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Statutes of Liberty?

SEEKING JUSTICE UNDER UNITED STATES LAW WHEN DIPLOMATS TRAFFIC IN PERSONS

I. INTRODUCTION

A Bangladeshi woman signed her contract for a job in the United States (“U.S.”) as a domestic worker for a Bahraini diplomat with a thumbprint because she could not read or write.¹ Upon her arrival she became “a virtual prisoner in a high-rise apartment on Manhattan’s East Side,”² her monthly pay sent to her husband back in Bangladesh. Forbidden to leave the apartment alone, she escaped while her employers were away and only after a child in the building showed her how to operate an elevator.³

A woman from Bolivia was paid less than a dollar an hour when she came to the U.S. to work for a human rights attorney employed by the Organization of American States (“O.A.S.”).⁴ When a friend of the family she worked for raped her, her employer offered her no assistance and refused to take her for medical attention.⁵ She later testified to Congress about her experiences, saying, “I have suffered more abuse than I have been able to explain.”⁶

These are just a few of many similar stories taking place in the U.S.,⁷ often in cities like New York and Washington, D.C.

¹ Somini Sengupta, *An Immigrant’s Legal Enterprise; In Suing Employer, Maid Fights Diplomatic Immunity*, N.Y. TIMES, Jan. 12, 2000, at B1.

² *Id.*

³ *Id.*

⁴ Abid Aslam, *Plight of Domestic Workers Wins Congressional Ear*, INTERPRESS SERVICE (Feb. 16, 2000), <http://www.globalexchange.org/campaigns/wbimf/ips021600.html.pf>.

⁵ *Id.*

⁶ *Id.*

⁷ Another worker was promised \$2000 monthly but paid \$200 to \$300 monthly instead, which she never saw because it was sent directly to her husband in India. She worked 18 hours a day and “[b]y the end of her years with the family,” her employer “raped her on a regular basis.” Matt Kelley, *Some Embassy Workers Enslave Domestic Help, Enjoy Immunity*, THE NEWSTANDARD, Jun. 28, 2005, <http://newstandardnews.net/content/index.cfm/items/1985/printmode/true>.

that house international organizations, missions and embassies.⁸ While the conduct of exploitative employers like these is illegal in the U.S.,⁹ diplomats, United Nations (“U.N.”) officials, and representatives of other international organizations who victimize domestic workers are often immune from U.S. criminal or civil jurisdiction because of the internationally recognized doctrine of diplomatic immunity.¹⁰ These instances shock the conscience, particularly in light of the purposes of the organizations that these immunized officials work for.¹¹ Organizations like the U.N. and the O.A.S. aspire to safeguard human rights and eradicate practices resembling slavery.¹²

Thousands of domestic workers enter the U.S. legally every year on special visas secured by diplomats or officials of international organizations who have agreed to employ them.¹³ Although the U.S. government sanctions this system of importation of domestic servants, often employers induce workers to travel to the U.S. through fraud or coercion and then subject their servants upon arrival to working conditions “akin to slavery.”¹⁴ This type of trafficking is fueled by a

⁸ See Lora Jo Foo, *The Trafficking of Asian Women*, in ASIAN AMERICAN WOMEN: ISSUES, CONCERNS, AND RESPONSIVE HUMAN AND CIVIL RIGHTS ADVOCACY 47, 51 (Ford Foundation 2002); Colbert I. King, Editorial, *The Slaves in Our Midst*, WASH. POST, Dec. 23, 2006, at A21; Lena H. Sun, “Modern-Day Slavery” Prompts Rescue Efforts; Groups Target Abuse of Foreign Maids, Nannies, WASH. POST, May 3, 2004, at A1.

⁹ See 18 U.S.C. §§ 1589-1590 (2000).

¹⁰ See Foo, *supra* note 8.

¹¹ Margaret Murphy, *Modern Day Slavery: The Trafficking of Women to the United States*, 9 BUFF. WOMEN’S L.J. 11, 13-14 (2000).

¹² See U.N. Charter art. 1, para. 3; Inter-American Democratic Charter art. 3.

¹³ Aslam, *supra* note 4; Murphy, *supra* note 11, at 13.

¹⁴ Murphy, *supra* note 11, at 13; see Marilyn R. Walter, *Trafficking in Humans: Now and in Herman Melville’s Benito Cereno*, 12 WM. & MARY J. WOMEN & L. 135, 136 (2005) (“Conditions approximating slavery and the slave trade exist today in the trafficking in human beings.”); A. Yasmine Rassam, *International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach*, 23 PENN ST. INT’L L. REV. 809, 824 (2005) (describing the “fundamental characteristics of ownership—total dominion over one’s autonomy through the use of coercion for purposes of economic/sexual exploitation” used to identify “modern forms of slavery”); *Hidden in the Home: Abuse of Domestic Workers with Special Visas in the United States*, HUMAN RIGHTS WATCH, June 2001, at 20 [hereinafter *Hidden in the Home*] (“In the most egregious cases, a domestic worker’s abusive employment conditions may combine to create a situation of servitude.”); Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN’S L.J. 1, 5 (2004) (“[h]uman trafficking is also called ‘modern day slavery’”); U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, Sub-Comm. on the Promotion and Prot. of Human Rights, *Report of the Working Group on Contemporary Forms of Slavery on its Twenty-Eighth Session*, U.N.

dangerous combination of easily available visas for international domestic workers¹⁵ and immunity from criminal and civil liability for diplomats,¹⁶ U.N. officials,¹⁷ and representatives to certain other international organizations.¹⁸ While the groundbreaking Victims of Trafficking and Violence Protection Act of 2000¹⁹ forcefully outlawed involuntary servitude and other crimes of human trafficking to the U.S., prosecutions of the new trafficking crimes are often barred by diplomatic immunity.²⁰ The Trafficking Victims Protection Reauthorization Act of 2003²¹ created civil remedies for victims of trafficking which are similarly barred in most cases where a

Doc. E/CN.4/Sub.2/2003/31 (June 27, 2003) (“forced labour is a contemporary form of slavery”).

¹⁵ A-3 visas, under the Immigration and Nationality Act (“I.N.A.”) § 101(a)(15)(A)(iii) (codified in title 8 of the U.S.C.), are issued to live-in workers for ambassadors, diplomats, and consuls. G-5 visas, under I.N.A. § 101(a)(15)(G)(v), are issued to live-in workers for employees of international organizations or of foreign missions to international organizations. See *Hidden in the Home*, *supra* note 14, at 4 (explaining the types of special visas and their limitations).

¹⁶ “Under international law, *diplomatic agents are immune from the criminal jurisdiction of the receiving state. Diplomatic agents are also immune, with limited exception, from the civil and administrative jurisdiction of the state. The immunities of diplomatic agents extend to the members of their family forming part of their household.*” 7 FAM 1116.2-2 (Nov. 30, 1995) (emphasis in original).

¹⁷ “Under the UN Headquarters Agreement, certain individuals are entitled to the same privileges and immunities accorded to diplomatic envoys.” 7 FAM 1116.2-3 (Nov. 30, 1995) (emphasis in original).

¹⁸ Some representatives and officials of “*organizations including, but not limited to, the Organization of American States, the International Monetary Fund, and the World Bank*” are also immune, but “[t]he number of such Resident Representatives and Officials entitled to diplomatic immunity is small.” 7 FAM 1116.2-4 (Nov. 30, 1995) (emphasis in original).

¹⁹ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (Oct. 28, 2000).

²⁰ See Nidhi Kumar, Note, *Reinforcing Thirteenth and Fourteenth Amendment Principles in the Twenty-First Century: How to Punish Today’s Masters and Compensate Their Immigrant Slaves*, 58 RUTGERS L. REV. 303, 306 (2005) (“the exemption of foreign officials from criminal suit is a severe obstacle in redressing the grievances of immigrant workers in the United States”); Chisun Lee, *Runaway Justice: Botswanan Domestic Sues UN Diplomat for “Involuntary Servitude”*, VILLAGE VOICE, July 25-31, 2001 (describing immunity obstacles to a civil suit alleging involuntary servitude brought by a domestic worker on a G-5 visa against the deputy permanent representative for Botswana’s mission to the U.N.); see also *infra* Part IV.B.

²¹ Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (Dec. 19, 2003). Additionally, the recently passed Trafficking Victims Protection Reauthorization Act of 2005, H.R. 972, 109th Cong. (2005), provides appropriations for anti-trafficking efforts in the fiscal years of 2006 and 2007 and was signed by President Bush on January 10, 2006. Press Release, Office of the Press Secretary, President Signs H.R. 972, Trafficking Victims Protection Reauthorization Act (Jan. 10, 2006), available at <http://www.whitehouse.gov/news/releases/2006/01/20060110-3.html>.

trafficker asserts diplomatic immunity.²² Immunity too often shields diplomats and officials of international organizations residing in the U.S. who illegally traffic in domestic servants.²³ These violations are particularly egregious in light of the role many of these perpetrators play within organizations philosophically dedicated to combating human rights violations.

This Note details the causes and effects of this problem and demands that immunized foreign officials who traffic domestic workers face consequences. Part II briefly outlines the definition of human trafficking and then focuses on trafficking to the U.S. for purposes of domestic servitude, the type of trafficking most frequently committed by diplomats and employees of international organizations. Part III covers the history of U.S. and international law applicable to human trafficking and describes the passage of federal anti-trafficking legislation in 2000 and 2003, as well as the impact and utility of the new laws. It focuses on those provisions of the anti-trafficking legislation that are particularly relevant to diplomatic trafficking, and discusses Congress's intent. Part IV explains the special visas diplomats and foreign officials may use to bring domestic workers to the U.S. and outlines the levels of immunity that they may invoke, a combination which facilitates this type of trafficking. It explores the prevalence of trafficking for the purposes of domestic servitude by diplomats and other immunized officials and cites examples of cases dismissed on grounds of diplomatic immunity. Part V evaluates several solutions geared to each aspect of this legal problem and argues that in grave cases where diplomats essentially enslave their victims, the *jus cogens* principle of international law allows U.S. jurisdiction over such traffickers in spite of their diplomatic immunity.

²² See *infra* Part IV.B.

²³ See HumanTrafficking.com, Human Trafficking 101: Who Are the Traffickers?, http://www.humantrafficking.com/humantrafficking/trafficking_ht3/who_traffickers.htm (last visited Apr. 4, 2007) (noting that “[d]iplomatic immunity also has been an obstacle to bringing justice” in the cases of victims of domestic servitude trafficked to the U.S. by diplomats or employees of international organizations).

