ILC added the amendment largely because the members did not believe that a diplomat should be able to claim immunity for acts forbidden in the VCDR.⁵² In response to an American member’s remark that this exception went beyond existing international law, the Special Rapporteur explained that the exception was aimed at activities that conflicted with diplomatic status. The Special Rapporteur asserted, “[i]t would be quite improper if a diplomatic agent, *ignoring the restraints* [on engaging in professional and commercial activities] *which his status ought to have imposed upon him*, could, by claiming immunity, force the client to go abroad in order to have the case settled by a foreign court.”⁵³ In the Report of the Commission to the General Assembly, the Commission explained, “activities of these kinds are normally wholly inconsistent with the position of a diplomatic agent, and that one possible consequence of his engaging in them might be that he would be declared *persona non grata*.”⁵⁴ The Commission continued by explaining that if the diplomat does engage in commercial activities, then “the persons with

⁴⁹ Tabion, 877 F.Supp. at 290 (citing Summary Records of the 402nd Meeting, *supra* note 48).

⁵⁰ Gov’t Statement, *Sabbithi*, *supra* note 48, at 9 (quoting Special Rapporteur, *Diplomatic Intercourse and Immunities: Summary of Observations Received from Governments and Conclusions of the Special Rapporteur*, at 56, U.N. Doc. A/CN.4/116 (1958) (by A. Emil F. Sandström)).

⁵¹ *Id.* at 10 (quoting *Summary Records of the 476th Meeting*, [1958] 1 Y.B. Int’l L. Comm’n 244, U.N. Doc. A/CN.4/SER.A/1958).

⁵² VCDR, *supra* note 19, art. 42 (“A diplomatic agent shall not in the receiving State practise for personal profit any professional or commercial activity”).

⁵³ Gov’t Statement, *Sabbithi*, *supra* note 48, at 10 (quoting *Diplomatic Intercourse and Immunities*, *supra* note 50 at 57).

⁵⁴ *Id.* at 11 (quoting *Report of the Commission to the General Assembly*, U.N. Doc. A/3859, *reprinted in* [1958] 2 Y.B. Int’l L. Comm’n 98, U.N. Doc. A/CN.4/SER.A/1958/Add.1). *Persona non grata* is Latin for “an unwelcome person.”

whom the diplomatic agent has had commercial or professional relations cannot be deprived of their ordinary remedies.”⁵⁵

The U.S. had another reason for accepting the commercial-activities exception. In its instructions to the U.S. delegation to the U.N. conference at which the ILC draft was considered, the State Department highlighted that “[w]hile *American diplomatic officers are forbidden to engage in such activities* in the country of their assignment, other states have not all been so inclined to restrict the activities of their diplomatic agents.”⁵⁶ The instructions further explained that the commercial-activities exception would “enable persons in the receiving State who have professional and *business* dealings of a non-diplomatic character with a diplomatic agent to have the same recourse against him in the courts as they would have against a non-diplomatic person engaging in similar activities.”⁵⁷

The negotiating history of the exception was the basis for the U.S. government’s rebuttal to domestic workers’ arguments that their employment relationship fell within the commercial-activities exception. The U.S. government argued in its Statements of Interest⁵⁸ that the commercial-activity exception “focuses on the pursuit of trade or business activity unrelated to diplomatic work”⁵⁹ and “does not encompass contractual relationships for goods and services incidental to the daily life of the diplomat and the diplomat’s family in the receiving State.”⁶⁰ The Department of Justice concluded that diplomats are immune from suits brought by their domestic-worker employees alleging breach of employment contract and violation of federal employment laws.⁶¹ The courts have mostly deferred to the government’s Statements of Interest because the Supreme Court has held that, “although not conclusive, the meaning attributed to treaty

⁵⁵ *Id.* (quoting Report of the Commission to the General Assembly, *supra* note 54).

⁵⁶ *Id.* (quoting 7 MARJORIE M. WHITEMAN, DEP’T OF STATE, DIGEST OF INTERNATIONAL LAW 406 (1970)).

⁵⁷ *Id.* (quoting WHITEMAN, *supra* note 56 at 406).

⁵⁸ The Department of Justice submits Statements of Interest pursuant to 28 U.S.C. § 517 (2006) (“The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court in the United States . . .”).

⁵⁹ *Id.* at 6; Statement of Interest of the United States at 8, *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187 (D.D.C. 2007) (No. 06-cv-00089-PLF) [hereinafter Gov’t Statement, *Gonzalez Paredes*]; *see also* *Tabion v. Mufti*, 73 F.3d 535, 537–38 (4th Cir. 1996).

⁶⁰ Gov’t Statement, *Sabbithi*, *supra* note 48, at 7; Gov’t Statement, *Gonzalez Paredes*, *supra* note 59, at 5 (same); *see also* *Tabion*, 73 F.3d at 537 (“When examined in context, the term ‘commercial activity’ does not have so broad a meaning as to include occasional service contracts.”).

⁶¹ Gov’t Statement, *Sabbithi*, *supra* note 48, at 5; Gov’t Statement, *Gonzalez Paredes*, *supra* note 59, at 2.

provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”⁶²

In *Tabion v. Mufti*,⁶³ the United States District Court for the Eastern District of Virginia was the first to tackle the question of whether the employment relationship between a domestic worker and a foreign diplomat falls within the commercial-activities exception. Corazon Tabion accepted a position as a domestic servant for Faris Mufti, the First Secretary at the Embassy of Jordan in Washington, D.C. Mufti promised to pay Tabion the U.S. minimum wage, plus overtime, and a “reasonable work schedule in a comfortable environment.”⁶⁴ Upon arrival, Mufti confiscated her passport, forced her to work sixteen hours a day for fifty cents an hour, with no overtime pay, and threatened termination, deportation, and arrest if she tried to leave the residence.⁶⁵ After working for twenty-eight months, Tabion brought suit against Mufti under the Fair Labor Standards Act⁶⁶ for not paying minimum wage plus overtime, breach of the employment contract, intentional misrepresentations, false imprisonment, and discrimination based on race.⁶⁷ In response to Mufti’s motion to quash based on diplomatic immunity, Tabion argued that her case fell within the commercial-activities exception.⁶⁸

Because the term “commercial activities” was not defined in the VCDR, the court looked to the drafting and negotiating history of the VCDR and the exception, as well as the government’s Statement of Interest.⁶⁹ The district court determined that “the Commission did not intend to deprive diplomats of immunity for commercial transactions that are unrelated to the pursuit of a business or trade, but that are merely incidental to day-to-day life.”⁷⁰ The district court dismissed the case because the negotiating history “points persuasively to the conclusion that Article 31(1)(c) was not intended to carve out a broad exception to diplomatic immunity for a diplomat’s daily contractual transactions for personal goods and services.”⁷¹ The United States Court of Appeals for the Fourth Circuit affirmed the district court’s decision and added that the exception does not “have so broad a

⁶² *United States v. Stuart*, 489 U.S. 353, 369 (1989) (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982)).

⁶³ 877 F. Supp. 285 (E.D.Va. 1995), *aff’d*, 73 F.3d 535 (4th Cir. 1996).

⁶⁴ *Id.* at 286.

⁶⁵ *Id.*

⁶⁶ 29 U.S.C. §§ 201–207 (2006).

⁶⁷ *Tabion*, 877 F. Supp. at 286.

⁶⁸ *Id.* at 287.

⁶⁹ *Id.* at 289–91; *see also supra* notes 47–57.

⁷⁰ *Tabion*, 877 F. Supp. at 290.

⁷¹ *Id.* at 291.

meaning as to include occasional service contracts as [Plaintiff] contends, but rather relates only to trade or business activity engaged in for personal profit.⁷² The court continued by stating that the “[d]ay-to-day living services such as dry cleaning or domestic help were not meant to be treated as outside a diplomat’s official functions. Because these services are incidental to daily life, diplomats are immune from disputes arising out of them.”⁷³

Courts outside the Fourth Circuit have adopted *Tabion*’s definition of commercial activity in the domestic-worker context.⁷⁴ Additionally, the government has consistently urged the court to adopt this interpretation in its Statements of Interest.⁷⁵ The United States District Court for the District of Columbia, for example, rejected the commercial-activities exception claim brought by Lucia Mabel Gonzalez Paredes. Gonzalez Paredes, a domestic worker from Paraguay, was hired by an Argentinean diplomat in Washington, D.C., and worked for an average of seventy-seven hours per week, for only five hundred dollars a month.⁷⁶ Gonzalez Paredes essentially argued that the employment relationship constituted a commercial activity outside the diplomat’s official function, thereby falling within Article 42 of the VCDR.⁷⁷ Relying on the holding in *Tabion* and the government’s Statement of Interest, the court found “no reason to disagree with the conclusion of the Department of State—and the Fourth Circuit—that a contract for domestic services such as the one at issue in this case is not itself a ‘commercial activity.’”⁷⁸

The United States District Court for the District of Columbia reaffirmed the *Gonzalez Paredes* rationale two years later in *Sabbithi v. Al Saleh*.⁷⁹ Based on these decisions and on the government’s consistent stance against the employment relationship being a commercial-activities exception, it is unlikely that the commercial-activities exception will be a useful tool for future domestic-servant plaintiffs.

⁷² *Tabion v. Mufti*, 73 F.3d 535, 537 (4th Cir. 1996).

⁷³ *Id.* at 538–39.

⁷⁴ *E.g.*, *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187 (D.D.C. 2007); *Sabbithi v. Al Saleh*, 605 F. Supp. 2d 122 (D.D.C. 2009), .

⁷⁵ *E.g.*, Gov’t Statement, *Sabbithi*, *supra* note 48; Gov’t Statement, *Gonzales Paredes*, *supra* note 59.

