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## Unlocking the Doors to Justice: Protecting the Rights and Remedies of Domestic Workers in the Face of Diplomatic Immunity

Amy Tai

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# UNLOCKING THE DOORS TO JUSTICE: PROTECTING THE RIGHTS AND REMEDIES OF DOMESTIC WORKERS IN THE FACE OF DIPLOMATIC IMMUNITY

AMY TAI\*

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INTRODUCTION

In 1998, Shamela Begum, the wife of a vegetable vendor and mother of three children, left Bangladesh in search of greater economic opportunities to provide a better life for herself and her family.<sup>1</sup> A Bangladeshi employment broker paired her with a housekeeping position in Bahrain, but she soon was transferred to New York City to work as a live-in maid for a Bahraini diplomat.<sup>2</sup> To her horror, she was treated as a slave: her employers, Mohammed Saleh and his wife, Khatun Saleh, confiscated her passport, provided her with little food, and abused her verbally and physically.<sup>3</sup> Her employers confined Begum to their apartment and only permitted her to leave on two occasions to accompany Mrs. Saleh to the store.<sup>4</sup> The Salehs also cheated Begum of her earned wages, paying her only one hundred dollars a month for her fourteen-hour workdays, notwithstanding a provision in her employment contract guaranteeing her the minimum wage.<sup>5</sup>

1. See Somini Sengupta, *An Immigrant’s Legal Enterprise In Suing Employer, Maid Fights Diplomatic Immunity*, N.Y. TIMES, Jan. 12, 2000, at B1 (describing a domestic worker in her mid-thirties who had never worked outside her home in Bangladesh, but wanted to work abroad after observing friends find employment abroad and earn enough money to build a new home).

2. See *id.* (explaining how Begum was brought to the United States on a special visa designated for personal employees of United Nation (“UN”) officials). According to U.S. Department of State (“State Department”) figures, there are approximately 800 domestic workers on special visas working for UN officials in the United States. *Id.* See DOMESTIC WORKERS UNITED & DATA CENTER, HOME IS WHERE THE WORK IS: INSIDE NEW YORK’S DOMESTIC WORK INDUSTRY 1 (2006) [hereinafter HOME IS WHERE THE WORK IS] (defining domestic workers as live-in and live-out “nannies, housekeepers, elderly companions, cleaners, babysitters, baby nurses and cooks”).

3. See Complaint at ¶¶ 23-41, *Begum v. Saleh* (S.D.N.Y. 1999) (No. 99-11834) (alleging that the Salehs violated the Thirteenth Amendment by holding Begum in involuntary servitude and disregarded federal and state minimum wage laws, among other claims).

4. See *id.* (claiming that the Salehs committed false imprisonment); Sengupta, *supra* note 1, at B1 (describing Begum’s isolation from the outside world where she could not “feel the wind [or] see the trees,” and even her family was unaware of her whereabouts for months); see also *Hidden in the Home: Abuse of Domestic Workers with Special Visas in the United States*, 13 HUM. RTS. WATCH, No. 2, at 1,13 (2001) [hereinafter HUMAN RIGHTS WATCH] (discussing various tactics that employers use to confine domestic workers to their home, including withholding passports, limiting or denying workers the right to leave their home, forbidding workers to speak with strangers, and distorting U.S. law and culture so that workers are afraid to leave the house).

5. See Complaint at ¶ 12, *Begum* (S.D.N.Y. 1999) (No. 99-11834) (explaining that despite Begum’s employment contract stipulating that the Salehs would pay her \$5.15

Illiterate and unable to speak English, Begum felt trapped and alone; this predicament, however, began to change when she overheard a fruit vendor speaking her native Bengali during one of her few moments outside of the apartment.<sup>6</sup> She made her escape after finding her way back to the vendor and divulging her story.<sup>7</sup> With the help of local attorneys, she sued her employers in federal court, but the judge deferred to a statement submitted by the U.S. Department of State (“State Department”), and ruled that the Salehs had diplomatic immunity pursuant to the Vienna Convention on Diplomatic Relations (“VCDR”). This international treaty, which governs diplomatic relations and immunity privileges, prevents U.S. courts from exercising jurisdiction to adjudicate civil claims against diplomats unless certain exceptions apply.<sup>8</sup>

This Comment examines the rights and remedies of the tens of thousands of domestic workers in the United States who, like Begum, enter on special visas and then confront the defense of diplomatic immunity when they seek to vindicate their rights.<sup>9</sup> Specifically, this Comment focuses on workers with A-3 visas, which are temporary work visas reserved for domestic workers of ambassadors, consular officials, and other diplomats based in the United States.<sup>10</sup> Foreign government officials often will use this visa category to hire domestic workers and bring them to the United States to care for the children of the government officials and assume household chores and responsibilities. This Comment also addresses the plight of domestic workers on G-5 visas, which is a similar visa designated for

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per hour and provide her free room and board, Begum earned only one hundred dollars a month, which her employers sent directly to her husband in Bangladesh, so she never saw her earnings); *see also* Fair Labor Standards Act, 29 U.S.C. § 206(a) (1996) (requiring employers to pay employees at least \$5.15 per hour); *Dole v. Bishop*, 740 F. Supp. 1221, 1229 (S.D. Miss. 1990) (explaining that employers who violate FLSA wage provisions essentially are making a profit from what is owed to their employees).

6. *See* Sengupta, *supra* note 1, at B1 (recounting how Mrs. Saleh ordered Begum to walk faster and stated “America bad, America bad” when Begum noticed the fruit vendors speaking Bengali, whom she later made her way back to when the Salehs left town).

7. *See id.* (explaining how the vendor reported the story to a Bengali-language newspaper who then contacted Andolan, a South Asian workers’ rights organization).

8. *See* Vienna Convention on Diplomatic Relations art. 31(1), Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 [hereinafter VCDR] (stipulating that diplomats have immunity from criminal and civil jurisdiction except civil actions related to immovable property for personal use, where the diplomat has engaged in a commercial activity outside diplomatic functions, and in succession actions where the diplomat is acting as an executor in a personal capacity).

9. *See* U.S. DEP’T OF STATE, DEP’T OF CONSULAR AFFAIRS, VISA STATISTICS, [http://travel.state.gov/visa/frvi/statistics/statistics\\_1476.html](http://travel.state.gov/visa/frvi/statistics/statistics_1476.html) (last visited Feb. 19, 2007) (reporting that the State Department has granted over 18,500 A-3 visas in the past ten years); HUMAN RIGHTS WATCH, *supra* note 4, at 4 (informing that the government issued over 30,000 A-3 and G-5 visas in the 1990s).

10. *See* 8 U.S.C. § 1101(a)(15)(A)(iii) (2006) (classifying A-3 visa holders as “attendants, servants, [and] personal employees” of foreign government officials).

domestic workers employed by officials of international organizations, whom also may face legal hurdles in suing their employers.<sup>11</sup>

Because courts look to the executive branch for guidance in determining whether diplomats are immune from suit, the State Department plays a critical role in protecting the rights of domestic workers, ensuring their access to courts, and preventing diplomats from abusing their immunity privileges.<sup>12</sup> This Comment asserts that the State Department should guide courts to apply an alternative interpretation of the VCDR's immunity exceptions, rather than the current, narrower interpretation, which allows diplomats to hide behind a shield of diplomatic immunity and consequently prevents domestic workers from litigating their claims. Alternatively, if the State Department determines that employment of domestic workers by diplomats does not fit within an immunity exception, it should follow its policy for domestic workers who bring claims against employers who are consular officers and employees that work for other foreign state officials. Under this policy, the State Department requests waivers of immunity from sending states when domestic workers file claims against diplomats for criminal and/or civil violations. This process would thereby grant U.S. courts jurisdiction to hear claims brought by domestic workers against their diplomat employers.

Background part I provides background regarding the legal challenges that domestic workers face and how diplomatic immunity compounds these obstacles. Background part II examines the State Department regulations and practices relating to diplomatic immunity. Background part III describes the current interpretation of the VCDR as it pertains to domestic workers employed by diplomats. The remaining sections in Background parts IV and V provide an overview on the Vienna Convention on Consular Relations ("VCCR") and the Foreign Sovereign Immunities Act ("FSIA"), and describes how courts have interpreted the various authorities governing consular and foreign sovereign immunities. To justify an alternative interpretation of the VCDR that accommodates the rights and remedies of domestic workers and argues that a request for waiver of immunity from the sending state is consistent with U.S. laws, Analysis part I analyzes and compares the different employment relationships between foreign government officials and domestic workers as detailed in the VCDR,

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11. *See, e.g.*, Ahmed v. Hoque, No. 01-7224, 2002 WL 1964806, at \*1-2 (S.D.N.Y. Aug. 23, 2002) (dismissing an action brought by a former domestic worker against a UN diplomat because her employer had diplomatic immunity under the VCDR); *see* 8 U.S.C. § 1101(a)(15)(G)(v) (2006).

12. *See* Traore v. State, 431 A.2d 96, 99 (Md. 1981) (explaining that courts defer to the State Department to determine whether a diplomat has immunity to avoid interference with foreign relations but courts still have authority to resolve issues of law, including interpretations of statutes).

VCCR, and FSIA, and emphasizes that an alternative interpretation of the VCDR or a request to waive immunity will not undermine diplomatic functions. Analysis part II suggests mechanisms that the State Department should implement to protect the rights and remedies of domestic workers. This Comment concludes that the State Department should exercise its authority to intervene to protect the rights and remedies of domestic workers and prevent abusive employers from using diplomatic immunity as a shield.

#### BACKGROUND

##### I. THE LEGAL BARRIERS FACING DOMESTIC WORKERS EMPLOYED BY FOREIGN GOVERNMENT OFFICIALS IN THE UNITED STATES

Unfortunately, the experience of Shamela Begum—a migrant domestic worker, who found herself in an abusive and humiliating environment where she worked long hours and received well below the minimum wage—is common to domestic employees working for foreign government officials on special temporary work visas.<sup>13</sup> While there is no official figure indicating how many diplomats violate the rights of their workers, the cases filed in court, covered by the media, and reported upon by non-governmental organizations demonstrate that the problem is pervasive and underreported.<sup>14</sup> These workers, the majority of whom are women of color, often are not allowed to leave the employers' home, and in some cases, experience physical, psychological, and/or sexual abuse at the hands of their employers.<sup>15</sup> In the most egregious cases, the manner in which the workers are brought to the United States and their work conditions constitute human trafficking and slavery.<sup>16</sup> Because of linguistic, cultural,

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13. See, e.g., Complaint at ¶¶ 2-3, 37-54, *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187 (D.D.C. 2007) (No. 06-00089); see also HUMAN RIGHTS WATCH, *supra* note 4, at 1 (finding that, out of forty-three cases of migrant domestic workers, the median hourly earnings were \$2.14 for fourteen hour workdays).

14. See *Testimony of Elizabeth Keyes Before the Inter-American Commission for Human Rights*, Oct. 14, 2005 (on file with author) [hereinafter *Testimony of Keyes*] (stating that as an attorney for CASA of Maryland, a community legal services organization that focuses on workers' rights, she has dealt with two dozen cases over two years where diplomats have exploited workers).

15. See HOME IS WHERE THE WORK IS, *supra* note 2, at 2 (finding that ninety-three percent of domestic workers in New York City are women; ninety-five percent are people of color; sixty-seven percent earn low wages or below minimum wage; thirty-three have been in an abusive or uncomfortable situation with their employers; and ninety percent do not receive health care from employers).

16. See *United States v. Veerapol*, 312 F.3d 1128, 1131 (9th Cir. 2002) (holding that the wife of a Thai ambassador committed involuntary servitude when she abused and threatened her workers through legal action, physical force, and even threatened to take their lives); see also Margaret Murphy, *Modern Day Slavery: The Trafficking of Women to the United States*, 9 BUFF. WOMEN'S L.J. 11, 12 (2001) (approximating that 50,000 women and children are trafficked to the United States, many by foreign diplomats).

political, and legal barriers, most of these workers cannot find redress in the U.S. legal system.<sup>17</sup>

U.S. regulations and laws also largely have neglected domestic workers who are subject to abuse from their employers.<sup>18</sup> Federal laws mandating overtime pay, safe work conditions, and anti-discrimination laws do not protect live-in domestic workers, regardless of who their employers are, because live-in domestic work often is considered in the private sphere and is thus, unregulated.<sup>19</sup> In the context of domestic workers employed by foreign government officials, the Departments of State and Labor do not monitor the employment relationship; to obtain the special visa for a domestic worker, the government only requires the employer to submit a visa application and an employment contract.<sup>20</sup> The lack of government oversight, stronger laws to protect domestic workers, and enforcement mechanisms not only contribute to the workers' vulnerability, but essentially place the burden on them to seek redress.<sup>21</sup> Domestic workers employed by diplomats are the most vulnerable to abuse since their access to justice is complicated by their employers' ability to invoke immunity, which may bar courts from exercising jurisdiction over the workers' claims when none of the three VCDR immunity exceptions apply, as illustrated in

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17. See HUMAN RIGHTS WATCH, *supra* note 4, at 6, 32 (stressing the isolation of domestic workers when they are unfamiliar with local customs and laws, unaware of their rights or available resources to seek redress, and receive threats from their employers to deport them or retaliate against their families).

18. See *id.* at 27-30 (outlining the lack of legal protections for domestic workers: (1) lack of government enforcement to monitor employment contracts; (2) restrictions on changing employers while maintaining legal status; (3) exclusion of domestic workers under the National Labor Relations Act; (4) no sexual harassment protection under Title VII; (5) exclusion of live-in domestic workers under the Occupational Safety and Health Act; and (6) no FLSA requirement of overtime pay for live-in domestic workers).

19. See Donna E. Young, *Working Across Borders: Global Restructuring and Women's Work*, 2001 UTAH L. REV. 1, 65-68 (2001) (critiquing the gendered spheres doctrine where the public sphere is the market and government, and the private sphere is viewed as "women's work," such as housekeeping); see also NATIONAL EMPLOYMENT LAW PROJECT, JUSTICE FOR WORKERS: STATE AGENCIES CAN COMBAT WAGE THEFT 11 (2006), [http://www.nelp.org/docUploads/Justice\\_for\\_Workers.pdf](http://www.nelp.org/docUploads/Justice_for_Workers.pdf) (last visited Dec. 1 2007).

20. See 9 F.A.M. § 41.21 n.6.2 (2001) (indicating that consular officers can deny visa applications that do not adhere to the requirements by not submitting an employment contract signed by both parties to indicate their agreement to a fair wage, including a promise by the employee not to accept other employment, and terms regarding the employee's freedom to maintain possession of his/her passport and to leave the employer's home when off duty); see also HUMAN RIGHTS WATCH, *supra* note 4, at 2 (explaining that contracts are not enforced or monitored by the Department of Labor, nor kept on record with either the State Department or the former Immigration and Naturalization Service).

21. See HUMAN RIGHTS WATCH, *supra* note 4, at 1 (explaining that the burden that workers face in seeking redress is further compounded by the fact that employment-based visas imply that workers in abusive situations face the dilemma of staying in the abusive environment or escaping and losing their immigration status).

Begum's case.<sup>22</sup>

## II. THE ROLE OF THE STATE DEPARTMENT IN SAFEGUARDING THE RIGHTS AND REMEDIES OF DOMESTIC WORKERS

The Foreign Affairs Manual ("FAM"), which sets forth the responsibilities of the State Department in conducting international relations, outlines U.S. policies and procedures regarding the immunities and liabilities of foreign government officials working in the United States.<sup>23</sup> Diplomatic agents and their family members enjoy complete immunity from criminal suits and some immunity from civil suits.<sup>24</sup> Consular personnel enjoy immunity only for actions conducted in their official capacity; they have no immunity for acts conducted outside of their consular functions.<sup>25</sup>

Despite these immunity privileges, the State Department has a general policy to request waivers of immunity from the diplomat's government for criminal cases brought against foreign personnel, which provides U.S. courts with jurisdiction to investigate and prosecute these cases as necessary.<sup>26</sup> The State Department can proceed without requesting a

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22. See GLOBAL RIGHTS ET AL., DOMESTIC WORKERS' RIGHTS IN THE UNITED STATES: A REPORT PREPARED FOR THE U.N. HUMAN RIGHTS COMMITTEE IN RESPONSE TO THE 2ND AND 3RD PERIODIC REPORT OF THE UNITED STATES, at 10-12, available at [http://www.globalrights.org/site/DocServer/Domestic\\_Workers\\_report-FINAL.pdf?docID=5503](http://www.globalrights.org/site/DocServer/Domestic_Workers_report-FINAL.pdf?docID=5503) (arguing that preventing workers from adjudicating claims violates international laws, specifically, Article 2 of the International Covenant on Civil and Political Rights). Compare *United States v. Alzanki*, 54 F.3d 994, 999, 1005 (1st Cir. 1995) (convicting a Kuwaiti national studying in the United States of involuntary servitude when he and his wife exploited, physically abused, and threatened the life of a domestic worker on a B-1 visa, which can be used by domestic employees working for foreign nationals—who are not diplomats—in the United States), with *Testimony of Keyes*, *supra* note 14, at 3 (describing a story where a diplomat's wife told a domestic worker, while physically abusing the employee, that the police would be useless because the wife had diplomatic immunity).

