

2014

Demanding Accountability Where Accountability Is Due: A Functional Necessity Approach to Diplomatic Immunity Under the Vienna Convention

Nina M. Bergmar

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [International Humanitarian Law Commons](#)

Recommended Citation

Nina M. Bergmar, *Demanding Accountability Where Accountability Is Due: A Functional Necessity Approach to Diplomatic Immunity Under the Vienna Convention*, 47 *Vanderbilt Law Review* 501 (2021)
Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol47/iss2/3>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in *Vanderbilt Journal of Transnational Law* by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

NOTES

Demanding Accountability Where Accountability Is Due: A Functional Necessity Approach to Diplomatic Immunity Under the Vienna Convention

ABSTRACT

This Note addresses the inability of domestic workers to seek redress for exploitation by diplomat employers. In examining the legal quagmire facing these workers, this Note highlights a departure by courts from the functional necessity theory underlying the Vienna Convention. Courts now rely wholly on the U.S. State Department's interpretation of the scope of diplomatic immunity, communicated through "Statements of Interest." The significant deference given to such statements has had dire consequences for exploited victims. Under a functional necessity approach, domestic workers are able to demand redress, as exploitation is a private act—i.e., not in furtherance of the diplomatic mission—undertaken for personal gain. In contrast, the State Department's broad grant of immunity to diplomats has effectively eroded any exception to immunity hitherto relied upon by plaintiffs. This Note questions the delegation of interpretive functions to the Executive Branch and proposes a return to restrictive immunity, as postulated by functional necessity theory.

TABLE OF CONTENTS

I.	INTRODUCTION	503
II.	THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS.....	504
	A. <i>Theoretical Grounds for Diplomatic Immunity</i>	507
III.	THE ISSUE OF ACCOUNTABILITY.....	510
	A. <i>Abuse of Diplomatic Immunity and Cost-Benefit Analysis</i>	511
	B. <i>The Vulnerability of Domestic Workers Employed by Diplomats</i>	511
	C. <i>The Inability of Domestic Workers to Seek Redress</i>	514
IV.	CONSTRUING THE COMMERCIAL ACTIVITY EXCEPTION.....	516
	A. <i>Judicial Deference to Executive Statements of Interest</i>	516
	B. <i>Executive Fear of Reciprocity</i>	518
V.	LIMITATIONS OF PREVIOUS ATTEMPTS TO RETHINK DIPLOMATIC IMMUNITY	520
	A. <i>Waiver of Immunity</i>	520
	B. <i>Forced Isolation of Noncomplying Nations</i>	521
	C. <i>Creation of a Claims Fund</i>	521
	D. <i>Amending the Convention</i>	522
	E. <i>Adopting a Restrictive Interpretation of the Text</i>	523
VI.	SOLUTION	523
	A. <i>Facilitating the Transition to a Functional Necessity Approach</i>	525
	1. The Executive: Reevaluating Costs and Benefits.....	525
	2. The Judiciary: Reexamining the Text of the Commercial Activity Exception	526
	i. Deducing Intent from the Literal Language.....	526
	ii. Ordinary Meaning	527
	iii. Legislative History	527
	3. The Legislature: Clarifying the Role of the Judiciary	528
VII.	CONCLUSION.....	529

I. INTRODUCTION

Over the past decade, publicized instances of domestic workers alleging exploitation and abuse by diplomat employers have shed light on a hidden form of forced servitude.¹ In the typical narrative, domestic workers are induced by fraudulent employment contracts and false promises to accompany diplomat families to the United States.² Upon arrival, they discover that they are paid less than minimum wage; are forced to endure inhumane work hours; and become subjected to verbal, physical, and psychological abuse.³ Domestic workers bringing actions against diplomat employers have repeatedly had their cases dismissed for lack of subject-matter jurisdiction.⁴ In concluding that diplomatic immunity shields the employer from such suits, judges have relied almost exclusively on policy statements submitted by the State Department in the form of "Statements of Interest."⁵ Hence, few courts have endeavored to scrutinize the exact contours of the Vienna Convention on Diplomatic Relations (VCDR) and its enumerated exceptions to diplomatic immunity.

Cases involving diplomats likely constitute a small percentage of all domestic worker abuse cases;⁶ however, they raise complex legal

1. See, e.g., *Domestic Workers Who Accused Diplomats of Human Trafficking Settle with Kuwaiti Government*, AM. CIVIL LIBERTIES UNION (Feb. 15, 2012), <https://www.aclu.org/womens-rights/domestic-workers-who-accused-diplomats-human-trafficking-settle-kuwaiti-government> [<http://perma.cc/FL2E-2FS6>] (archived Jan. 20, 2014) ("The Kuwaiti government agreed to settle a case brought by three women who claimed that they were trafficked to the United States by a Kuwaiti diplomat and his wife and forced to work . . . against their will and under slavery-like conditions."); Traver Riggins, *Human Trafficking Allegations Test Diplomatic Immunity*, CTR. OF PUB. INTEGRITY (Apr. 29, 2011), <http://www.publicintegrity.org/2011/04/28/4400/human-trafficking-allegations-test-diplomatic-immunity> [<http://perma.cc/WN3H-CKA2>] (archived Jan. 20, 2014) (describing a human trafficking lawsuit brought by four women against a Qatari diplomat in the United States).

2. See Janie A. Chuang, *Achieving Accountability for Migrant Domestic Worker Abuse*, 88 N.C. L. REV. 1627, 1643–44 (2010) (discussing how some diplomats manipulate and exploit domestic workers).

3. See *id.* at 1629 ("[T]hese workers often work long days for little to no pay, labor under overwhelming debt, face threats from their employers, and suffer psychological and physical abuse.").

4. See, e.g., *Tabion v. Mufti*, 73 F.3d 535, 538–39 (4th Cir. 1996) (deferring to the State Department's narrow interpretation of the commercial activity exception, as communicated through a Statement of Interest, and ultimately dismissing case for lack of subject matter jurisdiction under the Diplomatic Relations Act); *Montuya v. Chedid*, 779 F. Supp. 2d 60, 63–65 (D.D.C. 2011) (same); *Swarna v. Al-Awadi*, 622 F.3d 123, 138–40 (2d Cir. 2010) (same); *Sabbithi v. Al Saleh*, 605 F. Supp. 2d 122, 126 (D.D.C. 2009) (same); *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187, 192–93 (D.D.C. 2007) (same).

5. *Id.*

6. *But see* Sarah Fitzpatrick, *Diplomatic Immunity at Issue in Domestic-Worker Abuse Cases*, WASH. POST (Sept. 20, 2009), <http://www.washingtonpost.com/wp->

questions that strike at the core of American attitudes toward the VCDR. To contextualize the dilemma facing domestic workers of diplomat families, Part II provides an overview of the VCDR, including its relevant provisions, stated purpose, and theoretical basis. Part III then discusses abuses of diplomatic privilege and exploitation of domestic workers. Part IV addresses a core obstacle to redress: courts' narrow construction of the commercial activity exception to diplomatic immunity. This Part pays close attention to the interaction of the Judiciary and the Executive in delineating the scope of diplomatic immunity. Part V evaluates the limits of previous attempts to rethink diplomatic immunity to better accommodate requests for redress. Finally, Part VI advocates adoption of a functional necessity approach to diplomatic immunity, which would limit the issue of unchecked exploitation. This Part also suggests how each branch of government may facilitate and accommodate such a shift.

II. THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS

In 1969, the United States ratified the VCDR,⁷ which codified longstanding diplomatic and consular practices with the purpose of maintaining the "sovereign equality of States[,] . . . international peace and security, and the promotion of friendly relations among nations."⁸ The VCDR, which is a non self-executing treaty, gained legal force in the United States through the enactment of the Diplomatic Relations Act of 1978,⁹ in which Congress "established the Vienna Convention as the sole U.S. law governing diplomatic privileges and immunities."¹⁰ The VCDR states in relevant part that a "diplomatic agent shall enjoy immunity from the criminal

[dyn/content/article/2009/09/19/AR2009091901864.html](http://perma.cc/UX3V-D4DU) [http://perma.cc/UX3V-D4DU] (archived Jan. 20, 2014) (quoting Suzanne Tomatore, Director of the Immigrant Women and Children Project at the New York City Bar Justice Center) ("Unfortunately, cases involving diplomatic employers represent a disproportionate amount of the domestic-worker abuse cases we see."); Amy Tai, Note, *Unlocking the Doors to Justice: Protecting the Rights and Remedies of Domestic Workers in the Face of Diplomatic Immunity*, 16 AM. U. J. GENDER SOC. POL'Y & L. 175, 180 (2007) ("While there is no official figure indicating how many diplomats violate the rights of their workers, the cases filed in court, covered by the media, and reported upon by non-governmental organizations demonstrate that the problem is pervasive and underreported.").

7. Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Apr. 18, 1961, 23 U.S.T. 3227 [hereinafter VCDR].

8. *Id.* at pmb1.

9. See Diplomatic Relations Act, 22 U.S.C.A. § 254 (West 2013) (repealing 1790 legislation on diplomatic immunity and bringing U.S. law in line with the Vienna Convention on Diplomatic Relations).

10. LINDA S. FREY & MARSHA L. FREY, *THE HISTORY OF DIPLOMATIC IMMUNITY* 490 (1999).

jurisdiction of the receiving State...[and] its civil and administrative jurisdiction.”¹¹ As such, diplomatic agents or members of their immediate family may not be arrested or detained; may not have their residences entered and searched; may not be subpoenaed as witnesses; and may not be prosecuted by the nation in which they are serving their country.¹² The VCDR is premised on the belief that an international convention on diplomatic relations, privileges, and immunities fosters friendly relations among nations, “irrespective of their differing constitutional and social systems.”¹³

While crucial to diplomatic and foreign relations, the VCDR recognizes certain exceptions. Article 31(1) outlines three exceptions to the immunity afforded to diplomats (and their families¹⁴) in the receiving state:

A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.¹⁵

The third exception, hereinafter referred to as the “commercial activity exception,”¹⁶ has proven controversial due to its ambiguous language.¹⁷ The VCDR provides no definition of what constitutes “commercial activity,” nor does the exception itself include any restricting qualifiers limiting the scope of the term.¹⁸ As a result, this

11. VCDR, *supra* note 7, at art. 31(1).

12. *See id.* at arts. 29–31, 37 (proclaiming that the person and private residence of the diplomatic agent shall be inviolable).

13. *Id.* at pmb1.

14. Article 37 provides for the same immunity for “members of the family of a diplomatic agent forming part of his household . . . , if they are not nationals of the receiving State.” *Id.* at art. 37.

15. *Id.* at art. 31(1).

16. *Id.* at art. 31(1)(c).

17. *See infra* Parts III.C, IV (presenting judicial interpretations of the language of the commercial activity exception).

18. *See* VCDR, *supra* note 7, at art. 31(1)(c) (stating “an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions”).

exception has generated litigation over the nature of activities undertaken by diplomats outside of their official duties.¹⁹

Aside from the enumerated exceptions, there are only limited opportunities for circumventing immunity. Perhaps the most effective method of avoiding immunity is set forth in Article 32 of the VCDR.²⁰ Article 32 builds on the previously listed rights of diplomats to immunity from arrest, detention, and civil and criminal prosecution²¹ but asserts that the sending country may waive this immunity at any time.²² Yet, states have proven exceedingly unwilling to grant such waivers, even in cases where the cost of doing so would be minimal.²³

As a last resort, a receiving state may assert a *persona non grata* claim, as stipulated in Article 9.²⁴ Under this provision, the receiving state may at any point and for any reason notify the sending state that the diplomat at issue is a *persona non grata*, or unwanted person.²⁵ The sending state must then either recall the diplomat or terminate his or her duties in the host state.²⁶ Although a *persona non grata* procedure appears simple, it is rarely used in practice. Fear of reciprocity²⁷ and disrupted diplomatic relationships weigh in favor of simply absorbing the costs of misdeeds.²⁸

Due to the infrequency with which a country agrees to waive immunity and the significant costs involved in *persona non grata* procedures, debates over diplomatic immunity have generally focused on the application and permissible scope of the three exceptions

19. See *infra* Parts III.C, IV (analyzing various lawsuits brought by domestic workers that have necessitated the interpretation of the language of Article 31(1)(c) of the VCDR).

20. VCDR, *supra* note 7, at art. 32.

21. See *id.* at arts. 29, 31 (providing for diplomatic immunity from arrest, detention, and prosecution).

22. See *id.* at art. 32(1) ("The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.").

23. See *infra* Part V.A (explaining the difficulties that the State Department has faced in its requests for waivers of diplomatic immunity).

24. See VCDR, *supra* note 7, at art. 9 (providing an alternate method to circumvent diplomatic immunity).

25. See *id.* ("The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is a *persona non grata* or that any other member of the staff of the mission is not acceptable.").

26. See *id.* at art. 9(1) ("In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission.").

27. See *infra* Part IV.B (describing the Executive's fear of reciprocity).

28. See *infra* Part III.A (presenting a cost-benefit analysis of diplomatic immunity).

enumerated in Article 32.²⁹ This Note will focus on the third of these exceptions: the commercial activity exception.

A. Theoretical Grounds for Diplomatic Immunity

Three theories seek to justify diplomatic immunity: representative of the sovereign, extraterritoriality, and functional necessity.³⁰ The early theory of representative of the sovereign, also known as personal representation, holds that “the representative’s privileges are similar to those of the sovereign herself, and an insult to the ambassador is an insult to the dignity of the sovereign.”³¹ This theory has three major flaws.³² First, granting the foreign envoy the same degree of immunity as the sending state would “place the individual diplomat above the law of the host state.”³³ Second, due to the evolution of popular rule, it is not always clear whom the diplomat represents.³⁴ Third, “the theory extends no basis for protecting diplomats from the consequences of their private actions.”³⁵ Consequently, the theory has been largely discredited.³⁶

The second theory, the theory of extraterritoriality, assumes that a diplomat is always on the soil of the sending country.³⁷ As a result,

29. Thus far, the United States has never labeled a diplomat charged with exploiting a domestic worker a *persona non grata*. While waivers have been attempted from time to time, they have never been successful in this context. *See, e.g., Sabbithi v. Al Saleh*, 605 F. Supp. 2d 122, 125 (D.D.C. 2009) (describing how the U.S. Department of State asked Kuwait to waive immunity for a diplomat accused of exploitation of domestic workers, and how such a request was declined).

30. *See* Mitchell S. Ross, Note, *Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities*, 4 AM. U. J. INT’L L. & POL’Y 173, 177 (1989) (presenting three theoretical bases for diplomatic immunity in a discussion of the history and development of diplomatic immunity).

31. Leslie Shirin Farhangi, *Insuring Against Abuse of Diplomatic Immunity*, 38 STAN. L. REV. 1517, 1520–21 (1986).

32. *See* Ross, *supra* note 30, at 177 (criticizing the “representation of the sovereign” theory on the grounds that it is overbroad in placing the individual diplomat above the law of the host state, undermined by modern nation states, and lacking in theoretical basis to provide protection for private acts).

33. *See id.* (citing C. WILSON, DIPLOMATIC PRIVILEGES AND IMMUNITIES 4 (1967)) (presenting the first ground upon which the personal representation theory is rejected).

34. *See id.* at 177–78 (citing WILSON, *supra* note 33) (crediting the invalidation of this theory, in part, on the decline of the powerful monarch after the American and French revolutions).

35. *See id.* at 178 (citing WILSON, *supra* note 33) (“Since the theory of personal representation fails to extend a foundation for immunity to private acts, it must be rejected as the sole juridical foundation of diplomatic privileges and immunities.”).

36. *See id.* (concluding that the analysis discredits the personal representation theory on three grounds).

37. *See* Farhangi, *supra* note 31, at 1520 (describing this assumption as “legal fiction”).

a diplomat is not subject to the receiving country's laws.³⁸ The role of extraterritoriality theory in today's discourse is not entirely clear. While some argue that the codification of the VCDR marked the official rejection of extraterritoriality,³⁹ others hold that this legal fiction maintains widespread support.⁴⁰ Many agree, however, that the theory sets forth an unjustifiably broad scope of diplomatic immunity.⁴¹

The third and most widely recognized justification for diplomatic immunity is the theory of functional necessity.⁴² This theory holds that diplomats engaging in official acts are immune to the jurisdictions of American courts.⁴³ Under this line of reasoning, diplomatic immunity protects those acts incidental to the mission⁴⁴ but "does not, however, afford protection and benefits to the diplomat as a person."⁴⁵ Hence, under this theory, when a diplomat "acts outside of the normal sphere of conducting international relations, a question arises as to whether immunity still applies."⁴⁶ A closer examination of the VCDR demonstrates how functional necessity theory pervades its text, purpose, and spirit.

The plain text of the VCDR's preamble expresses the very tenets of functional necessity theory by stating that although diplomatic privileges and immunities are necessary to diplomatic functions,⁴⁷ their purpose "is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing

38. See Ross, *supra* note 30, at 178 (concluding that the diplomat is immune to the receiving state's laws for lack of local residence).

39. See FREY & FREY, *supra* note 10, at 483 ("The Vienna Convention . . . signified the rejection of the fiction of extraterritoriality.").

40. See Ross, *supra* note 30, at 178 (citing Stephen L. Wright, Comment, *Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts*, 5 B.U. INT'L L.J. 177, 203-04 (1987) (noting the widespread support this theory received from international legal scholars and judicial opinions).