⁷⁶ *Gonzalez Paredes*, 479 F. Supp. 2d at 190. This practice violated the contract presented at the American Embassy, in which the diplomat agreed to pay Gonzales Paredes \$6.72 per hour, plus overtime. *Id.*

⁷⁷ *Id.* at 192.

⁷⁸ *Id.* at 193.

⁷⁹ 605 F. Supp. 2d at 127 (“Hiring household help is incidental to the daily life of a diplomat and therefore not commercial for purposes of the exception to the Vienna Convention.”).

2. Customary International Law Exceptions

The Vienna Convention on the Law of Treaties⁸⁰ defines a *jus cogens* norm as “a peremptory norm of general international law . . . from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”⁸¹ *Jus cogens* norms hold the highest position in international law and supersede treaties and customary international law.⁸² Therefore, if a provision of a treaty conflicts with a *jus cogens* norm, then the conflicting treaty provision is void.⁸³ Many litigants have argued that granting immunity to diplomats who traffic household workers inside their residences violates the *jus cogens* norm prohibiting slavery, and courts should therefore deny motions for immunity. However, as this section explains, courts have consistently rejected this argument.

In *Gonzalez Paredes*, the court declined to address the issue of whether the diplomat’s conduct violated *jus cogens* norms because the plaintiff did not allege slavery or human trafficking in the complaint.⁸⁴ Two years later, Mani Kumari Sabbithi, a domestic worker from India who was employed by Major Waleed KH N.S. Al Saleh during his tenure as Attaché to the Embassy of Kuwait in the U.S., brought suit in the same court explicitly alleging slavery in violation of *jus cogens* norms.⁸⁵ Al Saleh lured Sabbithi to the U.S. with an employment contract promising her a \$1,314 monthly salary and compliance with U.S. labor laws that Al Saleh presented to the U.S. Embassy in Kuwait.⁸⁶ Al Saleh did not abide by the contract, but instead took her passport, forced her to work sixteen to nineteen hours a day, seven days a week, sent only \$242 to \$346 per month directly to her family overseas, threatened her with physical injury, and physically abused her.⁸⁷

Sabbithi argued that the court should deny diplomatic immunity because the diplomat’s conduct constituted human trafficking and thus violated *jus cogens* norms prohibiting slavery.⁸⁸ Sabbithi further argued that the VCDR similarly conflicts with *jus cogens* norms

⁸⁰ May 23, 1969, 1155 U.N.T.S. 331.

⁸¹ *Id.* art. 53.

⁸² *Sabbithi v. Al Saleh*, 605 F. Supp. 2d 122, 129 (D.D.C. 2009) (citing *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 935 (D.C. Cir. 1988)).

⁸³ Vienna Convention on the Law of Treaties, *supra* note 80, art. 53.

⁸⁴ *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187, 195 (D.D.C. 2007).

⁸⁵ *Sabbithi*, 605 F. Supp. 2d at 122.

⁸⁶ *Id.* at 125.

⁸⁷ *Id.*

⁸⁸ *Id.* at 129.

because it immunizes slaveholders from liability.⁸⁹ The government disagreed and made clear that the U.S. position was that there is no *jus cogens* exception to diplomatic immunity.⁹⁰ The government argued, “diplomatic immunity is itself a fundamental principle of international law and there is no evidence that the international community has come to recognize a *jus cogens* exception to diplomatic immunity.”⁹¹ The government was particularly concerned that straying from this global consensus would lead to a heightened risk of other states subjecting American diplomats to contentious litigation in foreign jurisdictions.⁹² Accepting the government’s position, the court decided that there was no *jus cogens* norm at issue because the evidence did not convince the court that the diplomat’s conduct constituted human trafficking.⁹³

The United States District Court for the Southern District of New York has similarly rejected the argument that because involuntary servitude is a tort in violation of internationally recognized norms of international law, the court has jurisdiction under the Alien Tort Claims Act (ATCA).⁹⁴ The ATCA grants district courts original jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁹⁵ The Supreme Court addressed customary international law’s relation to the ATCA in *Sosa v. Alvarez-Machain*.⁹⁶ The court determined that Congress, at the time of the ATCA’s passage, intended three types of torts to be covered: “violation of safe conducts, infringement of the rights of ambassadors, and piracy.”⁹⁷ The Court mentioned the possibility of new causes of action but noted, “any claim based on the present-day law of nations [must] rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”⁹⁸ While the Second Circuit has allowed ATCA claims to proceed when the defendant was not immune, when the court found defendants to be immune, it rejected ATCA claims because the ATCA does not supersede diplomatic

⁸⁹ *Id.*

⁹⁰ Gov’t Statement, *Sabbithi*, *supra* note 48, at 20.

⁹¹ *Id.* (internal citations omitted).

⁹² *Id.* at 21.

⁹³ *Sabbithi*, 605 F. Supp. 2d at 129.

⁹⁴ 28 U.S.C. § 1350 (2006); *see also* Ahmed v. Hoque, No. 01 Civ. 7224(DLC), 2002 WL 1964806, at *7–8 (S.D.N.Y. Aug. 23, 2002).

⁹⁵ 28 U.S.C. § 1350.

⁹⁶ 542 U.S. 692 (2004).

⁹⁷ *Id.* at 715. (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *68 (1769)).

⁹⁸ *Id.* at 725.

immunity.⁹⁹ Therefore, it is more than likely that future diplomat defendants will prevail over any arguments that their conduct violates established customary international law and will continue to be unscathed by suits brought during their tenure.

3. Thirteenth-Amendment Claims

Litigants have also been unsuccessful in arguing that diplomats should be subject to liability for constitutional claims arising under the Thirteenth Amendment's prohibition of slavery and involuntary servitude. In *Ahmed v. Hoque*,¹⁰⁰ the court rejected the plaintiff's argument that the court should create an exception to diplomatic immunity for constitutional claims.¹⁰¹ The court reasoned that case law does not establish that *all* constitutional claims, including those not prompted by congressional enactment, must be heard in a judicial forum.¹⁰² Instead, the court cited the political-question and the sovereign-immunity doctrines in support of its argument that "some constitutional claims can and do go unheard."¹⁰³ Similarly, in *Sabbithi*, the court and the government stated that precedent suggests that diplomats are shielded from liability for alleged constitutional violations under diplomatic immunity.¹⁰⁴ The government further explained, "although Plaintiffs correctly note that treaty provisions are subject to constitutional limitations, there is no conflict between the Vienna Convention and the Thirteenth Amendment. Nothing in the Vienna Convention authorizes involuntary servitude or any other practice forbidden by the Constitution"¹⁰⁵

4. Fraud

Gonzalez Paredes, a domestic worker from Paraguay who worked for an Argentinean diplomat in Washington, D.C., also tried to argue that her diplomat employer was not entitled to diplomatic immunity because he defrauded the U.S. government. Specifically, the diplomat instructed Gonzales Paredes to tell the U.S. Embassy that the diplomat agreed to pay her the amount specified in the employment

⁹⁹ See, e.g., *Ahmed*, 2002 WL 1964806, at *8 (citing *Kadic v. Karadzic*, 70 F.3d 232, 247 (2d Cir. 1995) and *Filartiga v. Pena-Irala*, 630 F.2d 876, 879 (2d Cir. 1980)).

¹⁰⁰ No. 01 Civ. 7224(DLC), 2002 WL 1964806 (S.D.N.Y. Aug. 23, 2002).

¹⁰¹ *Id.* at *6-7.

¹⁰² *Id.* at *7.

¹⁰³ *Id.* (citing *F.D.I.C. v. Meyer*, 510 U.S. 471, 484-86 (1994)).

¹⁰⁴ *Sabbithi v. Al Saleh*, 605 F. Supp. 2d 122, 129 (D.D.C. 2009); Gov't Statement, *Sabbithi*, *supra* note 48, at 21 ("Indeed, we are not aware of any United States court that has recognized a *jus cogens* exception to a diplomat's immunity from its civil jurisdiction.").

¹⁰⁵ Gov't Statement, *Sabbithi*, *supra* note 48, at 18-19 (citation omitted).

contract presented at the embassy instead of the lower wages he told her he would pay. The court immediately rejected this argument on the basis that the VCDR does not recognize fraud as an exception to diplomatic immunity. The court asserted that this is an argument that should be presented to Congress or the State Department and that the courts have no authority over this matter.¹⁰⁶

*B. Suits Brought Under Residual Immunity After the
Diplomat's Term Expires*

Thus far, domestic workers have only been successful in defeating motions to dismiss when they waited until the diplomats were no longer serving in their official capacities and then sued under the theory that the diplomats were no longer protected by residual immunity.¹⁰⁷ Article 39 of the VCDR provides the basis for this argument, stating, “[w]hen the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time”¹⁰⁸ However, Article 39 grants continuing immunity for those “acts performed by such persons in the exercise of his functions as a member of the mission”¹⁰⁹ Therefore, the determinative issue is whether the diplomat performed the acts in question in the exercise of his or her diplomatic functions. If the acts constitute official functions, then the former diplomat remains immune from suit; but if the acts fall outside diplomatic functions, then the former diplomat becomes liable for those actions in court.

District judges seem to be a driving force behind this newfound effort to allow domestic-servant claims to proceed under the theory that residual immunity does not shield the diplomat from all claims. Although the court in *Gonzalez Paredes* granted the defendant’s motion to dismiss, the district judge added that the complaint was dismissed without prejudice, and that the claims could be re-filed if and when the diplomat no longer enjoyed full diplomatic immunity.¹¹⁰ He even proceeded to recommend that the statute of limitations be tolled until the diplomat was no longer immune from suit.¹¹¹

¹⁰⁶ *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187, 194 (D.D.C. 2007).