23. See generally 1 F.A.M. § 011 (2001).

24. See 2 F.A.M. § 232.1-1 (1991) (explaining that diplomatic agents and their family members benefit from the highest degree of privileges and immunities and that U.S. law enforcement officials may not arrest or detain them, are prohibited from searching their property, cannot prosecute criminal offenses without a waiver of immunity from the sending state, and U.S. courts can only exercise civil jurisdiction under certain exceptions).

25. See 2 F.A.M. § 232.2 (1991).

26. See 2 F.A.M. § 233.3 (1991) (indicating that under exceptional circumstances, the State Department may require a diplomat to leave the country if the sending state does not waive immunity where the State Department has requested a waiver to investigate criminal allegations); Libby Lewis, *U.S. Ousts Kuwaiti Diplomat, Investigates Tanzania* (N.P.R. Nov. 6, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=16035332> (reporting that the State Department—for the first time—forced a Kuwaiti diplomat to leave his post at the embassy in Washington D.C. as a result of alleged trafficking of domestic workers to the United States and involuntary servitude). The State Department, in this case, requested a waiver of immunity from Kuwait, but was denied such a request. *Id.* See also Lena H.

waiver from the diplomat's mission or government when there are outweighing foreign relations, national security, or humanitarian concerns.<sup>27</sup> In civil cases, the FAM articulates the State Department's right to intervene where the complainant can demonstrate that: (1) the governmental official owes the person a debt or civil liability; (2) attempts to address the issue with the diplomatic agent and the head of mission have failed; and (3) immunity would prevent adjudicatory or administrative action.<sup>28</sup> The State Department, however, has not articulated a clear process for the complainant to demonstrate the existence of a claim and how the Department would investigate the claim.<sup>29</sup>

The State Department also sets forth provisions to address abuse of immunity privileges.<sup>30</sup> The FAM makes evident that diplomatic immunity does not grant a license for diplomats to deprive domestic workers of their rights to fair wages.<sup>31</sup> It specifically provides that the Fair Labor Standards Act ("FLSA") covers A-3 employees and advises that employers not withhold their employees' passports or prohibit their freedom of movement.<sup>32</sup> As previously mentioned, in order for foreign officials to obtain A-3 visas for domestic employees, the State Department requires that they submit a contract, which includes the above terms to ensure that employees understand their rights and duties.<sup>33</sup> These required contract

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Sun, "Modern-Day Slavery" Prompts Rescue Efforts; Groups Target Abuse of Foreign Maids, WASH. POST, May 3, 2004, at A1 (reporting that the U.S. Attorney's Office in Maryland prosecuted six domestic worker cases between 2000 and 2004).

27. See 2 F.A.M. § 232.4(b) (1991) (suggesting that a humanitarian concern exists if one's presence in the United States is dangerous or harmful, or one's health or safety is in jeopardy).

28. See 2 F.A.M. § 234.2 (1991).

29. See *id.*

30. See 2 F.A.M. § 233.1 (1991) (recognizing the diplomatic community may abuse its privileges and setting forth procedures, such as requesting waivers of immunity from the sending state when there are criminal allegations or intervening in civil cases where the complainant can demonstrate that a civil liability exists); *cf.* The Special Rapporteur, *Report of the Special Rapporteur on Specific Groups and Individuals: Migrant Workers*, ¶ 59 n.21, delivered to the Economic and Social Council, U.N. Doc. E/CN.4/2004/76 (Jan. 12, 2004) (noting that some international organizations, such as the World Bank, have implemented codes of conduct to address their member officials exploiting domestic employees).

31. See 9 F.A.M. § 41.22 n.4.3, n.4.4 (2001) (noting that FLSA does not require live-in employees to receive overtime pay, but states may require overtime wages for live-in employees).

32. See 9 F.A.M. § 41.22 n.4.4 (2001).

33. See *id.* (noting that contracts should be in English and if necessary, a language that the employee understands); see also Margaret L. Satterthwaite, *Beyond Nannygate: Using the Inter-American Human Rights System in* NEW PERSPECTIVES ON GENDER AND MIGRATION: EMPOWERMENT, RIGHTS, AND ENTITLEMENTS 7-8 (Nicola Piper ed., 2007) (observing that contracts often are not written in a language that employees understand or not given to employees at all, and that employers have told employees that contracts were not binding or altered provisions so that it offered no protection to workers).

provisions are also published in Circular Diplomatic Notes, which are issued by the State Department's Office of Foreign Missions and distributed to foreign government officials in the United States, and express concern for diplomats who abuse their privileges and exploit their personal domestic employees.<sup>34</sup>

These policies are consistent with international law, which stipulates that those who enjoy certain privileges and immunities as foreign government officials in the United States also must respect the country's laws and regulations.<sup>35</sup> In practice, however, the State Department has strayed from these policies; instead of requesting a waiver of immunity from the sending state when complainants allege that diplomats abused and violated U.S. law, the State Department submitted Statements of Interest to courts that confirm that diplomats have immunity from civil jurisdiction under the VCDR.<sup>36</sup> These Statements of Interest generally are binding on courts, whereby domestic workers are precluded from litigating their claims when the State Department asserts that diplomats have immunity and that the immunity exceptions do not apply.<sup>37</sup>

The State Department justifies its actions by invoking theories of functional necessity and reciprocity.<sup>38</sup> It asserts that safeguarding the immunity privileges of diplomats based in the United States ensures that the interests of U.S. diplomats who are based in other countries also are protected.<sup>39</sup> Thus, diplomatic immunity is intended to facilitate diplomatic

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34. See U.S. DEP'T OF STATE, OFFICE OF FOREIGN MISSIONS, CIRCULAR DIPLOMATIC NOTE ON DOMESTIC EMPLOYEES (June 19, 2000), available at <http://www.state.gov/ofm/31311.htm> [hereinafter CIRCULAR DIPLOMATIC NOTE OF JUNE 2000] (reserving the right to deny a diplomat's visa application for a domestic employee if it reasonably suspects that the diplomat violated past employment provisions and obligations).

35. See VCDR, *supra* note 8, art. 41.

36. See *Ahmed v. Hoque*, No. 01-7224, 2002 WL 1964806, at \*2 (S.D.N.Y. Aug. 23, 2002) (adhering to a Statement of Interest from the State Department that confirmed the Economics Minister for the Permanent Mission of Bangladesh had the same VCDR immunity privileges as a diplomat pursuant to the Convention on Privileges and Immunities of the United Nations, and the Agreement between the United Nations and the United States Regarding the Headquarters of the United Nations); HUMAN RIGHTS WATCH, *supra* note 4, at 35 (finding that between 1995 and 2001, the State Department had only intervened in one civil case—*Ahmed v. Hoque*—regarding a diplomat's abuse of his domestic worker, and only to the extent that it mediated a settlement between the parties). *But see* Lewis, *supra* note 26 (discussing the first case where the State Department has intervened to request a waiver of immunity from the Kuwaiti government to prosecute a Kuwaiti diplomat based in the United States who allegedly held his domestic workers in slavery conditions).

37. *Abdulaziz v. Metro. Dade County*, 741 F.2d 1328, 1329-30 (11th Cir. 1984) (dismissing claims brought against Saudi Arabian diplomats because the State Department's Statement of Interest is binding on the court).

38. Statement of Interest of the United States at 4, *Gonzalez Paredes v. Vila*, No. 06-0089 (D.D.C. Jan. 26, 2007).

39. *Id.* at 2, 6; see *Diplomatic Immunity and U.S. Interests: Statement on H.R. 3036*

missions in carrying out their official functions in representing the sending states without interference.<sup>40</sup>

### III. THE CURRENT INTERPRETATION OF THE VCDR COMMERCIAL ACTIVITY EXCEPTION APPLIED IN *TABION V. MUFTI*

Like the FAM, the VCDR also requires diplomats to respect the laws of the receiving state and provides that the purpose of diplomatic immunity is not to benefit individuals. The VCDR, which Congress codified through the Diplomatic Relations Act,<sup>41</sup> further articulates exceptions to immunity from civil and administrative jurisdiction, including a commercial activity exception.<sup>42</sup> As articulated above, the State Department has the authority to request waivers of immunity from sending states and its Statement of Interests, interpreting a diplomat's immunity privileges under the VCDR, are generally binding on courts.<sup>43</sup>

The VCDR does not define commercial activity explicitly nor does its negotiation history provide a clear definition.<sup>44</sup> The VCDR, however, lists

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*Before the Senate Foreign Relations Committee*, 100th Cong. 8-9 (1987) (statement of Ambassador Selwa Roosevelt, Chief of Protocol of the United States) (suggesting that other countries will retaliate against U.S. officials abroad if the United States unilaterally lessens immunity privileges of diplomats).

40. *See Diplomatic Immunity and U.S. Interests: Statement on H.R. 3036 Before the Senate Foreign Relations Committee*, 100th Cong. 8-9 (1987) (statement of Ambassador Selwa Roosevelt, Chief of Protocol of the United States) (asserting that immunity privileges are not intended to benefit individuals but ensure that all diplomats work in an independent and secure environment without fear of incarceration).

41. Diplomatic Relations Act of 1978, 22 U.S.C. § 254 (a)-(e) (2007) (codifying the VCDR into federal law despite the self-executing nature of the international treaty, and repealing legislation that was inconsistent with the VCDR, which provided complete civil immunity for diplomats). The Act brought U.S. diplomatic relations law consistent with international diplomatic relations law. *Id.* *See also* Foreign Missions Act, 22 U.S.C. § 4304(b) (1982) (addressing how the State Department can further the interests of foreign missions in the United States and U.S. missions abroad while protecting the interests of individuals in the United States by stipulating that the Secretary of State submit an annual report detailing allegations of "serious criminal offenses," such as a felony, committed by diplomats, and disclosing cases to Congress where the State Department has requested waivers of immunity from sending states).

42. *See* VCDR, *supra* note 8, art. 31(1).

43. *See* 2 F.A.M. § 234.1-1 (1991) (providing that the State Department will provide a certification of immunity, indicating whether the diplomat has immunity and the scope of that immunity, to law enforcement officials, U.S. courts, and attorneys, when a diplomat has allegedly committed a crime); *see also* 2 F.A.M. § 234.2 (1991).

44. *See* VCDR, *supra* note 8, art. 31(1); U.N. Conference on Diplomatic Intercourse and Immunities, 36th mtg. at ¶¶ 3-4, U.N. Doc. A/Conf.20/14 (Mar. 30, 1961) [hereinafter U.N. Conference] (discussing whether investing in a company is a commercial activity, but not revealing a definitive answer); *see also Report of the International Law Commission to the General Assembly: Diplomatic Intercourse and Immunities, Summary of Observations Received from Governments and Conclusions of the Special Rapporteur*, 10th Commission, at 56, U.N. Doc. A/CN.4/116 (May 2, 1958) [hereinafter *Report of the Commission*] (noting that commercial activity should be a continuous act rather than a single act of commerce).

several functions of a diplomatic mission and although the list is not exhaustive, none of the specified functions explicitly or implicitly include the employment of a domestic worker as an official function.<sup>45</sup> Nonetheless, courts, following the guidance of the State Department, have ruled that employment of domestic workers is not a professional or commercial activity outside the official functions of the diplomat.<sup>46</sup> Instead, courts have applied a narrower interpretation of commercial activity and held that it does not include “occasional service contracts” that are “incidental to the daily life of the diplomat” and that commercial activity “relates only to trade or business activity engaged in for personal profit.”<sup>47</sup> The Fourth Circuit applied such an interpretation in *Tabion v. Mufti* where Corazon Tabion, a domestic worker from the Philippines, sued Faris Mufti, a Jordanian diplomat based in Washington D.C., for violating the terms of her employment contract.<sup>48</sup> The court reiterated the conclusions in the State Department’s Statement of Interest submitted in support of the Muftis’ diplomatic immunity and barred Tabion from adjudicating her claims against her employers.<sup>49</sup> The Fourth Circuit’s decision not only prevented Tabion’s access to the courts, but it also has substantially influenced subsequent cases and denied rights and remedies to others in similar abusive situations.<sup>50</sup>

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45. See VCDR, *supra* note 8, art. 3(1) (providing examples of the functions of diplomatic missions, such as (1) representation of sending states; (2) protection of sending states’ nationals and state interests; (3) negotiation and communication with receiving states; and (4) cultivation of friendly relations between states); see also EILEEN DENZA, *DIPLOMATIC LAW: A COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS* 252 (Oxford Univ. Press, 2d ed. 2002) (1998) (noting that it is unclear whether the drafters of the VCDR intended Article 3 to serve as a reference in determining the scope of diplomatic functions under Article 31(1)(c)—the commercial activity exception—because of the ambiguous boundaries between activities deemed commercial and those that are incidental to diplomatic functions).

46. See, e.g., *Tabion v. Mufti*, 73 F.3d 535, 538-39 (4th Cir. 1996) (holding that “day-to-day living services such as dry cleaning or domestic help” were not outside a diplomat’s official functions and such “occasional service contracts” were not commercial activity under the VCDR).

47. See *id.* at 537 (reading “for personal profit” into the commercial activity exception in Article 31(1)(c) of the VCDR, which does not explicitly state this element). But see *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) (providing that if Congress includes specific language in one section of a statute but excludes it another section, then Congress intended the language’s exclusion in the latter).

48. See Brief of Appellant Corazon Tabion at 5-6, *Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996) (No. 95-1732) (alleging violations of the FLSA when Mufti paid Tabion only \$0.50 per hour for eighteen-hour workdays from August 1991 to December 1993, breach of contract, intentional misrepresentation in employment, and false imprisonment).

49. See *Tabion*, 73 F.3d at 539 (explaining that the court’s decision to dismiss the case, despite its unfairness, reflects policy choices that Congress and the Executive Branch have already determined in balancing the purpose of diplomatic immunity and the private interest of the aggrieved party).

50. See, e.g., Statement of Interest of the United States at 10 n.6, *Begum v. Saleh*, No. 99-11834 (S.D.N.Y. Mar. 2000) (relying on *Tabion* to assert that the VCDR

IV. THE VCCR'S SCOPE OF OFFICIAL FUNCTIONS AND *PARK V. SHIN*

The VCDR governs the immunity privileges of diplomats and exceptions to such privileges, while the VCCR governs immunity privileges of consular officials.<sup>51</sup> It may be useful to compare these two conventions, courts' interpretation of these conventions, and the courts' application of these standards to similar facts to determine whether there is a fundamental difference between domestic workers' employment relationships with diplomats and their relationships with consular officers, such that the former employer would be afforded immunity privileges whereas the latter would likely not have immunity.<sup>52</sup> In contrast to the VCDR's provisions on diplomats, the VCCR grants consular officials immunity only with respect to actions that arise in the exercise of their official functions.<sup>53</sup> The VCCR also specifically states that consular officials do not have immunity with regards to contract claims where the officers do not expressly or impliedly contract as agents of sending states.<sup>54</sup> Thus, U.S. case law demonstrates that a domestic worker employed by a consular official has an opportunity to adjudicate claims against her employer.<sup>55</sup> This was the case in *Park v. Shin* where the Ninth Circuit found that Shin, the consular official, was not performing his consular functions when he hired and supervised Park as a domestic worker.<sup>56</sup> Thus, Park could continue with

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commercial activity exception is not relevant where a UN diplomat has employed a domestic worker); Statement of Interest of the United States at 6-7, *Gonzalez Paredes v. Vila*, No. 06-0089 (D.D.C. Jan. 26, 2007) (following *Tabion* to illustrate that the VCDR commercial activity does not pertain to a diplomat's employment of a domestic worker).

51. Compare VCDR, *supra* note 8, arts. 1(e), 31 (defining a diplomatic agent as a member of a country's diplomatic mission in a receiving state and establishing diplomatic immunity from criminal and most civil prosecution), with Vienna Convention on Consular Relations arts. 1(d)-(e), 43, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR] (defining consular officers and employees respectively as any person entrusted with consular functions or with administrative or technical functions and establishing consular immunity from prosecution in the receiving state for duties performed when carrying out their consular functions).

