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Double Jeopardy: Domestic Workers in Diplomatic Households and Jurisdictional Immunities†

The scope of diplomatic immunity and rights claims by domestic workers in diplomatic households have been the subject of a series of cases in U.S. and U.K. courts in recent years. Parallel to these cases is a related but distinct body of case law on the immunities of states and possible exceptions to immunity claims that arise in the sphere of employment relations. Against this background, international law on state and diplomatic immunities has become increasingly fragmented and uncertain in its scope and application. This Article examines the evolving laws of diplomatic and state immunity as they apply to the employment of domestic workers, with particular reference to the evolving case law in the United Kingdom and the United States. The picture that emerges is a fragmented one, suggesting continuing uncertainty on the part of courts and tribunals when faced with immunity claims. This fragmentation and, at times, dissonance go to the heart of competing views of the purpose of international law and its declared values. The case law and evolving human rights norms examined here reveal a willingness to question the scope and purpose of immunity claims. What remains, however, is a tangled web of state and diplomatic immunity laws, with limited and often highly contested exceptions that pose significant difficulties for domestic workers who seek effective remedies for their claims.

Introduction

The scope of diplomatic immunity and claims by domestic workers in diplomatic households have been the subject of a series of cases in U.S. and U.K. courts in recent years. Parallel to these developments is a related but distinct body of case law on the immunities of states and possible exceptions to immunity claims that may arise in the sphere of employment relations. International law on state and diplomatic

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immunities has become increasingly fragmented and uncertain in its scope and application. For domestic workers, this uncertainty adds further to the precarious nature of their work, undermining the gradual expansion and "jurisgenerative"[1] potential of expanding human rights standards.

Domestic workers employed as private staff by diplomats or international civil servants remain one of the most "at risk" categories of domestic workers, with two factors combining to create a "specific protection gap":[2] the often "tied" nature of their immigration status and the potential immunity claim that may be submitted by a state invoking international law rules on state immunity or by a diplomat invoking the 1961 Vienna Convention on Diplomatic Relations (VCDR).[3]

Debates concerning whether or not international law rules can safeguard domestic workers in diplomatic households reflect the often gendered politics of jurisdictional conundrums in international law. Jurisdiction has been described as the "governance of legal governance," concerned primarily with questions of territory (where) and authority (who).[4] Jurisdiction—understood as a peculiarly legal technology of governance—"also differentiates and organizes the 'what' of governance—and, most importantly because of its relative invisibility, the 'how' of governance."[5] The seeming legitimacy of jurisdictional limits applied to exclude domestic workers from rights, for example, can follow from a failure to question how the first-order determinations of jurisdictional line-drawing were decided upon. Hiding behind such jurisdictional conundrums serves to deny the politics of decision making on how or whether to regulate employment in diplomatic households.

This Article examines the evolving laws of diplomatic and state immunity as they apply to the employment of domestic workers. It focuses, in particular, on evolving case law and legal standards in the United Kingdom and the United States. The picture that emerges from this examination is a fragmented one, suggesting

1. *See* Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). The term "jurisgenerative" is used by Cover to describe the process through which legal meaning is created. Benhabib draws on the concept of the "jurisgenerative" to explore the expansion of human rights norms through international legal standards and their implementation in domestic laws. *See* SEYLA BENHABIB, THE RIGHTS OF OTHERS 181 (2004); SEYLA BENHABIB, DIGNITY IN ADVERSITY: HUMAN RIGHTS IN TROUBLED TIMES (2011).

2. Gulnara Shahinian (Special Rapporteur on Contemporary Forms of Slavery, Including Its Causes and Consequences), *Report to the Human Rights Council, 15th Sess.*, ¶ 57, U.N. Doc. A/HRC/15/20 (June 18, 2010).

3. Vienna Convention on Diplomatic Relations, Apr. 14, 1961, 500 U.N.T.S. 95. A "private servant" is defined as "a person who is in the domestic service of a member of the mission and who is not an employee of the sending State." *Id.* art. 1(h).

4. Mariana Valverde, *Jurisdiction and Scale: Legal 'Technicalities' as Resources for Theory*, 18 SOC. & LEGAL STUD. 139, 141, 144 (2009).

5. *Id.* at 144.

continuing uncertainty on the part of courts and tribunals when faced with diplomatic and state immunity claims. This fragmentation and, at times, dissonance go to the heart of competing views of the purpose of international law and its declared values. Workers seeking to vindicate rights that might otherwise be protected were their employers not shielded by the walls that surround diplomatic households have encountered significant difficulties in challenging immunity claims. Piercing the veil of jurisdictional immunities, even where a clear "inequality of arms" exists, has not proven easy, and, as yet, the transformative potential of evolving human rights and labor standards for domestic workers in such households has not been realized.

The case law and international legal standards examined here reveal a willingness to question and challenge the scope and purpose of immunity claims. What remains, however, is a tangled web of state and diplomatic immunity laws, subject to limited and often highly contested exceptions that pose significant difficulties for domestic workers seeking effective remedies for their claims.

I. Setting the Scene: Migrant Domestic Workers Accompanying Diplomats

As Aleinikoff notes, the migration process is built around a "triangular relationship among a person, a sending state, and a receiving state."[6] The rights claims of domestic workers in diplomatic households, however, are frequently trumped by the more pressing interests of safeguarding good diplomatic relations between states. The "decent work deficit" experienced by domestic workers has increasingly come to the attention of international human rights bodies and regional and domestic courts.[7] In respect of migrant domestic workers, their often precarious migration status and dependency (both de facto and de jure) on their employers adds further to the deficits in protection afforded by international labor and human rights standards.[8] Recent standard-setting initiatives have attempted to address these gaps and have included the adoption of the landmark 2011 International Labour Organization (ILO) Convention Concerning Decent Work for

6. T. Alexander Aleinikoff, *International Legal Norms and Migration: A Report*, *in* Migration and International Legal Norms 1, 2–3 (T. Alexander Aleinikoff & Vincent Chetail eds., 2003).

7. For commentary, see Virginia Mantouvalou, *Servitude and Forced Labour in the 21st Century: The Human Rights of Domestic Workers*, 35 Indus. L.J. 395 (2006); Siobhán Mullally & Clíodhna Murphy, *Migrant Domestic Workers in the UK: Enacting Exclusions, Exemptions, and Rights*, 36 Hum. Rts. Q. 397 (2014).

8. *See, e.g.*, Bridget Anderson, Doing the Dirty Work? The Global Politics of Domestic Labour (2000); Bridget Anderson, *A Very Private Business: Exploring the Demand for Migrant Domestic Workers*, 14 Eur. J. Women's Stud. 247 (2007); Bridget Anderson, *Migration, Immigration Controls and the Fashioning of Precarious Workers*, 24 Work Emp. & Soc'y 300 (2010).

Domestic Workers,[9] a General Recommendation on Women Migrant Workers from the UN Committee on the Elimination of Discrimination Against Women (CEDAW),[10] and a General Comment on Migrant Domestic Workers from the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families—the first General Comment issued by this committee.[11]

The protection of the rights of domestic workers is a key site of conflict between international legal rules that regulate diplomatic relations between states and those regulating relationships between individuals (including migrant workers) and states. As presently defined, the intersection of the legal regulation of immigration with that of diplomatic relations molds domestic workers in diplomatic households into a position of subordination, a position that is anathema to international human rights and labor standards. Of all the categories of migrant domestic workers, those employed in diplomatic households are most likely to be characterized as engaged in "unfree" work, constrained by immigration law on the one hand and laws of diplomatic and state immunity on the other.[12] The protection theoretically available to such workers continues to be hindered by the operation of law, with state interests in protecting the public sphere of international diplomacy shielding diplomats and states from accountability for what takes place in the private domain of the diplomatic household.

Information and statistics from specialized NGOs, as well as reported cases, confirm that the exploitation and abuse of domestic workers in diplomatic households is a real and ongoing problem.[13] The precarious situation of such workers has been highlighted by a number of UN and international bodies, including the UN Special Rapporteur on Contemporary Forms of Slavery and the EU Fundamental Rights Agency.[14] CEDAW in its General Recommendation on Women Migrant

9. Convention Concerning Decent Work for Domestic Workers, I.L.O. Convention No. 189, June 16, 2011.

10. Committee on the Elimination of Discrimination Against Women [CEDAW], General Recommendation No. 26 on Women Migrant Workers, Doc. No. CEDAW/C/2009/WP.1/R (Dec. 5, 2008).

11. Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families [Committee on Migrant Workers], General Comment No. 1 on Migrant Domestic Workers, Doc. No. CMW/C/GC/1 (Feb. 23, 2011).

12. On the transition from "unfree" to "free" work for migrant domestic workers generally, see ANDERSON, *supra* note 8, ch. 1 (in particular at 4). *See also*, *generally*, Fiona Williams, Review Article, *Migration and Care: Themes, Concepts and Challenges*, 9 SOC. POL'Y & SOC'Y 385 (2010).

13. *See, e.g.*, Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings Organization for Security and Co-operation in Europe [OSCE], *Unprotected Work, Invisible Exploitation: Trafficking for the Purpose of Domestic Servitude* (OSCE Occasional Paper Series No. 4, 2010), http://www.osce.org/secretariat/75804?download=true [hereinafter OSCE Occasional Paper No. 4].

14. *See* Shahinian, *supra* note 2; EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, MIGRANTS IN AN IRREGULAR SITUATION EMPLOYED IN DOMESTIC WORK: FUNDAMENTAL RIGHTS CHALLENGES FOR THE EUROPEAN UNION AND ITS MEMBER STATES 17 (2011), http://fra.europa.eu/sites/default/files/migrants_in_an_irregular_situation_employed_in_domestic_work_en.pdf.

Workers[15] and the UN Committee on Migrant Workers in its General Comment on Migrant Domestic Workers[16] have highlighted the particular obstacles faced by domestic workers in diplomatic households, in obtaining effective remedies for human rights violations.

In the United States, statements of interest submitted by the U.S. Department of State in the context of both state and diplomatic immunity claims reflect an overriding concern to preserve friendly relations between nations. Deference is repeatedly paid to such claims, leaving domestic workers without recourse to legal remedies. For EU member states and states parties to the European Convention on Human Rights (ECHR),[17] both EU law and the ECHR have been found to be infringed in cases where domestic courts have upheld state immunity claims in the context of employment disputes. Diplomatic immunity afforded by domestic courts to serving diplomats also raises questions as to those states' compliance with positive obligations of protection arising under Article 4 ECHR, which prohibits slavery, servitude, and forced or compulsory labor, and under international human rights standards. These positive obligations include the prevention, investigation, and prosecution of serious forms of labor exploitation, and are linked to duties to ensure access to the courts (Article 6 ECHR) and to effective remedies for human rights violations (Article 13 ECHR), recognized also in Article 47 of the Charter of Fundamental Rights of the European Union.[18]

The UN Committee on Migrant Workers has called on states to ensure that migrant domestic workers can obtain legal redress and remedies, including from employers who enjoy diplomatic immunity.[19] In 2010, the UN Special Rapporteur on the Human Rights of Migrants, reporting on his mission to the United Kingdom, specifically recommended that the U.K. government consider extending the right to change employer to domestic workers in diplomatic households as a safeguard against "abusive practices."[20]

The 2014 Report of the U.K. Joint Committee on the Draft Modern Slavery Bill specifically recommended that the government consider issuing visas to domestic workers only where the contractual arrangements are directly with an embassy or other diplomatic mission, rather

15. CEDAW, General Recommendation No. 26 on Women Migrant Workers, *supra* note 10, at ¶ 21.

16. Committee on Migrant Workers, General Comment No. 1 on Migrant Domestic Workers, *supra* note 11, at ¶ 18.

17. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221.

18. Consolidated Version of the Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 2.

19. Committee on Migrant Workers, General Comment No. 1 on Migrant Domestic Workers, *supra* note 11, at ¶ 49.

20. Jorge Bustamente (Special Rapporteur on the Human Rights of Migrants), *Report of the Special Rapporteur on the Human Rights of Migrants—Addendum: Mission to the United Kingdom of Great Britain and Northern Ireland*, ¶ 76(a), U.N. Doc. A/HRC/14/30/Add.3 (Mar. 16, 2010).

than with an individual diplomat.[21] In response, the government questioned whether such a measure would provide additional safeguards to a domestic worker, given that a decision by a tribunal in favor of a worker could face difficulties of enforcement where an immunity claim is asserted by an embassy. No reference was made by the government to obligations arising under either the ECHR or the EU Charter of Fundamental Rights to ensure access to the courts and to effective remedies. Neither was any reference made to the state's obligations under international human rights treaty standards. The only reference to international legal obligations in the government's response is found in its stated commitment to the VCDR and to ensuring compliance with employment laws, including by requesting waivers of immunity should immunity claims arise.[22] An independent review of the United Kingdom's Overseas Domestic Worker Visa, undertaken by James Ewins QC, recommended that the conditions of the sponsorship license be amended to require that overseas domestic workers in diplomatic households be employed by the embassy mission rather than by individual diplomats.[23] This recommendation reflects the evolution of the law of state immunity and greater recognition of the more limited scope of state immunity in disputes relating to employment contracts. In its response to the report, the government reiterated its earlier position, noted above, that such a reform would be unlikely to make a "material difference" to the government's ability to check compliance, noting that the mission would enjoy state immunity. This response, however, fails to acknowledge the diverging practice on the scope of diplomatic and state immunity in such cases. A compromise position is taken in the 2016 *Tiers 2 and 5: Guidance for Sponsors* document issued by U.K. Visas and Immigration (applicable to sponsors of private servants in diplomatic households), which provides that an application for a sponsor license amounts to an acknowledgment that a limited waiver of immunity or inviolability may be sought from the head of mission in order to undertake compliance activity relating to the license.[24]

The continuing nexus between abuse of domestic workers and the classical architecture of international law is manifested here in the law of diplomatic immunity. Domestic workers in diplomatic households continue to function in law's shadows, dependent on ad-hoc

21. JOINT COMMITTEE ON THE DRAFT MODERN SLAVERY BILL, DRAFT MODERN SLAVERY BILL: REPORT, 2013–14, HL Paper 166 & HC 1019, ¶ 228 (U.K.).