¹⁰⁷ Residual immunity is also referred to as “functional” and “continuing” immunity, but this Note will consistently refer to it simply as “residual immunity.”

¹⁰⁸ VCDR, *supra* note 19, art. 39(2).

¹⁰⁹ *Id.*

¹¹⁰ *Gonzalez Paredes*, 479 F. Supp. 2d at 189.

¹¹¹ *Id.* at 189 n.2 (citing *Knab v. Republic of Georgia*, No. 97-3118, 1998 WL 34067108,

Therefore, he impliedly recommended that the plaintiff relitigate the case under the theory of residual immunity once the diplomat ceased serving in his official capacity.

Another district court judge made a similar recommendation to Vishranthamma Swarna. She originally brought suit against her diplomat employer, Badar Al-Awadi, a diplomat stationed at the Permanent Mission of the State of Kuwait to the U.N. in New York City, but the Southern District of New York dismissed her case because Al-Awadi was then still employed by the Kuwait Mission and was therefore entitled to full diplomatic immunity.¹¹² The judge, however, dismissed her case “without prejudice because plaintiff could plausible [sic] institute a new action against defendants now that they are no longer associated with the Kuwaiti Mission.”¹¹³

Swarna re-filed her suit against Al-Awadi once he concluded his diplomatic service in New York and was reassigned to the Embassy of Kuwait in Paris.¹¹⁴ Swarna had to overcome service hurdles because of Al-Awadi’s new post, but the district court judge still seemed open to finding a way to bring the diplomat into court. Swarna first served the State Department’s Office of the Legal Advisor and then attempted to serve Al-Awadi and his wife under the Hague Service Convention.¹¹⁵ However, because of his diplomatic status in France, the French government refused service.¹¹⁶ Despite the U.S. government’s objection, the judge granted the plaintiff’s motion for alternative service by an international courier that records the delivery in writing or electronically and by U.S. mail in accordance with Federal Rule of Civil Procedure 4(f)(3).¹¹⁷ Thus, Swarna was able to overcome the obstacle of Al-Awadi’s ability to claim diplomatic immunity in his subsequent post.

at *4 (D.D.C. May 29, 1998).

¹¹² Swarna v. Al-Awadi, 607 F. Supp. 2d 509, 514 (S.D.N.Y. 2009), *aff’d in part, vacated in part*, Nos. 09-2525-cv (L), 09-3615-cv (XAP), 2010 WL 3719219 (2d. Cir. Sept. 24, 2010). For factual background, see *supra* notes 2–8 and accompanying text.

¹¹³ Swarna, 607 F. Supp. 2d. at 514 (quoting Summary Order, Vishranthamma v. Al-Awadi, No. 02 Civ. 3710 (PKL)(MHD) (S.D.N.Y. Jan. 26, 2006).

¹¹⁴ See *id.*

¹¹⁵ Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, art. 9, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163. (“Each contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another contracting State with [sic] are designated by the latter for this purpose. Each contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.”).

¹¹⁶ Swarna v. Al-Awadi, 06 Civ. 4880 (PKC), 2007 U.S. Dist. LEXIS 72661, at *2 (S.D.N.Y. Sept. 20, 2007).

¹¹⁷ *Id.* at *4–5.

Finally, in March 2009, Swarna became the first domestic servant to win a default judgment against her diplomat employer based on the theory of residual immunity.¹¹⁸ The district court rejected Al-Awadi's argument that it lacked subject-matter jurisdiction based on diplomatic immunity because Al-Awadi was a former diplomat to the U.S. who had already left the country and was therefore entitled to the more limited immunity in U.S. courts under Article 39 of the VCDR.¹¹⁹ Since a former diplomat has immunity only for "acts performed . . . in the exercise of his functions as a member of the mission," the court had to determine whether Al-Awadi's acts were "private acts," and therefore not covered by immunity, or "official acts," which fell within residual immunity.¹²⁰ Once again, the court looked to the purpose of diplomatic immunity, which "is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States."¹²¹ The court explained that once a diplomat's duties have terminated in the host country, "there ceases to be a reason to immunize that person from criminal or civil jurisdiction of the Receiving State" because the purpose of the immunity is not to give a personal benefit to the diplomat but to ensure the efficient functioning of the mission.¹²² Once the diplomat's duties have ended, the efficient functioning of the mission will no longer be affected if the former diplomat is held responsible for "private acts."¹²³ However, "acts performed . . . in the exercise of his functions as a member of the mission" continue to be covered under residual immunity because "official acts" are imputed to, and thus indirectly implicate, the sending State.¹²⁴

What constitutes an official act? The court explained, "official acts" irrefutably encompass the Article 3 listing of "functions of [the] diplomatic mission."¹²⁵ However, if an act is "entirely peripheral to the diplomat's official duties," then it will likely not fall within the

¹¹⁸ *Swarna*, 607 F. Supp. 2d at 509.

¹¹⁹ *Id.* at 516–17.

¹²⁰ *Id.* (quoting VCDR, *supra* note 19, art. 39(2)).

¹²¹ *Id.* at 516 (quoting VCDR, *supra* note 19, pmbl., cl. 4).

¹²² *Id.* at 516–17.

¹²³ *Id.* at 517.

¹²⁴ *Id.* at 516–17 (quoting VCDR, *supra* note 19, art. 39(2)).

¹²⁵ *Id.* at 517 & n.10 ("The functions of a diplomatic mission consist *inter alia* in: (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 them thereon to the Government of the sending State; (e) prompting friendly relations between the sending State and the receiving State, and developing their economic, cultural, and scientific relations." (quoting VCDR, *supra* note 19, art. 3(1))).

grant of residual immunity.¹²⁶ The *Swarna* court also noted that other courts have held that employment decisions and relationships at a diplomatic mission were covered by residual immunity because an element of the diplomat's official duties is to staff the mission and the mission cannot efficiently function without the employment of certain personnel.¹²⁷ However, the court asserted, "[i]t does not follow that all employment-related acts by a diplomat are official acts to which residual immunity attaches once the diplomat's duties end."¹²⁸ The court reasoned that when a diplomat employs a person unrelated to the diplomatic mission, it is not the same as an act performed on behalf of the sending State, such as staffing a diplomatic mission.¹²⁹ The court decided that the employment relationship between Swarna and Al-Awadi constituted a private act because the employment of a household worker did not fall within the meaning of Article 3, nor was it part of the implementation of official policy of the sending State.¹³⁰ Instead, Al-Awadi hired Swarna to take care of his family's personal affairs in his private residence.¹³¹ The court dismissed the "tangential benefit" to the Kuwaiti Mission of Swarna occasionally serving members of the Mission while Al-Awadi was entertaining them at his home.¹³² Therefore, the court held that plaintiff won a default judgment on her labor-law claims because Al-Awadi's failure to pay minimum wage and overtime pay was not covered by residual immunity.¹³³

Swarna was also successful in winning a default judgment for "trafficking, involuntary servitude, enslavement, forced labor, rape and sexual slavery"¹³⁴ brought under the ATCA.¹³⁵ In determining that "trafficking, involuntary servitude, enslavement, forced labor, and sexual slavery" were "private acts," the court analogized this case

¹²⁶ *Id.* at 518; see also *United States v. Guinand*, 688 F. Supp. 774, 776–77 (D.D.C. 1988) (holding that a former diplomat who distributed cocaine during his term as diplomat was not entitled to residual immunity).

¹²⁷ *Swarna*, 607 F. Supp. 2d at 518; see also *Brzak v. United Nations*, 551 F. Supp. 2d 313, 319 (S.D.N.Y. 2008) (dismissing a suit brought by U.N. employees against former U.N. officials and the U.N. for sexual harassment, employment discrimination, and indecent battery based on the rationale that "courts have consistently found that functional immunity applies to employment-related suits against officials of international organizations"); *De Luca v. United Nations*, 841 F. Supp. 531, 535 (S.D.N.Y. 1994) (holding that U.N. officials' wrongful conduct in the workplace was covered by IOIA because employment activities qualify as official conduct).

¹²⁸ *Swarna*, 607 F. Supp. 2d at 519.

¹²⁹ *Id.* at 519–20.

¹³⁰ *Id.* at 520.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 522.

¹³⁵ 28 U.S.C. § 1350 (2006).

to *United States v. Guinand*.¹³⁶ *Guinand* held that a former diplomat who distributed cocaine during his tenure was not immune from prosecution under his residual immunity because the illegal cocaine distribution was completely peripheral to his official diplomatic duties.¹³⁷ The *Swarna* court explained, “to conclude that the residual diplomatic immunity provided by Art. 39 extends to rape, forced labor, and the other malicious acts alleged here would be tantamount to holding that . . . all acts of a diplomatic agent are ‘official acts’” and that there is “no support for such a proposition.”¹³⁸ Finding these “private acts” entirely peripheral to the diplomat’s duties and therefore outside the realm of residual immunity, the court granted *Swarna* a default judgment as to her ATCA claims.¹³⁹

On appeal, the Second Circuit upheld the district court’s decision that Al-Awadi was not protected by residual immunity.¹⁴⁰ The court rejected Al-Awadi’s argument that *Swarna*’s role was to help him with mission-related functions and thus he was immune from suit.¹⁴¹ The court pointed to several facts to support its conclusion that *Swarna* was employed to attend to the diplomat’s private needs.¹⁴² First, the nature of her responsibilities, such as cooking, cleaning, taking care of the children, was personal rather than related to the mission.¹⁴³ Second, *Swarna*’s cooking for and serving guests at official functions were merely incidental to her position as his private servant.¹⁴⁴ Thirdly, Al-Awadi, not the mission, paid for her services.¹⁴⁵ Lastly, *Swarna* was issued a G-5 visa, which is issued to “attendants, servants, and personal employees of any such representative,”¹⁴⁶ rather than a G-2 visa, which is issued to “other accredited representatives of such a foreign government.”¹⁴⁷ The court made clear that even if *Swarna*’s employment could be deemed an official act, “[o]nly if the commission of such crimes could be considered an official act would residual immunity apply.”¹⁴⁸

Although the Second Circuit found that residual immunity did not bar *Swarna*’s claims, it held that the default judgment was improperly

¹³⁶ 688 F. Supp. 774 (D.D.C. 1988).