41. See *id.* (citing WILSON, *supra* note 33, at 1-5) (explaining that "if diplomatic premises covered an entire section of a city, that part of the city would become untouchable by local law enforcement because it is not theoretically part of the territory of the receiving state").

42. See, e.g., *id.* (citing WILSON, *supra* note 33, at 17) (portraying functional necessity as "the most widely accepted current justification of diplomatic immunity"); Farhangi, *supra* note 31, at 15-21 (describing functional necessity as "currently popular"); FREY & FREY, *supra* note 10, at 484-85 (describing consensus at the Vienna Convention as "function determined privilege").

43. See Ross, *supra* note 30, at 178-79 ("This theory provides that the diplomat is not subject to the jurisdiction of local courts, because this would hamper the functions of diplomatic relations.").

44. See *id.* at 179 (allowing diplomats to conduct their diplomatic business without fear of prosecution in local courts).

45. *Id.*

46. *Id.*

47. See Farhangi, *supra* note 31, at 1521 (justifying immunity on the grounds that "diplomats could not fulfill their diplomatic functions without such privileges").

States.”⁴⁸ The preamble’s disaggregation of “individuals” and “diplomatic missions” is perhaps most telling of the notion that official acts rather than individuals are immunized.⁴⁹

The structure of the VCDR further reflects the drafter’s intention to take a restrictive view of diplomatic immunity, which eschews blanket provisions of immunity.⁵⁰ Importantly, the VCDR outlines and distinguishes between different levels of immunity granted to different categories of staff, suggesting that immunity can only be justified to the extent that it is necessary to carry out the functions of a specific position.⁵¹ The VCDR’s enumeration of carved-out exceptions further confirms that immunity was meant to be limited.⁵²

Moreover, historical inquiry reveals the drafters’ desire to move away from the individual diplomat and toward a focus on the diplomatic mission, thus limiting the scope of diplomatic immunity in a manner consistent with functional necessity.⁵³ Prior to the VCDR, countries like the United States granted blanket immunity to ambassadors, ambassadors’ administrative staffs, and ambassadors’ personal servants.⁵⁴ Any attempt to limit or challenge the extent of such immunity was considered a crime.⁵⁵ In stark contrast with such nondiscriminatory, blanket immunity, the drafters included language specifically delineating permissive degrees of immunity for different categories of staff.⁵⁶ In doing so, the drafters forced a shift away from the individual toward the mission by defining immunity in terms of job functions.⁵⁷ As dictated by functional necessity, immunity was only justified insofar as it was necessary to the furtherance of the mission.

48. VCDR, *supra* note 7, at pmb1.

49. See Ross, *supra* note 30, at 180–81 (“The preamble to the Vienna Convention reflected the internal concern of giving unlimited immunity to all classes of diplomats.”).

50. See FREY & FREY, *supra* note 10, at 485 (“The limitations on jurisdictional immunity for diplomats, staff, and family reflected the restrictive position that prevailed at Vienna.”).

51. Wright, *supra* note 40, at 207 (noting that the Convention provides no immunity to diplomats and administrative or technical staff for criminal conduct).

52. FREY & FREY, *supra* note 10, at 485.

53. See Ross, *supra* note 30, at 180 (citing M. OGDON, JURIDICAL BASES OF DIPLOMATIC IMMUNITY, at vii (1936)) (noting a shift of world public opinion against diplomatic privileges).

54. See *id.* (noting that the Act of April 30, 1790 provided blanket immunity to ambassadors and their administrative staff, as well as their personal servants).

55. See *id.* (providing that the statute’s protective nature criminalized the act of bringing a suit against any individual with diplomatic immunity).

56. See *id.* at 181–82 (citing Wright, *supra* note 40, at 204) (noting the Vienna Convention establishes four categories of personnel, each with a different level of immunity).

57. See *id.* (providing that the Vienna Convention look to the category of personnel when determining immunity).

Finally, the legislative history of the VCDR removes any lingering doubt as to whether the drafters intended a restrictive definition of diplomatic immunity.⁵⁸ Beyond the provisions in the VCDR, numerous other proposals were originally submitted to the committee urging even more restrictive immunity than that which was ultimately adopted.⁵⁹ Importantly, the rejection of these proposals stemmed from disagreement over the specific language of the proposals—not disagreement with the restrictive scope.⁶⁰ The prevalence of restrictive proposals coupled with the relative lack of opposition to such a scope suggests that a limited scope of immunity was generally, if not universally, understood and accepted among the drafters.⁶¹

The theoretical principles underlying the VCDR provide insight into the permissible scope of diplomatic immunity. As demonstrated in this Note, the plain text, purpose, and spirit of the VCDR reflect the drafters' adherence to the functional necessity theory. A compelling argument can therefore be made for a more restrictive reading of the VCDR, which would limit the ability of diplomats to shield themselves from liability in cases involving exploitation of vulnerable populations for personal gain.

III. THE ISSUE OF ACCOUNTABILITY

Despite the traces of functional necessity evident in the text, structure, and purpose of the convention, American courts have rejected a restrictive reading of immunity. Instead of guarding the line between official and nonofficial conduct, or adhering to a presumption against immunity for acts furthering personal interests, courts have followed a *de facto* rule against interfering with diplomatic immunity.⁶² By allowing blanket privileges, the United States has invited various forms of abuse of immunity, as illustrated

58. See Wright, *supra* note 40, at 207 (suggesting that legislative history indicates varying levels of immunity were contemplated for diplomatic staff and technical or administrative staff).

59. See *id.* at 208 (highlighting the several proposals made at the Vienna Convention with substantially narrower immunity for administrative staff).

60. See *id.* at 208–09 (“At the United Nations conference convened to draft the Vienna Convention, many of the proposed amendments considered to restrict the scope of immunity failed to pass because of abstentions. The United States interpreted these failures as arising from disagreement with the specific language of the proposals rather than disagreement with the proposals’ restrictive principles.”).

61. See *id.* (providing that these proposals are evidence of an intent to provide limited immunity).

62. See *infra* Part IV.A (discussing the phenomenon of why “[t]o date, most, if not all, cases involving domestic workers alleging to have been exploited by diplomats with absolute immunity have been dismissed”).

by the experiences of exploited domestic workers employed by diplomats.⁶³

A. Abuse of Diplomatic Immunity and Cost-Benefit Analysis

Diplomatic immunity necessarily invites limited instances of abuse, such as unpaid tickets or unnecessarily risky or negligent behavior. For example, a 2006 study by the National Bureau of Economic Research found that between November 1997 and 2002 in New York City, “diplomats accumulated over 150,000 unpaid parking tickets, resulting in outstanding fines of more than \$18 million.”⁶⁴ The United States has consistently taken the position that absorbing the costs of such abuses is preferable to disrupting diplomatic relations.⁶⁵

This Note agrees that the cost—specifically, the risk of reciprocity⁶⁶—of holding foreign diplomats accountable for such petty abuses as parking violations exceeds the benefits derived therefrom. When the abuse takes on a different magnitude, however, so as to implicate the lives and rights of underprivileged individuals, the cost-benefit analysis arguably begins to shift. This Note suggests that the government’s divergence from the text, purpose, and spirit of the VCDR becomes unjustifiable when it results in the exploitation of human labor for personal gain.

B. The Vulnerability of Domestic Workers Employed by Diplomats

When diplomat families relocate to a receiving state, they frequently bring household help from their home countries. Most domestic workers traveling with diplomat families enter the United States on A-3⁶⁷ or G-5⁶⁸ visas.⁶⁹ Consular officers in each state are

63. See *infra* Part III.C.

64. Raymond Fisman & Edward Miguel, *Cultures of Corruption: Evidence from Diplomatic Parking Tickets*, Working Paper 12312, THE NAT’L BUREAU OF ECON. RES. (June 2006), <http://www.nber.org/papers/w12312> (archived Feb. 28, 2014).

65. See *infra* Part IV.A. (quoting the Tabion court, stating that it “is mindful that . . . what may prevent parties from obtaining redress in our courts also serves to protect American diplomats and their families from what we might consider legal abuses overseas. This balancing is a policy decision this Court should not challenge.”).