22. SEC'Y OF STATE FOR THE HOME DEPT., THE GOVERNMENT RESPONSE TO THE REPORT FROM THE JOINT COMMITTEE ON THE DRAFT MODERN SLAVERY BILL, SESSION 2013–14 HL PAPER 166 / HC 1019: DRAFT MODERN SLAVERY BILL, 2014, Cm. 8889, at 28 (U.K.).

23. JAMES EWINS, INDEPENDENT REVIEW OF THE OVERSEAS DOMESTIC WORKERS VISA 46 (¶ 165.1) (Dec. 16, 2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486532/ODWV_Review_-_Final_Report__6_11_15_.pdf.

24. U.K. Visas & Immigration, Tiers 2 and 5: Guidance for Sponsors ¶ 4.20 (TIER 5 (Temporary Worker) International Agreement) (Apr. 2016), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515819/Tier_25_guidance_04-16_v1.2.pdf.

measures of diplomacy to secure enforcement of rights claims. The expansion of decent work standards to domestic work may provide a corrective, as Blackett has suggested, to the "abstract articulations" of rights that traditionally overlook the exploitation of domestic workers.[25] The refusal on the part of some governments and employers to support this expansion of rights, however, continues to postpone a meaningful expansion of rights protections for diplomatic domestic workers in particular.

A. Denial of Redress: Implications of Diplomatic Immunity

Continued deference to the law of diplomatic immunity stems from the reciprocal benefits of compliance for states, which, as Rosalyn Higgins noted, are "visible and manifest."[26] The rationale for the granting of privileges and immunities to diplomats is outlined in the preamble to the VCDR, which states that it contributes "to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,"[27] while also emphasizing that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States." Article 31, the key provision in this respect, provides that diplomatic agents[28] shall enjoy immunity from jurisdiction and from enforcement measures, with Article 31(1) setting out the principles of criminal immunity and qualified civil immunity.

The immunity of the diplomat is reinforced by Articles 29 and 30, which render the diplomat's person, private residence, papers and correspondence, and property inviolable. The diplomat's family members (spouse and minor children) who are living in the household are also extended immunity during the period of the diplomatic posting, pursuant to Article 37 of the VCDR.

Unfortunately, the immunity of diplomats in respect of relatively minor issues such as illegal parking has often received greater public attention than the abusive employment relationships of some diplomatic employers with their domestic workers.[29] There are two significant implications of Article 31 VCDR for domestic work, however. First,

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25. Adelle Blackett, *Introduction: Regulating Decent Work for Domestic Workers*, 23 CAN. J. WOMEN & L. 1, 44 (2011) (citing Adelle Blackett, *Situated Reflections on International Labour Law, Capabilities, and Decent Work: The Case of Centre Maraîcher Eugène Guinois*, REVUE QUÉBÉCOISE DE DROIT INTERNATIONAL (SPECIAL ISSUE) 223, 242 (2007)).

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

27. Vienna Convention on Diplomatic Relations, *supra* note 3, pmbl.

28. Note that diplomats who are nationals or permanent residents of the host state have more limited immunity. They enjoy immunity from jurisdiction and inviolability only in respect of official acts performed in the exercise of their function. *Id.*, art. 38(1)).

29. *See* Jonathan Brown, *Diplomatic Immunity: State Practice Under the Vienna Convention on Diplomatic Relations*, 37 INT'L & COMP. L.Q. 53 (1988); Mitchell S. Ross, *Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities*, 4 AM. U. INT'L L. REV. 173 (1989).

absent a waiver by the sending state, the diplomat is immune from prosecution for offences involving trafficking, slavery, domestic servitude or forced labour, where such offences exist in domestic law. These offences aim to deter and punish extreme forms of labour exploitation. Secondly, immunity from civil proceedings in employment law persists unless a claim can fit into one of the exceptions allowed for in Article 31.

Diplomatic immunity is extended to diplomats once they take up their post within the host state,[30] and (pursuant to Article 39(2)) continues until a diplomat leaves the host state, except for acts performed by such a person in the exercise of his or her functions as a member of the mission; for those acts, immunity subsists.[31] The extent of the residual immunity enjoyed by former diplomats has been explored in case law, and there is now greater willingness to limit the scope of such immunity claims. Family members do not benefit from residual immunity.

Consular staff also benefit from immunity under the Vienna Convention on Consular Relations,[32] though the immunity available is more limited and does not apply to civil actions which arise out of a contract entered into by a consular officer or employee that was not undertaken in his or her capacity as an agent of the sending state.[33] Certain categories of staff employed by international organizations also enjoy immunities and privileges.[34]

B. Reinforcing Vulnerability: Informal Immigration Arrangements for Diplomatic Domestic Workers

Immigration arrangements relating to diplomatic domestic workers are characterized by their relative informality. As a general rule, the special immigration status of domestic workers is dependent on the continuation of the employment relationship and their employer's stay in the host country, and therefore it does not allow them to switch their employer. This means that once the employment relationship has ended, the domestic worker loses her or his right to stay and work in the host state's territory.[35]

30. Vienna Convention on Diplomatic Relations, *supra* note 3, art. 39(1).

31. *Id.* art. 39(2).

32. Vienna Convention on Consular Relations art. 43(1), Apr. 24, 1963, 596 U.N.T.S. 261.

33. *Id.* art. 43(2).

34. These are usually set out in the organization's statutes or, where an international organization is hosted by a particular country, in the headquarters agreement between the organization and the host country. The Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15, and the Convention on the Privileges and Immunities of the Specialized Agencies, Nov. 21, 1947, 33 U.N.T.S. 261, set out the privileges and immunities to which staff of the United Nations and its specialist agencies are entitled.

35. ANGELIKA KARTUSCH, GERMAN INST. FOR HUMAN RIGHTS, DOMESTIC WORKERS IN DIPLOMATS' HOUSEHOLDS: RIGHTS VIOLATIONS AND ACCESS TO JUSTICE IN THE CONTEXT OF DIPLOMATIC IMMUNITY 26 (2011).

In a number of states, media and NGO commentary on the risks faced by domestic workers in diplomatic households has led to the introduction of mechanisms of control at the "entry" stage of the immigration process. For example, Austria, Belgium, Germany, and France provide model contracts that are drafted in compliance with domestic labor law standards.[36] Other states require that the employer sign a declaration, endorsed by the relevant embassy mission, confirming compliance with domestic labor law in the employment relationship, and further confirming that accommodation, health insurance, and a return flight at the end of the contract will be provided.[37] In Austria, it must be shown that a bank account has been opened for the domestic worker, and in practice the protocol departments in France, Germany, and the Netherlands recommend the setting-up of bank accounts for domestic workers as an additional protective measure. Ministries of foreign affairs in certain jurisdictions hold interviews with domestic workers employed in diplomatic households,[38] a practice that has been welcomed in the Austrian context, for example, by the Council of Europe Group of Experts on Action Against Trafficking in Human Beings (GRETA).[39] Ireland has traditionally provided a striking example of relative informality in the approach taken to the employment of domestic workers in diplomatic households.[40] More recently, guidelines published by the Irish Department of Foreign Affairs and Trade have sought to remedy the gaps in protection arising in such contexts, and have clarified the application procedure for domestic workers employed by diplomats coming to Ireland.[41] An undertaking

36. *See id.* at 23.

37. *Id.* at 24. On reforms to improve the status of domestic workers in diplomatic households in the context of human trafficking, see generally Group of Experts on Action Against Trafficking in Human Beings [GRETA], Council of Europe, Report Concerning the Implementation of the Council of Europe Convention on Action Against Trafficking in Human Beings by Germany: First Evaluation Round, ¶¶ 120–21, Doc. No. GRETA(2015)10 (June 3, 2015); GRETA, Council of Europe, Report Concerning the Implementation of the Council of Europe Convention on Action Against Trafficking in Human Beings by the Netherlands: First Evaluation Round, ¶ 143, Doc. No. GRETA(2014)10 (June 18, 2014).

38. Upon their arrival, workers in Austria, Belgium, Switzerland, and (with some exceptions) France must attend the relevant government department unaccompanied to collect their identification card. *See* KARTUSCH, GERMAN INST. FOR HUMAN RIGHTS, *supra* note 35, at 24. *See also* GRETA, Council of Europe, Report Concerning the Implementation of the Council of Europe Convention on Action Against Trafficking in Human Beings by Belgium: First Evaluation Round, ¶ 127, Doc. No. GRETA(2013)14 (Sept. 25, 2013).

39. GRETA, Council of Europe, Report Concerning the Implementation of the Council of Europe Convention on Action Against Trafficking in Human Beings by Austria: First Evaluation Round, ¶ 73, Doc. No. GRETA(2011)10 (Sept. 15, 2011). *See also* GRETA, Council of Europe, Report Concerning the Implementation of the Council of Europe Convention on Action Against Trafficking in Human Beings by Austria: Second Evaluation Round, ¶ 196, Doc. No. GRETA(2015)19 (Oct. 12, 2015).

40. MIGRANT RIGHTS CENTRE IRELAND, PROTECTING DOMESTIC WORKERS EMPLOYED BY DIPLOMATS IN IRELAND 2 (2011), http://mrci.ie/wp-content/uploads/2012/10/Policy-Paper-Diplomatic-Immunity-2011.pdf.

41. Ireland, Dept. of Foreign Affairs, Guidelines Relating to the Employment of Private Domestic Employees by Accredited Members of the Mission (Oct. 2015), https://www.dfa.ie/media/dfa/alldfawebsitemedia/newspress/publications/Guidelines-on-the-Employment-of-Private-Domestic-Employees-by-Accredited-Members-of-the-Mission-OCT15.pdf.

to comply with agreed terms and conditions of employment must be signed prior to arrival. The domestic worker remains outside of normal immigration procedures, however, cannot change employer, and cannot access the social protection system. The high degree of informality in respect of the immigration status of diplomatic workers reinforces their invisibility.

In the United States, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 introduced a series of preventive measures following increasing political criticism of the failure to address incidents of trafficking by diplomats.[42] The measures introduced include the distribution of an education pamphlet for domestic workers informing them of their rights and available supports; a prenotification requirement of visa application; a presumption of visa ineligibility unless the employer holds the diplomatic rank of minister (or equivalent), so as to ensure his or her ability to pay the legally required wages; and a requirement that wage payments be deposited into a bank account in the domestic worker's name only. The prenotification requirement allows the U.S. State Department to maintain records of employment of domestic workers, and is also intended to ensure that chiefs of mission can be held accountable for the treatment of domestic workers.[43] The education efforts are now to be supplemented with video materials for domestic workers to be shown in consular offices, as provided in the Violence Against Women Reauthorization Act of 2013.[44] Additional references to states' positive obligations to "appropriately address public allegations" against officials, including diplomats, once they return home are included in the 2013 act as indicia of "serious and sustained efforts" to eliminate severe forms of trafficking, and failure to meet such obligations is to be considered "inaction."[45]

To date, the U.S. government's efforts concerning trafficking in diplomatic households have tended to focus on prevention rather than on provision of effective remedies and access to compensation for the domestic worker.[46] These efforts, Chuang argues, "are too weak to serve as the centerpiece of the U.S. government's response to the problem of diplomatic trafficking," especially in the absence of effective remedies or a willingness to invoke punitive measures against

42. Pub. L. 110-457, 122 Stat. 5044 (2008) (codified as amended at 22 U.S.C. ch. 78).

43. *See* U.S. DEP'T OF STATE, REPORT TO CONGRESS REGARDING THE "WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2008" 2–3 (2009), *cited in* Janie A. Chuang, *Achieving Accountability for Migrant Domestic Worker Abuse*, 88 N.C. L. REV. 1627, 1648 n.119 (2010).

44. Pub. L. 2013-4, sec. 1206, 127 Stat. 54, 140–41 (2013) (amending William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, § 292 (8 U.S.C. § 1375b)).

45. *Id.* sec. 1204, 127 Stat. 54, 139 (amending Trafficking Victims Protection Act of 2000, § 108(b) (22 U.S.C. § 7106(b))).

46. *See* Chuang, *supra* note 43, at 1649.

diplomatic missions that fail to ensure the adequate protection of domestic workers' rights.[47] Where sensitive or strategically important diplomatic ties are engaged, however, as in the case of Indian consular official Devyani Khobragade,[48] the political will to pursue the "inaction" of sending states is limited.[49]

Evolving "best practices" and bilateral initiatives may be useful in reducing the invisibility and isolation of domestic workers in diplomatic households.[50] They signal an acknowledgment of the difficulties that can be encountered by such workers. However, in practice, it is difficult to monitor the effectiveness of these policies partly because they are, for the most part, set out in administrative circulars and diplomatic correspondence rather than in legally binding texts. Despite the expansion of such bilateral initiatives, avenues of redress for those who have endured abuse and exploitation remain limited.

Abuse of domestic workers in diplomatic households is all the more egregious given that migrant domestic workers are frequently reliant on consular services for support.[51] The importance of effective access to such supports is noted by the UN Special Rapporteur on the Human Rights of Migrants, François Crépeau, in his thematic report on the labor exploitation of migrants.[52] Several governments have entered into bilateral agreements with receiving states in an effort to prevent abuses of migrant domestic workers and to overcome the otherwise limited applicability of labor standards to diplomatic households.[53] The advocacy of embassy officials is often crucial to ensuring that such agreements are effectively implemented. The necessity for such advocacy in the absence of effective safeguards for domestic workers is already recognized, for example, by the governments of the Philippines and several other countries considered to be "labor-exporting."[54] The governments of the Philippines and Lebanon have negotiated a Memorandum of Understanding and

47. *Id.*

48. *See* discussion *infra* text accompanying notes 82–86.

49. On the strategic importance of the United States–India diplomatic relationship, see BROOKINGS INST., THE MODI–OBAMA SUMMIT: A LEADERSHIP MOMENT FOR INDIA AND THE UNITED STATES (2014), http://www.brookings.edu/research/flash-topics/flash-topic-folder/us-india-modi-obama-summit.

50. For a discussion on such initiatives in Lebanon, see Gulnara Shahinian, *Traditions, Law and Practice: Migrant Domestic Workers in Lebanon*, *in* CARE, MIGRATION AND HUMAN RIGHTS: LAW AND PRACTICE 131 (Siobhán Mullally ed., 2015).