52. Compare *Park v. Shin*, 313 F.3d 1138, 1145-46 (9th Cir. 2002) (holding that the consular officer hired the domestic worker as a personal employee, so he is not protected by any immunity privileges of the VCCR), with *Tabion*, 73 F.3d at 539 (holding that a diplomat's employment of a domestic worker is "incidental to daily life" and part of diplomatic functions, such that the diplomat, under the VCDR, is immune from suit by the domestic employee in U.S. federal courts).

53. VCCR, *supra* note 51, art. 43.

54. *Id.*

55. See Opening Brief of Appellant Tae Sook Park at 3-4, 8-9, *Park v. Shin*, 313 F.3d 1138 (9th Cir. 2002) (No. 01-16805) (concluding that a domestic worker employed by a consular official could bring suit against her employer because the consular officer acted outside his official functions when he hired her to perform services, such as cooking for his family, and paid her an average wage of \$1.00 per hour, which was well below the minimum wage).

56. 313 F.3d at 1143.

her suit.<sup>57</sup> To reach this conclusion, the *Park* court applied a two-prong test: (1) “whether the functions asserted are ‘legitimate consular functions;’” and (2) whether the acts performed by the consular officer are in the scope of his legitimate consular functions.<sup>58</sup>

#### V. THE FSIA AND THE COMMERCIAL ACTIVITY EXCEPTION

In contrast to the VCDR and the VCCR, which govern individual diplomatic and consular immunity respectively, the FSIA is a statute enacted in 1976 that authorizes U.S. courts to determine whether foreign states and their instrumentalities qualify for sovereign immunity.<sup>59</sup> Despite the sovereign state and diplomat being different legal entities, it is useful to consider the FSIA in understanding the VCDR and the commercial activity exception as it is applied to diplomats who employ domestic workers because both the FSIA and VCDR invoke standards that attempt to balance the public interest—in promoting foreign relations—and the interest of private individuals.<sup>60</sup> Even though the FSIA does not explicitly state that individuals can claim sovereign immunity, courts have interpreted that individuals can invoke immunity if they can demonstrate that the functions they performed were within their official capacity as agents of a foreign sovereign.<sup>61</sup> The statute codified the restrictive immunity theory, which provided that foreign sovereigns enjoy immunity privileges for public acts

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57. See *id.*; VCCR, *supra* note 51, art. 43 (providing that consular officials do not have immunity if acting outside official functions).

58. See *Park*, 313 F.3d at 1141-43. The court found Shin’s argument too attenuated and concluded that any services performed that benefited the consulate were incidental to Park’s job as a personal servant. *Id.*

59. See Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1604-1605 (2006) (giving foreign states immunity from jurisdiction of courts with the exception of commercial activity, among other noted exceptions); see also H.R. REP. NO. 94-1487, at 7 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6606 (articulating intent to transfer sovereign immunity issues from executive branch to judicial branch, which is a common practice in many countries, to avoid political and diplomatic pressures and ensure that judicial decisions are grounded in the law).

60. See *Tabion v. Mufti*, 73 F.3d 535, 539 (4th Cir. 1996) (comparing the similarity of cases invoking sovereign immunity with those invoking diplomatic immunity, such that the “inequity to a private individual [that results from the immunity privileges] 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”).

61. See 28 U.S.C. § 1603 (defining agency or instrumentality of foreign state as a separate legal person or an organ of the foreign state); *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990) (declaring that suing an individual acting in his official capacity is the “practical equivalent” of suing the foreign state so that individuals, in this context, can invoke immunity); *cf.* *Trajano v. Marcos (In re Estate of Ferdinand Marcos Human Rights Litig.)*, 978 F.2d 493, 497-98 (9th Cir. 1992) (concluding that the daughter of a former Philippine President could not invoke sovereign immunity because acts of torture and arbitrary killing were outside the scope of her official functions under the Foreign Sovereign Immunities Act (“FSIA”).

but not private commercial acts.<sup>62</sup>

The FSIA defines commercial activity as “either a regular course of commercial conduct or a particular commercial transaction or act,” and the legal standard—known as the private actor test—is to look to the nature of the act rather than its purpose and whether the commercial activity has a direct effect on the United States.<sup>63</sup> The nature of the activity is commercial if a private party can engage in the act, as opposed to a non-commercial act that is exclusive to foreign sovereigns.<sup>64</sup> In a number of cases, employees successfully have sought relief under the FSIA from their employers who are foreign governments officials based in the United States.<sup>65</sup> For example, in *Segni v. Commercial Office of Spain* and *El-Hadad v. Embassy of the U.A.E.*, the Seventh Circuit and the District Court for the District of Columbia respectively concluded that the foreign state could not invoke sovereign immunity because the employment of the complainants fell within the commercial activity exception.<sup>66</sup> Alternatively, in *Butters v. Vance International, Inc.*, a corporation that specialized in security services invoked FSIA immunity as a defense to a suit brought by a former employee and the Fourth Circuit held that the corporation was immune from suit because decisions as to how to secure and protect the safety of a government premise and its occupants are governmental in nature.<sup>67</sup>

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62. See 28 U.S.C. § 1602; H.R. REP. NO. 94-1487, at 7 (justifying the shift from absolute immunity to restrictive immunity to accommodate modernization, where foreign states have become regular participants in markets and those engaging in commercial activities with foreign states should have a way to seek redress in U.S. courts if needed).

63. See H.R. REP. NO. 94-1487, at 16 (clarifying that even if the ultimate objective of the activity is for public purpose, such as buying military equipment or repairing an embassy building, it is commercial if private actors can also perform the act).

64. See, e.g., *Argentina v. Weltover*, 504 U.S. 607, 616-17 (1992) (concluding that issuance of bonds was a commercial activity rather than a sovereign act because private parties issue bonds).

65. See, e.g., *Al Mukaddam v. Permanent Mission of Saudi Arabia to the United Nations*, 111 F. Supp. 2d 457, 466 (S.D.N.Y. 2000) (concluding that a former employee, who helped draft speeches that articulated government policy, could sue the Saudi Arabia mission because a private actor can just as likely hire someone to perform such tasks and the employee did not contribute to the actual development of Saudi Arabia’s policies).

66. See *Segni v. Commercial Office of Spain*, 835 F.2d 160, 165 (7th Cir. 1987) (characterizing Segni’s duties to market Spanish wines in the United States as “product marketing,” something done by many private persons and individual businesses); *El-Hadad v. Embassy of the United Arab Emirates*, No. 96-1943, 2006 WL 826098, at \*7 (D.D.C. Mar. 29, 2006) (holding that the former employee, an internal auditor for the U.A.E. mission, was not a civil servant, and could continue with her suit against her employer because a private actor can hire internal auditors).

67. 225 F.3d 462, 466 (4th Cir. 2000) (holding that the corporation, Vance International, could invoke sovereign immunity under the FSIA as a result of derivative immunity if it relied on Saudi Arabia’s orders to properly secure government property, which is an act deemed unique to sovereigns).

In *Park v. Shin*, the Shins also attempted to claim sovereign immunity under the FSIA, but the Ninth Circuit rejected this argument.<sup>68</sup> The court concluded that Mr. Shin was not a foreign sovereign as defined by the FSIA because an individual can only invoke sovereign immunity if they are acting within their official capacity, and the court deemed that he was acting outside of his official duties when he hired and supervised Park.<sup>69</sup> It further emphasized that even if Shin could invoke the FSIA, the commercial activity exception would apply because a private person can also hire and supervise a domestic worker.<sup>70</sup>

#### ANALYSIS

##### I. THERE IS AN ALTERNATIVE INTERPRETATION OF THE VCDR COMMERCIAL ACTIVITY EXCEPTION THAT PROVIDES DOMESTIC WORKERS ACCESS TO COURTS THAT IS ALSO HARMONIOUS WITH THE VCDR AND U.S. LAWS AND REGULATIONS

The State Department's narrow interpretation of the VCDR commercial activity exception currently excludes the employment of domestic workers.<sup>71</sup> This interpretation not only contributes to the exploitation of domestic workers who work for diplomats, but it also is inconsistent with the State Department's own policies to prevent abuse of immunity privileges by intervening in civil cases when immunity would preclude judicial action.<sup>72</sup> Moreover, the current interpretation does not address how a diplomat-domestic worker relationship substantively differs from that of consular official-domestic worker or foreign state agent-domestic worker. Why is someone engaging in the same work for equally demanding hours and being paid well below the minimum wage barred from suit simply because her employer is a diplomat, as opposed to a consular officer or an

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68. 313 F.3d 1138, 1143 n.4 (9th Cir. 2002).

69. *Id.* at 1144-45.

70. *Id.* (asserting that even if Shin employed Park to assist with serving consulate guests at Shin's home, the purpose is irrelevant because the statute looks to the nature of the activity rather than purpose when considering if the commercial activity exception applies).

71. *See, e.g.*, Statement of Interest of the United States at 2, *Gonzalez Paredes v. Vila*, No. 06-0089 (D.D.C. Jan. 26, 2007) (asserting that diplomats are immune from suit because employment of domestic workers does not fall within the VCDR commercial activity exception even if it is deemed commercial activity under the FSIA because the VCDR and FSIA refer to different doctrines and histories).

72. *See* 2 F.A.M. § 234.2(b) (1991) (articulating that the State Department will intervene where the aggrieved party can show: (1) a diplomat owes him/her a debt; (2) he/she has unsuccessfully attempted to address the matters with the head of the mission; and (3) immunity would prevent the aggrieved party from obtaining redress through judicial or administrative action); *see also* HUMAN RIGHTS WATCH, *supra* note 4, at 22 (noting that the U.S. government, aware of its lack of rigor in addressing the abuse of domestic workers, would only be interviewed under conditions of anonymity).

agent of a foreign state?<sup>73</sup> As the facts of *Park* and *Tabion* illustrate, there is essentially no difference between the employment relationships of a diplomat and a domestic employee and of a consular official and a domestic employee.<sup>74</sup> Yet diplomats who employ domestic workers are immune from the jurisdiction of U.S. courts whereas domestic workers who are employed by consular officers, foreign state agents, and private individuals can sue in U.S. courts when those employers violate their employment contract as a personal employee.<sup>75</sup> If functional necessity and reciprocity are the justifications for upholding the diplomat's immunity privileges, why are these concerns outweighed by protections for the individual in the context of immunity for consular officers and foreign state agents, at least in the context of employment of domestic workers?<sup>76</sup>

The negotiation history of the VCDR notes that a commercial activity is a continuous act, but it does not provide a clear definition of commercial activity.<sup>77</sup> Nonetheless, the VCDR's negotiation history makes evident that

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73. Compare *United States v. Veerapol*, 312 F.3d 1128, 1130 (9th Cir. 2002) (concluding that the employer, who was a common law wife of a Thai ambassador, was guilty of involuntary servitude when she brought Thai nationals on visitor visas to the United States, ordered them to work at least twelve-hour days, paid them between \$240 and \$360 per month to cook, clean, and take care of her child, confiscated their passports, prohibited them from speaking to anyone, and threatened them verbally and physically), with *Ahmed v. Hoque*, No. 01-7224, 2002 WL 1964806, at \*1-2 (S.D.N.Y. Aug. 23, 2002) (holding that the domestic employee of a UN foreign minister could not sue his employers because of diplomatic immunity, despite allegedly forcing him to cook and clean fourteen to seventeen-hour days, every day of the week, providing him with a small stipend but no salary, subjecting him to verbal and physical abuse, and withholding his travel documents).

74. Compare Opening Brief of Appellant Tae Sook Park at 3-4, *Park v. Shin*, 313 F.3d 1138 (9th Cir. 2002) (No. 01-16805) (noting that the Shins hired a domestic worker to cook, clean, and care for the consular official's children for over twelve hours per day, every day of week at an average hourly wage of one dollar), with Brief of Appellant Corazon Tabion at 5, *Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996) (No. 95-1732) (noting that the Mufti's employed a domestic worker to cook, clean, and care for the diplomat's children at least sixteen hours per day, every day of week at an average hourly wage of fifty cents).

75. See, e.g., *United States v. Alzanki*, 54 F.3d 994, 999, 1004-05 (1st Cir. 1995) (finding the employer, a Kuwaiti national studying at Boston University, guilty of involuntary servitude when he and his wife brought a Sri Lankan native to the United States on a B-1 visa to clean their home for fifteen hours a day for \$120 per month). See generally 9 F.A.M. § 41.31 n.9.3 (2005) (explaining that B-1 visas can be issued to domestic employees of U.S. citizens residing temporarily in the United States or certain foreign nationals in the United States).

76. See *Tabion v. Mufti*, 73 F.3d 535, 539 (4th Cir. 1996) (articulating that sovereign immunity and diplomatic immunity are similar in that the "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"). But see H.R. REP. NO. 94-1487, at 8 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6606 (setting forth that the FSIA provides individuals with some remedy to obtain a judgment against a foreign state under certain circumstances, such as a commercial transaction).

77. See U.N. Conference, *supra* note 44, at ¶¶ 3-4 (indicating that that there was no consensus on the definition of commercial activity; for example, one might consider a

the purpose of the commercial activity exception is to ensure that third parties are not “deprived of their ordinary remedies.”<sup>78</sup> This intention is further demonstrated in a resolution on civil claims adopted by the UN Conference on Diplomatic Intercourse and Immunities, asserting that diplomatic immunity is intended not to deprive individuals of their civil remedies where adjudication of the claims would not interfere with diplomatic functions.<sup>79</sup>

Thus, in considering the current interpretation of the VCDR commercial activity exception, which deprives domestic workers of their remedies, comparing the manner in which different courts analyzed employer-employee relationships in the context of the FSIA and the VCCR helps to discern how courts should interpret the commercial activity exception of the VCDR and what constitutes activities within the scope of a diplomat’s official functions.<sup>80</sup> The following subsections demonstrate that there is an alternative interpretation of the VCDR commercial activity exception—one that is not only harmonious with the VCDR and U.S. laws and regulations, but that also ensures domestic workers have access to courts—that the State Department and courts should adopt.

*A. Diplomats Should Not Have Immunity From Civil Jurisdiction Because Employment of Domestic Workers is Commercial in Nature*

*1. The U.S. Government Treats the Domestic Work Industry as a Commercial Enterprise*

Though much of the domestic work industry is unregulated, it is undoubtedly a commercial enterprise.<sup>81</sup> In New York City alone, there are

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diplomat who is a stockholder of a company as commercial activity though different countries disagreed whether this would be the case); *Report of the Commission, supra* note 44, at 56.

78. See *Report of the Commission, supra* note 44, at 56 (emphasizing that the purpose of the commercial activity exception is to allow aggrieved parties, as a result of a commercial activity, to obtain a remedy where the diplomat has violated the law, and that it would be inappropriate under these circumstances to request the aggrieved parties to seek redress from the diplomat’s home state).

79. See U.N. Conference on Diplomatic Intercourse and Immunities, 12th plen. Mtg., Apr. 15, 1961, *Resolution on the Consideration of Civil Claims*, 90 U.N. Doc A/Conf.20/10/Add.1 (recommending sending states waive immunity where individuals would be deprived of remedies that they would normally be entitled to, or at a minimum, help facilitate a fair settlement if immunity is not waived).

80. See Letter from Gilda Brancato, Attorney-Adviser, U.S. Dep’t of State to Foreign Embassy 1, 3 (Oct. 23, 1990), available at <http://www.state.gov/documents/organization/28510.pdf> [hereinafter Letter from Brancato] (applying the rationale of the FSIA commercial activity exception with the VCDR and VCCR mandate that foreign officials have to respect the receiving state laws, to conclude that foreign missions, as employers, are engaging in commercial activity when they hire employees and should be subjected to federal and state employment laws).

81. See Memorandum of Law for the ACLU et al. as Amici Curiae Supporting

somewhere between 200,000 and 600,000 domestic workers employed by private families and government officials.<sup>82</sup> Within the United States, estimates of domestic workers range in the millions, from 1.13 million to four million.<sup>83</sup> Moreover, the Internal Revenue Service considers the domestic work industry a commercial enterprise, requiring individuals—not diplomats—who employ domestic workers in their home at an annual salary of \$1,500 or more in 2007, to report those wages and withhold taxes, which are similar to requirements for businesses.<sup>84</sup> Because many households evade these taxes, the Internal Revenue Service estimated that the government lost \$1.2 billion in social security and Medicare taxes in 1998.<sup>85</sup> The sheer figures illustrate that employment of domestic workers is a commercial activity.<sup>86</sup> Nonetheless, courts have interpreted it otherwise.<sup>87</sup>

## *2. The VCDR Commercial Activity Exception Does Not Only Refer to Activities for Personal Profit*

The *Tabion* court relied on a Statement of Interest from the State Department, which articulated a narrow interpretation of the VCDR's Article 31(1)(c) commercial activity exception such that it refers only to activities for personal profit; however, Article 31(1)(c) does not

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Plaintiff at 12-13, *Gonzalez Paredes v. Vila* 479 F. Supp. 2d 187 (D.D.C. 2007) (No. 06-00089) (asserting that domestic work is a lucrative commercial industry, one which the U.S. government also recognizes and treats as a commercial enterprise through its taxation system); *see also* HOME IS WHERE THE WORK IS, *supra* note 2, at 1, 11 (characterizing the New York City domestic work industry as the “invisible backbone of [the city’s] economy” because domestic employees take on the responsibility of household chores and child care, which allows their employers to work and earn more money that ultimately expands the economy through increased spending).

