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The Prohibition of Human Trafficking and Diplomatic Immunity

A report for Kalayaan (London)

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CONTRIBUTORS

Faculty:

Dr Eirik Bjorge
Shaw Foundation Junior Research Fellow
Jesus College
University of Oxford

Research co-ordinator(s):

Louis Tran Van Lieu
Mjur Candidate, University of Oxford

Researchers:

Kalina Arabadjieva
MPhil Candidate in Law, University of Oxford

Benjamin Mak
BCL Candidate, University of Oxford

Nomfundo Ramalekana
BCL Candidate, University of Oxford

Alexander Wang
Senior Status B.A., P.P.E Candidate, University of Oxford

Clara Ludot
BCL Candidate, University of Oxford

Eilís O'Keeffe
BCL Candidate, University of Oxford

Sanya Samtani
BCL Candidate, University of Oxford

Readers:

Louis Tran Van Lieu
Mjur Candidate, University of Oxford

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A. EXECUTIVE SUMMARY

TERMS OF REFERENCE

1. Oxford Pro Bono Publico (OPBP), an organisation within the Law Faculty at the University of Oxford, was invited by Kalayaan, an organisation protecting the rights of migrant domestic workers in the United Kingdom, to conduct a comparative research project on the prohibition of slavery and human trafficking, and commercial activities of diplomatic agents as an exception to their diplomatic immunity. A factual context for the research is summarized below.
2. The UK Visas and Immigration found that a woman (Ms Reyes) was the victim of trafficking. Ms Reyes was employed in 2011 by a diplomatic agent and his wife (Mr and Mrs Al-Malki) at their official diplomatic residence. Ms Reyes made claims to the Employment Tribunal alleging that she had suffered racial discrimination and harassment, and had been paid less than the national minimum wage. Mr Al-Malki claimed diplomatic immunity.
3. Under Article 31(1)(c) of the 1961 Vienna Convention on Diplomatic Relations, a diplomatic agent does not enjoy immunity from civil and administrative jurisdiction for "an action relating to any professional or commercial activity exercised [...] in the receiving State outside his official functions." In its decision *Reyes v Almalki* of [2015] EWCA Civ 32, the Court of Appeal held that the employment by a diplomatic agent of a trafficked employee for domestic services was not a commercial activity under the 1961 Vienna Convention. The court also found that the international law protections for a victim of trafficking does not provide for an exception to diplomatic immunity and that the prohibition on trafficking is not a peremptory norm of international law overriding diplomatic immunity.
4. Kalayaan is intervening with the appellant before the United Kingdom Supreme Court against this decision and approached OPBP to assist in conducting comparative research. This research will provide information on the prohibition of human trafficking in international law and domestic legislation, the incorporation of the 1961 Vienna Convention on Diplomatic Relations into seven national jurisdictions, and the extent to which the prohibition of human trafficking can constitute an exception to diplomatic immunity under this convention. The outcome of the research is contained in this report.

JURISDICTIONS INVESTIGATED

5. OPBP has prepared comparative research on thirteen different jurisdictions: three international jurisdictions, two regional jurisdictions, and eight national jurisdictions. They are as follows:

Table 1. Jurisdictions researched:

Domestic jurisdictions	International Jurisdictions	Regional Jurisdictions
Australia	**United Nations Human Rights Committee**	**Inter-American Human Rights Court**
Canada	**United Nations Commission on Human Rights**	**The African Charter on Human and People's Rights**
France	**United Nations Human Rights Council**	
Germany	**International Labour Organisation**	
India		
Italy		
South Africa		
The United States of America		

RESEARCH QUESTIONS

6. The following four primary research questions were formulated in order to structure the research in each jurisdiction for the purposes of this study:

(a) Research on the prohibition on slavery/human trafficking under the executive practice, legislation, case law of your jurisdiction/international body;

(b) Research on the relevant expressions of State practice (national legislation, case law, policy documents…) regarding the commercial nature of human trafficking, in particular arising out of labour exploitation;

(c) Research on incorporation of the 1961 Vienna Convention on Diplomatic Relations in your familiar jurisdiction;

(d) Research on instances of human trafficking falling under the commercial activity exception of diplomatic immunity in Article 31(1)(c) of the 1961 Vienna Convention on Diplomatic Relations.

SUMMARY OF FINDINGS

I. THE PROHIBITION OF HUMAN TRAFFICKING

7. Slavery and human trafficking is considered by the international community as a whole to be a grave violation of human rights. This is evidenced by the prohibition of these practices on an international, regional and national level and a growing number of implementation mechanisms.
8. At the international level, United Nations human rights bodies have called for the eradication of human trafficking through multiple conventions, protocols (like the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime), and resolutions. Both the Human Rights Committee and the Human Rights Council have called on some States to ensure the prosecution and punishment of those engaged in trafficking and to provide access to a remedy for victims. A number of instruments, including three conventions of the International Labour Organisation (ILO), also address human trafficking and slavery. Moreover, the ILO clearly recognises the especially vulnerable position of (migrant) domestic workers.
9. At the regional level, the European Court of Human Rights has recognised that human trafficking falls within the provision that prohibits slavery, servitude and forced labour (Art 4)[1]. Article 5 of the African Charter on Human and Peoples' Rights and Article 6 of the American Convention on Human Rights provide for the prohibition of slavery. Human trafficking is also specifically addressed in other instruments such as Inter-American Convention on International Traffic in Minors. Other regional initiatives, such as the Bali Process on People Smuggling, Trafficking in Persons, and Related Transnational Crime and the Australia-Asia Program to Combat Trafficking in Persons, offer supplementary protection. Another example is the Organisation of American States which now includes a section specifically addressing anti-trafficking in persons.

[1] *Rantsev v. Cyprus and Russia*, Application no. 25965/04, Council of Europe: European Court of Human Rights, 7 January 2010

10. At the national level, the widespread ratification of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, fostered the criminalisation of human trafficking in many domestic criminal law frameworks, including those researched. Moreover, some States such as India have demonstrated a stronger normative commitment by constitutionalising the prohibition of human trafficking. Some governments have also developed policies, plans, and working groups to address trafficking and ensure the implementation of measures to prevent it.

II. THE COMMERCIAL NATURE OF HUMAN TRAFFICKING

11. In Resolution 11/3, the United Nations Human Rights Council lists a number of motives for trafficking in persons which are of a commercial nature: commercialised sex, sex tourism, forced labour, slavery, and the removal of organs. Moreover, the national policies of Australia and Canada acknowledge that traffickers are motivated by the profit generated through such exploitation. An Australian court has held that some instances of human trafficking "are undoubtedly economically motivated"[2].
12. This is echoed in a piece of German legislation in which one of the conditions for aggravated human trafficking is its commercial basis, the relevant term in German being 'gewerbsmäßig'; the same as the one used in Art 31(1)(c) of the Vienna Convention on Diplomatic Relations ('gewerbliche Tätigkeit', commercial activity). A French case[3] of the Cour de Cassation, where a father was given 120 000 euros in exchange for his daughter, epitomises this commercial dimension of human trafficking.
13. In its Concluding Observations on the Czech Republic, the UN Human Rights Committee addressed the issues of trafficking and commercial sexual exploitation in combination. This indicates that it considers the practices to be closely linked. An analogy could indeed be drawn from the definitions of 'commercial sexual exploitation'. The mere procurement of a person for their performance of labour for financial reward amounts to trafficking for purposes

[2] [2008] HCA 39, [79]

[3] Cour de cassation - Chambre criminelle n° 5705, 16 décembre 2015 (14-85.900)

of 'commercial labour exploitation'; the procurer need not actually have benefited financially from the labour.

III. INCORPORATION OF THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS

14. All of the domestic jurisdictions investigated have incorporated the 1961 Vienna Convention without modifications to Articles 22 to 24 and 27 to 40 (included). However, the United States has added a caveat in its incorporation act which provides that the President of the United States may

> "specify privileges and immunities for members of the mission, and their families, and the diplomatic couriers of any sending state which result in more favourable treatment or less favourable treatment than is provided under the Vienna convention".

France made a reservation whereby

> "The Government of the French Republic considers that article 38, paragraph 1, is to be interpreted as granting to a diplomatic agent who is a national of or permanently resident in the receiving State only immunity from jurisdiction, and inviolability, both being confined to official acts performed by the said diplomatic agent in the exercise of his functions."

IV. INSTANCES OF HUMAN TRAFFICKING FALLING UNDER THE COMMERCIAL ACTIVITY EXCEPTION OF DIPLOMATIC IMMUNITY IN ARTICLE 31(1)(c) OF THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS

15. An authoritative interpretation of Article 31(1)(c), given by Professor Salmon, states that "it is clearly settled that there is no immunity in cases of 'profession' or 'activity'. Both terms clearly indicate that what was intended [in the Vienna Convention] is a continuous activity and not an accidental action, like an isolated contract."[4] A note given by the Swiss Federal Department of Foreign Affairs on 13 July 1976 further elaborates this point, stating that:

> "the diplomatic agent cannot invoke his immunity from the civil and administrative jurisdiction for claims involving any of his professional or commercial activities

[4] J Salmon, *Manuel de droit diplomatique*, Bruylant, Brussels 1994, pp. 313

carried in the receiving State and outside the scope of his official functions. … From a strictly legal perspective, [in such cases] immunity never existed."[5]

16. Instances of human trafficking falling under the commercial activity exceptions of Article 31(1)(c) of the 1961 Vienna Convention on Diplomatic Immunity are rare and their outcome heterogeneous.
17. On one end of the spectrum, the Zimbabwean High Court in *Sibanda and Anor v International Committee of the Red Cross*[6] held that the engagement of local staff in Zimbabwe by a foreign State or organisation is a commercial transaction, which made the case justiciable before the courts. Moreover, the Italian Court of Cassation in *Comina v Kite*[7] determined that: 'The absolute immunity put forward from historical times is now ended and is one of the political doctrines that have been superseded". In the same vein, a 1989 case[8] of the same court also held, concerning an employee in a consulate, that it had jurisdiction in all situations where the rights of the employee to access to court were concerned.
18. Finally, *CN and V v. France*[9] is a case in which the immunity of a diplomatic agent who exploited domestic workers was waived by its international organisation.
19. German courts have adopted a nuanced position. In a case where the defendant diplomat exploited and physically abused the claimant, a domestic worker, the Bundesarbeitsgericht held that:

> "the question can be left open of whether […] the immunity of the defendant was, exceptionally, limited with respect of the gravity of the accusations raised and the alleged hopelessness of pursuing [her] rights in the sending state"[10].

20. At the other end of the spectrum are cases in which courts clearly refused to find an exception to diplomatic immunity. American cases are consistent in refusing to consider private contracts between members of a diplomatic mission and their domestic employees as commercial activities under the Vienna

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[5] [1977] Annuaire suisse de droit international p 226–8

[6] *Sibanda and Anor v International Committee of the Red Cross* 2002 (1) ZLR 364 H.

[7] *Comina v Kite* (1922) Annual Digest Case No 202 p 286.

[8] Foro Italiano, 1989 Volume I, col 2466

[9] *C.N. and V. v France,* App no 67724/09 (ECtHR, 11 October 2012)

[10] BAG Urteil vom 22.8.2012, 5 AZR 949/11

Convention. The French Conseil d'Etat, in a case of outstanding payments of domestic worker by a diplomat held that the latter enjoyed immunity. Nonetheless, the French State was found to have an objective responsibility to compensate the unpaid worker[11].

21. Cases of successful invocation of the commercial activity exception not featuring human trafficking are still relevant and should be mentioned. An Indian case[12] held that the renting out of a certain premises by a diplomat in the form of a sub-tenancy did not fall within the ambit of Article 31(1)(c) of the 1961 Convention. However, in a French case, a diplomat sub-letting an apartment was found to act as a private individual outside his functions[13].

[11] A Pellet and A Miron, *Les Grandes Décisions de la Jurisprudence Française de Droit International Public* (Dalloz 1998), chapter 10

[12] 2012 (114) Bom LR 67

[13] *Freeborn v Fou Pei Kouo* (1949) Annual Digest Case No 97 p 286–7.

B. NATIONAL JURISDICTIONS

AUSTRALIA

I. THE PROHIBITION OF HUMAN TRAFFICKING

a) CRIMINAL LEGISLATION

22. Australia's prohibition on slavery and human trafficking is mainly enforced through the criminal law. According to Australia's *National Action Plan to Combat Human Trafficking and Slavery 2015–2019*, there are four major statutes which provide for criminal offences to address the challenges of slavery and human trafficking: (1) the Criminal Code Act 1995, (2) the Crimes Act 1914, (3) the Migration Act 1958 and the (4) Proceeds of Crime Act 2002.[14]
23. First, the main provisions in the Criminal Code Act 1995 that address human trafficking and slavery are Divisions 270 and 271.
24. The title for Division 270 is slavery and slavery-like conditions. Slavery is outlawed by Division 270.2 and is defined at Division 270.1 as 'the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.'[15]
25. The related concept of servitude is defined at Division 270.4 as 'the condition of a person (the *victim*) who provides labour or services, if, because of the use of coercion, threat or deception: (a) a reasonable person in the position of the victim would not consider himself or herself to be free: (i) to cease providing the labour or services; or (ii) to leave the place or area where the victim provides the labour or services; and (b) the victim is significantly deprived of

[14]Australian Government, 'National Plan to Combat Human Trafficking and Slavery 2015-2019' (*Attorney-General's Department*, 2014) https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Trafficking-NationalActionPlanToCombatHumanTraffickingAndSlavery2015-19.pdf> accessed 24 January 2016, see pages 8-10

[15] Australian Legal Information Institute, 'Criminal Code Act 1995', (*Australian Legal Information Institute*, 2016) <http://www.austlii.edu.au/au/legis/cth/consol_act/cca1995115/sch1.html> accessed 24 January 2016

personal freedom in respect of aspects of his or her life other than the provision of the labour or services.'[16]

26. Offences relating to slavery and servitude are both punishable by imprisonment. It is stated in Division 270.10(2)(a) of the Australian Criminal Code that 'for the purposes of proceedings for a slavery-like offence, the trier of fact may have regard to' the 'economic relationship between the alleged victim and the alleged offender' in order to determine whether the alleged victim 'has been coerced, threatened or deceived.'[17] To further underline the importance of the commercial dimension of human trafficking, the trier of fact may also consider 'the terms of any written or oral contract or agreement between the alleged victim and the alleged offender' in seeking to ascertain whether the alleged victim 'has been coerced, threatened or deceived.' (Division 270.10(2)(b)[18]
27. Division 271 is the part of the Criminal Code Act 1995 which deals specifically with human trafficking. Indeed, it is described as the provision which seeks to incorporate Australia's international law commitments under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.[19]
28. The main general offence (in contrast to the more specific offences of child trafficking, organ trafficking, and debt bondage) is the offence of 'trafficking in persons'. This offence is defined at Division 271.2 (1) as follows: '(1) A person (the *first person*) commits an offence of trafficking in persons if: (a) the first person organises or facilitates the entry or proposed entry, or the receipt, of another person into Australia; and (b) the first person uses coercion, threat or deception; and (c) that use of coercion, threat or deception results in the first

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[16] Australian Legal Information Institute, 'Criminal Code Act 1995', (*Australian Legal Information Institute*, 2016) <http://www.austlii.edu.au/au/legis/cth/consol_act/cca1995115/sch1.html> accessed 24 January 2016

[17] Australian Legal Information Institute, 'Criminal Code Act 1995', (*Australian Legal Information Institute*, 2016) <http://www.austlii.edu.au/au/legis/cth/consol_act/cca1995115/sch1.html> accessed 29 January 2016

[18]Australian Legal Information Institute, 'Criminal Code Act 1995', (*Australian Legal Information Institute*, 2016) <http://www.austlii.edu.au/au/legis/cth/consol_act/cca1995115/sch1.html> accessed 29 January 2016

[19]Australian Government, 'National Plan to Combat Human Trafficking and Slavery 2015-2019' (*Attorney-General's Department*, 2014) https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Trafficking-NationalActionPlanToCombatHumanTraffickingAndSlavery2015-19.pdf> accessed 24 January 2016, see page 9

person obtaining the other person's compliance in respect of that entry or proposed entry or in respect of that receipt.'[20]

29. Second, the Crimes Act 1914 contains provisions in section 15, Part IAD on the protection of vulnerable persons when they have to give evidence in court.[21]
30. Third, the Migration Act 1958 provides provisions which make it a criminal offence to allow an unlawful non-citizen to work (section 245AB) or allow a lawful non-citizen to work in breach of visa conditions (section 245AC). These are all contained in a set of provisions under Division 12, Subdivision C of the Act which is titled 'Offences and civil penalties in relation to work by non-citizens'.[22]
31. Fourth, according to Australia's National Plan to Combat Human Trafficking and Slavery 2015-2019 the Proceeds of Crime Act 2002 provides a scheme for tracing, restraining and confiscating the proceeds of crimes against Australian law, including human trafficking and slavery. These proceeds can then be returned to the Australian community to fund anti-crime initiatives.'[23]

b) INTERNATIONAL LAW

32. Australia's prohibition on human trafficking is bolstered by its participation in two specific international legal instruments which seek to address slavery and human trafficking. On 6 January 1958, Australia ratified the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.[24] On 14 September 2005, Australia ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially

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[20] Australian Legal Information Institute, 'Criminal Code Act 1995', (*Australian Legal Information Institute*, 2016) <http://www.austlii.edu.au/au/legis/cth/consol_act/cca1995115/sch1.html> accessed 24 January 2016

[21] Australian Government, 'Crimes Act 1914' (ComLaw, 25 March 2015) <https://www.comlaw.gov.au/Details/C2015C00111/Html/Volume_1> accessed 24 January 2016

[22]Australian Government, 'National Plan to Combat Human Trafficking and Slavery 2015-2019' (*Attorney-General's Department*, 2014) https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Trafficking-NationalActionPlanToCombatHumanTraffickingAndSlavery2015-19.pdf> accessed 24 January 2016, see page 10

[23] Australian Government, 'National Plan to Combat Human Trafficking and Slavery 2015-2019' (*Attorney-General's Department*, 2014) https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Trafficking-NationalActionPlanToCombatHumanTraffickingAndSlavery2015-19.pdf> accessed 24 January 2016, see page 10

[24] United Nations Treaty Collection, 'Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery' (*UN*, 2016) <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XVIII-4&chapter=18&Temp=mtdsg3&lang=en> accessed 24 January 2016

Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.[25]

33. Australia also participates in two instruments at the International Labour Organisation which address human trafficking and slavery: (i) the Abolition of Forced Labour Convention 1957 (ratified on 7 June 1960) and (ii) the Worst Forms of Child Labour Convention 1999 (ratified on 19 December 2006).[26]

34. Australia further participates in regional processes to address human trafficking. This is seen with its contribution to short policy guides on international and regional standards relating to human trafficking which was published as part of the Bali Process on People Smuggling, Trafficking in Persons, and Related Transnational Crime.[27] Moreover, between 2013 and 2018, Australia is providing financial aid to support efforts to address human trafficking in South-east Asian countries as part of the Australia-Asia Program to Combat Trafficking in Persons.[28]

c) ENHANCING WORKER PROTECTION DOMESTICALLY

35. While Australia has yet to ratify the International Labour Organisation's Domestic Workers Convention 2011, it voted in support of the Domestic Workers Convention 2011 before it was passed.[29] There is now a campaign by leading Australian non-governmental organisations including the Walk Free Foundation and the Salvation Army-Freedom Partnership for the Australian government to ratify the Convention to enhance protections for migrant

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[25] United Nations Treaty Collection, 'Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime' (*UN*, 2016) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-a&chapter=18&lang=en> accessed 24 January 2016

[26] International Labour Organisation, 'Ratifications for Australia' (*ILO*, 2016) <http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102544> accessed 24 January 2016

[27] Australian Government, 'Trafficking in Persons: The Australian Government Response, 1 July 2014 – 30 June 2015' (*Attorney-General's Department*, 30 June 2015) <https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Report-Interdepartmental-Committee-Human-Trafficking-Slavery-July-2014-June-2015.PDF> accessed 24 January 2016, see page 3

[28] Australian Government, 'Trafficking in Persons: The Australian Government Response, 1 July 2014 – 30 June 2015' (*Attorney-General's Department*, 30 June 2015) <https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Report-Interdepartmental-Committee-Human-Trafficking-Slavery-July-2014-June-2015.PDF> accessed 24 January 2016, see page 80

[29] The Salvation Army-Freedom Partnership and the Walk Free Foundation, 'Improving protections for migrant domestic workers in Australia: Discussion Paper, Policy Brief 1' (*Australian Productivity Commission*, 2015) <http://www.pc.gov.au/__data/assets/pdf_file/0010/188191/sub0156-workplace-relations.pdf> accessed 24 January 2016

domestic workers who may otherwise be denied the protections of Australia's Fair Work Act 2009.[30] In relation to this, Parliament has recently sought to reform the Migration Regulations to address some issues in the existing framework which may have prevented migrant domestic workers from obtaining equal protection to domestic workers in Australia.