51. Ayesha Shahid, *Migrant Filipino Domestic Workers in Pakistan: Agency, Rights and the Limits of the Law*, *in* CARE, MIGRATION AND HUMAN RIGHTS: LAW AND PRACTICE, *supra* note 50, at 150, 170.

52. François Crépeau (Special Rapporteur on the Human Rights of Migrants), *Labour Exploitation of Migrants*, ¶ 99, U.N. Doc. A/HRC/26/35 (Apr. 3, 2014).

53. *See* Abdul Rehman, *From Philippines to Pakistan: Maids Can Be Brought in for Only a Few Thousand Rupees*, EXPRESS TRIB. (Feb. 24, 2013), http://tribune.com.pk/story/511766/from-philippines-to-pakistan-maids-can-be-brought-in-for-only-a-few-thousand-rupees/.

54. *See* Nicole Constable, *Obstacles to Claiming Rights: Migrant Domestic Workers in Asia's World City, Hong Kong*, *in* CARE, MIGRATION AND HUMAN RIGHTS: LAW AND PRACTICE, *supra* note 50, at 90.

Protocol intended as a step towards lifting the restrictions on travel to Lebanon that were previously in place for migrant domestic workers seeking employment.[55]

Such bilateral negotiations and agreements can serve to fill gaps in rights enforcement.[56] However, as long as diplomatic households themselves continue to remain immune to scrutiny, efforts to support the enforcement of labor standards for migrant domestic workers can only be of limited impact. What is not clear in such cases is the outcome for the domestic worker as states resort to the traditions of "tit-for-tat" diplomatic disputes. Whether such responses meet states' positive obligations on the right to effective access to legal remedies is increasingly open to question. Skepticism as to the political will to support implementation and greater compliance with labor and human rights standards persists in the absence of a commitment to extend scrutiny to the state's own diplomatic missions.

II. "IMMUNITY USUALLY ENTAILS IMPUNITY"?[57] RESPONSES TO IMMUNITY CLAIMS

A. Diplomatic Law Limits to Immunity

Suggestions to amend the VCDR in order to exclude diplomatic immunity for all offenses committed by diplomatic staff in private life[58] or to provide for a human trafficking exception to immunity are unlikely to be taken on board. Nonetheless, as the UN Special Rapporteur on Contemporary Forms of Slavery has pointed out, where immunity is accepted by the receiving state and its courts, the receiving state still has a number of options open to it to secure remedies under the terms of the VCDR itself.[59] Article 9 of the Convention provides that the receiving state may "at any time, and without having to explain its decision" declare any member of the diplomatic mission to be *persona non grata* and not accepted in the state. In those circumstances, the sending state must recall the person concerned or

55. *See* Memorandum of Understanding on Labor Cooperation, Leb.–Phil., Feb. 1, 2012, http://www.poea.gov.ph/laborinfo/bilateralLB/BLA_PH_Lebanon2012.pdf. The MOU and accompanying Protocol, however, have been described by Human Rights Watch as a "band-aid," applicable only to a limited group of domestic workers and not addressing the systemic, structural problems in place. *See* Emma Gatten, *MOU on Philippine Workers Won't Resolve Key Problems: Rights Group*, DAILY STAR (Feb. 4, 2012), http://www.dailystar.com.lb/News/Local-News/2012/Feb-04/162130-mou-on-philippine-workers-wont-resolve-key-problems-rights-group.ashx.

56. *See* Marion Panizzon, *Temporary Movement of Workers and Human Rights Protection: Interfacing the "Mode 4" of GATS with Non-Trade Bilateral Migration Agreements*, 104 AM. SOC'Y INT'L L. PROC. 131 (2010).

57. OSCE, *supra* note 13, at 27.

58. *See, e.g.*, Council of Europe, Parliamentary Assembly, Recommendation 1523 (2001): Domestic Slavery, ¶ 10.4.

59. The UN Special Rapporteur on Contemporary Forms of Slavery recommended these courses of action for states in her report to the Human Rights Council. *See* Shahinian, *supra* note 2, at ¶¶ 57–58.

terminate their functions within the mission. The U.K. Foreign Office, for example, has stated that a "serious view" is taken of any reliance on diplomatic immunity from civil jurisdiction to evade legal obligations.[60]

The receiving state can also request that the sending state waive the person's immunity under Article 32 VCLT, invoking the duty of the member of the mission pursuant to Article 41 to respect the laws and regulations of the receiving state. In respect of domestic workers, the U.K. government stated in 2011 that the failure of a sending state to waive immunity "may result in a request to the mission for withdrawal of the diplomat."[61] However, it seems that as a matter of general practice in international relations, waivers of immunity are routinely requested but only occasionally granted.[62] Finally, Article 31(4) provides that "the immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State," and as such, the receiving state could request that the sending state take criminal or civil action (as appropriate) against the diplomat.

Thus while "legal means are at hand[,] . . . they need to be matched by political will."[63] There are ways in which states could minimize the impact of immunity on the rights of diplomatic domestic workers. However, such diplomatic maneuvers have been relatively ineffective to date.

B. Continuing Invisibility: ILO Convention No. 189 Concerning Decent Work for Domestic Workers

The adoption of the 2011 ILO Convention No. 189 Concerning Decent Work for Domestic Workers[64] represented a "landmark moment" for domestic workers. The reification (and exclusion) of the household was one of the key issues that emerged in debates leading up to the adoption of Convention No. 189. The 2011 Convention is the first international instrument dedicated to addressing the specificity of domestic work. It was welcomed as recognizing "for the first time in a holistic manner within a legal document"[65] the working conditions of domestic workers. As the report that preceded the Convention notes, it was intended to mark "a transition from the paternalistic conception of the 'good employer', acting out of a sense of *noblesse oblige*, to one that is founded on respect for domestic workers' labour rights."[66] The Convention seeks to extend core decent work standards

60. Foreign Office, Memorandum on Diplomatic Privileges and Immunities in the United Kingdom, *in U.K. Materials on Int'l L.* [UKMIL], 1987 Brit. Y.B. Int'l L. 549.

61. *See* 727 Parl Deb HL (5th ser.) (2011) col. WA 79.

62. *See* Malcolm Shaw, International Law 771 (7th ed. 2014).

63. Higgins, *supra* note 26, at 651.

64. *Supra* note 9.

65. Einat Albin & Virginia Mantouvalou, *The ILO Convention on Domestic Workers: From the Shadows to the Light*, 41 Indus. L.J. 67, 67 (2012). *See also* Adelle Blackett, *The Decent Work for Domestic Workers Convention and Recommendation, 2011*, 106 Am. J. Int'l L. 778 (2012).

66. International Labour Conference, 99th Sess., Report IV(1): Decent Work for Domestic Workers 13 (2011).

concerning fair terms of employment and working conditions to the realm of domestic work. States are required to ensure that domestic workers enjoy equality with other workers with respect to working time,[67] entitlements to minimum wage,[68] healthy and safe working conditions,[69] and social security protection (including with respect to maternity).[70] It also requires states to introduce measures providing for the regulation of employment agencies[71] and for effective and accessible dispute resolution mechanisms for domestic workers.[72]

In its submission to the ILO during the drafting process, the RESPECT network (a network of migrant domestic workers' organizations, trade unions, NGOs, and supporters that campaigns for the rights of migrant domestic workers in Europe and internationally) put forward seven key areas to be considered, including the position of domestic workers in diplomatic households.[73] Despite the concerns raised, diplomatic immunity as an obstacle to securing decent work standards is not addressed in either the Convention or the accompanying Recommendation.[74] Domestic workers are treated for the most part as a homogeneous group and the particular circumstances of individual workers, including domestic workers in diplomatic households, have not been acknowledged.

C. Comparing State Practice on Diplomatic Immunity

There are documented examples of domestic workers employed by diplomats securing remedies against their former employers.[75] However, these examples generally arise from specific fact patterns or informal negotiation and settlement rather than from legal principle or certainty. In Ireland, France, and the United Kingdom, tribunals and courts have found themselves to be competent to hear cases, and have made awards to domestic workers in instances where the diplomat employer did not acknowledge the proceedings or failed to take part, but did not claim immunity as such.[76] However, such awards are often not then enforced, because immunity claims are triggered at the

67. Convention Concerning Decent Work for Domestic Workers, *supra* note 9, art. 10.
68. *Id.* art. 11.
69. *Id.* art. 13.
70. *Id.* art. 14.
71. *Id.* art. 15(a).
72. *Id.* art. 16.
73. RESPECT NETWORK, PART 1—INTRODUCTION AND KEY RECOMMENDATIONS FOR AN ILO CONVENTION ON DOMESTIC WORK 4 (Key Recommendation no. 5) (May 2009), http://respectnetworkeu.org/data/documents/RESPECT-Recs-ILO-DW-Convention-Questionaire-may-2009.pdf.
74. Int'l Labour Org., Gen. Conference, Recommendation No. 201 Concerning Decent Word for Domestic Workers, 100th Sess. (2011).
75. KARTUSCH, GERMAN INST. FOR HUMAN RIGHTS, *supra* note 35, at 33–35.
76. *Id.* at 33. In Ireland, the Employment Appeals Tribunal made an award of €80,000 ($88,500) to each of three migrant domestic workers employed by the United Arab Emirates ambassador to Ireland, who had been paid less than €2 per hour. Neither the ambassador nor his wife appeared at the tribunal hearing. *See* Calderon et al. v. Lootah and Alghubaisi, Case Nos. UD1219/2013, UD1220/2013, UD1221/2013 (Emp't Apps. Trib. Nov. 25, 2014) (Ir.). The French case is *Conseil de Prud'hommes de Paris*, Jan. 4, 2006, RG n° F 05/06486.

point of attempted enforcement[77] or because of the departure of the diplomat from the receiving state.[78] In France, the *Conseil d'État* has found that where the award cannot be enforced against the diplomat due to their immunity from enforcement measures, the French government may be liable for the worker's compensation under the doctrine of state liability without negligence.[79] Under this doctrine, the French state is liable in cases where an international treaty signed by France has an unintended significant negative effect upon a distinct group, such that the injury suffered can be considered both serious and exceptional. The relevant group for the purposes of the present discussion was defined by the Court as domestic workers employed by diplomats who had obtained a judgment of a French court that could not be enforced because of their employers' immunity from measures of execution under the VCDR.

In the U.S. context, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 offers some protection for trafficked domestic workers employed by diplomats. It authorizes the suspension of visa issuance to domestic workers seeking to work for an official in a diplomatic mission where there has been previous evidence of abuse by that official and where the abuse was tolerated by the mission.[80] Domestic workers are also permitted to remain in the United States while they are seeking legal redress against employers.[81]

The dispute concerning the arrest in New York of the Indian Deputy Consul General accredited to the United States, Devyani Khobragade, by U.S. federal authorities, following charges of visa fraud and violations of employment laws, illustrates the legal confusion that surrounds responses to abuses of consular or diplomatic privileges.[82] In this case, the dispute took a number of diplomatic twists, including indictment by a federal grand jury, a refusal on the part of India to waive immunity, reassignment of Ms. Khobragade to

77. *See* Vienna Convention on Diplomatic Relations, *supra* note 3, art. 31(3).

78. In the French case referred to above, the award could not be enforced because of the diplomat's immunity from measures of execution. In the United States, in the case of *Mazengo v. Mzengi*, 542 F. Supp. 2d 96 (D.D.C. 2008), the award could not be enforced as the defendants left the United States. In the Irish case of *Calderon et al.*, referred to *supra* note 76, the workers have received no compensation to date.

79. *See* CE 6th & 1st, Feb. 11, 2011, 325253.

80. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 203(a), 8 U.S.C. § 1375c(a); Chuang, *supra* note 43.

81. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 203(c), 8 U.S.C. § 1375c(c); Chuang, *supra* note 43.

82. United States v. Khobragade, 15 F. Supp. 3d 383 (S.D.N.Y. 2014). The indictment and associated materials are available at *Indictment, Exhibits & Related Letter; U.S. v. Devyani Khobragade*, U.S. DEPT. OF JUSTICE: U.S. ATT'Y'S OFFICE—S. DIST. OF N.Y. (Jan. 9, 2014), http://www.justice.gov/usao/nys/pressreleases/January14/KhobragadeIndictment.php. Khobragade was indicted by a Grand Jury on January 9, 2014, on two counts of visa fraud and making false statements in violation of 18 U.S.C. §§ 2, 1001, and 1546. The domestic worker in this case, Sangeeta Richard, was supported by an NGO, Safe Horizon, in pursuing her claim.

the Indian mission to the UN (in order to bring her within the scope of full diplomatic immunity rather than consular immunity only),[83] and, finally, her subsequent departure from the United States and reassignment to a post with the Ministry of External Affairs in Delhi. Retaliatory measures followed on the part of India, all of which illustrates the range of sanctions that may be deployed when an employment dispute involving a diplomatic mission arises.[84]

U.S. District Judge Shira Scheindlin subsequently ruled that Ms. Khobragade enjoyed immunity at the time the indictment was issued (January 9, 2014), having been accredited as an Indian representative to the UN as of January 8. Section 11(a) of the 1946 Convention on the Privileges and Immunities of the United Nations provides that "[r]epresentatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their functions . . . enjoy . . . [i]mmunity from personal arrest or detention."[85] This immunity extends to legal processes, but only with respect to acts committed in their capacity as representatives of an international organization. Thus, it is functional immunity only, similar to that provided to consular officials. However, the inviolability of a representative to the UN is absolute.

Ms. Khobragade was re-indicted by a federal grand jury just two days after Judge Scheindlin's ruling, on the ground that her immunity ceased following her departure from the United States and that, as such, she could no longer claim to benefit from its protection. Section 11(a) of the 1946 Convention provides for immunity and inviolability only "while [representatives are] exercising their functions and during the journey to and from the place of [conferences]."[86] As of May 2016, the indictment remains outstanding.

III. Litigating Employment Abuses: Legal Proceedings Taken by Domestic Workers Against Diplomat Employers

Despite the well-documented evidence of abuse, relatively few cases involving domestic workers seeking redress for abuse and

83. This strategy follows from the headquarters agreement between the United Nations and the United States. *See* Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations §§ 11, 15, June 26, 1947, 61 Stat. 3416, 11 U.N.T.S. 11. *See also The Practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency Concerning Their Status, Privileges and Immunities*, [1967] 2 Y.B. Int'l L. Comm'n 154, U.N. Doc. A/CN.4/L.118 and Add. l and 2.