66. See *infra* Part IV.B (discussing the concept of reciprocity and how it affects diplomatic relations).

67. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-892, U.S. GOVERNMENT’S EFFORTS TO ADDRESS ALLEGED ABUSE OF HOUSEHOLD WORKERS BY FOREIGN DIPLOMATS WITH IMMUNITY COULD BE STRENGTHENED 2 (2008) [hereinafter GAO REPORT] (“Most of the household workers brought to the United States by foreign diplomats arrive with A-3 visas—as employees of officials from foreign embassies, consulates, or governments—or with G-5 visas—as employees of foreign officials for international organizations, such as the United Nations or the World Bank.”). Given to employees of officials from foreign embassies, consulates, or governments. See *infra* note 69.

responsible for ensuring that employment contracts submitted by A-3 and G-5 visa applicants comply with the *Foreign Affairs Manual*, which sets forth such requirements as minimum wage.⁷⁰ However, research has shown that consular officers are often confused about the reasons for which they may refuse A-3 or G-5 visas.⁷¹ Moreover, they are often ill prepared to scrutinize employment contracts between domestic workers and diplomats.⁷² As a result, visas are frequently granted to domestic workers whose employment contracts violate American laws.⁷³

In 2008, the U.S. Government Accountability Office (GAO) investigated the scope of alleged abuse of domestic workers by diplomat employers and how often fraudulent or illegal employment contracts were accepted by consular officers granting A-3 or G-5 visas.⁷⁴ While the exact number of domestic workers abused by diplomats is difficult to ascertain, the GAO identified forty-two household workers with A-3 or G-5 visas who allege to have been abused by foreign diplomats with immunity from 2000 through 2008.⁷⁵ The commission noted that at the time of the report, the total number of alleged incidents was likely higher than the reported number for four reasons: (1) victims' fears of contacting law enforcement; (2) Nongovernmental organizations' protection of victim confidentiality; (3) limited information on some cases handled by the U.S. government; and (4) the challenges federal agencies face in identifying cases since no office is the central repository for information on allegations.⁷⁶

68. Given to employees of foreign officials for international organizations, such as the United Nations or the World Bank. *See infra* note 69.

69. GAO REPORT, *supra* note 67, at 2.

70. *Id.* at 5.

71. *See id.* (highlighting that after speaking with consular offices, the GAO noted that many appeared unaware or unclear of the requirements and grounds for refusal).

72. *See id.* (noting that while A-3 and G-5 visas require consular offices to determine employment status, consular officials are not provided with explicit guidance as to how to complete that determination).

73. Note that it remains unclear whether the Wilberforce Act has had an impact on the frequency of such occurrences; the GAO research referenced was performed prior to the enactment of this statute.

74. *See* GAO REPORT, *supra* note 67, at 30 (explaining that the GAO interviewed officials in US agencies and NGOs, and collected data to identify civil lawsuits in order to determine how many A-3 or G-5 visa holders have alleged abuse).

75. *See id.* at 11 (after collecting data from 2000–2008, the GAO identified 42 allegations of abuse but noted the actual number of incidents is likely higher).

76. *Id.* at 13–16. Other organizations have produced alternative numbers: a collection of social service organizations have estimated that one-third of their domestic servitude cases implicate diplomats with immunity; the Spanish Coalition Center in Washington, D.C. claims to have seen approximately a thousand cases of domestic worker exploitation by employers with immunity since its inception in 1967; and the ACLU created its own independent report in 2007 of domestic workers abused by

Noting considerable deficiencies in enforcement, the GAO submitted three recommendations asking the government to (1) collect and maintain records on allegations of household worker abuse by foreign diplomats; (2) establish a system alerting consular officers to seek guidance before issuing an A-3 or G-5 visa to an individual applying to work for a foreign diplomat who may have abused workers; and (3) spot-check compliance with A-3 and G-5 visa policies and procedures.⁷⁷ President George W. Bush responded to the suggestions outlined in the GAO report by signing into law the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (Act).⁷⁸

The Act specifically aims to reduce the number of domestic workers falling prey to abusive diplomats by placing limitations on issuance of A-3 and G-5 visas and enhancing protections for A-3 and G-5 visa holders employed by diplomats.⁷⁹ The Act requires, *inter alia*, that all applicants execute a contract with their employer containing: (A) an agreement by the employer to abide by all federal, state, and local laws in the United States; (B) information on the frequency and form of payment, work duties, weekly work hours, holidays, sick days, and vacation days; and (C) an agreement by the employer not to withhold the passport, employment contract, or other personal property of the employee.⁸⁰ Moreover, a consular officer must conduct a personal interview with the applicant outside the presence of the employer during which the officer reviews the terms of the contract and the fair labor standards in the United States.⁸¹ Importantly, the Act further stipulates that “the Secretary shall suspend . . . the issuance of A-3 visas or G-5 visas to applicants seeking to work for officials of a diplomatic mission . . . if the Secretary determines that there is credible evidence that 1 or more employees of such mission . . . have abused or exploited 1 or more nonimmigrants holding an A-3 visa or a G-5 visa.”⁸²

diplomats, identifying 63 cases that had been publicized in the media, court filings, and human rights reports. *See also* Krista Friedrich, *Statutes of Liberty?: Seeking Justice Under United States Law When Diplomats Traffic in Persons*, 72 BROOK L. REV. 1139, 1160 (2007) (citing Lena H. Sun, “Modern-Day Slavery” Prompts Rescue Efforts; Groups Target Abuse of Foreign Maids, Nannies, WASH. POST, May 3, 2004, at A1).

77. GAO REPORT, *supra* note 67, at 27.

78. William Wilberforce Trafficking Victims Protection Reauthorization Act, 8 U.S.C. § 1375 (2008).

79. *Id.* § 203.

80. *See id.* § 203(b)(2) (establishing a mandatory contract with three required provisions).

81. *See id.* § 202(e)(1) (requiring the consular office to conduct an interview with the applicant outside the presence of the employer before issuing or renewing a visa).

82. *Id.* § 203(a)(2).

While the Act marked an important step in the fight against exploitation of domestic workers, its sole focus on prevention significantly limited its impact. As written, the Act gives the U.S. secretary of state the power to refuse to issue A-3 and G-5 visas under certain circumstances at the outset, but it does not suspend or limit the applicability of diplomatic immunity for diplomats suspected of exploitative practices.⁸³ Thus, once 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, leaving the question of accountability unresolved.

Even in the event of strict compliance with the Act, an additional layer of *ex post* evaluation of employment contracts between diplomats and their domestic workers is necessary to accommodate the unique situation of domestic workers. As recognized by the American Civil Liberties Union, “domestic workers are extremely vulnerable to exploitation for a variety of reasons including unfamiliarity with their domestic and international rights, cultural and language barriers, and in many cases long work hours in isolation from their peers.”⁸⁴ Foreign domestic workers employed by diplomats on A-3 or G-5 visas are therefore caught in a precarious situation where previsa issuance measures are incapable of adequately protecting their rights.

C. *The Inability of Domestic Workers to Seek Redress*

The experience of Corazon Tabion—one of the first publicized cases of diplomat abuse of a domestic worker—aptly illustrates the obstacles facing domestic servants attempting to seek redress.⁸⁵ Plaintiff Corazon Tabion left the Philippines in 1989 to work as a domestic servant for Defendants Faris and Lana Mufti in Jordan.⁸⁶ The employment lasted until 1991, when the Muftis moved to the United States following Mr. Mufti's appointment to the position of first secretary at the Embassy of Jordan in Washington, D.C.⁸⁷ The

83. Usama Kahf, *Development in the Debate Over Diplomatic Immunity for Diplomats Who Enslave Domestic Workers*, 1 INTERDISCIPLINARY CONFERENCE ON HUMAN TRAFFICKING 3 (2009), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1015&context=humtraffconf> [<http://perma.cc/8Q3L-HLU7>] (archived Jan. 20, 2014).

84. *Case Profile - Sabbithi, et al. v. Al Saleh, et al.*, AM. CIVIL LIBERTIES UNION (Feb. 15, 2012), <https://www.aclu.org/human-rights-womens-rights/case-profile-sabbithi-et-al-v-al-saleh-et-al> [<http://perma.cc/S6Y3-R8BA>] (archived Jan. 20, 2014).

85. See *Tabion v. Mufti*, 877 F. Supp. 285, 286 (E.D. Va. 1995), *aff'd*, 73 F.3d 535 (4th Cir. 1996) (detailing many of the obstacles domestic workers face when seeking redress).

86. *Id.*

87. *Id.*

Muftis then offered Tabion a position as their domestic servant in the United States, promising “minimum wage plus overtime, as well as a reasonable work schedule in a comfortable environment.”⁸⁸ Yet during the two-year period that Tabion worked as a domestic servant for the Muftis in Virginia, the Muftis required Tabion to work sixteen hours a day at approximately fifty cents per hour, with no compensation for overtime work.⁸⁹ Moreover, the Muftis “confiscated her passport and threatened her with dismissal, deportation, and arrest if she attempted to leave their household.”⁹⁰ Tabion filed suit against the Muftis for violating the Fair Labor Standards Act, breaching her employment contract, engaging in intentional misrepresentations, falsely imprisoning her, and discriminating against her on the basis of race.⁹¹

The central question in *Tabion v. Mufti* concerned the scope of Article 31(1)(c) of the VCDR, or the commercial activity exception. The Muftis, claiming immunity from civil suit under the provisions of the VCDR, maintained that the employment of a domestic servant is not a commercial activity under the VCDR. Tabion, by contrast, contended that the exploitation of her labor for personal gain falls squarely within Article 31(1)(c), which governs any civil action “relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.”⁹²

Setting the stage for what has since become the standard in cases involving domestic workers exploited by diplomats, the Fourth Circuit affirmed the district court’s holding that: (1) the commercial activity in the VCDR means a business or trade activity for profit and not contractual transactions for personal goods and services, and (2) the relationship between a diplomat and a domestic worker is not commercial activity within the immunity exception.⁹³ The court also initiated a trend of deferring to Statements of Interest submitted by the Executive Branch when interpreting the scope of the commercial activity exception, as discussed below.⁹⁴

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 287.