82. HOME IS WHERE THE WORK IS, *supra* note 2, at 1 n.2 (explaining that the varied figures of 200,000 and 600,000 domestic workers employed in New York City result from the industry’s informal structure and difficulty in accounting for undocumented workers).

83. David Cay Johnston, *Despite an Easing of Rules, Millions Evade “Nanny Tax,”* N.Y. TIMES, Apr. 5, 1998, § 1, at 1.

84. *See* Internal Revenue Service, Publication 926, *available at* <http://www.irs.gov/publications/p926/ar02.html#d0e94> (last visited Mar. 23, 2007).

85. *See* Johnston, *supra* note 83, at 1 (explaining that many households that employ domestic workers do not report the workers’ wages to the Internal Revenue Service because the government is not rigorous in enforcing such violations).

86. *See* Memorandum of Law for the ACLU et al. as Amici Curiae Supporting Plaintiff at 12, *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187 (D.D.C. 2007) (No. 06-00089) (estimating that the one million nannies who work in U.S. homes generate a multi-billion dollar enterprise).

87. *See* *Tabion v. Mufti*, 73 F.3d 535, 537-38 (4th Cir. 1996) (concluding that the VCDR commercial activity exception does not include employment of domestic workers, which the court characterized as “occasional service contracts” incidental to diplomatic functions).

specifically state this.<sup>88</sup> In comparison, the drafters explicitly stated in Article 42 of the VCDR that a diplomatic agent is prohibited from engaging in any professional or commercial activities “for personal profit” in the receiving state.<sup>89</sup> Interpreting Article 31(1)(c) to include personal profit is contrary to the plain language of the VCDR.<sup>90</sup> If the drafters intended the commercial activity exception in Article 31(1)(c) to include “for personal profit,” they would have explicitly stated it as they did in Article 42.<sup>91</sup> Furthermore, if Article 31(1)(c) and Article 42 both referred to the commercial activity exception, then the drafters would not have separated these provisions.<sup>92</sup> Thus, the *Tabion* court misinterpreted Article 31(1)(c) by combining it with the terms of Article 42, which is a separate and distinct provision.<sup>93</sup>

Even if the VCDR drafters intended the commercial activity exception to relate only to those activities for personal profit, Mufti’s employment of Tabion was still commercial in nature. Moreover, his exploitation of

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88. See *id.* (finding that commercial activity, which is undefined by the VCDR, should be examined in the context of Article 31(1)(c), referring to when diplomats are not immune from civil actions, and Article 42, mandating that diplomats are prohibited from engaging in commercial activity for personal profit).

89. See U.N. Conference, *supra* note 44, at 10 (distinguishing Article 31(1)(c), which was Article 29 at the time of negotiations, from Article 42, which was Article 40 *bis*, because Article 42 refers only to diplomatic agents whereas Article 31(1)(c) also applies to diplomats’ family members and administrative, technical, and service staff).

90. See VCDR, *supra* note 8, art. 31(1)(c); see also *Tabion*, 73 F.3d at 537 (conceding that the exchange between Tabion and Mufti constitutes commercial activity under the plain meaning because there was an employment contract and a transaction of goods and services between the two parties); Brief of Appellant Corazon Tabion at 7-10, *Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996) (No. 95-1732) (asserting that defendant’s interpretation of the commercial activity exception is contrary to the unambiguous plain meaning of the VCDR, which is merely the exchange of goods and services, including employment contracts).

91. E.g., Brief of Appellant Corazon Tabion at 10, *Tabion*, 73 F.3d 535 (No. 95-1732) (citing *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994)) (noting that it is generally intentional when Congress has included particular language in one section and omitted it in another section of the same statute).

92. See U.N. Conference, *supra* note 44, at 14 (stating that the commercial activity exception to immunity from civil jurisdiction is distinct from the provision prohibiting diplomatic agents from engaging in professional or commercial activity for personal profit because the former refers to actions of the diplomats that are subject to the receiving state’s jurisdiction whereas the latter refers to actions that are prohibited by diplomats).

93. Compare *Tabion*, 73 F.3d at 537-38 (narrowing the interpretation of commercial activity in Article 31(1)(c) to refer only to trade or business activity for personal profit—and not employment of domestic workers—because Article 42 emphasizes that diplomats are prohibited from engaging in commercial activity for personal profit), with U.N. Conference, *supra* note 44, at ¶¶ 1-37, (expressing that the new article—which ultimately became Article 42—proposed by Colombia that explicitly prohibited diplomats from engaging in professional and commercial activity for personal profit was necessary to ensure the public’s trust that diplomats would not abuse their privileges, which was different from the provision—Article 31(1)(c)—that noted the exceptions to diplomatic immunity).

Tabion would have satisfied the “for personal profit” component of the commercial activity exception.<sup>94</sup> By not paying Tabion what was mandated under federal minimum wage laws, Mufti was essentially profiting personally from Tabion’s services.<sup>95</sup> In other words, Mufti reaped a profit by retaining the amount of wages that should have been paid to Tabion as a matter of law.<sup>96</sup> Some states even criminalize an employer’s failure to pay wages as “theft of services.”<sup>97</sup>

During the twenty-eight months that Tabion worked for Mufti, she earned approximately \$5,600.<sup>98</sup> This amount was based on an average wage of \$0.50 per hour for over 400 hours of work per month.<sup>99</sup> Under the federal minimum wage, which was \$4.25 per hour during the time the Muftis employed Tabion, she should have earned at least \$47,600.<sup>100</sup> Because Mufti paid her only \$5,600, he profited at least \$42,000 from

94. See VCDR, *supra* note 8, art. 31(1)(c); Brief of Appellant Corazon Tabion at 5, *Tabion*, 73 F.3d 535 (No. 95-1732) (claiming that Mufti only paid Tabion \$5,600 over the course of twenty-eight months, which was equivalent to approximately \$0.50 per hour, rather than the required minimum wage, which was \$4.25 per hour during her employment); see also *Report of the Commission*, *supra* note 44, at 56 (discussing the importance of third parties’ ability to obtain redress from diplomats where there has been a commercial exchange).

95. See Brief of Appellant Corazon Tabion at 5, *Tabion*, 73 F.3d 535 (No. 95-1732); see also *Dole v. Bishop*, 740 F. Supp. 1221, 1229 (S.D. Miss. 1990) (determining that it is in the public interest and within the mandate of the FLSA to require employers to pay back wages into the court’s registry to prevent employers from profiting from back wages). In *Dole*, the back wages went to the court’s registry rather than the employees themselves since the employees presented false testimonies at trial; had they not presented false testimonies, the employees would have been entitled to the back wages. *Id.*

96. See Brief of Appellant Corazon Tabion at 4-5, *Tabion v. Mufti*, 73 F.3d 535 (No. 95-1732) (contending that the Muftis breached their employment contract with Tabion, violated the FLSA, and committed intentional misrepresentations in employment); Memorandum of Law for the ACLU et al. as Amici Curiae Supporting Plaintiff at 14, *Gonzalez v. Vila*, 479 F. Supp. 2d 187 (D.D.C. 2007) (No. 06-00089) (citing *Jeremiah v. Richardson*, 148 F.3d 17, 20 (1st Cir. 1998), *Higgins v. Detroit Educ. Television Found.*, 4 F. Supp. 2d 701, 710 (E.D. Mich. 1998), among other cases, to demonstrate that courts have recognized that one profits when retaining the money that is owed to another).

97. See, e.g., N.Y. PENAL LAW § 165.15 (McKinney 2006). See generally NAT’L EMPLOYMENT LAW PROJECT, STATE LAWS CREATING CRIMINAL PENALTIES FOR FAILURE TO PAY WAGES 3, 6 (2004), <http://www.nelp.org/docUploads/criminal%20penalties%20for%20unpaid%20wages%2Epdf> [hereinafter NAT’L EMPLOYMENT LAW PROJECT] (listing Washington, D.C. and California, among other states, as including a “theft of services” or “theft of labor” provision in their criminal codes, which subjects the employer to fines and possible imprisonment if they violate the law).

98. Brief of Appellant Corazon Tabion at 5, *Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996) (No. 95-1732).

99. *Id.* at 5-6.

100. See Fair Labor Standards Act, 29 U.S.C. § 206(a) (1996) (requiring employers to pay employees the minimum wage, which has been at least \$5.15 per hour since September 1, 1997). Brief of Appellant Corazon Tabion at 5, *Tabion*, 73 F.3d 535 (No. 95-1732).

Tabion's services.<sup>101</sup> Therefore, under *Tabion* and the State Department's interpretation of the VCDR commercial activity exception, which both require "personal profit" as a component of commercial activity, Mufti's failure to comply with the FLSA standards, which resulted in a net profit to Mufti, was sufficient to fall within the VCDR commercial activity exception.

*3. The Scale and Frequency of the Employment of Domestic Workers Demonstrates that Such Employment is a Commercial Activity Exception Under the VCDR*

The *Tabion* court characterized the employment contract between the diplomat and the domestic worker as the "occasional service contract" and reasoned that the commercial activity exception was not intended to include such occasional contracts.<sup>102</sup> While there was some discussion in the negotiation history of the VCDR over the significance of employment disputes between diplomats and their domestic servants,<sup>103</sup> both the quantity of domestic workers employed by diplomats and the widespread, abusive violations of the law in this context illustrate that the landscape has changed in the last half century.<sup>104</sup> For example, given the multi-billion dollar domestic work industry that exists today and the thousands of A-3 and G-5 visas issued each year, it is apparent that these employment contracts are more than occasional.<sup>105</sup> Also, diplomats are permitted to bring multiple domestic employees to the United States on special visas at

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101. See Brief of Appellant Corazon Tabion at 5, *Tabion*, 73 F.3d 535 (No. 95-1732).

102. See *Tabion v. Mufti*, 73 F.3d 535, 537 (4th Cir. 1996) (characterizing Tabion's interpretation of commercial activity, in which Tabion insisted that her employment constituted commercial activity because there was an employment contract and a transaction of goods and services, as superficial and inadequate because the court considered the commercial activity exception to only pertain to trade or business activity engaged in for personal profit).

103. See *Summary Records of the 402nd Meeting*, [1957] 1 Y.B. Int'l L. Comm'n 95, U.N. Doc. A/CN.4/SER.A/1957 (noting cases in which courts found that diplomats implicitly waived immunity from labor disputes by entering into employment agreements with domestic servants). In response to whether litigating labor dispute claims in the courts of the diplomat's home country was too inconvenient for the domestic worker, the Special Rapporteur stated that he sympathized with domestic servants, who he characterized as the "small man," but opined that the VCDR should not make too many immunity exceptions based solely on inconvenience. *Id.*

104. See Libby Lewis, *Diplomatic Abuse of Servants Hard to Prosecute* (N.P.R. Mar. 1, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=7672967> (noting that the State Department issued 1,957 special temporary visas for domestic workers of foreign government officials in 2006 and that attorneys are aware of at least forty cases related to diplomatic abuse of domestic employees).

105. See U.S. DEP'T OF STATE, *supra* note 9 (providing statistics showing that the State Department has granted more than 18,500 A-3 visas and at least 11,100 G-5 visas to domestic workers in the past ten years); HUMAN RIGHTS WATCH, *supra* note 4, at 4 (noting that during the 1990s the government issued over 30,000 A-3 and G-5 visas).

one time.<sup>106</sup> Additionally, many diplomats hire successive employees and the State Department continues to grant diplomats the privilege of bringing domestic workers to the United States despite complaints that they have abused their previous workers.<sup>107</sup>

Not only is this type of employment relationship common and beyond the “occasional contract,” organizations have documented the extensive and widespread problem of diplomats abusing and taking advantage of domestic workers.<sup>108</sup> Evident from the FAM regulations and the Circular Diplomatic Notes, which mandate diplomats to submit employment contracts with the visa applications for the domestic workers, the State Department recognizes the vulnerable conditions that the workers face and the prevalence of diplomats exploiting them.<sup>109</sup>

*4. Because a Private Individual Can Employ a Domestic Worker and There is No Meaningful Distinction Between a Diplomat and a Foreign State Agent that Employs a Domestic Worker, the Broad Interpretation of the FSIA Commercial Activity Exception Should Apply to the VCDR Commercial Activity Exception*

The FSIA, which was passed two years prior to the Diplomatic Relations Act that codified the VCDR, though separate and distinct, is similar to the VCDR in that both include a commercial activity exception that bars the foreign state and diplomat, respectively, from enjoying immunity protections based on the relevant statutory terms.<sup>110</sup> It is nonetheless

106. See HUMAN RIGHTS WATCH, *supra* note 4, at 25.

107. See *id.* (describing the lack of rigorous enforcement by the U.S. government in verifying whether diplomats abused previous workers or violated contract provisions when they issue visas for new domestic employees). For example, in 2000, three weeks after a Bolivian domestic worker left her employer, an official at the Organization of American States, the diplomat already had hired a new employee despite the previous worker’s pending lawsuit against him. *Id.*

108. See *id.* at 1 (documenting over forty cases citing employer exploitation of domestic workers on special temporary work visas); see also Eur. Parl. Ass., *Report of the Committee on Equal Opportunities for Women and Men*, 18th Sess., Doc. No. 9102 (2001) (noting that a France-based organization, the Committee Against Modern Slavery, has handled over two hundred domestic slavery cases in which twenty percent of the employers are diplomats who are shielded by immunity, as opposed to the other cases where the employers are private individuals that lack immunity protections).

109. U.S. DEP’T OF STATE, OFFICE OF FOREIGN MISSIONS, CIRCULAR DIPLOMATIC NOTE ON DOMESTIC EMPLOYEES 1 (May 20, 1996), available at <http://www.state.gov/ofm/31311.htm> [hereinafter CIRCULAR DIPLOMATIC NOTE OF MAY 1996]. See Letter from Brancato, *supra* note 80, at 3 (quoting a September 24, 1990 letter from the U.S. State Department Office of the Legal Adviser, which expressed deep concern over reports of diplomats exploiting their workers, noting that embassies should observe internationally recognized and statutorily mandated preservation of human rights, and declared that the State Department will address cases where there is evidence of abuse).

110. Compare Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(2) (2006) (noting that courts can exercise jurisdiction over foreign states where the claim falls within the commercial activity exception) [hereinafter FSIA], with VCDR, *supra*

important to note that courts explicitly have recognized the differences between the VCDR and the FSIA.<sup>111</sup> The FSIA is a domestic statute that governs foreign states, whereas the VCDR is an international treaty that governs foreign diplomats.<sup>112</sup> In contrast to the FSIA delegating the judiciary authority to determine immunity, courts defer to the State Department when considering diplomatic status.<sup>113</sup> Courts, however, maintain their authority to determine if an issue is consistent with congressional intent; thus, because the VCDR commercial activity is codified by statute, it is within a court's authority to apply a broader interpretation of the VCDR commercial activity exception.<sup>114</sup>

Despite the distinctions between the FSIA and the VCDR, both authorities share the similar intent to recognize a commercial activity exception in civil actions rather than absolute immunity from civil jurisdictions.<sup>115</sup> Similar to the FSIA codifying the restrictive immunity theory such that foreign states are only immune for governmental acts rather than private, commercial acts, Congress repealed a prior federal law that granted diplomats complete immunity when it passed the Diplomatic Relations Act in 1978 because the prior law was inconsistent with the VCDR.<sup>116</sup> By providing a commercial activity exception, Congress intended both the FSIA and VCDR to allow parties engaging in commercial activities with foreign states and diplomats, respectively,

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note 8, art. 31(1)(c) (providing that diplomatic agents do not enjoy immunity from civil and administrative jurisdiction where the action relates to a professional or commercial activity exercised outside of the diplomat's official functions).

111. *See, e.g., Al Mukaddam v. Permanent Mission of Saudi Arabia to the United Nations*, 111 F. Supp. 2d 457, 469-70 (S.D.N.Y. 2000) (asserting that the VCDR and FSIA do not affect one another, such that the VCDR cannot prevent a court from exercising jurisdiction over a claim that falls under a FSIA exception).

112. *Logan v. Dupuis*, 990 F. Supp. 26, 30 (D.D.C. 1997).

113. *Abdulaziz v. Metro. Dade County*, 741 F.2d 1328, 1329-30 (11th Cir. 1984).