84. Dapo Akande, *The Immunity of Representatives to the UN: A New Twist in the Diplomatic Row Between India and the United States*, EJIL: Talk!—Blog of the Eur. J. Int'l L. (Dec. 30, 2013), http://www.ejiltalk.org/the-immunity-of-representatives-to-the-un-a-new-twist-in-the-diplomatic-row-between-india-and-the-united-states/.

85. Convention on the Privileges and Immunities of the United Nations, *supra* note 34, art. IV, § 11(a).

86. *Id.*

exploitation by employers with diplomatic immunity are ever heard by courts or tribunals. Diplomatic domestic workers face structural barriers to bringing these claims, such as isolation within the diplomatic home, language difficulties, and the lack of a secure migration status independent of the employer.[87] Where such cases come before a court or tribunal, the primary difficulty faced by the litigant is the immunity of the diplomatic employer. The cases have concerned the interpretation of the commercial activity exception, residual immunity and, in the United States, civil suits for trafficking and forced labor. There are three principal objections to the application of the law of immunity in these cases. First, the current interpretation of the commercial activity exception leaves domestic workers with no civil means of redress for employment violations while the diplomat remains in their official post. Second, the approach taken in the residual immunity cases focuses on whether the acts carried out by the diplomatic employer were performed in the course of their official functions, thus taking the spotlight away from the individual rights violations at issue. Both of these factors collide with the workers' right of access to the courts. Third, immunity from criminal prosecution for diplomats may conflict with states' obligations in respect of the criminalization and effective prevention of trafficking, slavery, servitude, and forced labor.

A. Wokuri v. Kassam *and* Abusabib v. Taddese*: Pursuing an Employment Claim in the United Kingdom*

In *Wokuri v. Kassam*,[88] the scope of diplomatic immunity was examined in the U.K. courts when a domestic worker submitted a claim before an employment tribunal, stating that her diplomat employer had failed to provide her with a copy of her contract as required by law and had failed to pay her wages in full. The claimant, Ms. Wokuri, was employed as a chef and general domestic worker for the respondent, Ms. Kassam, a diplomat in the Ugandan High Commission in London. The respondent left the United Kingdom for the Rome mission in 2011, meaning that, in addition to the Article 31(1) commercial activities exception, Article 39(2) of the VCDR on residual immunity was also applicable in this case.[89]

The High Court's decision thus centered on the assessment of whether the claim arose from acts performed in the exercise of the defendant's official functions. Ms. Kassam argued that the claimant was employed directly by the High Commission and that even if she had employed the claimant personally, she did so in the exercise of her

87. U.N. Office of the High Commissioner for Human Rights, Regional Office for Europe, Rights of Migrant Domestic Workers in Europe 4 (2010), http://www.europe.ohchr.org/Documents/Publications/Study_Domestic_Migrant_webversion.pdf.

88. [2012] EWHC 105.

89. *Id.* [9]–[10]; Vienna Convention on Diplomatic Relations, *supra* note 3, arts. 31(1), 39(2).

functions as a diplomat in the High Commission and so in either case was entitled to diplomatic immunity.[90] However, the court accepted that Ms. Wokuri had worked for Ms. Kassam in Uganda for several years before Ms. Kassam became a diplomat, therefore this contract was not entered into in the exercise of her functions as a diplomat. There was no evidence that any changes were made to this contract when Ms. Wokuri came to the United Kingdom to work for Ms. Kassam, nor was there any evidence that she worked directly for the High Commission.[91] In arguing that receiving domestic help was of vital importance to her work as a diplomat,[92] Ms. Kassam referred to a circular issued by the Ugandan Ministry of Foreign Affairs, which, in the interests of promoting "conducive working conditions" in its overseas missions, allowed for the provision of a housekeeper/cook to each appointed Deputy Head of Mission at their residence, to be paid by the mission. In spite of this arrangement, the court considered that the provision of a housekeeper or cook was of indirect rather than direct benefit to diplomatic functions. Diplomatic immunity did not apply, as the claim did not arise out of acts performed in the exercise of the respondent's functions as a diplomat in the High Commission.[93]

In arriving at its decision in *Wokuri*, the court observed that there were no U.K. authorities on the issue being considered and referred to three U.S. cases involving domestic workers employed by diplomats: *Tabion v. Mufti*,[94] *Swarna v. Al-Awadi*,[95] and *Baoanan v. Baja*, discussed below.[96] These cases were drawn upon again by the U.K. Employment Appeal Tribunal (EAT) in the case of *Abusabib v. Taddese*,[97] in which the focus was once more on the functional test set out in Article 31(1)(c). The EAT went a step further than the High Court had in *Wokuri*, expressing the view that there was "little scope for the act of employing a domestic servant to be part of the function of the diplomat in his mission."[98] It acknowledged that there is a "spectrum"[99] between the employment of a domestic worker who performs no work outside the diplomat's home (which was seen as "unlikely to be an act performed in the exercise of the functions as such"),[100] and a personal assistant whose job is "replying to correspondence" and "managing the diary, travel arrangements and the like of the diplomat."[101] The EAT recognized that in less clear-cut cases along the spectrum

90. *Wokuri*, [2012] EWHC 105, [3].
91. *Id.* [27] (point (iii)).
92. *Id.* [27] (point (iv)).
93. *Id.* [27] (point (v)).
94. 73 F.3d 535 (4th Cir. 1996).
95. 622 F.3d 123 (2d Cir. 2010).
96. 627 F. Supp. 2d 155 (S.D.N.Y. 2009).
97. [2013] All ER (D) 121 (Mar), UK EAT App. No. UKEAT/0424/11/ZT (Dec. 20, 2012).
98. *Id.* [29].
99. *Id.* [31].
100. *Id*.
101. *Id*.

between these two situations, it may "be difficult to see where the dividing line between the functions of the mission, and other functions might fall."[102] In this case, taken on the grounds of direct race discrimination and harassment, harassment on the basis of religion, and sexual harassment, neither the domestic worker's employment nor the acts complained of arose from the exercise of the appellant's diplomatic functions, and thus residual immunity did not apply. The EAT noted that "[i]t cannot be said that an act of racial or sexual discrimination . . . could be regarded as any part of, or ancillary to any part of, the functions of a diplomat as a member of a mission."[103]

B. Tabion v. Mufti *and U.S. Case Law: Domestic Work as Incidental to the Daily Life of Diplomats?*

The case of *Tabion v. Mufti*[104] centered on Article 31(1)(c) VCDR, the commercial activity exception. The case concerned a Jordanian diplomat, who had retained the applicant's passport and forced her to work for sixteen hours per day and for fifty cents an hour (with no overtime pay). The respondent had threatened her with termination, deportation, and arrest if she left the residence. When the respondent, Mr. Mufti, claimed diplomatic immunity, the plaintiff argued that the commercial activity exception applied. The U.S. Court of Appeals for the Fourth Circuit concluded that the commercial activity exception was intended to encompass "trade or business activity engaged in for personal profit."[105] The court followed the "negotiating history" approach set out in the U.S. Department of State's Statement of Interest in the case, coming to the conclusion that the exception "focuses on the pursuit of trade or business activity" and "does not encompass contractual relationships for goods and services incidental to the daily life of the diplomat and family in the receiving State."[106] As the exception was held not to apply, the diplomat's immunity was recognized and the motion was therefore quashed.

As well as being endorsed in the United Kingdom in *Wokuri v. Kassam*,[107] this approach was followed in subsequent U.S. cases, including *Gonzales Paredes v. Vila*[108] and *Montuya v. Chedid*,[109] which (like *Tabion*) ended in the dismissal of civil suits against sitting diplomats by former domestic workers on the grounds of immunity.[110] In *Gonzales Paredes*, the Court found that the Statement of Interest

102. *Id*.
103. *Id.* [28].
104. 73 F.3d 535 (4th Cir. 1996).
105. *Id.* at 537.
106. *Id.* at 538 (quoting the Statement of Interest filed by the Department of State).
107. [2012] EWHC 105.
108. 479 F. Supp. 2d 187, 189–90 (D.D.C. 2007).
109. 779 F. Supp. 2d 60 (D.D.C. 2011).
110. *See also* Ahmed v. Hoque, No. 01 Civ. 7224 (D.L.C.), 2002 WL 1964806 (S.D.N.Y. Aug. 23, 2002) (also dismissed on the grounds of diplomatic immunity).

filed by the U.S. Department of State, "while not dispositive, is entitled to great deference";[111] it decided that there was "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' within the meaning of Article 31(1)(c) of the Vienna Convention on Diplomatic Relations."[112] The court rejected what it called the "creative"[113] argument that the domestic work performed by the plaintiff had allowed the diplomat to pursue academic studies, which constituted a "professional activity" outside his official functions within the meaning of Article 39(2).[114]

Attempts to expand the commercial activities exception in the United States have been unsuccessful. In *Montuya v. Chedid*,[115] the U.S. District Court for the District of Columbia rejected the argument that it should consider the case law interpreting the term "commercial activity" under the Foreign Sovereign Immunities Act,[116] as that Act was not a multilateral treaty, it was enacted after the VCDR, and it was not intended that it would change the meaning of existing international treaties. In *Sabbithi v. Al Saleh*[117] and *Swarna v. Al-Awadi*,[118] discussed below, the plaintiffs and amici curiae argued that trafficking was "commercial activity exercised by the diplomatic agent . . . outside his official functions" as human trafficking is a profitable commercial activity that results in severe human rights violations.[119] This argument was rejected in both cases, with the United States District Court for the District of Columbia in *Sabbithi* instead reaffirming the *Tabion* and *Gonzales Paredes* decisions that "such a literal manner of interpretation is superficial and incomplete, and, [this Court] believe[s], yields an incorrect rendering of the meaning of 'commercial activity' as used in the Vienna Convention."[120] It refused to interpret the VCDR in light of other elements of international law, most particularly human rights protections.

The employment relationship between a diplomat and their "private servant" (to use the terminology of the VCDR)[121] is thus

111. *Gonzales Paredes*, 479 F. Supp. 2d at 193.
112. *Id.*
113. *Id*. at 194.
114. *Id*.
115. *Montuya*, 779 F. Supp. 2d 60 (granting the defendant's motion to dismiss the plaintiff's complaint).
116. 28 U.S.C. § 1602 *et seq*.
117. 605 F. Supp. 2d 122 (D.D.C 2009).
118. 622 F.3d 123 (2d Cir. 2010).
119. *See* Statement of Interest of the United States of America, *Sabbithi*, 605 F. Supp. 2d 122, http://www.state.gov/documents/organization/153562.pdf; Second Statement of Interest of the United States of America, *Sabbithi*, 605 F. Supp. 2d 122, http://www.state.gov/documents/organization/179265.pdf; Brief for the United States of America as Amicus Curiae in Support of Affirmance, *Swarna*, 622 F.3d 123, http://www.state.gov/documents/organization/179267.pdf.
120. *Sabbithi*, 605 F. Supp. 2d at 127 (citing Tabion v. Mufti, 73 F.3d 535, 537 (4th Cir. 1996)) (alterations in original).
121. A "private servant" is defined as a "person who is in the domestic service of a member of the mission and who is not an employee of the sending State." Vienna Convention on Diplomatic Relations, *supra* note 3, art. 1(h).

not generally interpreted as involving any element of "professional or commercial activities."[122] Diplomatic employers are consequently immune from employment litigation brought by their domestic workers. This interpretive approach reflects the classic difficulty encountered by domestic workers seeking to enforce their rights: the lack of recognition of the economic value of their work and the consequent confinement of the employment relationship to the seemingly impregnable "private sphere." This also gives rise to the paradoxical situation that the indispensable nature of the day-to-day work provided by domestic workers results in a lower level of protection for their rights.

The *Tabion* line of case law enshrines a narrow approach to the interpretation of the VCDR which appears to be directly based on the U.S. government's views as set out in the relevant Statements of Interest. The Court of Appeals in *Tabion* was heavily influenced by the reciprocity approach underlying the perception of diplomatic immunity as a fundamental rule of diplomatic law, and the deference of the court to the executive branch of government in matters of foreign policy is clear in the following quote: "Policymakers in Congress and the Executive Branch . . . have determined that apparent inequity to a private individual is outweighed by the great injury to the public that would arise from permitting suit against the entity or its agents calling for application of immunity."[123]

Notwithstanding this reasoning, there are strong arguments in favor of taking a different interpretive approach to Article 31.[124] In particular, developments in the sphere of state immunity have recognized limits to the doctrine in the context of employment disputes. In the cases of *Cudak v. Lithuania*[125] and *Sabeh El Leil v. France*[126] (discussed below), the European Court of Human Rights has found that the application of state immunity in an employment dispute involving embassy employees constituted a violation of Article 6(1) ECHR, which provides *inter alia* for a right of access to a hearing by a tribunal in the determination of civil rights and obligations.[127]

C. Residual Diplomatic Immunity in the U.S. Courts

Despite the non-applicability of the commercial activity exception to the domestic worker employment relationship, two further U.S. cases, which were relied on by the U.K. High Court in *Wokuri*, confirmed the

122. Kartusch, German Inst. for Human Rights, *supra* note 35, at 16.
123. Tabion v. Mufti, 73 F.3d 535, 539 (1996).
124. See the arguments of Amy Tai, *Unlocking the Doors to Justice: Protecting the Rights and Remedies of Domestic Workers in the Face of Diplomatic Immunity*, 17 Am. U. J. Gender, Soc. Pol'y & L. 175 (2007).
125. Cudak v. Lithuania, 2010-III Eur. Ct. H.R. 153.
126. Sabeh El Leil v. France, App. No. 34869/05 (June 19, 2011), http://hudoc.echr.coe.int/eng?i=001-105378.
127. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 17, art. 6(1).

narrow limitation on immunity for claims brought by domestic workers against former diplomats. This limitation draws upon Article 39(2) VCDR which, as mentioned above, provides for residual immunity to a diplomat who is no longer in post, but only for "acts performed by such a person in the exercise of his functions as a member of the mission."[128] The lifting of immunity in these cases depends on a determination of whether the employment of the worker and the conduct of the employer constituted an official act. In *Swarna v. Al-Awadi*,[129] the plaintiff, Ms. Swarna, was promised $2,000 a month with Sundays off and one month of paid vacation per year to visit her family in India. However, when she arrived in the United States, the diplomat (Mr. Al-Awadi) retained her passport, forced her to work very long hours, and paid her only $200–$300 per month. She was also physically abused and raped by the diplomat. On considering all the facts, the Court of Appeals for the Second Circuit considered that residual immunity did not apply in this case, as Mr. Al-Awadi's employment of the plaintiff was not an act performed by the diplomat in the exercise of his functions as a member of the mission. The plaintiff was employed to meet Mr. Al-Awadi's private needs and although she cooked at official functions on occasion, this was incidental to her regular employment.[130] She won a default judgment in the District Court (as the diplomat had already left the country) for her labor law claims relating to non-payment of minimum wage and overtime, and under the Alien Tort Claims Act[131] for her claims relating to "trafficking, involuntary servitude, forced labor, assault, and sexual abuse."[132] While the Court of Appeals vacated the default judgment, it affirmed the substantive findings of the District Court in relation to diplomatic immunity.

