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### Achieving Accountability for Migrant Domestic Worker Abuse

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# ACHIEVING ACCOUNTABILITY FOR MIGRANT DOMESTIC WORKER ABUSE\*

JANIE A. CHUANG\*\*

*Domestic work has become increasingly commoditized in the global economy. Migrant domestic workers' remittances constitute a rich source of revenues for their countries of origin, while their labor ameliorates the "care deficit" experienced in wealthier countries of destination. Despite the importance of their work, migrant domestic workers are some of the most exploited workers in the world. They are often discriminated against based on their gender, class, race, nationality, and immigration status, and they are excluded from labor law protections in most countries of destination.*

*This Essay examines some of the underlying reasons for this mistreatment and neglect. After describing the scope and framework of the global domestic work market, it explains why the domestic work sector remains highly resistant to formal recognition as a form of labor entitled to worker protections under international and national laws. It explores the roots of resistance to accountability for migrant domestic worker abuse, drawing from sociological studies that have examined the social construction of demand for trafficked migrant domestic workers' labor. Building upon these findings, this Essay turns to a case study of the trafficking of migrant domestic workers into the United States by foreign diplomats. The study underscores the challenges to achieving accountability for this devalued worker population.*

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\*\* Assistant Professor of Law, American University Washington College of Law. I would like to express my sincere appreciation to the organizers and participants of the University of North Carolina Law Review symposium *Globalization, Families, and the State*. I am grateful for the helpful suggestions and insights provided by Ann Shalleck, Ashley Parrish, Jayesh Rathod, Elizabeth Keyes, Ana Avendaño, Eileen Boris, and the numerous rights advocates with whom I have worked to address and bring attention to the problem of migrant domestic worker trafficking. Thanks also to Kyle Ingram and Matthieu Riviere for their research assistance and to law review editor Steve Koch for his patience and careful review of drafts of this Essay.

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## INTRODUCTION

Over the last decade, stories reporting the enslavement of domestic workers by foreign diplomats in the United States have increasingly made the headlines of major media outlets.<sup>1</sup> Among the

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1. See, e.g., Henri E. Cauvin, *Diplomat's Ex-Employee Sues for Wages, Damages*, WASH. POST, Jan. 19, 2006, at B2 (describing case brought by exploited Paraguayan domestic worker against Argentine diplomat); Sarah Fitzpatrick, *Diplomatic Immunity Leaves Abused Workers in Shadows*, WASH. POST, Sept. 20, 2009, at A4 (recounting the story of a former Philippine ambassador to the United Nations, Lauro L. Baja Jr., who was sued by his former maid); Daniela Gerson, *A Slavery Case Nears Hearing in Manhattan*, N.Y. SUN, Aug. 10, 2004, at 1 (describing case brought by Indian domestic worker against Kuwaiti diplomat); Colbert I. King, *The Slaves in Our Midst*, WASH. POST, Dec. 23, 2006, at A21 (indicating that exploitation of domestic workers by foreign diplomats "aptly illustrates the claims of egregious labor exploitation"); Ernesto Londoño, *Former Domestic Worker Sues Tanzanian Diplomat*, WASH. POST, May 2, 2007, at B6 (detailing allegations made by a Tanzanian domestic worker against a Tanzanian diplomat); Kirk Semple, *Government Report Points to Diplomats' Mistreatment of Workers Brought from Abroad*, N.Y. TIMES, July 30, 2008, at B3 (reporting the release of a Government Accountability Office report documenting allegations of abuse at the hands of foreign diplomats); Somini Sengupta, *U.S. Supports Bid to Dismiss Maid's Suit Against Envoy*, N.Y. TIMES, Apr. 4, 2000, at B4 (describing case brought by Bangladeshi domestic worker against Bahraini diplomat); Lena H. Sun, *'Modern-Day Slavery' Prompts Rescue Efforts: Groups Target Abuse of Foreign Maids, Nannies*, WASH. POST, May 3, 2004, at A1 (documenting allegations of an Ecuadorian domestic servant and the efforts of a workers' rights group which assisted her in leaving the home of her former employer); Matt Kelley, *Some Embassy Workers Enslave Domestic Help, Enjoy Immunity*, NEW STANDARD, June

most exploited in the world, these workers often work long days for little to no pay, labor under overwhelming debt, face threats from their employers, and suffer psychological and physical abuse. That these abuses are perpetrated with impunity—the abusers shielded from civil and criminal proceedings by diplomatic immunity—has fueled moral outrage and inspired broader advocacy on behalf of migrant domestic workers' rights.

Diplomats' abuse of domestic workers is but one example of the exploitation experienced by migrant domestic workers more generally. This mistreatment belies migrant domestic workers' crucial contributions to the global economy. The remittances these workers send home constitute a valuable source of revenue for their home economies, and the labor they provide offsets the "care deficit"<sup>2</sup> increasingly experienced in wealthy destination countries. Relegated to the informal labor sector, migrant domestic workers are routinely excluded as a worker category from labor law protections. The formal devaluing of their labor compounds the discrimination many already experience based on their class, race, nationality, gender, and immigration status.

This Essay assesses the underlying reasons for the mistreatment and neglect of this important group of workers, as well as the failure of and potential for law to prevent and redress their abuse. Part I examines the push-pull factors driving the migration of women for domestic work in wealthier countries. Drawing from sociological studies, it considers the social construction of demand for migrant domestic workers and explores how and why domestic workers are excluded from the protections afforded to the formal labor market. Part II turns to a case study of the trafficking of migrant domestic workers into the United States by foreign diplomats. The pronounced power imbalance between diplomats and their domestic employees renders those workers particularly vulnerable to exploitation. In this

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28, 2005, <http://newstandardnews.net/content/index.cfm/items/1985> (detailing the story of an Indian maid who worked in the home of a Kuwaiti diplomat); Frank Langfitt, *Servants: Diplomats Held Us as Suburban 'Slaves,'* NPR MORNING EDITION, Mar. 1, 2007, <http://www.npr.org/templates/story/story.php?storyId=7626754> (recounting the plight of three former servants of a Kuwaiti diplomat); Libby Lewis, *Diplomatic Abuse of Servants Hard to Prosecute* (NPR radio broadcast Mar. 1, 2007), available at <http://www.npr.org/templates/transcript/transcript.php?storyId=7672967> (describing diplomatic immunity as a "game stopper" for efforts to prosecute forced-domestic-labor cases).

2. Barbara Ehrenreich & Arlie Russell Hochschild, *Introduction* to GLOBAL WOMAN: NANNIES, MAIDS, AND SEX WORKERS IN THE NEW ECONOMY 1, 8 (Barbara Ehrenreich & Arlie Russell Hochschild eds., 2003) [hereinafter GLOBAL WOMAN] (describing the increased demand for domestic labor in Western countries as women in those countries enter the formal workforce).

context, anti-trafficking law arguably holds heightened promise for addressing abuses because States' anti-trafficking commitments are backed by political will otherwise lacking in the traditional labor law context. In this sense, the case study exposes the underlying power dynamics that feed State responses (or lack thereof) to migrant domestic worker abuse, and it underscores the efforts that rights advocates have made to seek accountability.

## I. MIGRANT DOMESTIC WORKERS IN THE GLOBAL ECONOMY

### A. *Global Dynamics of Migrant Domestic Work*

Absorbing up to ten percent of total employment in some countries, domestic work is an occupation for millions of women worldwide.<sup>3</sup> Domestic work, along with other forms of "care work," is the single largest sector of the global economy that pulls women to migrate.<sup>4</sup> Gender ideologies undergird the globalization of domestic work—"[t]he process of labor migration push[es] women outside the home" but also paradoxically "reaffirm[s] the belief that women belong inside the home."<sup>5</sup> As international migration becomes increasingly feminized, women from the global South migrate to meet the care demands of families in the global North.<sup>6</sup>

Emigration push- and immigration pull-factors feed the growing ranks of migrant domestic workers worldwide.<sup>7</sup> Because these workers' remittances are a rich source of revenues for their countries

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3. UNITED NATIONS POPULATION FUND, STATE OF WORLD POPULATION 2006: A PASSAGE TO HOPE, WOMEN AND INTERNATIONAL MIGRATION 51 (2006) [hereinafter UNFPA REPORT]; INT'L LABOUR OFFICE [ILO], DECENT WORK FOR DOMESTIC WORKERS 2, 6 (2010), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_104700.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_104700.pdf) (noting that domestic work accounts for 4%–10% of total employment, both male and female, in developing countries and 1%–2.5% of total employment in individual countries). Women comprise the overwhelming majority of domestic workers around the world. ILO, *supra*, at 6.

4. RHACEL SALAZAR PARREÑAS, THE FORCE OF DOMESTICITY: FILIPINA MIGRANTS AND GLOBALIZATION 3 (2008). For example, according to the United Nations Population Fund, female domestic workers comprise the majority of approximately 1.5 million Filipino overseas foreign workers throughout Asia and the majority of 1 million low-level migrant women workers in Saudi Arabia. UNFPA REPORT, *supra* note 3, at 51.

5. PARREÑAS, *supra* note 4, at 4.

6. Lourdes Benería, *The Crisis of Care, International Migration, and Public Policy*, FEMINIST ECON., July 2008, at 1, 4. For example, sixty to seventy-five percent of Filipino, Sri Lankan, and Indonesian legal migrants are women, the majority of whom are employed as domestic workers in the Middle East, Singapore, Malaysia, and Hong Kong. HUMAN RIGHTS WATCH, SWEPT UNDER THE RUG: ABUSES AGAINST DOMESTIC WORKERS AROUND THE WORLD 3 (2006) [hereinafter SWEPT UNDER THE RUG], <http://www.hrw.org/sites/default/files/reports/wrd0706webwcover.pdf>.