114. *See, e.g., Traore v. State*, 431 A.2d 96, 99 (Md. 1981) (clarifying that notwithstanding the court's deference to the State Department on issues of foreign affairs, the court is still in the position to handle questions of law, including interpretations of statutes).

115. *See FSIA*, 28 U.S.C. §§ 1602-1603 (declaring that U.S. law on sovereign immunity should be consistent with international law, such that U.S. courts have jurisdiction over foreign states if the states partake in commercial activity that has a substantial impact on the United States); VCDR, *supra* note 8, art. 31(1)(c) (setting forth that diplomats are not immune from administrative and civil jurisdiction if they engage in commercial activities outside their official functions and in the receiving state); *see also* Letter from Brancato, *supra* note 80, at 3 (referring to the restrictive theory of the FSIA, which provides that sovereign immunity does not apply to commercial activities, and concluding that diplomats and consular officials acting as employers in the United States constitutes commercial activity that is subject to litigation by third parties).

116. *See* 22 U.S.C. §§ 252-254, *repealed by* the Diplomatic Relations Act of 1978, 22 U.S.C. § 254(a)-(e) (1978) (giving complete immunity to diplomats, including their domestic employees).

access to courts.<sup>117</sup> Moreover, in considering the purpose of diplomatic immunity and foreign sovereign immunity in the first instance, the shared concern of protecting foreign relations in both contexts illustrate that where there are exceptions to immunity, it is likely that the rationale for the exceptions would be similar.<sup>118</sup> In both contexts, foreign relations, arguably, could be at risk when courts invoke the commercial activity exception such that they have jurisdiction over the diplomat or foreign state agent.<sup>119</sup> Nonetheless, Congress decided to make an exception for suits involving commercial activity that are brought against foreign sovereigns and diplomats.<sup>120</sup> Yet, thus far, courts and the State Department have made a distinction between the breadth of the commercial activity exception where courts interpret commercial activity more broadly under the FSIA, and the narrow conception under the VCDR.<sup>121</sup> There does not seem to be a meaningful explanation as to why, in the context of the FSIA, individual interests trump foreign relations when it involves any activity in which a private actor can engage, whereas foreign relations outweigh individual interests when a diplomat hires and employs a personal domestic employee.<sup>122</sup> As such, the distinction between the broad and narrow

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117. See FSIA, 28 U.S.C. § 1602 (noting that the FSIA commercial activity exception, which would allow individuals to bring suit against foreign sovereigns when there has been a commercial exchange in the United States, is intended to “serve the interests of justice and . . . protect the rights of both foreign states and litigants in United States courts”); *Report of the International Law Commission to the General Assembly*, U.N. Doc. A/3859 (1958), reprinted in [1958] 2 Y.B. Int’l L. Comm’n 98, 104, U.N. Doc. A/CN.4/SER.A/1958/Add.1, available at [http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC\\_1958\\_v1\\_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1958_v1_e.pdf) (stressing that the VCDR commercial activity exception is meant to ensure that third parties are not deprived of their “ordinary remedies” when there has been a commercial relationship between a diplomat and a third party that is outside the scope of diplomatic function).

118. See, e.g., *Tabion v. Mufti*, 73 F.3d 535, 539 (4th Cir. 1996) (noting the similarities between sovereign immunity and diplomatic immunity in a discussion of balancing the interests of the private individual with foreign relation concerns).

119. See, e.g., H.R. REP. NO. 94-1487, at 7 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6606 (explaining that one of the purposes of the FSIA is to “transfer the determination of sovereign immunity from the executive branch to the judicial branch . . . to reduce[e] the foreign policy implications of immunity determinations”).

120. See FSIA, 28 U.S.C. § 1605(a)(2) (providing that a foreign state cannot assert immunity from U.S. courts when the action is based on commercial activity); VCDR, *supra* note 8, art. 31(1)(c) (stating that a diplomatic agent does not enjoy immunity from civil and administrative jurisdiction where he or she has engaged in a commercial activity outside the realm of his or her diplomatic function).

121. See, e.g., Statement of Interest of the United States at 19-23, *Gonzalez v. Vila*, No. 06-0089 (D.D.C. Jan. 26, 2007) (asserting that the case law interpreting the FSIA commercial activity exception is inappropriate for guiding the interpretation of the VCDR commercial activity exception because the VCDR is intended to confer broader immunity privileges than the FSIA).

122. Compare *Park v. Shin*, 313 F.3d 1138, 1144-45 (9th Cir. 2002) (concluding that employment of a domestic worker falls within the FSIA commercial activity exception because a private individual can also employ a domestic worker), with

interpretations of commercial activity under each statute is seemingly arbitrary.

Rather, courts and the State Department should apply a broader interpretation of the commercial activity exception of the VCDR.<sup>123</sup> A broader interpretation, similar to that of the FSIA, allows certain employees—both personal employees and government employees—to bring suits against foreign state agents in U.S. courts; sovereign immunity does not apply when the claimant demonstrates that the civil suit based on labor violations constitutes a commercial activity because foreign state agents should not be protected for unlawful acts that they commit regardless of their governmental position.<sup>124</sup> In *Park*, the Ninth Circuit held that the consular official could not invoke the FSIA because he was acting outside the scope of his official duties when he hired and supervised Park, and thus, was not considered a foreign state entitled to immunity protections.<sup>125</sup> The court, nonetheless, went through the commercial activity analysis of the FSIA, applying the private actor test, to illustrate that even if the consular official satisfied the foreign state requirement, he would not have immunity under the FSIA because the activity was considered commercial.<sup>126</sup>

The private actor test used by federal courts to determine commercial activity under the FSIA applies a much broader interpretation of commercial activity to ensure that private individuals that engage in transactions with government officials have an opportunity to claim redress if the government official acts in a manner in which any private individual can act.<sup>127</sup> In *El-Hadad v. Embassy of the U.A.E.* where El-Hadad, an

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*Tabion*, 73 F.3d at 538-39 (holding that employment of a domestic worker is not within the VCDR commercial activity exception).

123. See *Park*, 313 F.3d at 1144-45 (holding that the employment of a domestic worker is a commercial activity because it is an act that a private actor can engage in, rather than a public act that only a government can perform); see also *Al Mukaddam v. Permanent Mission of Saudi Arabia to the United Nations*, 111 F. Supp. 2d 457, 466 (S.D.N.Y. 2000) (finding that the Saudi Arabia mission was not immune from suit by a former employee because hiring someone to perform “research, writing, and clerical duties” was a commercial activity because a private actor can also engage in such an act).

124. See Lekopanye Mooketsi, *No Diplomatic Immunity in Labour Cases*, MMEGI, Dec. 2, 2005, <http://www.mmegi.bw/2005/December/Friday2/454029690697.html> (citing a Botswanan judge, presiding over the Industrial Court, that held that the Libyan Embassy was not immune from the labor dispute because the complainant, who was a former employee of the embassy, did not disagree with governmental actions, but simply claimed wages to which he was entitled). Judge Key Dingake ruled on this case with the guidance of Botswana’s Attorney General, who expressed that employment is not an act unique to governments, and therefore immunity should not apply. *Id.*

125. See *Park*, 313 F.3d at 1144.

126. See *id.* at 1144-46.

127. See *Argentina v. Weltover*, 504 U.S. 607, 614 (1992) (concluding that issuing bonds is a commercial activity under the FSIA because it is an act that private actors

internal auditor for the United Arab Emirates embassy, brought suit against the embassy, the District Court for the District of Columbia found that the employment of El-Hadad was a commercial act under the FSIA because conducting audits is a “regular course of commerce” that is not unique to governments.<sup>128</sup> Extending the rationale in analyzing the nature of the employment relationship between foreign officials and domestic workers, it is clear that diplomats hiring domestic employees to assist in domestic work is commercial in nature because private actors can also engage in this type of contractual relationship.<sup>129</sup> Not only is hiring a domestic worker an action in which any private individual can engage, but a personal domestic employee mainly assists with the personal needs of the diplomat and his family within the confines of their home, as opposed to an internal auditor who works at the embassy and assists with government functions.<sup>130</sup> Moreover, hiring someone to cook, clean, and take care of children is “a regular course of commercial conduct.”<sup>131</sup>

In contrast to *El-Hadad*, the Fourth Circuit held in *Butters v. Vance International, Inc.* that the FSIA commercial activity exception did not apply, and therefore a former employee of Vance International, a corporation that provided security services to businesses and governments, could not sue the company claiming gender discrimination.<sup>132</sup> The court reasoned that the exception did not apply because it is unique to governments to decide how to best secure and protect their property and those who occupy it.<sup>133</sup> This case is easily distinguishable from *Tabion* because Mufti did not hire Tabion to secure the safety of his home; rather he hired her to perform household duties—an act that is, without a doubt,

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can also perform, as opposed to issuing regulations limiting foreign currency exchange, which is an activity unique to governments).

128. No. 96-1943, 2006 WL 826098, at \*6-7 (D.D.C. Mar. 29, 2006). Consequently, the court concluded that the former employee could bring suit against the embassy because foreign sovereign immunity did not apply. *Id.*

129. See HOME IS WHERE THE WORK IS, *supra* note 2, at 11 (discussing that many of the employers of domestic workers in New York City work in business, finance, law, healthcare, and other private professions).

130. See Brief of Appellant Corazon Tabion at 5, 15, *Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996) (No. 95-1732) (emphasizing that Mufti hired Tabion in his personal capacity, where Tabion never assisted with responsibilities in the embassy, and only assisted with Mufti and his family’s needs in the home).

131. See FSIA, 28 U.S.C. §§ 1603(d)-(e), 1605(a)(2) (2006).

132. See 225 F.3d 462, 465 (4th Cir. 2000) (explaining that the corporation, Vance International, could invoke derivative immunity under the FSIA because, as a private contractor, it is following the Saudi Arabian government’s orders to not promote Butters, who was the security agent employed by Vance International).

133. See *id.* (holding that employment of a security agent who is responsible for protecting the wife of a Saudi King and guarding her residence is governmental in nature because ensuring the security and safety of a royal family are concerns unique to sovereign states).

commercial in nature since a private actor can also employ a domestic worker.<sup>134</sup>

The examples provided by the FSIA legislative history as to what constitutes commercial activity, and what is an activity peculiar to foreign sovereigns, also illustrate that there are no ambiguous incidental acts, nor do the examples fail the private actor test.<sup>135</sup> In other words, commercial activities are either commercial or governmental. Thus, employment of domestic employees to provide services of cooking, cleaning, and caring for children should not fall into an incidental gray area considered part of diplomatic functions; rather, it is apparent that such activities would be characterized as commercial and outside the scope of diplomatic functions because private actors can hire people to take on such duties.<sup>136</sup>

*B. Diplomats Should Not Have Immunity From Civil Jurisdiction Because the Employment of Domestic Workers is Outside Their Official Functions*

The VCDR commercial activity exception specifies that the diplomat is not immune for commercial activities “outside his official functions.”<sup>137</sup> This section demonstrates that U.S. laws and regulations, the VCDR, and the manner in which courts have interpreted employment of domestic workers under the VCCR and FSIA suggest that domestic work is outside official functions of the diplomat.

As explained in Background part I, live-in domestic workers often fall through the gaps of the U.S. legal system because the Department of Labor (“DOL”) considers their occupation to be work in the private sphere, which is unregulated by federal labor laws.<sup>138</sup> This policy undoubtedly leaves

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134. *Compare* Brief of Appellant Corazon Tabion at 5-6, *Tabion v. Mufti*, 73 F.3d 535 (No. 95-1732) (stating that Mufti hired Tabion in his personal capacity to assist with preparing meals and other housekeeping duties in Mufti’s home, but had no such responsibilities at the Jordanian embassy), *with Butters*, 225 F.3d at 464-65 (concluding that the Saudi Arabian officials’ refusal of Butters, a female security guard, to serve in the government’s command post rotation—reasoning that it was contrary to Islamic law to have male and female officers together for a long duration—was a decision pertaining to police power, and thus, unique to governments).

135. *See* H.R. REP. NO. 94-1487, at 16 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6615 (explaining that employment of civil servants, diplomatic, and military personnel is governmental in nature because only governments can hire civil servants and diplomats).

136. *See* HOME IS WHERE THE WORK IS, *supra* note 2, at 11 (finding that over half of the employers of domestic workers are private individuals who work as corporate executives, business owners, accountants, lawyers, doctors, reporters, and other professions); *see also* Young, *supra* note 19, at 20 (asserting that as long as there is an employment relationship, domestic workers should have the same legal protections as other workers, such as safe and healthful working conditions under the Occupational Safety and Health Act, because tasks such as cleaning and cooking can be performed anywhere).

137. *See* VCDR, *supra* note 8, art. 31(1)(c).

138. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. § 213(b)(21) (2004) (excluding

domestic workers unprotected and in a weaker bargaining position than their employers.<sup>139</sup> Nonetheless, if applying the DOL rationale that domestic work is in the private sphere such that a “true employment relationship” does not exist, then the relationship between diplomats and domestic workers who cook, clean, and take care of children would be of a personal nature.<sup>140</sup> Under this rationale, it would seem that the relationship between diplomats and domestic workers would be considered an activity outside the scope of their official duties.<sup>141</sup>

Nonetheless, the *Tabion* court asserted that the services provided by the domestic worker were incidental to the diplomat’s daily life and not intended to be considered outside of a diplomat’s official functions.<sup>142</sup> The court, however, provided no justification for this statement nor did it address *Tabion*’s argument that the diplomat’s assertion produces unrealistic demands on third parties who assist the diplomat in daily services.<sup>143</sup> To the contrary, these “incidentals to daily life” personally benefit the employer and not the sending state.<sup>144</sup>

*1. U.S. Laws and Regulations and the VCDR Illustrate that the Employment of Domestic Workers Is Outside Diplomatic Functions*

By definition, as elucidated in Article 1(h) of the VCDR, a “private servant” is a person who is in the domestic service of a member of the mission and who is *not* an employee of the sending [s]tate.”<sup>145</sup> Moreover, the FAM defines an A-3 visa holder as a “personal employee” of the diplomat.<sup>146</sup> The Diplomatic Circular Notes also emphasize that A-3

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time and a half overtime pay for workweeks that are over forty hours if domestic employees reside in the employer’s home).

139. See GLOBAL RIGHTS ET AL., *supra* note 22, at 10.

140. See Young, *supra* note 19, at 67 (noting that some argue that the home—the private sphere—should not be regulated by the government).

141. Cf. Park v. Shin, 313 F.3d 1138, 1142-43 (9th Cir. 2002).

142. See *Tabion v. Mufti*, 73 F.3d 535, 539 n.9 (4th Cir. 1996) (contending that a decision to include domestic worker employment in the VCDR commercial activity exception would prompt foreign courts to follow the same conclusion, and subsequently put U.S. diplomats located overseas at risk for having to appear in foreign courts).

143. See Brief of Appellant Corazon *Tabion* at 11-12, *Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996) (No. 95-1732) (arguing that a decision to include domestic worker employment in the commercial activity exception would generate unrealistic demands on commercial service providers because merchants would have to inquire whether they are dealing with diplomats to protect themselves from situations where their customers refuse to pay for the contracted services).

144. See *Tabion*, 73 F.3d at 536.

145. VCDR, *supra* note 8, art. 1(h) (emphasis added in text). On the other hand, another provision of the VCDR defines a member of the service staff as a person that is in domestic service of the mission itself, as opposed to a member of the mission. *Id.* at art. 1(g).

146. Compare 9 F.A.M. § 41.22 n.4 (2001) (designating A-3 visas to personal

employees are personal household employees of the diplomat and not employees of the mission.<sup>147</sup> By defining the domestic worker as a personal employee of the diplomat in the various authorities discussed above and characterizing the relationship between a domestic worker and a foreign government official as one that is a “true employee and/or employer relationship,” it seems unambiguous that the employment of a personal employee is outside of the diplomat’s official activities.<sup>148</sup>

Congress’s enactment of the Diplomatic Relations Act to codify the VCDR provides further evidence that a domestic employee of the diplomat is not considered part of the diplomat’s official functions.<sup>149</sup> The Diplomatic Relations Act repealed a 1790 statute that had granted private servants of diplomats immunity from criminal and civil jurisdiction.<sup>150</sup> By affirmatively taking away immunity privileges from domestic employees so that U.S. law would be consistent with international law on diplomatic immunity, it is clear that the work of domestic employees does not support the official functions of diplomats; otherwise, domestic employees would be afforded some level of immunity protections to help them carry out their functions.<sup>151</sup>

The fact that the services provided by a private domestic employee are outside diplomatic functions is demonstrated further in the FAM where the State Department sets forth different levels of immunity privileges to the varying grades of diplomatic positions and does not afford any immunity privileges to private domestic employees.<sup>152</sup> The FAM recognizes that

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employees of A-1 or A-2 visa holders), with 9 F.A.M. § 41.22 n.2.1 (1988) (providing A-2 visas for employees of diplomatic missions or consular posts).