Baoanan v. Baja[133] concerned a claim brought by a domestic worker alleging that she was forced to work for Mr. Baja, a diplomat, and his family in circumstances where she thought that she was coming to the United States to look for a nursing position. When Article 39(2) of the Vienna Convention dealing with residual immunity was invoked, the U.S. District Court for the Southern District of New York distinguished between domestic workers hired by the mission itself to perform domestic tasks and those employed in a private capacity to undertake tasks of a private or personal nature. It noted that "[a] diplomat could employ and pay staff to perform personal or private tasks for the diplomat or the diplomat's family that the sending State would not recognize as ordinary or necessary to the official

128. Vienna Convention on Diplomatic Relations, *supra* note 3, art. 39(2).
129. 622 F.3d 123 (2d Cir. 2010).
130. This approach follows *Park v. Shin*, 313 F.3d 1138, 1145–46 (9th Cir. 2002).
131. 28 U.S.C. § 1350.
132. 622 F.3d at 127. The plaintiff's initial claim was dismissed without prejudice, as at the time of the filing of the suit Al-Awadi was still employed by the Kuwaiti mission, with the judge specifically referring to the possibility of bringing a fresh suit when he was no longer with the mission.
133. 627 F. Supp. 2d 155 (S.D.N.Y. 2009).

functioning of the mission and for which it would not provide compensation."[134] The court held that, as in this case the plaintiff's employment as a domestic worker served the defendant's private needs and only very indirectly benefited the diplomatic mission, residual diplomatic immunity did not apply and the case could proceed.

There is an apparent contradiction in the way in which the work is characterized in *Tabion v. Mufti* and the residual immunity cases. The *Tabion* approach relies on the presumption that "[d]ay-to-day living services such as dry cleaning or domestic help were not meant to be treated as outside of a diplomat's official functions."[135] The residual immunity cases, on the other hand, are based on classifying this work precisely as falling outside of the official functions of the diplomat. Thus, while the development of a narrow "exception" for the actions of former diplomats is welcome from a rights-protection perspective, the case law in respect of diplomatic immunity is not internally coherent.

The right of access to the courts and to an effective legal remedy continues to pose a challenge to the kind of jurisdictional "chain-reaction" that has historically followed from both diplomatic and state immunity claims. As we shall see, in the realm of state immunity claims, it is possible to point to a progress narrative, albeit one that remains contested.

IV. Effective Remedies and Jurisdictional Immunities: Gendered Processes of Line Drawing

A. Access to Courts, Effective Remedies, and State Immunity

While the European Court of Human Rights has not yet been called upon to adjudicate a conflict between diplomatic immunity and abuse in the case of migrant domestic workers, it has considered the interaction of state immunity and rights violations through the prism of Article 6(1) ECHR. The Court's judgments in *Fogarty v. United Kingdom*,[136] which concerned a sex discrimination claim taken against the U.S. embassy in the United Kingdom, and *McElhinney v. Ireland*,[137] regarding a claim for personal injuries against the United Kingdom for acts committed in Ireland, were handed down on the same day. Illustrating the difficulties involved in seeking to dislodge immunity claims, neither of the applicants were successful in arguing that the application of state immunity in these cases violated Article 6 ECHR.

134. *Id.* at 165.
135. Tabion v. Mufti, 73 F.3d 535, 538–39 (1996).
136. 2001-XI Eur. Ct. H.R. 157 (extracts), *full judgment available at* http://hudoc.echr.coe.int/eng?i=001-59886.
137. 2001-XI Eur. Ct. H.R. 37 (extracts), *full judgment available at* http://hudoc.echr.coe.int/eng?i=001-59887.

In *Fogarty*, the Court rejected the applicant's argument (among others made by her) that the application of state immunity was a disproportionate limitation on the right of access to the courts as the United Kingdom was not obliged under international law to grant immunity in respect of her claim, due to the tendency in international law towards restricting the scope of state immunity. While the Court recognized this tendency, it found that international practice was still divided on the question of whether and in what circumstances state immunity continued to apply to employment-related disputes in a foreign mission or embassy.[138] It pointed out that this case concerned the sensitive area of discrimination in the recruitment process and that there was no consensus in relation to the recruitment stage of the employment relationship, stating that it was "not aware of any trend in international law towards a relaxation of the rule of state immunity as regards issues of recruitment to foreign missions."[139] The Court's decision was adopted with only one dissenting judgment.[140] Similarly, the applicant in *McElhinney* was unsuccessful in his argument that the immunity afforded to the U.K. government should not have been granted, as most states had changed their sovereign immunity rules to permit actions for personal injuries inflicted in the forum state. The Court found, in a majority decision of 12–5, that the practice of limiting state immunity in respect of personal injury caused by an act or omission within the forum state was "by no means universal."[141]

In neither of these cases did the Court explore in detail the argument that the international law of immunity had to be reconciled with human rights guarantees. In both judgments, the Court was content to point out:

> Just as the right of access to courts is an inherent part of the fair trial guarantee in that Article [6(1) ECHR], so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.[142]

These judgments were handed down over a decade ago. More recent case law of the Strasbourg Court, in particular the decisions of the Court in *Cudak v. Lithuania*[143] and *Sabeh El Leil v. France*,[144] indicates a subsequent evolution of international law in relation to state immunity. *Cudak v. Lithuania* concerned an applicant who had been dismissed from her secretarial role in the Polish embassy as a result

138. *Fogarty*, 2001-XI Eur. Ct. H.R. at 166–67 (¶ 37).
139. *Id.* at 167 (¶ 38).
140. The dissenting judgment was by Justice Loucaides. In addition, Justices Caflisch, Costa, and Vajić together issued a separate opinion concurring in the result.
141. *McElhinney*, 2001-XI Eur. Ct. H.R. at 46 (¶ 38).
142. *Id.* ¶ 37; *Fogarty*, ¶ 36.
143. 2010-III Eur. Ct. H.R. 153.
144. App. No. 34869/05 (June 19, 2011), http://hudoc.echr.coe.int/eng?i=001-105378.

of events transpiring from a sexual harassment complaint she had lodged with the relevant ombudsman in Lithuania (which had been upheld). The evolution of customary international law before and since the decision in *Fogarty* was expressly referred to by the Court in *Cudak*, with the Court noting "that there was a trend in international and comparative law towards limiting State immunity in respect of employment-related disputes, with the exception, however, of those concerning the recruitment of staff in embassies."[145] The Court went on to find that, in this regard, "the application of absolute State immunity has, for many years, clearly been eroded."[146]

The Court repeated its finding in *Fogarty* that the restriction on access to the courts in state immunity cases "pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty."[147] However, the interference here was disproportionate as it was not required by international law, and neither the secretarial duties performed by the applicant nor the acts of sexual harassment complained of could be "regarded as undermining Poland's security interests."[148] The Court found that customary international law, reflecting Article 11 of the 2004 UN Convention on the Jurisdictional Immunities of States and Their Property,[149] contains an exception to state immunity in respect of employment contracts for staff of a state's diplomatic missions abroad. This exception applies generally, aside from a limited number of situations as set out in Article 11(2). These include: where the person has been recruited to perform particular functions in the exercise of governmental authority; where the subject matter of the proceeding is the recruitment, renewal of employment, or reinstatement of an individual; where the employee is a national of the employer state; and where the subject matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of state, the head of government, or the minister of foreign affairs of the employer state, the proceeding would interfere with the security interests of that state. In finding that Article 11 of the 2004 UN Convention forms part of customary international law, the Court referred to the work of the International Law Commission in codifying and developing the law in this area, the 1991 Draft Articles,[150] and the 2004 Convention itself (the text of which is based upon the Draft Articles and the deliberations of the Commission).[151]

145. *Cudak*, 2010-III Eur. Ct. H.R. at 175 (¶ 63).
146. *Id.* at 175 (¶ 64).
147. *Id.* at 175 (¶ 60); *Fogarty*, ¶ 34.
148. *Cudak*, 2010-III Eur. Ct. H.R. at 177–78 (¶ 72).
149. G.A. Res. 59/38, annex, U.N. GAOR, 59th Sess., Supp. No. 49, U.N. Doc., A/59/49 (Dec. 16, 2004) (not yet in force).
150. Int'l Law Comm'n, *Draft Articles on Jurisdictional Immunities of States and Their Property*, [1991] 2 Y.B. Int'l L. Comm'n 13, U.N. Doc. A/CN.4/SR.2218–SR.2221 [hereinafter ILC Draft Articles].
151. U.N. Convention on the Jurisdictional Immunities of States and Their Property, *supra* note 149.

The Court in *Cudak* also pointed out that *Fogarty* could be distinguished on the basis that it concerned the issue of recruitment (which would fall under the Article 11(2) exceptions of the 2004 Convention in any event).[152]

In *Sabeh El Leil v. France*,[153] which concerned an unfair dismissal claim brought by a former accountant and head accountant of the Kuwaiti embassy in France, the Grand Chamber followed the approach taken in *Cudak*. The Court unanimously found that the French courts had not correctly applied the international law of state immunity, as reflected in the provisions of the 2004 Convention and customary international law. The Court repeated its finding in *Cudak* that the application of absolute state immunity had been eroded,[154] in particular given the adoption of the 2004 UN Convention.

On the customary international law point, the European Court of Human Rights in *Sabeh El Leil* reiterated, without any analysis, its finding in *Cudak* that Article 11 of the UN Convention on Jurisdictional Immunities of States and Their Property "applies under customary international law, even if the State in question has not ratified that convention, provided it has not opposed it either."[155] Bederman has criticized the Court's approach because, among other reasons, the 2004 Convention has not come into force and the status of its rules as part of customary international law is doubtful.[156] However, to reinforce its conclusions, the Court stated that this finding was confirmed in French domestic law, because "[i]n its case-law the [French] Court of Cassation refuses to apply jurisdictional immunity in an absolute manner, taking the view that it is not applicable in the context of a dispute concerning an embassy employee who has no particular responsibility in the exercise of the public diplomatic service."[157]

Article 11 of the 2004 Convention was thus applicable as forming part of customary law, and none of the Article 11(2) exceptions applied to the applicant. The European Court criticized the French domestic courts for assuming that additional responsibilities taken on by the applicant and his (limited) degree of autonomy meant that he "participated in acts of governmental authority of the State of Kuwait,"[158] without any objective evidence or justification for this conclusion.[159]

Rather than focusing on the applicant's argument that the approach of the French courts was flawed because his claim was

152. *Cudak*, 2010-III Eur. Ct. H.R. at 175 (¶ 62).
153. Sabeh El Leil v. France, App. No. 34869/05 (June 19, 2011), http://hudoc.echr.coe.int/eng?i=001-105378.
154. *Id.* ¶ 53.
155. *Id.* ¶ 54.
156. David J. Bederman, *Sabeh El Leil v. France*, 106 AM. J. INT'L L. 125 (2012).
157. *Sabeh El Leil*, App. No. 34869/05, ¶ 59.
158. *Id.* ¶ 63.
159. *Id.* ¶¶ 63–65.

in the nature of an allegation of a human rights violation, the reasoning in *Sabeh El Leil* turned on the interpretation of the express provisions of the 2004 Convention, much as it had in *Cudak*. The applicability of this reasoning to cases involving diplomatic immunity is thus doubtful. As is clear from the analysis above, the VCDR, unlike the 2004 Convention, does not contain a specific exception to immunity in proceedings relating to employment contracts. As seen in the U.S. context in *Montuya v. Chedid*, mentioned earlier, it seems that courts will be reluctant to apply the approach taken to state immunity in the interpretation of the limits of diplomatic immunity.

The Grand Chamber in *Sabeh El Leil* did emphasize that the ECHR is intended to guarantee rights that are not merely theoretical or illusory, but practical and effective, and stated that it would be inconsistent with the rule of law in a democratic society if states were able to remove a whole range of civil claims from the jurisdiction of the courts without any restraint or control by Convention bodies.[160] Overall, the Court concluded that in upholding the state immunity claim and dismissing the applicant's claim without providing relevant and sufficient reasons, "the French courts [had] failed to preserve a reasonable relationship of proportionality."[161] They had consequently "impaired the very essence of the applicant's right of access to a court."[162]

These cases reflect the view of the Court that the rationale underpinning state immunity laws is less compelling in the context of employment-related disputes. In both *Cudak* and *Sabeh El Leil*, the Court indicated that the state must show a reasonable basis for concluding that one of the Article 11(2) exceptions applied on the facts of the case. The Court requires evidence, therefore, that the duties of the person or the acts complained of "related to the sovereign interests" of the state.[163]

The approach of the Strasbourg Court, drawing on expressly stated narrow exceptions to state immunity, is similar to that followed by the U.K. Employment Appeal Tribunal in *Nigeria v. Ogbonna*,[164] where the tribunal was called upon to interpret the scope of permissible exceptions in the State Immunity Act 1978.[165] The applicant had argued that her employer (the Republic of Nigeria) had unlawfully discriminated against her on the ground of her daughter's disability and that her treatment had affected her physical and mental health. The EAT confirmed that the exception to state immunity for contracts

160. *Id.* ¶ 50.
161. *Id.* ¶ 67.
162. *Id.* ¶ 57.
163. *Id.* ¶ 62.
164. [2011] All ER (D) 19 (Oct), UK EAT App. No. UKEAT/585/10 (July 12, 2011).
165. 1978, c. 33 (U.K.).

of employment provided for in section 4 of the Act did not apply because the applicant was a member of the mission and the claim was therefore excluded under section 16(1) of the same Act.[166] However, in respect of state immunity for personal injury proceedings, the general exception for acts which had taken place in the United Kingdom was a freestanding exception.[167] For this reason, among others, the State of Nigeria was not immune and the tribunal had jurisdiction to hear the claim.

