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Statutes of Liberty?: Seeking Justice Under United States Law When Diplomats Traffic in Persons

Krista Friedrich

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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. Upon her arrival she became “a virtual prisoner in a high-rise apartment on Manhattan’s East Side,” 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.

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."). 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. She later testified to Congress about her experiences, saying, “I have suffered more abuse than I have been able to explain.”

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

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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.
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 NEWSSTANDARD, Jun. 28, 2005, http://newstandardnews.net/content/index.cfm/items/1985/printmode/true.
that house international organizations, missions and embassies. While the conduct of exploitative employers like these is illegal in the U.S., 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. These instances shock the conscience, particularly in light of the purposes of the organizations that these immunized officials work for. Organizations like the U.N. and the O.A.S. aspire to safeguard human rights and eradicate practices resembling slavery.

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. 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.” This type of trafficking is fueled by a

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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.

dangerous combination of easily available visas for international domestic workers and immunity from criminal and civil liability for diplomats, U.N. officials, and representatives to certain other international organizations. While the groundbreaking Victims of Trafficking and Violence Protection Act of 2000 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. The Trafficking Victims Protection Reauthorization Act of 2003 created civil remedies for victims of trafficking which are similarly barred in most cases where a

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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).


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.

trafficker asserts diplomatic immunity. Immunity too often shields diplomats and officials of international organizations residing in the U.S. who illegally traffic in domestic servants. 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 Richar d, 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.
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 & Hreshchyshyn, 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. The complex forces tied into today’s trafficking epidemic are “personal, cultural, and economic.” A larger trend known as the feminization of migration further facilitates trafficking.

While linked to the forces which drive economic migration, trafficking must be distinguished from ordinary migration and smuggling. 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.” Statistics on trafficking tend to be underestimates because of the underground nature of the crime and fear of reporting by its victims. Estimates of the annual number of victims trafficked into the U.S. range from 14,500 to 50,000 individuals. However, since 2001 the U.S. government has located only 611 trafficking victims.

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.
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 protections. 43

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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.


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.”).

protections. Often the arrangements for a domestic worker position are made through an acquaintance or by the worker’s parents overseas. Diplomats and officials of international organizations traffic domestic workers with relative ease because of their access to special visas. The relative lack of interest in trafficking for labor servitude as opposed to trafficking for sexual exploitation 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. Congress criminalized peonage and involuntary servitude in 1948. These laws, passed pursuant to the Thirteenth Amendment, were sometimes used to prosecute crimes known today as trafficking offenses. But the U.S. Supreme Court subsequently narrowly interpreted the statute prohibiting involuntary servitude 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.” 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 Gozdziak & 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.
53 See Candes, supra note 52.
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, \textit{Kozminski} contributed to a growing need for legislation that might adequately combat the continually increasing flow of human trafficking to the U.S.\(^{58}\)

\section{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 slavery\(^{63}\) 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

\begin{footnotesize}
\begin{enumerate}
\item Hidden Slaves, supra note 38, at 67 & n.65.
\item Candes, supra note 52, at 578.
\item See id. at 586.
\item Hidden Slaves, supra note 38, at 68.
\item Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 60 L.N.T.S. 253.
\item 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.
\item Convention Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55.
\item “First generation slavery was, of course, ante-bellum 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.
\item As Bahar 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).
\item Hidden Slaves, supra note 38, at 69.
\end{enumerate}
\end{footnotesize}
Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others\textsuperscript{66} addressed only trafficking for the purposes of prostitution and was “widely criticized as ineffectual in combating trafficking.”\textsuperscript{67}

The focus of such early instruments reflects the persistent lack of attention to trafficking related to involuntary servitude as opposed to sex trafficking,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{71} In 2000, the U.N. adopted the International Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,\textsuperscript{72} incorporating a broadened definition of trafficking cognizant of modern realities.\textsuperscript{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.”\textsuperscript{74} The definition also provides that trafficking may be effected by means “of


\textsuperscript{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).

\textsuperscript{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”).

\textsuperscript{69} Rassam, supra note 14, at 811.

\textsuperscript{70} Id. at 844.

\textsuperscript{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.”).


\textsuperscript{73} See Hidden Slaves, supra note 38, at 69.

\textsuperscript{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.
78 Id.
79 Id.
80 See discussion infra Part III.C.
82 Developments in the Law, supra note 25, at 2188.
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 “[T]he 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.
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).
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.

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).
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.
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 to traffickers who use more subversive recruitment methods can be punished.”).
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.” This civil cause of action also allows for the possibility of recovering punitive damages and the costs of litigation, 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. 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. The TVPRA also allows trafficking victims to sue their traffickers in federal court even in the absence of an actual federal prosecution. This may be particularly helpful to victims of trafficking for purposes of domestic servitude, which receives much less attention from prosecutors.

E. Implementation of the New Anti-Trafficking Legislation

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

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\(^{108}\) 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

¹²⁰ See Hidden in the Home, supra note 14 (explaining the types of special visas and their limitations).
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 plane 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. Employers further exercise control by confiscating passports and other documents on arrival.


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.” Because the procedure for obtaining a G-5 or A-3 visa requires evidence of a fair contract, employers often draft and sign fraudulent

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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 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. 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. 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.

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. 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.\textsuperscript{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.\textsuperscript{138} Even in the rare cases where abuses come to light, if employers invoke diplomatic immunity they escape consequences for their actions.