¹³⁷ *Swarna*, 607 F.Supp. 2d at 521.

¹³⁸ *Id.*

¹³⁹ *Id.* at 522.

¹⁴⁰ *Swarna v. Al-Awadi*, 622 F.3d 123, 140 (2d. Cir. 2010).

¹⁴¹ *Id.* at 137–38.

¹⁴² *Id.* at 138.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ 8 U.S.C. §1101(a)(15)(G)(v)(2006).

¹⁴⁷ 8 U.S.C. §1101(a)(15)(G)(v)(2006); *Swarna*, 622 F.3d at 138.

¹⁴⁸ *Swarna*, 622 F.3d at 12.

granted.¹⁴⁹ It determined that Al-Awadi's default was not willful, but was based on the mistaken belief that he was immune from suit.¹⁵⁰ Secondly, the court determined that setting aside the default judgment would not prejudice Swarna's claims.¹⁵¹ Despite the court's decision to set aside the default judgment, the Second Circuit's decision will be valuable precedent for other domestic servants who bring claims against their former diplomat employers after their official tenure is concluded.

Plaintiffs can also turn to *Baoanan v. Baja*¹⁵² to support their claims against former diplomats. Marichu Suarez Baoanan, a recent nursing graduate, paid Norma Castro Baja, the wife of the Permanent Representative of the Philippines to the United Nations, 250,000 Philippine Pesos in what Baoanan thought was an exchange for travel to the U.S., a U.S. employment-based visa, and help in finding a nursing position. Upon Baoanan's arrival in New York City, however, Baja's driver drove Baoanan directly to the Bajas' residence at the Philippine Mission. Mrs. Baja then confiscated Baoanan's passport and informed her that she had to work for six months to pay off an additional 250,000 pesos for travel expenses and employment arrangements. The Bajas forced Baoanan to work eighteen hours per day, seven days a week, performing household tasks, monitoring Mrs. Baja's blood pressure and diabetes, providing child care for the Bajas' son, and preparing for and cleaning up after weekly parties. The Bajas never paid Baoanan for her services, fed her only leftovers, verbally abused and denigrated her, made her sleep in the basement with only one sheet, restricted her use of the telephone, and refused to let her leave the house unaccompanied.¹⁵³

When Baoanan brought suit against Baja, the parties first focused on whether Baja's conduct fell within the commercial-activities exception of the VCDR.¹⁵⁴ Under this theory, it is highly likely that the court would have dismissed Baoanan's suit because of the expansive reach of diplomatic immunity. However, in its Statement of Interest, the government argued that the court should instead focus on whether to apply residual immunity because Baoanan filed the complaint on June 24, 2008, and Baja's term ended on February 21, 2007.¹⁵⁵ The government explained that it has "consistently

¹⁴⁹ *Id.* at 15.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² 627 F. Supp. 2d 155, 158–59 (S.D.N.Y. 2009).

¹⁵³ *Id.* at 158–59.

¹⁵⁴ *Id.* at 159–60.

¹⁵⁵ Statement of Interest of the United States, at 2, *Baoanan v. Baja*, 627 F. Supp. 2d 155 (S.D.N.Y. 2009) [hereinafter Gov't Statement, *Baoanan*].

interpreted Article 39 of the VCDR to permit the exercise of U.S. jurisdiction over persons whose status as members of the diplomatic mission has been terminated for acts they committed during the period in which they enjoyed privileges and immunities,” but not “for acts performed in the exercise of the functions as a member of the mission.”¹⁵⁶ The government supported its position by stating that its interpretation is “consistent with the practice of other sovereign states, including [those] which are parties to the Vienna Convention.”¹⁵⁷

In its Statement of Interest, the government discussed the district court’s analysis of residual immunity in *Sabbithi v. Al Saleh*.¹⁵⁸ Since Sabbithi filed her complaint and served Baja with process while he was still an accredited diplomat, the government recommended—and the court granted—the diplomat’s motion to dismiss based on diplomatic immunity. At the end of the opinion, the court discussed the possibility of the residual-immunity claim. The court held that the “defendant’s immunity remains intact for acts performed in the exercise of his duties as a diplomatic officer” even after his term had ended because the employment of the plaintiff “was not performed outside the exercise of defendants’ diplomatic functions.”¹⁵⁹ The government did not comment on residual immunity in its Statement of Interest in the *Sabbithi* case because it was not applicable, but the government “respectfully disagree[d]” with the *Sabbithi* court’s residual-immunity analysis in its Statement of Interest for *Baoanan*.¹⁶⁰ Specifically, it disagreed with the “belief that if the hiring of domestic employees is not a commercial activity under Article 31(1)(c), it follows that it must be an official act and therefore merits residual immunity provided under Article 39(2).”¹⁶¹ Rather, the government recommended that even if a former diplomat’s conduct was not a commercial activity, the court should conduct a separate analysis to determine whether the former diplomat’s conduct was an official act, therefore falling within the grant of residual immunity.¹⁶²

The court in *Baoanan* adopted the government’s recommended approach and concurred with the *Swarna* court’s analysis in determining whether the conduct constituted an “official act.”¹⁶³ The

¹⁵⁶ *Id.* at 6 (internal citation omitted).

¹⁵⁷ *Id.* at 7 (internal citation omitted).

¹⁵⁸ *Id.* at 11. For the facts of *Sabbithi*, see *supra* text accompanying notes 85–87.

¹⁵⁹ *Sabbithi v. Al Saleh*, 605 F. Supp. 2d 122, 130 (D.D.C. 2009).

¹⁶⁰ Gov’t Statement, *Baoanan*, *supra* note 155, at 12.

¹⁶¹ *Id.*

¹⁶² *Id.* at 14.

¹⁶³ *Baoanan v. Baja*, 627 F. Supp. 2d 155, 164 (S.D.N.Y. 2009) (“[A]cts allegedly committed by Baja that were performed in the furtherance of his diplomatic functions such that

court first rejected Baja's argument that the mere act of hiring a domestic worker was an official act and then examined the specific circumstances of the employment to ascertain whether the act was private or official.¹⁶⁴ The court also rejected Baja's argument that the Philippine government's issuance of a red passport (i.e. a government passport) and the U.S. Embassy in the Philippines granting of a G-5 visa (which is granted to employees of officials for international organizations) made it an official act.¹⁶⁵ The court noted that the documents themselves describe the employment of domestic workers as a private act.¹⁶⁶

The court also analyzed Baoanan's duties of cooking, cleaning, doing laundry, monitoring Mrs. Baja's blood pressure, and providing child care, and determined that these services were performed only to benefit the Baja family's personal needs and "are unrelated to Baja's diplomatic functions as a member of the mission."¹⁶⁷ Following the *Swarna* analysis, the court concluded that the "tangential benefit" to the Philippine Mission gained from Baoanan's preparing for and cleaning up after the Bajas' parties was not enough.¹⁶⁸

Lastly, the court analyzed Baja's argument that this case should come out differently because the family resided at the Philippine Mission itself, whereas the diplomat in *Swarna* had a separate private residence.¹⁶⁹ The court held that while it should consider the physical location of the employment, that location was not dispositive.¹⁷⁰ Based on this analysis, the court held that Baoanan's employment as a domestic worker at the Philippine Mission was a private act and therefore Baja was not immune from civil jurisdiction.¹⁷¹

Baoanan also brought claims of human trafficking, involuntary servitude, and forced labor. The court held that these actions, if true, were not performed as a function of the mission nor on behalf of the

they are 'in law the acts of the sending state' are official acts; all other acts are private acts for which residual immunity is not available." (quoting *DENZA*, *supra* note 21, at 439)).

¹⁶⁴ *Id.* at 165–70.

¹⁶⁵ *Id.* at 167.

¹⁶⁶ *Id.* The Philippine Department of Foreign Affairs' guidelines for issuing a red passport provide "information and guidance [to] Foreign Service personnel who wish to bring *private staff* to their posts of assignment." *Id.* (internal quotations omitted). Similarly, the G-5 passport is granted to "an attendant or *personal employee* of an official or other employee of a diplomatic or consular mission or international organization." *Id.* at 168 (internal quotations omitted).

¹⁶⁷ *Id.* at 168.

¹⁶⁸ *Id.* (internal quotations omitted).

¹⁶⁹ *Id.* at 168–69.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 170.

sending State but rather were also private acts not covered by residual immunity.¹⁷²

With the *Swarna* and *Baoanan* decisions, along with the government's support of the courts' analysis and holdings, domestic workers have a good chance of surviving the motion to dismiss if they file their complaint *after* their diplomat-employer is no longer an accredited diplomat in the United States. If the diplomat is still serving as a diplomat in another country, the domestic worker who experienced the harm in the U.S. can still seek justice in U.S. federal court because the diplomat's term in the U.S. is over, and therefore he enjoys only residual immunity. If victims can escape and wait until the diplomat is no longer acting in his capacity as a diplomat in the U.S., those who can show that their employers abused, exploited, or trafficked them can legally stay in the U.S. under certain accommodations and visas.¹⁷³ These procedures allow the victims to remain in the U.S. and file suit under the residual-immunity theory, even years after they stop working for the diplomat. However, the waiting period that results from bringing the claims under residual immunity imposes incredible burdens on the victims who likely do not have family or friends in the U.S., a place to live, or money to live on because they never received wages. The victims may be unable to remain in the U.S. until they can file suit because of these emotional, financial, and practical constraints. As a result, victims may never obtain justice. Therefore, it is necessary to provide other avenues of relief to these human-trafficking victims within the U.S.