Neither this decision, nor the exception in section 4 of the State Immunity Act 1978 for employment-related cases, was referred to in the later diplomatic immunity cases of *Wokuri v. Kassam*[168] or *Abusabib v. Taddese*,[169] illustrating the separateness of the state immunity and diplomatic immunity regimes. The current differing interpretations of the exceptions to state immunity and diplomatic immunity introduce an anomaly whereby if a domestic worker's employment contract is with the foreign state, that state will not be able to claim immunity in respect of matters arising from the employment contract, whereas if the contract is with the diplomat in their individual capacity, immunity will generally apply and the worker will be blocked from obtaining redress.

In *Benkharbouche v. Embassy of the Republic of Sudan*,[170] the Court of Appeal of England and Wales declared sections 4(2)(b) and 16(1)(a) of the United Kingdom's State Immunity Act 1978 to be incompatible with Article 6 of the ECHR in its application to the claims in dispute in this case. The case concerned two Moroccan domestic workers, Ms. Benkharbouche and Ms. Janah, employed by the embassies of Sudan and Libya who brought a series of claims to the Employment Appeal Tribunal following their dismissals from employment. Both embassies invoked state immunity, relying on the U.K. State Immunity Act.

On the potential conflict with Article 6 ECHR, the Court of Appeal noted the finding of the European Court of Human Rights in *Jones v. United Kingdom*,[171] that "states enjoy a margin of appreciation in relation to limiting access to courts,"[172] and that the grant of

166. Section 4(1) of the State Immunity Act 1978 provides: "A State is not immune as respects proceedings relating to a contract of employment between the State and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly performed there," but section 16(1) provides for an exclusion from section 4 in the case of members of the mission.

167. *Ogbonna*, UK EAT App. No. UKEAT/585/10, ¶ 12.

168. [2012] EWHC 105.

169. [2013] All ER (D) 121 (Mar), UK EAT App. No. UKEAT/0424/11/ZT (Dec. 20, 2012).

170. Benkharbouche v. Embassy of the Republic of Sudan; Janah v. Libya [2015] EWCA Civ 33.

171. App Nos. 34356/06 & 40528/06 (Jan. 14, 2014), http://hudoc.echr.coe.int/eng?i=001-140005 (ECHR). *See also* discussion *infra* note 195–205.

172. *Benkharbouche*, [2015] EWCA Civ 33 [23] (citing *Jones*, App Nos. 34356/06 & 40528/06, ¶ 186).

immunity was, in that case, "a proportionate means of achieving a legitimate aim."[173] The Court of Appeal, however, also noted that the circumstances of *Jones v. United Kingdom* were "far removed from embassy employment disputes."[174] Examining the jurisprudence of the Strasbourg Court, they expressed concern at the latter Court's reasoning in *Cudak*, *Sabeh El Leil*, and later cases, specifically its interpretation of the scope of international law on state immunity. They noted that important differences between the text of the International Law Commission's 1991 Draft Articles[175] and the final text of the 2004 UN Convention[176] were not addressed in these decisions, although both were relied upon by the Strasbourg Court. Given such differences, they said, the two texts could not both represent the current state of customary international law.[177]

The court went on to inquire into the precise scope of section 16(1)(a) of the State Immunity Act 1978, and concluded that the blanket immunity provided was neither required by international law, nor "within the range of tenable views of what is required by international law."[178] Its application in this case, was therefore found to be incompatible with the requirements of Article 6 ECHR.

Ms. Janah's claim was also barred, prima facie, by section 4(2)(b) of the State Immunity Act because she was not habitually resident in the United Kingdom at the time her contract of employment was made; the employment exception created by section 4(1) did not therefore apply. The judgment is significant not only in its limiting of state immunity and the resulting vindication of domestic workers' right of access to the courts, but also in recognizing that a "habitual residence" condition applied at the date of entering into the contract of employment constituted discrimination on grounds of nationality contrary to Articles 6 and 14 of the ECHR. As the Court of Appeal noted, similar habitual residence requirements can be found in state immunity laws in several other states, including South Africa, Singapore, and Israel. The court's finding, therefore, will have significance beyond these proceedings. In support of its conclusion, the court referred to the discussions in the International Law Commission on its 1991 Draft Articles (which provide for an additional requirement of nationality or habitual residence for the employment exception to apply) and the absence of such a requirement in the UN Convention on Jurisdictional Immunities of States and Their Property.[179] The habitual residence requirement in the U.K. State Immunity Act itself gave effect to Article 5(2)(b) of the European Convention on State

173. *Id.*
174. *Id.*
175. ILC Draft Articles, *supra* note 150.
176. U.N. Convention on the Jurisdictional Immunities of States and Their Property, *supra* note 149.
177. *Benkharbouche*, [2015] EWCA Civ 33 [29] (point 4).
178. *Id.* [46].
179. *Id.* [59]–[60].

Immunity,[180] but this provision of the European Convention was not considered to reflect a requirement of customary international law.[181]

Significantly, the court also concluded that the claims (by both claimants) for breach of the Working Time Regulations 1998[182] and (by Ms. Janah) for racial discrimination and harassment fell within the scope of EU law. The claimants were therefore entitled to rely on Article 47 of the EU Charter of Fundamental Rights[183]—the right to an effective remedy—which the court concluded was a general principle of EU law with horizontal direct effect, and the court was required to disapply sections 4(2)(b) and 16(1)(a) of the State Immunity Act, in so far as they applied to those parts of the claims that fell within the scope of EU law. To the extent that employment disputes concerning service staff did not touch upon the sovereign functions of the mission staff, the court held that the claims should be permitted to proceed. The court therefore applied a functional test to the relevance of any possible immunity claim, and ultimately gave greater weight to safeguarding the effectiveness of the available remedies.

In the case of *Mahamdia v. Algeria*,[184] the Court of Justice of the European Union (CJEU), also recognized employment disputes as potentially falling within the scope of permissible exceptions to state immunity, following *Cudak*. In this case, the *Landesarbeitsgericht Berlin-Brandenburg* (Higher Labor Court of Berlin and Brandenburg) had asked the CJEU to interpret Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.[185] Continuing the trend of limiting state immunity in the sphere of employment, the CJEU found that where the employee's duties do not engage the exercise of public power, the foreign state cannot plead immunity in response to employment law proceedings. It is for the national court, in such a

180. May 16, 1972, 1495 U.N.T.S. 181, E.T.S. No. 074.

181. *Benkharbouche*, [2015] EWCA Civ 33 [56]–[57] (citing De Queiroz v. State of Portugal, 115 I.L.R. 430 (1992)). As described by the Court of Appeal, *id.* [56],

> [in *De Queiroz*,] the Labor Court of Brussels (Fourth Chamber) held that since Portugal had signed but not ratified [the European Convention on State Immunity] the convention was not applicable to those proceedings except in relation to those of its provisions which are declaratory of customary international law. It observed:
>
> > "Paragraph 2 of Article 5 does not reproduce a pre-existing rule of customary law since it refers to a connecting factor based on the nationality of the employee, which negates the theory of restrictive immunity based on the distinction between acts of sovereignty performed jure imperii and commercial acts performed *jure gestionis*" ([De *Queiroz*, 115 I.L.R. at] 434).

182. SI 1998/1833 (U.K.).

183. Consolidated Version of the Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 2.

184. Case C-154/11, Mahamdia v. People's Democratic Republic of Algeria, EUR-Lex CELEX 62011CJ0154 (July 19, 2012).

185. 2001 O.J. (L 12) 1.

dispute, to determine the precise nature of the functions carried out by the employee in question.

B. Access to Courts, Effective Remedies, and State Immunity in Respect of Claims for Violations of Jus Cogens Norms

Conflict between *jus cogens* norms and immunity rules may also lead to an alleged violation of Article 6 ECHR, which protects the right of access to courts. This issue was considered by the Grand Chamber of the European Court of Human Rights in *Al-Adsani v. United Kingdom*.[186] Here, the applicant alleged that the English courts, by granting immunity from suit to the State of Kuwait, failed to secure enjoyment of his right not to be tortured and denied him access to a court, contrary to Articles 3, 6(1), and 13 of the ECHR. In dealing with the arguments under Article 6(1), the Court accepted that the prohibition of torture had achieved the status of a peremptory norm in international law, however it was "unable to discern . . . any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged."[187] The majority considered that civil claims must be distinguished in this regard from criminal matters, in which the immunity *ratione materiae* of former heads of state for acts constituting violations of *jus cogens* norms, for example, had been eroded. This was a far more contentious decision than any of the cases mentioned above, with the Grand Chamber split nine votes to eight on the question of the violation of Article 6(1). The minority judgment written by Judges Rozakis and Caflisch, and joined by Judges Wildhaber, Costa, Cabral Barreto, and Vajic, disagreed on this point with the majority's distinction between civil and criminal claims, and found that, "[d]ue to the interplay of the *jus cogens* rule on prohibition of torture and the rules on State immunity, the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect."[188]

Despite the strong minority dissent in *Al-Adsani*, as well as conflicting decisions in the Greek[189] and Italian supreme courts,[190] the law in this area has evolved consistently with the majority judgment

186. 2001-XI Eur. Ct. H.R. 79. *See generally* Lorna McGregor, *State Immunity and* Jus Cogens, 55 INT'L & COMP. L.Q. 437 (2006).

187. *Al-Adsani*, 2001-XI Eur. Ct. H.R. at 101 (¶ 61).

188. *Id.* at 112 (Joint Dissenting Opinion, ¶ 3). See the criticism of the Court's majority decision in Lorna McGregor, *Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty*, 18 EUR. J. INT'L L. 903 (2007).

189. Areios Pagos [A.P.] [Supreme Court] 11/2000, Prefecture of Voiotia v. Fed. Republic of Germany (May 4, 2000), *discussed in* Maria Gavouneli & Ilias Bantekas, Case Comment, 95 AM. J. INT'L L. 198, 200 (2001).

190. Cass., sez. un., 11 marzo 2004, n. 5044/04, Ferrini v Federal Republic of Germany, 87 RIVISTA DI DIRITTO INTERNAZIONALE 539 (2004).

in *Al-Adsani,* that is, away from the possibility that *jus cogens* norms trump state immunity.

The International Court of Justice (ICJ), in the *Jurisdictional Immunities (Germany v. Italy)* case,[191] decided that there was no exception to state immunity from the jurisdiction of other states for *jus cogens* violations. In a definitive pronouncement on the applicable customary international law, the Court expressed the opinion that "no conflict" could exist between the two sets of rules, as they "address different matters."[192] The rules of state immunity are "procedural in character,"[193] and "do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful."[194] If viewed alongside *Cudak* and *Sabeh El Leil*, this decision gives rise to the unsatisfactory position that state immunity is inapplicable in most employment cases but remains in place for other civil claims based on *jus cogens* violations.

While the ICJ decision did not touch on the scope of immunity of state officials as such, the European Court of Human Rights adopted a similar line of reasoning in *Jones v. United Kingdom*,[195] which involved British citizens alleging torture against the State of Saudi Arabia and named state officials. Their claims had failed at the domestic level, since state immunity claims function as obstacles to access to the courts.[196]

The European Court of Human Rights in a 6–1 majority judgment considered the ICJ judgment in the *Jurisdictional Immunities* case, which it described as "authoritative as regards the content of customary international law."[197] As the European Court of Human Rights is a regional human rights court, however, it might have been expected that greater consideration would have been given to the argument of Judge Cançado Trindade, in his dissenting judgment in the *Jurisdictional Immunities* case, that laws of state immunity must be read in light of the "fundamental human values" that underpin the development of international law. As Judge Cançado Trindade noted, "State immunities are, after all, a 'prerogative or a privilege.'"[198]

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191. Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99 (Feb. 3). For commentary, see Lorna McGregor, *State Immunity and Human Rights: Is There a Future After* Germany v. Italy?, 11 J. INT'L CRIM. JUST. 125 (2013).

192. *Jurisdictional Immunities*, 2012 I.C.J. Rep. 99, ¶ 93.

193. *Id.* ¶ 58.

194. *Id.* ¶ 93.

195. Jones v. United Kingdom, App Nos. 34356/06 & 40528/06 (Jan. 14, 2014), http://hudoc.echr.coe.int/eng?i=001-140005. For a discussion on possible *jus cogens*-focused exceptions to state immunity, see Noah Benjamin Novogrodsky, *Immunity for Torture: Lessons from* Bouzari v. Iran, 18 EUR. J. INT'L L. 939 (2007).

196. *See* Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia [2006] UKHL 26, [2007] 1 AC 270.

197. *Jones*, App Nos. 34356/06 & 40528/06, ¶ 198.

198. Jurisdictional Immunities of the State (Ger. v. It.), Dissenting Opinion of Judge Cançado Trindade, 2012 I.C.J. Rep. 179, ¶ 40 (Feb. 3).