147. U.S. DEP’T OF STATE, OFFICE OF FOREIGN MISSIONS, CIRCULAR DIPLOMATIC NOTE ON DOMESTIC EMPLOYEES (May 20, 1996), available at <http://www.state.gov/ofm/31311.htm> (emphasizing that the United States will hold a mission and sending government responsible where its diplomats have abused their personal employees even though personal servants work for diplomats and not the mission).

148. See 9 F.A.M. § 41.22 n.4.3 (2001) (suggesting that the employer inquire whether the A-3 applicant is capable of performing the work duties such that the government official and domestic employee would be entering into a “true employee and/or employer relationship” governed by U.S. laws).

149. Diplomatic Relations Act of 1978, 22 U.S.C. § 254(a)-(e) (1978).

150. See 22 U.S.C. §§ 252-254, repealed by the Diplomatic Relations Act of 1978, 22 U.S.C. § 254(a)-(e) (1978) (abolishing an English immunity statute from 1790 under the rule of Queen Anne, which granted complete criminal and civil immunity for diplomats, family members of diplomats, diplomatic staff, and private servants, including U.S. citizens and permanent residents).

151. See *Diplomatic Immunity and U.S. Interests: Statement on H.R. 3036 Before the Senate Foreign Relations Committee*, 100th Cong. 17 (1987) (statement of Ambassador Selwa Roosevelt, Chief of Protocol of the United States).

152. See 2 F.A.M. § 232.1 (1991) (denoting that diplomatic agents have the highest level of privileges with complete immunity from criminal jurisdiction and some immunity from civil jurisdiction; that members of administrative and technical staff have the same privileges as diplomatic agents except that they are not immune from civil actions conducted outside official duties; and that members of service staff only

members of the administrative and technical staff handle internal matters that are pertinent to the functions of the mission, and consequently accords them similar immunity privileges as that of diplomatic agents except that immunity from civil claims only apply in actions conducted in the course of official duties.<sup>153</sup> It also acknowledges that members of the service staff of diplomatic missions carry out basic responsibilities that support the mission and accords them immunity for acts conducted during these official duties.<sup>154</sup> Applying the Fourth Circuit's characterization of Tabion's services as incidental to the daily life of the diplomat, one could argue that the basic support tasks of service staff, who are "in the domestic service of the mission," are also incidental to the mission.<sup>155</sup> Nonetheless, the FAM, echoing the VCDR, explicitly carves out a category of privileges to which the service staff are entitled to because of their official duties; in contrast, the State Department does not articulate any immunity protections for private domestic employees, but denotes domestic workers of diplomats as "personal household employees . . . of the mission member and not of the mission."<sup>156</sup> Consequently, without any immunity protections, it can be inferred that domestic employees of diplomats are not part of the official functions of the mission; thus, a diplomat's employment of a domestic worker is outside diplomatic functions.<sup>157</sup>

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have criminal and civil immunity for official acts).

153. See 2 F.A.M. § 232.1-2 (1991); VCDR, *supra* note 8, art. 1(f) (defining members of the administrative and technical staff as "the members of the staff of the mission employed in the administrative and technical service of the mission").

154. See 2 F.A.M. § 232.1-3 (1991) (providing that members of service staff have immunity from both civil and criminal jurisdiction in so far as the acts are performed in their official capacity, but that they do not benefit from personal inviolability or immunity from being a witness); VCDR, *supra* note 8, art. 1(g) (explaining that members of service staff are "members of the staff of the mission in the domestic service of the mission").

155. See *Tabion v. Mufti*, 73 F.3d 535, 538-39 (4th Cir. 1996) (articulating that diplomats are immune to actions related to activities, such as paying for dry cleaning service or domestic help, because they are incidental to a diplomat's daily life and not outside diplomatic functions).

156. Compare 2 F.A.M. § 232.1-3 (1991) (setting forth that service staff of missions have some immunity protections, but far less than diplomatic agents or administrative and technical staff because they only perform menial tasks), with U.S. DEP'T OF STATE, OFFICE OF FOREIGN MISSIONS, CIRCULAR DIPLOMATIC NOTE ON DOMESTIC EMPLOYEES 3, 5 (May 20, 1996), available at <http://www.state.gov/ofm/31311.htm> (articulating that the diplomats' personal domestic employees are not employees of the mission, and that the State Department may deny diplomats' applications to bring personal servants to the United States when diplomats violate such privileges).

157. See U.S. DEP'T OF STATE, LEGAL ASPECTS OF DIPLOMATIC IMMUNITY AND PRIVILEGES (2004), available at <http://www.state.gov/documents/organization/20047.pdf>.

*2. Based on the Nature of the Duties of Domestic Workers and the Structure of the Employment Relationship, Employment of Domestic Workers is Not a Core Function of Diplomats and Consular Officers*

In *Park v. Shin*, the Ninth Circuit properly concluded that Shin's employment of Park, his domestic employee, was not considered within the scope of a legitimate consular function under the VCCR.<sup>158</sup> The Ninth Circuit's analysis to determine whether Park could sue her employer is relevant because the court goes beyond the Fourth Circuit's unsupported argument that Tabion's employment was within the scope of diplomatic functions because her services were "incidental to daily life."<sup>159</sup> It is clear from the varying degrees of immunity privileges and from the articulated functions of consular officials and diplomats that the scope of official functions of consular officials differs from that of diplomats.<sup>160</sup> Nonetheless, because the nature of domestic work does not depend on the position of the employer—for example, whether the employer is a diplomat or consular officer—there are several factors that indicate that employment of domestic workers is outside the context of both the official functions of diplomats and consular officials, such that domestic workers should have the opportunity to adjudicate claims against their employers.<sup>161</sup>

First, one must decide, in both the context of consular officers and diplomats, what functions are official when determining whether immunity privileges apply to the government official.<sup>162</sup> One of the main purposes of having diplomatic missions and consular officers present in the receiving state is for the sending state to protect its citizens living in the destination

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158. See 313 F.3d 1138, 1142 (9th Cir. 2002).

159. See *id.* at 1142-43 (considering several factors, such as the domestic worker's type of employment visa and whether Park was paid out of the consular officer's personal funds, to determine that Shin employed Park as a personal employee, outside of consular functions).

160. Compare VCCR, *supra* note 51, art. 5 (listing various functions of consular officers, some of which overlap with diplomatic functions, and some of which, such as issuing passports, are specific to consulates), and VCCR, *supra* note 51, art. 43 (specifying that immunity privileges only apply to acts conducted in the exercise of consular functions), with VCDR, *supra* note 8, art. 3 (articulating that diplomatic missions are responsible for representing the sending state in the host state and negotiating with the host state's government, which are functions not listed in the VCCR), and VCDR, *supra* note 8, art. 31(1) (setting forth that diplomats have complete immunity from criminal jurisdiction regardless of whether the act in question is conducted in the performance of diplomatic functions, as opposed to consular officers who only have immunity for official acts).

161. See *Park*, 313 F.3d at 1142-43.

162. See VCDR, *supra* note 8, art. 3(1) (permitting courts to have civil jurisdiction over actions where diplomats have engaged in a professional or commercial activity *outside official functions*) (emphasis added); VCCR, *supra* note 51, art. 43 (highlighting that consular officers have immunity only to the extent that the actions at issue are performed within their *official functions*) (emphasis added).

country.<sup>163</sup> International organizations such as the International Labor Organization and the UN have stated explicitly the significant role of embassies and consulates in protecting domestic workers from abuse.<sup>164</sup> Thus, because it is within a diplomat's official functions to protect domestic workers, it follows that exploiting domestic workers would be considered outside diplomatic functions.<sup>165</sup> Even in instances where the diplomat and domestic worker are from different countries, it is not only outside of the diplomat's official functions to exploit and abuse its workers, but also to employ domestic workers in the first instance.

Second, in both the context of a consular officer and of a diplomat, one must determine if the individual acted within the scope of his or her official functions when they performed the particular act in question.<sup>166</sup> Similar to the assertion above that employment of personal domestic employees is not part of diplomatic functions, otherwise the workers themselves would be afforded immunity privileges, the Ninth Circuit rejected Shin's argument that hiring and supervising Park was essential to Shin's performance of his consular functions.<sup>167</sup> Even though Park's services allowed Shin more time to tend to consular matters, the court appropriately considered it an indirect benefit and insufficient to justify Park's employment as a consular function.<sup>168</sup> Given the similarities in the structure of the employment relationship between domestic workers and their employers—whether diplomats or consular officers—and the nature of domestic work, the Ninth Circuit's rationale that employment of private domestic employees is outside consular functions should apply to diplomats who employ domestic workers, such that domestic workers' services are an indirect benefit, if any, to the mission and do not constitute diplomatic functions.<sup>169</sup>

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163. See VCDR, *supra* note 8, art. 3(1) (providing that diplomatic functions include protecting the sending state's nationals, representing the sending state's interests, negotiating with the receiving state, monitoring developments in the sending state, and promoting diplomatic relations between the states); VCCR, *supra* note 51, art. 5 (listing thirteen consular functions, two of which include protecting, assisting, and representing the interests of nationals from sending states).

164. See Int'l Labour Org., *Protection of Migrant Domestic Workers in Destination Countries*, at 26 (Mar. 1, 2006) [hereinafter ILO] (discussing the responsibility of foreign service officers under the VCDR and VCCR to protect its nationals in the receiving state, particularly in light of the increasing migrant domestic workforce); The Special Rapporteur, *supra* note 30, ¶ 87 (recommending that consulates provide shelter and legal assistance to domestic workers escaping abusive employers, and mediate between parties where legal recourse is implausible).

165. See Brief of Appellant Corazon Tabion at 5, *Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996) (No. 95-1732).

166. See VCDR, *supra* note 8, art. 3(1)(c); 2 F.A.M. § 232.2 (1991).

167. See *Park v. Shin*, 313 F.3d 1138, 1142 (9th Cir. 2002).

168. See *id.*

169. See Brief of Appellant Corazon Tabion at 15, *Tabion v. Mufti*, 73 F.3d 535 (No. 95-1732) (asserting that Tabion only provided services that benefited Mufti and

Third, domestic workers of consular officers and diplomats often are employed as their personal employees and not employees of the consulates or embassies.<sup>170</sup> In contrast to the Fourth Circuit's articulation that the domestic worker's services of cooking and cleaning were incidental to daily life and within the scope of the diplomat's official functions, the Ninth Circuit accurately characterized the domestic worker's services as personally benefiting the consular officer and his family, and that any services to the consulate were incidental to her job as a personal employee.<sup>171</sup> The Ninth Circuit considered several elements that should apply to domestic workers employed by diplomats to determine the scope of their employment.<sup>172</sup> First, it compared the different types of visas available to employees of foreign government officials to demonstrate the delineation between personal employees and employees of consulates, or embassies.<sup>173</sup> It reasoned that if Shin's employment of Park was within the scope of his consular functions, then Park would have been employed on an A-2 visa designated for employees of consulates or diplomatic missions, and not an A-3 visa designated for the personal employees of consular officers.<sup>174</sup> Applying this rationale to diplomats who employ domestic workers, it is clear that domestic workers are personal employees, so the employment of domestic workers is outside the scope of diplomatic functions; otherwise, domestic workers would be employed and brought to the United States on A-2 visas rather than A-3 visas.<sup>175</sup> One might argue

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his family and she never assisted in any diplomatic events).

170. See *Park*, 313 F.3d at 1142-43 (stating that Park had an A-3 visa, which is reserved for personal employees of consular officers and diplomats); Brief of Appellant Corazon Tabion at 5 n.3, *Tabion v. Mufti*, 73 F.3d 535 (No. 95-1732) (noting that Mufti obtained an A-3 visa for Tabion, so that she could work in the United States exclusively as Mufti's personal employee).

171. Cf. VCCR, *supra* note 51, art. 1(i) (defining private staff as someone "who is employed exclusively in the private service of a member of a consular post"). Compare *Tabion v. Mufti*, 73 F.3d 535, 538-39 (4th Cir. 1996) (asserting that providing dry cleaning service to diplomats or assisting with laundry are incidental to daily life, so diplomats should be immune from legal actions that arise from such occurrences), with *Park*, 313 F.3d at 1142-43 (concluding that Park was a personal employee for the Shins because the majority of her time was spent caring for the Shins' children and engaging in other household duties, rather than assisting with a few consulate dinner events held at the Shins' home).

172. *Park*, 313 F.3d at 1143.

173. See *id.* (comparing 8 U.S.C. § 1101(a)(15)(A)(iii) (2006), which reserves A-3 visas for personal employees of foreign government officials, with 8 U.S.C. § 1101(a)(15)(A)(ii) (2006), which specifies that employees of consulates or diplomatic missions should obtain A-2 visas, and observing that "PERSONAL EMPLOYEE OF MR. SHIN" appeared on Park's visa).

174. See *id.* at 1145 (rejecting Shin's argument that foreign sovereign immunity under FSIA should apply because only a government official can obtain an A-3 visa, and explaining that a private foreign national can just as likely employ a domestic employee under the B-1 visa).

175. See Brief of Appellant Corazon Tabion at 6, 5 n.3, *Tabion v. Mufti*, 73 F.3d

that the existence of special temporary work visas designated for domestic employees of diplomats indicates that domestic employees were contemplated as part of diplomatic functions; this, however, is not the premise behind the special visa category, which extends to diplomats as a matter of custom and courtesy.<sup>176</sup>

The Ninth Circuit also looked to the fact that the Shins paid Park from their personal funds and that the majority of Park's workday entailed services that catered towards the Shins themselves.<sup>177</sup> Although there is no information in the record regarding the source of Tabion's salary, it is evident that Tabion was a personal employee of the Muftis, particularly because she never performed any services for the Jordanian embassy unlike Park, who assisted with some consular events held at the Shins' home.<sup>178</sup> Thus, based on the above factors, the manner in which courts and the State Department characterize the services of domestic workers as "incidental to daily life" and within the scope of a diplomat's official functions is unsound; rather, employment of a personal domestic employee should be considered outside diplomatic functions.

*3. The Employment of Domestic Workers is Outside Diplomatic Functions Because the Official is Acting as an Individual, the Action Brought Against the Official is Targeted at Him and Not the State, and the Action Does Not Interfere with the Sovereignty of the Foreign State*

In *Park v. Shin*, the Ninth Circuit articulated several factors to determine whether foreign agents are acting within the scope of their official duties

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535 (4th Cir. 1996) (No. 95-1732) (explaining how Mufti employed Tabion as a domestic employee in his home in Jordan, and then brought Tabion on an A-3 visa to the United States after his appointment as the First Secretary of the Jordanian Embassy); see also VCDR, *supra* note 8, art. 1(h) (clarifying that a domestic worker is the personal employee of a member of the diplomatic mission and "not an employee of the sending state").

176. See Lewis, *supra* note 104 (citing John Miller, a recently retired State Department official who dealt with human trafficking issues, and who claims that eliminating the special visa program, which he considers to serve no purpose, would put an end to the problem of diplomatic immunity because diplomats would then have to hire Americans as their domestic workers); cf. *Summary Records of the 407th Meeting*, [1957] 1 Y.B. Int'l L. Comm'n 122, U.N. Doc. A/CN.4/SER.A/1957 (explaining that it was the practice, though not a rule, that the personal effects of the diplomatic agent—including private servants brought with him from the sending country—should be exempt from taxation). It should be noted, however, that this recommendation and assumption that diplomats would hire U.S. citizens as domestic workers oversimplifies the complexity of the problem; removing the special visas does not necessarily imply that diplomats would employ U.S. citizens as their personal servants, nor would it resolve the problem of diplomats abusing their employees or address the immunity issues that arise when employees, regardless of their citizenship, attempt to vindicate their rights. See HUMAN RIGHTS WATCH, *supra* note 4, at 1-3.

177. *Park*, 313 F.3d at 1143.

178. See Brief of Appellant Corazon Tabion at 5-6, *Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996) (No. 95-1732).

under the FSIA.<sup>179</sup> The court's analysis, which looked to whether the officer was acting as an individual and not as an official, if the action against the officer was in reality targeted at the officer's state, and if the action taken against the officer would interfere with the sovereignty of the foreign state, was more nuanced than the Fourth Circuit's unsupported articulation that "day-to-day living services . . . were not meant to be treated as outside a diplomat's official functions."<sup>180</sup> The *Park* court found that Shin was acting in his individual capacity when he hired Park as a personal family employee, paid her with personal funds, and most of her work benefited the family and not the consulate.<sup>181</sup> Extending the *Park* rationale to a relationship between a diplomatic agent and domestic worker, such as between Mufti and Tabion, one could clearly find that a diplomat is acting outside the scope of his duties when he employs a domestic worker as his personal employee, where she cooks, cleans, and engages in other activities that personally benefit the family of the diplomat.<sup>182</sup>

The *Park* court's determination that Shin's claims were not disguised as actions taken against the foreign state because she objected to Shin's personal decisions regarding her wages and working conditions rather than his government policy decisions also applies to many domestic worker claims against diplomats.<sup>183</sup> Using the Ninth Circuit's reasoning that a judgment against Shin would not interfere with the sovereignty of Korea, it is clear that allowing domestic workers to adjudicate claims against diplomats would similarly not interfere with diplomatic relations because the lawsuits are targeted at diplomats' personal decisions and not the decisions of the mission.<sup>184</sup> Taking all these factors into consideration, it is

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179. 313 F.3d at 1144.