II. HUMAN TRAFFICKING TO THE U.S. FOR PURPOSES OF DOMESTIC SERVITUDE

A. *Defining Human Trafficking*

Trafficking in persons is “the modern day form of slavery.”²⁴ In addition to transporting individuals across borders, traffickers commonly make fraudulent promises to victims and then subject them to working conditions to which they never agreed and never would have consented.²⁵ While some trafficking cases involve kidnapping or forcible abduction, most trafficking victims arrive willingly but lack knowledge of the terms and conditions they will face.²⁶ They may be promised wages that are never paid and forced to labor without sufficient sleep or food.²⁷ Among an estimated 50,000 victims trafficked into the U.S. each year,²⁸ about half are trafficked for sexual exploitation and about half for labor exploitation, which includes sweatshops, agriculture and domestic service.²⁹

The perpetrators of trafficking include transnational organized crime rings, smaller, family-run operations,³⁰ and diplomats.³¹ The desire for cheap or free labor typically

²⁴ Stephanie Richard, Note, *State Legislation and Human Trafficking: Helpful or Harmful?*, 38 U. MICH. J.L. REFORM 447, 447 (2005); see *supra* note 14 and accompanying text.

²⁵ *Developments in the Law—Jobs and Borders: II. The Trafficking Victims Protection Act*, 118 HARV. L. REV. 2180, 2184-85 (2005) [hereinafter *Developments in the Law*]. “Though the definition of trafficking varies, all definitions include the movement of human beings across national or international borders using coercion or deception for the purpose of exploiting their labor.” Walter, *supra* note 14, at 136-37.

²⁶ FRANCIS T. MIKO, CONG. RES. SERV. REP. RL30545, *TRAFFICKING IN PERSONS: THE U.S. AND INTERNATIONAL RESPONSE* 8 (2006); see *Developments in the Law*, *supra* note 25, at 2184-85.

²⁷ Aiko Joshi, *The Face of Human Trafficking*, 13 HASTINGS WOMEN’S L.J. 31, 47 (2002).

²⁸ Bo Cooper, *A New Approach to Protection and Law Enforcement Under the Victims of Trafficking and Violence Protection Act*, 51 EMORY L.J. 1041, 1045 (2002).

²⁹ Richard, *supra* note 24, at 450. “Given the factors that motivate and create opportunities for traffickers to take advantage of individuals, human trafficking into the United States will not decrease anytime soon.” *Id.*

³⁰ Kim & Hreshchshyn, *supra* note 14, at 6.

³¹ “Traffickers wear many different faces: members of organized criminal networks, freelancers, relatives, neighbors, friends, village chiefs, community leaders, shop owners, employees (e.g., fraudulent employment, modeling, travel and matchmaking agencies), *diplomats*, agricultural business operatives, and more.” International Rescue Committee, *Trafficking in the United States*, <http://www.theirc.org/index.cfm/wwwID/1886> (last visited Apr. 9, 2007) (emphasis added).

motivates all of these actors.³² The complex forces tied into today's trafficking epidemic are "personal, cultural, and economic."³³ A larger trend known as the feminization of migration³⁴ further facilitates trafficking.

While linked to the forces which drive economic migration, trafficking must be distinguished from ordinary migration and smuggling.³⁵ Trafficking differs from other movement across borders because an individual's decision to migrate includes the element of a trafficker's inducement by means of "deception . . . coercion, violence or threat of violence."³⁶ Statistics on trafficking tend to be underestimates because of the underground nature of the crime and fear of reporting by its victims.³⁷ Estimates of the annual number of victims trafficked into the U.S. range from 14,500 to 50,000 individuals.³⁸ However, since 2001 the U.S. government has located only 611 trafficking victims.³⁹

³² "The basic causes of trafficking are greed on one side and desperation on the other." Walter, *supra* note 14, at 139.

³³ *Developments in the Law*, *supra* note 25, at 2182-83.

³⁴ As Elena Tiuriukanova describes:

The feminization of migration (the increasing percentage of women in the migrant population), is recognized by experts as characteristic of a new stage in the development of international labor migration. In large part, this is related to structural changes in the world economy accompanying the globalization processes: relative reduction of the industrial sector in the postwar period and the growth of the service sector.

Elena Tiuriukanova, *Female Labor Migration Trends and Human Trafficking: Policy Recommendations*, in HUMAN TRAFFIC AND TRANSNATIONAL CRIME 95, 98 (Sally Stoecker & Louise Shelley, eds., 2005). "The difference in the standard of living and economic opportunities among different countries is the main moving force for such migration." *Id.* at 97. See Rassam, *supra* note 14, at 825-26 ("[F]or the first time in history, women comprise the largest sector of migrant labor both domestically and internationally.").

³⁵ Joshi, *supra* note 27, at 32.

³⁶ *Id.*

³⁷ There is also a general "lack of precision and methodological transparency in providing estimates of the number of trafficked victims in North America." Elzbieta M. Gozdziaik & Elizabeth A. Collett, *Research on Human Trafficking in North America: A Review of Literature*, in INTERNATIONAL ORGANIZATION FOR MIGRATION, DATA AND RESEARCH ON HUMAN TRAFFICKING: A GLOBAL SURVEY 116 (2005).

³⁸ The U.S. Department of Justice posits that traffickers import between 14,500 and 17,500 humans into the U.S. annually. U.S. DEP'T OF JUST., ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 4 (Sept. 2005) [hereinafter ASSESSMENT OF ACTIVITIES TO COMBAT TRAFFICKING]. See Free the Slaves, Washington, D.C., and the Human Rights Center of the University of California, Berkeley, *Hidden Slaves: Forced Labor in the United States*, 23 BERKELEY J. INT'L L. 47, 58 (2005) [hereinafter *Hidden Slaves*]. The U.S. Department of State puts the number at 17,500. Miko, *supra* note 26, at 7. Congress found in 2000 that "[a]pproximately 50,000 women and children are trafficked into the United States each

B. Domestic Servitude

This Note focuses on trafficking for purposes of domestic servitude,⁴⁰ the type of trafficking in which individuals who assert diplomatic immunity are most frequently implicated.⁴¹ Trafficking for the purpose of human servitude typically results in a dependent, economically abusive labor relationship between an employer and a worker with no means of escape.⁴² When an employer completely controls a worker's life through tactics such as passport confiscation,⁴³ abuse, and isolation,⁴⁴ domestic servitude becomes a modern day form of slavery.⁴⁵ “[M]odern day slavery, while not always overtly racist, often relies on ‘some form of categorical exploitation . . . of a particularly weak subgroup,’ including women, religious minorities, indigenous people and ethnic minorities or, as in the case of trafficking, persons from less developed countries.”⁴⁶ Domestic workers are particularly susceptible to trafficking and other forms of abuse in part because domestic jobs tend to be less visible, less formal, and subject to fewer legal

year.” Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(b)(1), 114 Stat. 1464, 1466 (Oct. 28, 2000).

³⁹ ASSESSMENT OF ACTIVITIES TO COMBAT TRAFFICKING, *supra* note 38, at 4.

⁴⁰ “Domestic workers whose labor conditions constitute servitude or forced labor are frequently trafficking victims.” *Hidden in the Home*, *supra* note 14, at 20.

⁴¹ Even after the Special Rapporteur on Migrant Workers reported to the UNCHR in 2004 cases of human rights abuses “involving women working for diplomatic staff or staff in international organizations . . . many migrant domestic workers employed by the United Nations’ own staff and the staff of country missions to the UN are still suffering exploitation and being denied their human rights.” U.N. Comm’n on Human Rights, *Written Statement Jointly Submitted by Global Rights and the ACLU, Non-governmental Organizations in Special Consultative Status*, Apr. 7, 2005, available at <http://www.aclu.org/FilesPDFs/written%20statement%20on%20migrant%20workers%20un.pdf> [hereinafter *Statement Submitted by Global Rights and the ACLU*].

⁴² *Hidden in the Home*, *supra* note 14, at 50.

⁴³ See Sun, *supra* note 8.

⁴⁴ Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and A Reconstructed Civil Rights Agenda*, 71 *FORDHAM L. REV.* 981, 994 (2002).

⁴⁵ See *id.* at 983 (analogizing trafficking victims to antebellum slaves because “[t]heir lives are subject to complete control by their ‘bosses’; their passports are taken upon arrival, they are physically isolated and abused and are otherwise denied the basic freedoms essential to their personhood.”).

⁴⁶ Rassam, *supra* note 14, at 824 (quoting James G. Wilson, *Why the International Criminal Court Should Have Jurisdiction Over Contemporary Forms of Slavery*, in *EFFECTIVE STRATEGIES FOR PROTECTING HUMAN RIGHTS* 177, 180 (2001)); see Comm’n on Human Rights, *Report of the Working Group on Contemporary Forms of Slavery on its Thirtieth Session*, U.N. Doc. E/CN.4/Sub.2/2005/34 (July 7, 2005) (focusing the attention of the Working Group in its 2006 session on issues including trafficking in persons, forced labor, and exploitation of domestic workers).

protections.⁴⁷ Often the arrangements for a domestic worker position are made through an acquaintance or by the worker's parents overseas.⁴⁸ Diplomats and officials of international organizations traffic domestic workers with relative ease because of their access to special visas.⁴⁹ The relative lack of interest in trafficking for labor servitude as opposed to trafficking for sexual exploitation⁵⁰ compounds the problem of eliminating the trafficking of domestic workers by keeping it under the global radar.

III. HUMAN TRAFFICKING AND U.S. LAW

A. *Early U.S. Law*

In 1865, the Thirteenth Amendment outlawed slavery in the U.S..⁵¹ Congress criminalized peonage and involuntary servitude in 1948.⁵² These laws, passed pursuant to the Thirteenth Amendment, were sometimes used to prosecute crimes known today as trafficking offenses.⁵³ But the U.S. Supreme Court subsequently narrowly interpreted the statute prohibiting involuntary servitude⁵⁴ by holding in *U.S. v. Kozminski* that “the term ‘involuntary servitude’ necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process.”⁵⁵ The *Kozminski* decision

⁴⁷ “Jobs in the service industry, where most women-migrants are employed, have particular features that make workers more vulnerable and less socially protected than workers in other sectors. . . . That is especially the case with so-called ‘domestic services.’” Tiuriukanova, *supra* note 34, at 99.

⁴⁸ See Aslam, *supra* note 4.

⁴⁹ Detailed *infra* in Part IV.A.