C. Human-Trafficking Exception to Diplomatic Immunity

Because residual immunity applies only after the diplomat ceases to serve as a diplomat in the U.S., a stronger and more comprehensive

¹⁷² *Id.*

¹⁷³ There are three main immigration accommodations available to victims. Under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (WWTVPRA), once an A-3 or G-5 visa holder files a complaint, the Department of Homeland Security may grant the alleged victim continued presence so that the victims can legally stay in the U.S. and work "for time sufficient to fully and effectively participate in all legal proceedings related to such action." Pub. L. No. 110-457, § 203(c)(1)(a), 122 Stat. 5044, 5058 (2008). The victim can also apply for either the T-visa or the U-visa. The T-visa is granted to victims of "a severe form of trafficking in persons" who, because of trafficking, are physically present in the U.S. or at an American port of entry. Immigration and Naturalization Act, 8 U.S.C. § 1101(a)(15)(T)(i)(I) (2006). Victims are also able to apply for a U-visa, which is granted to persons who have "suffered substantial physical or mental abuse" due to specified acts of violence, including involuntary servitude. § 1101(a)(15)(U)(i)(I). With the T-visa or the U-visa, the victim can work in the U.S., apply for government benefits such as food stamps and medical care, and after three years can file for adjustment of status to be a lawful permanent resident. § 1101(a)(15)(U); GAO Report, *supra* note 9, at 10.

policy should be enacted and accepted to solve this problem. However, due to the international nature of the problem, and diplomatic immunity's status as a basic principle of universally accepted international law, federal courts or Congress cannot act unilaterally to create a human-trafficking exception to diplomatic immunity that would apply in U.S. courts. Nonetheless, the human-trafficking exception to diplomatic immunity would fulfill the goals of bringing justice to those who have been treated as slaves on U.S. soil and reducing the likelihood that diplomats would continue engaging in this practice. The impact on U.S. foreign relations of the United States unilaterally creating a human-trafficking exception, however, is too devastating to be a realistic option.

One concern is the strain on American relations with other States because allowing diplomats to be sued in U.S. courts would be a clear violation of international law under the VCDR. As the government argued in *Sabbithi*, the "privileges and immunities accorded to diplomats under the Vienna Convention are vital to the conduct of peaceful international relations and must be respected. If the United States is prevented from carrying out its international obligation to protect the immunities of foreign diplomats, adverse consequences may well obtain."¹⁷⁴

Another major concern is that a departure from the international consensus would hurt American diplomats abroad. The courts and the government explain, "[r]ecent history is unfortunately replete with examples demonstrating how fragile is the security for American diplomats and personnel in foreign countries; their safety is a matter of real and continuing concern."¹⁷⁵ The *Tabion* court elaborated that "[t]o protect United States diplomats from criminal and civil prosecution in foreign lands with differing cultural and legal norms as well as fluctuating political climates, the United States has bargained to offer that same protection to diplomats visiting this country."¹⁷⁶ The federal courts have realized 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."¹⁷⁷

¹⁷⁴ Gov't Statement, *Sabbithi*, *supra* note 48, at 24–25.

¹⁷⁵ *Id.* at 25 (quoting 767 Third Ave. Assocs. v. Permanent Mission of the Rep. of Zaire to the United Nations, 988 F.2d 295, 301 (2d Cir. 1993)).

¹⁷⁶ *Tabion v. Mufti*, 877 F. Supp. 285, 293 (E.D.Va. 1995), *aff'd*, 73 F.3d 535 (4th Cir. 1996).

¹⁷⁷ *Ahmed v. Hoque*, No. 01 Civ. 7224(DLC), 2002 WL 1964806, at *5 (S.D.N.Y. Aug. 23, 2002) (quoting 757 Third Ave. Assocs., 988 F.2d at 296).

Finally, the government is also concerned that other states would respond by subjecting American diplomats to controversial and possibly unwarranted litigation in foreign jurisdictions.¹⁷⁸ Many courts have agreed and stated that “[b]ecause not all countries provide the level of due process to which United States citizens have become accustomed, and because diplomats are particularly vulnerable to exploitation for political purposes, immunity for American diplomats abroad is essential.”¹⁷⁹

The international community as a whole must take action to solve this problem and avoid the consequences of deviating from the global consensus for multiple reasons. First, domestic-worker trafficking by diplomats occurs around the world.¹⁸⁰ Secondly, countries in addition to the U.S. likely have similar concerns about repercussions for their diplomats if they unilaterally take a harder stance against diplomats engaged in human trafficking inside their own residences. Thirdly, the international community broadly supports the eradication of human trafficking worldwide. For example, the Trafficking Victims Protection Act (TVPA)¹⁸¹ specifically provides that the “United States and the international community agree that trafficking in persons involves grave violations of human rights and is a matter of pressing international concern” and cites twelve declarations, treaties, U.N. resolutions, and reports that condemn involuntary servitude, violence against women, and other components of trafficking in persons.¹⁸² Additionally, Article 6(2) of the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational

¹⁷⁸ Gov’t Statement, *Sabbithi*, *supra* note 48, at 21.

¹⁷⁹ *Tabion*, 877 F. Supp. at 293.

¹⁸⁰ For example, the 2009 Trafficking in Persons Report noted that the “trafficking of workers for domestic servitude and trafficking for sexual exploitation continued to be committed by some members of the international community posted in Belgium. The Belgian government has conducted campaigns to reduce this problem and investigate such cases.” U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 78 (2009), available at <http://www.state.gov/g/tip/rls/tiprpt/2009/123135.htm>. Similar problems were reported in France. *Id.* at 135.

¹⁸¹ 22 U.S.C. § 7101 (2006).

¹⁸² *Id.* § 7101(b)(23) (explaining “[t]he international community has repeatedly condemned slavery and involuntary servitude, violence against women, and other elements of trafficking, through declarations, treaties, and United Nations resolutions and reports, including the Universal Declaration of Human Rights; the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; the 1948 American Declaration on the Rights and Duties of Man; the 1957 Abolition of Forced Labor Convention; the International Covenant on Civil and Political Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; United Nations General Assembly Resolutions 50/167, 51/66, and 52/98; the Final Report of the World Congress against Sexual Exploitation of Children (Stockholm, 1996); the Fourth World Conference on Women (Beijing, 1995); and the 1991 Moscow Document of the Organization for Security and Cooperation in Europe”).

Organized Crime obligates each State Party to ensure that its domestic legal or administrative system offers “victims of trafficking in persons . . . (a) [i]nformation on relevant court and administrative proceedings; (b) [a]ssistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.”¹⁸³ Each State Party must also “ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.”¹⁸⁴ However, because of diplomatic immunity, State Parties cannot carry out these obligations with respect to trafficking victims who are domestic workers of diplomats.

An ideal option would be for the U.N. to adopt a human-trafficking exception to the VCDR modeled after the commercial-activities exception. Even though the VCDR does not provide for a method of amendment, State Parties do have the power to create a human-trafficking exception.¹⁸⁵ The proposing party state could argue that human trafficking is similarly, or even more “wholly inconsistent with the position of the diplomatic agent, and that one possible consequence of his engaging in them might be that he would be declared *persona non grata*.”¹⁸⁶ State Parties may also recognize the injustice of “a diplomatic agent, *ignoring the restraints which his status ought to have imposed upon him*” forcing a human trafficking victim who worked for the diplomatic agent “to go abroad in order to have the case settled by a foreign court.”¹⁸⁷ In addition, State Parties might be inclined to accept this exception if their own “diplomatic officers are forbidden to engage in such activities in the country of their assignment, [and] other states have not all been so inclined to restrict the activities of their diplomatic agents.”¹⁸⁸ The wording would have to be very limited in scope for the amendment to even be considered, but a State Party could propose language reflective of the phrasing of the commercial-activities exception. One possible

¹⁸³ G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25 at Annex II, Art. 6(2) (Jan. 8, 2001).

¹⁸⁴ *Id.* at Annex II, art. 6(6).

¹⁸⁵ DENZA, *supra* note 21, at 7.

¹⁸⁶ Gov’t Statement, *Sabbithi*, *supra* note 48 at 11 (quoting Report of the Commission to the General Assembly, U.N. Doc. A/3859, reprinted in [1958] 2 Y.B. Int’l L. Comm’n 98, U.N. Doc. A/CN.4/SER.A/1958/Add.1); *Tabion v. Mufti*, 877 F. Supp. 285, 290 (E.D.Va. 1995), *aff’d*, 73 F.3d 535 (4th Cir. 1996) (quoting same).

¹⁸⁷ Gov’t Statement, *Sabbithi*, *supra* note 48, at 10 (quoting Special Rapporteur on Diplomatic Intercourse and Immunities, *Diplomatic Intercourse and Immunities: Summary of Observations Received from Governments and Conclusions of the Special Rapporteur*, Int’l Law Comm’n, U.N. Doc. A/CN.4/116 (May 2, 1958) (by A. Emil F. Sandström)).

¹⁸⁸ *Id.* at 11 (emphasis omitted) (quoting WHITEMAN, *supra* note 56, at 406).

wording for the human-trafficking could be: “a diplomatic agent is not immune from suit arising from actions relating to human trafficking inside the sending State’s mission or inside the diplomat’s residence.”