7. Ehrenreich & Hochschild, *supra* note 2, at 1, 8.

of origin,<sup>8</sup> some countries actively encourage their female workers to migrate abroad for domestic work.<sup>9</sup> For less wealthy countries, the “exporting” of labor is often a key development strategy, offsetting unemployment problems at home while growing the economy through accumulating foreign exchange reserves.<sup>10</sup> In turn, wealthy countries increasingly rely on this “exported” labor to address their “care deficit,” reflecting the paradox that for women in wealthier countries to enter the paid work force, they need domestic workers to handle the work in their homes.<sup>11</sup> As women in wealthy countries transfer their “reproductive labor”<sup>12</sup> to less privileged women in order to pursue a career, the traditional division of labor in the patriarchal nuclear household does not get significantly renegotiated.<sup>13</sup> The

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8. Officially recorded remittance flows to developing countries in 2008 reached \$338 billion, although “the true size of flows, including unrecorded flows . . . , is even higher.” DILIP RATHA, SANKET MOHAPATRA & ANI SILWAL, *MIGRATION AND REMITTANCE TRENDS 2009: A BETTER-THAN-EXPECTED OUTCOME SO FAR, BUT SIGNIFICANT RISKS AHEAD 1* (2009) [hereinafter *MIGRATION AND REMITTANCE TRENDS 2009*], <http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1110315015165/MigrationAndDevelopmentBrief11.pdf>. “For many developing economies, remittances constitute the single largest source of foreign exchange, exceeding export revenues, foreign direct investment (FDI), and other private capital inflows.” INT’L MONETARY FUND, *WORLD ECONOMIC OUTLOOK: GLOBALIZATION AND EXTERNAL IMBALANCES* 69 (2005), <http://www.imf.org/external/pubs/ft/weo/2005/01/index.htm>. In 2004 Filipino migrant workers, who were mostly women, sent home \$11.6 billion—13.5% of the country’s gross domestic product. WORLD BANK, *GLOBAL ECONOMIC PROSPECTS: ECONOMIC IMPLICATIONS OF REMITTANCES AND MIGRATION* 90 (2006) [hereinafter *GLOBAL ECONOMIC PROSPECTS*], [http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2005/11/14/000112742\\_20051114174928/Rendered/PDF/343200GEP02006.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2005/11/14/000112742_20051114174928/Rendered/PDF/343200GEP02006.pdf).

9. See, e.g., PARREÑAS, *supra* note 4, at 2 (noting how Indonesia, Sri Lanka, the Philippines, and Vietnam “promote the labor migration of women”).

10. SWEPT UNDER THE RUG, *supra* note 6, at 67; Saskia Sassen, *Women’s Burden: Counter-Geographies of Globalization and the Feminization of Survival*, 71 *NORDIC J. INT’L L.* 255, 270–71 (2002).

11. Ehrenreich & Hochschild, *supra* note 2, at 1, 7–8. Migrant domestic workers’ response to the “care deficit” can lead to a “care drain” in the workers’ home countries, with workers facing the prospect of caring for other people’s children while unable to care for their own. See PARREÑAS, *supra* note 4, at 47–48; Benería, *supra* note 6, at 10.

12. The term “reproductive labor” refers to “the labor needed to sustain the productive labor force.” This labor includes, for example, household chores, the care of elderly and youth, and socialization of children. Rhacel Salazar Parreñas, *Migrant Filipina Domestic Workers and the International Division of Reproductive Labor*, 14 *GENDER & SOC’Y* 560, 561 (2000).

13. UNFPA REPORT, *supra* note 3, at 25; PARREÑAS, *supra* note 4, at 42. In the United States, although the difference between the amount of time women (as opposed to their male partners) spend caring for children, cooking, and house-cleaning has decreased over the last three decades, women still carry the burden of this work. ELLEN GALINKSY, KERSTIN AUMANN & JAMES T. BOND, *TIMES ARE CHANGING: GENDER AND GENERATION AT WORK AND AT HOME* 14–18 (2008), [http://familiesandwork.org/site/research/reports/Times\\_Are\\_Changing.pdf](http://familiesandwork.org/site/research/reports/Times_Are_Changing.pdf).

construction of such work as a private problem—i.e., for families to resolve on their own, rather than relying on the state to provide public alternatives—“has permitted governments and employers to free ride” on migrant women’s labor.<sup>14</sup>

Notwithstanding the increasing societal demand for domestic work,<sup>15</sup> domestic workers in general remain among the most exploited and abused workers in the world.<sup>16</sup> Domestic work is looked upon as unskilled labor, and, even when paid, the work is undervalued and poorly regulated.<sup>17</sup> As a result, domestic workers often experience working conditions that fall short of international labor standards, including low and irregular pay, excessively long hours with no rest periods, and no access to social security or other benefits.<sup>18</sup> Poor working conditions are exacerbated by the isolation of working alone in a private household, beyond the scrutiny of the State and the scope of most labor laws.<sup>19</sup>

Migrant domestic workers are especially vulnerable to exploitation. Migration usually requires significant financial capital and social networks to facilitate moving from one country to another. But the establishment of recruitment agencies has removed these obstacles, giving poor rural women access to the domestic work market—though under conditions that heighten the potential for abuse.<sup>20</sup> These agencies may pay the initial costs of travel and immigration documents, later arranging with employers to deduct these and (sometimes exorbitant) recruitment fees from the workers’

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14. Kathryn Abrams, *Third Annual Ruth Bader Ginsburg Lecture: The Global Impact of Feminist Legal Theory*, 28 T. JEFFERSON L. REV. 307, 322 (2006).

15. UNFPA REPORT, *supra* note 3, at 51 (predicting that demand for domestic work will grow in tandem with international migration). In 2006, the World Bank reported that “the number of people who wish to migrate from developing to high-income countries will rise over the next two decades.” GLOBAL ECONOMIC PROSPECTS, *supra* note 8, at 28. In light of the global economic crisis, new migration flows have fallen, but there is little evidence of migrants returning home, likely due to fears that they may not be able to re-enter the destination countries due to tightened immigration controls. MIGRATION AND REMITTANCE TRENDS 2009, *supra* note 8, at 4.

16. See UNFPA REPORT, *supra* note 3, at 51–52; ILO, THE COST OF COERCION 29 (2009) [hereinafter 2009 ILO REPORT], [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/genericdocument/wcms\\_106200.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/genericdocument/wcms_106200.pdf).

17. See 2009 ILO REPORT, *supra* note 16, at 29.

18. See U.N. Comm. on Migrant Workers, *Report of the Day of General Discussion on Migrant Domestic Workers*, ¶ 7, U.N. Doc. CMW/C11/CRP.3 (Oct. 29, 2009).

19. See SWEPT UNDER THE RUG, *supra* note 6, at 1.

20. PARREÑAS, *supra* note 4, at 1–2; ILO, A GLOBAL ALLIANCE AGAINST FORCED LABOUR 55–56 (2005) [hereinafter 2005 ILO REPORT], <http://www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/rep-i-b.pdf>.

wages.<sup>21</sup> Some recruitment agencies maintain “holding centers” where prospective workers are placed before their deployment abroad (sometimes for several months), at which they are forced to work for minimal (or no) pay and are confined so as to prevent loss on the agencies’ investment.<sup>22</sup>

In addition to debts incurred up front, a migrant domestic worker’s immigration status can constrain her ability to leave an abusive employment situation. For those who migrate legally, immigration status may be tied to specific employers, rendering it impossible for a migrant domestic worker to change employers without going through the onerous process of reapplying for lawful immigration status in the United States.<sup>23</sup> Due to increasingly stringent border controls in the favored countries of destination,<sup>24</sup> migrant domestic workers may be undocumented, having used clandestine migration methods to cross the border.<sup>25</sup> Those who choose this route may be burdened with excessive smuggling and/or recruitment fees and, as a result, forced to forego wages for months or even years to reimburse these fees.<sup>26</sup> Moreover, what began as smuggling may warp into trafficking as workers are kept in debt bondage<sup>27</sup> or coerced into working under exploitative conditions with threats of deportation or arrest based on their undocumented status.<sup>28</sup>

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21. 2009 ILO REPORT, *supra* note 16, at 24–25.

22. *Id.* at 26.

23. See *infra* notes 86–88 and accompanying text; see also U.S. Department of State, Visitor Visas – Business and Pleasure, [http://travel.state.gov/visa/temp/types/types\\_1262.html](http://travel.state.gov/visa/temp/types/types_1262.html) (providing general information regarding visa application and reapplication procedures) (last visited May 4, 2010).

24. For a map of migration trends, see Robert Espinoza, *Migration Trends: Maps and Chart*, in GLOBAL WOMAN, *supra* note 2, at 275, 275–80.

25. MIKE KAYE, ANTI-SLAVERY INT’L, THE MIGRATION–TRAFFICKING NEXUS: COMBATING TRAFFICKING THROUGH THE PROTECTION OF MIGRANTS’ HUMAN RIGHTS 6 (2003), available at [http://www.antislavery.org.uk/includes/documents/cm\\_docs/2009/t/the\\_migration\\_trafficking\\_nexus\\_2003.pdf](http://www.antislavery.org.uk/includes/documents/cm_docs/2009/t/the_migration_trafficking_nexus_2003.pdf).

26. 2009 ILO REPORT, *supra* note 16, at 26–27.

27. Debt bondage is defined as:

the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery art. 1, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3.

28. See, e.g., Memorandum of the United States with Respect to the Sentencing of Soripada Lubis and Siti Chadidjah Siregar at 2, 4–5, *United States v. Lubis*, No. 1:09-cr-91-GBL (E.D. Va. June 16, 2009) [hereinafter *Lubis* Sentencing Memorandum] (describing the tactics used by defendants to create a “climate of fear” among domestic workers they harbored and abused).