⁵⁰ Gozdziaik & Collett, *supra* note 37, at 117. Lack of research interest corresponds to the lack of prosecutorial interest in trafficking cases that do not involve sexual exploitation, as discussed *infra* in Part III.D & E.

⁵¹ U.S. CONST. amend. XIII.

⁵² 18 U.S.C. § 1581(a) (2000) outlaws peonage. Peonage is “the practice of holding someone captive to work off a debt.” *Hidden Slaves*, *supra* note 38, at 67. 18 U.S.C. § 1583 and 18 U.S.C. § 1584 outlaw involuntary servitude, which forces an individual “to work against his or her will.” *Id.* at 67 & n.64. See also Michael R. Candes, Comment, *The Victims of Trafficking and Violence Protection Act of 2000: Will it Become the Thirteenth Amendment of the Twenty-First Century?*, 32 U. MIAMI INTER-AM. L. REV. 571, 576 (2001) (referring to the criminalization of peonage and involuntary servitude).

⁵³ See Candes, *supra* note 52.

⁵⁴ 18 U.S.C. § 1584 (2000).

⁵⁵ *U.S. v. Kozminski*, 487 U.S. 931, 952 (1988); see also *U.S. v. Alzanki*, 54 F.3d 994, 1000-01 (1st Cir. 1995).

prevented use of the statute to prosecute individuals who held their victims in servitude through “psychological coercion or trickery.”⁵⁶ The increasing numbers of traffickers who employed more subtle tactics of “psychological and economic coercion,”⁵⁷ as opposed to physical force or threat of physical force, were not covered by U.S. criminal law. Thus, *Kozminski* contributed to a growing need for legislation that might adequately combat the continually increasing flow of human trafficking to the U.S.⁵⁸

B. *Applicable International Law*

From 1926 on, members of the international community ratified numerous instruments outlawing slavery and analogous practices,⁵⁹ such as the League of Nations Slavery Convention of 1926,⁶⁰ the U.N. Supplementary Convention on Slavery of 1956,⁶¹ and the International Labour Organization Forced Labour Convention No. 29.⁶² During the twentieth century the trend in exploitation of people shifted globally from chattel slavery⁶³ to trafficking in persons—an evolution from ownership and control to movement and commerce.⁶⁴ The first treaties to address trafficking by name were limited in scope to sex trafficking.⁶⁵ The 1949 U.N. Convention for the

⁵⁶ *Hidden Slaves*, *supra* note 38, at 67 & n.65.

⁵⁷ *Candes*, *supra* note 52, at 578.

⁵⁸ *See id.* at 586.

⁵⁹ *Hidden Slaves*, *supra* note 38, at 68.

⁶⁰ Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 60 L.N.T.S. 253.

⁶¹ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3.

⁶² Convention Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55.

⁶³ “First generation slavery was, of course, antebellum chattel slavery in the United States, with its immediately recognizable and monstrous images of the auctioneer’s block, shackle and whip.” *Azmy*, *supra* note 44, at 987.

⁶⁴ As *Baher Azmy* notes:

Global capitalism has organized countries into unequal participants and expanded broad structural, hierarchical links between poor, sending countries, and rich, receiving countries. Within this international system, a major instrument for moving humans has been organized criminal enterprises of various sizes and degrees of sophistication. The human trafficking industry has become, in fact, one of the world’s most lucrative and fastest growing criminal enterprises

Id. at 992 (footnote omitted).

⁶⁵ *Hidden Slaves*, *supra* note 38, at 69.

Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others⁶⁶ addressed only trafficking for the purposes of prostitution and was “widely criticized as ineffectual in combating trafficking.”⁶⁷

The focus of such early instruments reflects the persistent lack of attention to trafficking related to involuntary servitude as opposed to sex trafficking,⁶⁸ despite the fact that “trafficking for purposes of forced prostitution comprises only a small fraction” of worldwide trafficking of individuals into conditions analogous to slavery.⁶⁹ There has long been a dearth of recognition of the roles discrimination and lack of employment opportunities in many countries play in susceptibility to enslavement.⁷⁰ This inattention to the problem of labor trafficking contributed to the lack of consequences for diplomats and U.N. officials who traffic foreigners into the U.S. to become domestic servants.

Members of the international community now recognize that the massive growth of transnational trafficking rings can only be checked through global cooperation.⁷¹ In 2000, the U.N. adopted the International Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,⁷² incorporating a broadened definition of trafficking cognizant of modern realities.⁷³ The definition of trafficking in the Trafficking Protocol first mentions forced prostitution, but also specifically includes “forced labour or services, slavery or practices similar to slavery [and] servitude.”⁷⁴ The definition also provides that trafficking may be effected by means “of

⁶⁶ Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271.

⁶⁷ Rassam, *supra* note 14, at 831. *See also id.* at 830-31 (noting the Convention’s lack of a definition of “exploitation” and criticism of its obsolescence).

⁶⁸ Shelley Case Inglis, *Expanding International and National Protections Against Trafficking for Forced Labor Using a Human Rights Framework*, 7 BUFF. HUM. RTS. L. REV. 55, 70 (2001) (“human rights reporting on trafficking has focused on the sex work or sexual exploitation dimension of the practice”).

⁶⁹ Rassam, *supra* note 14, at 811.

⁷⁰ *Id.* at 844.

⁷¹ Walter, *supra* note 14, at 168 (“The impetus for the United Nations action was the enormous growth of transnational organized crime and the recognition that this problem could only be solved through close international cooperation.”).

⁷² Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001) [hereinafter Trafficking Protocol].

⁷³ *See Hidden Slaves*, *supra* note 38, at 69.

⁷⁴ Trafficking Protocol, *supra* note 72, art. 3(a).

coercion . . . of fraud, of deception, of the abuse of power or of a position of vulnerability . . . for the purpose of exploitation.”⁷⁵ Significantly, the Trafficking Protocol also requires states that ratify it to enact criminal sanctions against traffickers.⁷⁶ The Trafficking Protocol entered into force in 2003,⁷⁷ and the U.S. ratified it in November of 2005.⁷⁸ 111 countries are party to the Trafficking Protocol today.⁷⁹ It took the U.S. several years to consent to this international instrument, but in 2000 Congress had enacted a similarly expanded federal definition of trafficking.⁸⁰

C. *The Victims of Trafficking and Violence Protection Act of 2000*

With strong support across party lines,⁸¹ Congress passed the U.S.’s first and only anti-trafficking legislation,⁸² the Victims of Trafficking and Violence Protection Act (“VTVPA”) of 2000.⁸³ A “bold departure”⁸⁴ from prior U.S. law,⁸⁵ the VTVPA denounces trafficking in “unusually strong words”.⁸⁶ The new crime, “[t]rafficking with respect to peonage, slavery, involuntary servitude, or forced labor,” warrants a maximum sentence of life imprisonment.⁸⁷ The VTVPA defines “severe form of trafficking in persons” as:

(A) [S]ex trafficking in which a commercial sex act is induced by force, fraud or coercion, or in which the person induced to perform

⁷⁵ *Id.*

⁷⁶ *Id.* art. 5; see Rassam, *supra* note 14, at 841.

⁷⁷ United Nations Office on Drugs and Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, http://www.unodc.org/unodc/pt/crime_cicp_signatures_trafficking.html.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See discussion *infra* Part III.C.

⁸¹ LeRoy G. Potts, Jr., Note, *Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons*, 35 GEO. WASH. INT’L L. REV. 227, 242 (2003).

⁸² *Developments in the Law*, *supra* note 25, at 2188.

⁸³ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (Oct. 28, 2000).

⁸⁴ *Hidden Slaves*, *supra* note 38, at 69.

⁸⁵ A number of states have now also enacted or drafted anti-trafficking legislation. See generally Richard, *supra* note 24, for a discussion of the pros and cons of such legislation.

⁸⁶ “[The Act] refers to trafficking as an ‘evil’ and a ‘modern form of slavery,’ comparable to the institution outlawed in this country in 1865.” Cooper, *supra* note 28, at 1045.

⁸⁷ 18 U.S.C. § 1590 (2000).

such an act has not attained 18 years of age; or (B) *the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.*⁸⁸

The Act also created a new crime of “forced labor,” defined as labor or services provided or obtained:

(1) by threats of serious harm to, or physical restraint against, that person or another person; (2) by means of any scheme, plan or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or (3) by means of the abuse or threatened abuse of law or the legal process.⁸⁹

Congress intended the forced labor provision to apply to cases that do not rise to the level of involuntary servitude⁹⁰ and further clarified that “[i]nvoluntary servitude statutes are intended to reach cases in which persons are held in a condition of servitude through nonviolent coercion,”⁹¹ replacing the *Kozminski* interpretation.⁹² The new crime of forced labor⁹³

⁸⁸ Victims of Trafficking and Violence Protection Act §§ 103(8)(A)-(B) (emphasis added).

⁸⁹ 18 U.S.C. § 1589 (2000).

⁹⁰ As stated in the legislative record:

Section 1589 is intended to address the increasingly subtle methods of traffickers who place their victims in modern-day slavery, such as where traffickers threaten harm to third persons, restrain their victims without physical violence or injury, or threaten dire consequences by means other than overt violence. Section 1589 will provide federal prosecutors with the tools to combat severe forms of worker exploitation that do not rise to the level of involuntary servitude as defined in *Kozminski*. Because provisions within section 1589 only require a showing of a threat of “serious harm,” or of a scheme, plan, or pattern intended to cause a person to believe that such harm would occur, federal prosecutors will not have to demonstrate physical harm or threats of force against victims. The term “serious harm” as used in this Act refers to a broad array of harms, including both physical and nonphysical, and section 1589’s terms and provisions are intended to be construed with respect to the individual circumstances of victims that are relevant in determining whether a particular type or certain degree of harm or coercion is sufficient to maintain or obtain a victim’s labor or services, including the age and background of the victims.

H.R. REP. NO. 106-939, at 101 (2000) (Conf. Rep.).

⁹¹ Victims of Trafficking and Violence Protection Act § 102(b)(13); *See also* H.R. REP. NO. 106-939, at 100 (“the Senate amendment provides a definition of involuntary servitude in section 1584 to include a condition of servitude induced by means of any act, scheme, plan, or pattern intended to cause a person to believe that the person or another person would suffer serious harm or physical restraint or the abuse or threatened abuse of the legal process”).

⁹² *See* Victims of Trafficking and Violence Protection Act § 102(b)(13).