36. This is seen with the recent amendment to subparagraph 403.242 of the Migration Regulations 1994 to align it with subparagraph 403.243 so that regardless of whether an application for a visa for domestic workers is made by diplomatic personnel in Australia or from a foreign country, the standards of protection applicable to domestic workers will be the same.[31] Previously, subparagraph 403.243(c), which covered applications made from outside Australia, stated that the applicant is 'is to be employed or engaged in Australia in accordance with the standards for wages and working conditions provided for under relevant Australian legislation and awards'. However, there was no equivalent provision under subparagraph 403.242, which covered applications made within Australia. Following the amendments, there is now a new clause 403.242 (2) which states 'the applicant is employed or engaged in accordance with the standards for wages and working conditions provided for under relevant Australian legislation and awards.'
37. In relation to the specific challenge of abuse of domestic workers by diplomatic personnel, Australia has established a Working Group on Protections for Private Domestic Workers Working for Diplomats or Consular Officials which has come up with a set of draft education and awareness-raising materials. Members of the Working Group include the Attorney-General's Department, the Department of Employment, Department of Foreign Affairs and Trade, and the Department of Immigration and Border Protection and its work was expected to be finalised in mid-to-late 2015.[32]

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[30] The Salvation Army-Freedom Partnership and the Walk Free Foundation, 'Improving protections for migrant domestic workers in Australia: Discussion Paper, Policy Brief 1' (*Australian Productivity Commission*, 2015) <http://www.pc.gov.au/__data/assets/pdf_file/0010/188191/sub0156-workplace-relations.pdf> accessed 24 January 2016

[31] Australian Government, 'Migration Legislation Amendment (2015 Measures No. 3) Regulation 2015' (*ComLaw*, 2015) <https://www.comlaw.gov.au/Details/F2015L01810/aa2ed22f-0248-4d56-ba7f-35886b68430f> accessed 24 January 2016

[32] Australian Government, 'National Plan to Combat Human Trafficking and Slavery 2015-2019' (*Attorney-General's Department*, 2014) https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Trafficking-NationalActionPlanToCombatHumanTraffickingAndSlavery2015-19.pdf> accessed 24 January 2016, see page 71

38. In 2014, Australia also established a Supply Chain Working Group under the aegis of the National Roundtable on Human Trafficking and Slavery 'to provide expert advice and recommendations to government about possible strategies to address serious exploitation in supply chains.'[33] The working group is chaired by the Attorney-General's Department and brings together stakeholders from government, business, industry, civil society, unions and academia.[34] Between 2014 and 2015, the working group focused on the first phase of its response, 'understanding the problem'.[35] In 2015–16, the working group is expected to begin phase two of its work program, 'developing the response' which will involve detailed studies on how best practice measures to address supply chain exploitation could be implemented in Australia.[36]
39. The Australian Department of Foreign Affairs and Trade has also released a set of guidelines on the appropriate procedures for diplomats who wish to bring in domestic workers from their home countries into Australia. These guidelines can be found under chapter 10 of the Protocol Guidelines, and are titled 'private domestic employees.' These guidelines include (i) restrictions on the number of private domestic employees who may be brought in ('in general, the Department is prepared to approve up to three private domestic employees for heads of diplomatic missions), (ii) conditions relating to the domestic worker ('that a domestic worker's level of English should be sufficient allow them to operate independently in Australia [and] … must be over 18 years of age') and (iii) employment protections for workers ('It's a requirement that the employer and the employee must enter into an

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[33] Australian Government, 'Trafficking in Persons: The Australian Government Response, 1 July 2014 – 30 June 2015' (*Attorney-General's Department*, 30 June 2015) <https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Report-Interdepartmental-Committee-Human-Trafficking-Slavery-July-2014-June-2015.PDF> accessed 29 January 2016, see page 46

[34] Australian Government, 'Trafficking in Persons: The Australian Government Response, 1 July 2014 – 30 June 2015' (*Attorney-General's Department*, 30 June 2015) <https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Report-Interdepartmental-Committee-Human-Trafficking-Slavery-July-2014-June-2015.PDF> accessed 29 January 2016, see page 46

[35] Australian Government, 'Trafficking in Persons: The Australian Government Response, 1 July 2014 – 30 June 2015' (*Attorney-General's Department*, 30 June 2015) <https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Report-Interdepartmental-Committee-Human-Trafficking-Slavery-July-2014-June-2015.PDF> accessed 24 January 2016, see page 46

[36] Australian Government, 'Trafficking in Persons: The Australian Government Response, 1 July 2014 – 30 June 2015' (*Attorney-General's Department*, 30 June 2015) <https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Report-Interdepartmental-Committee-Human-Trafficking-Slavery-July-2014-June-2015.PDF> accessed 24 January 2016, see page 46

employment contract that accords with the standards of wages and employment conditions provided for under Australian laws.')[37]

II. THE COMMERCIAL NATURE OF HUMAN TRAFFICKING

40. There is evidence of State practice both in documents from the executive and in judicial decisions with regard to the commercial nature of human trafficking.

a) DOCUMENTS FROM THE EXECUTIVE

41. The 2015-2019 Australian National Plan to address human trafficking adopts a conception of human trafficking with a strong commercial dimension: 'human traffickers are motivated by the prospect of profiting from the exploitation of their victims once they reach the destination'.[38]
42. The Australian Federal Police page on human trafficking adopts a definition of human trafficking which also reveals its commercial nature: 'Human trafficking is the physical movement of people across and within borders through deceptive means, force or coercion. The people who commit human trafficking offences are motivated by the continuing exploitation of their victims once they reach their destination country'. [39]
43. In the Australian Government's 2014-2015 report on its progress in addressing human trafficking, the definition of human trafficking adopted in the report's *Introduction* suggests that commercial profit and human trafficking are linked: 'human trafficking is inherently concerned with exploitation. It may involve a person being moved domestically or transnationally for the purpose of exploitation, or a person already in Australia being subject to exploitative practices.'[40]

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[37] Department of Foreign Affairs and Trade, '10. Private Domestic Employees' (*Department of Foreign Affairs and Trade*, 2016) <http://dfat.gov.au/about-us/publications/corporate/protocol-guidelines/Pages/10-private-domestic-employees.aspx> accessed 24 January 2016

[38]Australian Government, 'National Plan to Combat Human Trafficking and Slavery 2015-2019' (*Attorney-General's Department*, 2014) https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Trafficking-NationalActionPlanToCombatHumanTraffickingAndSlavery2015-19.pdf> accessed 24 January 2016, see page 10

[39] Australian Federal Police, 'Human Trafficking' (*Australian Federal Police*, 2015)<http://www.afp.gov.au/policing/human-trafficking> accessed 24 January 2016

[40]Australian Government, 'Trafficking in Persons: The Australian Government Response, 1 July 2014 – 30 June 2015' (*Attorney-General's Department*, 30 June 2015) <https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Report-Interdepartmental-Committee-Human-Trafficking-Slavery-July-2014-June-2015.PDF> accessed 24 January 2016, see page 4

44. Similarly, the Australian Institute of Criminology (which was established by statute and is currently a statutory authority[41]) offers a definition which also has a commercial element in its 2014 research report on 'Human trafficking involving marriage and partner migration to Australia': 'The recruitment, harbouring or receipt of persons through coercion, threat or deception, for the purpose of exploitation.'[42]

b) JUDICIAL DECISIONS

45. In his discussion of the evidence relating to whether an individual was guilty of slavery in the High Court of Australia decision in *R v Tang*, Gleeson CJ suggested that human trafficking could be viewed as having a commercial aspect in some cases: 'Whilst trafficking in persons for sexual or like purposes is an undeniable feature of modern population movements, equally, some such movements are undoubtedly economically motivated.'[43]
46. The importance of an expansive interpretation of human trafficking which includes consideration of economic conditions is seen in the Queensland Court of Appeal decision in *R v Dobie*. In construing section 271.2(2B)(c) of Australia's Criminal Code relating to deception of victims of sexual trafficking by a person, Fraser JA (with whom Culliane J and Lyons J agreed) stated that 'the provision was intended to have such a broad operation, including in relation to what might conventionally be regarded as *conditions of employment*' (italics added), further supporting his analysis with the fact that the provision was meant to fulfil Australia's obligations under the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.[44]

III. INCORPORATION OF THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS

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[41] Australian Institute of Criminology, 'About the AIC' (*AIC*, 2016) <http://www.aic.gov.au/about_aic.html> accessed 24 January 2016

[42] Australian Institute of Criminology, 'Human trafficking involving marriage and partner migration to Australia' (*AIC*, 2014) <http://www.aic.gov.au/media_library/publications/rpp/124/rpp124.pdf> accessed 24 January 2016, see page viii

[43] [2008] HCA 39, [79]

[44] [2009] QCA 394, [27]

47. Australia signed the Vienna Convention on Diplomatic Relations on 30 March 1962 and ratified the Convention on 26 January 1968.[45]
48. Via section 7 of the Diplomatic Privileges and Immunities Act 1967, 'the provisions of Articles 1, 22 to 24 (inclusive) and 27 to 40 (inclusive) of the Convention have the force of law in Australia and in every external Territory.'[46] The rest of section 7 contains mainly definitional provisions that do not modify the incorporation of article 31 of the Convention in Australian law.

IV. INSTANCES OF HUMAN TRAFFICKING FALLING UNDER THE COMMERCIAL ACTIVITY EXCEPTION OF DIPLOMATIC IMMUNITY IN ARTICLE 31(1)(c) OF THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS

49. There appear to be no reported cases in this area for Australia so far. One example where concerns for worker protection might have taken precedence over diplomatic immunity is a case where a migrant domestic worker (known by the pseudonym Cristina) received legal support from the humanitarian pro bono legal services group Salvos International. According to a June 2015 policy brief by the Salvation Army and the Walk Free Foundation, Australia's Fair Worker Ombudsman decided 'they could not pursue Cristina's complaint on the basis that her employer was covered by immunity', but she 'benefited from a precarious culmination of circumstances, including a supportive and trustworthy embassy, connection with the right NGO, and access to a legal provider willing and able to provide pro bono services.'[47]
50. While the same June 2015 policy brief mentioned in the previous paragraph further states that it took over 3 years before Cristina gained an outcome in

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[45] United Nations Treaty Collection, 'Vienna Convention on Diplomatic Relations' (*UN*, 2016) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en#EndDec> accessed 24 January 2016

[46] Australian Legal Information Institute, 'Diplomatic Privileges and Immunities Act 1967', (*Australian Legal Information Institute*, 2016) <http://www.austlii.edu.au/cgi-bin/download.cgi/au/legis/cth/consol_act/dpaia196736> accessed 24 January 2016

[47] The Salvation Army-Freedom Partnership and the Walk Free Foundation, 'Improving protections for migrant domestic workers in Australia: Discussion Paper, Policy Brief 1' (*Salvos*, 2015) <http://endslavery.salvos.org.au/wp-content/uploads/2015/02/Improving-Protections-for-Domestic-Workers-in-Australia.pdf > accessed 24 January 2016, see page 10

relation to her legal case,[48] it is not stated what the precise outcome was and it has not been possible to locate that outcome as Cristina is a pseudonym given to the migrant domestic worker in question to protect her identity.

51. There has also been a 2015 decision of Forrest J in the Supreme Court of Victoria which may evince an exception to diplomatic immunity where a diplomat's domestic worker, Jane Doe, had suffered severe sexual abuse.[49] The case demonstrated a robust stance on the issue of whether an award for damages in favour of Jane Doe which was handed down in an American court could be enforced in Australia. In dismissing the diplomat's complaint that she had been denied a trial on the merits in Australia, Forrest J stated that her request for a trial after two years of silence was 'opportunistic in the extreme.'[50] This ruling prompted mediation between the parties, eventually resulting in a seven-figure settlement in favour of Jane Doe.[51]

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[48] The Salvation Army-Freedom Partnership and the Walk Free Foundation, 'Improving protections for migrant domestic workers in Australia: Discussion Paper, Policy Brief 1' (*Australian Productivity Commission*, 2015) < http://endslavery.salvos.org.au/wp-content/uploads/2015/02/Improving-Protections-for-Domestic-Workers-in-Australia.pdf > accessed 24 January 2016, see page 11

[49] *Jane Doe v Linda Howard* [2015] VSC 75

[50] *Jane Doe v Linda Howard* [2015] VSC 75, [213]

[51] Steve Butcher, 'Melbourne woman settles claim over slavery, sex abuse claims by former maid at US Embassy in Tokyo' (*The Age*, 6 September 2015) < http://www.theage.com.au/victoria/melbourne-woman-settles-claim-over-slavery-sex-abuse-claims-by-former-maid-at-us-embassy-in-tokyo-20150905-gjftsp.html> accessed 29 January 2016

CANADA

I. THE PROHIBITION OF HUMAN TRAFFICKING

a) CRIMINAL LEGISLATION

52. Canada's prohibition on human trafficking is primarily enforced via four specific offences under section 279 of the Canadian Criminal Code: (i) trafficking in persons (section 279.01), (ii) trafficking of a person under the age of 18 years (section 279.011), (iii) receiving a Financial or Other Material Benefit for the purpose of committing or facilitating trafficking in persons – adult victims (section 279.02), and (iv) Withholding or Destroying a Person's Identity Documents in order to commit or facilitate trafficking of that person (section 279.03).[52]

53. In relation specifically to cross-border human trafficking, Canada has also put in place criminal legislation to prohibit it. The Immigration and Refugee Protection Act 2001 contains a specific sub-heading for 'Human Smuggling and Trafficking' which lists two offences: (i) it is illegal to 'knowingly organize the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of force or coercion' (section 118), and (ii) it is illegal to 'organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada' (section 117, with the severity of penalties increasing based on the number of people trafficked into Canada).[53]

54. Canada's prohibition on human trafficking is further supported by a host of general criminal offences which may be deployed to prosecute human traffickers depending on the circumstances. These include kidnapping, forcible confinement, uttering threats, extortion, assault, sexual assault, aggravated

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[52] Canadian Government, 'Kidnapping, Trafficking in Persons, Hostage Taking and Abduction' (*Canadian Government*, 21 January 2016) <http://laws-lois.justice.gc.ca/eng/acts/C-46/page-66.html#h-83> accessed 24 January 2016

[53] Canadian Government, 'Human Smuggling and Trafficking' (*Canadian Government*, 21 January 2016) <http://laws-lois.justice.gc.ca/eng/acts/I-2.5/page-22.html#h-69> accessed 24 January 2016

sexual assault, prostitution-related offences and criminal organization offences.[54]

b) INTERNATIONAL LAW

55. Canada's prohibition on human trafficking is bolstered by its participation in 2 UN legal instruments which seek to address human trafficking. On 13 May 2002, Canada ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.[55] Next, on 14 September 2005, Canada ratified the Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.[56]

56. Canada also participates in two instruments at the International Labour Organisation which address human trafficking and slavery: (i) the Abolition of Forced Labour Convention 1957 (ratified on 14 July 1959) and (ii) the Worst Forms of Child Labour Convention 1999 (ratified on 6 June 2000).[57]

c) POLICIES FOR DOMESTIC WORKERS IN DIPLOMATIC CONTEXT

57. Canada has developed policies to deal specifically with the threat of servitude of domestic workers in diplomatic households. These strategies (as at September 2015) are detailed concisely in the country report for Canada in a

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[54] Department of Justice, 'Legislation' (*Canadian Government*, 21 May 2015) <http://justice.gc.ca/eng/cj-jp/tp/legis-loi.html> accessed 24 January 2016

[55] United Nations Treaty Collection, 'Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime' (*UN*, 2016) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-a&chapter=18&lang=en> accessed 24 January 2016

[56] United Nations Treaty Collection, 'Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography' (*UN*, 2016) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11-c&chapter=4&lang=en> accessed 24 January 2016

[57] International Labour Organisation, 'Ratifications for Canada' (*ILO*, 2016) <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102582> accessed 24 January 2016

handbook published by the Organisation for Security and Cooperation in Europe.[58]

58. Canada's strategies can be understood in 3 categories: (i) Pre-arrival, (ii) Regulation during the posting, and (iii) Corrective measures should abuses occur.

i) Pre-arrival

59. The State from which the domestic worker is being sent must confirm the potential diplomatic employer can pay the employee's wages. Potential employees must be interviewed by the Canadian mission abroad responsible for issuing the temporary residency visa. At the interview, they will receive the pamphlet ''Accredited Domestic Workers in Diplomatic Households – About Your Rights and Protections," which provides information on the rights conferred upon domestic workers.[59]

(ii) Regulation during the posting

60. Canada's Office of Protocol regularly gathers data to monitor the situation regarding exploitation of domestic workers through systematic and random interviews with domestic workers throughout their stay. Employee wages must be paid by cheque or bank transfer, and proof of payment must be provided to the Office of Protocol by the employer upon request. The passport, identity card, employment contract and the other personal effects of the employee cannot be confiscated by the employer.[60]

(ii) Corrective measures should abuses occur

61. Diplomats who fail to respect the terms of the approved employment contract will be prohibited from hiring domestic workers in the future. Their entire embassy could also be banned from hiring domestic workers, especially where repeated or systematic breaches occur. To promote synergy across government agencies, the Canadian Police has also established the Human Trafficking National Coordination Centre as a point of contact for law enforcement

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[58] Organisation for Security and Cooperation in Europe, 'How to prevent human trafficking for domestic servitude in diplomatic households and protect private domestic workers' (*OSCE*, 2014) <http://www.osce.org/handbook/domesticservitude?download=true> accessed 24 January 2016

[59] Organisation for Security and Cooperation in Europe, 'How to prevent human trafficking for domestic servitude in diplomatic households and protect private domestic workers' (*OSCE*, 2014) <http://www.osce.org/handbook/domesticservitude?download=true> accessed 24 January 2016

[60] Organisation for Security and Cooperation in Europe, 'How to prevent human trafficking for domestic servitude in diplomatic households and protect private domestic workers' (*OSCE*, 2014) <http://www.osce.org/handbook/domesticservitude?download=true> accessed 24 January 2016

organisations endeavouring to stop activities by individuals and criminal organisations involved in human trafficking. Citizenship and Immigration Canada also helps protect human trafficking victims by securing their immigrant status with a special temporary resident permit of 180 days.[61]

II. THE COMMERCIAL NATURE OF HUMAN TRAFFICKING

62. State practice from the Canadian government which supports the commercial nature of human trafficking is mostly seen in government reports on the fight against human trafficking, and occasionally seen in judicial decisions.

a) NATIONAL ACTION PLAN

63. In his 'Foreword' to Canada's 2012 National Action Plan to Combat Human Trafficking, then-Minister for Public Safety Vic Toews stated that in human trafficking, 'The victims, who are mostly women and children, are deprived of their normal lives and compelled to provide their labour or sexual services, through a variety of coercive practices all for the direct profit of their perpetrators.'[62] The 'Introduction' to the 2012 Action Plan further notes that 'Traffickers reap large profits while robbing victims of their freedom, dignity and human potential at great cost to the individual and society at large. Traffickers control their victims in various ways such as taking away their identity documents and passports, sexual abuse, threats, intimidation, physical violence, and isolation.'[63]

b) ANNUAL REPORTS ON THE NATIONAL ACTION PLAN

64. A similar emphasis is seen in Canada's annual report for 2012–2013 on progress for the 2012 National Annual Plan. In the Introduction, it is stated that 'Human trafficking is a horrific crime that robs its victims of their most

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[61] Organisation for Security and Cooperation in Europe, 'How to prevent human trafficking for domestic servitude in diplomatic households and protect private domestic workers' (*OSCE*, 2014) <http://www.osce.org/handbook/domesticservitude?download=true> accessed 24 January 2016

[62] Canadian Government, 'National Action Plan to Combat Human Trafficking' (*Canadian Government*, 2012) <http://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ntnl-ctn-pln-cmbt/ntnl-ctn-pln-cmbt-eng.pdf> accessed 24 January 2016, see page 1

[63] Canadian Government, 'National Action Plan to Combat Human Trafficking' (*Canadian Government*, 2012) <http://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ntnl-ctn-pln-cmbt/ntnl-ctn-pln-cmbt-eng.pdf> accessed 24 January 2016, see page 3

basic human rights. A complex issue with a diverse range of victims and circumstances, it deprives individuals of their normal lives and forces them to provide their labour or sexual services through a variety of coercive practices - all for the direct profit of their perpetrators, who are often linked to gangs and organized crime.'[64]

65. In the latest annual report for 2013–2014 on progress with the 2012 National Action Plan, the definition of human trafficking adopted by the Canadian government suggests it is a commercial activity arising out of labour exploitation: 'Human Trafficking, often described as a modern-day form of slavery, involves the recruitment, transportation, harbouring and/or exercising control, direction or influence over the movement of a person in order to exploit that person, typically through sexual exploitation or forced labour.'[65]

c) DEPARTMENT OF JUSTICE DEFINITION

66. The definition of 'Human Trafficking' offered on the Canadian Department of Justice website also supports the view that human trafficking is a commercial activity arising out of labour exploitation. It states that, 'Human trafficking is often characterized as a "low risk/high reward activity" because of the fact that the crime is clandestine, therefore difficult to detect and investigate, which contributes to the relatively low prosecution rates worldwide. Victims can be exploited over and over for the financial or material benefit of the traffickers making this crime lucrative. The United Nations (UN) has estimated that this illegal activity generates approximately $32 billion (US) annually for its perpetrators.'[66]

67. The definition of 'Human Trafficking' offered on the same Canadian Department of Justice page also supports the aforementioned view when we consider the bases on which it suggests we draw the distinction between human trafficking and human smuggling: (i) 'smuggled persons are generally

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64 Canadian Government, '2012-2013 Human Trafficking Stakeholder Consultations - National Summary Report' (*Canadian Government*, 2013) <http://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2013-hmn-trffckng-stkhldr/index-en.aspx> accessed 24 January 2016

65 Canadian Government, 'National Action Plan to Combat Human Trafficking: 2013-2014 Annual Report on Progress' (*Canadian Government*, 2014) <http://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2014-ntnl-ctn-pln-cmbt-hmn/2014-ntnl-ctn-pln-cmbt-hmn-en.pdf> accessed 24 January 2016

66 Department of Justice, 'What is human trafficking?' (*Canadian Government*, 7 January 2015) <http://www.justice.gc.ca/eng/cj-jp/tp/what-quoi.html> accessed 24 January 2016

free to do what they want once they have arrived in the country of destination. In contrast, trafficked persons have their liberty curtailed and are compelled to provide their labour or services', and (ii) 'smugglers make their profits through the fees associated with their services. Traffickers, on the other hand, profit through exploiting the labour or services of trafficked persons.'[67]

d) COURT DECISIONS

68. The Canadian courts have been willing to consider human trafficking as a commercial activity arising out of labour exploitation in the course of statutory interpretation. In setting out the context for interpreting section 37 of the Immigration and Refugee Protection Act 2001, the Canadian Supreme Court noted that following the UN Human Trafficking Protocol human trafficking involved 'threats or use of force, abduction, deception, fraud or other forms of coercion against the trafficked person.'.[68]
69. The Canadian Federal Court has also applied the definition of human trafficking from the UN Human Trafficking Protocol which notes the idea of exploitation. They construe it as stating that 'human trafficking requires "exploitation". "Exploitation" is defined as including prostitution or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs: see Article 3."[69]
70. The view of human trafficking as involving exploitation is affirmed by MacLean J in the Provincial Court of British Columbia: it 'involves the use of force, fraud or deception, to compel a person to participate in the scheme to gain entry.'[70]
71. In its analysis of the meaning of 'exploitation' for the purposes of the human trafficking offences under section 279 of the Canadian Criminal Code, the Quebec Court of Appeal stated that: 'An objective test is used to assess the actions leading to the exploitation. Victims are caused to provide or offer to provide labour or services by engaging in conduct that, in light of the

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[67] Department of Justice, 'What is human trafficking?' (*Canadian Government*, 7 January 2015) <http://www.justice.gc.ca/eng/cj-jp/tp/what-quoi.html> accessed 24 January 2016

[68] *B010 v The Minister of Citizenship and Immigration*, [2015] SCC 58, [51]

[69] *Siregar v Canada*, 2010 FC 415, [18]

[70] *R v Ng*, 2006 BCPC 0111, [8]

circumstances, can reasonably be expected to cause the victims to believe that their safety or the safety of a person known to them would be threatened if they failed to provide or offer to provide the labour or services.' (Underlines in original)[71]

III. INCORPORATION OF THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS

72. Canada signed the Vienna Convention on Diplomatic Relations on 5 February 1962 and ratified the Convention on 26 May 1966.[72]

73. Canada's method of incorporating relevant provisions of the Convention into domestic law was through the Diplomatic and Consular Privileges and Immunities Act 1976–1977.[73]