Employment in this informal—and hence unregulated—labor sector, combined with migrants’ often conditional or undocumented immigration status, renders migrant domestic workers particularly vulnerable to extreme abuse and even death.<sup>29</sup>

*B. Roots of Resistance to Treating Migrant Domestic Work as Work*

While economic factors drive the continuing migration for (potentially exploitable) domestic work abroad, notions of “the home” and a worker’s “otherness” undergird societal resistance to treating these workers as a group entitled to labor protections. That domestic work has traditionally been classified as “women’s work” exacerbates the low status of domestic workers. As sociologists Julia O’Connell Davidson and Bridget Anderson explain, “[t]he home is imagined as governed by mutual dependence and affective relations, its values are in opposition to those of the market, [which is] driven by self-interest and instrumentalism, where individualism rather than conforming to pre-existing social roles is the rule.”<sup>30</sup> Labeling housework as “care” signals that work in the home is divorced from economic entitlements.<sup>31</sup> Labor rights considered normal in the formal economy (e.g., minimum wage, days off, vacation, and fixed working hours) are not viewed as necessary or even appropriate in the context of work in a private household.

Sociologists have demonstrated that racial, national, or ethnic otherness of migrant domestic workers can facilitate their exploitation and/or trafficking.<sup>32</sup> A worker’s otherness can help alleviate the discomfort that many employers experience when bringing the employment relationship into the home.<sup>33</sup> Instead of treating the worker as a traditional employee, the employer views the relationship as one of mutual dependence—the domestic worker

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29. See, e.g., SWEPT UNDER THE RUG, *supra* note 6, at 3 (“In Singapore, at least 147 domestic workers have fallen to their deaths from hazardous workplace conditions or suicide.”). In 2008, migrant domestic workers were dying at a rate of more than one per week in Lebanon, a rate that recently skyrocketed to eight in October 2009. Human Rights Watch, *Lebanon: Deadly Month for Domestic Workers*, Nov. 9, 2009, <http://www.hrw.org/en/news/2009/11/09/lebanon-deadly-month-domestic-workers>.

30. BRIDGET ANDERSON & JULIA O’CONNELL DAVIDSON, *IS TRAFFICKING IN HUMAN BEINGS DEMAND DRIVEN? A MULTI-COUNTRY PILOT STUDY* 33 (2003) [hereinafter MULTI-COUNTRY PILOT STUDY].

31. Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHI.-KENT L. REV. 1441, 1447 (2001) (citing Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51, 51 (1997)).

32. MULTI-COUNTRY PILOT STUDY, *supra* note 30, at 31.

33. *Id.*

needs money and work, and the employer needs a “flexible” worker.<sup>34</sup> In some cases, the domestic worker is a poorer member of the employer’s extended family and is, therefore, subject to bonds of kinship as well as dependence.<sup>35</sup> Easier to mold to the requirements of individual households, migrant domestic workers are particularly desirable over local workers because their immigration status and/or lack of other job opportunities renders them more willing to work longer hours and less likely to quit.<sup>36</sup> Employers’ sense of “helping” these people can mask their exploitation (i.e., through labor control and retention) over workers made vulnerable by their economic circumstances, isolation, and possibly undocumented status.<sup>37</sup>

Race and ethnicity can feed resistance to expanding domestic workers’ rights. In the United States, for example, domestic workers’ explicit exclusion from the National Labor Relations Act (“NLRA”)<sup>38</sup> when it was drafted in the 1930s has been linked to the fact that domestic workers were predominantly black and that Southern politicians feared expanding domestic workers’ rights would upset the racial status quo.<sup>39</sup> Even a half-century later, studies suggest that the race or ethnicity of migrant domestic workers is directly linked to their desirability and treatment. Employers’ hiring preferences for domestic workers of a particular race, ethnicity, and nationality contribute to a hierarchy of domestic caretakers. Filipina workers, for example, are often stereotyped as providing a “higher-quality” service due to their higher education and supposedly “docile and submissive” natures.<sup>40</sup>

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34. *Id.* at 32.

35. E-mail from Martina Vandenberg, Partner, Jenner & Block LLP, to author (Mar. 26, 2010, 04:57 EST) (on file with the North Carolina Law Review).

36. MULTI-COUNTRY PILOT STUDY, *supra* note 30, at 30; 2005 ILO REPORT, *supra* note 20, at 51.

37. MULTI-COUNTRY PILOT STUDY, *supra* note 30, at 39.

38. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2006)).

39. See Eileen Boris, *Labor’s Welfare State: Defining Workers, Constructing Citizens*, in 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 319, 343–44 (Michael Grossberg & Christopher Tomlins eds., 2008).

40. Mary Romero, *Nanny Diaries and Other Stories: Imagining Immigrant Women’s Labor in the Social Reproduction of American Families*, 52 DEPAUL L. REV. 809, 840–41 (2003) (quoting in part Dan Gatmaytan, Recent Development, *Death and the Maid: Work, Violence, and the Filipina in the International Labor Market*, 20 HARV. WOMEN’S L.J. 229, 246–47 (1997)); see also SWEPT UNDER THE RUG, *supra* note 6, at 35 (noting how Filipina workers earn significantly more than workers of other ethnicities); UNFPA REPORT, *supra* note 3, at 34 (same); Audrey Macklin, *Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?*, 37 MCGILL L.J. 681, 700–01 (1992) (recounting a married couple’s realization of “how quiet and docile Filipino women were” after the couple hired a Filipina domestic worker).

Employers and governmental authorities sometimes use a migrant domestic worker's undocumented status as an excuse to justify exploitation.<sup>41</sup> Such excuses are based on the mistaken view that a worker's decision to cross borders illegally amounts to an agreement to subsequent exploitation. Many also wrongly believe that a worker's undocumented status automatically renders her beyond the reach of labor law protections.<sup>42</sup> Even those responsible for upholding and applying U.S. trafficking laws have failed to acknowledge domestic worker abuse, placing more emphasis on the workers' underlying undocumented migration status than the abuses inflicted on them. In *United States v. Lubis*,<sup>43</sup> for example, the defendant harbored twenty undocumented domestic workers in his basement over an eight-year period and farmed them out to wealthy households, threatening to kill the workers' families if they fled and sexually abusing two of them.<sup>44</sup> A federal judge sentenced the defendant to only three years probation and a \$2,000 fine, noting that he was "troubled" by the thought of sending the defendant to prison while the employers were not criminally charged for hiring illegal immigrants.<sup>45</sup>

The *Lubis* case demonstrates how migrant domestic workers' otherness often plays into their mistreatment. Several Indonesian women brought into the trafficking ring were previously exploited by Middle Eastern diplomats who had brought the women to the United States on false promises of good salaries and working conditions.<sup>46</sup> Using information from his contacts at the Indonesian embassy, Lubis approached these women at their places of employment, introduced himself as Indonesian, and enticed them to work for him "with promises of higher pay and less work" than was required by their Middle Eastern employers.<sup>47</sup> To keep them in his employ, Lubis

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41. Interview with Ana Avendaño, Assoc. Gen. Counsel, AFL-CIO, in Wash., D.C. (Apr. 2, 2010) [hereinafter Avendaño Interview].

42. *Id.*

43. No. 1:09-cr-91-GBL (E.D. Va. Aug. 13, 2009).

44. See *Lubis* Sentencing Memorandum, *supra* note 28, at 2-46; Freeman Klopott, *Federal Judge Slams Feds for Not Charging Illegal Immigrants' Employers*, WASH. EXAMINER, Aug. 14, 2009, [http://www.washingtonexaminer.com/local/Federal-judge-slams-feds-for-not-charging-illegal-immigrants\\_employers-8103073.html](http://www.washingtonexaminer.com/local/Federal-judge-slams-feds-for-not-charging-illegal-immigrants_employers-8103073.html).

45. Klopott, *supra* note 44.

46. See generally *Lubis* Sentencing Memorandum, *supra* note 28 (contrasting the terms of the women's employment contracts with what they actually received from their diplomat-employers); Susan Ferrechio, *Women Made Vulnerable by Embassy Treatment*, WASH. EXAMINER, July 1, 2009, <http://www.washingtonexaminer.com/local/Women-made-vulnerable-by-embassy-treatment-7904563-49549387.html> (same).

47. *Lubis* Sentencing Memorandum, *supra* note 28, at 48.

played on the Indonesian “culture of gratitude,”<sup>48</sup> berating the women for being ungrateful for the better life he provided them and threatening to deport them or harm their families.<sup>49</sup> Lubis also sexually assaulted some of the women, threatening to call their family members in Indonesia to falsely accuse the women of promiscuity if they rejected his advances.<sup>50</sup> Cultural and gender norms, ethnicity, and immigration status were all strategically used to perpetrate abuse against these workers.

### C. *Legal Obstacles and Avenues to Accountability*

Governments’ failure to protect domestic workers in the formal labor market contributes to the tendency to understand domestic work as “not work.”<sup>51</sup> While countries of origin welcome the revenues brought into their economies through the remittances migrant domestic workers often send home,<sup>52</sup> they do little to protect the workers from exploitative employers or labor agents. Governments often fail to monitor and punish abusive practices by recruitment agencies.<sup>53</sup> Consular officials posted in the countries of destination might provide limited assistance when approached with claims of domestic worker abuse, but the more frequent solution is simply to ban women’s migration to particular destinations.<sup>54</sup> Although some countries have entered into bilateral agreements mandating standards for the treatment of domestic workers, this is far from standard practice.<sup>55</sup> Indeed, the lack of regional minimum standards for treatment of migrant domestic workers feeds a “race to the bottom,” with rival countries of origin accepting fewer labor protections as a way to maintain the competitive edge of their overseas work forces.<sup>56</sup>

Meanwhile, countries of destination have traditionally regarded domestic workers as informal labor and thus beyond the scope of regulation and scrutiny. An International Labour Organization (“ILO”) 2005 study of national laws in sixty-five countries revealed

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48. *Id.* at 15.