93. *Id.* at 286.

94. *See Tabion v. Mufti*, 73 F.3d 535, 539 (4th Cir. 1996) (“Substantial deference is due to the State Department’s conclusion.”).

IV. CONSTRUING THE COMMERCIAL ACTIVITY EXCEPTION

The Diplomatic Relations Act provides that “any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations . . . shall be dismissed.”⁹⁵ Hence, the sole question before the court in cases involving diplomats is whether the alleged illegal activity falls within one of the enumerated exceptions.⁹⁶ If no exception applies, the court lacks subject-matter jurisdiction to address the case and the case must be dismissed.⁹⁷ Thus, the power of the Judiciary to interpret the scope of such exceptions is of central importance to domestic workers who have been subjected to exploitation by diplomats.

A. *Judicial Deference to Executive Statements of Interest*

Despite, or perhaps due to, the crucial importance of the commercial activity exception, the Judiciary has delegated most of its interpretive powers to the Executive. To date, most, if not all, cases involving domestic workers alleging to have been exploited by diplomats with absolute immunity have been dismissed for lack of subject-matter jurisdiction pursuant to the Diplomatic Relations Act.⁹⁸ In dismissing these actions, courts have repeatedly relied on the Statements of Interest submitted by the Executive Branch in support of the diplomat defendant, which mandate a narrow reading of the commercial activity exception.⁹⁹

In the landmark decision of *Tabion v. Mufti*, discussed above, the court relied wholly on a Statement of Interest submitted by the Executive Branch that interpreted the commercial activity provision when dismissing Tabion’s action for lack of personal jurisdiction. The Executive statement claimed that the commercial activity exception “focuses on the pursuit of trade or business activity; it does not

95. Diplomatic Relations Act, *supra* note 9, § 254(d).

96. See, e.g., *Baoanan v. Baja*, 627 F. Supp. 2d 155, 160–61 (2009) (stating that any action against someone who is entitled to immunity under the VCDR must be dismissed for lack of jurisdiction, unless the action falls within one of the exceptions effectuated by Article 31).

97. See, e.g., *Montuya v. Chedid*, 779 F. Supp. 2d 60, 62 (D.D.C. 2011) (asserting that “[i]f the Court, therefore, concludes that Defendants are entitled to diplomatic immunity, it must dismiss the action”).

98. See e.g., *Tabion*, 73 F.3d at 538 (deferring to the State Department’s narrow interpretation of the commercial activity exception, as communicated through a Statement of Interest, and ultimately dismissing the case for lack of subject-matter jurisdiction under the Diplomatic Relations Act); *Montuya*, 779 F. Supp. 2d at 61 (same); *Swarna v. Al-Awadi*, 622 F.3d 123, 143 (2d Cir. 2010) (same); *Sabbithi*, 605 F. Supp. 2d at 124 (same); *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187, 189 (D.D.C. 2007) (same).

99. See *supra* note 97 and accompanying text.

encompass contractual relationships for goods and services incidental to the daily life of the diplomat and family in the receiving State.”¹⁰⁰ The court justified the significant weight attributed to the Executive statement by stating: “[T]he court . . . is mindful that the VCDR is not a unilateral document; what may prevent parties from obtaining redress in our courts also serves to protect American diplomats and their families from what we might consider as legal abuses overseas. *This balancing is a policy decision this Court should not challenge.*”¹⁰¹

Subsequent courts addressing cases of domestic workers exploited by diplomat employers similarly accepted and deferred to Executive Statements of Interests. For example, in *Gonzalez Paredes v. Vila*, the State Department instructed the court: “When diplomats enter into contractual relationships for personal goods or services incidental to residing in the host country, including the employment of domestic workers, they are not engaging in ‘commercial activity’ as that term is used in the Convention.”¹⁰² Two years later, in *Sabbithi v. Al Saleh*, the State Department submitted a similarly phrased Statement of Interest, again emphasizing that the employment relationship between a diplomat and a domestic worker is not a commercial activity.¹⁰³

The deference paid to the Executive Branch by courts confronted with the issue of diplomatic immunity is not unfounded. The Supreme Court has held that “although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”¹⁰⁴ Accordingly, lower courts have held that “[a] Statement of Interest filed by the United States, while not dispositive, is entitled to great deference.”¹⁰⁵ Yet in cases involving domestic workers exploited by diplomats, the distinction between a Statement of Interest being entitled to great deference as opposed to it being dispositive has been difficult to discern.¹⁰⁶ The *Carrera* court explicitly acknowledged the tendency of courts to conflate the two standards in the context of diplomatic immunity, stating that “courts are disposed to accept as conclusive of the fact of the diplomatic status of an individual

100. *Id.*

101. *Montuya*, 779 F. Supp. 2d at 65.

102. *Gonzalez*, 479 F. Supp. 2d at 193.

103. *Sabbithi*, 605 F. Supp. 2d at 130.

104. *United States v. Stuart*, 489 U.S. 353, 369 (1989) (citing *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982)).

105. *Gonzalez*, 479 F. Supp. 2d at 193 (citing *Stuart*, 489 U.S. at 369).

106. For example, in *Sabbithi*, the court concluded its analysis of the Convention by stating, “In view of the State Department’s determination that the defendants are diplomats and its certification that as diplomats they are immune from suit pursuant to the Vienna Convention, the Court concludes that these defendants are entitled to diplomatic immunity.” *Sabbithi*, 605 F. Supp. 2d at 126. (citing *Gonzalez*, 479 F. Supp. 2d at 192). In doing so, the court clearly indicated that the statement was dispositive.

claiming an exemption, the views thereon of the political department of their government.”¹⁰⁷ Thus, while courts continue to pay lip service to this principle of limited deference, any meaningful distinction has been largely eroded in practice.¹⁰⁸

B. Executive Fear of Reciprocity

The government’s unwillingness to construe the commercial activity exception more broadly stems from a fear of reciprocity—the principle that a state adopts and returns the behavior of another state, potentially leading to a cycle of diplomatic disruptions.¹⁰⁹

In an international system dependent on well-functioning diplomatic relations, the threat of reciprocity carries significant weight. As Eileen Denza, professor of international law, explains:

[T]he establishment of diplomatic relations and of permanent missions takes place by mutual consent, every State is both a sending and receiving State. Its own representatives abroad are in a sense hostages who may on a basis of reciprocity suffer if it violates the rules of diplomatic immunity, or may be penalized even for minor restrictions regarding privileges or protocol.¹¹⁰

In addition to the risk of foreign nations disproportionately punishing minor acts by American officers in retaliation, commentators have raised the concern that foreign governments may fabricate charges against U.S. Foreign Service officers abroad if the United States prosecutes foreign diplomats at home.¹¹¹

American diplomats abroad have long experienced the wrath of reciprocity. In a rather mild altercation between the United States and Russia, Russia rescinded the American embassy’s beach privileges on the river at Nikolnaya Gora in direct response to the United States’ decision to rescind recreational privileges for Russian diplomats living in Glen Cove, Long Island.¹¹² In another incident, eighty-seven Americans received moving violations outside the U.S. Embassy in Manila, Philippines, immediately following the ticketing

107. *Carrera v. Carrera*, 174 F.2d 496, 497 (D.C. Cir.1949) (citation and internal quotation marks omitted).

108. *Gonzalez*, 479 F. Supp. 2d at 193 (citing *Stuart*, 489 U.S. at 369).

109. See, e.g., EILEEN DENZA, UNITED NATIONS, VIENNA CONVENTION ON DIPLOMATIC RELATIONS 1–2 (2009), available at http://legal.un.org/avl/pdf/ha/vcdr/vcdr_e.pdf [<http://perma.cc/9CGJ-BVSZ>] (archived Jan. 20, 2014).

110. *Id.*

111. Ross, *supra* note 30, at 203 (citing *Diplomatic Crimes Legislation: Hearings Before the Senate Committee on Foreign Relations*, 100th Cong., 1st Sess. 102, at 11–13 (1987)); *Government Workers at Home . . . And Abroad*, WASH. POST, Aug. 10, 1987, at A14).