74. This Act has since been superseded by the Foreign Missions and International Organizations Act 1991. Per section 16 of the Foreign Missions and International Organizations Act 1991 however, 'Every regulation and order made under the *Diplomatic and Consular Privileges and Immunities Act* or then *Privileges and Immunities (International Organizations) Act* that is in force immediately before the coming into force of this Act shall be deemed to have been made under this Act and shall remain in force until it is repealed or amended pursuant to this Act.'[74]

75. Under section 3(1) of the Foreign Missions and International Organizations Act 1991, the following provisions of the Convention have effect in Canadian law: 'Articles 1, 22 to 24 and 27 to 40 of the Vienna Convention on Diplomatic Relations, and Articles 1, 5, 15, 17, 31 to 33, 35, 39 and 40, paragraphs 1 and 2 of Article 41, Articles 43 to 45 and 48 to 54, paragraphs 2 and 3 of Article 55, paragraph 2 of Article 57, paragraphs 1 to 3 of Article 58, Articles 59 to 62, 64, 66 and 67, paragraphs 1, 2 and 4 of Article 70 and Article 71 of the Vienna Convention on Consular Relations, have the force of

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[71] *R v Urizar*, 2013 QCCA 46, [71]

[72] United Nations Treaty Collection, 'Vienna Convention on Diplomatic Relations' (*UN*, 2016) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en#EndDec> accessed 24 January 2016

[73] Stéphane Beaulac and John Currie, 'Canada', in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion* (OUP 2011) 133

[74] Canadian Government, 'Foreign Missions and International Organizations Act 1991' (*Canadian Government*, 2016) <http://laws-lois.justice.gc.ca/PDF/F-29.4.pdf> accessed 24 January 2016

law in Canada in respect of all foreign states, regardless of whether those states are parties to those Conventions.'[75]

IV. INSTANCES OF HUMAN TRAFFICKING FALLING UNDER THE COMMERCIAL ACTIVITY EXCEPTION OF DIPLOMATIC IMMUNITY IN ARTICLE 31(1)(c) OF THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS

76. There appear to be no reported cases in this area for Canada so far. One instance that may serve to indicate an emerging exception on diplomatic immunity is in the decision of the Ottawa Police to contact Canada's Department of Foreign Affairs and Trade on 30 April 2014 to seek a waiver of diplomatic immunity against a diplomatic couple from the Philippines.[76] The motive behind this decision of the police was that without a waiver, they could not issue warrants for their arrest.[77] However, on 5 May 2014, the Department of Foreign Affairs and Trade got back to the Ottawa police to say that the couple had already returned to the Philippines and Canada-wide warrants have been issued for the arrest of the Filipino diplomatic couple. [78]

FRANCE

I. THE PROHIBITION OF HUMAN TRAFFICKING

a) CONTEXTUAL BACKGROUND

77. Slavery was abolished in France in 1848. Under French law, "slavery" meant "legal bondage", but after its abolition, the word disappeared from French

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[75] Canadian Government, 'Foreign Missions and International Organizations Act 1991' (*Canadian Government*, 2016) <http://laws-lois.justice.gc.ca/PDF/F-29.4.pdf> accessed 24 January 2016

[76]Shaamni Yogaretnam and Ian Macleod, 'Diplomatic couple charged in Ottawa human trafficking case' (*Ottawa Citizen*, 20 May 2014)< http://ottawacitizen.com/news/local-news/diplomatic-couple-charged-in-ottawa-human-trafficking-case>accessed 29 January 2016

[77] Shaamni Yogaretnam and Ian Macleod, 'Diplomatic couple charged in Ottawa human trafficking case' (*Ottawa Citizen*, 20 May 2014)< http://ottawacitizen.com/news/local-news/diplomatic-couple-charged-in-ottawa-human-trafficking-case>accessed 29 January 2016

[78] Pilipino Express, 'Human trafficking charges laid against PH diplomat' (*Pilipino Express*, 16 May 2014) http://pilipino-express.com/news/2488-human-trafficking-charges-laid-against-ph-diplomat.html>accessed 29 January 2016

legislation and only remained criminalised as a crime against humanity under Article 212-1 of the Criminal Code[79]. This Article is only applicable to mass perpetrations of the offence, and not to isolated cases of enslavement[80].

78. Slavery of one or more person(s) in isolated contexts, outside of a wider concerted enslavement plan, was not incriminated in France until the 5 August 2013 legislation which introduced the slavery, servitude and forced labour provisions into the Criminal Code[81].

b) LEGAL BACKGROUND

i) The French Criminal Code

79. The new Criminal Code introduced more protections against enslavement. Article 224-1 prohibits the abduction of a person, Article 225-13 prohibits the abuse of a person's vulnerability, Article 225-14 protects persons from being subjected to living and labour conditions contrary to human dignity[82]. In addition, the labour regulations prohibit clandestine work and resorting to illegal workers (article L.324-9).
80. To sum up the relevant codified articles[83]:
    - **Article 212-1** criminalises enslavement as a crime against humanity[84].
    - **Article 225-4-1** criminalises human trafficking was also amended by the 5 August 2013 law[85].
    - **Articles 225-13** and **14** criminalise the act of subjecting someone to work and accommodation conditions which are contrary to human dignity, as well as the absence of remuneration, or insufficient remuneration[86].

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[79] Comité Contre l'Esclavage Moderne, « Pour une vraie abolition de l'esclavage - Mise en place des mécanismes de protection des femmes et des enfants victimes d'esclavage domestique» CCEM 1998, English version accessible at : http://www.esclavagemoderne.org/0034-nos-publications/24-page.htm, p.12

[80] Ibid, p12-13

[81] CCEM, « Que dit la loi française? » http://www.esclavagemoderne.org/0035-que-dit-la-loi-francaise/13-page.htm accessed 23 January 2016

[82] CCEM (n 1), p. 12

[83] Except where explicitly mentioned in a footnote, the translation of the Articles of the French Criminal Code is my own.

[84] CCEM (n 3)

[85] CCEM (n 3)

[86] CCEM (n 3)

- **Article 225-13**: Obtaining the performance of unpaid services or services against which a payment is made which clearly bears no relation to the importance of the work performed from a person whose vulnerability or dependence is obvious or known to the offender is punished by five years' imprisonment and by a fine of €150,000[87].
- **Article 225-14**: Subjecting a person, whose vulnerability or dependence is obvious or known to the offender, to working or living conditions incompatible with human dignity is punished by five years' imprisonment and by a fine of €150,000[88].

81. The major amendments made to the French Criminal Code by the 5 August 2013 legislation introduced the following articles:
    - **Article 224-1 A**- Enslavement: this is the act of exercising against a person one of the attributes of property rights. Enslavement of a person is punished by twenty years' imprisonment.
    - **Article 224-1 B**- Exploitation of an enslaved person is the act of committing against a person whose enslavement is obvious or known to the offender, a sexual aggression, sequestration, or submission to perform forced labour or forced services. Exploitation of an enslaved person is punished by twenty years' imprisonment.
    - **Article 225-4-1-** Trafficking in persons is the act of recruiting a person, transporting, transferring, accommodating or hosting this person with the objective of exploiting this person in one of the following circumstances:
        - Either with threats, constraints, violence or painful means, aiming at the victim, his/her family, or a person in a relation with the victim
        - Either by a legitimate ascendant of this person, natural or adoptive of this person, or by a person who has authority on him/her or abuses the authority conferred upon them by their occupation,
        - Either by the abuse of a situation of vulnerability due to the age, sickness, invalidity, physical or psychic deficiency, pregnancy of the victim (either obvious or known to the offender)
        - Either in exchange or in granting of a remuneration or any other advantage or promise of remuneration or advantage.

[87] Translation of the French Criminal Code by Légifrance

[88] Translation of the French Criminal Code by Légifrance

The exploitation mentioned in the first paragraph of this Article is the act of putting the victim to the offender's disposition or to the disposition of a third person, even non-identified, so as so permit the perpetration against the victim of infractions of procuring, sexual aggression or abuse, enslavement, submission to forced work or services, submission to servitude, removal of one of his/her organs, exploitation of mendicancy, work or hosting conditions contrary to his/her dignity, or to force the victim to commit any crime or delict.

Human trafficking is punished by seven years' imprisonment and 150 000 euros of fine.

82. Trafficking in human beings or a minor of age is constituted even if not committed in any of the circumstances prescribed in the four paragraphs. It is punished by ten years' imprisonment and 1 500 000 euros of fine.
    - **Article 225-14-1**- Forced labour is the act, through violence or threat, of forcing a person into accomplishing work without remuneration or in exchange of a remuneration which clearly bears no relation to the importance of the work accomplished. This is punished by seven years' imprisonment and a fine of 200 000 euros.
    - **Article 225-14-2**- reduction to servitude is the act of submitting, routinely, someone whose vulnerability or dependence are obvious or known to the offender, to the infraction prescribed in article 225-4-1. It is punished by ten years' imprisonment and a fine of 300 000 euros.

ii) International instruments binding upon France

83. France is a party to:
    - 2005 Council of Europe Convention on Action against Trafficking in Human Beings (ratified by France in 2008)
    - 2000 UN Convention against Transnational Organised Crime (Ratified by France in 2002; no reservations, no declarations)
    - 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (ratified by France in 2002; no reservations, no declarations)
    - 1930 ILO Convention on Forced Labour (ratified by France in 1937 without declarations or reservations)
    - 1989 UN Convention on the Rights of the Child – France signed and ratified the Convention in 1990 and entered the following declaration:

(1) The Government of the French Republic declares that this Convention, particularly article 6, cannot be interpreted as constituting any obstacle to the implementation of the provisions of French legislation relating to the voluntary interruption of pregnancy.

(2) The Government of the Republic declares that, in the light of article 2 of the Constitution of the French Republic, article 30 is not applicable so far as the Republic is concerned.

(3) The Government of the Republic construes article 40, paragraph 2 (b) (v), as establishing a general principle to which limited exceptions may be made under law. This is particularly the case for certain non-appealable offences tried by the Police Court and for offences of a criminal nature. None the less, the decisions handed down by the final court of jurisdiction may be appealed before the Court of Cassation, which shall rule on the legality of the decision taken.

- 2000 Optional Protocol on the Rights of the Child on the sale of children, child prostitution and child pornography- France signed it in 2000, ratified it in 2003

iii) France's position on human trafficking and enslavement

84. At the international level, France has supported the UN-GIFT (UN Global Initiative to Fight Human Trafficking) initiative when it was launched. It also supported the UN Global Plan of Action to Combat Trafficking in Persons, which was launched in 2010.

85. At the national level, an inter-ministerial mission finalised a national plan of action for the period of 2014-2016 to combat human trafficking. This plan was adopted in May 2014 by a Council of ministers[89]. The plan contains 23 measures aimed at enhancing the identification of victims, facilitating assistance to them, prosecuting offenders and dismantling the networks, and finally, ensuring that the prevention of human trafficking will be fully considered on the public sphere[90]. The plan focuses primarily on victims of sexual exploitation, but also aims at preventing domestic servitude by informing and orientating the victims and vulnerable groups. The plan states that it also aims

[89] Le Sénat, 'Projet de loi autorisant la ratification du protocole relatif à la convention n° 29 de l'Organisation internationale du travail sur le travail forcé, 1930', accessible at : < http://www.senat.fr/rap/l15-317/l15-3173.html>

[90] Ministère des droits des femmes, de la ville, de la jeunesse et des sports, 'Plan d'Action National Contre la Traite des Etres Humains (2014-2016)', p. 5

[91] Ibid p. 9

at facilitating the contact with victims of exploitation in the private sphere[91]. It does not elaborate further on this point though.

II. THE COMMERCIAL NATURE OF HUMAN TRAFFICKING

a) FORCED LABOUR

86. France is bound by the ILO Conventions No.9 and 105 in relation to forced labour, but the No.29 Convention definition has not been transposed in its exact wording in France. France is also a party to the Palermo Convention and Protocol.

87. As mentioned above, the French Criminal Code contains two Articles, 225-13 and 225-14, which prohibit taking advantage of services which are not remunerated or which are under-paid; and which also prohibit imposing work conditions or living conditions which are contrary to human dignity. These two infractions rest on the common notions of "abuse of vulnerability" and "dependence of the person"[92]. For the sake of these two Articles, it is irrelevant whether the victim consents or not, because in French law, the consent of a vulnerable person is not valid[93].

b) ILLEGAL WORK

88. France is not a party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990.
89. At the domestic level, illegal work is prohibited by the legislation n97-210 of 11 March 1997, which identifies eight major forms of illegal work, three of which are of particular interest to the present research:
    - dissimulated work (Articles L8221-1, L8221-2, L8221-3, L8221-4, L8221-5, L8221-6-1)
    - the illegal sharing of workers (Articles L8241-1 and L8241-2)
    - frauds regarding the introduction and recruitment of foreign workers (Articles L8251-1, L8251-2)[94]

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[92] Gao Yun and Véronique Poisson, Le trafic et l'exploitation des immigrants chinois en France (Bureau International du Travail 2005), p. 13

[93] Ibid p.14

[94] Ibid p. 15

90. In Particular, Article L8252-1 and L8252-2 protect the rights of the foreign worker who has been illegally recruited and employed. The worker will be treated as a worker legally employed so as to benefit from certain protections (in relations to the working hours, to the health and security at work provisions, the right to annual leave…) normally granted by the French labour law. The worker will also have the right to be paid the salary due to him from the moment the illegal work started.

c) CASE LAW ON ARTICLE 225-4-1

i) Cour de cassation - Chambre criminelle n° 5705, 16 décembre 2015 (14-85.900)

91. This case concerned a thirteen year old girl, V. Z., who had been 'given away' by her father to a man, M. X., who wanted to marry her to his son A. In exchange for her daughter, the father was given 120 000 euros. M. X. also wanted to use her to work within a team of thieves. At first instance, M. X. was found guilty of the offence of human trafficking under Article 225-4-1 of the Criminal Code. He appealed and his appeal was successful. The case was finally considered by the *Cassation Court*, which restored the finding of guilty. The *Cassation Court* held that the lower court had erred in finding that, although immoral, the conduct of the accused did not fall within the scope of article 225-4-1. The Cassation Court took the view that one of the objectives behind article 225-4-1 was to eradicate the trade in human beings in order to combat offences of enslavement which are particularly destructive to human dignity and which are inscribed in a context of global economic instability. It also said that the 'mercantile aspect' of an arranged marriage, even if it is a cultural practice, is shocking, and therefore the seriousness of this offence should not be minimised. On this basis, it found M. X. guilty under article 225-4-1 of the Criminal Code.

III. INCORPORATION OF THE 1861 VIENNA CONVENTION ON DIPLOMATIC RELATIONS

92. France ratified the 1961 Vienna Convention on Diplomatic Relations on 31 December 1970. It made the following declarations and reservations:

"**France**

The Government of the French Republic considers that article 38, paragraph 1, is to be interpreted as granting to a diplomatic agent who is a national of or permanently resident in the receiving State only immunity from jurisdiction, and inviolability, both being confined to official acts performed by the said diplomatic agent in the exercise of his functions".

93. France ratified the 1963 Vienna Convention on Consular Relations and filed no declarations or reservations.

a) STATE LIABILITY FOR IMPLEMENTATION OF INTERNATIONAL CONVENTIONS

94. The *Conseil d'Etat*, the highest administrative jurisdiction in France, held in *Dame Kirkwood* (CE, 30/05/1952) that international conventions are a source of internal law, on the same basis as domestic legislation. Later, the Article 55 of the 1958 French Constitution gave international conventions regularly ratified priority over domestic legislation.

IV. INSTANCES OF HUMAN TRAFFICKING FALLING UNDER THE COMMERCIAL ACTIVITY EXCEPTION OF DIPLOMATIC IMMUNITY IN ARTICLE 31(1)(c) OF THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS

a) CONTEXTUAL INFORMATION

95. The Comité Contre l'Esclavage Moderne (CCEM), an independent organisation which assists victims of human trafficking in France, conducted a study between 1998 and 2006 demonstrating that 21% of employers exploiting domestic workers in France benefitted from diplomatic immunities[95].

b) THE EUROPEAN COURT OF HUMAN RIGHTS

i) CN and V v. France, 201296

96. **Facts**: The applicants were two sisters, C.N and V., of French nationality, born in 1978 and 1984 in Burundi. Their parents had been killed during the civil war

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[95] CCEM, Lettre Trimestrielle n31 – Octobre 2007, accessible at http://www.esclavagemoderne.org/media/ee31.pdf

96 C.N. and V. v France, App no 67724/09 (ECtHR, 11 October 2012)

which started in Burundi in 1993. One sister arrived in France in 1994, the other in 1995. In France they lived with their uncle and aunt, who were Burundi nationals and who obtained the legal custody of the two sisters. They alleged that they were force to take care of all domestic chores, without any remuneration and without any days of leave or rest. C.N. affirmed that she also had to take care of her aunt and uncle's disabled son, whether during daytime or night-time. They also alleged that they did not have access to a bathroom, thus living in poor hygiene conditions. V. started to go to school in 1995. After school she would usually do her homework and help her sister with domestic chores. They were not admitted at the family table and were often subjected to physical or verbal bullying, under threats of being sent back to Burundi.

97. **The domestic proceedings**: in 1995, a public departmental service for social action reported the situation to the prosecutor (*Procureur de la République*) of Nanterre, but the file was classified without any further action being taken following an inspection by the specialised police organ.

98. In 1999, an association called "Enfance et Partage" reported the situation to the Prosecutor of Nanterre, as the sisters had ran away and were now being cared by this association.

99. M. M. was the sisters' uncle and was a former minister of the government of Burundi as well as a civil servant for the UNESCO. In January 1999, the prosecutor of Nanterre requested the waiver of the diplomatic immunity of M. M. to the general director of UNESCO. The request was granted on an exceptional basis and in the context of an investigation into the suspicion of maltreatment. The immunity of M.M.'s wife was also waived.

100. In February 2001, the *juge d'instruction* of the *tribunal de grande instance* (a first instance jurisdiction) of Nanterre sent the case back to the correctional court (*tribunal correctionnel,* a first instance criminal court) confirming the charges of intentional violence against a minor below 15 by a person in authority, having engendered a work incapacity of less than 8 days (Article 222-13 of the Criminal Code); and of submission of persons to living or work conditions which are incompatible which human dignity, by abusing of their vulnerability or their situation of dependence (Articles 225-14 and 225-15 of the Criminal Code).

101. In 2003, the court of appeal of Versailles examined the scope of the immunity waiver and declared that the immunity was deprived of its effects, holding that:

"Considering that the explicit terms of the letter (dating 20 January 2003) addressed to the Court by the person in charge of the service of the protocol of the Ministry of Foreign Affairs, on behalf of the Minister who has the capacity to interpret and appreciate the scope of the immunity granted to diplomats, enabled the waiving of any doubts as to the situation of M. M. ; as a result of M.M. having ceased his functions at the UNESCO in November 2001, regarding acts committed outside of the exercise of his functions he does not benefit from diplomatic immunity; and therefore there is no obstacle to prosecution."[97]

102. The Criminal Court of Nanterre convicted both Mr and Mrs M. of all the charges against them in September 2007. Nevertheless, The Court of Appeal of Versailles only upheld the charge of aggravated assault held against Mrs. M. Mrs M. was ordered to pay a criminal fine of 1,500 euros to V; together with the sum of one euro as compensation for non-pecuniary damage. The applicants lodged an appeal to the Criminal Division of the Court of Cassation which dismissed it on 23 June 2010; and the prosecutor did not appeal against the judgment. It should be noted nevertheless that the Court of Cassation only decided the civil aspects of the case to do with enslavement and forced labour. The criminal aspects related to the physical violence which, as will be explained in the next session, the Strasbourg Court considered to be a separate question from that of enslavement or forced labour.

103. The Strasbourg Court's decision**:** the applicants relied on Articles 3, 4 and 13 in their complaints before the Strasbourg Court. The Court found no violation of Article 3 as Mrs. M. had been condemned for aggravated assault before the domestic jurisdiction.

104. The Court held that France had failed to fulfil its obligations under Article 4 of the Convention: the French criminal law did not provide adequate and effective protection to victims of servitude and forced labour. It found the French legislation insufficient in these regards, especially as in this particular case, the *Cour de Cassation* had ultimately only decided on the civil aspects of the case with regards to the offences of enslavement and forced labour, granting no criminal law protection to the victims. France had breached its obligations under Article 4 of the ECHR.

105. Prior to this case, France had already been condemned for a violation of Article 4 of the ECHR by the European Court of Human Rights in the case *Siliadin v*

[97] The translation is my own.

France[98], in 2005. This latter case did not involve the question of diplomatic immunities. In *Siliadin*, a minor girl from Togo had been reduced to servitude by host families in France. The Court noted that France had not criminalised domestic servitude or domestic enslavement in its domestic legislation.

106. As noted in the precedent sections; those condemnations by the Strasbourg Court led France to modify its legislation and to introduce new criminal offences in the context of domestic servitude (namely the 2013 legislation).

c) DOMESTIC LAW

107. There is no extensive case law on the matter. One of the most interesting and relevant cases is a decision handed down by the *Conseil d'Etat*, the highest French administrative court, in CE 11 février 2011, *Mlle Susilawati*. This case concerned the objective responsibility of the French government for the incorporation of international conventions which lead to an inequality in bearing public burdens. As noted by Christian Tomuschat, in the case of *Mlle Susilawati*, where the final judgment concerned outstanding payments from work contracts which could not be executed against the diplomatic agents protected by immunity, "the courts ordered the French state to assume the financial burden on grounds of objective responsibility. This is not a requirement to be derived from international law but constitutes an ingenious solution reconciling traditional inter-state law and requirements stemming from the human rights concept."[99]

i) CE 11 février 2011, Mlle Susilawati.

108. The facts. Miss Susilawati was a domestic employee of Mr. Macki, a diplomat representative of the Sultanate of Oman before the UNESCO. Miss Susilawati was in reality the victim of forced labour. She successfully sued the diplomat in the civil court to obtain reparation. Nevertheless, she never obtained any form of damages because the diplomat benefitted from a form of immunity of execution, which is a form of immunity which prevents the execution of any decisions taken by a civil court. Mr. Macki had ceased to benefit from his immunity since 2005 and had left the country which made the execution of the court's decision very difficult in practice. Miss Susilawati brought her complaint before the administrative court to obtain damages against the state on the

[98] Siliadin v. France, Application no. 73316/01 (ECtHR, 26 October 2005)

[99] Christian Tomuschat, Human Rights: Between Idealism and Realism (3rd ed. OUP 2014), p. 417

ground of equality before public burdens; but both this court and the administrative court of appeal rejected her claim. Her case finally arrived before the *Conseil d'Etat* which considered that she had the right to obtain reparation for the prejudice suffered due to the immunity granted by the state to Mr. Macki[100].

