

PETITION NO. P-1481-07
DOMESTIC WORKERS EMPLOYED BY DIPLOMATS
RESPONSE OF THE UNITED STATES OF AMERICA

The Government of the United States appreciates the opportunity to provide the following response to the Inter-American Commission on Human Rights (“Commission”) regarding the above-referenced Petition filed by several civil society organizations and a law school clinic on behalf of Siti Aisah, Hildah Ajasi, Raziah Begum, Mabel González Paredes, Otilia Huayta, and Susana Ocares (“individual Petitioners”); and Andolan Organizing South Asian Workers, Break the Chain Campaign, and CASA of Maryland (“organizational Petitioners”). In this brief, we refer collectively the individual and organizational Petitioners as “Petitioners.”

Before proceeding to address the Petition, and without prejudice to our views on admissibility and merits set forth below, the United States underscores—as we did when then-Ambassador-at-Large to Monitor and Combat Trafficking in Persons Luis CdeBaca appeared before the Commission on November 2, 2012—that the United States views human trafficking as an affront to human dignity and freedom and a global challenge confronting all nations. The United States is committed to meeting that challenge with a coordinated effort not just here at home, but also around the world, through policies, partnerships and practices that uphold the “3P” paradigm of prosecuting traffickers, protecting victims, and preventing human trafficking. As the Commission is aware, in addition to face-to-face diplomacy, one of our most important diplomatic tools is the Department of State’s annual *Trafficking in Persons Report*, which can be accessed at <http://www.state.gov/j/tip/rls/tiprpt/>.

The United States is also fully committed to protecting the welfare of domestic workers employed by foreign mission personnel residing in our country, both in hopes of preventing abuse of these workers and addressing allegations of mistreatment when they arise. The State Department’s commitment is reflected in a series of measures implemented over the past several years to provide increased safeguards for domestic workers. Many of these measures are described below.

This response proceeds in three parts to explain why the Petition is inadmissible and, in the alternative, without merit. Section I summarizes the relevant factual background of the Petition and provides initial observations on the proper scope of the Commission’s review and the relevant considerations with respect to admissibility and merits. Section II addresses to grounds of inadmissibility. Section III examines two additional inadmissibility grounds along with the merits of the Petition.

I. INITIAL CONSIDERATIONS

Individual Petitioners are former domestic workers who allege exploitative living and working conditions while employed by foreign diplomats serving in the United States.¹ Organizational Petitioners are non-profit organizations with missions associated with fair employment practices and clients who were allegedly exploited by their foreign diplomat employers in the United States.

The Department of State requires diplomats seeking visas for their domestic workers coming from abroad to provide a signed contract of employment specifying a living wage (the greater of the minimum wage under applicable federal, state, or local law) and appropriate benefits.² Petitioners allege that their diplomat employers were able to breach these contracts with impunity because of diplomatic immunity.³ Petitioners further allege that the exclusion of the category of domestic workers from several U.S. labor laws amounts to a violation of their right to equality.⁴

Petitioners allege that the United States has “violated”⁵ certain specific rights recognized in the American Declaration of the Rights and Duties of Man (“American Declaration” or “Declaration”). Petitioners argue, among other things, that the application of diplomatic immunity in civil suits brought by domestic workers against their diplomat employers in U.S. domestic courts amounts to a violation of certain rights set forth in the American Declaration, including the right to life, liberty, and personal security (Art. I); the right to equality before law (Art. II); the right to special protection for mothers and children (Art. VII); the right to inviolability of the home (Art. IX); the right to inviolability and transmission of correspondence (Art. X); the right to preservation of health and well-being (Art. XI); the right to education (Art. XII); the right to work and to fair remuneration (Art. XIV); the right to leisure time and the use thereof (Art. XV); and the right to a fair trial (Art. XVIII).

The United States has undertaken a political commitment to uphold the American Declaration, a non-binding instrument that does not itself create legal rights or impose legal obligations on member States of the Organization of

¹ Petition at 13–14.

² *Id.* at 39.

³ *Id.* at 27.

⁴ *Id.* at 75.

⁵ As the American Declaration of the Rights and Duties of Man is a non-binding instrument and does not create legal rights or impose legal duties on member states of the Organization of American States, the United States understands that a “violation” in this context means an allegation that a country has not lived up to its political commitment to uphold the American Declaration. The United States respects its political commitment to uphold the American Declaration.