⁹³ 18 U.S.C. § 1589 (2000).

and new definition of involuntary servitude enhanced the framework of existing law effective only against sex trafficking and involuntary servitude effected by force or threat of physical force.⁹⁴ With these major advances, Congress intended that more prosecutions be brought against traffickers who lure their victims into domestic servitude, in part because it recognized the growth in that variety of trafficking to the U.S.⁹⁵

Despite the tendency of law enforcement personnel and the general public to equate human trafficking with media depictions of sex trafficking,⁹⁶ the VTVPA broadened the definition of trafficking and the scope of acts that warrant prosecution. It also expanded existing federal criminal law in a manner cognizant of the nonphysical coercion employed effectively by sophisticated traffickers.⁹⁷ Thus, the VTVPA criminalizes the most severe forms of exploitation of domestic workers, including the scenarios described in Part I. Recognizing that the VTVPA focused more on the prosecution of traffickers than on the protection of those trafficked, Congress enhanced protections for victims when it reauthorized the Act three years later.⁹⁸

D. *The Trafficking Victims Protection Reauthorization Act of 2003*

In 2003 Congress created civil remedies for trafficking victims as part of the Trafficking Victims Protection Reauthorization Act (“TVPRA”).⁹⁹ While the original VTVPA

⁹⁴ See *supra* Parts III.A, III.B.

⁹⁵ H.R. REP. NO. 106-939, at 101.

⁹⁶ See, e.g., HUMAN TRAFFICKING (Lifetime Television 2005) (portraying sex-trade trafficking to the U.S.).

⁹⁷ Cooper, *supra* note 28, at 1049-50. For example, Congress found that traffickers’ “representations to their victims that physical harm may occur to them or others should the victim escape or attempt to escape . . . can have the same coercive effects on victims as direct threats to inflict such harm.” Victims of Trafficking and Violence Protection Act § 102(b)(7). See also *Developments in the Law, supra* note 25, at 2197 (“[T]he benefit of the TVPA’s definition of coercion is that it simply gives more explicit assurance that traffickers who use more subversive recruitment methods can be punished.”).

⁹⁸ Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4, 117 Stat. 2875, 2877 (Dec. 19, 2003); 18 U.S.C. § 1595.

⁹⁹ Trafficking Victims Protection Reauthorization Act § 4(a)(4), 117 Stat. 2878; 18 U.S.C. § 1595 (providing for victims of violations of the new crimes outlined in the 2000 VTVPA the ability to “bring a civil action against the perpetrator in an appropriate district court of the United States” and to “recover damages and reasonable attorneys fees”). The TVPRA also loosened some of the requirements for obtaining T visas, the remedy created in the VTVPA to allow trafficking victims to stay in the U.S. legally if they are willing to assist in their traffickers’ prosecutions. See

provided for mandatory restitution to victims in criminal cases, “[s]ince prosecutors are mostly focused on incarceration, restitution is easily forgotten to the detriment of the victim.”¹⁰⁰ This civil cause of action also allows for the possibility of recovering punitive damages and the costs of litigation,¹⁰¹ exceeding what might be available through restitution. The civil setting allows victims to exercise control over their cases in ways they cannot during criminal prosecutions, and damage awards may both compensate the victims and deter their traffickers from acting similarly in the future.¹⁰² Damage awards obtained through this civil cause of action could be of particular benefit to victims of trafficking who, even after they are freed from a coercive situation, often lack money, a support network, language skills, and educational resources.¹⁰³ The TVPRA also allows trafficking victims to sue their traffickers in federal court even in the absence of an actual federal prosecution.¹⁰⁴ This may be particularly helpful to victims of trafficking for purposes of domestic servitude, which receives much less attention from prosecutors.¹⁰⁵

E. Implementation of the New Anti-Trafficking Legislation

Prosecution under the VTPVA has been limited¹⁰⁶ but continues to expand. From 2001 to 2003, a total of 32 total trafficking cases were filed, 21 of them using the VTPVA.¹⁰⁷

Trafficking Victims Protection Reauthorization Act §4(a)(3); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 107(e), 114 Stat. 1464, 1477 (Oct. 28, 2000).

¹⁰⁰ Kim & Hreshchyshyn, *supra* note 14, at 16 (“[A] restitution award depends largely on the aggressiveness of the prosecutor and the court to inform the criminal defendant that restitution may be an element of the sentence.”).

¹⁰¹ Richard, *supra* note 24, at 455.

¹⁰² Kim & Hreshchyshyn, *supra* note 14, at 16.

¹⁰³ See *Hidden Slaves*, *supra* note 38, at 85 (“A consequence of forced labor is that, when freed, survivors are usually left with little or no resources to rebuild their lives.”).

¹⁰⁴ *Id.* at 86.

¹⁰⁵ See Kim & Hreshchyshyn, *supra* note 14, at 35 (suggesting that governmental implementation of the VTPVA has suffered from a lack of understanding of the law’s new definition of involuntary servitude).

¹⁰⁶ “These crimes, though they are fairly widespread in the United States, are not prosecuted often, due in part to the lack of tools available to prosecutors.” Candes, *supra* note 52, at 575 (citation omitted). “Both the United Nations’ and American efforts represent a positive and essential step in attacking the problem of trafficking. Still, aggressive enforcement of the laws is not the norm internationally, and the impact of anti-trafficking regulation has yet to be widely felt.” Walter, *supra* note 14, at 168.

¹⁰⁷ *Developments in the Law*, *supra* note 25, at 2198. “Because the TVPA cannot be used to prosecute conduct that occurred prior to October 2000, its effective

Since 2001, federal authorities have indicted, convicted, or sentenced only 113 people on trafficking charges in the U.S.¹⁰⁸ While the percentage of trafficking cases prosecuted pales in comparison to the flow of trafficking,¹⁰⁹ there are signs that the number of prosecutions will continue to increase with each passing year.¹¹⁰ In 2004, federal prosecutors filed 29 total human trafficking cases against a total of 59 defendants.¹¹¹ But, strikingly, while prosecutors charged 32 of those 59 using provisions of the VTVPA, “all but one of [the] cases” targeted perpetrators of trafficking for sexual exploitation.¹¹² Even as prosecutors attempt to hone in on trafficking, they still give short shrift to trafficking for purposes of labor servitude.¹¹³

One common explanation for the overall lack of prosecutorial use of the VTVPA is that trafficking investigations take tremendous time and manpower as compared to other criminal investigations.¹¹⁴ Some predict that the trend towards providing state prosecutors with anti-trafficking legislation will increase total prosecutions, particularly since state police are often the individuals who discover trafficking operations.¹¹⁵ Especially if the problem stems from a lack of resources on the federal level, expanding states’ abilities to prosecute should yield greater results.¹¹⁶ But

date, some of the cases have been brought under preexisting statutes such as the Mann Act.” Beatrix Siman Zakhari, *Legal Cases Prosecuted under the Victims of Trafficking and Violence Protection Act of 2000*, in HUMAN TRAFFIC AND TRANSNATIONAL CRIME 125, 134 (Sally Stoecker & Louise Shelley eds., 2005) (footnote omitted).

¹⁰⁸ Richard, *supra* note 24, at 460.

¹⁰⁹ *Developments in the Law*, *supra* note 25, at 2199.

¹¹⁰ “Although few cases have yet resulted in convictions, the growth in the number of cases nevertheless represents a dramatic change in U.S. response to human trafficking.” Sally Stoecker & Louise Shelley, *Introduction*, in HUMAN TRAFFIC AND TRANSNATIONAL CRIME 1, 3 (Sally Stoecker & Louise Shelley eds., 2005).

¹¹¹ ASSESSMENT OF ACTIVITIES TO COMBAT TRAFFICKING, *supra* note 38, at 3.

¹¹² *Id.* at 15.

¹¹³ Some law enforcement officials explain that “[d]omestic servitude cases are difficult to prosecute . . . because the victims are scared to go to police and the crimes take place behind closed doors.” Sun, *supra* note 8.

¹¹⁴ “[H]uman trafficking cases are among the most labor- and time-intensive criminal investigations that the United States government undertakes.” Richard, *supra* note 24, at 469. “Prior to the TVPA, trafficking cases did not offer sufficient ‘payoffs’ relative to the amount of time and resources that were invested. This concern was particularly apt in trafficking cases, which necessitate enormous amounts of time and labor . . .” *Developments in the Law*, *supra* note 25, at 2200 (footnote omitted).

¹¹⁵ Richard, *supra* note 24, at 460 (“local law enforcement officers encounter the majority of human trafficking victims”).

¹¹⁶ *Id.* (“[G]iven the labor-intensive and resource-driven nature of human trafficking investigations, if more responsibility is spread to states for investigation

this leaves the problem of law enforcement focus on sex trafficking to the exclusion of labor servitude, which contributes to the lack of remedies for domestic workers trafficked by individuals with diplomatic immunity. Furthermore, when fully immunized diplomats and officials of the U.N. and other international organizations hold victims in domestic servitude, Congress's otherwise strong laws are useless both to prosecutors and to trafficking victims seeking civil remedies.¹¹⁷

IV. THE PROBLEM OF DIPLOMAT TRAFFICKERS

A. *Special Visas for Domestic Workers*

Diplomats and employees of international organizations traffic domestic workers into their U.S. homes with relative ease. With diplomatic or international official status comes eligibility to apply for special visas in order to bring domestic workers to the U.S.¹¹⁸ Under the Immigration and Nationality Act, the U.S. issues A-3 visas¹¹⁹ to live-in workers for ambassadors, diplomats, and consuls.¹²⁰ G-5 visas¹²¹ are furnished to live-in workers for employees of international organizations or of foreign missions to international organizations.¹²² Sometimes these dignitaries bring workers with them from their own countries¹²³ for the obvious reasons of culture and language. Employers may also obtain domestic help through international employment agencies,¹²⁴ resulting in

and prosecution of trafficking cases, it is more likely that significant numbers of traffickers can be stopped.”)

¹¹⁷ See, e.g., *Ahmed v. Hoque*, No. 01 Civ. 7224, 2002 WL 1964806, at *5-8 (S.D.N.Y. Aug. 23, 2002).

¹¹⁸ See I.N.A. § 101(a)(15)(A)(iii), (G)(v), 8 U.S.C. § 1101(a)(15)(A)(iii), (G)(v).

¹¹⁹ *Id.* § 101(a)(15)(A)(iii), 8 U.S.C. § 1101(a)(15)(A)(iii).

¹²⁰ See *Hidden in the Home*, *supra* note 14 (explaining the types of special visas and their limitations).