109. The decision**.** The *Conseil d'Etat* held that the source of Miss Susilawati's prejudice was to be found in the application of the 1961 Vienna Convention. The *Conseil d'Etat* clarified the conditions which must exist for Miss Susilawati to be able to obtain reparation: firstly, the relevant international convention, that is the 1961 Vienna Convention, must have been validly incorporated into domestic law. Otherwise, it cannot attract the liability of the government. The *Conseil* held that the 1961 Vienna Convention had indeed been regularly incorporated into French law. Secondly, if the relevant international convention explicitly rejects the liability of the state for reparation for damages suffered, there can be no such liability. The *Conseil* held that the 1961 Vienna Convention did not reject the government's liability in damages. Finally, the *Conseil* held that there must be a causal relation between the Convention and the prejudice suffered by Miss Salawati.

110. The *Conseil* also rejected the lower courts' finding that Miss Susilawati could not obtain damages because her case was based upon an exception referred to as "accepted risk". The lower courts had considered that when she entered into the contractual relationship with her employer, Miss Susilawati knew he was a diplomat and could therefore have foreseen that, due to his diplomatic immunities, she would be barred from obtaining damages against him. The *Conseil* rejected this interpretation, both on the basis of her precariousness and on the basis that she could not be held to have renounced to the essential elements of her employment contract, i.e. her rights to the salary she was entitled to.

111. The *Conseil* also held that, in order to be entitled to damages, her prejudice should be special. This means that only a limited number of people must suffer from this prejudice within the community; otherwise there can be no issue of "inequality before public burdens". In this case the *Conseil* held that the number of victims was small and therefore her prejudice was special.

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[100] Alain Pellet and Alina Miron, *Les Grandes Décisions de la Jurisprudence Française de Droit International Public* (Dalloz 1998), chapter 10

112.The *Conseil* held that the State was liable to pay Miss Susilawati 33, 380, 55 euros in damages.

113.Following two condemnations by the Strasbourg Court in *Saliadin* and in *C.N. and V.*, France modified its legislation in 2013 to incorporate further protections in its criminal law for victims of offences of enslavement, human trafficking, and servitude.

114.The *Melle Susilawati* case was a cornerstone decision. It established that the French government can be strictly liable (or *objectively responsible*) when an international treaty regularly incorporated into domestic law leads to an inequality before public burdens. In this particular case, the *Conseil d'Etat* found that the length of the legal proceedings and the obstacle formed by the *immunity of execution* granted to Mr. Macki engaged the responsibility of the state which was liable to pay Melle Susilawati financial damages for the prejudice suffered.

ii) Freeborn v Fou Pei Kouo

115.In *Freeborn v Fou Pei Kouo* the claimant, Mrs Freeborn, was sub-letting an apartment to the defendant, a diplomat; one of the terms of the sub-lease was that the claimant retained one room for her private use. The defendant subsequently refused to let her enter the apartment. The claimant asked the court to order the defendant to admit her: the defendant pleaded diplomatic immunity. The court, the Tribunal Civil de la Seine, held:

116.'The inviolability of a diplomatic agent involves immunity from all jurisdiction, for the protection of his person and of the goods necessary to the exercise of his functions. It cannot apply to the factual and legal situation existing in the present case, where the property of a third party alone is in question. The diplomat is preventing that third party from enjoying her property, outside the framework and the requirements of his mission. The defendant is acting as a private individual in refusing Mrs. Freeborn access to the contested room. That room cannot be considered either to be his domicile or to be necessary for the exercise of his functions.'[101]

[101] *Freeborn v Fou Pei Kouo* (1949) Annual Digest Case No 97 p 286–7.

GERMANY

I. THE PROHIBITION OF HUMAN TRAFFICKING

a) GERMAN CRIMINAL CODE

117. Human trafficking is criminalised under German law through §§ 232, 233 of the German criminal code (StGB). These provisions are intended to implement Germany's international obligations to combat human trafficking.[102] Whereas § 232 StGB deals with human trafficking (*Menschenhandel*) for the purpose of sexual exploitation, § 233 StGB criminalises human trafficking for the purpose of exploitation of labour. The latter includes slavery and serfdom, as well as the exploitation of a 'condition of predicament' (*Zwangslage*) or vulnerability (=Hilflosigkeit) or employment under working conditions which are noticeably out of proportion/out of balance in comparison to those of other employees. Therefore, the definition of the offence is relatively broad (drafted in accordance with the Palermo Protocol 2000), though there are a number of elements which must be proved in relation to the conditions in which the victim found themselves.

118. The penalty for an offence under § 233 StGB is a prison sentence between 6 months and 10 years. § 233 III states that § 232 III-V apply – § 232 III envisages a sentence of minimum a year for 'aggravated' or 'grave/serious' forms of human trafficking (*schwerer Menschenhandel*). These are situations in which 1) the victim is a child; 2) the perpetrator has seriously physically abused the victim or 3) *where the perpetrator has committed the offence on a commercial basis* (*gewerbsmäßig*) or as a member of a gang which commits such acts.

119. Note that there are proposals to amend § 233 so that it covers any kind of exploitation (rather than just exploitation of labour) and in particular to cover circumstances in which victims are forced to commit unlawful acts or beg, as well as to cover trafficking for the purposes of organ 'harvesting'. These changes are mainly intended to implement EU Directive 2011/36/EU.

[102] Fischer, Strafgesetzbuch und Nebengesetze (Kommentar), 56. Auflage 2009, § 232 Rn. 2

b) PRACTICE UNDER § 233 StGB

120. § 233 StGB has only been in force since 2005 and there is therefore little case-law on the topic and little to be found on 'state practice' more generally. Indeed, NGO 'Bundesweiter Koordinierungskreis gegen Menschenhandel e.V.' reports that there have so far been very few (32) investigations into human trafficking on the basis of these provisions.[103]

121. However, there are a number of things which may be of interest in the case-law. To constitute an offence, the conduct in question must involve the *bringing* of the victim into a position as that described in § 233, ie it is not enough to merely find the victim in such a situation and benefit from their position (BGH, 13.01.2010 - 3 StR 507/09).The condition of 'Zwangslage' (predicament/ condition of predicament) has been interpreted broadly by the Supreme Court to include 'precarious economic conditions' in the home country (BGH, Urteil vom 16.7.2014 - 5 StR 154/14)

122. An interesting domestic worker case is AG Köln, Urteil vom 24.10.2007 which illustrates which factors appear to be relevant in sentencing – here it appeared that the fact that the abuse happened over a long period of time and included not only non-payment of wages but also the imposition of other unacceptable working conditions was weighed in favour of a higher sentence.

c) LAW ON RESIDENCE

123. § 25 4a AufenthG provides that victims of trafficking (under § 232, 233) should be granted a residence permit (of at least one year - § 26 I S.3 AufenthG) under particular conditions, namely if: 1) criminal proceedings against the perpetrators would be made more difficult without their testimony; 2) the person in question has severed all connection to the perpetrator; 3) and has declared their willingness to give testimony in criminal proceedings. After criminal proceedings are concluded, a residence permit can be granted for humanitarian or personal reasons or on grounds of matters of public interest which require the presence of the person in the country.

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[103] Bundesweiter Koordinierungskreis gegen Menschenhandel e.V, Menschenhandel in die Arbeitsausbeutung - Frauenhandel in die Arbeit: http://www.kok-gegen-menschenhandel.de/menschenhandel/in-die-arbeitsausbeutung.html (accessed 25 January 2016).

d) CLAIMS IN CIVIL LAW

124. Victims of trafficking have their normal claims under civil law such as unpaid wages (on the basis og § 611 Bürgerliches Gesetzbuch/BGB), holiday pay and other compensation (eg on the basis of §§ 280, 249ff BGB). Domestic workers are protected by employment legislation, bar a couple of exceptions (such as § 18 I 3 of the Arbeitszeitgesetz / Working time law; § 1 II 1 Arbeitsschutzgesetz & § 17 I Arbeitssicherheitsgesetz).

e) STATE COMPENSATION

125. Victims of trafficking might also be entitled to compensation under § 1 Opferentschädigungsgesetz (law for the compensation of victims) if they were also the victims of acts of violence such as physical abuse, and suffered an 'injury to health' (*gesundheitliche Schädigung*).

II. THE COMMERCIAL NATURE OF HUMAN TRAFFICKING

126. It is notable that the word used in the translation of term 'commercial activity' in Art 31(1)(c) of the Vienna Convention on Diplomatic Relations is '*gewerbliche* Tätigkeit' (=commercial activity) – and, as stated above, one of the conditions for an aggravated human trafficking under § 233 StGB is if it is done on a commercial basis, the relevant term in German being 'gewerbsmäßig' (=commercial). This suggest that a commercial aspect of human trafficking is clearly recognised – however, the argument could also be made that, since this is an 'aggravating' factor, it means that there are also forms of human trafficking which are not done on a commercial basis.

Gesetz zu dem Wiener Übereinkommen vom 18. April 1961 über diplomatische Beziehungen von 6. August 1964 *(Law on the Vienna Convention of 18 April 1961 on diplomatic relations, 6 August 1964).*

*127.*Article 1 of this Law declares the ratification of the Vienna Convention on Diplomatic Relations. Article 2 gives the required authorisation to the German Parliament to implement Art 47 (2) of the VCDR. There are no modifications.

III. INCORPORATION OF THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS

a) § 18 Gerichtsverfassungsgesetz (GVG)

128.§§ 18 – 20 GVG incorporate the Vienna Convention on Diplomatic Relations into German law (without modification). They are the so-called Befreiung von der deutschen Gerichtsbarkeit (exemption from German jurisdiction).

129.§ 18 GVG (Befreiung für Mitglieder diplomatischer Missionen / exemption for members of diplomatic missions) incorporates the provisions on diplomatic immunity under the Vienna Convention on Diplomatic Relations into German law (without modifications). It states that the members of diplomatic missions to which the law applies, their family members and private domestic workers (=Hausangestellte) are exempted from German jurisdiction in accordance with the VCDP and that this is the case even when the home state of the diplomat is not party to the VCDP.

130.Note also that, in accordance with Article 39 VCDP, the immunity comes to an end when the relevant person has left the country, apart from with respect to acts performed by such a person in the exercise of his functions as a member of the mission. This was key in case BAG Urt. v. 22.08.2012, Az: 5 ARZ 949/11 on domestic workers in diplomat households (see below), where it was considered that the immunity had ceased to apply as the act was <u>not</u> performed by the person in the exercise of his functions as a member of the mission.

IV. INSTANCES OF HUMAN TRAFFICKING FALLING UNDER THE COMMERCIAL ACTIVITY EXCEPTION OF DIPLOMATIC IMMUNITY IN ARTICLE 31(1)(c) OF THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS

131.There is no case-law which specifically relates either to instances of human trafficking falling under the Art 31(1)(c) exception.

132. However, there is one case that could be of interest because it involves very similar facts to *Reyes v Almalki* and which seems to have gained much prominence in the media in 2011-2012. It is not a criminal law case under § 233 StGB, but involves the claims of a domestic worker from Indonesia in civil law (unpaid wages and other types of compensation) against her employer, an attaché of the Saudi Arabian embassy in Berlin.

133. The judgment of the Landesarbeitsgericht Berlin sets out the facts and arguments of the claimant (LAG Berlin-Brandenburg, Urteil vom 9. November 2011, Az. 17 Sa 1468/11 – an appeal from the first instance employment court which had ruled that the claim was barred on the basis of § 18 GVG). The claimant had worked in the household of the relevant diplomat for about 19 months, had not been paid or received time off, her passport was withheld from her and she had been physically abused on occasions by various members of the household (see para. 5 of the judgment). Her appeal was against the ruling of the first instance court that the case fell outside German jurisdiction on the basis of § 18 GVG (diplomatic immunity, see above), and was dismissed by the LAG. She pursued a number of different lines of argument:

134. That immunity under § 18 GVG only applied to criminal liability and not to claims made in civil law – this was rejected by the LAG which stated that there is no basis on which to distinguish between criminal and civil liability for the purposes of diplomatic immunity.

135. That there was no immunity against claims in civil law in the case of grave human rights violations (=schwere Menschenrechtsverletzungen) – this was also rejected by the LAG, which firmly stated that the existence of diplomatic immunity *does not depend on the gravity of the violation* (by reference to a decision of the German Constitutional Court: BVerfG, Beschluss vom 10. Juni 1997 – 2 BvR 1516/96 – BVerfGE 96, 68 zu II. 2. a). In particular, it rejected the relevance of international human rights norms for the relationship between the parties, as the relationship (on which the particular claim was based) was determined solely in accordance with private law principles (para 20).

136. That the diplomat had forfeited or waived (=verwirkt) their immunity through particularly serious violations – which was rejected on the same basis as 2. namely that the gravity of the violation does not affect immunity.

137. That the exemption from German jurisdiction under § 18 GVG here was unconstitutional as it violated Article 14 of the Grundgesetz (= the German constitution) which protects the right to property – this was also rejected on the

basis that § 18 does not affect the existence of claims (ie does not affect property rights) but their enforceability, which does not fall within the scope of Art 14 GG.

138. That the exemption from German jurisdiction under § 18 GVG here was unconstitutional as it violated Article 20 III of the Grundgesetz (the 'Rechtsstaatsprinzip' = rule of law). The LAG stated that the Rechtsstaatsprinzip/rule of law covers the right of access to a court, which was affected in this case. It then went on the assess the proportionality of the interference with this right on a very similar basis to the CA in *Reyes*, and came to the conclusion that interference was proportionate given the importance of diplomatic immunity for cooperation and maintenance of good relations between states (emphasis is on the public interest which outweighs the interest of the individual, para 30ff). An important factor in the balancing exercise seems to have been the fact that the claim is not prevented from arising and that it can still be enforced against the other party once they have left the country (in accordance with Art 39 VCDP).

139. This seems to have been a very disappointing judgment for the claimant and for human rights organisations working with domestic workers and victims of trafficking/forced labour. However, the BAG (=Bundesarbeitsgericht) allowed an appeal from this judgment (BAG Urteil vom 22.8.2012, 5 AZR 949/11). It stated that the claim was enforceable as diplomatic immunity had come to an end in accordance with the provisions of Art 39 (2) VCDR, and referred the case back to the first instance court – however, the case was settled before it came to court again. What is interesting, however, is the following:

> 3. The question can be left open of whether – as the claimant alleges – the immunity of the defendant was, exceptionally, limited with respect of the gravity of the accusations raised and the alleged hopelessness of pursuing [her] rights in the sending state, as the defendant was in any case no longer exempted from German jurisdiction at the time of the decision of the appeal. His immunity ceased with leaving the country in accordance with Art 39 (2) VCDP[104].

[104] 3. Es kann dahinstehen, ob - wie die Klägerin meint - die Immunität des Beklagten im Hinblick auf die Schwere der erhobenen Vorwürfe und der behaupteten Aussichtslosigkeit der Rechtsverfolgung im Entsendestaat ausnahmsweise eingeschränkt war, denn der Beklagte ist jedenfalls zum Zeitpunkt der Entscheidung über die Revision nicht mehr von der deutschen Gerichtsbarkeit befreit. Seine Immunität endete gemäß Art. 39 Abs. 2 WÜD mit der Ausreise (vgl. Prütting/Gehrlein/Bitz ZPO 4. Aufl. § 18 GVG Rn. 9).

140. This, in rough translation, states that the question of whether immunity can, in exceptional circumstances, be limited in view of the gravity of the accusations and the difficulty/hopelessness of pursuing a claim in the 'sending' state does not need to be decided/can be left open ('Es kann dahinstehen') in the case as immunity had in any event ceased. That is, the court was not as dismissive of the claims based on the seriousness of the offence as the LAG, leaving open the possibility that such an argument might succeed in the future.

INDIA

I. THE PROHIBITION OF HUMAN TRAFFICKING

a) CONSTITUTIONAL PROVISIONS

141. The Indian Constitution, as a part of the fundamental rights guaranteed to its citizens, explicitly prohibits the traffic of persons and "other similar forms of forced labour."[105] Trafficking has occurred in the Indian context due to two primary reasons – first, the trafficking of human beings for the purpose of forced labour, involuntary servitude or bonded labour through coercion, fraud or duress in agricultural and industrial sectors, domestic work, the entertainment sector and beggary; and second, for the purposes of commercial sexual exploitation under coercion, fraud or duress.[106]

142. The Constitution also prohibits child labour in factories and other forms of hazardous employment.[107] Child labour is inextricably linked with human trafficking and forced labour, considering the socio-economic demographic from which such children are employed. Thus there exists a normative commitment to the prohibition of any form of forced labour and human trafficking.

143. The Constitution also provides for the Parliament to pass laws related to the punishment of contravention of this prohibition, and ensures that state legislatures cannot modify the same.[108]

b) LEGISLATION

144. The prohibition / abolition on bonded labour and human trafficking is further expressed through key central legislations as follows.

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[105] Article 23(1), Indian Constitution, 1950.

[106] Stanford Human Trafficking India, Final Report, available at :https://asiafoundation.org/resources/pdfs/StanfordHumanTraffickingIndiaFinalReport.pdf

[107] Article 24, Indian Constitution, 1950.

[108] Article 35(a)(ii), Indian Constitution, 1950.

i) Bonded Labour System (Abolition) Act, 1976[109]

145.Although the Constitution prohibits bonded labour 'begar,' it was clear that the practice was still being carried out with a remuneration of minimal to no wages and hence the President at the time promulgated an ordinance to bridge the gap in the law, which was later introduced in Parliament as a bill and passed. The Act ensures that the system of 'begar' be abolished, and that the persons who were forced labourers, were discharged from debt and labour obligations. Moreover it also provides for a degree of protection from being evicted from their housing. It also provides for Vigilance Committees to be set up in order to ensure that the implementation of the Act takes place by the executive.[110]

ii) Child Labour (Prohibition and Regulation) Act, 1986[111]

146.The Gurupadswamy Committee was formed in 1979, in order to take stock of the situation of child trafficking and child labour in the country. The outcome of the committee report was the Child Labour (Prohibition and Regulation) Act, 1986, which banned the employment of children below the age of 14 as well as adolescents (14 to 18 years) in hazardous industries. However, in May 2015, the Union Cabinet approved of a set of amendments to the Act, which introduced an exception from the ban for non-hazardous family owned enterprises and farmlands, provided that it takes place post school hours. Further, child artistes are also exempt from the ban. This is deeply problematic as it contradicts directly with Article 21-A that is the right to education, and also opens up floodgates to classification of certain enterprises within the family bracket in order to continue to perpetuate forced labour of children.[112]

147.In addition to this, the Factories Act, 1948 and the Mines Act, 1952 are also relevant in terms of prohibiting the forced labour of children in the above industries.

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[109] The Bonded Labour System (Abolition) Act, No. 19 of 1976, available at : http://indiacode.nic.in/fullact1.asp?tfnm=197619.

[110] The Bonded Labour System (Abolition) Act and Rules available at : http://www.childlineindia.org.in/CP-CR-Downloads/Bonded%20Labour%20System%20(Abolition)%20Act%201976%20and%20Rules.pdf

[111] The Child Labour Prohibition and Regulation Act, available at : http://www.cry.org/resources/pdf/Child-Labour-Act-1986.pdf

[112] Cabinet Approves Change in Child Labour Law, The Hindu, available at : http://www.thehindu.com/news/national/cabinet-approves-changes-in-child-labour-law/article7201276.ece

iii) Juvenile Justice (Care and Protection of Children) Act, 2000[113]

148.This Act provides for criminal sanctions against the employer of children in hazardous employment, and any employer who withholds the earnings of the child, or uses it for his own benefit. Furthermore, it also mandates relief and rehabilitation to the children who have been subject to this practice.[114]

iv) Immoral Traffic (Prevention) Act, 1986[115]

149.This Act was a consequence of India's signature of the UN declaration on the Suppression of Trafficking. It criminalises trafficking of women and girls for the purposes of prostitution and sexual exploitation. The offences that are specified within the Act are the trafficking of persons for the purposes of prostitution; detention within the area where prostitution takes place; solicitation for sex work or prostitution; the ownership or establishment of a brothel, or the act of allowing a particular premises to be used as a brothel. As per this Act, however, the government has a duty to provide for rehabilitation and rescue operations to any person involved in sex work who requires assistance as a result of such criminalisation.

150.The Act was intended to thus criminalise various aspects of sex work, citing trafficking as the key cause for the same. It is problematic, however, due to the fact that it criminalises all forms of sex work, not just those forms that are a result of human trafficking.[116]

v) Criminal Law (Amendment) Act 2013

151.The Indian Penal Code, 1860, criminalises the trafficking and detention of persons as slaves and provides for penal sanction for the same.[117] Until 2013,

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[113] The Juvenile Justice (Care and Protection of Children) Act, No. 56 of 2000, available at : http://indiacode.nic.in/fullact1.asp?tfnm=200056

[114] National Legislation and Policies Against Child Labour in India, ILO, available at : https://www.ilo.org/legacy/english/regions/asro/newdelhi/ipec/responses/india/national.htm

[115] The Immoral Traffic (Prevention) Act, No. 104 of 1956, available at : http://wcd.nic.in/act/itpa1956.htm

[116] US Department of State, 2008 Human Rights Report India, available at : http://www.state.gov/j/drl/rls/hrrpt/2008/sca/119134.htm

[117] Section 370, Indian Penal Code, 1860.

however, Indian law did not provide for a definition of human trafficking – even though it provided for its prohibition. As a result of the Justice Verma Committee report on criminal law reform,[118] in March 2013, the first ever definition of human trafficking was incorporated into domestic law, drawn from the UN Trafficking Protocol that was signed by India. Essentially, it stated[119] :

> "Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by
> First, using threats, or
> Secondly, using force, or any other form of coercion, or
> Thirdly, by abduction, or
> Fourthly, by practising fraud, or deception, or
> Fifthly, by abuse of power, or
> Sixthly, by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking."

152. Thus, the new version of Section 370 includes within its ambit any sort of physical or sexual exploitation as well as slavery as well as acts similar to slavery. Furthermore, the Act broadened the scope of offences that fall within the ambit of trafficking and included an extended sentence for the perpetrators. Whilst the term 'physical exploitation' is broad enough to include 'forced labour', it is largely ambiguous as it is undefined anywhere within the Act.[120]

II. THE COMMERCIAL NATURE OF HUMAN TRAFFICKING

153. No State practice was found with regard to the commercial nature of human trafficking.

III. INCORPORATION OF THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS

154. India acceded to the Vienna Convention on Diplomatic Relations in 1965. India also acceded to the 1961 Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Acquisition of Nationality. Further, India

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[118] Justice J.S. Verma Et Al, Report Of The Committee On Amendments To Criminal Law (2013), available at : http://nlrd.org/wp-content/uploads/2013/01/121798698-Justice-Verma-Committee-report.pdf.

[119] The Criminal Law (Amendment) Act, 2013.