American States (OAS).⁶ Article 20 of the Statute of the Commission sets forth the Commission's powers that relate specifically to OAS member States that, like the United States, are not parties to the legally binding American Convention on Human Rights ("American Convention"), including to pay particular attention to observance of certain enumerated human rights set forth in the American Declaration, to examine communications and make recommendations to the State, and to verify whether in such cases domestic legal procedures and remedies have been applied and exhausted.

For a petition to be admissible before the Commission, it must satisfy several procedural requirements under the Commission's Rules of Procedure ("Rules"). Among these, the Commission must have competence to consider the allegations in the petition; supervening information or evidence presented to the Commission must not reveal that the matter is inadmissible or out of order;⁷ the facts alleged must, if true, "tend to establish a violation of the rights" set out in the American Declaration;⁸ and the petitioners must show that they have pursued and exhausted the remedies of the domestic legal system "in accordance with the generally recognized principles of international law."⁹ The Petition fails to meet any of these requirements, and it is also inadmissible as untimely with respect to two of the individual Petitioners.¹⁰ Should the Commission nevertheless declare the matter admissible, it should deny the requested relief because the Petition does not demonstrate a failure by the United States to uphold its commitments under the American Declaration, especially in light of the actions taken and the relevant policies enacted in the years since the Petition was filed.

These elements are discussed in turn below. Section II explains why the Petition is inadmissible for failure to exhaust and for untimeliness. Section III

⁶ The United States has for decades consistently maintained that the American Declaration remains a nonbinding instrument notwithstanding assertions by the Commission and the Inter-American Court of Human Rights to the contrary. For an elaboration of the U.S. reasoning, *see* Request for an Advisory Opinion Submitted by the Government of Colombia to the Inter-American Court of Human Rights Concerning the Normative Status of the American Declaration of the Rights and Duties of Man, Observations of the United States of America, 1988, available at <http://www1.umn.edu/humanrts/iachr/B/10-esp-3.html>.

⁷ Rules, art. 34(c).

⁸ *Id.*, art. 34(a). Article 34(a) of the Rules provides that "[t]he Commission shall declare any petition or case inadmissible when ... it does not state facts that tend to establish a violation of the rights referred to in Article 27 of these Rules of Procedure" Article 27, in turn, directs the Commission to "consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights and other applicable instruments" Article 20 of the Commission's Statute and Article 23 of the Rules identify the American Declaration as an "applicable instrument" with respect to nonparties to the American Convention. The United States is not a party to, nor has it endorsed, any of the other instruments listed in Article 23 of the Rules.

⁹ Rules, art. 31(1); *accord* Statute of the Inter-American Commission on Human Rights, art. 20(c).

¹⁰ *Id.*, art. 32.

explains why the Petition is inadmissible due to supervening events and the failure to state facts that tend to establish a violation of the American Declaration; and explains why the Petition is in any event meritless. Section IV offers some concluding thoughts.

II. THE PETITION IS INADMISSIBLE FOR FAILURE TO EXHAUST AND UNTIMELINESS.

a. Petitioners have failed to exhaust domestic remedies.

The U.S. government recognizes the difficulties faced by workers bringing suit against diplomatic employers in light of the legal obligations of States parties to the Vienna Convention on Diplomatic Relations (“Vienna Convention” or “VCDR”)¹¹ to provide diplomatic immunity. We note that fulfillment of this legal obligation may lead to difficulties in fulfilling the requirement in the Commission’s Rules that petitioners must pursue and exhaust domestic remedies, so that States are given the opportunity to remedy rights violations internally before the Commission may consider them.

Petitioners contend that they are excused from the exhaustion requirement for their claims under Article 31(2)(a) and (b) of the Rules. Article 31(2)(a) excuses one from exhausting domestic remedies if the State does not afford due process of law for protection of the rights that have allegedly been violated. Article 31(2)(b) excuses exhaustion when the party alleging a violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them. These exceptions to the exhaustion requirements are not applicable in this matter.

i. Petitioners have not exhausted their claims against their employers.

As the Commission is aware, the requirement of exhaustion of domestic remedies stems from customary international law, as a means of respecting State sovereignty. It ensures that the State where a human rights violation has allegedly occurred has the opportunity to redress the allegation by its own means within the framework of its own domestic legal system.¹² It is a sovereign right of a State conducting judicial proceedings to have its national system be given the opportunity to determine the merits of a claim and decide the appropriate remedy

¹¹ Apr. 18, 1961, 500 U.N.T.S. 95, 23 U.S.T. 3227.