49. *Id.* at 21.

50. *Id.* at 22.

51. See Abrams, *supra* note 14, at 318–19.

52. See *supra* notes 8–9 and accompanying text.

53. UNFPA REPORT, *supra* note 3, at 54 (noting that in many countries recruitment agencies “remain outside the purview of regulations and national laws”).

54. NANA OISHI, WOMEN IN MOTION: GLOBALIZATION, STATE POLICIES, AND LABOR MIGRATION IN ASIA 59–61, tbl.3.2 (2005) (detailing emigration restrictions on female migration for domestic work in western Asia and northern Africa).

55. Avendaño Interview, *supra* note 41.

56. SWEPT UNDER THE RUG, *supra* note 6, at 5.

that only nineteen countries had enacted specific laws or regulations dealing with domestic work.<sup>57</sup> Those that did often afforded less protection to domestic workers than other worker categories.<sup>58</sup> For example, in the United States, domestic workers are excluded from the protections of the NLRA<sup>59</sup> and the Occupational Safety and Health Act (“OSHA”),<sup>60</sup> as well as from the overtime provisions of the Fair Labor Standards Act (“FLSA”).<sup>61</sup> Even where a country’s labor laws apply to domestic work, abuse of domestic workers often falls outside government scrutiny because of privacy concerns involved in monitoring workplace conduct in private households.<sup>62</sup> As a result, there have been very few convictions of abusive employers worldwide.<sup>63</sup>

Nor does international law offer much in the way of labor protections for migrant domestic workers. There are no international laws specifically covering migrant domestic workers, though the ILO is considering adopting such an instrument by 2011.<sup>64</sup> The most relevant international laws with respect to migrant domestic workers’ rights are the fundamental ILO Conventions relating to freedom of association and collective bargaining, forced labor, non-discrimination, and child labor—all of which apply to undocumented workers.<sup>65</sup> The ILO Conventions relating specifically to migrant

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57. 2005 ILO REPORT, *supra* note 20, at 50.

58. *Id.*

59. 29 U.S.C. §§ 151–169 (2006). The National Labor Relations Act (“NLRA”) defines the term “employee” to exclude “any individual employed . . . in the domestic service of any family or person at his home.” § 152(3).

60. 29 U.S.C. §§ 651–678 (2006). The Occupational Safety and Health Administration exempts from the Act anyone who privately employs someone in a residence “for the purpose of performing . . . what are commonly regarded as ordinary domestic household tasks, such as house cleaning, cooking, and caring for children.” 29 C.F.R. § 1975.6 (2009).

61. 29 U.S.C. §§ 201–219 (2006). The Fair Labor Standards Act (“FLSA”) exempts from overtime pay requirements “any employee who is employed in domestic service in a household *and who resides in such household*.” § 213(b)(21) (emphasis added). Domestic workers tend not to be covered by Title VII sexual harassment prohibitions and the Family Medical Leave Act (“FMLA”) since private households rarely meet the threshold number of employees required for these laws to apply. *See* 42 U.S.C. § 2000e(b) (2006) (defining “employer” as a person who employs fifteen or more workers for purposes of Title VII of the Civil Rights Act of 1964); 29 U.S.C. § 2611(4) (2006) (defining “employer” as someone who employs fifty or more workers for purposes of the FMLA).

62. 2005 ILO REPORT, *supra* note 20, at 50.

63. *Id.*

64. ILO, *supra* note 3, at 2, 95.

65. *See* ILO Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, T.I.A.S. No. 13,045, 2133 U.N.T.S. 161; ILO Convention (No. 138) Concerning Minimum Age for Admission to Employment, June 26, 1973, 1015 U.N.T.S. 297; ILO Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362

workers and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (“U.N. Migrant Workers Convention”) apply to migrant domestic workers, but with lesser protections for undocumented workers.<sup>66</sup> Although most States—with the notable exception of the United States—are parties to the fundamental ILO Conventions,<sup>67</sup> no major destination countries<sup>68</sup> are party to the U.N. Migrant Workers Convention, and only a handful are party to the ILO migrant workers conventions.<sup>69</sup>

While international and national labor laws offer limited recourse for exploited migrant domestic workers, anti-trafficking laws may provide relief for some. The issue of human trafficking has become a priority on national agendas worldwide due to States’ growing concerns over the involvement of criminal syndicates in the clandestine migration of peoples and the harms suffered by the estimated 2.4 million people trafficked worldwide.<sup>70</sup> The last decade

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U.N.T.S. 31; ILO Convention (No. 105) Concerning the Abolition of Forced Labour, June 25, 1957, S. TREATY DOC. NO. 102-3 (1991), 320 U.N.T.S. 291; ILO Convention (No. 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, June 29, 1951, 165 U.N.T.S. 303; ILO Convention (No. 98) Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, July 1, 1949, 96 U.N.T.S. 257; ILO Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organise, July 9, 1948, 68 U.N.T.S. 17; ILO Convention (No. 29) Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55. The texts and ratifications of these conventions are available at the ILO’s Web site and are arranged by ILO Convention number. See ILOLEX, Database of International Labour Standards, <http://www.ilo.org/ilolex/english/convdisp1.htm> (last visited May 4, 2010).

66. ILO Convention (No. 143) Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, June 24, 1975, 1120 U.N.T.S. 323; ILO Convention (No. 97) Concerning Migration for Employment (Revised 1949), July 1, 1949, 120 U.N.T.S. 71; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, G.A. Res. 45/158, U.N. Doc. A/RES/45/158 (Dec. 18, 1990).

67. See ILOLEX, *supra* note 65. Note that the United States has ratified only two of the eight ILO Fundamental Conventions: Convention 105 (forced labor) and Convention 182 (child labor). *Id.*

68. For a map of migration trends depicting the major destination countries, see Espinoza, *supra* note 24, at 275–80.

69. See United Nations Treaty Collection, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-13&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en) (last visited May 4, 2010) (showing ratification status of U.N. Migrant Workers Convention); ILOLEX, *supra* note 65 (showing ratification status of Convention 97 (migration for employment) and Convention 143 (abuse prevention)).

70. 2005 ILO REPORT, *supra* note 20, at 14; Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 976–77 (2001).

has thus borne witness to a rapid proliferation of anti-trafficking laws at the international, regional, and national levels.<sup>71</sup>

Depending on the level of exploitation suffered and the scope of the domestic anti-trafficking law, a migrant domestic worker may be covered under an anti-trafficking regime. Exploitation rises to the level of trafficking when three key elements exist: (1) the recruitment, movement, or harboring of a person, (2) by use of force, fraud, or coercion, and (3) for the purpose of exploitation, including forced labor or services, slavery, slavery-like practices, or servitude.<sup>72</sup> Given this broad definition, anti-trafficking laws could cover a significant swath of migrant domestic worker abuse cases involving more extreme exploitation. This assumes, however, that a domestic anti-trafficking law—consistent with international standards—covers trafficking into both sex and non-sex sectors. Regrettably, a number of countries have yet to adopt comprehensive anti-trafficking laws, opting instead to focus only on trafficking into the sex sector.<sup>73</sup>

But if comprehensive in their scope, anti-trafficking laws may provide an additional avenue of relief to the few currently available to abused domestic workers under international and national laws. For example, until the U.S. Congress passed the Trafficking Victims Protection Act (“TVPA”),<sup>74</sup> abused domestic workers’ options for financial compensation were limited to wage and hour claims under the FLSA and breach of contract actions. The TVPA defines “severe forms of trafficking in persons” as:

The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of

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71. Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT’L L. 789, 792–93 (2009).

72. International treaty law defines trafficking as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

G.A. Res. 55/25, Annex II, art. 3(a), U.N. Doc. A/RES/55/25 (Nov. 15, 2000).

73. See Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. (forthcoming May 2010).

74. Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended in scattered sections of 8, 18, 20, 22 & 42 U.S.C.) [hereinafter TVPA].

force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.<sup>75</sup>

Under this definition, a migrant domestic worker subjected to a situation where she feels she cannot leave the employment—e.g., because of debt bondage<sup>76</sup> or threats of harm to herself or her family members—could qualify as trafficked under the TVPA and its subsequent reauthorizations. As long as she provides “reasonable” cooperation in efforts to prosecute her traffickers, the domestic worker could be eligible for social services equivalent to those provided to refugees, temporary (and potentially permanent) residency status, mandatory restitution, and the right to pursue a civil action against her traffickers for monetary compensation.<sup>77</sup>

To better illustrate the limits and possibilities of using anti-trafficking laws to address domestic worker exploitation, the following discussion explores the application of U.S. anti-trafficking laws to the much-publicized problem of trafficking by diplomats.

## II. CASE STUDY: TRAFFICKING OF DOMESTIC WORKERS INTO THE UNITED STATES BY DIPLOMATS

Numerous national media stories over the last decade have profiled the abuse of migrant domestic workers by foreign

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75. 22 U.S.C. § 7102(8)(B) (2006). Since its enactment in 2000, the TVPA has been amended and supplemented by several additional trafficking-related laws. *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (codified as amended in scattered sections of 8, 18, & 22 U.S.C.) [hereinafter 2003 TVPRA]; Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006) (codified as amended in scattered sections of 18, 22, & 42 U.S.C.) [hereinafter 2005 TVPRA]; Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified as amended in scattered sections of 6, 8, 18, 22, & 42 U.S.C.A (2009)) [hereinafter 2008 TVPRA].

76. Debt bondage involves being held to a debt for which one’s services are not adequately valued in the repayment. For the definition of “debt bondage” under international treaty law, see *supra* note 27.