[120] India's Human Trafficking Laws Report, Jindal Global University, available at : http://www.jgu.edu.in/chlet/pdf/Indias-Human-Trafficking-Laws-Report-Book_Feb-2015.pdf

has acceded to the 1961 Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes. As a result of the accession to the above international legal instruments, in order to translate the obligations that India owes to the international community, the Parliament enacted the Diplomatic Relations (Vienna Convention) Act, 1972 with that as its explicit objective.[121] It lists out the following provisions of the Convention within its Schedule to have the force of law within the Indian territory – Articles 1, 22, 23, 24, 27-40.

IV. INSTANCES OF HUMAN TRAFFICKING FALLING UNDER THE COMMERCIAL ACTIVITY EXCEPTION OF DIPLOMATIC IMMUNITY IN ARTICLE 31(1)(c) OF THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS

a) Eva Drdakova v. Khemka Exports Pvt Ltd [30.11.2011][122]

155. One of the relevant issues framed in this case is with regard to whether the renting out of the ground floor of a particular premises in the form of a sub-tenancy would fall within the ambit of Article 31(1)(c) of the 1961 Convention. The question of whether or not this is a commercial activity is relevant in order to adjudicate upon whether the alleged unlawful dispossession falls within the exception.

156. It was held that Article 22 provides for the immovable property of a diplomatic mission, and Article 30 provides for absolute immunity except for clause 3 of Article 31. In the instant case, the court held that the issue was related to property and not positions that were held and hence due to procedural infirmities the suit was not maintainable.

b) Saudi Arabian diplomat incident

157. In September 2015, there was an incident of forced detention and rape of two Nepali domestic workers by a Saudi Arabian diplomat living in New Delhi,

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[121] The Diplomatic Relations (Vienna Convention) Act, 1972, available at : http://indianbarassociation.org/wp-content/uploads/2014/05/Diplomatic-Relations-Vienna-Convention-Act1972.pdf

[122] 2012 (114) Bom LR 67.

India. The two women were employed as domestic help, and were allegedly "held against their will, denied food and water, beaten, and repeatedly raped by up to seven men at a time over a period of several weeks."[123]

158. The NGO working with the rehabilitation of the two women in question stated that they were victims of human trafficking and were sent to Saudi Arabia as domestic workers before being brought to India with their new employer.[124]

159. The Spokesperson in the Ministry of External Affairs in India dealt with this particular issue by calling in the Saudi ambassador and asking for cooperation of the Embassy in the inquiry.[125] In response, the Saudi Embassy issued a statement terming the allegations false and protested that the police raids conducted in the said diplomat's house is against all diplomatic conventions. The Nepali ambassador also formally requested an inquiry into the matter.[126]

160. The outcome was, however, that the diplomat in question fled back to Saudi Arabia, and some newspaper articles cited that Article 32 of the Convention would necessarily need to be engaged (waiver of diplomatic immunity) in order to continue with the investigation.[127]

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[123] India Urges Saudi Arabia to Cooperate after reports of diplomat raping servants, The Guardian, available at : http://www.theguardian.com/world/2015/sep/11/india-urges-saudi-arabia-to-cooperate-after-reports-diplomat-raped-servants

[124] India Seeks Saudi Help to Quiz Tainted Diplomat, IndiaToday, available at : http://indiatoday.intoday.in/story/nepalese-women-rape-case-india-seeks-saudi-help-to-quiz-tainted-diplomat/1/470865.html

[125] India Wants Saudi Arabia's Cooperation, IBTimes, available at : http://www.ibtimes.com/india-wants-saudi-arabias-cooperation-inquiry-rape-allegations-against-diplomat-2092580

[126] Outrage Grows in India, Times of India, available at :: http://timesofindia.indiatimes.com/city/delhi/Outrage-grows-India-reasons-with-Saudis/articleshow/48907559.cms

[127] A Diplomatic Failure, The Hindu, available at : http://www.thehindu.com/opinion/editorial/a-diplomatic-failure/article7665653.ece

SOUTH AFRICA

I. THE PROHIBITION OF HUMAN TRAFFICKING

161. South Africa became a signatory to the UN Protocol to Prevent, Supress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime (the Protocol) in 2000. The Protocol was fully incorporated into South African law by section 282 of the Children's Act, 2005.

162. In July 2013, the Prevention and Combating of Trafficking in Persons Act (the PCTPA) was signed by the South African president.[128] The purpose of the PCTPA, amongst other things, was to give effect to South Africa's obligation in terms of the Protocol. However, the PCTPA has yet to come into force.

163. Currently, persons accused of human trafficking and related crimes are prosecuted for specific crimes in accordance with a wide range of legislation and common law crimes, including, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007, the Children's Act of 2005, the Immigration Act of 2002, the Domestic Violence Act of 1998, the Prevention of Organized Crime Act of 1998, the Basic Conditions of Employment Act of 1997, the Intimidation Act of 1982, and common law prohibitions against

[128] Act 7 of 2013.

rape, kidnapping, indecent assault, abduction, murder, assault with intent to cause grievous bodily harm, common assault, and extortion, as well as in accordance with section 13 of the South African Constitution which provides that no one may be subjected to slavery servitude and forced labour.

164. While the majority of trafficking victims in South Africa are labour trafficking victims, most prosecutions occur in relation to commercial sexual exploitation.[129] This is done in accordance with the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 and the Children's Act 2005. The first prosecution of a domestic servitude case, initiated in October 2013, against a father and son in Western Cape, is still pending prosecution.[130]

165. When it comes into force, section 4 of the PCTPA will prohibit trafficking in persons which it defines as the delivery, recruitment, transport, transfer, harbouring, selling, exchanging, leasing or receiving of another person within or across the borders of South Africa

"by means of - (a) a threat of harm; (b) the threat or use of force or other forms of coercion; (c) the abuse of vulnerability; (d) fraud; (e) deception; (f) abduction; (g) kidnapping; (h) the abuse of power; (i) the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or (j) the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage, aimed at either the person or an immediate family member of that person or any other person in close relationship to that person, [the means] for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons.'

II. THE COMMERCIAL NATURE OF HUMAN TRAFFICKING

166. The PCTPA defines 'exploitation' as "(a) all forms of slavery or practices similar to slavery; (b)sexual exploitation; (c) servitude; (d) forced labour; (e) child labour; (f) the removal of body parts; or (g) the impregnation of a female person against her will for the purpose of selling her child when the child is born." Servitude is defined as the condition in which labour or services of a person are provided or obtained through threats of harm to that person or

[129] United States Department of State, *2015 Trafficking in Persons Report - South Africa*, 27 July 2015, available at: http://www.refworld.org/docid/55b73b9f15.html [accessed 22 January 2016].

[130] n2.

another person, or through any scheme, plan or pattern intended to cause the person to believe that, if the person does not perform the labour or services in question, that person or another person would suffer harm. Forced labour is defined as labour or services of a person obtained or maintained without the consent of that person; and through threats or perceived threats of harm, the use of force, intimidation or other forms of coercion, or physical restraint to that person or another person. A person convicted of trafficking in persons is liable to a fine not exceeding ZAR100 million or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine, or both.[131]

167. In addition to 'trafficking in persons' the PCTPA will also prohibit debt bondage,[132] possessing, destroying or tampering with travel documents of a victim of trafficking,[133] and using the services of victims of trafficking. Section 7 of the PCTPA specifically provides that

"Any person who intentionally benefits, financially or otherwise, from the services of a victim of trafficking or uses or enables another person to use the services of a victim of trafficking and knows or ought reasonably to have known or suspected that such person is a victim of trafficking, is guilty of an offence."

A person convicted of debt bondage or the use of services of a trafficked person will be liable to a fine or imprisonment for a period not exceeding 15 years or both.[134]

III. INCORPORATION OF THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS

168. South Africa has ratified the Convention on the Privileges and Immunities of the United Nations, 1946, the Convention on the Privileges and Immunities of the Specialised Agencies, 1947, the Vienna Convention on Diplomatic

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[131] Section 13 (b) of the Prevention and Combating of Trafficking in Person Act 7 of 2013.

[132] Debt bondage is described as "the involuntary status or condition that arises from a pledge by a person of-
(a) his or her personal services; or
(b) the personal services of another person under his or her control, as security for a debt owed, or claimed to be owed, including any debt incurred or claimed to be incurred after the pledge is given, by that person if the-
(i) debt owed or claimed to be owed, as reasonably assessed, is manifestly excessive;
(ii) length and nature of those services are not respectively limited and defined; or
(iii) value of those services as reasonably assessed is not applied towards the liquidation of the debt or purported debt.

[133] Section 6 of the Prevention and Combating of Trafficking in Person Act 7 of 2013.

[134] Section 13 (c) of the Prevention and Combating of Trafficking in Person Act 7 of 2013.

Relations, 1961, and the Vienna Convention on Consular Relations, 1963. These treaties have been incorporated into South African law through the Diplomatic Immunities and Privileges Act, 2001. No amendments have been made to these treaties. Accordingly, the immunities provided by these conventions operate in their entirety in South Africa.

IV. INSTANCES OF HUMAN TRAFFICKING FALLING UNDER THE COMMERCIAL ACTIVITY EXCEPTION OF DIPLOMATIC IMMUNITY IN ARTICLE 31(1)(c) OF THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS

169. The South African courts have yet to consider whether or not an employment contract between a domestic worker and her diplomat employer is "commercial activity" that falls under the exception in Article 31 Vienna Convention on Diplomatic Relations, 1961. However, in relation to an employment contract between a foreign state and an individual, the jurisdiction of the South African courts is expressly excluded from the definition of "commercial activity" in section 4 of the Foreign States Immunities Act 1981. It appears likely that this would also be excluded in relation to diplomats as well. This is particularly because, South African diplomats have raised diplomatic immunity in cases of a similar nature (with the government acquiescence) and succeeded. In 2009, the Migrant Rights Centre Ireland advocated on behalf of a domestic worker who took a case against the then South African ambassador, who she claimed did not pay her according to minimum standards in Ireland and unfairly dismissed her when she raised the issue, the ambassador invoked diplomatic immunity and was successful in this regard.[135]

170. However, perhaps an analogy could be drawn from the definition of 'commercial sexual exploitation' in the Children's Act 2005. Section 1 of the Children's Act 2005 defines 'commercial sexual exploitation' as

"the procurement of a child to perform sexual activities for financial or other reward, including acts of prostitution, pornography; irrespective of whether that reward is claimed by, payable to, or shared with the procurer, the child, the parent or the caregiver of the child or any other person".

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[135] Migrant Rights Centre Ireland Policy Paper, 2011 available at http://mrci.ie/wp-content/uploads/2012/10/Policy-Paper-Diplomatic-Immunity-2011.pdf [accessed 22 January 2016].

171. It could perhaps be argued that the mere procurement of a person for their performance of labour for financial reward amounts to trafficking for purpose of 'commercial labour exploitation', the procurer need not have actually benefited financially from the labour.

172. In contrast to South Africa, the courts in Botswana and Zimbabwe have considered the question of diplomatic immunity and employment contracts.

173. In *Bah v Libyan Embassy,* the Botswana Industrial Court held that

"The Vienna Convention on Diplomatic Immunities and Privileges as incorporated into the laws of Botswana recognizes the existence of certain exceptions to the immunity of a diplomatic agent to jurisdiction of the courts of Botswana. The Diplomatic Immunities and Privileges Act seeks to emphasize the application of immunity on matters which are necessary for the functional needs of a diplomatic mission or agent, hence the acceptance of exceptions to the rule on immunity in respect of matters which are of a non-functional importance to the duties of a diplomatic agent. The Act draws a distinction between the Diplomatic agent when conducting sovereign acts (acta jure imperil) and those done as any other individual (acta jure gestiones). In the case of the latter, the diplomatic agent is shorn of his/her immunity".[136]

Accordingly, a breach of an employment contract and/or

Botswana's employment legislation involves a private law transaction and is justiciable.[137] This is because, according to the court, the applicant was not challenging a governmental act, but merely seeking compliance with employment legislation.[138]

174. The position in Botswana is similar to that in Zimbabwe. In the *Sibanda and Anor v International Committee of the Red Cross*,[139] the Zimbabwean High Court held that,

"the employment contract is a commercial arrangement of master and servant. It entails the provision of a service by the employee and the payment for the service by the organisation concerned. In my view, such an arrangement falls to be determined, so far as the question of the organisation's immunity is concerned, as an actus jure

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[136] *Bah v Libyan Embassy* (IC 956/2005) [2004] BWIC 1 (1 November 2004), paras 21 -26; available at http://www.elaws.gov.bw/desplaylrpage.php?id=9&dsp=2

[137] n9.

[138] n9.

[139] *Sibanda and Anor v International Committee of the Red Cross* 2002 (1) ZLR 364 H, available at: http://ezproxyprd.bodleian.ox.ac.uk:4821/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu

gestionis, a commercial transaction. And, should a dispute arise from the employer/ employee relationship established by such a commercial arrangement, then the doctrine of restricted sovereign immunity should apply."[140]

This case concerned an employment dispute between the International Committee of the Red Cross (ICRC) and Zimbabwean nationals regarding the termination of employment of the Zimbabwean nationals. The ICRC was covered under the Privileges and Immunities Act [Chapter 3:03] and accordingly, it argued that the Zimbabwean courts did not have jurisdiction to hear the matter. The Court rejected this argument and held that the engagement of local staff in Zimbabwe by a foreign state or organisation is a commercial transaction which, in accordance with the doctrine of restricted immunity, made the case justiciable before the Zimbabwean courts.[141]

175. The court made the compelling argument that a local person who finds employment with an international organisation is not likely to know, or to be concerned about, the immunity from suit or legal process of his prospective employer, this is because the contract which he enters into with such an employer is not likely to allude to that issue.[142] Accordingly, the court held that it would be grossly unjust to the individual concerned if the courts were to accept that an employer can invoke its immunity in a purely civil or commercial dispute with its local employee.[143] Furthermore, the court pointed out that the ICRC could not argue that the challenge brought up by the employees interfered with its official functions for which the immunity is conferred in the first place, the court specifically stated that

"The employment of the local person by the organisation has, as its purpose, the efficient discharge of its functions by that organisation. But the relationship it establishes with the local employee is purely a private act, the kind which the employer can enter into with any other employee. It is simply a master and servant relationship which must be subject to the local laws. Additionally, when the organisation breaches the laws which apply to such a relationship then that breach

[140] n11.

[141] n11.

[142] n11.

[143] n11.

cannot be protected by the invocation of an immunity which is conferred for a purpose different from that for which the organisation invokes it."[144]

THE UNITED STATES OF AMERICA

I. THE PROHIBITION OF HUMAN TRAFFICKING

176. Human trafficking in the United States is most commonly prosecuted under the Trafficking Victims Protection Act (TVPA) (passed in 2000, reauthorized in 2003, 2008 and 2013), which makes commercial trafficking in persons a crime under federal law.[145] This is the most comprehensive federal legislation designed

[144] n11.

[145] U.S. Department of State. "U.S. Laws on Trafficking in Persons". http://www.state.gov/j/tip/laws/ The U.S. Department of State describes the TVPA and its reauthorizations as follows; "The Victims of Trafficking and Violence Protection Act of 2000 (P.L. 106-386), the Trafficking Victims Protection Reauthorization Act of 2003 (H.R. 2620), the Trafficking Victims Protection Reauthorization Act of 2005 (H.R. 972), and the Trafficking Victims Protection Reauthorization Act of 2008 (H.R. 7311) provide the tools to combat trafficking in persons both worldwide and domestically. The Acts authorized the establishment of G/TIP and the President's Interagency Task Force to Monitor and Combat Trafficking in Persons to assist in the coordination of anti-trafficking efforts."

to combat human trafficking, though in recent years, the executive branch of the U.S. government has also made attempts to address this policy issue.

177. This report begins with a brief overview of involuntary servitude laws. It then reviews TVPA, other federal legislation used for prosecuting human trafficking, executive actions regarding human trafficking, and relevant case law. It then turns to cases of human trafficking and involuntary servitude involving members of diplomatic missions, reviewing the commercial activity exception and relevant case law. It concludes by briefly describing the incorporation of the 1961 Vienna Convention on Diplomatic Immunity In U.S. law.

a) INVOLUNTARY SERVITUDE

178. Involuntary servitude is illegal under 18 U.S.C. § 1584[146], which prohibits sale into involuntary servitude, and 18 U.S.C § 241[147], which prohibits conspiracy to deny any person of their rights under the Constitution or laws of the United States. Involuntary servitude deprives an individual of their 13th Amendment right against enslavement and involuntary servitude. [148] The Supreme Court has adopted a narrow interpretation of U.S.C. § 1584 in *United States v. Kozminski et al.*[149], applying only to cases "involving the compulsion of service by the use or threatened use of physical or legal coercion".[150] The Court notes further that adopting an expanded notion of involuntary servitude "would delegate to prosecutors and juries the inherently legislative task of determining what type of coercive activities are so morally reprehensible that they should be punished as crimes."[151]

b) TRAFFICKING VICTIMS PROTECTION ACT AND OTHER LEGISLATIONS

i) TVPA

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[146] 18 U.S.C. § 1584 https://www.law.cornell.edu/uscode/text/18/1584

[147] 18 U.S.C. § 241 https://www.law.cornell.edu/uscode/text/18/241

[148] U.S. Const. amend. XIII https://www.law.cornell.edu/constitution/amendmentxiii

[149] *United States v. Kozminski* 487 U.S. 931. (1987) http://heinonline.org/HOL/Page?handle=hein.usreports/usrep487&div=37&start_page=931&collection=usreports&set_as_cursor=0&men_tab=srchresults

[150] *Ibid* 932

[151] *Ibid* 933

179. Prior to TVPA, traffickers could only be prosecuted under existing federal laws (such as breach of contract and violation of U.S. labor law; see *Tabion v. Mufti*[152], detailed below). The original text of the Act notes that "no comprehensive law exists in the United States that penalizes the range of offenses involved in the trafficking scheme … [and that] the seriousness of this crime and its components is not reflected in current sentencing guidelines, resulting in weak penalties for convicted traffickers."[153] Most relevant to this report are new crimes created by the act related to human trafficking and labor exploitation: "forced labor; trafficking with respect to peonage, slavery, involuntary servitude, or forced labor; sex trafficking by force, fraud, or coercion; or sex trafficking of children; and unlawful conduct with respect to documents in furtherance of trafficking."[154]

180. First, the Act increased penalties for existing crimes relating to human trafficking. The Act amends 18 U.S.C. § 1581 (which prohibits holding or returning anyone to a "condition of peonage"),[155] 1583 (prohibits "enticement into slavery"),[156] and 1584 (prohibits "sale into involuntary servitude"[157] - increasing penalties from 10 to 20 years, and including the additional provision that if death results from the violation of these sections, or if the violation involves kidnapping, aggravated sexual abuse, or the attempt to commit aggravated sexual abuse, "the defendant shall be fined under this title or imprisoned for any term of years or life, or both."[158]

181. The Act newly establishes the following crimes:

a. 18 U.S.C. § 1589, regarding forced labor, requires fining and/or imprisoning for not more than 20 years anyone who obtains the labor/services of another through threats of physical harm or

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[152] Tabion v. Mufti 877 F.Supp. 285 (1995) https://scholar.google.co.uk/scholar_case?case=12151765319881725377&hl=en&as_sdt=6&as_vis=1&oi=scholarr&sa=X&ved=0ahUKEwjWvvfl9cPKAhWH0hoKHW6XCv8QgAMIHygAMAA

[153] Trafficking Victims Protection Act of 2000 § 102 (14), (15)

[154] Polaris Project. "Trafficking Victims' Protection Act (TVPA) Fact Sheet" *Polaris Project*. 2008. http://www.rescue.org/sites/default/files/resource-file/trafficking%20victims%20protection%20act%20fact%20sheet_0.pdf

[155] 18 U.S.C. § 1581 https://www.law.cornell.edu/uscode/text/18/1581

[156] 18 U.S.C. § 1583 https://www.law.cornell.edu/uscode/text/18/1583

[157] 18 U.S.C. § 1584 https://www.law.cornell.edu/uscode/text/18/1584

[158] TVPA § 112 (a) (1) (A)

restraint; through a deceptive scheme/plan that implies person who does not perform labor will be seriously harmed or restrained; or by "means of the abuse or threatened abuse of law of the legal process".[159]

b. 18 U.S.C. § 1590, regarding "trafficking with respect to peonage, slavery, involuntary servitude, or forced labor" requires fining and/or imprisoning for not more than 20 years any person who "knowingly recruits, harbors, transports, provides, or obtains by means, any person for labor or services under this title."[160]

c. 18 U.S.C. §§ 1591, regarding sex trafficking of children, requires fining and imprisoning for any terms of years or for life anyone who trafficks a child younger than 18. For children between 14 to 18, the penalty is "a fine under this title or imprisonment for not more than 20 years, or both".[161]

d. 18 U.S.C. §§ 1592, regarding travel documentation that facilitates trafficking, peonage, slavery, involuntary servitude, or forced labor, requires fining and/or imprisoning for not more than 5 years anyone who "knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document of another person"[162]

e. As with the amendments added to existing laws regarding slavery and involuntary servitude, if violation results in death, or involves kidnapping, aggravated sexual abuse, attempted aggravated sexual abuse, or an attempt to kill - the punishment is a fine and/or imprisonment "for any term of years or life."

f. 18 U.S.C. § 1593 mandates that restitution is paid to victims of human trafficking. This amount should "include the greater of the gross income or value to the defendant of the victim's services or labor or

[159] 18 U.S.C 1589 https://www.law.cornell.edu/uscode/text/18/1589

[160] 18 U.S.C. 1590 https://www.law.cornell.edu/uscode/text/1590

[161] 18 U.S.C. 1591 https://www.law.cornell.edu/uscode/text/1591

[162] 18 U.S.C. 1592 https://www.law.cornell.edu/uscode/text/1592

the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act."[163]

g. Finally, U.S.C. 18 §§ 1594 holds that any an attempt to violate §§ 1581, 1583, 1584, 1589, 1580, or 1591 will be "punishable in the same manner as a completed violation of that section". What's more, convicted parties forfeit to the state "interests in any property, real or personal" used commit the violation - or derived as a result of the violation.[164]

182. In addition to these new crimes, the Act was also responsible for establishing an Inter-Agency Task Force to Monitor and Combat Trafficking (including the Secretary of State, Administrator of the United States Agency for International Development, Attorney General, Secretary of Labor, Secretary of Health and Human Services, Director of Central Intelligence, and other parties designated by the President).[165] The task force is responsible for data collection regarding trafficking; evaluating the US's and other nations' progress in preventing trafficking, assisting victims of trafficking; prosecuting both traffickers and forms of public corruption that facilitate trafficking; facilitating cooperation between origin, transit, and destination countries to prevent trafficking; studying international sex tourism; and engaging with governmental and nongovernmental organizations to advance its cause.[166] Further, it established minimum standards for the elimination of trafficking that the United States can assist foreign nations in meeting,[167] or withhold foreign assistance to countries that fail to comply with these standards.[168]