The key question, of course, is whether there will be the requisite political will to take such a bold move. As noted above, there is strong international and national support for combating human trafficking,¹⁸⁹ but the difficulty of passing any amendment to the VCDR remains a major issue. The VCDR has remained unamended because governments continue to favor protecting their diplomats and missions from “terrorism, mob violence, and intrusive harassment from unfriendly States” over combating abuse via an amendment.¹⁹⁰ Instead, governments have decided to “use the remedies already provided in the Convention more vigorously even where this carried short-term political disadvantages, to invoke countermeasures on a basis of reciprocity, and to build up coalitions to apply pressure on States flouting normal rules of international conduct.”¹⁹¹ Therefore, it is more likely that governments will choose to use existing tools in the VCDR, such as declaring an abusive diplomat *persona non grata*, than to agree upon a human trafficking exception to the VCDR. However, given the gravity of the problem and the international push towards the fight against human trafficking, it is possible that State Parties may now consider a limited human-trafficking exception to diplomatic immunity.

Even if the international community would craft a human-trafficking exception in the Vienna Convention or if a domestic worker prevails against her diplomat employer in court under residual immunity, the problem still remains that litigants themselves are unable to obtain meaningful relief because diplomats are typically judgment-proof. First, the domestic worker will likely be unable to find any property or bank accounts of the former diplomat within the court’s jurisdiction for her to attach because the diplomat most likely closed any U.S. bank accounts and took all his property out of the U.S. upon leaving the country. Secondly, the domestic worker will

¹⁸⁹ See *supra* notes 181–84.

¹⁹⁰ DENZA, *supra* note 21, at 7.

¹⁹¹ *Id.* at 7–8. After the 1984 shooting at the Libyan People’s Bureau in London, the House of Commons Foreign Affairs Committee (FAC) drafted a report on the abuse of diplomatic immunities. FOREIGN AFFAIRS COMMITTEE: THE ABUSE OF DIPLOMATIC IMMUNITIES AND PRIVILEGES, 1984–85, H.C. 127 (U.K.) [hereinafter FAC REPORT]. The FAC addressed the possibility of amending the VCDR to include limitations on “immunity from criminal jurisdiction of accredited diplomats” and “personal immunity after participation in acts of terrorism,” but decided against recommending an amendment because the practical difficulties of getting it passed and fear of reciprocity. *Id.* ¶¶ 53–57.

not be able to place a levy on the mission or embassy because the judgment indicates that the diplomat was acting outside of his official functions in the misconduct, and therefore was no longer acting on behalf of the State.

One possible solution to this problem is to require diplomats to post a bond before the household worker's visa is approved. Therefore, if the household worker sues the diplomat, she will be able to attach the bond and, if she wins, she will at least be able to recover the value of the bond. However, it is unlikely that the U.S. would, in practice, require diplomats, especially those with a clean record, to post a bond because of the fear of reciprocity and tarnishing relations with the diplomat and her sending State. Therefore, a domestic worker most likely will never be compensated for the money she earned during her employment.

However, the fact that a domestic worker is unable to collect her judgment does not detract from the deterrent value of winning a favorable judgment. Even if the plaintiff cannot be made whole, another goal of a judgment against the diplomat is to prevent these atrocities from happening in the future. Once the government or the international organization is aware of diplomats who have been reported or convicted of abusing household workers, they can prevent those diplomats from being granted future A-3 and G-5 visas. Part III will also propose other available deterrent measures that the government and international organizations can and should adopt. The following solutions are forward-looking and aimed towards the goals of deterring diplomats from abusing their domestic workers in the future.

III. IMMIGRATION AND INSTITUTIONAL INITIATIVES

A. Improve Visa Issuance and Implementation Procedures at Embassies and Consulates

The United States, as a partial solution to the problem, could reduce the likelihood that domestic workers even begin working for an abusive diplomat by improving visa issuance procedures and implementing these procedures at U.S. embassies and consulates overseas. Domestic-worker employees of officials who work for foreign embassies, consulates, and governments are eligible for an A-3 visa, and domestic workers of staff members of international organizations, such as the U.N. or the World Bank, are eligible for a G-5 visa. Between 2000 and 2007, American embassies and

consulates overseas granted 7,522 G-5 visas and 10,386 A-3 visas.¹⁹² The State Department's *Foreign Affairs Manual* requires that Foreign Service officers follow a certain process and ensure that certain criteria are met before approving A-3 and G-5 employment contracts.¹⁹³ Most of the measures are designed to prevent domestic workers from obtaining visas to come to the U.S. under circumstances that a consular officer finds suspicious. To obtain an A-3 or G-5 visa, the applicant must submit: an employment contract signed by both the employer and the employee containing an agreement that the employer will abide by all federal, state, and local laws; a guarantee that the employer will pay the greater of either the minimum wage or the prevailing wage; details on the frequency and form of payment, work duties, weekly work hours, holidays, sick days, and vacation days; an employee statement that she will not work elsewhere; an employer statement that he will not withhold the passport; employment contract, or other personal property of the employee; and a statement that both the employer and employee understand that the employee can remain on the premises after hours only if compensated.¹⁹⁴ In addition, the applicant must submit the contract in English *and* in a language that the applicant comprehends to help ensure that the applicant understands his or her rights and duties.¹⁹⁵

Even though these policies are in place, they are not always executed effectively. Based on visits to four consular posts, the July 2008 GAO Report found that some consular officers were unfamiliar with or uncertain about certain aspects of guidance on the issuance of A-3 and G-5 visas.¹⁹⁶ For example, the GAO found that many officers did not realize that a diplomatic note from the diplomat's embassy or mission confirming the employer's diplomatic status was required to process the application,¹⁹⁷ or that they were supposed to electronically scan the employment contracts into the Consular Affairs Consolidated Database.¹⁹⁸ Additionally, the GAO discovered that many of the contracts did not contain all of the necessary criteria. For instance, 71% of the contracts at one post, 35% at the second, 23% at the third, and 6% at the fourth did not contain at least one of the necessary criteria.¹⁹⁹ Some contracts had multiple deficiencies. One contract, for example, paid the employee below the minimum wage and omitted

¹⁹² GAO Report, *supra* note 9, at 7.

¹⁹³ 9 U.S. DEP'T OF STATE, *Foreign Affairs Manual* 41.21 N6.2 (2009) [hereinafter FAM].

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ GAO Report, *supra* note 9, at 22.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 23.

¹⁹⁹ *Id.* at 21.

the section providing that the employer could not require the employee to stay on the premises after working hours without pay.²⁰⁰ Additionally, at a post in a country where residents rarely spoke or read English, the GAO found that all of the contracts were written only in English, though it is required that the contract be translated into the language familiar to the applicant as well.²⁰¹

There were also deficiencies in the information that many officers gave applicants. The officers were unaware, and therefore did not inform applicants, of the telephone hotline for reporting abuse and of the State Department's advice to call 911 in case of an emergency or for help. Nor did they give applicants the anti-trafficking brochere recommended by the State Department.²⁰² The GAO explained the importance of these educational measures by sharing the words of workers who reported abuse. One worker recommended that American embassies should inform A-3 and G-5 visa applicants of their rights and provide contact information for resources that to which victims can turn. She explained that the employers often continue the abuse by telling the workers that they are not protected by U.S. law, but rather are subject to the laws of the diplomat's state.²⁰³ Another abuse victim stated that she knew to seek help because the consular officer explained her rights to her at the visa interview.²⁰⁴

The government responded to this inconsistency in information dissemination by requiring, under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (WWTVPRA),²⁰⁵ that the consular officer inform the applicant of his or her legal rights under federal immigration, labor, and employment laws, including explaining the "illegality of slavery, peonage, trafficking in persons, sexual assault, extortion, blackmail, and worker exploitation"²⁰⁶ during the visa interview. WWTVPRA also requires that consular officers give applicants a pamphlet²⁰⁷ that explains the workers' legal rights and answers important questions such as "what should I do if my rights are violated?" and "will I be

²⁰⁰ *Id.*

²⁰¹ *Id.* at 21–22.

²⁰² *Id.* at 22–23. Under the WWTVPRA, it is now required that consular officers give a pamphlet similar to the pamphlet that the GAO recommended. *See supra* note 173.

²⁰³ GAO Report, *supra* note 9, at 23.

²⁰⁴ *Id.*

²⁰⁵ Pub. L. No. 110-457, 122 Stat. 5044 (2008).

²⁰⁶ *Id.* § 202(b)(3); FAM, *supra* note 193, at 41.21 N6.5-1.

²⁰⁷ Pub. L. No. 110-457, § 202, 122 Stat. 5055; U.S. DEP'T OF STATE, WWTVPRA PAMPHLET (2009), available at <http://travel.state.gov/pdf/Pamphlet-Order.pdf> [hereinafter WWTVPRA PAMPHLET]; FAM, *supra* note 193, at N6.5-2 (Consular Officer Responsibilities).

deported if I report the abuse?” The pamphlet encourages workers to get help if their rights are violated and provides the telephone numbers for the National Human Trafficking Resource Center’s 24-hour hotline (a non-governmental organization), the Trafficking in Persons and Worker Exploitation Task Force Complaint Line (run by the Department of Justice), and 911.²⁰⁸

Since consulate officers are unaware or uncertain of many policies essential to combating the domestic-worker trafficking, the WWTVPRA now requires the State Department to provide training to consular officers on fair labor standards, human trafficking, changes resulting from the WWTVPRA, and information in the pamphlet that consular officers are required to give and review with the applicant.²⁰⁹ In addition, the State Department can require a consular officer to fill out and attach a checklist of all the requirements to the applicant’s file. The checklist is a quick and easy way to ensure that all the requirements are known and met, thereby reducing the number of dodgy A-3 and G-5 visas granted.