¹²¹ I.N.A. § 101(a)(15)(G)(v), 8 U.S.C. § 1101(a)(15)(G)(v).

¹²² See *Hidden in the Home*, *supra* note 14, at 4.

¹²³ “Some trafficking victims, in the United States, are domestic workers brought over from their country of origin by non-U.S. employees of the World Bank, the International Monetary Fund (I.M.F.), or foreign diplomats living in the United States.” *Joshi*, *supra* note 27, at 46 (footnote omitted). See *Azmy*, *supra* note 44, at 993.

¹²⁴ See *Hidden in the Home*, *supra* note 14, at 10 (telling the story of one employee of a Middle Eastern mission to the U.N. who “met an employment agent in Bangladesh who promised her a job in her employer’s country of origin, where she worked briefly as a domestic worker for her employer’s brother before agreeing to come to the United States to work for her employer” (footnote omitted)).

situations where a worker arrives in the U.S. by plane¹²⁵ without ever having met her employer, even though the worker's visa bears her employer's name. Because the visas are contingent on employment for the listed employer, workers who do escape exploitative situations lose their legal non-immigrant status in the U.S. and may be subject to deportation if discovered by immigration enforcement authorities.¹²⁶ Employers further exercise control by confiscating passports and other documents on arrival.¹²⁷

The State Department issues approximately 4,000 visas annually for domestic workers employed by diplomats, U.N., World Bank, International Monetary Fund ("I.M.F.") and O.A.S. officials.¹²⁸ Through the U.N. Headquarters in New York alone, "[t]here are nearly 800 migrant domestic workers with special visas."¹²⁹ The World Bank and the I.M.F.'s employees together had over 1000 G-5 visa workers in the U.S. in 2000.¹³⁰

Human Rights Watch reports that "[t]he special visa programs for domestic workers are conducive to and facilitate the violation of the workers' human rights."¹³¹ Because the procedure for obtaining a G-5 or A-3 visa requires evidence of a fair contract,¹³² employers often draft and sign fraudulent

¹²⁵ 9 FAM 41.21 N6.2(d) (Sept. 27, 2001) ("The employer must pay the domestic's initial travel expenses to the United States.")

¹²⁶ "[W]omen trafficked for domestic service may be provided legitimate visas to work in the destination country. For these women, their immigrant status in a foreign country may specifically depend on their employer . . ." Inglis, *supra* note 68, at 97 (footnote omitted). See *Hidden in the Home*, *supra* note 14, at 1 ("Ironically, their special visas exacerbate their vulnerability to abuse."). A G-5 visa "is only valid as long as the person works for the diplomatic family." Kelley, *supra* note 7.

¹²⁷ See Inglis, *supra* note 68, at 97:

Control over a woman's immigration status, including the ability to confiscate her immigration documents, and threats to modify that status can serve as a license for the dominant party to further exploit and abuse. Thus, trafficked women with legal status are still highly vulnerable to abuse, exploitation and fear of seeking assistance because of the temporary or dependent nature of their immigration status.

Id. (footnote omitted).

¹²⁸ Aslam, *supra* note 4.

¹²⁹ Sengupta, *supra* note 1.

¹³⁰ *Hidden in the Home*, *supra* note 14, at 36.

¹³¹ *Id.* at 2; see Kelley, *supra* note 7 ("Human rights experts are starting to point to the homes of diplomats as potentially dangerous workplaces for vulnerable foreign workers.")

¹³² The U.S. Dep't of State Foreign Affairs Manual provides:

Among other issues, a consular officer must be satisfied that the wage to be received by the A-3, G-5 or NATO-7 applicant is a fair wage. . . . To insure

contracts for that purpose alone.¹³³ Typically the worker never receives a copy of the contract, and cannot even read what she signs because she is not literate or the document is in an unfamiliar language.¹³⁴ Employers may select the workers they think will be most susceptible to forced labor, and remain free from worry about the consequences when they know they have diplomatic immunity.¹³⁵

In many cases, the domestic worker is told upon arrival at the U.S. home that if she leaves the home she will be arrested, deported, or even killed.¹³⁶ Workers who come from countries where the government and police are not to be trusted may not be surprised when told that they will be locked up if found on the street, or that they should never speak to

that the applicant will receive a fair wage, applications for such visas must include an employment contract signed by the employer and the employee. The contract must include the following elements: (1) A guarantee the employee will be compensated at the state or federal minimum or prevailing wage, whichever is greater (Please note that the consular officer must be satisfied that any money deducted for food or lodging is no more than reasonable); (2) A promise by the employee not to accept any other employment while working for the employer; (3) A promise by the employer not to withhold the passport of the employee; and (4) A statement indicating that both parties understand that the employee cannot be required to remain on the premises after working hours without compensation.

9 FAM 41.21 N6.2(a) (Sept. 27, 2001). *But see Hidden in the Home*, *supra* note 14, at 2 (noting that although the State Department requires submission of employment contracts for domestic workers that meet certain terms in order to issue visas, it neither enforces the contracts nor keeps them on file for later reference); 9 FAM 41.21 N6.2(c) (Sept. 27, 2001) (“the Department [of State] or individual consular officers are not in a position to enforce behavior of employers or employees when in the United States”).

¹³³ *Hidden in the Home*, *supra* note 14, at 24 (“Seven domestic workers explained to Human Rights Watch that their employers explicitly told them that their employment contracts were signed to satisfy U.S. consular offices’ requirements, were not binding, and were not intended to govern their employment relationships in the United States.”). Through a review of forty cases, Human Rights Watch estimated that the actual median hourly wage was \$2.14 or 42% of the minimum wage. *Id.* at 17.

¹³⁴ *See supra* note 1 and accompanying text. *See also* Press Release, ACLU, Diplomats Should Keep their Own Houses in Order, Advocates for Domestic Workers Say (Apr. 7, 2005), <http://www.aclu.org/news/NewsPrint.cfm?ID=17964&c=36> (“migrant domestic workers are extremely vulnerable to exploitation for a variety of reasons including unfamiliarity with their domestic and international rights, cultural and language barriers”); Kelley, *supra* note 7 (“the isolated nature of domestic labor leads to abuses easily committed and repeated outside of the public eye.”).

¹³⁵ “The problems [of migrant domestic workers being especially vulnerable to exploitation] are compounded when the employers can claim immunity from civil and criminal jurisdiction due to their status as diplomats.” Press Release, ACLU, *supra* note 134. *See Hidden in the Home*, *supra* note 14, at 19 (sharing the story of a former domestic employee of a European diplomat who told her “he was a diplomat and could do whatever he wanted with her because the U.S. justice system could not reach him”).

¹³⁶ Azmy, *supra* note 44, at 994-95.

anyone outside of the house.¹³⁷ The lack of monitoring by any U.S. agencies of the employment conditions of domestic workers who receive special visas makes abuses even less visible.¹³⁸ Even in the rare cases where abuses come to light, if employers invoke diplomatic immunity they escape consequences for their actions.

B. *Diplomatic Immunity*

Diplomatic immunity is governed by the Vienna Convention on Diplomatic Relations,¹³⁹ and has long been the customary practice of nations including the U.S.¹⁴⁰ U.S. law and international law recognize several levels of diplomatic immunity.¹⁴¹ Full immunity “from the criminal, civil, and administrative jurisdiction of the United States”¹⁴² extends to diplomatic agents,¹⁴³ diplomatic-level staff of missions to international organizations such as the U.N. and the O.A.S.,¹⁴⁴ and their families.¹⁴⁵ These individuals are immune from

¹³⁷ *Id.* at 994-95 nn.69-70.

¹³⁸ *Hidden in the Home*, *supra* note 14, at 2 (“Neither the State Department, the Immigration and Naturalization Service (INS), nor the Department of Labor (DOL) monitors employer treatment of migrant domestic workers with special visas.”).

¹³⁹ Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

¹⁴⁰ *See, e.g.*, *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (Phila. Ct. of Oyer & Terminer 1784) (incorporating the customary international law of diplomatic immunity into the municipal law of Pennsylvania); *see also* Jacques Hartmann, *The Gillon Affair*, 54 INT’L & COMP. L.Q. 745, 748 (2005) (noting that the Vienna Convention on Diplomatic Relations “expresses a codification of customary international law”).

¹⁴¹ *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, 993-94 (2003) (defining diplomatic immunity).

¹⁴² *Hidden in the Home*, *supra* note 14, at 34; *see* Vienna Convention on Diplomatic Relations art. 31, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

¹⁴³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 464 (1987) (“A diplomatic agent of a state, accredited to and accepted by another state, is immune . . . from arrest, detention, criminal process, and, in general, civil process in the receiving state.”).

¹⁴⁴ *Id.* § 470 (“Under applicable international agreements, permanent representatives of member states to the principal international organizations are generally entitled to the same privileges and immunities in the headquarters state as are accorded diplomatic agents of a state accredited to another state.”).

¹⁴⁵ Diplomatic and Consular Privileges and Immunities from Criminal Jurisdiction: Summary of Law Enforcement Aspects, <http://www.state.gov/documents/organization/20047.pdf> (last visited Apr. 3, 2007) [hereinafter Diplomatic and Consular Privileges].

arrest¹⁴⁶ and may simply invoke immunity rather than respond to any allegations in a civil complaint.¹⁴⁷

Consular officers¹⁴⁸ and most employees of organizations like the U.N. have only functional immunity, limited to acts taken in an official capacity.¹⁴⁹ The U.S. may subject them to criminal, civil, or administrative jurisdiction for acts taken outside the scope of their official duties. Members of the technical and administrative staff of diplomatic missions and their family members are fully immune from criminal jurisdiction, but do not enjoy diplomatic immunity from civil or administrative jurisdiction unless the acts in question are related to the performance of their job.¹⁵⁰ A trafficking victim can bring a civil suit under the TVPRA against such an employer with limited immunity, but the likelihood of actually recovering a judgment is slim since the defendant's assets may be in their home country, and international organizations including the U.N., O.A.S., I.M.F. and World Bank assert immunity from garnishment orders against their employees' salaries.¹⁵¹

In cases where a defendant asserts diplomatic or consular immunity, the State Department generally issues a certification to the court indicating the status of the defendant and the level of immunity to which he or she is entitled.¹⁵² The U.S. Department of State can request a waiver from a diplomat's home country in order to subject him or her to U.S. jurisdiction. Because diplomatic immunity is a right of the home state and not the individual, the sending country may waive it.¹⁵³ The Foreign Affairs Manual, which is not U.S. law or regulation but outlines internal State Department policy,¹⁵⁴

¹⁴⁶ *Id.*

¹⁴⁷ See *Hidden in the Home*, *supra* note 14, at 11.