The European Court of Human Rights' decision on the immunity of state officials is more surprising, and reflects a marked shift away from the trend towards distinguishing between the immunity of the state itself and that enjoyed by state officials. With regard to the latter, a greater willingness to limit immunity has been evident, particularly when lower-level state officials are impugned. The Court acknowledged that the law is in "a state of flux" in this area, and pointed to "some emerging support in favour of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials."[199] Ultimately the Court decided, however, that the judgment of the House of Lords at the domestic level, to the effect that there was no exception to the civil immunity of state officials for *jus cogens* violations, was "neither manifestly erroneous nor arbitrary."[200] Rather, the judgment "reflected generally recognised rules of public international law."[201] The Court placed significant weight on the ICJ judgment in *Jurisdictional Immunities*, despite the fact that the ICJ itself had expressly stated that "the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case."[202] It was "only the immunity of the State itself from the jurisdiction of the courts of other States"[203] that was at issue, leaving open the possibility of a diversification of approaches to criminal or civil claims involving individual state officials.[204] Ultimately, the Strasbourg Court in *Jones v. United Kingdom* arrived at a "pragmatic understanding" that the definition of "State" includes its representatives and that state immunity must not be circumvented by bringing legal proceedings against named officials.[205]

A divergent approach can be seen in recent litigation in the U.S., in the case of *Samantar v. Yousuf*. The case concerned the claims of five Somali nationals who sought compensatory and punitive damages under the Alien Tort Statute and the Torture Victims Protection Act,[206] arising from extrajudicial killings and torture at the hands of military and intelligence agents of the Somali government in the 1980s. As a former Defence Minister and Prime Minister of Somalia, it was argued that Mr. Samantar knew or ought to have known of the crimes committed by agents under his command. Mr. Samantar accepted liability, but claimed immunity on the ground that the acts complained

199. *Jones*, App Nos. 34356/06 & 40528/06, ¶ 213.
200. *Id.* ¶ 214.
201. *Id.* ¶ 215.
202. Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99, ¶ 91 (Feb. 3).
203. *Id.*
204. *See generally* Hazel Fox & Philippa Webb, The Law of State Immunity (3d ed. 2013).
205. *Jones*, App Nos. 34356/06 & 40528/06, ¶ 202.
206. Alien Tort Statute, 28 U.S.C. § 1350; Torture Victims Protection Act of 1991, Pub. L. No. 102–256, 106 Stat. 73 (1992).

of were official acts. The key question that arose, then, was whether Mr. Samantar, as an individual official, could benefit from a claim of immunity, and if yes, what was the scope of any such immunity claim. In a landmark decision, the Supreme Court unanimously held that officials of foreign states were not covered by the Foreign Sovereign Immunities Act[207] and that their immunities were governed instead by common law.[208] The court remanded the case for further proceedings and, in 2012, the Court of Appeals for the Fourth Circuit found that Mr. Samantar did not enjoy common law immunity in respect of civil claims alleging torture.[209] "[A]s a matter of international and domestic law," the court concluded, "*jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign" and, as such, are not covered by foreign official (*ratione materiae*) immunity.[210] The court's conclusion is significant, given its acceptance of a *jus cogens*-based exception to immunity. In 2015, the Supreme Court denied the petition for a writ of certiorari,[211] bringing to an end the attempt by Mr. Samantar to rely on his immunity as a foreign official.

The significance of the legal questions raised is reflected in the amicus curiae brief submitted by the Kingdom of Saudi Arabia in support of the petitioner, arguing that the petition raised issues of "exceptional importance" to U.S. foreign relations and to foreign governments.[212] The decision of the Court of Appeals, it was argued, had introduced uncertainty and unpredictability into the law of immunity, by introducing a *jus cogens* exception to possible claims of immunity. It is noteworthy that the amicus brief submitted by the United States to the Supreme Court rejected the reasoning of the Court of Appeals, specifically on the existence of a categorical judicial exception for cases involving alleged violations of *jus cogens* norms.[213] (The U.S. government's position, however, supported the denial of immunity by the Court of Appeals, referring in this case to the "diplomatic note" sent to the Government of Somalia confirming that the Somali government did not wish to assert immunity on behalf of Mr. Samantar.)[214] Given the position taken by the Executive in this

207. 28 U.S.C. § 1603.
208. Samantar v. Yousuf, 560 U.S. 305 (2010).
209. Samantar v. Yousuf, 699 F.3d 763 (4th Cir. 2012).
210. *Id.* at 777, *cited in* Jones, App Nos. 34356/06 & 40528/06, ¶ 122 (ECHR).
211. Samantar v. Yousuf, 134 S. Ct. 897 (2015). The question presented to the Supreme Court was "[w]hether the court of appeals erred in holding that the Executive Branch's determination concerning conduct-based immunity is not binding on the court, and in creating a new categorical judicial exception to foreign official immunity from civil suits alleging violations of *jus cogens* norms." *See* Brief for the United States as Amicus Curiae at 1, Samantar v. Yousuf, No. 13–1361, 135 S. Ct. 1528 (2015), http://www.scotusblog.com/case-files/cases/samantar-v-yousuf-3/.
212. Brief of the Kingdom of Saudi Arabia as Amicus Curiae in Support of Petitioner at 6, Samantar v. Yousuf, No. 13–1361, 135 S. Ct. 1528 (2015), http://www.scotusblog.com/case-files/cases/samantar-v-yousuf-3/.
213. Brief for the United States as Amicus Curiae, *supra* note 211, at 21.
214. *Id.* at 10–11.

amicus brief, arguments concerning the validity and scope of any *jus cogens* exception are likely to continue.

C. Diplomatic Immunity: At the Limits of Human Rights Protection?

Diplomatic immunity is a well-established rule and a fundamental element of international law. Central to the observance of the law of diplomatic immunity is reciprocity, which serves, as Denza notes, as a "constant and effective sanction."[215] Even with regard to relatively minor matters, the "failure to accord privileges or immunities to diplomatic missions or to their members is immediately apparent and is likely to be met by appropriate countermeasures."[216] This positing of diplomatic immunity as fundamental to the functioning of international relations underscores much of the domestic case law on this point and is apparent in the Department of State's interventions in the U.S. litigation. The domestic workers cases thus raise important issues concerning the relationship between diplomatic immunity and international human rights norms, particularly in the situation where the diplomat is still in post.

The more extreme forms of labor exploitation suffered by migrant domestic workers working for diplomats raise human rights issues linked to trafficking, slavery, servitude, and forced and compulsory labor. In the European context, Article 4 of the ECHR has been interpreted as imposing positive obligations on states in respect of protecting individuals from such abuses. These obligations, as interpreted in *Rantsev v. Cyprus and Russia*,[217] *Siliadin v. France*,[218] *C.N. and V. v. France*,[219] and *C.N. v. United Kingdom*,[220] include criminalizing such conduct, putting in place effective deterrent regimes, and effectively investigating complaints. In *Siliadin* and *C.N. and V. v. France*, the French criminal law was found to have provided insufficient and ineffective protection for the individuals in those cases, who had gone to France and been subjected to domestic forced labor and servitude. The Court in *Rantsev* found that Cyprus had violated its positive obligations of protection under Article 4 by maintaining a visa regime which it was aware facilitated trafficking. These decisions are directly applicable to the question of domestic workers in diplomatic households: the interpretation of diplomatic immunity by domestic courts means that diplomatic domestic workers are not effectively protected from Article 4 violations, and allowing diplomats to bring domestic workers into the country in the relatively informal manner described

215. Eileen Denza, Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations 2 (3d ed. 2008).
216. *Id.* at 2.
217. 2010-I Eur. Ct. H.R. 65 (extracts), *full judgment available at* http://hudoc.echr.coe.int/eng?i=001-96549.
218. 2005-VII Eur. Ct. H.R. 333.
219. App. No. 67724/09 (Oct. 11, 2012) http://hudoc.echr.coe.int/eng?i=001-114032.
220. App. No. 4239/08 (Nov. 13, 2012), http://hudoc.echr.coe.int/eng?i=001-114518.

above, together with the operation of immunity, facilitates the trafficking of these workers for the purposes of domestic work.

The European Court of Human Rights has consistently emphasized the fundamental and non-derogable nature of the Article 4 ECHR provisions and the absence of exceptions to these rights.[221] The immunity from criminal prosecution, as well as the denial of civil redress for these forms of abuse, thus raises serious questions in respect of states' obligations under Article 4 and the issue of whether cases involving Article 4 rights constitute an exception to diplomatic immunity. The potential conflict between states' Article 4 obligations and the implementation of diplomatic immunity has not been litigated before the Strasbourg Court as yet. In the U.S. case of *Sabbithi v. Al Saleh*[222] mentioned earlier, however, it was argued that the diplomat and his wife trafficked three domestic workers to work in their home and that trafficking in human beings is a *jus cogens* exception to diplomatic immunity as a violation of *jus cogens* norms prohibiting slavery.

Ms. Sabbithi and two other domestic workers had worked previously in the home of a Kuwaiti diplomat, Mr. Al Saleh, in Kuwait, and before coming to the United States they signed an employment contract which provided that U.S. labor law for domestic workers would apply to their employment. However, on arrival in the United States, the defendants (Mr. Al Saleh and his wife) did not comply with the terms of the employment contract and forced the plaintiffs to work up to nineteen hours a day, seven days a week. They received no salary directly (some payments instead being made to the workers' families overseas), their passports were confiscated, they were threatened, and Ms. Sabbithi was physically abused. On escape from the diplomat's home, the plaintiffs instituted civil proceedings which turned on a number of arguments, including that diplomatic immunity could not apply because the actions complained of violated *jus cogens* norms prohibiting slavery and slavery-like practices.[223] The U.S. District Court for the District of Columbia stated (without any analysis) that, on the facts, the defendants' conduct did not amount to trafficking and there was therefore no *jus cogens* norm at issue, meaning that it did not have to decide on the *jus cogens* exception.[224] However, even if it had, the court referred to the U.S. government's view (outlined in the Statement of Interest) that "there is no *jus cogens* exception to diplomatic immunity" and "there is not evidence that the international

221. *See, e.g.*, *Siliadin*, 2005-VII Eur. Ct. H.R. at 367 (¶ 112); *Rantsev*, 2010-I Eur. Ct. H.R. at 124 (¶ 282).

222. 605 F. Supp. 2d 122 (D.D.C. 2009).

223. Article 53 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 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."

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

community has come to recognize a *jus cogens* exception to diplomatic immunity."[225] This illustrates the U.S. courts' consistent rejection of the argument that the VCDR must be interpreted in a manner that is consistent with human rights law.

As already noted, the potential conflict between the law of immunity and *jus cogens* rules has not yet been tested in the Article 4 ECHR context, nor has the specific application of the law of diplomatic immunity in the context of domestic workers come under scrutiny by the European Court of Human Rights. However, the trend observed in *Al-Adsani*[226] and *Jones*[227] suggests a cautious approach whereby the Court will be reluctant to recognize a human rights exception to immunity. In respect of civil claims—even in respect of employment law violations which would constitute slavery, servitude, or forced or compulsory labor—it would be very difficult for a domestic worker to successfully argue that diplomatic immunity violates his or her right of access to a court under Article 6(1), as there would seem to be no universal practice of providing an exception to diplomatic immunity in these cases (unlike in the case of state immunity in employment disputes, as seen in *Cudak*[228] and *Sabeh El Leil*[229]). States thus continue to be unconstrained by the ECHR in their application of diplomatic immunity in respect of most employment-related claims taken by domestic workers working for diplomats.

As the sole dissenting judge in *Jones* pointed out, it is difficult to accept that the Court would waive state immunity in employment cases such as *Cudak* and *Sabeh El Leil* but not in a case concerning redress for torture.[230] Judge Kalaydjieva also criticized the distinction that this approach appears to create in international law between the application of civil immunity and criminal immunity in cases involving the violation of *jus cogens* norms, given developments in the sphere of universal criminal jurisdiction and the findings of the House of Lords in *Pinochet No.3*.[231] This distinction means that while criminal immunity for diplomats for offenses related to slavery,

225. *Id.* The American Civil Liberties Union reports that the Kuwaiti government agreed to a confidential settlement in February 2012. *Case Profile—Sabbithi, et al. v. Al Saleh, et al.*, Am. Civil Liberties Union (last updated Feb. 15, 2012), http://www.aclu.org/human-rights-womens-rights/case-profile-sabbithi-et-al-v-al-saleh-et-al.

226. Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79.

227. Jones v. United Kingdom, App Nos. 34356/06 & 40528/06 (Jan. 14, 2014), http://hudoc.echr.coe.int/eng?i=001-140005.

228. Cudak v. Lithuania, 2010-III Eur. Ct. H.R. 153.

229. Sabeh El Leil v. France, App. No. 34869/05 (June 19, 2011), http://hudoc.echr.coe.int/eng?i=001-105378.

230. *Jones*, App Nos. 34356/06 & 40528/06, Dissenting Opinion of Judge Kalaydjieva. For a critique, see also Lorna McGregor, *Jones v. U.K.: A Disappointing End*, EJIL: Talk!—Blog of the Eur. J. Int'l L. (Jan. 16, 2014), http://www.ejiltalk.org/jones-v-uk-a-disappointing-end/; Philippa Webb, *Jones v UK: The Re-integration of State and Official Immunity?*, EJIL: Talk!—Blog of the Eur. J. Int'l L. (Jan. 14, 2014), http://www.ejiltalk.org/jones-v-uk-the-re-integration-of-state-and-official-immunity/.

231. R. v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 3) [1999] 1 AC 147 (HL) (U.K.).

servitude, or forced labor could conceivably be found to violate states' positive obligations of criminalization and prosecution under Article 4, diplomatic domestic workers seeking to vindicate employment rights through civil claims remain in a legal wilderness. The protective potential of Article 4 for domestic workers in severely exploitative situations that has been unlocked in recent jurisprudence is thus effectively denied for diplomatic domestic workers.

The fragmentation of international law rules on jurisdictional immunities came into sharp relief before the Court of Appeal of England and Wales in the case of *Reyes and Another v. Al-Malki*,[232] a judgment that was handed down on the same day as *Benkharbouche*.[233] The case reveals the precariousness of human rights protections and the limited effectiveness of law's remedies even in the face of an acknowledged violation of human rights standards and a criminal act. The claimants in this case, Philippine and Indonesian nationals, were employed as domestic workers by the respondents, a Saudi diplomatic agent and his wife. Both worked at the official diplomatic residence. U.K. Visas and Immigration, a division of the U.K. Home Office, had determined that both women were victims of human trafficking. Both claimants brought proceedings before an employment tribunal alleging, *inter alia*, that they had suffered racial discrimination and harassment and had been paid less than the national minimum wage. The claimants were successful before the Employment Tribunal, which found that the exception in Article 31(1)(c) of the Vienna Convention must be read consistently with Article 6 ECHR. This finding was reversed, however, by the Employment Appeals Tribunal. Ms. Reyes then appealed this decision to the Court of Appeal. (The second claimant, Ms. Suryadi, no longer participated in the proceedings.)