112. Ross, *supra* note 30, at 203 (citing Griffin, *Diplomatic Impunity*, 13 STUDENT L. 18, 20 (1984)).

of illegally parked Philippine diplomats in the District of Columbia.¹¹³ The ongoing case of Devyani Khobragade further provides a more recent example of the reality of reciprocity that more closely mimics the facts discussed in this Note.

Deputy Consul General for India Devyani Khobragade was arrested by U.S. authorities on December 12, 2013, for “lying in her visa application for the purposes of recruiting an Indian national who was employed as housekeeper at her home and was paid less than \$4 an hour, which is lower than the U.S. minimum wage.”¹¹⁴ Following Khobragade’s arrest, India’s politicians expressed outrage over the United States’ “despicable and barbaric” treatment of their consul, which included a strip search, a DNA swab, and placement in a prison cell with drug addicts.¹¹⁵ Consequently, India forced all U.S. diplomats stationed in the country to turn in their identity cards, removed police barricades outside the U.S. embassy in New Delhi, and blocked access for U.S. diplomatic staff to airports in a general boycott against the five-member U.S. delegation to New Delhi. The Khobragade case is distinguishable from the cases discussed in this Note since the post of deputy consul general only entitled Khobragade to consular immunity, which is more limited than diplomatic immunity.¹¹⁶ However, India’s reaction to the treatment of their consul clearly demonstrates the risks and reality of reciprocity.

Sensitive to the threat of reciprocity, the Executive Branch has repeatedly sought to “protect American diplomats and their families from what we might consider as legal abuses overseas”¹¹⁷ by blocking any effort to infringe on the absolute immunity of foreign diplomats in the United States. In defense of this strategy, congressional and Executive policymakers have agreed that “the apparent inequity to a private individual is outweighed by the great injury to the public that

113. *Id.* (citing Turan, *The Devilish Demands of Diplomatic Immunity*, WASH. POST, Jan. 11, 1976, at 11 (describing the consequences of arresting a diplomat under the 1790 Act)).

114. *India-US Spat over Diplomat’s Arrest Escalates with Official Boycott*, AL JAZEERA AMERICA (Dec. 17, 2013), available at <http://america.aljazeera.com/articles/2013/12/17/india-us-row-escalatesoverdiplomatsarrest.html> [<http://perma.cc/6KRN-5M8K>] (archived Jan. 20, 2014); see Gardiner Harris, *Outrage in India, and Retaliation, Over a Female Diplomat’s Arrest in New York*, N.Y. TIMES (Dec. 17, 2013), available at http://www.nytimes.com/2013/12/18/world/asia/outrage-in-india-over-female-diplomats-arrest-in-new-york.html?_r=0 [<http://perma.cc/XPP4-HWE5>] (archived Jan. 20, 2014).

115. *India-US Spat Over Diplomat’s Arrest Escalates With Official Boycott*, *supra* note 114.

116. See Narayan Lakshman, *No Retroactive Immunity For Devyani, Says U.S.*, THE HINDU (Dec. 21, 2013), <http://www.thehindu.com/news/international/world/no-retroactive-immunity-for-devyani-says-us/article5481901.ece> available at [<http://perma.cc/3Z9U-A37J>] (archived Jan. 20, 2014).

117. *Montuya*, 779 F. Supp. 2d at 65.

would arise from permitting suit against the entity or its agents calling for application of immunity."¹¹⁸

As demonstrated above, the narrow interpretation of the commercial activity exception espoused by the Executive Branch and the Judiciary's unconditional deference thereto have effectively blocked access to the courts for domestic workers exploited by diplomat employers.

V. LIMITATIONS OF PREVIOUS ATTEMPTS TO RETHINK DIPLOMATIC IMMUNITY

In addressing possible solutions to the lack of redress for those suffering the consequences of absolute immunity, commentators have primarily suggested the following approaches: (1) asking the sending state to waive immunity;¹¹⁹ (2) isolating nations that abuse VCDR provisions;¹²⁰ (3) creating a fund to compensate victims of foreign diplomats;¹²¹ (4) interpreting some of the VCDR's provisions more restrictively;¹²² and (5) amending the VCDR.¹²³ Each of these proposed solutions falls short in solving the dilemma facing domestic workers exploited by diplomats.

A. Waiver of Immunity

Convincing a sending state to waive diplomatic immunity for one of its officers is arguably the most effective way of holding diplomats accountable for unlawful acts.¹²⁴ This approach also comports with the letter of the VCDR. As one commentator noted, "If the sending state waives its diplomat's immunity, the receiving state does not infringe upon any of the Vienna Convention's protections when the receiving state acts against the offending diplomat."¹²⁵ Yet this method is rarely used, as it seldom works in practice; "all too frequently, governments allow diplomats to use immunity as a shield, even when the waiver of immunity would be a relatively trivial step."¹²⁶ The limitations of the waiver method were exposed in the

118. *Id.* at 64–65 (quoting *Tabion*, 73 F.3d at 539).

119. Farhangi, *supra* note 31, at 1526.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 1526–27. *But see* Richard Dowden, *Diplomat to Face Drugs Questioning*, THE TIMES (London), Mar. 6, 1985, at 3, col. 1 (mentioning how Zambia agreed to waive the immunity of a diplomat who was wanted for questioning in connection with allegedly smuggling heroin worth 1.2 million pounds (sterling) into Britain through Pakistani diplomatic baggage).

recent case of *Sabbithi v. Al Saleh*.¹²⁷ In *Sabbithi*, a Kuwaiti diplomat and his wife brought three women of Indian nationality to the United States under false pretenses, where they were subjected to physical and psychological abuse by the Al Saleh family and forced to work as domestic employees and childcare workers against their will under slave-like conditions.¹²⁸ The U.S. Department of Justice filed criminal charges against the diplomat couple and called on the State Department to request a waiver of immunity from Kuwait. When Kuwait declined to waive the defendants' immunity, the Department of Justice closed its investigation.¹²⁹

B. Forced Isolation of Noncomplying Nations

The United Kingdom has considered isolating nations that abuse VCDR provisions, such as when a host country refuses to grant immunity.¹³⁰ Isolation is highly problematic because it fails to strike a balance between maintaining positive diplomatic relations and protecting the rights of people within the host country's borders.¹³¹ While the practical consequences remain unknown, one can conceive of two likely results: (1) such a measure may intensify threats of reciprocity and thus disrupt, rather than protect, the peaceful coexistence among nations; or (2) it may simply be ineffective, as evidenced by other forms of sanctions historically undertaken by nations in attempts to change the status quo.¹³²

C. Creation of a Claims Fund

In exploring ways to strike a balance between maintaining broad immunity while also providing victims with a means for redress, the United States has considered the possibility of establishing a claims fund.¹³³ Under this approach, domestic workers seeking redress

127. *Sabbithi v. Al Saleh*, 605 F. Supp. 2d 122, 122 (D.D.C. 2009).

128. Case Profile, *supra* note 84.

129. *Sabbithi*, 605 F. Supp. 2d at 125–26. But note how, in an interesting turn of events, this case ended up agreeing to a confidential settlement with the women in February 2012. *Domestic Workers Who Accused Diplomats of Human Trafficking Settle with Kuwaiti Government*, *supra* note 81.

130. Farhangi, *supra* note 31, at 1528.

131. *Id.* at 1529.

132. *See id.* at 1529–30 (“There are all kinds of measures that might be taken, measures in trade, measures in cultural circles, not receiving ballet dancers, all these kinds of things.’ Unfortunately, history has shown that isolating a nation through trade or cultural sanctions has little more than symbolic effect. These sanctions do not change the wrongdoers’ behavior and, since a change in countries’ behavior is the goal, a different and more effective answer to the problem must be found.” (citations omitted)).

133. *Id.* at 1528 (citing *Diplomatic Immunity: Hearings Before the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 129 at 35 (1978) (testimony of Lawrence

would draw compensation from a government-funded financial pool rather than go to court.¹³⁴ While this proposal has attracted some support among critics of the current system,¹³⁵ the feasibility of such a system depends on the availability of extensive resources. History suggests that such resources are simply not available.¹³⁶ In the 1970s, the government did, in fact, institute a claims fund in response to increased pressure from interest groups complaining of diplomatic immunity abuses.¹³⁷ The fund, however, failed due to logistical difficulties in processing claims.¹³⁸ Between April 10, 1974, and April 9, 1977, about twenty complaints remained unresolved every year.¹³⁹ Little suggests that a different result would occur today, as resources remain scarce and Executive agencies are hobbled by bureaucracy.