183. Reauthorizations of TVPA in 2003, 2005, 2008, and 2013 have tended to expand the scope of its protections.[169] Notable changes include providing a civil remedy for victims of trafficking, enabling them to sue their traffickers by

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[163] 18 U.S.C. 1593 https://www.law.cornell.edu/uscode/text/1593

[164] 18 U.S.C. 1594 https://www.law.cornell.edu/uscode/text/1594

[165] TVPA § 103, (a)(b)

[166] TVPA § 103 (d)(1-6)

[167] TVPA § 108, 109

[168] TVPA § 110

[169] See Polaris Fact Sheet (footnote 10) for key points in reauthorizations until 2008.

creating a federal civil cause of action (from the 2003 reauthorization);[170] creating a new crime, 18 U.S.C. §§ 1351, regarding fraud in foreign labor contracting — punishing those that recruit those for work either inside or outside the United States on false pretenses (from the 2008 authorization; amended in the 2013 reauthorization);[171] and amending 18 U.S.C. §§ 1597 regarding unlawful conduct with respect to immigration documents, making it illegal for "any person to knowingly destroy, or, for a period of more than 48 hours, conceal, remove, confiscate, or possess, an actual or purported passport, other immigration, or personal identification document of another individual" (in the 2013 reauthorization).[172]

iii) Other National Legislation

184. While TVPA is the most comprehensive federal legislation dealing with issues of human trafficking, the U.S. Department of Homeland Security identifies other federal legislation that can be used to prosecute human trafficking. These include the Customs Facilitation and Trade Enforcement Reauthorization Act of 2009 who prohibits "importation of goods to the United States made by benefit of human trafficking or forced labor"[173]; Intelligence Reform and Terrorism Prevention Act, which established the Human Smuggling and Trafficking Center[174] (interagency center that includes the Secretary of State, Secretary of Homeland Security, and Attorney General)[175]; Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, which includes provisions to protect children from sexual exploitation and abuse; the Civil Asset Forfeiture Reform Act of 2000,

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[170] Trafficking Victims Protection Reauthorization Act of 2003 § 1595 http://www.state.gov/j/tip/laws/61130.htm

[171] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 221 http://www.state.gov/j/tip/laws/113178.htm

[172] 18 U.S.C. 1597 https://www.law.cornell.edu/uscode/text/18/1597

[173] Department of Homeland Security. "Human Trafficking Laws and Regulations." *Department of Homeland Security Laws and Regulations*. 2015. http://www.dhs.gov/human-trafficking-laws-regulations

[174] Intelligence Reform and Terrorism Prevention Act § 7202 http://www.state.gov/m/ds/hstcenter/41449.htm

[175] U.S. Department of State. "Human Smuggling and Trafficking." *U.S. Department of State Under Secretary of Management, Bureau of Diplomatic Security*. http://www.state.gov/m/ds/hstcenter/. The Center "provides a mechanism to bring together federal agency representatives from the policy, law enforcement, intelligence, and diplomatic areas to work together on a full time basis to achieve increased effectiveness, and to convert intelligence into effective law enforcement and other action."

which "provides notice to property owners whose properties have been identified as being used to facilitate smuggling or harboring aliens"; and finally, the Mann Act of 1910, under which it is a "felony to knowingly persuade, induce, entice, or coerce an individual to engage in prostitution or attempts to do so."[176]

c) EXECUTIVE ACTION

185. In addition to existing legislative efforts, the executive branch under the Obama administration has been active in the fight against human trafficking. In 2012, the Obama administration enacted an executive order for "strengthening protections against trafficking in persons in federal contracts." This order argued, on account of the U.S. Government's responsibility to not use taxpayer dollars to contribute to trafficking in persons — that additional resources and training should be put towards ensuring that Government contractors and subcontractors are not engaged in trafficking.[177] In the same year, the Departments of Justice, Health and Human Services, and Homeland Security released a Federal Strategic Action Plan on Services for Victims of Human Trafficking in the United States. The document lays out a 5-year plan including "a series of coordinated actions to strengthen the reach and effectiveness of services provided to all victims of human trafficking."[178] Most recently (in accordance with this five year plan), in January 2015, the Obama administration hosted a forum on combatting human trafficking in supply chains (exploring strategies that both the federal government and the private sector can use to ensure workers' rights are not violated).[179]

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[176] Department of Homeland Security. "Human Trafficking Laws and Regulations."

[177] Executive Order 13627. Executive Order Strengthening Protections Against Trafficking in Persons in Federal Contracts". 2012. https://www.whitehouse.gov/the-press-office/2012/09/25/executive-order-strengthening-protections-against-trafficking-persons-fe

[178] Departments of Justice, Health and Human Services, and Homeland Security; member agencies of the President's Interagency Task Force to Monitor and Combat Human Trafficking in Persons, and other federal organizations. *Federal Strategic Action Plan on Services for Victims of Human Trafficking in the United States 2013-2017.* United States Bureau of Public Affairs. 2014. 1. http://www.ovc.gov/pubs/FederalHumanTraffickingStrategicPlan.pdf.

[179] Pope, Amy. "Combatting Human Trafficking in Supply Chains." *The White House Blog.* 2015. https://www.whitehouse.gov/blog/2015/01/29/combating-human-trafficking-supply-chains

II. THE COMMERCIAL NATURE OF HUMAN TRAFFICKING

186. This report focuses on four recent and representative cases which involve commercial human trafficking and labor exploitation - *Carazani v. Zegarra* (2013);[180] *Cruz v. Maypa* (2014);[181] *United States v. Andrew Blane Fields* (2013);[182] and *Nunag-Tanedo et al. v. East Baton Rouge Parish Schoolboard et al* (2011).[183] The first two cases are civil actions brought under the TVPA and FLSA with regards to victims of human trafficking, forced into domestic servitude. The third case describes one application of TVPA to a criminal case of sex trafficking. The final case is described by the Southern Poverty Law Center as setting a "new precedent in protecting victims of human trafficking… mark[ing] the first time a court has interpreted the federal Trafficking Victims Protection Act (TVPA) with the breadth Congress intended", extending its protections to include working professionals (in addition to laborers).[184]

i) Carazani v. Zegarra (2013)

187. Virginia Carazani, a housekeeper, filed a case against her former employer, Emma Zegarra, and sought damages under the FLSA and TVPA. Carazani and moved with her employer to the US in 2006 (having previous worked as her housekeeper in Bolivia). The defendant provided a contract stipulating a work schedule and wages consistent with the FSLA, in addition to various benefits. Upon arrival, the plaintiff was forced to work much longer hours, received no time off, and was paid only $8.50 in total — the amount "necessary to keep [Carazani's] bank account open, a requirement under World Bank rules."

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[180] *Virginia Carazani v. Emma Zegarra.* 972 F.Supp.2d1 (2013) https://scholar.google.co.uk/scholar_case?case=5521602160709344664&hl=en&as_sdt=6&as_vis=1&oi=scholarr&sa=X&sqi=2&ved=0ahUKEwjVofOptMXKAhUEOxQKHTPWB_wQgAMIHigAMAA

[181] *Cristina Fernandez Cruz v. Nilda Maypa* 981 F.Supp2d 485 (2013) http://www.ca4.uscourts.gov/Opinions/Published/132363.P.pdf

[182] *United States v. Andrew Blane Fields* 2013 U.S. Dist LEXIS 135763. https://www.law.umich.edu/clinical/HuTraffic Cases/Pages/CaseDisp.aspx?caseID=772

[183] *Nunag-Tanedo et al. v. East Baton Rouge Parish Schoolboard et al.* 790 F.Supp.2d 1134 (2011) https://scholar.google.co.uk/scholar_case?q=Mairi+Nunag-Tanedo+Et.+Al.+v.+East+Baton+Rouge+Parish+Schoolboard+et.+al+&hl=en&as_sdt=2006&case=6237302325494036117&scilh=0

[184] Knoepp, Jim. "Judge Delivers Groundbreaking Decision in SPLC Lawsuit on Behalf of Trafficked Teachers." *Southern Poverty Law Center.* 2011. https://www.splcenter.org/news/2011/05/25/judge-delivers-groundbreaking-decision-splc-lawsuit-behalf-trafficked-teachers

Zegarra also seized Carazani's passport. While employed by Zegarra, Carazani incurred medical expenses relating to her and her son's care. Zegarra allowed Carazani's visa to expire in 2008, leading her to become an undocumented immigrant, and increasing the family's dependence on the defendant. In 2009, Carazani escaped from Zegarra's home; in 2012, the plaintiff filed this action.[185]

188. Given the defendant's non-response after filing of the action,[186] the case was decided with a default judgment against the defendant. Carazani claimed she was entitled to damages equal to "lost wages for breach of contract, medical expenses for breach of contract, liquidated damages under the FLSA, emotional and punitive damages under the TVPA, punitive damages for fraud and fradulent inducement under Virginia state law, and punitive damages for intentional infliction of emotional distress under Viriginia state law."[187] The court cites TVPA and FLSA in making its determination of damages; however, while TVPA "creates a federal cause of action for breach of contract, it does not supply independent rules of decision" — meaning that the court must apply state rules of decision regarding Carazani's breach of contract[188], and quantum meruit claims.[189] The court awards liquidated damages to Carazani under FLSA,[190] emotional distress damages under TVPA,[191] and punitive damages under "common law principles" (given that TVPA is "silent on the availability of punitive damages").[192]

ii) Cruz v. Maypa (2014)

189. Cristina Fernandez Cruz is a Filipina national who was employed as a domestic worker for Nilda Maypa, Michelle Barba and Ferdinand Barba. In 2002, Maypa provided Cruz an employment contract that included a range of benefits and monthly pay of $250.[193] Upon arrival, the plaintiff was forced to work

[185] *Carazani v. Zegarra* 10

[186] *Ibid* 11

[187] *Ibid* 15

[188] *Ibid* 16

[189] *Ibid* 21

[190] *Ibid* 26

[191] *Ibid* 23

[192] *Ibid* 26

[193] *Cruz v. Maypa* 4

extremely long hours and received none of the promised benefits Later, Cruz was provided two contract extensions from Maypa which promised higher wages/ greater benefits (these promises were never met).[194] During this time, Cruz was forced to stay in the Maypa and Barba homes (unable to fly home to see her family, and only allowed to contact home while supervised by the family).[195] Cruz escaped in 2008, and filed a lawsuit in 2013 with the US District Court for the Eastern District of Virginia — "seeking compensatory and punitive damages for the defendant's violations of the TVPA, the FLSA, and state law prohibiting breach of contract, fraudulent misrepresentation, and false imprisonment."[196]

190. The plaintiff's claims were dismissed by the district court on the grounds that they were time-barred, a determination that Cruz challenged on appeal -arguing that her TVPA claims were subject to a ten year statute of limitations in the context of the 2008 authorization, and that her FLSA claims "should be equitably tolled under the actual notice set forth by this Court in Vance v. Whirlpool Corp., 716 F.2d 1010 (4th Cir. 1983)". Cruz argued further that breach of contracts claims should also be equitably tolled, given that her former employers interfered with her ability to file a lawsuit.[197] The appeals court reviewed de novo the district court's grant of a motion to dismiss, and its rejection of Cruz's equitable tolling arguments for abuse of discretion — noting that because the court rejected the equitable tolling arguments in the context of this motion to dismiss — "the facts at issue were, in essence, undisputed".[198]

191. In sum, while the appeals court affirmed that the district court was correct to dismiss Cruz's claims with regards to state laws, it argued that her claims regarding TVPA and FLSA should not be dismissed. The appeals court remanded consideration of TVPA claims to the district court, to determine if these warrant equitable tolling.[199] It also remands consideration of FLSA claim, on the grounds of a previous ruling in Vance v. Whirpool Corp (in which the court ruled that the plaintiff was allowed to exceed the "180-day filing

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[194] *Ibid* 5

[195] *Ibid* 6

[196] *Ibid* 7-8

[197] *Ibid* 8

[198] *Ibid* 8-9.

[199] *Ibid* 15

requirement of the Age Discrimination in Employment Act due to the plaintiff's employers' "failure to post statutory notice of workers' rights under the Act.")[200] Cruz's breach of contract claims, under VA state law, were dismissed, on the grounds that she could not demonstrate what prevented her from filing a claim more than five years after her escape in 2008.[201]

iii) United States v. Andrew Blane Fields

192. U.S. District Court Middle District of Florida convicted Andrew Blane Fields of commercial sex trafficking under 18 U.S.C. § 1591(a)(1), and possession with intent to distribute narcotics. Fields recruited young women either engaged in prostitution or performing at strip clubs, provided them with narcotics to escalate their drug use, then forced them into prostitution.[202] With regards to TVPA, the federal grand jury's indictment included 3 counts of sex trafficking by force, fraud and coercion (18 U.S.C. Sections 1591(a)(1), (a)(2), and (b)(1))[203], and demands that Fields forfeit assets used to facilitate, and derived from trafficking (pursuant to 18 U.S.C. 1594).[204] This case illustrates one example of how TVPA can be applied in criminal cases of commercial sex trafficking.

iv) Nunag-Tanedo et al. v. East Baton Rouge Parish Schoolboard et al (2012)

193.Finally, TVPA was first applied to a class in *Nunag-Tanedo et al. v East Baton Rouge Parish Schoolboard et al.*,[205] wherein 347 Filipino teachers, recruited to work at a school district in Louisiana, sued the East Baton Rouge Public School Board, school district officials, company responsible for recruiting the teachers (Universal Placement International, UPI), Lourdes Navarro (owner of UPI), and a California-based lawyer, Robert Silverman, for setting up a fraudulent

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[200] *Ibid* 16

[201] *Ibid* 20

[202] Department of Justice Office of Public Affairs. "Lutz, Fla., Man Convicted on Drug Distribution and Sex Trafficking Charges." *United States Department of Justice.* 2013. http://www.justice.gov/opa/pr/lutz-fla-man-convicted-drug-distribution-and-sex-trafficking-charges

[203] *United States v. Andrew Blane Fields.* Federal Grand Jury Indictment (2013).https://www.ice.gov/doclib/news/releases/2013/130418tampa.pdf

[204] *United States v. Andrew Blane Fields.* Federal Grand Jury Indictmet

[205] http://www.hernblawg.com/firm-defeats-trafficking-claim-in-15-million-lawsuit/

trafficking scheme.[206] Teachers were brought into the US under H1-B visas, paid recruitment fees adding up to over $16,000, and had their passports held until fees were paid. What's more, upon arrival, the teachers were forced to sign away 10% of their salaries (those who refused to do so were threatened with being sent home and losing their jobs). The U.S. District Court of the Central District of California denied in part and granted in part the defendant's motion for partial summary judgment — affirming that the plaintiffs could "base their § 1589 forced labor claim on alleged acts that occurred prior to December 23, 2003" and that these claims did not apply TVPA extraterritorially. However, the court granted the defendant's motion to dismiss Plaintiff's claims for document servitude under 18 U.S.C. § 1592,[207] on the grounds that prior to December 23, 2008 - Congress only provided a civil remedy for U.S.C. § 1589, 1590, 1591 — not to 1592.[208]

194. The case went to trial in 2012, with the jury ordering UPI to pay $4.5 million in restitution.[209] Though the teachers were awarded a far smaller amount in damages than they had demanded ($15 million),[210] the Southern Poverty Law Center hailed the federal judge's ruling with respect to U.S.C. § 1589, on the grounds that it was the "first time a court has interpreted the federal Trafficking Victims Protection Act (TVPA with the breadth Congress intended." This case is the first time that TVPA has been applied to professionals (brought to the U.S. under H1-B visas), as it had previously only been applied to laborers.[211]

III. INCORPORATION OF THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS

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[206] *Tanedo et al v. East Baton Rouge Parish School Board, et al.* U.S. Disrict Court Central District of California Civil Minutes. 2012.1. https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/case/082712_SummaryJudgmentDenial.pdf

[207] *Ibid* 11

[208] *Ibid* 9

[209] Southern Poverty Law Center. "Mairi Nunag-Tanedo Et Al. v. East Baton Rouge Parish Schoolboard et al" *Southern Poverty Law Center Case Docket* https://www.splcenter.org/seeking-justice/case-docket/mairi-nunag-ta%C3%B1edo-et-al-v-east-baton-rouge-parish-school-board-et-al

[210] Hernandez, Schaedel, and Associates. "Firm Defeats Trafficking Claim in $15 Million Lawsuit". 2012. http://www.hernblawg.com/firm-defeats-trafficking-claim-in-15-million-lawsuit/

[211] Knoepp 2011

195. US ratified the 1961 Vienna Convention on Diplomatic Immunity in 1972 with no modifications.[212] In 1978, the US passed the Diplomatic Relations Act, which established the Vienna Convention as "the United States law on diplomatic privileges and immunities." The Diplomatic Relations Act established 22 U.S.C. 254 (a) through (e)[213], with 22 U.S.C. 254c noting that "the President may, on the basis of reciprocity and under such terms and conditions as he may determine, specify privileges and immunities for members of the mission, and their families, and the diplomatic couriers of any sending state which result in more favorable treatment or less favorable treatment than is provided under the Vienna convention."[214] Aside from this minor caveat, the U.S. has fully adopted the Vienna Convention on Diplomatic immunity with no modifications.

IV. INSTANCES OF HUMAN TRAFFICKING FALLING UNDER THE COMMERCIAL ACTIVITY EXCEPTION OF DIPLOMATIC IMMUNITY IN ARTICLE 31(1)(c) OF THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS

a) INTRODUCTION

196. In an analysis of domestic worker abuses licensed under the commercial activity exception, Bergmar argues that diplomatic immunity in the context of the Vienna Convention is justified on the basis of "functional necessity"[215] — diplomats need to engage in activities which are not directly linked to, yet still supportive of the diplomatic mission (that is, ensuring that diplomats can efficiently perform their jobs requires them to perform actions not straightforwardly linked to international relations, which may be in violation of their host country's laws). However, in American courts, diplomatic immunity is less restricted: "instead of guarding the line between official and nonofficial conduct, or adhering to a presumption against immunity for acts furthering

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[212] Vienna Convention on Diplomatic Relations and the Optional Protocol on Disputes Treaty Ratification 1972. http://www.state.gov/documents/organization/17843.pdf

[213] Diplomatic Relations Act § 3 http://uscode.house.gov/statutes/pl/95/393.pdf

[214] 22 U.S.C. § 254c http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title22-section254c&num=0&edition=prelim

[215] Ibid 508

personal interests, courts have followed a de facto rule against interfering with diplomatic immunity."[216]

197. Particularly with regards to labor exploitation - in the United States, several cases of human trafficking and involuntary servitude have failed to fall under commercial activity exception of the Vienna Convention on Diplomatic Relations, Article 31(1)(c) (wherein the diplomatic agent does not enjoy immunity from criminal jurisdiction of the receiving State for "an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions").[217] Private contracts between members of a diplomatic mission, and their domestic employees have not been regarded as commercial activities, as seen in several of the relevant cases described below.

198. Domestic workers for members of a diplomatic mission are required to enter the US under a special visa, granted after negotiating an employment contract that specifies some basic labor standards (including a minimum wage). However, given that consular offices are unsure about which standards apply, visas are "frequently granted to domestic workers whose employment contracts violate American laws.[218] The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 includes provisions to ensure that employment contracts necessary for the issuance of these visas accord with a federal/state/local laws in the US, include information on labor standards (such as work duties, sick days, etc), and an agreement by the employer to "not to withhold the passport, employment contract, or other personal property of the employee."[219] Bergmar points out that the act provides strong preventative measures (i.e. enables the State Department to refuse to issue visas); however "it does not suspend or limit the applicability of diplomatic immunity for diplomats suspected of exploitative practices". That is, if the "employment relationship has begun in the United States, the absolute immunity of diplomat employers prevents domestic workers from bringing actions against their employers for violation of American labor laws."[220]

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[216] Ibid 510

[217] Vienna Convention on Diplomatic Relations Art. 31(1)(c)

[218] Ibid 512

[219] Ibid 513

[220] Ibid 514

b) RELEVANT CASE LAW

199. This report focuses on four cases of trafficking involving individuals employed by members of diplomatic missions: *Tabion v. Mufti* (1995)[221]; *Sabbithi v. Al Saleh* (2008)[222]; *Doe v. Howard et al.* (2012)[223]; and *United States v Khobragade* (2014).[224] The first two cases involve foreign diplomats on U.S. soil; in both cases, charges are dismissed. The third case involves an employee of the U.S. Department of State, located in Tokyo and prosecuted under U.S. laws. The final case resulted in two indictments (the first of which was dismissed), and has yet to be resolved (given that the defendant returned to India shortly after being granted diplomatic immunity).

i) Tabion v. Mufti (1995)

200. Prior to passage of TVPA, Corazon Tabion attempted to sue her employers, Faris and Lana Mufti for violation of FSLA. The district court found that the defendants were protected by diplomatic immunity, and not subject to the commercial activity exception; hence, the suit was barred according to the Vienna Convention. Tabion appealed the decision; however, the appeals court affirmed the district court ruling. [225]

201. Tabion (a Filipina national) was originally employed to work for Faris and Lana Mufti in Jordan. The Muftis relocated to US in 1991, and offered a job to the plaintiff. The Muftis promised to pay Tabion U.S. minimum wage and overtime, and agreed to set a reasonable work schedule in a safe work environment. Upon arrival, Tabion was forced to work overtime at an extremely low salary (in violation of the original contract). Tabion filed her suit on basis of violation of Fair Labor Standards Act, breach of employment contract, intentionally misrepresenting the position, falsely imprisoning her; and discriminating on

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[221] *Tabion v. Mufti,* 877 F. Supp. 285 (1995)

[222] *Sabbithi et al. v Al Saleh et al.* 605 F.Supp.2d 122 (2009) https://scholar.google.co.uk/scholar_case?q=+Sabbithi+et.+al.+v+Al+Saleh+et.+al.&hl=en&as_sdt=2006&case=10111503603185151459&scilh=0

[223] *Doe v. Howard et al.* 2012 U.S. Dist. LEXIS 125414 http://law.justia.com/cases/federal/district-courts/virginia/vaedce/1:2011cv01105/272788/132/

[224] *United States v. Khobragade,* 15 F.Supp.3d 383 (2014) https://scholar.google.co.uk/scholar_case?q=United+States+v.+Khobragade&hl=en&as_sdt=2006&case=7573005874275821451&scilh=0