¹⁴⁸ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 465 (1987) ("A consular officer of a state, commissioned to and accepted by another state, is immune . . . from arrest, detention, and criminal or civil process in respect of acts or omissions in the exercise of the officer's official functions."); Diplomatic and Consular Privileges, *supra* note 145.

¹⁴⁹ See Maginnis, *supra* note 141, at 1012-13.

¹⁵⁰ *Hidden in the Home*, *supra* note 14, at 35; see Vienna Convention on Diplomatic Relations art. 37, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

¹⁵¹ *Hidden in the Home*, *supra* note 14, at 35.

¹⁵² 2 FAM 234.1-1 (Feb. 28, 1991).

¹⁵³ Vienna Convention on Diplomatic Relations art. 32, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95; see Hartmann, *supra* note 140, at 753.

¹⁵⁴ See *Hidden in the Home*, *supra* note 14, at 23-24 (describing the authority of the FAM).

asserts that “Department of State general policy is to request a waiver of immunity from criminal jurisdiction in all criminal cases involving foreign personnel with such immunity,” with exceptions, where justified, for “overriding foreign relations, national security, or humanitarian concerns.”¹⁵⁵ If the sending country refuses to waive its diplomat’s immunity and allow the U.S. to prosecute “serious offenses,” the diplomat is not to be permitted to remain in the U.S.¹⁵⁶

In practice, the U.S. fails to request waivers of diplomatic immunity to enable trafficking prosecutions.¹⁵⁷ In 2000, the Department of State claimed that “no case charging the diplomat employer of a domestic worker with criminal conduct ha[d] come to its attention.”¹⁵⁸ Even if the Department of State follows its own policy and requests a waiver to enable prosecution, the sending country can refuse to grant it.¹⁵⁹ In the civil context, there is not even a Department of State policy on requests for waivers of immunity.¹⁶⁰

While prosecutorial focus on domestic servitude trafficking is minimal to begin with,¹⁶¹ perceived immunity of potential defendants also greatly deters investigations. In one New York case where a domestic worker made allegations of false imprisonment against her diplomat employers, a police spokesman noted that the employers were not arrested because of diplomatic immunity, but that “the Police Department made no determination as to whether the case, based on its merits, could be prosecuted.”¹⁶² The Department of State in turn commented that it “would have sought a waiver of

¹⁵⁵ 2 FAM 232.4 (Feb. 28, 1991).

¹⁵⁶ 2 FAM 233.3(a)(3) (Feb. 28, 1991); see *Hidden in the Home*, *supra* note 14, at 35.

¹⁵⁷ See Kelley, *supra* note 7 (“Lawyers have repeatedly filed suits [on behalf of domestic workers] in the face of diplomatic immunity, only to be stonewalled by the United States or other governments.”).

¹⁵⁸ *Hidden in the Home*, *supra* note 14, at 35.

¹⁵⁹ See Ryan Gallagher, *County Hears Perils of Modern Slavery*, THE SENTINEL NEWSPAPERS (Maryland), Feb. 19, 2005, <http://www.thesentinel.com/print/303286567656083.php>.

¹⁶⁰ See 2 FAM 234.2 (Feb. 28, 1991); *Ahmed v. Hoque*, No. 01 Civ. 7224, 2002 WL 1964806, at *1 (S.D.N.Y. Aug. 23, 2002) (State Department submitted a statement of interest supporting immunity rather than requesting waiver of immunity from the government of Bangladesh); *Knab v. Republic of Georgia*, No. 97CV3118, 1998 WL 34067108, at *3 (D.D.C. May 29, 1998) (holding that a home country’s waiver of immunity from criminal jurisdiction does not also constitute waiver from civil jurisdiction); *Hidden in the Home*, *supra* note 14, at 35.

¹⁶¹ See *supra* Part III.E.

¹⁶² Sengupta, *supra* note 1.

immunity . . . had the police referred the case for prosecution.”¹⁶³ In the politically delicate arena of diplomatic immunity, each agency involved may shift responsibility onto another, until it is no longer clear at which point in the process a breakdown occurred.

C. *The Need for a Remedy*

1. The Prevalence of Trafficking by Diplomats

Non-governmental organizations rally against this form of “modern day slavery,”¹⁶⁴ particularly in communities like Washington, D.C. and New York City that host international organizations whose employees may import household help using special visas.¹⁶⁵ Advocacy groups estimate that one-third of their domestic servitude cases implicate diplomats with immunity.¹⁶⁶ One organization in Washington, D.C. has seen approximately a thousand cases of domestic worker exploitation by employers with immunity since its inception in 1967.¹⁶⁷

The combined numbers of diplomats and representatives to international organizations residing in the U.S. create a significant demand for domestic workers.¹⁶⁸ That demand is frequently satisfied by trafficking women from foreign countries under false promises to abide by U.S. law.¹⁶⁹ While these international organizations are involved in the visa process¹⁷⁰ and can exercise control over their employees, they fail to act to prevent their employees from repeatedly trafficking workers into their homes and abusing them.¹⁷¹ For example, the U.N. has yet to discipline any employee for mistreatment of a G-5 domestic worker.¹⁷²

¹⁶³ *Id.*

¹⁶⁴ See Kim & Hreshchyshyn, *supra* note 14, at 5 (“[h]uman trafficking is also called ‘modern day slavery’”).

¹⁶⁵ Sun, *supra* note 8.

¹⁶⁶ *Id.*

¹⁶⁷ Aslam, *supra* note 4 (quoting the head of the Spanish Catholic Center).

¹⁶⁸ Azmy, *supra* note 44, at 993.

¹⁶⁹ *Id.*

¹⁷⁰ Such organizations as the U.N., O.A.S., I.M.F. and World Bank “assist their employees with the process of applying for domestic workers and endorse completed visa applications.” *Hidden in the Home*, *supra* note 14, at 36.

¹⁷¹ *Id.* at 36-39 (describing the organization-wide requirements of the I.M.F., World Bank, U.N. and O.A.S. for employees who obtain special visas for domestic help).

¹⁷² *Id.* at 38.

The dramatic failure of justice in these particular cases warrants immediate remedy. Diplomats and employees of organizations like the I.M.F. or the World Bank sometimes fail to pay servants brought from their home countries, and abuse them “physically, emotionally and sexually.”¹⁷³ Attorneys who represent exploited domestic workers report a disproportionate number of trafficking cases in which the perpetrators are employed by such international organizations.¹⁷⁴ This widespread pattern of worker exploitation in the diplomatic community will continue unchecked until the U.S. holds perpetrators accountable.¹⁷⁵ Also, because victims of this type of trafficking arrive alone to this country and lack knowledge of potential remedies, these cases are severely underreported.¹⁷⁶ An official at the World Bank admitted to Human Rights Watch that “the fact that there were not many cases that came forward was not indicative of the number of cases.”¹⁷⁷

What is ironic for the women in this situation, is that many of the officials and diplomats that they work for are members of institutions, including: the United Nations, the World Bank, and Inter-American Development Bank, the International Monetary Fund, and the Organization of American States. The goal of many of these government agencies is to reduce human suffering and slavery throughout the world.¹⁷⁸

This irony, combined with the situs of the events in major U.S. cities, underscores the egregious nature of such violations. The U.S. purports to be the global leader in the eradication of trafficking¹⁷⁹ and thus must prevent the import of workers into involuntary servitude inside its own borders.

2. Failures of Justice

Prosecutors have not brought criminal charges against a diplomat under the VTVPA or its predecessor laws because of

¹⁷³ See HumanTrafficking.com, Human Trafficking 101: Who Are the Traffickers?, http://www.humantrafficking.com/humantrafficking/trafficking_ht3/who_traffickers.htm (last visited Apr. 4, 2007).

¹⁷⁴ Kelley, *supra* note 7.

¹⁷⁵ King, *supra* note 8, at A21 (“many of today’s human traffickers and slavers are diplomats, flaunting U.S. and local laws, under the protective shield of the [State] [D]epartment’s interpretation of diplomatic immunity”).

¹⁷⁶ Gallagher, *supra* note 159 (“reported cases are only the tip of the iceberg”).

¹⁷⁷ *Hidden in the Home*, *supra* note 14, at 32.

¹⁷⁸ Murphy, *supra* note 11, at 13-14.

¹⁷⁹ See U.S. DEPT OF STATE, TRAFFICKING IN PERSONS REPORT (June 2006), <http://www.state.gov/g/tip/rls/tiprpt/2006>.

the immunity barrier. Government resources for anti-trafficking prosecutions are so limited to begin with,¹⁸⁰ they are unlikely to be wasted on a case where a waiver of immunity must be requested and may be refused.¹⁸¹

Victims bring civil cases against diplomat traffickers without success. In 1996, a domestic servant sued a Counsellor of the Jordanian Embassy in Washington, D.C. for numerous claims including false imprisonment and violations of the Fair Labor Standards Act.¹⁸² This case, like others brought before the TVPRA created a private right of action for trafficking victims in 2003, relied on a patchwork of civil rights legislation, contract and tort claims. The court considered the exception to diplomatic immunity for “commercial activity” within the Vienna Convention on Diplomatic Relations,¹⁸³ but ultimately held that employment of household workers is not commercial activity.¹⁸⁴ In 2001, a U.S. District Court dismissed on grounds of diplomatic immunity the case brought by a domestic servant with an A-3 visa against her consular officer employer.¹⁸⁵ Similarly, another District Court dismissed the suit brought in 2002 by a domestic servant against the Economic Minister to the Permanent Mission of Bangladesh to the U.N..¹⁸⁶ In that case the State Department provided formal certifications indicating that the defendants had full diplomatic immunity, which the court accepted.¹⁸⁷

Victims trafficked by the staff of international organizations or by diplomatic staff often face heightened exploitation because of the fact that their employers can claim immunity from civil and criminal jurisdiction.¹⁸⁸ Secure in the knowledge that they may invoke immunity if their human rights abuses are uncovered, these traffickers feel they can act with impunity.¹⁸⁹ Thus, in part *because of* immunity, “[m]any of the worst cases of abuse of domestic workers involve these

¹⁸⁰ See *supra* Part III.E.

¹⁸¹ See *supra* Part IV.B.

¹⁸² *Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996).

¹⁸³ See Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95.

¹⁸⁴ *Tabion*, 73 F.3d at 537-39.