77. 22 U.S.C. § 7105(b)(1)(E)(i)(I) (2006) (requiring as a prerequisite for assistance eligibility that the victim be “willing to assist in every reasonable way in the investigation and prosecution” or that the person be “unable to cooperate with such a request due to physical or psychological trauma”); 18 U.S.C. § 1593 (2006) (providing for mandatory court-ordered restitution for victims of criminal defendants convicted of trafficking offenses). For many trafficked persons, the TVPA’s requirement of reasonable cooperation is too high a price to pay: the possibility of employer retaliation against the victim and/or her family members and the traumatizing trial process are often strong deterrents against cooperation. *See* Jennifer Nam, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1684–86 (2007); ANTI-SLAVERY INT’L, HUMAN TRAFFIC, HUMAN RIGHTS: REDEFINING VICTIM PROTECTION 123 (2002), [http://www.antislavery.org/includes/documents/cm\\_docs/2009/h/hum\\_traff\\_hum\\_rights\\_redef\\_vic\\_protec\\_final\\_full.pdf](http://www.antislavery.org/includes/documents/cm_docs/2009/h/hum_traff_hum_rights_redef_vic_protec_final_full.pdf).



diplomats,<sup>78</sup> garnering widespread public attention and outrage. Together with the vulnerability factors that all migrant domestic workers face, diplomats' immunity to civil and/or criminal proceedings and the political power they may wield in the workers' home countries create a perfect storm of conditions for exploitation with impunity. While the diplomat cases likely are a small percentage of all domestic worker abuse cases, these cases have had an important spillover effect, prompting broader organizing efforts around domestic worker abuse more generally—from wage and hour abuses at one end of the exploitation spectrum to trafficking and slavery on the other end.<sup>79</sup>

Representing one extreme of the abuse spectrum,<sup>80</sup> diplomatic trafficking cases provide a telling case study of the challenges to achieving accountability for migrant domestic worker abuse. Here, the perpetrators of the harm are government actors; their direct ties to the State carry the expectation of accountability given (most)

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78. See Larry Luxner, *Oppressed Nannies: State Department Orders Embassies to Clean Up Their Act*, WASH. DIPLOMAT, Feb. 2010, available at [http://www.washdiplomat.com/February%202010/a2\\_02\\_10.html](http://www.washdiplomat.com/February%202010/a2_02_10.html); *supra* note 1. The United States is not alone in experiencing this problem. Reports indicate that one-fifth of domestic worker trafficking cases in France involve diplomats, and the problem has become a priority issue with respect to Belgium's efforts to combat trafficking. Cf. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 78, 135 (2009) [hereinafter 2009 TIP REPORT] (noting exploitation of domestic workers by diplomats posted in Belgium and France); U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 69, 120 (2008) [hereinafter 2008 TIP REPORT] (same); U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 63, 101 (2007) [hereinafter 2007 TIP REPORT] (same). All three of these reports are available at <http://www.state.gov/g/tip/rls/tiprpt/index.htm>.

79. See, for example, the American Civil Liberties Union's ("ACLU") domestic worker campaign. American Civil Liberties Union, Domestic Workers, <http://www.aclu.org/human-rights-immigrants-rights-womens-rights/domestic-workers> (last visited May 4, 2010) (depicting the stories of several domestic workers who had been abused by diplomats in the United States).

80. In a 2007 compilation of case summaries, the ACLU identified fifty-nine such cases in the United States. *Id.* (follow "Domestic Workers Abused by Diplomats – Case Summaries" hyperlink). In a 2008 report, the U.S. Government Accountability Office ("GAO") identified forty-two cases of domestic worker abuse by foreign diplomats posted in the United States since 2000, noting that the actual number was likely higher. U.S. GOV'T ACCOUNTABILITY OFFICE, U.S. GOVERNMENT'S EFFORTS TO ADDRESS ALLEGED ABUSE OF HOUSEHOLD WORKERS BY FOREIGN DIPLOMATS WITH IMMUNITY COULD BE STRENGTHENED 11 (2008) [hereinafter GAO REPORT], available at <http://www.gao.gov/new.items/d08892.pdf>. The GAO notes that these cases are underreported due to workers' fear of contacting law enforcement, nongovernmental organizations' protection of victim confidentiality, limited information on some cases handled by the U.S. government, and federal agencies' challenges in identifying cases. *Id.*

States' ratification of the U.N. Trafficking Protocol.<sup>81</sup> The United States' self-positioning as a global leader in the fight against human trafficking<sup>82</sup> heightens expectations that the United States, in particular, will be vigilant in addressing trafficking within its own borders. In this sense, trafficking by diplomats is a problem that tests whether and to what extent States' rhetorical commitment to eradicating human trafficking translates into reality. Moreover, although immunity is a tremendous challenge unique to these diplomat cases, navigating immunity issues forces advocates and committed State actors to find creative avenues to prevent and address the problem of domestic worker abuse—solutions that may be more broadly applicable to abuses outside the diplomatic context.

#### A. *Exploitation of Domestic Workers by Diplomats*

Each year, the U.S. State Department issues approximately 3,500 special visas for domestic workers—A-3 visas for workers of diplomatic personnel and their families, and G-5 visas for workers of foreign officials for international organizations (such as the United Nations or World Bank).<sup>83</sup> Diplomats apply for visas for their workers,<sup>84</sup> which are issued for one to three years with possible two-year extensions.<sup>85</sup> The visas are tied to the diplomat-applicant, providing the domestic worker with lawful immigration status for the

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81. United Nations Treaty Collection, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en) (last visited May 4, 2010) (noting that 135 countries are party to the Protocol).

82. The U.S. State Department issues a yearly report ranking other countries' efforts to combat trafficking according to a set of U.S. standards, with those countries falling in the lowest tier being potentially subject to unilateral sanctions. For a discussion of the sanctions regime and its implications for international anti-trafficking law and policy, see Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437, 452–54 (2006). The 2010 U.S. State Department Trafficking in Persons ("TIP") Report will—for the first time—assess the United States' own efforts to combat trafficking. See Request for Information for the 2010 Trafficking in Persons Report, 75 Fed. Reg. 11,982, 11,982–85 (Mar. 12, 2010) ("For the 2010 TIP Report, the United States will voluntarily report on its compliance with the minimum standards.").

83. U.S. DEP'T OF STATE, 9 FOREIGN AFFAIRS MANUAL § 41.21 n.6 (2009), available at <http://www.state.gov/m/a/dir/regs/fam/09fam/c22752.htm> (describing classification requirements for A-3 and G-5 visas).

84. See U.S. Department of State, Employees of International Organizations and NATO, [http://travel.state.gov/visa/temp/types/types\\_2638.html#4](http://travel.state.gov/visa/temp/types/types_2638.html#4) (last visited May 4, 2010).

85. HUMAN RIGHTS WATCH, HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES 4 (2001) [hereinafter HIDDEN IN THE HOME].

duration of the worker's employment by the applicant.<sup>86</sup> Unlike other employment-based temporary visa programs in the United States, the employment requirements for A-3/G-5 migrant domestic workers are not set forth in U.S. law or regulations. Rather, such conditions are established as employment contract requirements in the State Department's Foreign Affairs Manual ("FAM") and are supplemented by recommended—but not mandatory—provisions set forth in State Department circular diplomatic notes.<sup>87</sup> Under this guidance, visa applications must include an employment contract that stipulates that the employer will abide by U.S. laws (including minimum wage laws), will provide information regarding payment schedules, work duties, and hours, and will not withhold the employee's passport, employment contract, or other personal property, or require the employee to remain on the premises after working hours without compensation.<sup>88</sup>

In practice, however, these contract requirements provide little protection from abuse. No government agency has responsibility for ensuring the contract requirements are fulfilled, and the FAM does not provide a right of action for domestic workers.<sup>89</sup> Rather, exploited workers must base their complaints on violations of other U.S. law provisions, such as the failure to pay minimum wage, breach of contract, trafficking, or for torts under state law.<sup>90</sup> Workers tend not to receive copies of their contracts from their employers, however, and U.S. consular offices have only very recently been required to keep contracts on file.<sup>91</sup> Exploited workers, in any event, often are reluctant to report their abuse for fear that their employers will use their political status and connections to harm the workers or their families back home.<sup>92</sup>

The biggest obstacle to accountability for diplomatic trafficking lies in the privileges and immunities the U.S. government affords to certain foreign diplomats and consular officials pursuant to international and U.S. law.<sup>93</sup> Depending on their rank, employers of

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86. *Id.*

87. U.S. DEP'T OF STATE, *supra* note 83, § 41.21 n.6.1.

88. *See id.* § 41.22 n.4.4.

89. *See generally id.* § 41 (describing the scope of the Foreign Affairs Manual and the State Department's oversight authority regarding employees of diplomats).

90. *Id.*; *see also* 2003 TVPRA, *supra* note 75, § 4(a)(4), 18 U.S.C. § 1595 (2006) (providing a civil remedy for trafficked persons).

91. HIDDEN IN THE HOME, *supra* note 85, at 24.

92. *Id.* at 32–33.