180. *Id.* at 1142-44 (examining whether the action against the foreign official is masked as a claim against the state and whether allowing the action to proceed would impact state sovereignty to determine if Shin acted within his official functions in employing Park).

181. *Id.* at 1143-44.

182. See Brief of Appellant Corazon Tabion at 6, *Tabion v. Mufti*, 73 F.3d 535 (No. 95-1732) (describing that Mufti's family hired Tabion in their personal capacity, that Tabion only catered towards their personal needs, and at no time worked at the Jordanian embassy).

183. Compare *Park*, 313 F.3d at 1141, 1144 (holding that Shin could not invoke foreign sovereign immunity with regards to Park's allegations that he failed to pay her the minimum wage and provide her proper medical treatment because Park's claims pertained to Shin's personal decisions and not government policy), with Complaint at ¶¶ 9-19, *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187 (D.D.C. 2007) (No. 06-00089) (claiming that the diplomats breached the employment contract, which stipulated that Gonzalez, an A-3 domestic employee, would earn \$6.72 per hour for forty hours per week and receive overtime wages for work exceeding the forty hours). Instead, for an average of seventy-seven hours of work per week, the diplomat only paid her a monthly wage of \$500, which is roughly \$1.60 per hour. *Id.*

184. See, e.g., Mooketsi, *supra* note 124 (citing a Botswanan judge who reasoned that a former employee of the Libyan Embassy bringing suit against the Embassy for

clear that employment of domestic workers is not within the scope of a government agent's official duties under the FSIA, nor is it within the scope of diplomatic functions.

Moreover, in situations where the diplomatic employer commits egregious violations of law, such as trafficking or involuntary servitude, these actions cannot be considered within the scope of his official duties.<sup>185</sup> Even where the employment relationship between the diplomat and domestic worker would be deemed as part of the diplomat's official functions, the diplomat's disrespect for the receiving state's laws are undiplomatic and contrary to the VCDR and the policies of the State Department.<sup>186</sup>

Integrating the analysis from Analysis parts I.A and I.B, it is clear that the diplomat-domestic worker employment relationship constitutes commercial activity outside the diplomat's official functions pursuant to the VCDR. As the earlier analysis demonstrates, commercial activity does not necessarily require that the diplomat gain a personal profit, although a diplomat who pays his domestic employee below minimum wage arguably gains a personal profit. Furthermore, the VCDR did not anticipate the egregious exploitation of domestic workers nor did it intend to deprive domestic workers of their remedies. Employment of a domestic worker also is considered a commercial activity under the FSIA private actor test.<sup>187</sup> Finally, hiring and supervising a domestic employee is outside the diplomat's official functions, and employment of domestic workers is a common practice among the diplomatic community.

*C. An Alternative Interpretation of the VCDR or a Request to Waive Immunity From the Sending State is Consistent with U.S. Laws and Will Not Undermine Diplomatic Relations*

The State Department regulations specific to the diplomat-domestic worker employment relationship, and the general FAM regulations governing the scope of immunity privileges demonstrate that the State Department has a duty—and the authority—to request waivers of immunity from sending states or to apply an alternative interpretation of the VCDR

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his wages was not invoking diplomatic issues but claiming his entitled compensation).

185. See *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 497-98 (9th Cir. 1992) (concluding that Imee Marcos-Manotoc, the daughter of Ferdinand Marcos, a former Philippine President, was acting outside the scope of her official duties under the FSIA, when she ordered police and military intelligence to torture a student to death because the student disagreed with her politics).

186. See VCDR, *supra* note 8, preamble; 2 F.A.M. § 233.2 (1991).

187. See *Park*, 313 F.3d at 1145 (explaining that courts are required under the FSIA to examine the nature of the governmental entities' actions, not the purpose, and if the act does not require performance by a state actor it qualifies as commercial).

commercial activity exception to protect the rights of domestic workers and ensure that diplomats are not abusing their privileges.<sup>188</sup> Recently, the State Department requested on behalf of three domestic workers—who were trafficked into the United States by a Kuwaiti diplomat—a waiver of immunity from the government of Kuwait to prosecute the diplomat.<sup>189</sup> When the Kuwaiti government refused, the State Department forced Mr. XX to leave his post at the Kuwaiti embassy in Washington, D.C.<sup>190</sup> While the State Department's actions on behalf of these three domestic servants are a step forward, its practices generally are inconsistent with the FAM regulations, and the current legal mechanisms governing the employment of domestic workers are not strong enough.

This raises the question of why the State Department does not follow its own policies as articulated in the FAM. The State Department justifies its lack of intervention in these cases by contending that there are reciprocity concerns at play; because a receiving state also acts as a sending state in another country, diplomatic immunity is meant to protect U.S. officials that are living and working abroad.<sup>191</sup> While it is true that there are U.S. diplomats stationed in countries where they might not have the same due process protections as they have in the United States, this justification, however, does not explain why including employment contracts of domestic employees in the FSIA commercial activity exception—when the acts of a foreign agent are at issue—does not interfere with foreign relations.<sup>192</sup> Similarly, how does characterizing domestic worker employment outside consular functions such that employees can sue consular officers affect relations between consulates and the countries that they represent?<sup>193</sup> The fact that courts interpret the FSIA and VCCR in a manner that allows employees to adjudicate their claims against foreign government officials indicates that the alternative interpretation of the VCCR commercial activity exception or a request to the sending state to

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188. See 2 F.A.M. §§ 233.2, 233.3, 234.2 (1991) (recognizing the State Department's own responsibility in protecting the public from diplomats that abuse their immunity privileges, such that it will respond immediately to reports of abuse by requesting a waiver of immunity from the sending state or requiring offenders to leave the country).

189. See Lewis, *supra* note 26.

190. See *id.*

191. See, e.g., *Diplomatic Immunity and U.S. Interests: Statement on H.R. 3036 Before the Senate Foreign Relations Committee*, 100th Cong. 8 (1987) (statement of Ambassador Selwa Roosevelt, Chief of Protocol of the United States) (indicating that legislation limiting diplomatic immunity would subject U.S. diplomats living abroad to indefinite detention if arrested in a country that lacked due process protections).

192. See *Segni v. Commercial Office of Spain*, 835 F.2d 160, 165 (7th Cir. 1987).

193. See *Park v. Shin*, 313 F.3d 1138, 1142-43 (9th Cir. 2002) (concluding that Park's suit would not interfere with consular relations because the suit was against the consular officer and not targeted against the state).

waive immunity will not undermine diplomatic relations.

There are several reasons why the alternative interpretation of the VCDR commercial activity exception, to include employment of domestic workers or a request to waive immunity from the sending state, will not affect reciprocity or functional necessity in a manner that is detrimental to U.S. officials working in another country or the diplomatic system. First, as discussed above, adjudicating the claims of domestic workers does not rise to the level of interfering with diplomatic affairs, particularly compared to issues such as espionage and terrorist activities, which are targeted acts towards a country.<sup>194</sup> The claims brought by domestic workers against diplomats are legal in nature and not political.<sup>195</sup> In other words, the worker bringing the case is not criticizing the diplomat for one's policy choices nor is the State Department when it requests a waiver of immunity.<sup>196</sup> This was illustrated in both *Tabion* and *Park*, where the causes of actions brought against the employers targeted the government official's personal decisions governing the employment relationship and did not aim at impacting the diplomatic relations between the receiving and sending states.<sup>197</sup> The *Park* court explained that a judgment against the consular official would not impact Korea's sovereignty or "policy-making power."<sup>198</sup>

Even in *Segni v. Commercial Office of Spain*, where a government employee, as opposed to a personal domestic employee, filed suit against the Spanish government for breach of contract, the Seventh Circuit reasoned that the government could not invoke foreign sovereign immunity under the FSIA because the nature of his employment was commercial

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194. See, e.g., John Greenwald, *Showdown on Embassy Row*, TIME, July 27, 1987, at 46 (describing a dispute between the French and Iranian embassies, which was triggered by Iran's refusal to allow France to interrogate a suspected Iranian terrorist who took refuge in the Iranian embassy in Paris); Michael S. Serrill, *Moscow Takes a Hostage*, TIME, Sept. 15, 1986, at 22 (explaining how officers of the Federal Bureau of Investigation arrested a suspected Soviet diplomat for espionage, and that one week later, the Soviet Union retaliated by detaining a U.S. reporter in Moscow).

195. See Sangeetha Mugunthan, *Diplomatic Immunity in the Context of International Human Rights*, LEGAL SERVICE INDIA.COM, <http://www.legalserviceindia.com/articles/dhuman.htm> (last visited Feb. 16, 2005) (describing two broad categories of abuse of diplomatic immunity—one which is of "terrorist or political nature," and the other is of "a more personal nature"); see also Eur. Parl. Ass., *Recommendation on Domestic Slavery*, 18th Sess., Doc. No. 1523 (2001) (recommending that states amend the VCDR so that it includes a waiver of immunity for "offen[s]es committed in private life").

196. E.g., David A. Jones, Jr., *Diplomatic Immunity: Recent Developments in Law and Practice*, 85 AM. SOC'Y INT'L L. PROC. 261, 266 (1991) (explaining, as the State Department's Office of the Legal Adviser, that many cases, such as traffic violations and real property disputes, are not political in character and do not affect diplomatic functions).

197. See *Park*, 313 F.3d at 1144; *Tabion v. Mufti*, 73 F.3d 535, 536 (4th Cir. 1996).

198. *Park*, 313 F.3d at 1144.

despite his duty to help facilitate government policy.<sup>199</sup> While the *Park* and *Segni* courts analyzed the cases in the context of consular and foreign sovereign immunity, respectively, similar reasoning has been advanced to explain why the VCDR provides exceptions to diplomatic immunity from civil jurisdiction.<sup>200</sup> In 2005, a judge of the Industrial Court in Botswana ruled that the Libyan Embassy's employment of a translator was a private act that the VCDR immunity privileges did not cover.<sup>201</sup> The judge reasoned that claimants should be permitted to bring labor disputes because they were simply claiming their rights to their earned wages and not antagonizing the government or attempting to "assault [its] dignity."<sup>202</sup> Applying this rationale to *Tabion* and other domestic workers employed by diplomats, it is evident that U.S. courts should interpret employment contracts as a commercial activity under the VCDR because adjudication of such claims would not interfere with diplomatic relations.<sup>203</sup> Though one could argue that disputes between diplomats and domestic workers from the same sending state are internal matters that would be better dealt with by the courts of the sending state, the VCDR negotiation history noted the inconvenience and absurdity of having two parties located in the receiving state to have to litigate their claims in a different country.<sup>204</sup>

Moreover, in comparison to criminal accountability, some consider that civil liability interferes less with diplomatic relations because incarceration is not at issue.<sup>205</sup> Because the VCDR provides for a commercial activity exception with respect to immunity for civil jurisdiction, some argue that private claims against the diplomat involving commercial activity are permitted because the receiving states' interests outweigh the sending states' interests and the risks of interfering with diplomatic functions are minimal.<sup>206</sup> Nonetheless, it should also be stressed that the U.S.

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199. See 835 F.2d 160, 165 (7th Cir. 1987) (holding that the Spanish government's employment of Segni, who was hired to market Spanish wines, was commercial in nature because his job was only to promote government policies, not create them).

200. See Mooketsi, *supra* note 124 (reporting on a Botswanan judge's decision holding that diplomats are not immune from labor disputes because, as a functional matter, a lawsuit claiming wages withheld would not interfere with diplomatic functions).

201. See *id.*

202. See *id.*

203. See Letter from Brancato, *supra* note 80, at 3 (expressing in a State Department telegram to a U.S. mission abroad that employees of diplomatic or consular missions can sue their employers if their employment terms have been violated because their employment is generally considered commercial activity).

204. *Report of the Commission*, *supra* note 44, at 56.

205. See, e.g., S. REP. NO. 95-958, at 4 (1978), as reprinted in 1978 U.S.C.C.A.N. 1940 (pressing local jurisdictions to shift parking ordinances contained in the local criminal code to the civil code).

206. See Jones, Jr., *supra* note 196, at 266 (providing, as the State Department Office of the Legal Adviser, traffic violations and real property disputes as examples of

government should have as much of an interest in requesting waivers of immunity from sending states to prosecute diplomats that have committed trafficking, servitude, forced labor, and other egregious crimes as it does for civil actions.<sup>207</sup>

## II. MECHANISMS THAT THE STATE DEPARTMENT SHOULD IMPLEMENT TO PROTECT THE RIGHTS AND REMEDIES OF DOMESTIC WORKERS THAT DO NOT UNDERMINE DIPLOMATIC RELATIONS

In so far as diplomatic functions are at issue, there are practical vehicles available that are consistent with existing law to buttress an alternative interpretation of the VCDR's commercial activity exception and ensure that including employment of domestic workers as an activity that is unprotected by diplomatic immunity, or a request to waive immunity in this context, does not interfere with diplomatic relations.

### *A. The State Department Should Strengthen Bilateral and Regional Agreements to Ensure that the Parties to the Treaties Clearly Understand that Diplomats Can be Sued for Abusing Their Domestic Workers*

Adjudicating domestic worker claims will not provoke reciprocity issues because the United States has mechanisms in place to ensure that U.S. officials working abroad are treated fairly.<sup>208</sup> When Congress enacted the Diplomatic Relations Act to codify the VCDR, it included a provision that authorizes the President to extend more or less favorable treatment than what is provided for in the VCDR to diplomatic missions.<sup>209</sup> In addition, the VCDR explicitly states in Article 47(2)(b) that states can enter into separate agreements that deviate from the international treaty.<sup>210</sup> With

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cases that "carry no political baggage" meaning that waiving immunity for such actions would not interfere with diplomatic functions).

207. See Lewis, *supra* note 104 (discussing how an immigration lawyer reported fifteen cases of diplomats abusing personal servants to the State Department, but none of the diplomats in those cases have been prosecuted). The U.S. government, however, recognized nine of the domestic workers as human trafficking victims, which means that they are allowed to remain in the United States on a T-visa and qualify for welfare assistance. *Id.*

208. See Diplomatic Relations Act of 1978, 22 U.S.C. § 254(c) (2007) (giving the President authority to deviate from the VCDR such that the United States and other countries may choose to grant more extensive or restrictive immunity privileges to one another).

209. *Id.*

210. *E.g.*, Agreement between the United States and Canada Concerning the Privileges and Immunities of Members of the Administrative and Technical Staffs of the Embassy of Canada in the United States and the Embassy of the United States in Canada, U.S.-Can., Sept. 22, 1993, State Dep't No. 94-18, 1993 WL 590469 (agreeing to extend the immunity protections of the VCDR, including complete criminal immunity and immunity from civil jurisdiction even for acts conducted in their unofficial capacity unless it is commercial in nature, to members of the administrative and technical staff and their families); see VCDR, *supra* note 8, art. 47(2)(b) (providing

many countries and international organizations recognizing that diplomats are exploiting their workers with impunity, thus, creating an urgent need to address the issue,<sup>211</sup> the U.S. government should exercise its authority by entering into bilateral or multilateral agreements with other countries to adopt a broader interpretation of the VCDR commercial activity exception that includes employment of domestic workers.<sup>212</sup>

Bilateral treaties are particularly effective when the agreements are made with countries that have similar due process protections as the United States, such as Canada and the United Kingdom.<sup>213</sup> Thus, by using bilateral agreements or regional agreements, the State Department could negotiate a policy with countries that have similar due process protections such that foreign government officials who violate U.S. laws governing labor, trafficking, abuse, false imprisonment, and other relevant areas of law would prompt the State Department to request a waiver of immunity.<sup>214</sup> With an explicit waiver from the sending state regarding adjudication of claims against the diplomat, reciprocity would not be at issue because signing states would clearly understand that immunity privileges would not extend to the issue of treatment of domestic workers.<sup>215</sup>

Furthermore, bilateral and regional agreements formalizing a waiver of immunity in this context would enhance diplomatic relations as opposed to exacerbating the tension between competing state interests.<sup>216</sup> Thus, by

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that a country will not be considered as discriminating against another, a violation of Article 47, if states diverge from the VCDR privileges by agreement or custom).