The State Department has taken some action to address the confusion over when consular officers may and must deny A-3 and G-5 visas, but more needs to be done. The GAO found that many consular officers were unsure of the circumstances under which they could refuse to grant the visas because the *Foreign Affairs Manual* did not explicitly provide that officers may deny applications if they were concerned about abuse or mistreatment.²¹⁰ Therefore, many officers reported that they often felt compelled to approve a visa application, even if it was suspicious, so long as there was a valid employment contract.²¹¹ Congress solved part of the problem by requiring the Secretary of State to suspend the issuance of A-3 or G-5 visas if “the Secretary determines that there is credible evidence that 1 or more employees of such mission or international organization have abused or exploited 1 or more nonimmigrants holding an A-3 visa or a G-5 visa, and that the diplomatic mission or international organization tolerated such actions.”²¹² The State Department will

²⁰⁸ WWTVPRA PAMPHLET, *supra* note 207; FAM, *supra* note 193, at N6.5-1 (Contents of Information Packet).

²⁰⁹ Pub. L. No. 110-457, § 203(b)(3), 122 Stat. 5055 The State Department issued a telegram to all diplomatic and consular posts explaining the changes of the WWTVPRA. *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*, U.S. DEP’T OF STATE (June, 2009), http://travel.state.gov/visa/laws/telegrams/telegrams_4542.html.

²¹⁰ GAO Report, *supra* note 9, at 24.

²¹¹ *Id.* at 25.

²¹² Pub. L. No. 110-457, §203(a)(3), 122 Stat. 5055, *reflected in* FAM, *supra* note 193, at N6.6, (“Suspension of Processing of A-3 and G-5 Applications from Certain Foreign Missions and International Organizations”).

then notify all visa processing posts of the suspension so that no A-3 or G-5 visas are issued.²¹³

The State Department can base its decision to suspend the issuance of the visas from two major sources of information that Congress requires the executive branch to maintain. First, Congress requires the Secretary of State to maintain records of each A-3 and G-5 visa-holder's date of entrance and permanent exit; the official title, contact information, and immunity of the employer; and any information about any allegations of employer abuse received by the State Department.²¹⁴ Secondly, by December 2010, the federal departments must combine all relevant information collected by each department or agency in the Interagency Task Force to Monitor and Combat Trafficking into an "integrated database" within the Human Smuggling and Trafficking Center.²¹⁵

Though these provisions are important additions and will be useful in stopping the recurrence of the problem by repeat offenders, the *Foreign Affairs Manual* still fails to provide concrete circumstances in which a consular officer may or must refuse to grant the visa. The State Department explained that "officers have little to go on beyond the contract and [that] it is impossible to refuse a visa based on something that has not happened or will not happen for another 6 months."²¹⁶ However, there still may be signs that mistreatment is likely, and the State Department should clarify that consular officers have the discretion to deny visas in suspicious circumstances. Consular officials at State Department headquarters told the GAO that "it is appropriate and even expected for consular officers to refuse A-3 and G-5 visas if they believe that visa applicants may be abused by their prospective employers."²¹⁷ But since that expectation is not expressed in the *Foreign Affairs Manual*, and no examples are provided, consular officers may still feel compelled to grant the visa if all of the technical requirements are met. The State Department may consider adding that consular officers may deny a visa if the applicant is under eighteen, if the employer resisted the private interview between the applicant and the consular officer, or if the applicant had not yet met the employer.²¹⁸

²¹³ FAM, *supra* note 193, at N6.6.

²¹⁴ Pub. L. No. 110-457, § 203(b)(4), 122 Stat. 5055.

²¹⁵ *Id.* § 108(a), 122 Stat. 5021.

²¹⁶ GAO Report, *supra* note 9, at 25 (internal quotation marks omitted).

²¹⁷ *Id.*

²¹⁸ These are circumstances under which consular officers have denied, or wanted to deny, A-3 and G-5 visas in the past. GAO Report, *supra* note 9, at 24–25.

B. Continuing Oversight of A-3 and G-5 Visa-holders

Even if consular officers follow all the procedures perfectly, diplomats may still decide to ignore the employment contracts and abuse the domestic workers. To combat diplomats disregarding the terms of the contract, Congress should consider requiring A-3 and G-5 visa-holders to meet with a United States Citizenship and Immigration Services (USCIS) officer three months after their arrival in the U.S. The purpose of the meeting would be to give the visa-holder a guaranteed opportunity to reveal any problems or abuse to the USCIS officer and allow the USCIS officer to remind the domestic worker of the resources available to them if they are later abused. If the visa-holder does not show up or reports abuse, USCIS should have the authority to investigate the situation. If the diplomat resists the investigation or the investigation supports the abuse allegations, USCIS should be able revoke the A-3 or G-5 visa and change the domestic worker's visa classification to a T-visa or a U-visa, which would allow the victim to remain in the U.S., find work, apply for food stamps and medical care, and after three years file for adjustment of status to be a lawful permanent resident.²¹⁹ This policy would help victims get out of the abusive environment, identify abusive diplomats, and prevent abusive diplomats from obtaining A-3 and G-5 visas in the future.

Additionally, international organizations can take control of the problem by establishing effective procedures for conducting internal review and providing institutional methods of relief. The IMF and World Bank provide a good example of this. In 1999, a Washington Post article²²⁰ and editorial²²¹ revealed that the IMF and World Bank officials were "some of the worst offenders" of household worker abuse and that both "take a hands-off approach once the workers are here."²²² Subsequently, the IMF and World Bank have sought to improve their efforts to prevent, investigate, and stop abuse of household workers.²²³ The World Bank created a model internal review system that establishes appropriate oversight for the employment of G-5 household workers. It also created a Code of Conduct Regarding Employment of G-5 Domestic Employees,²²⁴

²¹⁹ *Id.* at 10, 24–25.

²²⁰ William Branigin, *A Life of Exhaustion, Beatings, and Isolation*, WASH. POST, Jan. 5, 1999, at A6.

²²¹ Editorial, *Not in This Country, They Can't*, WASH. POST, Jan. 7, 1999, at A24.

²²² *Id.*

²²³ Michel Camdessus & James D. Wolfensohn, *Letter to the Editor*, WASH. POST, Jan. 16, 1999, available at <http://www.imf.org/external/np/vc/1999/011699.htm>.

²²⁴ F00042 World Bank Group Code of Conduct Regarding Employment of G5 Domestic

which obligates each staff member to comply with the provisions of federal, state, and local law related to the employment of G-5 domestic employees and provides that violations may result in disciplinary action, such as loss in the privilege of employing a G-5 employee and dismissal.²²⁵ The Code offers specific examples regarding what is to be included in the employment contract, such as the requirement that the contract must contain a complaint procedure that enables the G-5 employee to make a complaint regarding his or her fair treatment to the World Bank's Office of Professional Ethics or with the Human Resources Department.²²⁶ The World Bank also requires that the staff member and the G-5 employee attend an orientation program together explaining their mutual rights and responsibilities soon after their arrival in the U.S.; if they both do not attend the orientation, the World Bank may withhold any visa services for the staff member.²²⁷ Additionally, the World Bank requires the staff member to maintain specific records of the G-5 employee's position for the entire period of employment and for a minimum of three calendar years after the G-5 employee's termination.²²⁸ These records are subject to periodic audit or audit in response to a complaint.²²⁹

Although these procedures are in place, the practical effects of the measures vary. Some workers have complained that they experienced "months-long delays [after filing a complaint] and hostility when they finally meet with World Bank officials."²³⁰ Moreover, these procedures may be helpful for those household workers who wish to remain employed by the World Bank staff member, but those who wish to be made whole through damages have no relief under the process.

Employees, THE WORLD BANK (2009), <http://go.worldbank.org/5T74JMNEB0> [hereinafter *World Bank Code of Conduct*].

²²⁵ *Id.* at 1.

²²⁶ *Id.* at 3.

²²⁷ *Id.*

²²⁸ *Id.* For example, the staff member must keep a copy of the employment contract and any amendments, proof of wage payments, derivation of deductions taken from gross wages each pay period, a dated contemporaneous timesheet signed and dated by both the staff member and the G-5 employee at least on a weekly basis, copies of any health insurance policy and proof of payment by the staff member for insurance premiums, and various other documents. *Id.* at 3-4.

²²⁹ *Id.* at 4.

²³⁰ Krista Friedrich, Note, *Statutes of Liberty? Seeking Justice Under United States Law When Diplomats Traffic in Persons*, 72 BROOK. L. REV. 1139, 1164, (2007) (quoting Lora Jo Foo, *The Trafficking of Asian Women*, in ASIAN AMERICAN WOMEN: ISSUES, CONCERNS, AND RESPONSIVE HUMAN AND CIVIL RIGHTS ADVOCACY 47, 51 (2002)).

A household worker could theoretically file a complaint with the World Bank and the World Bank could threaten or use disciplinary action to resolve the problem. The World Bank stipulates, “the staff member may not interfere with such complaints or retaliate against the G5 domestic employee for any good faith statement or action by or on behalf of the employee in connection with a complaint.”²³¹ However, there remains no relief for domestic workers who want to stop working for the diplomat and obtain their unpaid salaries. The harshest punishment that the World Bank can give is dismissal, but the staff member’s dismissal will not lead to the domestic worker regaining lost wages.