93. *See generally* Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23

A-3/G-5 visa holders may be entitled to some degree of immunity. An employer with full diplomatic immunity—e.g., an ambassador or other diplomatic officer—is generally immune (as are his or her recognized family members) from the civil and criminal jurisdiction of U.S. courts.<sup>94</sup> They cannot, for example, be arrested, detained, or prosecuted, and their residences cannot be searched without their consent.<sup>95</sup> Employers with partial or “official acts” immunity—such as those employed by international organizations—are immune from civil and criminal jurisdiction of U.S. courts only for conduct performed under their official duties or functions.<sup>96</sup>

Though the concept of immunity seems at odds with basic notions of justice, proponents justify the practice as necessary because diplomats could not fulfill their diplomatic functions without such privileges.<sup>97</sup> Subjecting diplomats to ordinary legal and political interference from the State or other individuals would place diplomats in the uncomfortable position of relying on the goodwill of the receiving State. The “reciprocal nature” of diplomatic immunity fosters compliance, as limits to immunity imposed by one State would likely be reciprocally imposed on that State’s diplomats abroad.<sup>98</sup>

There are narrow exceptions to diplomatic immunity, but their interpretation in U.S. case law offers limited recourse for abused domestic workers to sue their diplomat-employers. Despite advocates’ efforts to argue for an expanded interpretation, U.S. courts have narrowly interpreted the “commercial activities” exception to diplomatic immunity<sup>99</sup> as being limited to the pursuit of a

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U.S.T. 3227, 500 U.N.T.S. 95 [hereinafter VCDR]; Agreement between the United Nations and the United States of America Regarding the Headquarters of the United Nations, June 26, 1947, 61 Stat. 3416, 11 U.N.T.S. 11. At the domestic level, the International Organizations Immunities Act extends certain privileges, exemptions, and immunities to international organizations and their employees. 22 U.S.C. §§ 288–288I (2006).

94. For a breakdown of diplomatic and consular privileges and immunities, see Appendix III to the GAO REPORT, *supra* note 80, at 37–38.

95. *Id.* at 37.

96. *Id.* at 38.

97. See Leslie Shirin Farhangi, Note, *Insuring Against Abuse of Diplomatic Immunity*, 38 STAN. L. REV. 1517, 1520–22 (1986).

98. U.S. DEPT OF STATE, REPORT ON THE NEED AND FEASIBILITY OF A COMPENSATION PROGRAM FOR VICTIMS OF DIPLOMATIC CRIMES 4 (1990) [hereinafter DEPT OF STATE COMPENSATION FOR DIPLOMATIC CRIMES REPORT] (noting concerns that failure by the United States to respect diplomatic immunity could subject U.S. diplomats to “speculative charges before hostile foreign courts”).

99. VCDR, *supra* note 93, art. 31(1)(c). This exception holds that diplomatic immunity does not attach to “action[s] relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.” *Id.*

trade or business activity. As such, “‘it does not encompass contractual relationships for goods and services incidental to the daily life of the diplomat and his family in the receiving State,’ ”<sup>100</sup> such as dry cleaning or domestic help. While these courts acknowledge that this may appear to be unfair, the “‘apparent inequity to a private individual is outweighed by the great injury to the public that would arise’ ” from disrupting diplomatic relations between the host and sending States.<sup>101</sup>

Recent developments in diplomatic immunity case law, however, do provide a narrow exception to immunity for lawsuits brought against *former* diplomats accused of exploiting domestic workers. In *Baoanan v. Baja*,<sup>102</sup> a federal district court found that former diplomats have only “residual” immunity once they leave their diplomatic posts.<sup>103</sup> Under the Vienna Convention, residual immunity is limited to “acts performed by [the diplomat] in the exercise of his functions as a member of the mission,”<sup>104</sup> often referred to as “official acts” immunity.<sup>105</sup> The *Baja* court denied the diplomat–employer’s motion to dismiss, finding that because the plaintiff’s employment pertained predominantly to the private needs of the Baja family and their domestic affairs, the employment fell outside the scope of the defendant’s residual immunity.<sup>106</sup> While potential claimants face the challenges of effecting service abroad and possible tolling of the statutes of limitations, for some, the opportunity to sue one’s abusive diplomat–employer may nonetheless be worth pursuing.

### *B. Current Efforts to Address Diplomatic Impunity for Trafficking*

Combined with employers’ diplomatic and consular immunity, the failure to codify the FAM requirements as mandatory obligations and to provide a meaningful enforcement mechanism open the door for employers of A-3/G-5 domestic workers to exploit these workers with impunity. Although such exploitation has been a known phenomenon since at least 2001,<sup>107</sup> the problem received concerted attention from policy makers beginning only in 2007. Allegations of

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100. *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187, 193 (D.D.C. 2007) (quoting *Tabion v. Mufti*, 73 F.3d 535, 538 (4th Cir. 1996)).

101. *Id.* at 195 (quoting *Tabion v. Mufti*, 73 F.3d 535, 539 (4th Cir. 1996)).

102. 627 F. Supp. 2d 155 (S.D.N.Y. 2009).

103. *Id.* at 161.

104. VCDR, *supra* note 93, art. 39(2).

105. *See, e.g.*, GAO REPORT, *supra* note 80, at 11 (describing residual immunity as “official acts” immunity).

106. *Baoanan*, 627 F. Supp. 2d at 161–64.

107. *See, e.g.*, HIDDEN IN THE HOME, *supra* note 85, at 1–2.

increasing incidents of abuse by foreign diplomats prompted the Senate Committee on the Judiciary to request the U.S. Government Accountability Office (“GAO”) to assess the U.S. government’s response to the phenomenon.<sup>108</sup> In its report, the GAO revealed that none of the diplomats in the forty-two cases of diplomatic abuse identified by the GAO since 2000 had yet to be held accountable.<sup>109</sup>

In an attempt to address this problem, the 2008 Trafficking Victims Protection Reauthorization Act (“2008 TVPRA”) provides enhanced protections for trafficked A-3/G-5 domestic workers.<sup>110</sup> Focused on preventing abuses, the 2008 TVPRA mandates that the State Department develop and oversee the distribution of a pamphlet to workers detailing their rights and available resources in the event of exploitation.<sup>111</sup> The 2008 TVPRA also places conditions on visa issuance that enable consular officers to better gauge the possibility of future abuse,<sup>112</sup> and it requires the State Department to record A-3/G-5 workers’ entries into and departures from the United States and any allegations of abuse.<sup>113</sup> The 2008 TVPRA also authorizes the State Department to suspend visa issuance to applicants seeking to work for officials of a mission or international organization where there is credible evidence that one or more employees of the mission or organization have abused an A-3 or G-5 worker and that the abuse was tolerated by that mission or international organization.<sup>114</sup>

To facilitate legal redress for exploited workers, the 2008 TVPRA permits workers to remain legally in the United States for

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108. See Letter from Richard J. Durbin & Tom Coburn, U.S. Senators, Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary, to the Honorable David M. Walker, Comptroller Gen. of the U.S. (May 17, 2007) (on file with the North Carolina Law Review); see also *International Trafficking in Persons: Taking Action to Eliminate Modern Day Slavery Before the H. Comm. on Foreign Affairs*, 110th Cong. 11–60 (2007) (statements by trafficking victims and by proponents of restricting diplomatic immunity); *Legal Options to Stop Human Trafficking: Hearing Before the Subcomm. on Human Rights of the S. Comm. on the Judiciary*, 110th Cong. 75–84 (2007) (statement of Martina Vandenberg, Partner, Jenner & Block LLP) (testifying as to shortcomings in U.S. efforts to implement trafficking-related human rights protections); CAROLINE FREDERICKSON & VANIA LEVEILLE, ERADICATING SLAVERY: PREVENTING THE ABUSE, EXPLOITATION AND TRAFFICKING OF DOMESTIC WORKERS BY FOREIGN DIPLOMATS AND ENSURING DIPLOMATIC ACCOUNTABILITY 1–8 (2007), [http://www.aclu.org/images/asset\\_upload\\_file359\\_32786.pdf](http://www.aclu.org/images/asset_upload_file359_32786.pdf) (memorializing a statement to be read before the House Foreign Affairs Committee).

109. GAO REPORT, *supra* note 80, at 12–13.

110. 2008 TVPRA, *supra* note 75, §§ 202–203, 8 U.S.C.A. §§ 1375b–c (2009).

111. *Id.* § 202, 8 U.S.C.A. § 1375b.

112. *Id.* § 203(b)(1), 8 U.S.C.A. § 1375c(b)(1).

113. *Id.* § 203(b)(4), 8 U.S.C.A. § 1375c(b)(4).

114. *Id.* § 203(a)(2), 8 U.S.C.A. § 1375c(a)(2).

the time necessary to pursue legal proceedings against their employers.<sup>115</sup> Moreover, to encourage more proactive measures with respect to possible remedies for exploited A-3/G-5 workers, the 2008 TVPRA requires the State Department to consider the feasibility of establishing a system to monitor the treatment of A-3/G-5 workers, to adjudicate abuses, and to provide compensation to exploited workers.<sup>116</sup>

The U.S. government's efforts to implement the 2008 TVPRA provisions thus far have focused entirely on prevention measures, however. In addition to producing the educational pamphlet for workers (with extensive input from NGOs and anti-trafficking advocates),<sup>117</sup> the State Department has instituted a pre-notification requirement that diplomatic missions are to inform the State Department in advance of any anticipated A-3 or G-5 applications.<sup>118</sup> The pre-notification requirement enables the State Department to maintain accurate records of domestic workers currently employed by diplomatic personnel in the United States. It also puts the heads of missions and embassies on notice that they are generally accountable for the treatment of domestic workers employed by their mission members and that they cannot disclaim—as they have in the past—knowledge of the existence of the worker alleging abuse.<sup>119</sup> To ensure that employers have the means to pay the legally required wages, the State Department has also instituted a presumption of visa

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115. *Id.* § 203(c)(1), 8 U.S.C.A. § 1375c(c)(1).

116. *Id.* § 203(d)(2), 8 U.S.C.A. § 1375c(d)(2). The 2008 TVPRA itself proposed several compensation schemes, including a bond program, a general compensation fund, and an insurance scheme. *Id.*

117. *See supra* note 111 and accompanying text.