¹² See, e.g., *Interhandel Case (Switzerland v. United States)* [1959] I.C.J. 6, 26–27.

before resort to an international body.¹³ The Inter-American Court of Human Rights (“Inter-American Court” or “Court”) has remarked that the exhaustion requirement is of particular importance “in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction.”¹⁴

Only one of the six individual Petitioners has sought a remedy in U.S. domestic courts for a claim against her employer. On January 18, 2006, Ms. González Paredes sued her employer, Mr. José Luis Vila, an Argentine diplomat, and his wife, Ms. Monica Nielsen, in the U.S. District Court for the District of Columbia. Her suit was dismissed on the ground of diplomatic immunity.¹⁵ To our knowledge, the other five individual Petitioners and three organizational Petitioners have not sued in domestic courts, and Petitioners assert that there is no remedy for claims brought by domestic workers against their diplomat employers, citing Article 31(2)(b) of the Rules.¹⁶ Article 31(2)(b) does not aid Petitioners here because there are domestic remedies available to them. As set forth in Article 39(2) of the VCDR, diplomatic immunity only applies to certain personnel while serving in a diplomatic capacity, and it ceases to apply to those individuals after the end of their diplomatic assignment. Thus, the U.S. legal obligation to provide diplomatic immunity may temporally limit the remedies of Petitioners, but it does not bar them altogether;¹⁷ most diplomatic appointments are for a set term of two to five years, so the delay may not be extensive.

Thus, individual Petitioners in this matter may be able to file a claim against their former employers, who are no longer serving in a diplomatic capacity within the United States. According to State Department records, none of the former employers of any of the individual Petitioners are still serving in a diplomatic capacity within the United States, and with respect to Petitioner Otilia Luz Huayta, we have not been able to identify her employer (as discussed below). Notably, the

¹³ Thomas Haesler, *The Exhaustion of Local Remedies in the Case Law of International Courts and Tribunals*, at 18–19..

¹⁴ *Velásquez Rodríguez Case*, Judgment of July 29, 1988, ¶ 61, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988) (“*Velásquez Rodríguez Judgment*”).

¹⁵ *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187 (D.D.C. 2007).

¹⁶ Rules, art. 31(2)(b) (“The provisions of the preceding paragraph shall not apply when: ... the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them”).

¹⁷ *Swarna v. Al-Awadi*, 622 F. 3d 123, 140 (2d Cir. 2010). In that case, the domestic worker’s claim against her former employers was permitted to proceed and was not barred by residual diplomatic immunity. Eventually, rather than go to trial, the case was settled and dismissed. *See also* *Baoanan v. Baja*, 627 F. Supp. 2d 155, 170 (S.D.N.Y. 2008). In that case, the former domestic worker was permitted to sue a former Philippine diplomat (who was the chief of mission) and his wife in federal court in New York. The worker was able to have the diplomat and his wife served with process in the Philippines and subjected to the jurisdiction of the United States on 15 causes of action.

other five individual Petitioners' employers were no longer serving in a diplomatic capacity within the United States even on November 15, 2007, the date on which the Petition was filed with the Commission.

Domestic workers employed by foreign mission personnel have pursued claims against foreign governments that led to settlements of those claims.¹⁸ In addition, a case brought against an embassy diplomat in the United States has been settled, even though the case could have been dismissed on the basis of diplomatic immunity. These settlements indicate that the improved accountability and monitoring mechanisms of the State Department (discussed below) contributed, at least in part, to the favorable resolutions of these cases.

Additionally, civil lawsuits alleging exploitation of domestic workers may usually be brought against foreign government personnel working at a consulate, administrative and technical staff at a foreign mission, and international civil staff employed by an international organization such as the United Nations, World Bank, or International Monetary Fund, including during their term of office, as they do not generally enjoy immunity from civil jurisdiction for acts performed outside of their official duties. A civil case against a former consular officer resulted in a default judgment of \$1.5 million in March 2012; another recent civil case against an accredited consular officer was settled and dismissed in July 2012. In addition, in some circumstances, criminal cases may be brought against consular and mission personnel and international civil staff who do not enjoy immunity from criminal jurisdiction or whose immunity has been waived. For example, a criminal case against a World Bank employee for matters relating to her abuse of a domestic worker resulted in the World Bank employee pleading guilty to a felony perjury charge and paying approximately \$40,000 in restitution. That same employee settled a civil claim brought by her former domestic worker. In addition, a consular officer and his wife who were criminally charged with forced labor pled guilty to conspiracy to possess an illegal identification document and paid thousands of dollars in back wages to the domestic employee.¹⁹

Separately, one of the Petitioners, Ms. Otilia Luz Huayta, did not provide the name of her employer, nor does her name appear in State Department records of employees of foreign mission personnel, making it impossible for the United States to verify whether her employer would enjoy or have enjoyed immunity from jurisdiction in the first instance and, if so, whether the employer would now be

¹⁸ See, e.g., <http://diplomaticbriefing.wordpress.com/2012/02/27/newsline-kuwait-settles-us-suit-that-charged-servants-abuse-by-diplomat/> (last visited Sept. 10, 2015).