The case turned in part on the precise meaning of the commercial activity exception provided for in Article 31(1)(c) VCDR and the immunities distinction in international law between *acta jure imperii* and *acta jure gestionis*. The claimants argued, with the support of the domestic workers' advocacy group Kalayaan, that Article 31(1)(c) VCDR should be construed in the light of the high status of the prohibition on human trafficking in international law and the incompatibility of engagement in human trafficking with the proper discharge of diplomatic functions.

Citing the judgment of the Strasbourg Court in *Rantsev*,[234] the claimants argued that upholding the respondents' claim to immunity would be in violation of the United Kingdom's positive obligations under Article 4 ECHR, specifically: (i) the duty to provide

232. [2015] EWCA Civ 32.

233. Benkharbouche v. Embassy of the Republic of Sudan; Janah v. Libya [2015] EWCA Civ 33.

234. 2010-I Eur. Ct. H.R. 65 (extracts), *full judgment available at* http://hudoc.echr.coe.int/eng?i=001-96549.

compensation as required by Article 15(3) of the Council of Europe Convention on Action Against Trafficking in Human Beings;[235] (ii) "the 'positive obligation to put in place an appropriate legislative and administrative framework' to give practical and effective protection against trafficking and exploitation";[236] and (iii) "the obligation to provide for an effective investigation."[237] On the last point, it was noted that the only way in which the investigative obligation arising could be discharged might be through ensuring the availability of civil proceedings, given that the Saudi authorities had refused to waive immunity.

The Court of Appeal concluded that there was no established rule of international law on human trafficking that took precedence over the international law rules on diplomatic immunity, which, it reiterated, were "well-established."[238] On the question of whether the restriction on the right of access to the courts arising from a diplomatic immunity claim conflicted with the general right of access to the courts under Article 6 ECHR, the court took the view that "the recognition of diplomatic immunity in civil proceedings pursue[d] the legitimate aim of complying with a State's international law obligations to prevent hindrance to the diplomat in performing his functions."[239] The conclusion was not in the court's view, "controversial."[240]

The court accepted that upholding the claim to diplomatic immunity might appear an affront to "justice and fairness,"[241] but concluded that this outcome simply reflected "policy choices already made";[242] the "apparent inequity to a private individual [was] outweighed by the great injury to the public that would arise" in rejecting the immunity claim presented.[243] Engaging in this balancing exercise in itself, however, suggests that the outcome was not inevitable and not simply the result of policy choices already made. The court was at pains to highlight what it viewed as "the clear distinction"[244] between state and diplomatic immunity—diplomatic immunity being "functional in nature,"[245] while state immunity was a concept of international law developed from the principle *par in parem non habet imperium*.[246] While there was evidence that international law on state immunity had evolved, notably through the 2004 UN Convention, the Court did

235. May 16, 2005, 2569 U.N.T.S. 33, C.E.T.S. No. 197. See *Reyes*, [2015] EWCA Civ 32 [49].
236. *Reyes*, [2015] EWCA Civ 32 [50].
237. *Id.* [51].
238. *Id.* [64].
239. *Id.* [68].
240. *Id.*
241. *Id.* [77].
242. *Id.* (quoting Tabion v. Mufti, 73 F.3d 535, 539 (4th Cir. 1996)).
243. *Id.* (quoting *Tabion*, 73 F.3d at 539).
244. *Id.* [73].
245. *Id.* [74].
246. *Id.* [73].

not find any evidence to suggest that the "international community" was in favor of a similar adjustment to diplomatic immunity.[247]

The concept of community invoked here, of course, is one that has rested on often highly gendered distinctions between the public and the private. Claims of communities are often exclusionary, and the communitarian impulse underpinning the weight given to "comity between nations" and diplomatic functioning is no exception.[248]

D. On the Relevance of Equality and Non-Discrimination Norms

The obligations of effective deterrence that arise from forced labor, slavery, and trafficking prohibitions are enshrined in several international and regional instruments, including the Convention on the Elimination of All Forms of Discrimination Against Women,[249] the International Covenant on Civil and Political Rights,[250] the Palermo Protocol,[251] and the Council of Europe Convention on Action Against Trafficking in Human Beings.[252] Developing obligations of due diligence at the regional and international levels have highlighted the nexus between states' positive obligations of prevention and non-discrimination norms in ways that are potentially of significance to domestic workers. The European Court of Human Rights has repeatedly recognized that a state's positive obligations under the ECHR go beyond the imposition of criminal sanctions and include policing and operative measures. In *Opuz v. Turkey*, for the first time in Strasbourg case law, the Court linked states' obligations to combat domestic violence to the Article 14 ECHR non-discrimination requirements.[253] More generally, the gradual expansion of indirect discrimination prohibitions suggests possible strategies for such challenges.[254] The *Jessica Lenahan* case before the Inter-American Commission on Human Rights,[255] the Inter-American Court of Human Rights' *"Campo Algodonero"* case,[256] and others similarly point to the non-discrimination nexus. Given that the majority of domestic workers are women, a similar nexus between diplomatic immunity, positive obligations, and non-discrimination norms arises. The *Advisory Opinion*

247. *Id.* [74].

248. The decision of the Supreme Court of Portugal in *Fonseca v. Larren* (Jan. 30, 1991, unreported), cited by the claimants, was dismissed as a "solitary authority" and of "little value as evidence of the contents of international law." *Reyes*, [2015] EWCA Civ 32 [74].

249. Dec. 18, 1979, 1249 U.N.T.S. 13.

250. Dec. 16, 1966, 999 U.N.T.S. 171.

251. Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319.

252. *Supra* note 235.

253. 2009-III Eur. Ct. H.R. 107.

254. *See* D.H. and Others v. Czech Republic, 2007-IV Eur. Ct. H.R. 241.

255. Jessica Lenahan (Gonzales) v. United States, Inter-Am. Comm'n H.R., Merits, Report No. 80/11, OEA/Ser.L/V/II, doc. 69 (2011).

256. Gonzalez ("Cotton Fields") v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009).

of the Inter-American Court on the Juridical Condition and Rights of the Undocumented Migrants points to the transformative promise that underpins human rights standards.[257] Fitting into the discrimination paradigm is not without its difficulties, however, and it is a strategy that brings many pitfalls, particularly when the claimant is required to identify an appropriate comparator.[258]

The European Court of Human Rights has only recently begun, after a period of stagnation, to develop a "larger and bolder" antidiscrimination case law.[259] The late development of this body of case law in the field of non-discrimination is all the more surprising given the Court's advanced jurisprudence on positive human rights obligations in general.[260] In contrast, as Besson notes, the non-discrimination regime of the European Social Charter[261] has always been interpreted as imposing a "positive duty to take action to protect equality 'in practice,'" its jurisprudence going well beyond the more tentative conclusions of the ECHR regime to date.[262] Besson further notes that the principle of non-discrimination is "pivotal" within international human rights law, revealing, as it does, "the social or collective dimension of individual human rights."[263] For domestic workers in diplomatic households, the limits of individualized remedies are evident. To date, the European Court of Human Rights has not examined or acknowledged the potential links between Article 4 and Article 14 claims, though the nexus with non-discrimination norms has been pointed to in submissions to the Court.[264] For now, the potential for this body of case law to extend into the realm of the diplomatic household remains to be realized. The importance of extending such norms into previously "closed circuits" has been recognized by the Court in the context of domestic violence,[265] the laws on which have often followed a similar trajectory to those regulating domestic work.[266]

257. Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ (Sept. 17, 2003).

258. *See* ALICE EDWARDS, VIOLENCE AGAINST WOMEN UNDER INTERNATIONAL HUMAN RIGHTS LAW (2010), especially ch. 4, *Equality and Non-Discrimination on the Basis of Sex*, at 140.

259. Samantha Besson, *Evolutions in Non-Discrimination Law Within the ECHR and the ESC Systems: It Takes Two to Tango in the Council of Europe*, 60 AM. J. COMP. L. 147, 148 (2012)

260. *Id.* at 175.

261. European Social Charter (Revised), Council of Eur., May 3, 1996, E.T.S. No. 163. *See especially* Additional Protocol to the European Social Charter, Council of Eur., May 5, 1988, ETS No. 128.

262. Besson, *supra* note 259, at 174 & n.144 (citing 2 EUR. COMM. OF SOC. RIGHTS, EUROPEAN SOCIAL CHARTER: CONCLUSIONS 2003, XVI-II (SPAIN)—ARTICLE 1 ADDITIONAL PROTOCOL 939 (2003)).

263. *Id.* at 179.

264. *See* Third Party Intervention Submission of Interights (Nov. 24, 2010), Kawogo v. United Kingdom, App. No. 56921/09 (ECHR), *available at* http://www.interights.org/kawogo/index.html. The case was subsequently struck out by the Court following an application by the United Kingdom. *See* Kawogo v. United Kingdom, App. No. 56921/09 (Sept. 3, 2013), http://hudoc.echr.coe.int/eng?i=001-126789.

265. Opuz v. Turkey, 2009-III Eur. Ct. H.R. 107, 146 (¶ 132). *See* Siobhán Mullally, *Migration, Gender, and the Limits of Rights*, *in* HUMAN RIGHTS AND IMMIGRATION 145 (Ruth Rubio-Marín ed., 2014).

266. *See generally* RONAGH J.A. MCQUIGG, INTERNATIONAL HUMAN RIGHTS LAW AND DOMESTIC VIOLENCE (2011).

CONCLUSION

Migrant domestic workers are "hard to locate on the map of democracy."[267] The movement of migrant domestic workers across multiple jurisdictional boundaries, between states as well as from the "public" domain into the "private" domain of the home, is central to the constructed vulnerability of the domestic worker.[268] Law plays a dual role here, jealously guarding the public borders of the state through immigration laws while at the same time "reifying the private borders of the home."[269] For domestic workers in diplomatic households, this division between the public and private is exacerbated by the jurisdictional walls created by diplomatic and state immunity claims. The deference that continues to be paid to diplomatic immunity claims, and to a more limited extent to state immunity, does not sit easily with international legal standards safeguarding rights of access to the courts and to effective remedies, particularly in cases where a criminal offence is alleged or in employment-related disputes where the inequality in bargaining power between the claimant and the respondent is marked. For the moment, the law continues to exclude and to deny the potentiality of rights claims against those who are serving diplomats. The everydayness of domestic work supports the categorization of such work as falling outside of commercial activity exceptions to diplomatic immunity and at the same time as being integral to the conduct of daily life (of diplomats). For domestic workers in both cases, this categorization results in legal remedies being rendered ineffective.

To quote Lord Denning, it is increasingly argued that it is "more in keeping with the dignity of a foreign sovereign [or diplomat] to submit himself to the rule of law than to claim to be above it."[270] In its submissions during the negotiating process on the 2011 ILO Domestic Work Convention, the RESPECT network specifically highlighted the need for enhanced protections for domestic workers in diplomatic households.[271] Again, in the final stages of negotiating, domestic workers' representatives called for the inclusion of additional provisions addressing the position of domestic workers in diplomatic households. These calls, however, went unheeded. This was an opportunity missed for the international community, and for domestic workers. A move towards expansion of multilateral standards could overcome the

267. Joseph Carens, *Live-In Domestics, Seasonal Workers, and Others Hard to Locate on the Map of Democracy*, 16 J. POL. PHIL. 419 (2008).

268. Judy Fudge, *Global Care Chains, Employment Agencies, and the Conundrum of Jurisdiction: Decent Work for Domestic Workers in Canada*, 23 CANADIAN J. WOMEN & L. 235 (2011).

269. Adelle Blackett, *Promoting Domestic Workers: Human Dignity Through Specific Regulation*, *in* DOMESTIC SERVICE AND THE FORMATION OF EUROPEAN IDENTITY: UNDERSTANDING THE GLOBALIZATION OF DOMESTIC WORK, 16TH–21ST CENTURIES 247, 247 (Antoinette Fauve-Chamoux ed., 2005), *cited in* Fudge, *supra* note 268, at 243.

270. Rahimtoola v. Nizam of Hyderabad [1958] AC 379, 418 (HL) (U.K.).

271. RESPECT Network, *supra* note 73, at 6 (Key Recommendation no. 5).

limits of bilateral attempts at reform, where the predictable trade-off between access to jobs and workers' rights too frequently kicks in.[272]

As cases such as *Benkharbouche* suggest, rights claims present an "alternative legality" to that presumed to follow from the jurisdictional lines traditionally drawn by laws of diplomatic and state immunity. The increasing recognition of exceptions to state immunity represents an acknowledgment that international law may serve not only the purpose of "comity between nations" but also the effective vindication of individual rights, including those often considered to be "superfluous" subjects.[273] Yet, jurisdictional immunities, both of the state and the diplomatic agent, continue to function as barriers to claiming rights and effective remedies. Even when faced with an egregious harm and a violation of a non-derogable human rights norm, immunity claims may trump a core tenet of the rule of law—the transformative potential inherent in securing the right of access to the courts.

Although courts continue to acknowledge the unfairness resulting from immunity claims, they hide behind "policy choices already made." How and where the lines of jurisdictional immunities are drawn, however, is not predetermined. Neither is it a legal process that leads to an inevitable outcome, rejecting the alterative legalities presented by individual litigants. Human rights standards and labor standards bring with them a "jurisgenerative" potential, to borrow from Robert Cover.[274] As yet, it is a potential that has not been realized for domestic workers in diplomatic households. The fragmentation of international law rules on state and diplomatic immunity and the divergences in how immunity claims function in civil and criminal proceedings create dissonance and confusion. They also reveal, however, the possibilities of transformative strategies that seek to redefine the "declared values" of international law—viewed through the claims of litigants in diverse jurisdictions and in a plurality of courts and tribunals.

272. *Labor and Migration in International Law: Challenges of Protection, Specialization, and Bilateralism*, 105 Am. Soc'y Int'l L. Proc. 407, 411–12 (2011) (panel contribution by Nisha Varia, Senior Researcher, Women's Rights Division, Human Rights Watch).

273. Susan Marks, *Law and the Production of Superfluity*, 2 Transnat'l Legal Theory 1 (2011).

274. *See supra* note 1.