118. On May 21, 2009, the U.S. State Department hosted a public meeting for input regarding the information pamphlet “Legal Rights and Resources: Applying for Employment or Education-Based Nonimmigrant Visas” (A-3, G-5, H, J, and B-1). *See* Memorandum from May State Department Meeting on Domestic Worker Exploitation (May 21, 2009) (on file with the North Carolina Law Review). All U.S. consular posts have been instructed to post the pamphlet on their Web sites, and the U.S. State Department is in the process of translating the pamphlet into different languages. Interview with unnamed official, U.S. State Dep’t Office of Protocol, in Wash., D.C., (Mar. 30, 2010) [hereinafter State Dep’t Office of Protocol Interview].

119. U.S. DEP’T OF STATE, REPORT TO CONGRESS REGARDING THE “WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2008” 2–3 (2009) (on file with the North Carolina Law Review) [hereinafter U.S. DEP’T OF STATE REPORT TO CONGRESS]. A diplomatic note recently circulated to all Chiefs of Mission states that “[t]he Secretary of State wishes to advise that the Department of State accepts Pre-Notification Forms with the understanding that the Chief of Mission has reviewed and authorized any such proposed employment by a mission member of a domestic worker.” Diplomatic Note from Department of State to the Chiefs of Mission (Sept. 16, 2009) (on file with the North Carolina Law Review).

ineligibility unless the potential employer carries the diplomatic rank (or equivalent) of Minister or higher.<sup>120</sup> Moreover, Chiefs of Mission are to ensure that employers make wage payments via check or electronic fund transfer to a bank account in the domestic worker's name only (cash payments are impermissible).<sup>121</sup>

The pre-notification requirement, diplomatic rank prerequisite, and bank account requirements are not statutorily mandated but rather innovations of the State Department. As this Essay goes to publication, the State Department has yet to implement the requirement of visa issuance suspension (e.g., for missions or organizations that have tolerated past A-3/G-5 worker abuse)—arguably the most stringent of measures *mandated* by the 2008 TVPRA and championed by rights advocates.<sup>122</sup>

### C. Critique

The actions recently taken by the State Department are a welcome and long overdue effort to acknowledge and begin to address domestic worker trafficking by diplomats. But they are lacking in several key respects. These initiatives aim to prevent *future* trafficking of A-3/G-5 visa-holders but do little to ensure safety and provide relief for those *already* trafficked into the United States.<sup>123</sup> As discussed below, the State Department has been reluctant to consider—much less adopt—the possible compensation schemes proposed in the 2008 TVPRA, pegging its hopes on the specious notion that its prevention efforts will obviate the need for remedies. The prevention measures it has pursued thus far, however, reflect a fundamental failure to understand the power dynamics at play in a trafficking situation and the nature of the exploitation trafficked domestic workers face, thereby undermining their potential for success. As such, these prevention measures are too weak to serve as the centerpiece of the U.S. government's response to the problem of diplomatic trafficking—particularly in the absence of meaningful remedies for victims. In addition to its failure to provide remedies, the State Department inexplicably has refused to utilize even the

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120. U.S. DEP'T OF STATE REPORT TO CONGRESS, *supra* note 119, at 3.

121. Diplomatic Note from Department of State to the Chiefs of Mission, *supra* note 119.

122. See, e.g., *Mazengo v. Mzengi*, 542 F. Supp. 2d 96, 97–98 (D.D.C. 2008). Lawyers for the plaintiff are undertaking “a very fierce advocacy campaign” to have Tanzania suspended from the A-3/G-5 visa issuance program. Luxner, *supra* note 78. For a discussion of the *Mazengo* case, see *infra* notes 150–52 and accompanying text.

123. See *infra* Part II.C.2.



powers it already possesses to hold diplomats accountable for trafficking abuses.

### 1. False Assumptions Underpinning Prevention Efforts

The ability-to-pay presumption underlying the diplomatic rank requirement for visa eligibility plays on the central myth that trafficking is connected to an abusive employer's *inability* to pay. As reflected in media coverage of these cases, however, domestic worker trafficking cases tend to involve employers with ample ability to pay at least the prevailing minimum wage.<sup>124</sup> For example, in *United States v. Calimlim*,<sup>125</sup> the trafficker-employers, both physicians, were millionaires who paid their domestic worker \$1,000 per year for nineteen years of working fifteen-hour days, seven days per week, as nanny to the defendants' three children and sole housekeeper for their 8,600 square foot home. As the Seventh Circuit noted in its decision, the victim's paltry earnings "were nothing but a book entry in the Calimlins' accounts."<sup>126</sup> As discussed above in Part I.B, trafficking is more appropriately attributed to baser motivations embedded in race, class, and gender discrimination against these workers than to a lack of financial resources to pay a worker a decent wage.<sup>127</sup> In a similar vein, the requirement that payment be made to a bank account in the domestic worker's name does nothing to prevent employers from forcing workers to simply refund the wages—for example, under the guise of "reimbursements" for costs purportedly incurred by the worker.<sup>128</sup>

The State Department policies also reveal a failure to appreciate the constraints trafficker-employers place on domestic workers' movement and interactions with the outside world. In its 2008 TVPRA-mandated report, the State Department noted that it was reviewing the feasibility of providing orientation briefings for A-3/G-5 visa holders to advise them of their rights and remedies in the event of exploitation.<sup>129</sup> Recently, the State Department announced that it was considering, in the alternative, producing a video for distribution to the visa applicants and their employers, noting that the workers

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124. See HIDDEN IN THE HOME, *supra* note 85, at 7–11.

125. 538 F.3d 706 (7th Cir. 2008).

126. See *id.* at 708–09.

127. See *supra* Part I.B.

128. See, e.g., *Calimlim*, 538 F.3d at 709 ("[The Calimlins' worker] was allowed to shop for personal items, but she had to leave the cart in the store (so that Elnora Calimlim could pay) and go wait in the car; she would later 'reimburse' the Calimlins for the cost through withheld 'wages.'").

129. U.S. DEP'T OF STATE REPORT TO CONGRESS, *supra* note 119, at 3.

could watch the video at their own home, at a neighbor's home, or at the local library.<sup>130</sup> But whether such a video would be effective in a typical trafficking case is highly questionable, given constraints on a worker's movement and employers' self-interest in preventing their employees from understanding their rights and remedies.<sup>131</sup>

## 2. No Accounting for Accountability

While the State Department efforts to prevent future diplomatic abuse of domestic workers have serious shortcomings, efforts to provide meaningful remedies to abused workers already working in the United States are lacking in every respect. Because all of these initiatives are triggered by A-3/G-5 applications and renewals, the State Department measures do nothing to address the situation of *current* domestic workers who may not yet be eligible for visa renewal. The State Department intends to survey the embassies and missions to account for the number of A-3/G-5 visa-holders residing in the United States<sup>132</sup>—a welcome initiative considering the lack of basic record-keeping by the State Department in this respect. But as of yet, the State Department has no plans to conduct concerted outreach to this population to inform them of their rights, much less to assess whether they have been trafficked.

Indeed, the State Department appears reluctant even to *consider* possible avenues for providing remedies to trafficked domestic workers, despite the 2008 TVPRA's explicit charge that the State Department research different approaches in this regard.<sup>133</sup> In

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130. State Dep't Office of Protocol Interview, *supra* note 118.

131. *See, e.g., Calimlim*, 538 F.3d at 709 (noting how the defendants hid the victim's existence from the outside world, keeping her away from houseguests and restricting and monitoring her movements outside the home).

132. State Dep't Office of Protocol Interview, *supra* note 118.

133. The State Department's blanket refusal to provide remedies in cases of trafficking has deep roots. During the 2007 negotiations over an earlier version of the 2008 TVPRA, the State Department strongly opposed provisions that restricted A-3/G-5 visa issuance, arguing that the provisions would "infringe upon the Secretary's authority and have the potential to adversely impact bilateral relations." Letter from Jeffrey T. Bergner, Assistant Sec'y, Legislative Affairs, U.S. Dep't of State, to the Honorable Tom Lantos, Chairman, Comm. on Foreign Affairs, House of Representatives (Nov. 14, 2007) (on file with the North Carolina Law Review). Advocates had hoped that a change in administrations, particularly given Secretary Clinton's past involvement in anti-trafficking issues as head of President Clinton's Interagency Council on Women, would bring greater U.S. pressure to bear on foreign diplomats engaged in the trafficking of domestic workers into the United States. Despite Secretary Clinton's avowed commitment to prevent trafficking both at home and abroad, the State Department has been slow to implement the policy changes required under the 2008 TVPRA. *See* Hillary Rodham Clinton, *Partnering Against Trafficking*, WASH. POST, June 17, 2009, at A21; Fitzpatrick, *supra* note 1.

response to the 2008 TVPRA's requirement that the State Department study and report on a range of compensation approaches to ensure payment to exploited workers,<sup>134</sup> the State Department maintains without explanation that it "is not in a position to adjudicate claims of rights violations, to determine levels of compensation, to run compensation programs, or to adjudicate civil claims or mediate allegations between diplomatic personnel and their employees."<sup>135</sup> It further states—again, without explanation—that it does not believe the compensation approaches mentioned in the 2008 TVPRA (a bond program, compensation fund, or insurance scheme<sup>136</sup>) "would be feasible at this time."<sup>137</sup> The State Department simply notes that it is "hopeful" that the preventive measures it has adopted "will obviate the need for a more elaborate compensation system."<sup>138</sup>

While the State Department's reluctance to consider compensation schemes might seem reasonable given the administrative burdens and the State Department's traditionally non-adjudicatory role, the substance and tone of its response stands in stark contrast to its past efforts to assess methods for compensating diplomatic crimes. In the early 1990s, for instance, the State Department issued a detailed report assessing a variety of possible schemes for compensating victims of diplomatic crimes, recognizing the outrage that diplomatic immunity provoked among the American public.<sup>139</sup> The report considers proposals to limit the scope of immunity, to establish mandatory insurance requirements for foreign missions, and to create a free-standing fund to compensate diplomatic crime victims.<sup>140</sup> The report ultimately recommends instead utilizing state mechanisms for victim compensation and relying on the State Department's powers to request waivers of immunity and *ex gratia* payments.<sup>141</sup> With respect to diplomatic trafficking, the State Department has not even mentioned, much less assessed, these approaches as possibilities. Moreover, it has not made any appreciable effort to examine the approaches that the State

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134. 2008 TVPRA, *supra* note 75, § 203(d)(2)(B)–(C), 8 U.S.C.A. § 1375c(d)(2)(B)–(C) (2009).