\section*{B. Diplomatic Immunity}

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

\begin{itemize}
  \item \textsuperscript{137} Id. at 994-95 nn.69-70.
  \item \textsuperscript{138} \textit{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.”).
  \item \textsuperscript{139} Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.
  \item \textsuperscript{140} See, e.g., \textit{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, \textit{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”).
  \item \textsuperscript{142} \textit{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.
  \item \textsuperscript{143} \textit{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.”).
  \item \textsuperscript{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.”).
\end{itemize}
arrest\textsuperscript{146} and may simply invoke immunity rather than respond to any allegations in a civil complaint.\textsuperscript{147}

Consular officers\textsuperscript{148} and most employees of organizations like the U.N. have only functional immunity, limited to acts taken in an official capacity.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{153} The Foreign Affairs Manual, which is not U.S. law or regulation but outlines internal State Department policy,\textsuperscript{154}

\textsuperscript{146} Id.
\textsuperscript{147} See Hidden in the Home, supra note 14, at 11.
\textsuperscript{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.
\textsuperscript{149} See Maginnis, supra note 141, at 1012-13.
\textsuperscript{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.
\textsuperscript{151} Hidden in the Home, supra note 14, at 35.
\textsuperscript{152} 2 FAM 234.1-1 (Feb. 28, 1991).
\textsuperscript{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.
\textsuperscript{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.” 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.

In practice, the U.S. fails to request waivers of diplomatic immunity to enable trafficking prosecutions. 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.” 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. In the civil context, there is not even a Department of State policy on requests for waivers of immunity.

While prosecutorial focus on domestic servitude trafficking is minimal to begin with, 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.” The Department of State in turn commented that it “would have sought a waiver of immunity.”

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.
161 See supra Part III.E.
162 Sengupta, supra note 1.
immunity...had the police referred the case for prosecution. 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,” particularly in communities like Washington, D.C. and New York City that host international organizations whose employees may import household help using special visas. Advocacy groups estimate that one-third of their domestic servitude cases implicate diplomats with immunity. 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.

The combined numbers of diplomats and representatives to international organizations residing in the U.S. create a significant demand for domestic workers. That demand is frequently satisfied by trafficking women from foreign countries under false promises to abide by U.S. law. While these international organizations are involved in the visa process 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. For example, the U.N. has yet to discipline any employee for mistreatment of a G-5 domestic worker.

163 Id.
164 See Kim & Hreshchyshyn, supra note 14, at 5 (“human 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.”\textsuperscript{173} Attorneys who represent exploited domestic workers report a disproportionate number of trafficking cases in which the perpetrators are employed by such international organizations.\textsuperscript{174} This widespread pattern of worker exploitation in the diplomatic community will continue unchecked until the U.S. holds perpetrators accountable.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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 trafficking\textsuperscript{179} 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

\textsuperscript{174} Kelley, supra note 7.
\textsuperscript{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”).
\textsuperscript{176} Gallagher, supra note 159 (“reported cases are only the tip of the iceberg”).
\textsuperscript{177} Hidden in the Home, supra note 14, at 32.
\textsuperscript{178} Murphy, supra note 11, at 13-14.
the immunity barrier. Government resources for anti-trafficking prosecutions are so limited to begin with, they are unlikely to be wasted on a case where a waiver of immunity must be requested and may be refused.

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. 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, but ultimately held that employment of household workers is not commercial activity. 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. 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.. In that case the State Department provided formal certifications indicating that the defendants had full diplomatic immunity, which the court accepted.

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. Secure in the knowledge that they may invoke immunity if their human rights abuses are uncovered, these traffickers feel they can act with impunity. Thus, in part because of immunity, “[m]any of the worst cases of abuse of domestic workers involve these

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180 See supra Part III.E.
181 See supra Part IV.B.
182 Tabion v. Mufti, 73 F.3d 535 (4th Cir. 1996).
184 Tabion, 73 F.3d at 537-39.
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 VTVPA 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.”

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. 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.” 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., 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”).


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. 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 VTVPA 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., while in fact only diplomats, particularly high-level representatives of international organizations, and their families may invoke such absolute immunity. Police and prosecutors should be encouraged to undertake investigations and indictments of consular officials and employees of organizations who have only functional immunity. 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. 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.

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. 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” to leave the country. 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." A *jus cogens* norm embodies the only universal policy rules in the international system. 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." While the Vienna Convention on Diplomatic Relations binds the U.S., the Vienna Convention on the Law of Treaties provides that treaties are invalid if they violate *jus cogens* norms. Diplomatic immunity is also mandated by customary international law, a source of international law derived from consistent practice of nation-states coupled with a sense of legal obligation on their part. *Jus cogens* invalidates customary rules that conflict with peremptory norms just as it invalidates treaties. *Jus cogens* norms emerge through their recognition by the international community as that which can never be legal.

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

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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.
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.
International humanitarian law condemns slavery as a crime against humanity. Because human trafficking is the modern-day embodiment of slavery, 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. 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. 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, 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. 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.

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 preeminent 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.”  

The first human right recognized worldwide was an affirmative right to live free from slavery. 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, a concept closely linked to diplomatic immunity. 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. 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.

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

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228 Rassam, *supra* note 14, at 827.

229 Hartmann, *supra* note 14, at 827; 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.”).


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”).
resolving the conflict between Denmark's right to prosecute under the Convention Against Torture and its obligations to respect diplomatic immunity under the Vienna Convention on Diplomatic Relations. 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, and the diplomatic community on the gravity of the problem. This in turn might spur law enforcement awareness and improve the monitoring practices of international organizations. 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.

VI. CONCLUSION

The U.S. “has been at the forefront of the fight against modern slavery and forced labor.” 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. 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. 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. 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. 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. The U.S. should take this bold step and maintain its role as a forerunner in the fight against this modern incarnation of slavery.

Krista Friedrich†

† B.A., Bowdoin College; J.D. candidate, 2007, Brooklyn Law School. The author is grateful for the contributions and guidance of Suzanne Tomatore, Professor Maryellen Fullerton, and the editors and staff of the Brooklyn Law Review.