D. Amending the Convention

Perhaps the most radical solution to the current deadlock involves amending the VCDR to allow victims of abuse to bring actions against diplomats.¹⁴⁰ While commentators disagree on what such an amendment would entail, one commentator has proposed amending Articles 22 and 27 of the VCDR to vest the International Court of Justice with the authority to punish noncomplying nations with suspension from the United Nations.¹⁴¹ Under this approach, each country would be forced to lodge monetary bonds with the International Court of Justice as "security for good diplomatic behavior."¹⁴² While promising in theory, the process of amending the VCDR necessarily involves a number of significant roadblocks. Most importantly, the absence of an amendment provision in the VCDR means that the Member States would first have to reach an agreement on the necessary procedures for changing the VCDR before they could even address the merits of such changes.¹⁴³ Thus, the logistics of any endeavor requiring the active participation and consensus of Member States will likely prove to be insurmountable.¹⁴⁴

Blumberg); R. Scott Garley, *Compensation for "Victims" of Diplomatic Immunity in the United States: A Claims Fund Proposal*, 4 *FORDHAM INT'L. L.J.* 135, 136-37 (1980)).

134. Ross, *supra* note 30, at 192 (citing Garley, *supra* note 133, at 149-59).

135. See, e.g., Garley, *supra* note 133, at 149.

136. FREY & FREY, *supra* note 10, at 496.

137. *Id.*

138. *Id.*

139. *Id.*

140. Farhangi, *supra* note 31, at 1536 (citing Brett, *Giving the Diplomatic Rules Some Teeth*, *THE TIMES* (London), Apr. 28, 1984, at 8, col. 2; S. Res. 395, 98th Cong., 2d Sess. 1-2 (1984)).

141. *Id.* at 1536.

142. *Id.*

143. *Id.*

144. *Id.*; see FREY & FREY, *supra* note 10, at 496-97.

E. Adopting a Restrictive Interpretation of the Text

A final alternative would be to adopt a restrictive reading of the text of the Vienna Convention, which would limit the immunity granted to diplomats. This proposal effectively addresses the abuse of diplomatic immunity by working within the existing framework of international law, thus obviating the need for unlikely waivers, worldwide consensus, or significant governmental resources.¹⁴⁵

Those who dismiss the possibility of pursuing a more restrictive reading of diplomatic immunity claim that the VCDR is explicit and unambiguous, and thus there is no room for reinterpretation.¹⁴⁶ Yet, as demonstrated *infra* in Part VI.A.2.ii., the plain language of the VCDR actually compels a more restrictive reading of the commercial activity exception than that adopted by courts today.¹⁴⁷

The proposed solution of a more restrictive reading is entirely consistent with and overlaps with the solution set forth in this Note. However, it stops short of addressing the obstacles that must first be addressed in order to enable a more restrictive reading—namely, the undue interference of the Executive Branch with the Judiciary’s interpretation of the text and the Judiciary’s excessive deference thereto. In other words, the value and feasibility of this approach is wholly dependent on an overlooked precondition: for a more restrictive reading of the VCDR to be viable, separation of powers must be restored. Thus, this Note builds on the restrictive-reading approach to provide a framework for how exploited domestic workers may initiate actions against diplomat employers.

VI. SOLUTION

This Note urges the United States to adopt a functional necessity approach to diplomatic immunity. A functional necessity approach, as conceived here, dictates a more restrictive scope of immunities that gives due force to the exceptions explicitly provided for in the VCDR.¹⁴⁸ Such a restrictive scope to diplomatic immunity not only

145. Farhangi, *supra* note 31, at 1533.

146. See, e.g., *id.* at 1533–34 (“On the question of waiver of immunity, for example, the Vienna Convention states: “The immunity from jurisdiction of diplomatic agents . . . may be waived by the sending State. Waiver must always be express.” Given the clarity of this provision, it is difficult, if not impossible, to argue that a diplomat perpetrating serious crime has gone beyond her function and so forfeits her status and is subject to the criminal law. She cannot have “forfeited” her immunity as such waiver must be express.”).

147. See *infra* in Part VI.A.2 (providing a roadmap for a permissible and logical reading of the commercial activity exception that would exclude immunity for diplomats engaged in the exploitation of domestic workers).

148. See *supra* Part II.A.

comports with the text, purpose, and spirit of the VCDR itself but also solves the issue of accountability.¹⁴⁹ In contrast to today's de facto rule of immunity—even for nonofficial acts clearly outside the scope of the diplomatic mission—a functional necessity approach allows plaintiffs to have their cases decided on the merits. While the approach hardly guarantees that immunity will be waived in cases involving domestic workers alleging exploitation, it at least affords plaintiffs an opportunity to seek redress.

Recent developments in Chile illustrate the feasibility of such a theoretical shift from extraterritoriality, “whereby the foreign embassy was deemed to be the territory of the sending State and acts of diplomats consequently given unrestricted immunity,” toward “a functional interpretation of official acts, willing to recognise immunity only in those cases which are of a functional nature.”¹⁵⁰ In two successive decisions, the Chilean Supreme Court reversed the lower courts' dismissals for lack of subject-matter jurisdiction pursuant to the VCDR.¹⁵¹ In rendering its decision, the court proclaimed that “[d]iplomatic and consular immunities . . . could no longer stand as an obstacle to the exercise of jurisdiction when the protection of fundamental rights was at stake.”¹⁵² Instead, the court adopted traditional notions of functional necessity, whereby “immunities would cover only ‘acts performed in the exercise of official functions.’”¹⁵³

From a cost-benefit perspective, it could be argued that since a shift toward more restrictive immunity would result in increased hostility toward the United States among sending states, it would likely increase the likelihood of reciprocity. The heightened threat of reciprocity, then, would still outweigh the significant benefit of providing workers exploited by diplomats with opportunities for redress. While such reasoning may be valid, it fails to consider the unique nature of the costs at issue here. In contrast to minor acts of reciprocity that cause mere inconvenience or relatively minor costs such as parking tickets, the government's tacit acceptance of the exploitation of domestic workers by diplomats involves a serious encroachment on fundamental rights. As asserted by the Chilean Supreme Court, “Diplomatic and consular immunities . . . [can] no

149. See *supra* Part II.A.

150. Francisco Orrego Vicuna, *Diplomatic and Consular Immunities and Human Rights*, 40 INT'L & COMP. L. Q. 34, 39–40 (1991).

151. *Id.* at 39 (citing Corte de Apelaciones [C. Apel.] [court of appeals], 26 mayo 1988, “Hoyer, Walter c. Primer Consejero de la Embajada de la República Federal de Alemania,” Rol de la causa: F. DEL M. vol. 356 p. 390 (1998) (Chile); Corte de Apelaciones [C. Apel.] [court of appeals], 25 abril 1988, “Skrabs, Manfred c. Consul de la República Federal de Alemania,” no declarada.).

152. Vicuna, *supra* note 150, at 39.

153. *Id.* (internal citation omitted).

longer stand as an obstacle to the exercise of jurisdiction when the protection of fundamental rights [are] at stake.”¹⁵⁴ While the heightened threat of reciprocity may be real, it is a small price to pay to protect the fundamental rights of those within our borders.

A. *Facilitating the Transition to a Functional Necessity Approach*

Each of the three branches of government should undertake independent actions to facilitate the adoption of a functional necessity reading of diplomatic immunity. The following subparts outline the ways in which each branch of government may contribute to the necessary shift in attitude on the issue of diplomatic immunity.

1. The Executive: Reevaluating Costs and Benefits

Even in the event of a restoration of separation of powers and a subsequent paradigm shift, Executive statements will likely continue to influence courts in their interpretation of the VCDR, as Statements of Interest are not inappropriate per se. Indeed, Executive opinions on the correct reading of international treaties are worthy of great deference; it is only when they become dispositive, whether expressly or effectively, that they raise constitutional concerns. To effectuate a shift toward the functional necessity theory underlying the VCDR, the Executive Branch must reevaluate the cost–benefit analysis currently justifying its policy in favor of broad immunity.¹⁵⁵ While petty instances of abuse, such as unpaid parking tickets, may warrant absorbing the costs of abuse of immunity to protect against reciprocity, the emergence of forced servitude in the United States has reconfigured the relative importance, and implications, of broad versus narrow immunity.

In reconsidering its cost–benefit analysis, the Executive should consider new costs that weigh against broad diplomatic immunity and have been consistently devalued thus far. Such costs include the harm suffered by individuals exploited by diplomats, the injury to human and civil rights within the United States, and the risk of damaging the nation’s reputation of being at the forefront of the human rights struggle. As the world continues to develop, it will become increasingly difficult for a modern nation like the United States to characterize exploitation and forced servitude as a reasonable price to pay for protection against reciprocity.

154. *Id.*

155. *See* Tai, *supra* note 6, at 179 (“[T]he State Department should guide courts to apply an alternative interpretation of the VCDR’s immunity exceptions, rather than the current, narrower interpretation, which allows diplomats to hide behind a shield of diplomatic immunity and consequently prevents domestic workers from litigating their claims.”).