IV. DIPLOMATIC PROCESS

The government can also work through the diplomatic process to pursue allegations of abuse and ensure compliance with U.S. law. Informally, the State Department can try to intercede and help the parties resolve the problem outside of court. The government asserts that simply calling attention to the diplomat’s misdeeds sometimes results in adequately embarrassing the diplomat, thereby inducing him to voluntarily comply with the law.²³² The State Department can also request that the sending State waive the diplomat’s immunity,²³³ but it is unlikely that the sending State would abandon its representative and risk the embarrassment of a trial exposing the wrongdoings of the diplomat, which would reflect badly on the sending State. For example, in *Sabbithi*, Kuwait refused the State Department’s request to waive the diplomat’s immunity and the Department of Justice therefore had to end its investigation of the household-worker’s allegations.²³⁴ The State Department also has the discretion to refuse to accept future diplomats from a country that it views as assisting or approving illegal conduct.²³⁵ Furthermore, the U.S. can stop or decrease economic or developmental aid to a country if it allows its diplomats to continue in a pattern of breaking American laws in hopes that the sending country takes measures to stop its diplomat’s wrongdoing.²³⁶

²³¹ World Bank Code of Conduct, *supra* note 224, at 3.

²³² GAO Report, *supra* note 9, at 10.

²³³ “The immunity from jurisdiction of diplomatic agents . . . may be waived by the sending State. Waiver must always be express.” VCDR, *supra* note 19, art 32(1)–(2).

²³⁴ *Sabbithi v. Al Saleh*, 605 F. Supp. 2d 122, 125 (D.D.C. 2009).

²³⁵ *See, e.g., Tabion v. Mufti*, 877 F. Supp. 285, 293 (E.D.Va. 1995), *aff’d*, 73 F.3d 535 (4th Cir. 1996) (citing The Diplomatic Privileges and Immunities Act: Hearings on H.R. 3036 Before the Subcomm. on Int’l Operations of the Comm. on Foreign Affairs, 100th Cong., 2d Sess. 50 (1988)).

²³⁶ *Id.*

Another formal measure that the State Department can take is to declare the diplomat *persona non grata* under Article 9(1) of the VCDR. If this happens, the sending State must either recall the diplomat or terminate his functions, or else the U.S. can expel him.²³⁷ As diplomatic-law expert Eileen Denza explains, “Article 9 has proved in practice to be a key provision which enables the receiving State to protect itself against numerous forms of unacceptable activity by members of diplomatic missions and forms an important counterweight to the immunities conferred elsewhere in the Convention.”²³⁸ For example, the United Kingdom successfully used *persona non grata* to dramatically decrease the number of diplomats who deliberately and systematically refused to pay their parking tickets. The diplomatic corps in London “reluctantly” accepted this action—even though this use of *persona non grata* was unprecedented—because it was within the powers of the receiving State.²³⁹ The United Kingdom has also adopted a policy of declaring diplomats *persona non grata* when they engage in espionage, incitement or advocacy of violence, violent crime, drug trafficking, firearms offenses, rape, fraud, multiple drunk driving offenses, traffic offenses involving serious death or injury, driving without third-party insurance, theft (including large-scale shoplifting), and even multiple lesser-scale shoplifting offenses.²⁴⁰ Additionally, Denmark, Finland, Norway, and Sweden have declared diplomatic agents *persona non grata* for crimes such as drug trafficking and the illegal importation and sale of drugs, alcohol, and cigarettes.²⁴¹

While the U.S. has not been as liberal as the United Kingdom in using Article 9, it will declare a person *persona non grata* for the possession or carrying of unauthorized firearms.²⁴² Even though using Article 9 would be an effective and internationally acceptable solution to the problem, the U.S. has stated its reluctance in the past for using *persona non grata* because it is concerned about unjustified reciprocity of its use and tarnishing the “United States’ reputation for being a society governed by the rule of law.”²⁴³

Though the fear of reciprocity should be considered, the government should not be “excessively reluctant” to declare a

²³⁷ VCDR, *supra* note 19, art. 9(1); *Tabion*, 877 F. Supp. at 293.

²³⁸ DENZA, *supra* note 21, at 76–77.

²³⁹ *Id.* at 86.

²⁴⁰ *Id.* at 83.

²⁴¹ *Id.* at 84.

²⁴² *Id.* at 85–86.

²⁴³ *Id.* at 85 (quoting Department of State Guidance for Law Enforcement Officers with regard to Personal Rights and Immunities of Foreign Diplomatic and Consular Personnel, printed in Feb. 1988, 27 I.L.M. 1617, 1633).

diplomat *persona non grata* because “[o]therwise, [the government] will effectively have conceded the real powers that are available under the convention to control abuses. The protection against abuse of diplomatic immunity requires not only well-drawn clauses in a treaty: it also requires political will.”²⁴⁴ Many leaders in Washington recently pledged to fight human-trafficking crimes committed by diplomats.²⁴⁵ This, coupled with the unanimous passage of the WWTVPRA in 2008, signals that the U.S. may be more willing to take bolder legislative or diplomatic action.

Just as the U.S. holds the rule of law as a bedrock of American society, the right to be free from slavery and involuntary servitude is also fundamental.²⁴⁶ Therefore, the U.S. should not allow the enslavement and abuse of domestic workers by foreign diplomats in the U.S. to taint America’s image as a society dedicated to the unalienable right of freedom for all. The U.S. can promote both the image of a society governed by the rule of law and the unalienable right of freedom for all by adopting a policy of declaring a diplomat *persona non grata* for human-trafficking offenses, similar to its policy regarding firearms offenses. International precedent for taking bolder action in declaring a diplomat *persona non grata* for drug trafficking offenses is already established by the actions by the United Kingdom, Denmark, Sweden, Finland, and Norway, so it is not a far stretch to adopt a similar policy for human trafficking. Though this is only a partial solution (because the victim is not able to recover any damages for the abuse), at least the abusive diplomat is expelled from the country and hopefully prevented from obtaining an A-3 or G-5 visa in the future.

²⁴⁴FAC REPORT, *supra* note 191, ¶ 66.

²⁴⁵Luis CdeBaca, the Ambassador At-large for Human Trafficking, stated, “immunity does not mean impunity to enslave domestic servants on U.S. soil, and we will continue to work to ensure that these domestic workers are accorded full rights and human dignity in our country.” Fitzpatrick, *supra* note 14. *See also supra* text accompanying note 1. Senator Richard Durbin of Illinois, Chairman of a Senate Subcommittee on Human Rights, has been quoted as saying: “It’s unthinkable that we would let this continue.” Kirk Semple, *Government Report Points to Diplomats’ Abuse of Workers They Bring With Them*, N.Y. TIMES, July 30, 2008, at B3.

²⁴⁶*See* Trafficking Victims Protection Act of 2000 of 2000, 22 U.S.C. § 7101(b)(22) (2006) (“One of the founding documents of the United States, the Declaration of Independence, recognizes an inherent dignity and worth of all people. It states that all men are created equal and that they are endowed by their Creator with certain unalienable rights. The right to be free from slavery and involuntary servitude is among those unalienable rights. Acknowledging this fact, the United States outlawed slavery and involuntary servitude in 1865, recognizing them as evil institutions that must be abolished. Current practices of sexual slavery and trafficking of women and children are similarly abhorrent to the principles upon which the United States was founded.”).

CONCLUSION

The stories of courageous women escaping their captivity and seeking help have opened the public and the government's eyes to the reality of trafficking and exploitation by foreign-diplomat employers. The legal and political battle of bringing these abusive diplomats to justice has begun, but there is still much to be accomplished. Although litigants have recently experienced more success in obtaining judgments against their diplomat employers under a theory of residual immunity, judicial avenues of relief are far from adequate. Not only do the household workers have to wait until the diplomat's term is over before they can bring suit, even if the litigation is successful, they will likely never be able to collect on the judgment. However, litigation and formal complaints to international organizations are extremely important in raising awareness of specific offenders. Once the government and organizational authorities are aware of who is involved in the violations, they can prohibit the perpetrators from bringing over household workers in the future.

Since the most impact will come from forward-looking solutions, it is necessary to be aware of tools within the government's reach. Legislation is a key tool in combating the abuse. The passage of the William Wilburforce Trafficking Victims Protection Reauthorization Act was a big step forward. Through this law, Congress tightened the visa interview process and forced consular officers to explain and give applicants a copy of a pamphlet outlining their legal rights and ways to get help. However, Congress needs to pass more legislation requiring the government to routinely check-up on domestic workers to make sure that they are not stuck in abusive situations. With increased public awareness and the pledges of Senator Richard Durbin, Secretary of State Hillary Rodham Clinton, and Ambassador Luis CdeBaca to combat trafficking,²⁴⁷ it is possible that more legislation on this topic will be passed.

Nonetheless, because of the fear of reciprocity, it is unlikely that the U.S. government or the international community will pass any legislation or make any amendments to the VCDR that would make even a small dent in the absolute nature of diplomatic immunity. However, the U.S. can and should use the diplomatic process and the formal measures embodied in the VCDR, such as declaring a diplomat *persona non grata*, to combat this problem. The U.S. should follow the lead of the United Kingdom, Denmark, Finland, Norway, and Sweden in expanding the use of *persona non grata* to include

²⁴⁷ See *supra* note 245.

more crimes and be the first country to declare a diplomat *persona non grata* for trafficking domestic workers. Therefore, even though under the current legal framework it is unlikely that the courts or the government can remedy the abuse that has happened in the past, authorities may be able to diminish, if not eliminate, similar abuse from occurring in the future. Action needs to be taken, for indeed, “[i]t is unthinkable that we would let this continue.”²⁴⁸

JENNIFER HOOVER KAPPUS[†]

²⁴⁸ Semple, *supra* note 245 (quoting Senator Richard Durbin) (internal quotation marks omitted).

[†] J.D. Candidate, 2011, Case Western Reserve University School of Law. The author would like to thank specially her husband, Brendan, her parents, and her brother, David, for their never-ending love and support, and Professor Jonathan Entin, Professor Richard Gordon, and Sarah Greenlee for their guidance and advice throughout the note-writing process.