211. See, e.g., Michel Camdessus & James D. Wolfensohn, Op-Ed., *Abused Foreign Workers*, WASH. POST, Jan. 16, 1999, at A24 (expressing their concern, as executives of the International Monetary Fund and the World Bank, respectively, that some of their staff have been exploiting their domestic employees).

212. See Mark S. Zaid, *Diplomatic Immunity: To Have or Not to Have, That is the Question*, 4 ILSA J. INT'L & COMP. L. 623, 631 (1998) (proposing that in addition to implementing bilateral treaties, a procedure should be established between countries where they agree that the diplomat will stand trial in the receiving state if there is sufficient evidence to show that the diplomat violated the law).

213. See, e.g., Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, s. 7 (U.K.); Observance of Due Process of Law Act, 1368, 42 Edw. 3, c. 3 (Eng.).

214. See, e.g., *Maid to Order: Ending Abuses Against Migrant Domestic Workers in Singapore*, 17 HUM. RTS. WATCH 10, 102 (2005), available at <http://hrw.org/reports/2005/singapore1205/singapore1205wcover.pdf> [hereinafter HUMAN RIGHTS WATCH, *Maid to Order*] (discussing how the Philippines' government through the Philippines Overseas Employment Administration and its diplomatic presence in Singapore developed more support for domestic workers in Singapore by issuing employment contracts and providing assistance to workers); see Jones, Jr., *supra* note 196, at 265-66 (suggesting, as the State Department Office of the Legal Adviser, that foreign missions are seemingly more inclined to waive immunity in U.S. courts because of their confidence in the fairness of the U.S. judicial system);.

215. See, e.g., ILO, *supra* note 164, at 141-42 (providing an example of a bilateral agreement between the Philippines and Kuwait, with a provision that explicitly states that if parties cannot settle amicably, they have a right to resort to adjudication).

216. See Jones, Jr., *supra* note 196, at 266 (suggesting that the increased use and

cooperating and negotiating with other countries, reciprocity concerns will be minimal because the U.S. government will not unilaterally apply an alternative interpretation of the VCDR commercial activity exception.<sup>217</sup>

*B. The State Department Should Strengthen Contract Provisions and Requirements to Ensure that the Responsibilities of Diplomats are Clearly Understood Between Diplomats, Sending States, the United States, and Domestic Workers*

The State Department should mandate that the employment contracts, which already require special temporary visas for domestic employees, include explicit provisions to indicate where sending states waived criminal and civil immunity privileges in the event that there are allegations made by domestic workers against diplomats. To be sure, the employment contract should require that the sending state co-sign the contract.<sup>218</sup> By doing so, the sending state recognizes that the diplomat, as a representative of the sending state, obliges to follow U.S. laws and regulations in employing their personal employees.<sup>219</sup>

Where diplomats and their sending states refuse to waive immunity privileges, the State Department should deny or revoke the diplomats' special visa privileges.<sup>220</sup> Moreover, if diplomats have a record of abusing previous employees or there have been complaints filed against them, the

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more consistent, formalized system of requesting waivers of immunity from sending states will not only ensure that individuals in the United States have stronger protections, but on the basis of reciprocity, will encourage stronger bilateral ties that will further diplomatic relations); see also Stephen L. Wright, Note, *Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts*, 5 B.U. INT'L L.J. 177, 177-78 (1987) (arguing that immunity privileges are undermining diplomatic relations as a result of the tension between states in resolving diplomats who violate the law and suggesting amendments to the VCDR to deter violent criminal acts).

217. See Veronica L. Maginnis, Note, *Limiting Diplomatic Immunity: Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations*, 28 BROOK. J. INT'L L. 989, 1022 (2003) (suggesting that if enough states enter into agreements to apply an alternative interpretation of immunity, then the approach would eventually become customary international law where all states would be bound by the new interpretation).

218. See CIRCULAR DIPLOMATIC NOTE OF MAY 1996, *supra* note 109 (recommending that the mission review and maintain a copy of the employment contract between its diplomat and the domestic personal employee because the State Department will ultimately hold the sending government liable for misconduct of its diplomats).

219. Cf. VCDR, *supra* note 8, art. 9 (stating that the receiving state can, at any time and without a reason, declare a diplomat *persona non grata*, which implies that it does not have to recognize the person as a member of the mission and the diplomat will likely have to return to his/her home country).

220. See 9 F.A.M. § 41.21 n.6.2 (2001) (giving consular officers who review visa applications the discretion to deny A-3 and G-5 visas where the application does not include an employment contract or the employment contract does not provide provisions, such as fair wages, that protect the employee).

State Department should revoke their visa privileges and initiate appropriate investigations.<sup>221</sup> The State Department could also require diplomats to post a security bond when they file for the special work visas for domestic employees.<sup>222</sup> Because employers would have to forfeit this deposit if found liable for abusing their employees, the deposit would serve as an added protection to prevent exploitation of workers.

*C. The State Department Should Develop a Centralized Register System to Track Complaints and Maintain Employment Contracts, and Implement a System to Monitor Compliance of Employment Contracts*

To accompany the more rigorous visa application process and employment contract provisions, the State Department needs to develop a centralized register system that maintains the employment contracts between foreign government officials and domestic workers in the United States on special temporary visas.<sup>223</sup> By doing so, the U.S. government will be able to implement a system that is able to account for the complaints filed against employers and properly monitor whether diplomatic employers are abusing their privileges.<sup>224</sup>

In conjunction with a centralized system of records, the State Department must articulate a clear process through which to file complaints, including what types of documents the complainant should submit to demonstrate that a civil liability exists given the particular challenges of documenting exploitation in these types of cases.<sup>225</sup> Even if the State Department did not investigate the complaint further, at a minimum, there would be a record and documentation of the complaint against the diplomat, which would be useful should that diplomat apply for

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221. See CIRCULAR DIPLOMATIC NOTE OF JUNE 2000, *supra* note 34.

222. See, e.g., MINISTRY OF MANPOWER, EMPLOYERS' GUIDELINES: TERMINATION OF SERVICES, REPATRIATION AND SECURITY BOND, [http://www.mom.gov.sg/public/momportal/en/communities/work\\_pass/foreign\\_domestic\\_workers/employers\\_guidelines/Termination\\_of\\_Services\\_Repatriation\\_and\\_Security\\_Bond.html](http://www.mom.gov.sg/public/momportal/en/communities/work_pass/foreign_domestic_workers/employers_guidelines/Termination_of_Services_Repatriation_and_Security_Bond.html) (requiring employers in Singapore to post a S\$5,000 (U.S. \$2,950) bond when applying for visas for foreign domestic employees to ensure that the employers follow employment guidelines and repatriate their workers at the end of their employment relationship).

223. See The Special Rapporteur, *supra* note 30, ¶¶ 15, 85.

224. See HUMAN RIGHTS WATCH, *Maid to Order*, *supra* note 214, at 24 (arguing that one of the strengths of Singapore's regulations governing foreign domestic workers is that there is a centralized system: one division, the Ministry of Manpower, which handles and manages the labor policy and complaints).

225. See 2 F.A.M. § 234.2 (1991) (setting forth that the complainant needs to notify the State Department in writing with "satisfactory evidence" that the diplomat owes her a debt of civil liability, that she has attempted to address matters independently with the mission with no avail, and that immunity would prevent her from adjudicating the issue). The State Department does not provide guidelines or examples of the type of evidence needed to show a civil liability. *Id.*

more special work visas or if other employees file similar complaints.<sup>226</sup>

Proper inspection procedures to monitor compliance with the provisions of employment contracts are also necessary to ensure that diplomats are not abusing their workers and to deter diplomats from doing so.<sup>227</sup> For example, the State Department could hold mandatory briefings for foreign personnel and their domestic employees where both parties would be given resources to better understand their rights and obligations.<sup>228</sup> These periodic trainings, which would be a condition imposed on diplomats to receive and maintain the special visas for domestic employees, would also offer an opportunity for attorneys and advocates to provide information to the workers should they want to seek legal assistance.<sup>229</sup> Recognizing that there are logistical challenges of providing the resources for holding briefings for the thousands of domestic workers in the United States, at a minimum, however, it would provide some oversight and transparency to the hidden nature of the employment of domestic workers without imposing heavy burdens on the parties.

*D. The State Department's Motor Insurance Scheme Demonstrates the Feasibility of These Mechanisms*

These proposals are within the authority of the State Department to implement, and in many ways, similar mechanisms already exist.<sup>230</sup> For example, Congress developed a motor licensing and insurance scheme when it enacted the Diplomatic Relations Act to address public concerns regarding traffic offenses committed by diplomats.<sup>231</sup> Even though the

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226. Cf. Jones, Jr., *supra* note 196, at 263 (explaining how the centralized database to maintain motor insurance and traffic citations of diplomats helps the State Department monitor whether it should issue or revoke licenses depending on whether the diplomat possesses adequate insurance, has a citation for driving under the influence of alcohol, or has too many traffic citations based on a point system).

227. See Written Statement on Ending the Exploitation of Migrant Domestic Workers Employed by UN Diplomats and Staff, Global Rights and American Civil Liberties Union, submitted to the Commission on Human Rights, 61st Session (Apr. 1, 2005) ¶¶ 5-6, available at <http://www.aclu.org/Files/PDFs/written%20statement%20on%20migrant%20workers%20un.pdf> (suggesting that abuse is still pervasive even with model contracts; and recommending the need for “watchdog mechanisms,” such as government enforcement of the contract obligations, to oversee and monitor employment conditions).

228. See HUMAN RIGHTS WATCH, *Maid to Order*, *supra* note 214, at 30 (discussing Singapore’s mandatory orientation training for new employers that hire migrant domestic employees to learn, among other things, that employers cannot deduct from their workers’ salaries as a form of punishment).

229. See *id.* (explaining another compulsory safety awareness training mandated by the Singapore government so migrant domestic workers have an opportunity to learn about workplace practices, such as operating electrical compliances safely, and what type of work is lawful under their work permit).

230. See Jones, Jr., *supra* note 196, at 263.

231. See Diplomatic Relations Act of 1978, 22 U.S.C. § 254e (1978) (requiring

issue of traffic accidents was discussed during the VCDR negotiation history and the drafters ultimately decided not to explicitly include an exception to immunity in this regard, the State Department recognized the growing problem of diplomats committing traffic violations and the more serious cases where diplomatic immunity deprived injured third parties of their remedies.<sup>232</sup> Thus, Congress passed legislation mandating diplomats to acquire motor insurance, enacting a special statute that would allow aggrieved parties to sue the insurance company directly rather than the diplomat, and requiring the State Department to develop a system to document and track diplomats who violated traffic laws.<sup>233</sup> Similarly, even though the VCDR did not explicitly include that domestic workers could bring suit against diplomats—though arguably, this would fall within the commercial activity exception—implementing a more concrete system to address the pervasive diplomatic abuse and exploitation of domestic workers would be consistent with the laws and mandate in which the motor insurance and licensing scheme arose.<sup>234</sup>

Additionally, just as the purpose of requiring diplomats to obtain motor insurance is to protect the rights and remedies of those injured in motor accidents, employment contracts between diplomats and domestic workers are meant to ensure that the employees are aware of their rights and remedies, and that the employers are aware of their duties and obligations.<sup>235</sup> The Office of the Legal Adviser of the State Department considered licenses to operate motor vehicles as a privilege and not a right.<sup>236</sup> Consequently, if the State Department were to revoke diplomats'

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diplomats to acquire insurance in the event that diplomats are involved in traffic accidents to ensure that aggrieved parties have an opportunity to adjudicate their claims); *see also* 28 U.S.C. § 1364 (adding, as a supplement to the Diplomatic Relations Act, that insurance companies cannot invoke immunity as a defense); Foreign Missions Act, 22 U.S.C. § 4304a (1982) (imposing a surcharge or fee based on the amount of damages incurred by the victim even where there is no-court rendered judgment when diplomats are: (1) at fault for injuring or causing the death of another; (2) as a result of motor accident; and (3) have failed to acquire liability insurance).

232. *See* S. REP. NO. 95-958, at 3 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 1935, 1937.

233. *See* S. REP. NO. 95-1108, at 3 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 1941, 1943 (explaining how mandatory liability insurance for diplomats and a direct action statute to enable victims from traffic accidents to sue insurance companies directly would not only provide a recourse for injured parties who would otherwise be denied of a remedy because of diplomatic immunity, but it would also prevent the State Department from invading the personal inviolability of a diplomat).

234. *See* S. REP. NO. 95-958, at 7 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 1935, 1940.

235. *Compare* S. REP. NO. 95-1108, at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1935, 1940-41 (explaining that the purpose of insurance is to ensure remedies for the aggrieved parties), *with* CIRCULAR DIPLOMATIC NOTE OF JUNE 2000, *supra* note 34, at 1-2 (requiring that diplomats offer a written employment contract to domestic employees to ensure that both parties understand their rights, duties, and obligations).

236. *See* Jones, Jr., *supra* note 196, at 263 (arguing that the State Department Office

licenses in the event that they abused that privilege, it would not violate the VCDR.<sup>237</sup> Moreover, because U.S. government officials are subject to the same State Department policies, reciprocity concerns are minimal.<sup>238</sup> Similar to the privilege to operate a motor vehicle, the special visas that the State Department provides diplomats to hire and bring domestic employees to the United States also are considered a privilege.<sup>239</sup> As such, revoking the visa privileges of diplomats to bring domestic employees into the United States if they violate U.S. laws would not interfere with the VCDR.

#### CONCLUSION

Under the current laws governing diplomatic immunity, the State Department plays a critical role in regulating diplomats' abuse of their immunity privileges.<sup>240</sup> To ensure that diplomatic employers are complying with U.S. laws and not exploiting their domestic workers, the State Department needs to exercise its authority to intervene in cases where claimants will be locked out of courts as a result of diplomatic immunity.<sup>241</sup>

Despite the State Department's claim that adjudication of claims will interfere with diplomatic relations, U.S. laws and regulations demonstrate that recognition of the rights and remedies of domestic workers will not impact U.S. interests, sovereign equality, international stability, and cordial diplomatic relations.<sup>242</sup> Not only does the statutory construction and the legislative history reveal that employment of domestic workers constitutes a commercial activity that denies diplomats immunity from civil jurisdiction, case law governing employment relationships between

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of the Legal Adviser's rules to monitor traffic offenses do not interfere with the VCDR because the State Department has authority to regulate privileges, such as operation of motor vehicles).

237. *See id.* at 263-64 (explaining that because licenses are a privilege, and not a right, the State Department has the authority to revoke them without interference with the VCDR, whereas prosecuting a diplomat for drunk driving without the sending state first waiving immunity would violate the VCDR).

238. *See* U.S. Dep't of State, Office of Foreign Missions, Diplomatic Motor Vehicle Reciprocity Program, <http://www.state.gov/ofm/resources/imp/23417.htm> (last visited Feb. 2, 2007) (describing that the Office of Foreign Missions assesses practices in other countries by conducting surveys and examining the issues that arise among missions to develop a country specific reciprocal policy to ensure equal treatment).

239. *See* CIRCULAR DIPLOMATIC NOTE OF MAY 1996, *supra* note 109 (providing that the State Department has the right to deny an A-3 visa application if employer violates the terms of employment).

240. *See* 2 F.A.M. § 233.2 (1991); *see also Report of the Special Rapporteur, supra* note 30, ¶ 56 (emphasizing the role of states to ensure domestic workers protection from abusive employers).

241. *See Testimony of Keyes, supra* note 14, at 5-6 (asserting to the Inter-American Commission for Human Rights the importance of lifting the "legal roadblock" of diplomatic immunity so domestic workers who suffer from human rights violations committed by diplomatic employers can effectively obtain redress).

242. *See, e.g., Park v. Shin*, 313 F.3d 1138, 1144 (9th Cir. 2002).

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domestic workers and consular officials, foreign state agents, and private individuals illustrates the importance of ensuring that domestic workers are not shut out of courts merely because their employers are diplomats.<sup>243</sup> Therefore, where diplomatic employers have allegedly violated U.S. laws in their treatment of domestic workers, either courts or the State Department should apply an alternative, broader interpretation of the VCDR immunity exceptions to include the employment of domestic workers, or the State Department should follow its own FAM regulations and intervene by requesting a waiver of immunity from the sending state to ensure that domestic workers have an opportunity to be heard in court. By doing so, the State Department will no longer provide diplomats a haven to continue mistreating workers ensuring that diplomats no longer hide behind a shield of immunity.

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243. See Mooketsi, *supra* note 124 (referencing Judge Dignake's ruling that diplomatic immunity under the VCDR does not extend to labor disputes because employment is a private act).