135. U.S. DEP'T OF STATE REPORT TO CONGRESS, *supra* note 119, at 4.

136. 2008 TVPRA, *supra* note 75, § 203(d)(2)(B), 8 U.S.C.A. § 1375c(d)(2)(B) (2009).

137. U.S. DEP'T OF STATE REPORT TO CONGRESS, *supra* note 119, at 4.

138. *Id.*

139. DEP'T OF STATE COMPENSATION FOR DIPLOMATIC CRIMES REPORT, *supra* note 98, at 3, 9–12.

140. *Id.* at 4–6.

141. *Id.* at 9–12; *see infra* notes 143–49 and accompanying text.

Department itself acknowledges are being taken by *other* countries (e.g., Belgium and France) to provide remedies for the victims of diplomatic trafficking.<sup>142</sup>

### 3. Failure to Use Power to Name, Shame, and Deter Wrongdoers

Even assuming that the proposed compensation schemes might ultimately be either inappropriate or too burdensome for the State Department to implement, there is little excuse for the State Department's continued failure to exercise its existing authority to identify and penalize the offending diplomats.

When confronted with a foreign diplomat's trafficking of a domestic worker into the United States, the State Department has the power to request that the diplomat's country waive immunity.<sup>143</sup> If the sending State declines, the State Department may declare the offending diplomat *persona non grata*, following which, if the diplomat fails to leave, the State Department may refuse to recognize the diplomat as a member of the sending State's mission.<sup>144</sup> The State Department can also request that the sending State prosecute the offending diplomat under the sending State's own laws or that the sending State provide an *ex gratia* payment to compensate for the victim's losses.<sup>145</sup> In the diplomatic trafficking context, however, the State Department has rarely—if ever—declared a diplomat-trafficker *persona non grata* or requested that the sending State waive immunity or provide an *ex gratia* payment to a victim.<sup>146</sup> This permissive approach is markedly different from the State Department's "vigorous pursuit" of waivers of immunity in other diplomatic crimes

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142. See generally 2009 TIP REPORT, *supra* note 78; 2008 TIP REPORT, *supra* note 78; 2007 TIP REPORT, *supra* note 78. For example, as the State Department noted in its 2007 TIP Report, diplomats can be tried for trafficking in Belgian labor courts. 2007 TIP REPORT, *supra* note 78, at 63.

143. See EILEEN DENZA, DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 273–88 (2d ed. 1998) (discussing article 32 of the Vienna Convention on Diplomatic Relations).

144. *Id.* at 59–71 (discussing article 9 of the Vienna Convention on Diplomatic Relations).

145. DEP'T OF STATE COMPENSATION FOR DIPLOMATIC CRIMES REPORT, *supra* note 98, at 2–3.

146. That the State Department has rarely resorted to exercising these powers is based on anecdotal evidence drawn from cases handled by NGOs and advocates in the Washington, D.C., area—e.g., the cases listed in the ACLU compilation, *supra* note 79. The author requested actual statistics from the U.S. State Department Office of Protocol, but—after being redirected to four other offices and, ultimately, back to the Office of Protocol—was unable to obtain this information.

contexts and the numerous (and successful) requests for *ex gratia* payments it has made in connection with automobile accidents.<sup>147</sup>

Nor has the State Department been willing to note such diplomatic wrongdoing in its annual TIP Reports, despite its clear mandate to do so under the TVPA.<sup>148</sup> This is puzzling, considering the State Department's past practice of noting even *alleged* involvement in trafficking cases by diplomats posted in *other* countries.<sup>149</sup> While it might be reasonable, for the sake of U.S. foreign relations, for the State Department to refrain from citing mere *allegations* of wrongdoing, where a case has been *adjudicated* by a U.S. court there seems little reason to refrain from referencing the case in the relevant country narrative. One example is the case of a migrant domestic worker who won a \$1 million default judgment in a lawsuit brought against her Tanzanian diplomat-employer for subjecting her to involuntary servitude and forced labor.<sup>150</sup> Her lawyers lobbied for the case to be mentioned in the 2008 TIP Report in order to pressure the Tanzanian government to assist in her thus far unsuccessful effort to collect on the judgment.<sup>151</sup> But while a reference to the case was purportedly included in a draft 2008 TIP Report, it was omitted from the final report.<sup>152</sup> Such inaction recently earned the State Department a rebuke from Congress, which, in a 2010 appropriations bill, explicitly prodded the State Department to take account of such judgments when considering whether to suspend visa issuance to certain embassies, to include references to all such cases in the annual TIP Report, and to assist in obtaining payment of the judgments.<sup>153</sup>

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147. DEP'T OF STATE COMPENSATION FOR DIPLOMATIC CRIMES REPORT, *supra* note 98, at 2 (noting that the United States has requested waiver "in every instance where there is probable cause to believe that a person entitled to immunity has committed a crime"); *id.* at 3, n.8 (noting that *ex gratia* payments have been received from a number of governments, including Panama, Swaziland, Mexico, and Nigeria, many of which were made in connection with automobile accidents).

148. TVPA, § 108(b) (codified as amended at 22 U.S.C. § 7106(b)(7) (2006)) (requiring the State Department to assess "[w]hether the government of the country vigorously investigates and prosecutes public officials who participate in or facilitate severe forms of trafficking in persons, and takes all appropriate measures against officials who condone such trafficking").

149. For example, the 2007 TIP Report narrative for Australia notes that a Bangladeshi domestic worker had filed a complaint against a United Arab Emirates diplomat posted in Australia. 2007 TIP REPORT, *supra* note 78, at 57. Moreover, the 2009 TIP Report narrative for France mentions how employers of trafficked domestic persons include diplomats from Saudi Arabia. 2009 TIP REPORT, *supra* note 78, at 135.

150. *Mazengo v. Mzengi*, 542 F. Supp. 2d 96, 97-98, 100 (D.D.C. 2008).

151. E-mail from Martina Vandenberg, *supra* note 35.

152. *See Fitzpatrick*, *supra* note 1.

153. Consolidated Appropriations Act of 2010, H.R. 3288, 111th Cong. § 7034(s) (2009).

## CONCLUSION

The diplomatic trafficking case study illustrates the failure of law to protect domestic workers from workplace harm and the failure of law to hold their exploiters accountable. In not providing protections and accountability avenues, the State Department has failed to address the underlying power dynamics that perpetuate these abuses despite public outrage and congressional action demanding that accountability be sought and achieved. In so doing, it reinforces the gender, racial, and ethnic otherness that facilitates the abuse of these workers. Considering the extraordinary powers the TVPA has bestowed upon the State Department to use its diplomatic clout to police *other* governments' efforts to eradicate trafficking, the State Department's relative inaction with respect to addressing diplomatic trafficking within its own borders seems hypocritical. But even more disturbingly, when compared to the State Department's avowedly vigorous efforts to address diplomatic crimes in other contexts, these omissions underscore the devaluing of migrant domestic workers as a victim category.

Government inaction in the face of rights abuses, however, has provoked advocates to think creatively about advocacy strategies and alternative avenues to accountability and compensation. The difficulty of overcoming immunity has directed much-needed attention to prevention strategies, targeting, for example, the vulnerabilities migrant domestic workers face during the recruitment and hiring phase. It has also forced the U.S. government to at least begin to acknowledge how its own lackluster administrative practices have fostered these vulnerabilities.

Moreover, advocates' victories, however few and far between, have been significant. Their success in challenging the bounds of residual immunity with respect to the diplomat abuse cases opens a rare path to compensation for diplomatic trafficking victims. And even when prosecution and civil suits cannot be pursued, victims' ability to obtain residency status through cooperation with law enforcement has signaled to other abused domestic workers that engaging with the authorities can be beneficial. Moreover, in some cases, advocates have succeeded in obtaining settlements notwithstanding the immunity obstacle—for example, where the perpetrators sought to avoid publicity regarding the alleged abuse.<sup>154</sup>

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154. Based upon the author's first-hand experiences and observations, diplomats frequently view a settlement with their victim as a small price to pay in exchange for the victim's silence.

Advocacy failures and successes have also had a consciousness-raising effect with respect to the problem of human trafficking. The publicity these diplomatic cases have generated has helped challenge prevailing misconceptions that trafficking takes place only for forced prostitution. It has also put a human face on the underreported and underaddressed phenomenon of trafficking into non-sex sectors of the economy.<sup>155</sup> By shedding light on how the intersection of race, class, gender, and immigration status can perpetuate migrants' vulnerabilities to abuse, the diplomatic trafficking cases have perhaps helped sensitize the broader public to migrant exploitation in the United States more generally. The *Lubis* case, for instance, tells us that even after escaping from an exploitative diplomat-employer, one can nonetheless be vulnerable as a low-wage immigrant worker to further abuse and trafficking. In this sense, these cases can and have helped foster commitment to a broader advocacy agenda that seeks to eliminate the variety and extent of migrant domestic worker abuses.

It is important to acknowledge progress made—however incremental. But, as this Essay has attempted to demonstrate, far more commitment from States—particularly the United States—and sustained and innovative advocacy efforts will be required if we are to succeed in preventing and redressing migrant domestic worker abuse.

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155. For in-depth discussion of this phenomenon, see Chuang, *supra* note 73.