¹⁸⁵ *Park v. Shin*, No. C-01-1800 MMC, 2001 U.S. Dist. LEXIS 11580 (N.D. Cal. Aug. 8, 2001).

¹⁸⁶ *Ahmed v. Hoque*, No. 01 Civ. 7224, 2002 WL 1964806 (S.D.N.Y. Aug. 23, 2002).

¹⁸⁷ *Id.*

¹⁸⁸ *Statement Submitted by Global Rights and the ACLU*, *supra* note 41, at 2.

¹⁸⁹ *Hidden Slaves*, *supra* note 38, at 62.

foreign officials.”¹⁹⁰ Ambassadors’ and dignitaries’ own awareness of their immunity from prosecution increases their propensity to commit crimes they view as insignificant and victimless.¹⁹¹ Victims report that employers “flaunt their diplomatic immunity.”¹⁹² Traffickers who essentially enslave other human beings often face nothing greater than a transfer by their organization from the U.S. to a post in another country as the sole consequence of their acts.¹⁹³ Those who do remain in the U.S. are left free to induce a new victim to work for them and continue the cycle of abuse.¹⁹⁴ Although Congress furnished strong anti-trafficking tools in the 2000 TVPRA and 2003 TVPRA, these tools often lie useless where their application intersects with the doctrine of diplomatic immunity. For that reason, the U.S. must adopt an innovative strategy towards human trafficking crimes committed by immunized individuals.

V. CLOSING THE DIPLOMATIC IMMUNITY LOOPHOLE

A. *Monitoring Employers Who Obtain Special Visas for Domestic Workers*

Organizations like the U.N., the O.A.S., the World Bank and the I.M.F. should take greater responsibility for their employees’ treatment of domestic workers. Disciplinary actions taken by the U.N. in particular would help legitimize its role in fomenting the global cooperation critical to a more effective international anti-trafficking effort.¹⁹⁵ The problem of trafficking of domestic workers by members of the diplomatic community is well known to organizations like the U.N.,¹⁹⁶ but

¹⁹⁰ Azmy, *supra* note 44, at 993-94.

¹⁹¹ Kelley, *supra* note 7.

¹⁹² *Id.*

¹⁹³ “In some cases . . . employers have been transferred to a position in a different country, in order to avoid charges or penalty.” *Statement Submitted by Global Rights and the ACLU, supra* note 41, at 3.

¹⁹⁴ While the Foreign Affairs Manual of the State Department requires certain terms in the contract for a domestic worker before it will improve an employer’s request for a special visa, it does not prohibit employers who breach those terms from subsequently obtaining a visa for another domestic worker. *Hidden in the Home, supra* note 14, at 25. Similarly, extensions to these visas are granted without any review of the employer’s treatment of the domestic worker. *Id.*

¹⁹⁵ See Potts, *supra* note 81, at 249.

¹⁹⁶ “It was noted that some of the exploiters of migrant domestic workers belonged to the diplomatic community. The Working Group recommended that whenever cases of abuse involving diplomats were proved, diplomatic immunity should

thus far has not been adequately addressed. Curiously, the Working Group on Contemporary Forms of Slavery of the U.N. Commission on Human Rights addressed the violation of human rights of the domestic workers of diplomats by recommending that “States must ensure that diplomatic status does not provide impunity for such human rights violations.”¹⁹⁷

One Washington, D.C. organization worked with the World Bank and the I.M.F., pressuring those organizations to give their officials codes of conduct to govern their treatment of domestic workers brought to the U.S. on special visas.¹⁹⁸ Despite the organization’s agreement to establishing a procedure for abused workers to file complaints, in practice “[w]orkers who have filed complaints have endured months-long delays and hostility when they finally meet with World Bank officials.”¹⁹⁹ While they may instruct their employees to follow U.S. laws, many organizations remain reluctant to intrude into the private realm of the homes of their employees. They may rather resolve claims that arise by means of a quiet settlement rather than exposing their own employees to embarrassment. This type of concealment contributes to the notion of some officials that they act with impunity. Formal monitoring and an awareness campaign by the U.N. and other international organizations would help defeat such notions.

Congress, which possesses broad powers to regulate immigration into the U.S.,²⁰⁰ could act to restrict the State Department’s issuance of A-3 and G-5 visas. Human Rights Watch suggests that Congress should require the State Department to evaluate the record of a diplomat or employee of an international organization before issuance of the visa, denying domestic worker visas for life to employers who commit egregious violations including servitude, forced labor,

be lifted and sanctions applied.” *Report of the Working Group on Contemporary Forms of Slavery on its Thirtieth Session*, *supra* note 46; see *Report of the Working Group on Contemporary Forms of Slavery on its Twenty-Eighth Session*, *supra* note 14 (noting the proposal by a member of the Working Group that it “consider the exploitation of domestic staff by diplomats”).

¹⁹⁷ *Report of the Working Group on Contemporary Forms of Slavery on its Thirtieth Session*, *supra* note 46, at 15.

¹⁹⁸ See Foo, *supra* note 8, at 57-58 (describing the activities of the Campaign for Migrant Domestic Workers, an organization whose “focus is on domestic workers employed by diplomats and officials of the World Bank and IMF”).

¹⁹⁹ *Id.* at 58.

²⁰⁰ STEVEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW & POLICY 120 (4th ed. 2005) (“Despite continuing uncertainty about the precise source of the federal immigration power, it is settled law today that the power exists.”).

and physical or sexual abuse.²⁰¹ But it is unclear how a diplomat's record would ever bear evidence of these types of violations as long as he or she is immune from the exercise of U.S. jurisdiction. With this solution, as with the abolition of special visa availability altogether, the possibility would remain that diplomats denied a special visa to import a domestic worker might simply exploit undocumented workers or workers in the U.S. on visitor visas.

B. Educating Law Enforcement on the Limits of Immunity

Law enforcement personnel and prosecutors need education and encouragement to pursue investigations and prosecutions of perpetrators of VTPA crimes who lack full immunity. Often police officers assume that any foreign representative is fully immune from civil and criminal jurisdiction in the U.S.,²⁰² while in fact only diplomats, particularly high-level representatives of international organizations, and their families may invoke such absolute immunity.²⁰³ Police and prosecutors should be encouraged to undertake investigations and indictments of consular officials and employees of organizations who have only functional immunity.²⁰⁴ Even in the case of an individual who can invoke absolute immunity, issuance of an arrest warrant or indictment can serve a future function if the individual later loses his or her diplomatic status.²⁰⁵ Congress should require the State Department to provide education and an awareness campaign for U.S. law enforcement on the meaning of immunity and its differing levels. Similarly, advocates should assist trafficking victims with filing civil claims under the TVPRA against employers who are not immune from civil jurisdiction.²⁰⁶

²⁰¹ *Hidden in the Home*, *supra* note 14, at 41.

²⁰² "The police reaction to discovering that a suspect is a foreign diplomat is often 'instant paralysis.'" Don Oberdorfer, *Papua New Guinea Recalls Diplomat; Serious Auto Accident Cited; New U.S. Policies Highlighted*, WASH. POST, Feb. 21, 1987, at B1.

²⁰³ *See supra* Part IV.B.

²⁰⁴ *See supra* Part IV.B.

²⁰⁵ *See Oberdorfer*, *supra* note 202.

²⁰⁶ Even if such a suit results in a judgment for the plaintiff, several potential bars to recovery remain. *See supra* note 151 and accompanying text. However, positive outcomes might include increased publicity of the trafficking problem and the possibility of settlements beneficial to victims.

The State Department should also educate police and prosecutors about its policy of requesting waivers of diplomatic immunity in criminal cases. Encouraging investigation of diplomatic trafficking cases and educating law enforcement personnel would be the gateway to actual waiver requests.

C. Mandating Diplomatic Immunity Waiver Requests

After the education of law enforcement professionals, the Department of State must also follow suit and request waivers in cases where prosecutors want to proceed.²⁰⁷ Even if all investigations do not result in formal charges or convictions, the investigations themselves might work to counteract the notion of some diplomats and officials of international organizations that they can act with impunity while in the U.S.. Drawing more law enforcement attention to what is often a hidden problem may result in publicity and media attention, which could be a deterrent to traffickers as well as the impetus for a sending country to actually grant a waiver request.

However, it is far more likely that the sending country would simply relocate the defendant to another country rather than consent to waive immunity. If a sending country refuses to grant a waiver but keeps its diplomat in the same post, the host country may strip the individual of his or her special status, requiring the "*persona non grata*"²⁰⁸ to leave the country.²⁰⁹ The U.S. could develop a policy to declare any accused trafficker a *persona non grata* in the absence of approval of the waiver request by the sending country. However, forcing a diplomat to leave the country still fails to prove and punish his or her crimes, and civil suits to compensate victims would remain barred.

²⁰⁷ See *Report of the Working Group on Contemporary Forms of Slavery on its Thirtieth Session*, *supra* note 46, at 9 ("The Working Group recommended that whenever cases of abuse involving diplomats were proved, diplomatic immunity should be lifted and sanctions should be applied.").

²⁰⁸ See Vienna Convention on Diplomatic Relations art. 9, Apr. 18, 1961, 500 U.N.T.S. 95; Maginnis, *supra* note 141, at 1003 ("The declaration of *persona non grata* is usually reserved for behavior such as espionage, terrorism, or other subversive activity, but can be used in other circumstances.").

²⁰⁹ See Vienna Convention on Diplomatic Relations art. 9, Apr. 18, 1961, 500 U.N.T.S. 95; Maginnis, *supra* note 141, at 993-94.

D. *Prosecution of Diplomats under Jus Cogens*

In the worst trafficking cases, where diplomats essentially enslave their imported domestic help, the U.S. should deny diplomat traffickers the defense of immunity under the *jus cogens* principle of international law. A *jus cogens* norm is “a peremptory norm of general international law.”²¹⁰ *Jus cogens* norms embody the only universal policy rules in the international system.²¹¹ The concept of a *jus cogens* norm encompasses both a substantive idea, such as genocide or slavery, and a “command prohibiting any derogation from the substantive provision.”²¹² While the Vienna Convention on Diplomatic Relations²¹³ binds the U.S., the Vienna Convention on the Law of Treaties provides that treaties are invalid if they violate *jus cogens* norms.²¹⁴ Diplomatic immunity is also mandated by customary international law,²¹⁵ a source of international law derived from consistent practice of nation-states coupled with a sense of legal obligation on their part.²¹⁶ *Jus cogens* invalidates customary rules that conflict with peremptory norms just as it invalidates treaties.²¹⁷ *Jus cogens* norms emerge through their recognition by the international community as that which can never be legal.²¹⁸

The illegality of slavery is established under customary international law and is a peremptory *jus cogens* norm.²¹⁹

²¹⁰ Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

²¹¹ REBECCA M.M. WALLACE, *INTERNATIONAL LAW* 33 (4th Ed. 2002); MALCOLM N. SHAW, *INTERNATIONAL LAW* 117 (5th Ed. 2003); see Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT’L L. 529, 542 (1993) (explaining that today *jus cogens* norms emerge when “the international legal system determines for moral, practical or political reasons that a rule of law shall be established, notwithstanding some objections, and that exceptions from it cannot be tolerated.”).