[225] *Tabion v. Mufti*, 877 F. Supp. 285 - Dist. Court, ED Virginia 1995 https://scholar.google.co.uk/scholar_case?case=12151765319881725377&hl=en&as_sdt=6&as_vis=1&oi=scholarr&sa=X&ved=0ahUKEwjWvvfl9cPKAhWH0hoKHW6XCv8QgAMIHygAMAA

basis of race.[226] The defendants claimed diplomatic immunity, which Tabion contested, claiming that this suit falls under the commercial activity exception.[227] Tabion bases her claim on a definition of "commercial activities" under the Foreign Sovereign Immunities Act - national legislation indicating that a foreign state is "not immune from suit for debts relating to 'private acts performed as a market participant.'"[228] Tabion argues that the definition of commercial activity under FSIA should be extended to the Vienna Convention. The court rejects Tabion's argument, and goes further in reviewing the history of the Vienna Convention's drafting and negotiating, arguing that it "points persuasively to the conclusion that Article 31(1)(c) was not intended to carve out a broad exception to diplomatic immunity for a diplomat's daily contractual transactions for personal goods and services."[229] The district court clarifies that commercial activity refers only to "business or trade activity for profit"[230] - hence, it does not include "the relationship between a diplomat and a domestic worker … [as] commercial activity within the immunity exception."[231]

202. The court summarizes its opinion as follows: "In sum, records of the treaty's drafting and negotiating history, the position taken by the State Department, and the views of various commentators make it abundantly clear that Article 31(1)(c) was not intended to divest diplomats and their family of immunity for disputes arising out of personal contracts for goods and services that are incidental to daily life in the receiving State. Because the Mufti's relationship with Tabion falls into this category, and is not a 'commercial activity' as envisioned by the drafters of, and signatories to, the Vienna Convention, the Muftis are immune from suit. The motion to quash must accordingly be granted."[232]

203. Importantly, this case sets a precedent of the judiciary deferring to a "Statement of Interest" submitted by U.S. State Department. The court invited

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[226] *Ibid* 286

[227] *Ibid* 287

[228] *Eckert Int'l v. Government of Republic of Fiji*, 834 F. Supp. 167, 170 (E.D. Va. 1993) in *Tabion v. Mufti 288*

[229] *Tabion v. Mufti* 291

[230] *Ibid* 291

[231] Bergmar 515

[232] *Tabion v. Mufti* 292

the State Department to submit a legal memorandum regarding the proper interpretation of the commercial activity exception, and this statement of interest clearly states that "commercial activity … focuses on the pursuit of trade or business activity."[233] When the judgment was affirmed on appeal, the appeals court noted that "substantial deference is due to the State Department's conclusion."[234] Bergmar holds that the Tabion case sets a precedent for future rulings, in which the judiciary defers to the executive branch's interpretation of the exception This same justification is used in subsequent cases — notably, *Gonzales Paredes v. Vila* (2007),[235] in which the State Department released another executive statement of interest noting that employment contracts with domesitc workers are not commercial activity, and in Sabbithi v. Al Saleh, which was decided with a similar statement of interest.[236] This report briefly details the latter case.

ii) Sabbithi et al. v. Al Saleh et al. (2009)

204. Three Indian domestic workers (Mani Kumari Sabbithi, Joaquina Quadros, and Gila Sixtina Fernandes) attempted to sue their former employers (Waleed KH N.S. Al Saleh and Maysaa KH A.O.A Al Omar) in addition to the state of Kuwait under the TVPA and FSLA. Originally employed by the defendants in Kuwait, the plaintiffs worked seven days a week and were paid far below U.S. minimum wage. Upon agreeing to accompany the family to the US, the three signed an employment contract promising higher wages, and compliance with U.S. labor law. Not only were these terms violated upon arrival to the US; however, plaintiffs also had their passports seized, and were victims of physical abuse and threats of physical harm. The plaintiffs fled from the Al Saleh home and filed this complaint in 2007, in addition to pursuing criminal charges against the defendants with the U.S. Department of Justice (DOJ). The DOJ asked the Department of State to request a waiver of diplomatic immunity, which Kuwait declined, leading DOJ to close its investigation.[237] The court

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[233] Statement of Interest 4, in *Tabion v. Mufti* 292

[234] *Tabion v. Mufti*, 73 F. 3d 535 (1996). 538

[235] Gonzales Paredes v. Vila 479 F.Supp.2d 187 (2007) https://scholar.google.co.uk/scholar_case?case=8330455262935659893&hl=en&as_sdt=6&as_vis=1&oi=scholarr&sa=X&ved=0ahUKEwjj1YmKzMXKAhUFuw4KHX1iCsUQgAMIIigAMAA

[236] Bergmar 517

[237] *Sabbithi et al v Al Saleh 125*

rejected the plaintiff's claims that trafficking falls under the commercial activity exception, and cited both Tabion v. Mufti, and a Statement of Interest by the US Department of State in making this determination.[238]

205. While the plaintiffs were unable to demonstratee that their mistreatment fell under the commercial activity exception, they made three other claims of interest to this analysis (though all are rejected by the court). First, the plaintiffs claim their 13th Amendment rights are violated, and that diplomatic immunity should not apply against constitutional challenges (an argument which the court rejects, on the grounds that case law suggests diplomatic "can shield a diplomat from liability for alleged constitutional violations"). Second, the plaintiffs argue that the defendants' human trafficking violates *jus cogen* norms - "peremptory norms of international law which enjoy the highest status in international law and prevail over both customary international law and treaties." The court did not agree that the defendants engaged in human trafficking, and concluded that no *jus cogen* norm was at issue. Third, the plaintiffs argue that TVPA should override the Vienna Convention due to the subsequent-in-time rule, wherein a treaty and state are related to the same subject, but cannot be harmonized. The court rejects this on the grounds that "TVPA concerns peonage, slavery, and trafficking in persons, whereas the Vienna Convention provides immunity from criminal prosecution and civil actions to foreign diplomats."[239] Notably, following the decision in 2009 - the ACLU reports that the state of Kuwait agreed to a confidential settlement with the women in 2012.[240]

iii) Doe v. Howard et al (2012)

206. Doe v. Howard is a unique case, wherein the defendants were employees of the U.S. State Department based in U.S. embassies, and the plaintiff a foreign domestic employee. An anonymous Ethiopian plaintiff sued two U.S. State Department employees who forced her to work long hours for less than $1 per hour, and physically and sexually abused her. The defendants, Linda and Russell Howard (the latter of whom was employed at the U.S. Embassy in Yemen), originally employed the plaintiff at their home in Yemen. When the couple

[238] Ibid 127-128

[239] Ibid 129

[240] American Civil Liberties Union. "Case Profile - Sabbithi, et al v. Saleh, et al." *American Civil Liberties Union Cases*. 2012. https://www.aclu.org/cases/case-profile-sabbithi-et-al-v-al-saleh-et-al

relocated to Japan, the plaintiff was promised "$300 per month, time off each week, health insurance, and safe place to live wand work." Upon arrival, the plaintiff was repeatedly physically and sexually abused, and subject to nonphysical force "such as isolation and threats of deportation". After five months, the plaintiff fled the defendant's home, and reported her abuse. The State Department removed Linda Howard from her post, and launched an investigation.[241]

207. The defendants were found liable for violation of 18 U.S.C. 1589 for holding the plaintiff in forced labor; and liable for trafficking in violation of the TVPA (18 U.S.C. §§ 1584, 1589, and 1590). Further, the defendants were also found liable for conspiracy to commit §§ 1581, 1583, 1584, 1589, 1580, or 1591, in violation of 18 U.S.C. 1594 - and obstruction of enforcement in violation of 18 U.S.C. §1590b.[242] The court found that the plaintiff was entitled to both compensatory and punitive damages under TVPA,[243] including compensatory emotional distress damages[244] (for forced sexual servitude,[245] and forced labor as a domestic worker),[246] punitive damages [247], and wage restitution.[248]

v) United States v. Devyani Khobragade (2014)

208. The most recent case of domestic worker abuse dismissed under diplomatic immunity involves Devyani Khobragade - a former Deputy Consul General for India who fraudulently secured a visa for an Indian domestic worker paid below U.S. minimum wage. Khobragade has been indicted twice, after having her initial charges dismissed by a district judge accepting her claim of diplomatic

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[241] LexisNexis Mealey's Legal News. "$3.3M Judgment Entered Against Couple Accused of Enslaving, Raping Housekeeper." *Lexis Nexis Legal Newsroom Labor and Employment Law Blog.* 2012. http://www.lexisnexis.com/legalnewsroom/labor-employment/b/labor-employment-top-blogs/archive/2012/09/06/3-3m-judgment-entered-against-couple-accused-of-enslaving-raping-housekeeper.aspx

[242] *Doe v. Howard* 2-3

[243] *Ibid* 3

[244] *Ibid* 3

[245] *Ibid* 6

[246] *Ibid* 6

[247] *Ibid* 8

[248] *Ibid* 10

immunity.[249] Khobragade was initially arrested in 2013 on felony charges of visa fraud and false statements about hiring a domestic worker. While she previously only enjoyed consular immunity and was arrested on December 12, 2013, following her release on bail - she was appointed to a position that enjoyed full diplomatic immunity on January 8, 2014. The Indian government denied a US State Department request for diplomatic immunity, resulting in the case being dismissed, and Khobragade leaving the United States.[250]

[249] Southall, Ashley. "Diplomat from India is Indicted Again Over Housekeeper." *New York Times.* March 14, 2014. http://www.nytimes.com/2014/03/15/world/asia/diplomat-from-india-is-indicted-again-over-housekeeper.html

[250] *United States v. Khobragade* 384

C. REGIONAL JURISDICTIONS

THE INTER AMERICAN SYSTEM ON HUMAN RIGHTS

I. THE PROHBITION OF HUMAN TRAFFICKING

a) ARTICLE 6 OF THE AMERICAN CONVENTION ON HUMAN RIGHTS

209.1. No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.

2. No one shall be required to perform forced or compulsory labor. This provision shall not be interpreted to mean that, in those countries in which the penalty established for certain crimes is deprivation of liberty at forced labor, the carrying out of such a sentence imposed by a competent court is prohibited. Forced labor shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner.

3. For the purposes of this article, the following do not constitute forced or compulsory labor:

a. work or service normally required of a person imprisoned in execution of a sentence or formal decision passed by the competent judicial authority. Such work or service shall be carried out under the supervision and control of public authorities, and any persons performing such work or service shall not be placed at the disposal of any private party, company, or juridical person;

b. military service and, in countries in which conscientious objectors are recognized, national service that the law may provide for in lieu of military service;

c. service exacted in time of danger or calamity that threatens the existence or the well-being of the community; or

d. work or service that forms part of normal civic obligations.

b) ADDITIONAL DEFINITIONS

210. The Inter-American Commission on Human Rights defined "Servitude or bondage [...] as free personal service and compulsory labor under coercion that originate in debts acquired using deceitful procedures, fraud, and other deceptive practices. It is characterised by the establishment of labor relations of forced labor and non-transparent systems of indebtedness, which are part of the relationship of servitude"[251].

c) OTHER INSTRUMENTS

211. Several instruments contribute to protecting victims of trafficking within the inter-American system of Human Rights[252]:

- Inter-American Convention on International Traffic in Minors, adopted in Mexico, 1994:[253] this instrument provides for cooperation between States, as well as criminal and civil aspects for the protection of minor victims of trafficking.
- American Declaration of the Rights and Duties of Man
- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights

d) THE ORGANIZATION OF AMERICAN STATES

212. Latin America is one of the region of the world which is most affected by human trafficking.[254] To address this, the OAS now comports of a section specialised on anti-trafficking in persons. OAS efforts to combat trafficking in persons began in 1999 following recommendations included in a research issued by the Inter-American Commission of Women (CIM).[255]

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[251] The Inter-American Commission followed the Human Rights Ombudsman of Bolivia on this point; Jean Allain, *Slavery in International Law: of Human Exploitation and Trafficking,* 2013, p. 174

[252] Global Rights Partners for Justice, 'Combating Human Trafficking in the Americas: A Guide to International Advocacy', 2007, p. 14

[253] Accessible at: http://www.oas.org/dil/treaties_B-57_Inter American_Convention_on_International_Traffic_in_Minors.htm

[254] IACHR, 'Captive Communities: situation of the Guarani Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco', 24 December 2009, p.10

[255] Claire Ribando, 'Trafficking in Persons in Latin America and the Carribean', CRS Report for Congress, 15 December 2005, accessible at: http://www.oas.org/atip/atip_Reports.asp

213. The section of the OAS on Anti-Trafficking in Persons regularly publishes assessments with regards to the situation of human trafficking in Latin-America[256].

e) THE JURISPRUDENCE OF THE INTER AMERICAN COURT OF HUMAN RIGHTS

i) Prohibition of slavery: an absolute right

214. In its Advisory Opinion of October 6, 1987, on Judicial Guarantees in States of Emergency,[257] the Inter-American Court confirmed that Article 6 on the prohibition of slavery is one of the provisions which do not authorise suspension.

215. Ituango Massacres v Columbia. In this case, the Court considered Article 6(2) on the Prohibition of Forced Labour together with Article 7 on the Right to Personal Liberty.

216. The material facts of the case concerned a paramilitary group which had obliged 17 peasants to herd the livestock to a destination point:[258]

> The Court considers that it has been proved (…) that, during the incursion in El Aro, in order to facilitate the theft of from 800 to 1,200 head of livestock (...), the paramilitary group deprived 17 peasants of their liberty and obliged them, by threat (…), to herd the animals for 17 days along the public roads under the custody of members of the Army, who not only acquiesced to the acts perpetrated by the paramilitary group, but also directly participated and collaborated at times, even ordering a curfew in order to facilitate the theft of the livestock.

217. The Court had to decide whether these acts gave rise to State responsibility. It relied on the definition of 'forced labour' provided by Article 2(1) of the ILO Convention n29 (to which Columbia was a party), which establishes that: "The term "forced or compulsory labour" shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[259]

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[256] http://www.oas.org/atip/atip_Reports.asp>

[257] Advisory Opinion OC-9/87 of October 6, 1987, Judicial Guarantees in States of Emergency, Requested by the Government of Uruguay, para. 2

[258] *Ituango Massacres v. Colombia*, Judgment of July 1, 2006, para. 150

[259] *Ituango v Columbia,* para. 159

218. The Court found that the definition of forced labour consisted of two major elements: first, the work or service is performed "under the menace of a penalty"; and second, it is performed involuntarily.[260]

219. To the two elements abovementioned, the Court added that, "to constitute a violation of Article 6(2) of the American Convention, it is necessary that the alleged violation can be attributed to State agents, either due to their direct participation or to their acquiescence to the facts."[261]

220. A menace of a penalty: "can consist in the real and actual presence of a threat, which can assume different forms and degrees, of which the most extreme are those that imply coercion, physical violence, isolation or confinement, or the threat to kill the victim or his next of kin."[262]

221. Unwillingness to perform the work of service: "consists in the absence of consent or free choice when the situation of forced labor begins or continues. This can occur for different reasons, such as illegal deprivation of liberty, deception or psychological coercion."[263]

222. In the case of *Ituango v Columbia*, the Court found that the three requirements, i.e. a menace of a penalty, the unwillingness to perform the work or service, as well as the connection with state agents were present and therefore the State had breached Article 6(2) of the American Convention.

ii) Inter-American Commission on Human Rights- Report on Captive Communities, 2009[264]

223. In this report, the Inter-American Commission relies on the ILO's assessment that "forced labor imposed by private actors is for the purpose of commercial sexual exploitation or economic exploitation. Economic exploitation includes work in servitude, forced domestic work, and forced labor in agriculture and in remote rural areas."[265]

224. In 2015, the Inter-American Commission reported Brazil to the Inter-American Court for a violation of Article 6 of the American Convention on

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[260] *Ituango v Columbia*, para. 160

[261] Ibid

[262] Ibid, para. 161

[263] Ibid, para. 164

[264] IACHR, 'Captive Communities: situation of the Guarani Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco', 24 December 2009

[265] Ibid, p.6

Human Rights. The case concerns thousands of victims of forced labour and enslavement on the estate of Fazenda Brazil Verde. The Commission's merits report is unfortunately only available in Portuguese. The Court has not rendered any decision on this matter yet, but this case will "enable the Inter-American Court to develop case law on forced labor and contemporary forms of slavery."[266]

THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS

225. Article 5 of the African Charter on Human and People's Rights provides that, "*Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.*" In addition, Article 4(2)(g) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women and Children in Africa places an obligation on member states to take appropriate and effective measures to prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk.[267]

226. It is not clear how many of its member states have enacted legislation to protect these rights, however the following states appear to have done so: Nigeria (Nigerian Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003); Ghana (Human Trafficking Act 2005); Tanzania (Anti-Trafficking in Persons Act 2008); Lesotho (Anti-Trafficking in Person Act 2011); Namibia (section 15 of the Prevention of Organized Crime Act 2004 prohibits Human Trafficking); Zambia (Anti-Human Trafficking Act 2008); Swaziland (People Trafficking and People Smuggling Act of 2009); and Madagascar (Anti-Trafficking Law No.2007-o38). Whether or not this

[266] OAS, Press release, 'IACHR takes case involving Brazil to the Inter-American Court', 7 May 2015, accessible at : < http://www.oas.org/en/iachr/media_center/PReleases/2015/045.asp>

[267] Protocol to the African Charter on Human and People's Rights on the Rights of Women and Children in Africa, - -available at http://www.achpr.org/instruments/women-protocol/#4 [accessed 22 January 2016].

legislation is in force and effect and the extent of its implementation by the individual states is unclear.

D. INTERNATIONAL JURISDICTIONS

THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

227. The Human Rights Committee is a body of independent experts that monitors the implementation of the International Covenant on Civil and Political Rights[268] by States Parties. States Parties are required to submit regular reports to the Committee detailing how rights within the ICCPR are being implemented. The Human Rights Committee addresses its concerns and recommendations to the State party relating to this report in the form of "concluding observations." The Human Rights Committee also publishes authoritative interpretations of the content of the rights within the ICCPR through general comments.

I. THE PROHIBITION OF HUMAN TRAFFICKING

a) RELEVANT ARTICLES of THE ICCPR

228. There is no direct reference to human trafficking in the ICCPR. However, the ICCPR prohibits a number of practices related to trafficking:

- Slavery (Article 8(1))

[268] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

- Slave trade (Article 8(1))
- Servitude (Article 8(2))
- Forced labour (Article 8(3)(a))

229. In addition, the Human Rights Committee, in its concluding observations for the following States Parties, has identified trafficking as a potential violation of Articles 3 (equal right of men and women to enjoyment of rights under the Covenant), 24 (children's rights) and 26 (equal protection of the law):

- Barbados[269]
- Brazil[270]
- Kosovo[271]
- Paraguay[272]
- Slovenia[273]

230. Furthermore, the UN Committee against Torture has recognised the link between trafficking and torture in its Concluding Observations for:

- Russian Federation[274]
- South Africa[275]
- Togo[276]

231. In General Comment no. 24 the Human Rights Committee stated that the prohibition of torture is a peremptory norm of international law.[277] Thus it is a norm from which derogations are not permitted. Accordingly, in its Concluding

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[269] UN Human Rights Committee, "Concluding Observations Barbados" (2007) CCPR/C/BRB/CO/3, para 8

[270] UN Human Rights Committee, "Concluding Observations Brazil" (2005) CCPR/C/BRA/CO/2 para 15

[271] UN Human Rights Committee, "Concluding Observations Kosovo (Serbia)" (2006) CCPR/C/UNK/CO/1 para 16

[272] UN Human Rights Committee, "Concluding Observations Paraguay" (2006) CCPR/C/PRY/CO/2 para 13

[273] UN Human Rights Committee, "Concluding Observations Slovenia" (2005) CCPR/CO/84/SVN para 11

[274] UN Committee against Torture, "Concluding Observations Russian Federation" (2007) CAT/C/RUS/CO/4 para 11

[275] UN Committee against Torture, "Concluding Observations South Africa" (2006) CAT/C/ZAF/CO/1 para 24

[276] UN Committee against Torture, "Concluding Observations Togo" (2012) CAT/C/TGO/CO2 para 18 and UN Committee against Torture, "Concluding Observations Togo" (2006) CAT/C/TGO/CO/1 para 26

[277] UN Human Rights Committee, "General Comment No. 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant" (1994) UN Doc CCPR/C/21/Rev.1/Add.6

Observations on Paraguay the Human Rights Committee called on the State Party to take measures to end human trafficking.[278]

b) DUTY TO PROSECUTE TRAFFICKERS

232. The Human Rights Committee has called on the following States Parties to prosecute and punish those who engage in trafficking:

- Albania[279]
- Brazil[280]
- Czech Republic[281]
- Former Yugoslav Republic of Macedonia[282]
- Kosovo[283]
- Serbia[284]
- Slovenia[285]
- Thailand[286]

233. In its Concluding Observations on South Africa the Committee against Torture called upon the State party to "adopt legislation and other effective measures, in order to adequately prevent, combat and punish human trafficking."[287] Similarly, it called upon Togo to "take the necessary steps to combat trafficking in women and children effectively and to punish those responsible for such

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[278] UN Human Rights Committee, "Concluding Observations Paraguay" (2013) CCPR/C/PRY/CO/3 para 17

[279] UN Human Rights Committee, "Concluding Observations Albania" (2004) CCPR/CO/82/ALB para 15 and UN Human Rights Committee, "Concluding Observations Albania" (2013) CCPR/C/ALB/CO/2 para 14

[280] UN Human Rights Committee, "Concluding Observations Brazil" (2005) CCPR/C/BRA/CO/2 para 15

[281] UN Human Rights Committee, "Concluding Observations Czech Republic" (2007) CCPR/C/CZE/CO/2 para 12

[282] UN Human Rights Committee, "Concluding Observations Former Yugoslav Republic of Macedonia" (2015) CCPR/C/MKD/CO/3

[283] UN Human Rights Committee, "Concluding Observations Kosovo (Serbia)" (2006) CCPR/C/UNK/CO/1 para 16

[284] UN Human Rights Committee, "Concluding Observations Serbia" (2011) CCPR/C/SRB/CO/2 para 16

[285] UN Human Rights Committee, "Concluding Observations Slovenia" (2005) CCPR/CO/84/SVN para 11

[286] UN Human Rights Committee, "Concluding Observations Thailand" (2005) CCPR/CO/84/THA para 20

[287] UN Committee against Torture, "Concluding Observations South Africa" (2006) CAT/C/ZAF/CO/1 para 24

[288] UN Committee against Torture, "Concluding Observations Togo" (2006) CAT/C/TGO/CO/1 para 26cat/

acts."[288] The Human Rights Committee requires that penalties are commensurate with the seriousness of the acts.[289]

c) EFFECTIVE AND APPROPRIATE REMEDIES FOR VICTIMS

234. In its Concluding Observations on Brazil the Human Rights Committee has expressed the need to provide redress to victims of trafficking.[290] In its Concluding Observations on Costa Rica the Human Rights Committee stated that the State Party should award compensation to victims of trafficking.[291] In its Concluding Observations on the Former Yugoslav Republic of Macedonia in 2008 the Human Rights Committee expressed its concern regarding the "the low number of cases where compensation for non-pecuniary damage has been granted" to victims of trafficking.[292] In its most recent Concluding Observations for Macedonia in 2015 the Human Rights Committee stressed that "the State party should intensify its efforts to guarantee adequate protection, reparation and compensation to victims [of trafficking]…"[293] In its Concluding Observations on Japan the Human Rights Committee has stated that legal support should be provided for victims of trafficking in order to claim unpaid wages and compensation.[294] The Human Rights Committee reiterated this position in its latest Concluding Observations for Japan in 2014.[295] In its Concluding Observations for Paraguay the Human Rights Committee stated that victims of trafficking "should receive fair and adequate compensation."[296]

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[289] UN Human Rights Committee, "Concluding observations Costa Rica" (2007) CCPR/C/CRI/CO/5 para 12

[290] UN Human Rights Committee, "Concluding Observations Brazil" (2005) CCPR/C/BRA/CO/2 para 15

[291] UN Human Rights Committee, "Concluding observations Costa Rica" (2007) CCPR/C/CRI/CO/5 para 12

[292] UN Human Rights Committee, "Concluding Observations The Former Yugoslav Republic of Macedonia" CCPR/C/MKD/CO/2 (2008) para 13

[293] UN Human Rights Committee, "Concluding Observations Former Yugoslav Republic of Macedonia" (2015) CCPR/C/MKD/CO/3

[294] UN Human Rights Committee, "Concluding Observations Japan" (2008) CCPR/C/JPN/CO/5 para 23

[295] UN Human Rights Committee, "Concluding Observations Japan" (2014) CCPR/C/JPN/CO/6

[296] UN Human Rights Committee, "Concluding Observations Paraguay" (2006) CCPR/C/PRY/CO/2 para 13

235.The Committee against Torture, in its Concluding Observations on Togo in 2012, stated that the State party should "provide fair and adequate redress and rehabilitation to… victims of trafficking in persons."[297]

II. THE COMMERCIAL NATURE OF HUMAN TRAFFICKING

236.The Human Rights Committee has not directly commented on the commercial nature of trafficking. However, such a nature appears to be implicit given that the Committee refers to trafficking "for purposes of sexual exploitation and forced labour."[298] In its Concluding Observations on the Czech Republic, the Human Rights Committee addressed together the issues of trafficking and commercial sexual exploitation.[299] This perhaps indicates that they consider the practices to be linked.

THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS

237.The United Nations Commission on Human Rights, which was replaced by the Human Rights Council, was composed of 53 States. It acted as a forum through which human rights concerns from around the world could be

[297] UN Committee against Torture, "Concluding Observations Togo" (2012) CAT/C/TGO/CO2 para 18

[298] UN Human Rights Committee, "Concluding Observations Thailand" (2005) CCPR/CO/84/THA para 20

[299] UN Human Rights Committee, "Concluding Observations Czech Republic" (2007) CCPR/C/CZE/CO/2 para 12

addressed. The Commission had the power to adopt resolutions, decisions and issue Chairperson's statements.

I. THE PROHIBITION OF HUMAN TRAFFICKING

238.In the Preamble of Resolution 2004/45 on trafficking in women and girls the Commission called on States to "eliminate all forms of sexual violence and trafficking… which both violate and impair or nullify the enjoyment of the human rights and fundamental freedoms of victims of trafficking."

THE UNITED NATIONS HUMAN RIGHTS COUNCIL

239.The Human Rights Council is an inter-governmental body consisting of 47 states which is responsible for the protection and promotion of human rights around the world. The Council is not bound by the provisions of a particular

treaty and thus can discuss all thematic human rights issues and situations which may arise. Through the Universal Periodic Review the Council can review the human rights records of all UN Member States.

I. THE PROHIBITION OF HUMAN TRAFFICKING

240. In the Preamble of Resolution 11/3 on trafficking in persons, especially women and children, the Council recognizes that:

> "Trafficking in persons violates human rights and impairs the enjoyment of them, continues to pose a challenge to humanity and requires a concerted international assessment and response and genuine multilateral cooperation among countries of origin, transit and destination for it to be eradicated."[300]

a) DUTY TO PROSECUTE

241. In the Preamble of Resolution 11/3 the Council noted that "all States have an obligation to exercise due diligence to prevent trafficking in persons, to investigate and punish perpetrators… and that not doing so violates and impairs or nullifies the enjoyment of the human rights and fundamental freedoms of victims." Accordingly, the Council urged governments "to criminalize trafficking in persons in all its forms and to condemn and penalize traffickers, facilitators and intermediaries." Furthermore, the Council expressed its concern regarding "the high level of impunity enjoyed by traffickers… and the denial of rights and justice to victims of trafficking."

b) EFFECTIVE AND APPROPRIATE REMEDIES FOR VICTIMS

242. In Resolution 11/3 the Council "affirms that it is essential… to protect, assist and provide access to adequate redress to victims, including the possibility of obtaining compensation from the perpetrators."

II. THE COMMERCIAL NATURE OF HUMAN TRAFFICKING

[300] UN Human Rights Council Res 11/3 (2009)

243. In the Preamble of Resolution 11/3 the Human Rights Council notes that "some of the demand for prostitution and forced labour is met by trafficking in persons in some parts of the world." In Resolution 11/3 the Council lists a number of the motives for trafficking in persons. These include a number of motives which are of a commercial nature:

- Prostitution
- Commercialized sex
- Sex tourism
- Forced labour
- Slavery
- Removal of organs

The Human Rights Council also recognized the link between "the demand created by sex tourism… and forced labour" and trafficking.

244. Furthermore, the economic element of trafficking was recognized in Resolution 23/5 entitled Trafficking in persons, especially women and children: efforts to combat human trafficking in supply chains of business.[301] In the Preamble the Human Rights Council recognized that "human trafficking in supply chains has been identified as a serious problem and a challenge that needs to be addressed in various economic sectors, including those integrated into global markets." In particular the Human Rights Council recognized that "some of the demand fostering sexual exploitation, exploitative labour and illegal removal of organs is met by trafficking in persons." The Human Rights Council thus called on States "to promote partnerships and engage the business community… in developing and implementing sustainable initiatives to prevent and combat human trafficking in supply chains…" It also encouraged businesses to take a number of steps in order to mitigate the risk of trafficked persons in their supply chains.

CONCLUSION ON UNITED NATIONS HUMAN RIGHTS BODIES

245. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime is a key instrument that established the prohibition of human trafficking. Its definition of human trafficking has been replicated in the following international and national legal instruments addressing the issue.

[301] UN Human Rights Council Res 23/5 (2013)

246. It is clear that each of these human rights bodies considers trafficking to be a serious violation of several human rights. Each of the human rights bodies examined in this paper has called for the eradication of human trafficking. Both the Human Rights Committee and the Human Rights Council have called on States to ensure the prosecution and punishment of those engaged in trafficking. Additionally, both the Human Rights Committee and the Human Rights Council have called on States to provide access to a remedy for victims. The Human Rights Council has stated that a remedy can include the possibility of compensation. As regards the commercial nature of trafficking there appear to have been no explicit statements by any of the human rights bodies in this regard. Nonetheless, references to "commercial sexual exploitation" and "forced labour" in the context of trafficking imply a degree of recognition as regards the commercial purposes of human trafficking.

THE INTERNATIONAL LABOUR ORGANIZATION

I. THE PROHIBITION OF SLAVERY/HUMAN TRAFFICKING

247. There are a number of ILO instruments that may be of relevance to the case which touch on issues forced labour, modern slavery and human trafficking. Since the ILO generally deals with issues related to employment relations, the emphasis in these instruments is on conditions of forced labour and otherwise unacceptable working conditions. However, the website of the ILO as well as various policy documents make clear that slavery and human trafficking are related to the issue of forced labour and forms thereof, even though if they are not specifically mentioned in most of the Convention texts.[302]

C029 - Forced Labour Convention, 1930 (No. 29)

248. The **Forced Labour Convention** is the main instrument for the protection against forced labour.[303] It has particularly high status within the ILO legal regime, being one of the 8 *fundamental* conventions of the ILO which members are obliged to respect regardless of ratification (although C29 is binding on the UK by virtue of ratification as well). **Article 2** defines forced labour as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily', with a number of exceptions listed in Article 2(2). **Article 1** contains the main obligation on States, which is 'to suppress the use of forced or compulsory labour in all its forms within the shortest possible period', though it must be noted that Article 1(2) also specifies conditions under which recourse to forced labour may be had for public purposes and exceptional circumstances (some of the later Articles specify the conditions). Of interest to the particular case may be **Article 4(1),** which stipulates that 'The competent authority shall not impose or *permit* the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations.' It is also important to have regard to Article 25, which states that 'The illegal exaction of forced or compulsory labour shall be punishable as a penal offence, and it shall be an

[302] See eg ILO, ‚Forced Labour, Human Trafficking and Slavery', http://www.ilo.org/global/topics/forced-labour/lang--en/index.htm (last accessed 20 January 2016).

[303] The second instrument related to forced labour is the Abolition of Forced Labour Convention, 1957 (No. 105). However, the Convention only covers particular circumstances in which use is made of forced labour, such as as a means of political coercion, and is therefore not relevant in the case.

obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced' – this highlights the fact that the ILO perceives the exaction of forced labour as a particularly serious rights violation.

The Protocol to the Forced Labour Convention

249. Since C029 dates back to 1930, P029 - Protocol of 2014 to the Forced Labour Convention was adopted in order to bring C029 up to date and address gaps in its implementation, which comes into force on 9th November 2016. The Preamble to the Protocol stresses the the role of the prohibition on forced labour as a fundamental human right and emphasises 'the urgency of eliminating forced and compulsory labour in all its forms and manifestations'. Importantly, it recognises that:

> "the context and forms of forced or compulsory labour have changed and trafficking in persons for the purposes of forced or compulsory labour, which may involve sexual exploitation, is the subject of growing international concern and requires urgent action for its effective elimination."

250. It also notes that:

> "an increased number of workers who are in forced or compulsory labour in the private economy, that certain sectors of the economy are particularly vulnerable, and that certain groups of workers have a higher risk of becoming victims of forced or compulsory labour, especially migrants";

and that:

> "the effective and sustained suppression of forced or compulsory labour contributes to ensuring fair competition among employers as well as protection for workers."

251. These could be considered as important statements on the gravity and extent of the problem and the growing measure of international concern on the matter.

252. **Article 1** of the Protocol is significant, as it stresses the obligations on Member States to take effective measures to prevent and eliminate forced labour, but also to 'to provide to victims protection and *access to appropriate and effective remedies,* such as compensation, and *to sanction the perpetrators* of forced or compulsory labour' (Article 1(1)). **Article 2** specifies the measures that might be taken, including efforts to ensure that 'the coverage and enforcement of legislation relevant to the prevention of forced or compulsory labour, including labour law as appropriate, apply to all workers and all sectors of the

economy' (Article 2(c)(i)) and 'protecting persons, particularly migrant workers, from possible abusive and fraudulent practices during the recruitment and placement process' (Article 2(d)). **Article 4 (1)** should also be highlighted, which states that 'Each Member shall ensure that all victims of forced or compulsory labour, irrespective of their presence or legal status in the national territory, have access to appropriate and effective remedies, such as compensation.' **Article 5** states that 'Members shall cooperate with each other to ensure the prevention and elimination of all forms of forced or compulsory labour.'

The Forced Labour (Supplementary Measures) Recommendation No. 203

253. In addition to the Convention and its Protocol, the ILC has also adopted the Forced Labour (Supplementary Measures) Recommendation No. 203, by its nature *non-binding*, in 2014, which makes recommendations on measures (including non-legal measures) on prevention, protection, remedies and enforcement and international cooperation issues. Of particular interest are the recommendations on remedies and access to justice (**para 12**): MS should 'take measures to ensure that all victims of forced or compulsory labour have access to justice and other appropriate and effective remedies, such as compensation for personal and material damages', and especially 12.a and 12.b on ensuring that victims have effective access to courts and tribunals to pursue remedies and compensation such as unpaid wages. **Para 14** on international cooperation should also be highlighted, and in particular 14.b which encourages 'cooperation to address and prevent the use of forced or compulsory labour by diplomatic personnel'. This is the only provision under instruments related to forced labour which alludes to the specific problem of rights abuses by diplomats (and by implication to the issue of diplomatic immunity).

C189 – Domestic Workers Convention, 2011 (No. 189)

254. Relevant in this context is also the Domestic Workers Convention. Crucially, the Convention has not been ratified by the UK and is therefore not binding on the UK. However, it is nevertheless significant as a recognition of the particularly vulnerable situation of domestic workers (and migrant domestic workers) and as one of the few hard-law instruments adopted by the ILO after

the 1998 Declaration on fundamental principles and rights at work.[304] Of interest in this case is the emphasis on *effective* protection for workers and access to justice. The Convention is said to take a human rights (or universal) approach, according *all* domestic workers particular rights (**Article 2**, though subject to exceptions defined in accordance with Article 2(2)).[305] **Article 3** sets out the main obligation of Member States, which is to 'to ensure the *effective* promotion and protection of the human rights of all domestic workers', including the elimination of all forms of forced or compulsory labour (which can include trafficking, see above). **Articles 4-16** set out particular rights of domestic workers, whereby **Article 8** pays particular regard to the rights of migrant domestic workers, including a statement that members 'shall take measures to cooperate with each other to ensure the effective application of the provisions of this Convention to migrant domestic workers' (Article 8(3)). **Article 16** states that Member States shall ensure that all domestic workers have 'effective access to courts, tribunals or other dispute resolution mechanisms under conditions that are not less favourable than those available to workers generally.'

255. Notably, as this falls outside the ILO's jurisdiction, the Convention does not specifically address questions of domestic workers employed by diplomats. This issue is highlighted in the supplementary Domestic Workers Recommendation No. 201 (again, non-binding). Paragraph 26(4) states:

> "(4) In the context of diplomatic immunity, Members should consider:
>
> (a) adopting policies and codes of conduct for diplomatic personnel aimed at preventing violations of domestic workers' rights; and
>
> (b) cooperating with each other at bilateral, regional and multilateral levels to address and prevent abusive practices towards domestic workers."

256. Thus, although the Recommendation recognises the problem at hand, no steps are taken to suggest whether or in what circumstances members should waive immunity or that immunity is not applicable in the case of migrant domestic workers. The remainder of para 26 makes other recommendations on cooperation between members in respect of migrant domestic workers, such as 'matters concerning the prevention of forced labour and trafficking in persons' (**para 26(2)).**

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[304] V Mantouvalou & E Albin, 'The ILO Convention on Domestic Workers: From the Shadows to the Light' (2012) 41 ILJ 67, 71.

[305] Ibid.

C143 - Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)

257. One additional source of standards which are relevant in the context of migrant workers and trafficking is the Migrant Workers (Supplementary Provisions) Convention No. 143, though, again, this has not been ratified by the UK. The Preamble to the Convention recognises that the existence of 'illicit and clandestine trafficking in labour calls for further standards specifically aimed at eliminating these abuse'. Part I is of interest as it deals with 'migration in abusive conditions'. **Article 2(1)** states that

258. Each Member for which this Convention is in force shall systematically seek to determine whether there are illegally employed migrant workers on its territory and whether there depart from, pass through or arrive in its territory any movements of migrants for employment in which the migrants are subjected during their journey, on arrival or during their period of residence and employment to conditions contravening relevant international multilateral or bilateral instruments or agreements, or national laws or regulations.

259. **Articles 3 and 4** concern the measures that states shall adopt to prevent the abuses mentioned in Article 2; **Article 5** stipulates that 'one of the purposes of the measures taken under Articles 3 and 4 of this Convention shall be that the authors of manpower trafficking can be prosecuted whatever the country from which they exercise their activities'.

Practice

260. There are over 2000 comments of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) under C029 on various member states issued over the many years in which the Convention has been in force, 670 of which contain the word 'trafficking'. It is therefore difficult to produce a general overview of an established 'practice' of the ILO in this regard, unless the search is narrowed. However, it is possible to establish that the issue of diplomatic immunity, for example, has not been properly discussed by the CEACR in this context: there are only two Direct Requests (2009 and 2007 on Belgium) which mention diplomatic immunity, and they do

so only by way of explaining the findings of the Government that this is one of the problems in the context of trafficking:

'In reply to the Committee's comments on the difficulties faced by the competent authorities in combating the trafficking of persons, the Government states that the Interdepartmental Task Force for Coordinating Action against Human Trafficking has prepared a list of all the difficulties faced by the various partners in this regard and, in response, set up four working groups. One of the difficulties mentioned by the Government is the issue of the identification of victims and conditions for granting the status of "victim of trafficking". Despite the fact that cooperation with the judicial authorities is a determining factor in granting this status, it seems that consideration has not always been given to the specific situation of certain victims and to the fact that it is difficult, if not impossible, for them to cooperate with the judicial authorities. *This is most notably the case for young victims who may find it difficult to provide useful information for an investigation and domestic staff working privately for diplomats. Indeed, due to the immunity enjoyed by diplomats, they are, in principle, exempt from criminal proceedings*. The Government also states that services which do not directly specialize in combating human trafficking may come across victims, but, through lack of training, omit to send them to the specialized centres. Sometimes, victims are more often considered as illegal immigrants or illegal workers than victims of trafficking.' (From 2007 report, emphasis added).

'Furthermore, a national plan of action to combat human trafficking was approved by the Council of Ministers on 11 July 2008. The plan of action assesses the policy implemented to combat trafficking and identifies the projects to be developed over the next ten years. It contains a number of proposals, including possible modifications to the law and regulations, the development of prevention initiatives, investigations and prosecutions relating to human trafficking and the protection of victims. With *regard to the domestic staff of diplomats, who are sometimes victims of trafficking, the plan of action proposes that a residence permit could be granted to a victim where a civil action is brought to the labour courts following a complaint, as criminal action is impossible in view of the immunity of the diplomats.* … The Committee notes, in light of the information contained in the plan of action, that the Minister of Employment sought the views of the Interdepartmental Task Force for the Coordination of Action against Human Trafficking on the action to be taken on the draft text, but has not received an answer.' (From 2009 report, emphasis added)

261. Since C189 is so recent, there is only one Direct Request so far and therefore no established practice. The comments under C143 are, again, extensive and a

narrower search into particular aspects of the protection against trafficking might be required – though there is no mention of diplomatic immunity.

Conclusions

262.Overall, it is clear that the prohibition on forced labour (and slavery and human trafficking) is taken very seriously within the jurisdiction of the ILO and seen as a serious human rights violation. Furthermore, the ILO clearly recognises the especially vulnerable position of (migrant) domestic workers, though in this regard it must be remembered that the UK has not ratified the relevant Conventions. Nevertheless, although a number of sources can be found on the ILO website which mention or specifically deal with the problems raised by the application of diplomatic immunity, ILO instruments (except R201, see above) do not address the issue, nor are there any helpful comments by the CEACR.

II. THE COMMERCIAL NATUTE OF HUMAN TRAFFICKING

a) ILO INSTRUMENTS

263.There is no explicit mention of the Vienna Convention on Diplomatic Relations, nor the exception under Article 31(1)(c). There is also nothing related to the commercial nature of human trafficking found within the rights enshrined in any of the relevant conventions. There is only scant evidence of the recognition of the economic/commercial dimension of trafficking and forced labour in the Preambles to:

264.P029: 'Noting that the effective and sustained suppression of forced or compulsory labour contributes to ensuring fair competition among employers as well as protection for workers'

265.*C189*: 'Recognizing the *significant contribution of domestic workers to the global economy*, which includes increasing paid job opportunities for women and men workers with family responsibilities, greater scope for caring for ageing populations, children and persons with a disability, and substantial income transfers within and between countries'

266.Unfortunately, therefore, ILO Conventions provide very little direct support for the claim that human trafficking is of 'commercial nature'. It should also be

mentioned that a study on 'Domestic Workers in Diplomats' Households' (prepared by Kartusch and Rabe before the adoption of C189) which outlines the protection accorded to domestic workers at international level suggests (albeit in a different part of the analysis) that 'employment relationships between private domestic workers and diplomats are not exempted from a diplomat's immunity.'[306]

b) POLICY DOCUMENTS

267. On the other hand, a number of policy documents which can be found on the ILO website do emphasise the profit-generating aspect of human trafficking and the fact that, generally, trafficking is undertaken for commercial purposes. A glance at the FAQs on forced labour found on the ILO website indicate that the ILO has conducted and plans to undertake further and more extensive research into the economics of modern forced labour.[307] A working paper prepared by Patrick Belser in 2005 estimates that 'the profits of forced labour could amount to US$ 44.3 billion per year, of which US$ 31.6 billion are made by exploiting trafficked victims.'[308] A more recent study in 2014 estimates that 'he total profits obtained from the use of forced labour in the private economy worldwide amount to US$150 billion per year', and that 'hat private households that employ domestic workers under conditions of forced labour save about US $8 billion annually by not paying or underpaying their workers'.[309] However, these documents only suggest that forced labour and human trafficking is of 'commercial nature' in some diffuse sense, rather than as an aspect of the particular relationship between the diplomat and the domestic worker, an argument which was rejected in the *Reyes v Almalki* case.

c) PRACTICE

268. There appears to be nothing relevant in the CEARC case-law on this issue.

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[306] Kartusch and Rabe, 'Domestic Workers in Diplomats' Households', German Institute for Human Rights (Berlin, 2011), 16.

[307] There are various studies which can be found on the ILO website but I have highlighted what I consider to be the most prominent ones.

[308] P Belser, ‚Forced Labour and Human Trafficking: Estimating the Profits', Special Action Programme to Combat Forced Labour DECLARATION/WP/42/2005.

[309] International Labour Office, ‚Profits and Poverty: The Economics of Forced Labour', Special Action Programme to Combat Forced Labour, Summary.

POSTSCRIPT

269. This section was added to include two important Italian cases found throughout the research. Italy was not originally planned to be treated, no researcher was allocated this jurisdiction. Therefore the section is not complete.

270. The Italian courts have, and have taken for a long time, a principled approach to the matter. The Italian Court of Cassation in *Comina v Kite* held that:

> 'The absolute immunity put forward from historical times is now ended and is one of the political doctrines that have been superseded; it is contrary to justice and to legal logic. The acts that a diplomatic agent does outside his public functions have no relation to the exercise of sovereignty; they do not constitute a manifestation of the activity of the Government represented by the agent'.[310]

271. In a decision handed down by the Court of Cassation on 15 May 1989, concerning an employee in consulate, it was held that the court had jurisdiction in all situations where the rights of the employee to access to court was concerned. The court held that in this field the right to access to justice could take precedence over immunity:

> '[a] growing difficulty emerges, a growing embarrassment in satisfactorily reconciling two clashing needs: a) to ensure respect for the foreign State, recognising its immunity for its official functions (in this case, its consular functions); b) to ensure citizens who are working in the national territory the protection of their rights, also through access to domestic courts. Such access is essential to allow citizens to obtain justice through readily available means.'[311]

[310] *Comina v Kite* (1922) Annual Digest Case No 202 p 286.

[311] Foro Italiano, 1989 Volume I, col 2466.