2. The Judiciary: Reexamining the Text of the Commercial Activity Exception

While limiting the Judiciary's deference given to Statements of Interest hardly guarantees that the courts will adopt a more permissive interpretation of the exception, a review of the text and relevant canons of construction certainly speaks in favor of a broad commercial activity exception. Appellant's brief in *Tabion v. Mufti* provides a compelling roadmap for a permissible—and logical—reading of the commercial activity exception that would exclude immunity for diplomats engaged in the exploitation of domestic workers while staying true to the spirit and text of the VCDR.¹⁵⁶

i. Deducing Intent from the Literal Language

To interpret the VCDR, judges should first consider the literal language.¹⁵⁷ If such language is unambiguous, it controls and no further inquiry is necessary or appropriate.¹⁵⁸ Analysis of the literal text of the VCDR involves comparing the language used across sections.¹⁵⁹ In doing so, it is generally presumed that Congress acted intentionally when it included particular language in one section of the statute but omitted it in another.¹⁶⁰ Here, a compelling argument for a broader reading of the commercial activity exception, which comports with the functional necessity theory's emphasis on restrictive immunity, suggests reading Article 31 with Article 42 of the VCDR since these two articles both contain the phrase "commercial activity."¹⁶¹ Article 42 of the VCDR states: "A diplomatic agent shall not in the receiving State practise *for personal profit* any professional or commercial activity."¹⁶² In contrast, Article 31 states that diplomatic immunity will be waived for "an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions."¹⁶³ Importantly, Article 42 contains the limiting qualifier "for personal profit," whereas Article 31 contains no such restrictive language.¹⁶⁴ Application of widely recognized canons of construction suggests that

156. Brief of Appellant Corazon Tabion, *Tabion v. Mufti*, 73 F.3d 535 (1996) (No. 95-1732), 1995 WL 17054954 [hereinafter *Tabion Brief*].

157. *Id.* at *8.

158. *Id.*

159. *Id.* at *10 (deducing the meaning of a statute from its literal language) (citing *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 538-39 (1994)).

160. *Id.* (citing *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 538-39 (1994)).

161. *Id.* at *12.

162. VCDR, *supra* note 7, at art. 42 (emphasis added).

163. *Id.* at art. 31(1)(c).

164. *Id.* at arts. 31(1)(c), 42.

the omission was intentional.¹⁶⁵ Moreover, whenever the text of a statute or treaty intentionally uses broad language, it is appropriate to infer a broad application of the provision.¹⁶⁶

ii. Ordinary Meaning

Even if the omission does not convey clear intent as to the definition of commercial activity, “it is a recognized canon of construction that unless otherwise defined, words will be interpreted as taking their ordinary and common meaning.”¹⁶⁷ The ordinary meaning of “commerce” involves the exchange of goods and services.¹⁶⁸ Therefore, commercial activity involves the act of contracting for goods and services. One would be hard pressed to argue that in hiring a domestic worker, a diplomat does not engage in an exchange for services.

iii. Legislative History

Although courts are not required to look beyond unambiguous language,¹⁶⁹ the legislative history and purpose of the VCDR lend further support to a liberal reading of the commercial activity exception.¹⁷⁰ The drafters explicitly noted that “the third exception arises in the case of proceedings relating to a professional or commercial activity exercised by the diplomatic agent outside his official functions.”¹⁷¹ Hence, “[i]f the diplomatic agent engages in such an activity, those with whom he has had dealings in so doing cannot be deprived of their remedy at law.”¹⁷² Since exploitation of domestic labor for personal gain does not further the diplomatic mission, such exploitation falls outside of the officials’ functions and therefore is exempt from immunity.¹⁷³

165. Tabion Brief, *supra* note 156, at *10–11.

166. *Id.*

167. *Id.* (noting that statutes should be construed under their plain and ordinary meaning) (citing *Perrin v. United States*, 444 U.S. 37, 44 (1979)).

168. *Id.*

169. *Id.* at *16.

170. *Id.*

171. *Id.* at *17.

172. *Id.*

173. *Id.*

3. The Legislature: Clarifying the Role of the Judiciary

The Legislature may also play an important role in defending the rights of exploited domestic workers by facilitating a shift away from the policy-centered interpretations provided by the Executive Branch and toward judicial independence in evaluating claims brought under the VCDR. The history of the Foreign Sovereign Immunity Act (FSIA)¹⁷⁴ provides some guidance on how this may be done. In the case of the FSIA, a nearly identical separation of powers issue attracted widespread criticism from commentators, leading Congress to take legislative action to clarify the role of the Judiciary in construing the language of the FSIA.¹⁷⁵

Prior to the enactment of the FSIA, notions of sovereign immunity for foreign enterprises were largely dictated by the Executive Branch.¹⁷⁶ As more foreign enterprises began to request immunity, the State Department grew increasingly involved in the affairs of the Judiciary.¹⁷⁷ Such intrusion into the judicial sphere drew much criticism from foreign corporations, which identified the separation of powers issue underlying the State Department's interference with judicial interpretation of the FSIA.¹⁷⁸ Commentators argued that the State Department's suggestions "were more often based on political and diplomatic concerns than on a legal and factual basis."¹⁷⁹ In response to these constitutional concerns, Congress took explicit action to clarify the role of the Judiciary in construing the FSIA. It passed an amendment that explicitly "transfer[red] the power to determine the existence of immunity to the courts rather than the State Department."¹⁸⁰

Similarly, Congress could speak directly to the allocation of power between the Judiciary and the Executive with regard to interpreting the VCDR. Such an express transfer of power would circumvent the issue of convincing the Executive Branch to go against its own policy and curb its own powers.¹⁸¹

174. Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583, 90 Stat. 2891, 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1601-11 (governing consular and foreign sovereign immunities).

175. Gary Jay Greener, Comment, *The Commercial Exception to Foreign Sovereign Immunity: To Be Immune or Not To Be Immune? That Is the Question—A Look at the International Law Commission's Draft Articles on Jurisdictional Immunities of States and Their Property*, 15 LOY. L.A. INT'L & COMP. L. REV. 173, 176-77 (1992).

176. *Id.*

177. *Id.*

178. *Id.* at 177.

179. *Id.* at 176-77.

180. *Id.* at 177.

181. See discussion of such policies and the cost-benefit analysis underlying them *supra* Parts III.A, IV.B.

As demonstrated, each branch of government can and should play a role in facilitating and accommodating a shift toward a functional necessity approach. This shift is important for three reasons: (1) it comports with the text, purpose, and spirit of the VCDR; (2) it partially solves the accountability issue by allowing domestic workers to bring actionable claims against diplomat employers; and (3) it restores the separation of powers among the three branches of government.

VII. CONCLUSION

In exploring the social, political, and legal factors contributing to the deadlock facing domestic workers who have been exploited by diplomats, this Note has highlighted the United States' clear move away from the theoretical underpinnings of the VCDR toward a highly politicized definition of the scope of diplomatic immunity. Such a shift is problematic on multiple levels. American case law is now directly at odds with the spirit of the VCDR, which was originally enacted to curb blanket immunity of diplomats by shifting the focus from the individual to the diplomatic mission at large. In stark contrast to the drafters' intent to extend immunity only to official acts taken in the furtherance of diplomatic missions, the United States has rejected all attempts at distinguishing between official acts and actions taken for mere personal gain. Moreover, the shift has undermined the separation of powers among the branches of government, raising concerns about the constitutionality of the current, *per se* policy against restricting the immunity of diplomats. By appropriating the interpretive function of the courts, the Executive Branch has encroached on territory reserved for the Judiciary.

In order to remedy the implications of such a shift, this Note proposes a concerted effort by all three branches of government to facilitate a return to the functional necessity approach underlying the VCDR. The proposal is two fold. First, it involves a power shift between the Executive and Judiciary, whereby the Executive Branch agrees to cease actively interfering with the courts' examination of diplomat defendants pursuant to the VCDR. Once the interpretive function is returned to the courts, the courts must reevaluate the body of law that has been distorted by the political involvement of the Executive and instead revert to the letter of the law itself. It is during this second step that a revival of the functional necessity approach will be crucial to victims of abuse of immunity who have thus far been shut out of the courts. In reasserting the interpretive function of the Judiciary, courts should respect the plain text, purpose, and spirit of the VCDR by moving toward a more restrictive view of diplomatic immunity that comports with a functional necessity reading of the

VCDR. Increased judicial scrutiny of diplomatic immunity solves the accountability issue by allowing victims to try claims of exploitation against diplomat employers on the merits without facing outright dismissal for lack of jurisdiction.

*Nina Maja Bergmar**

* Candidate for Doctor of Jurisprudence 2014, Vanderbilt Law School. B.A. 2011, Dartmouth College. Thank you to the *Vanderbilt Journal of Transnational Law* editors and staff for all their help. Many thanks to Andrew Smith for his thoughtful edits throughout the writing process.