²¹² CHRISTOS L. ROZAKIS, *THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES* 12 (1976).

²¹³ Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95.

²¹⁴ Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

²¹⁵ See 767 Third Ave. Assoc. v. Permanent Mission, 988 F.2d 295, 299-300 (2d Cir. 1993) (describing the Vienna Convention on Diplomatic Relations as a codification of historical, customary practices of nations).

²¹⁶ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987) (defining customary international law as a source of international law).

²¹⁷ SHAW, *supra* note 211, at 117.

²¹⁸ Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331.

²¹⁹ Tom Obokata, *Human Trafficking, Human Rights and Nationality, Immigration and Asylum Act 2002*, 4 EUR. HUM. RTS. L. REV. 410, 414 (2003)

International humanitarian law condemns slavery as a crime against humanity.²²⁰ Because human trafficking is the modern-day embodiment of slavery,²²¹ it violates *jus cogens*. Thus, treaties providing for diplomatic immunity may be void where their application would shield perpetrators of slavery-like practices prohibited under *jus cogens*.²²² This approach need not invalidate the diplomatic immunity treaties in their entirety; it merely suggests that where their application violates a *jus cogens* norm, they must not be applied.²²³ Insofar as treaty law shields diplomats from prosecution for trafficking individuals into domestic service, that treaty law violates *jus cogens* norms related to slavery and human rights.

By recognizing the immunity of perpetrators of diplomatic trafficking,²²⁴ the U.S. effectively acquiesces in the persistence of this form of modern-day slavery. Affirmative obligations to outlaw, investigate, prosecute and punish trafficking offenses are established in modern international law.²²⁵ Allowing the *jus cogens* prohibition of slavery to trump diplomatic immunity treaties is consistent with the growing international sentiment that states not only have the ability to outlaw trafficking but the affirmative obligation to do so.²²⁶

The *jus cogens* argument differs from an argument against diplomatic immunity from criminal jurisdiction because trafficking is not “merely the commission of a hideous

(“Prohibition of slavery is also part of customary international law and constitutes *jus cogens*.”); Rassam, *supra* note 14, at 809-10 (“The prohibition of slavery . . . is a preemptory norm of customary international law and *jus cogens* as well as a crime against humanity.”).

²²⁰ Rassam, *supra* note 14, at 834.

²²¹ See Azmy, *supra* note 44, at 983; Kim & Hreshchyshyn, *supra* note 14, at 5; Murphy, *supra* note 11, at 13; Rassam, *supra* note 14, at 824; Richard, *supra* note 24, at 447.

²²² See, e.g., Hartmann, *supra* note 140, at 754 (arguing that if the prohibition of torture is a *jus cogens* norm, “this norm would necessarily trump any other rule of international law, even immunity”).

²²³ “Any legal act of whatever nature and, hence, any international agreement is unlawful in so far as it infringes a rule of the *jus cogens*.” ROZAKIS, *supra* note 212, at 17 (quoting Suy, *The Concept of Jus Cogens in Public International Law* 75).

²²⁴ See *supra* Parts I and II.

²²⁵ Obokata, *supra* note 219, at 418; see *Report of the Working Group on Contemporary Forms of Slavery on its Twenty-Eighth Session*, *supra* note 14, at 13 (affirming that “slavery, in all its forms and practices, is a crime against humanity and that any acquiescence by a State in such practices . . . constitutes a grave violation of basic human rights”).

²²⁶ See Obokata, *supra* note 219, at 411 (discussing the dual duties of states to fight trafficking and to address the human rights implications of trafficking).

criminal offense,” but is “a direct violation of human rights.”²²⁷ The first human right recognized worldwide was an affirmative right to live free from slavery.²²⁸ Under *jus cogens*, the U.S. could argue that the Vienna Convention on Diplomatic Relations should not apply to immunize a defendant in a trafficking case because the prohibition against slavery supersedes treaty law. Thus, a court accepting this premise could proceed with a prosecution against a diplomat accused of trafficking for domestic servitude, or a civil suit brought by his or her victim in pursuit of damages, without regard to diplomatic immunity.

The international community is growing to recognize that violations of human rights that conflict with *jus cogens* prohibitions might supersede claims of sovereign immunity,²²⁹ a concept closely linked to diplomatic immunity.²³⁰ U.S. courts have already struggled with *jus cogens* violations in the context of sovereign immunity under the Federal Sovereign Immunities Act. In *Princz v. Federal Republic of Germany*, the U.S. Court of Appeals for the D.C. Circuit reversed the lower court’s denial of a motion to dismiss on grounds of sovereign immunity where a Holocaust victim sued Germany for damages he suffered in Nazi concentration camps.²³¹ However, the dissent argued forcefully that the motion to dismiss was correctly denied because Germany’s violations of *jus cogens* norms in its treatment of the plaintiff constituted a waiver of sovereign immunity under the Federal Sovereign Immunities Act.²³²

One scholar argues that Denmark should have applied the *jus cogens* prohibition of torture to prosecute an admitted torturer sent by Israel to Denmark as its Ambassador in

²²⁷ Konstantinos D. Magliveras, *Council of Europe Takes Action Against Human Trafficking*, 21 INT’L ENFORCEMENT L. REP. No. 10, 1 (Oct. 2005).

²²⁸ Rassam, *supra* note 14, at 827.

²²⁹ Hartmann, *supra* note 140, at 754; *see, e.g.*, *Al-Adsani v. Gov’t of Kuwait*, 100 ILR 465, 471 (A.C. 1994) (suggesting that sovereign immunity may not be a defense to allegations of torture).

²³⁰ 4 AM. JUR. 2D *Ambassadors, Diplomats & Consular Officials* § 7 (2005) (“Diplomatic immunity is not a privilege of the person, but of the state that the diplomatic agent represents.”).

²³¹ *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994).

²³² *Id.* (Wald, J., dissenting). “Germany waived its sovereign immunity by violating the *jus cogens* norms of international law condemning enslavement and genocide.” *Id.* at 1179. *See also* Shaw, *supra* note 211, at 118-19 (“it has been suggested that state conduct violating a rule of *jus cogens* may not attract a claim of state immunity”).

2001,²³³ resolving the conflict between Denmark's right to prosecute under the Convention Against Torture²³⁴ and its obligations to respect diplomatic immunity under the Vienna Convention on Diplomatic Relations.²³⁵ The U.S. should take a similar approach in trafficking cases, prioritizing the fulfillment of its international obligation to combat severe human rights violations over its adherence to the principle of diplomatic immunity.

Prosecution of a U.N. official or diplomat who engaged in particularly aggravated behavior would also serve to focus the attention of the media, the public,²³⁶ and the diplomatic community on the gravity of the problem. This in turn might spur law enforcement awareness²³⁷ and improve the monitoring practices of international organizations.²³⁸ It would also pave the way for the U.S. and other nations to assert jurisdiction over diplomats who commit other heinous crimes which implicate peremptory *jus cogens* norms, fostering adjustments in the global system of diplomatic immunity.²³⁹

VI. CONCLUSION

The U.S. "has been at the forefront of the fight against modern slavery and forced labor."²⁴⁰ While diplomatic immunity remains an important principle, the U.S. should further its leadership role in global anti-trafficking work by eradicating the practices of human trafficking, forced labor and involuntary servitude perpetrated by immunized representatives on U.S. soil.²⁴¹ Diplomatic immunity should not trump international human rights norms or constitutional

²³³ Hartmann, *supra* note 140, at 754.

²³⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art.7, Dec. 10, 1984, 1465 U.N.T.S. 85.

²³⁵ Hartmann, *supra* note 140, at 750.

²³⁶ "[P]opular indifference also supports trafficking. Today, few Americans are aware of the problem or consider it relevant to their lives." Walter, *supra* note 14, at 139.

²³⁷ Advocated for *supra* in Part V.B.

²³⁸ Recommended *supra* in Part V.A.

²³⁹ See *supra* Part V.E .

²⁴⁰ *Hidden Slaves*, *supra* note 38, at 73.

²⁴¹ "Although on the surface the United States takes a harsh stance towards human rights violators, the most egregious human rights violations exist, sometimes undetected, within its own borders." Candes, *supra* note 52, at 575.

prohibitions against slavery-like practices.²⁴² Diplomatic immunity is a major barrier to a significant advance enacted in the VTVPA, the new definition of involuntary servitude. Most of the cases prosecuted under this provision would involve domestic workers, whose employers often invoke diplomatic immunity.²⁴³ The civil cause of action introduced by the TVPRA is critical for trafficking victims who may lack any resources with which to start over after escaping a situation of domestic servitude.²⁴⁴ For this reason, diplomatic immunity in the cases described above works a double injustice: the diplomat or international official escapes punishment, while the victim lacks compensation.

Better monitoring of employers of domestic workers on special visas, education for law enforcement on the levels of immunity, and a commitment from the State Department to request waivers of immunity from sending countries in trafficking cases would all contribute to the resolution of this complex problem. However, the strongest solution asserts jurisdiction over immunized individuals based on *jus cogens*, treating human trafficking like the severe human rights violation that it is.²⁴⁵ The U.S. should take this bold step and maintain its role as a forerunner in the fight against this modern incarnation of slavery.

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²⁴² See Sun, *supra* note 8 (describing a New York lawyer's argument that "diplomatic immunity should not take precedence over the constitutional prohibition against slavery and indentured servitude").

²⁴³ See *supra* notes 166, 167 and accompanying text.

²⁴⁴ *Hidden Slaves*, *supra* note 38, at 85.

²⁴⁵ "[T]o have a significant effect, enforcement of laws against human trafficking must be significantly more aggressive and widespread . . . real efforts must be made to link law enforcement to the kind of moral outrage that ended the slave trade 200 years ago." Walter, *supra* note 14, at 141.

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