¹⁹ See, e.g., https://www.washingtonpost.com/opinions/diplomats-who-commit-domestic-worker-crimes-shouldnt-get-a-free-pass/2014/01/01/61b750b6-719d-11e3-9389-09ef9944065e_story.html (last visited Sept. 10, 2015).

subject to jurisdiction. This lack of identification means that the United States is not in a position to address and defend this Petitioner's allegations; accordingly, we believe that there is insufficient evidence for the Commission to evaluate whether the Petition is admissible with respect to Ms. Huayta. Thus, if her employer is, like the other former domestic workers in the Petition, not a diplomat currently serving in the United States, Ms. Huayta could have an available judicial remedy. Furthermore, her employer might have held a position such that the employer would not have enjoyed immunity from civil suits of this nature, such as serving at a consulate, as administrative and technical staff at a mission, or at an international organization. Without further information on the employer of this Petitioner, the United States is unable to adequately respond and this Commission is unable to fairly consider the merits of her assertions.

In light of the Commission's exhaustion requirement, this Petition must be deemed inadmissible. Only one of the Petitioners, Ms. González, brought any claim within domestic courts, which even she did not fully exhaust with an appeal. The United States has an independent and impartial judicial system, based firmly on the rule of law, which is available to address the questions raised in the Petition. Under the Commission's procedures and practice, the matter must be dismissed so that available domestic remedies may be pursued. The Commission should not hold the Petition in abeyance pending exhaustion of domestic remedies. Holding an inadmissible petition in abeyance—by explicitly deciding to hold the petition or by simply taking no action and allowing the matter to remain open on the Commission's docket—has no basis in the Rules and sets a poor example for future petitions that are similarly deficient.

ii. Petitioners have not exhausted their claim that U.S. labor laws violate their right to equal protection of the law.

The Petition is additionally inadmissible because none of the Petitioners has brought claims in the U.S. domestic system challenging the U.S. labor laws themselves as discriminatory. Instead, Petitioners incorrectly allege that there is no remedy in U.S. courts for their claim. They base this allegation on Supreme Court precedent establishing that the Fourteenth Amendment of the U.S. Constitution is only violated when there is *intent* to discriminate. Petitioners suggest that because they do not believe they can prove intent to discriminate, there is no remedy.²⁰ Yet in the Petition filed before the Commission, Petitioners clearly allege intent to discriminate against domestic workers because they are perceived as engaged in

²⁰ Petition at 54.

“women’s work,” traditionally engaged in by women.²¹ Petitioners’ fear that they would be unable to *prove* intent to discriminate is not a sufficient basis to claim that no remedy exists in U.S. domestic courts. As the Commission stated in a 2003 decision:

The fact that [Petitioner] fears an unfavorable judgment if he files the remedy of *amparo* that the State mentions, is not sufficient reason to abstain from contesting the ruling by the Court of Appeals or to constitute an exception to the rule of exhaustion of domestic remedies in this case.²² ...

[I]t should be recalled that the decisive factor is not the Petitioners’ subjective fear with respect to the impartiality that should characterize the court that takes up the trial, but the fact that in the specific case it can be argued that their fears are justified objectively. In this regard, the Inter-American Court of Human Rights has stated that it must not be rashly presumed that a State Party to the [American] Convention has failed to comply with its obligation to provide effective domestic remedies.²³

The Commission has remarked in a similar vein that “[m]ere doubt as to the prospect of success in going to court is not sufficient to exempt a petitioner from exhausting domestic remedies.”²⁴

The U.S. courts are open and available to hear constitutional challenges to federal laws. Such claims may be brought in state or federal court. Petitioners could have brought a claim challenging the exclusion of domestic workers and agriculture workers from the protections of many U.S. labor laws. If Petitioners believe that the United States is employing discriminatory views of gender and gendered work in its labor laws, then they should investigate the legislative history of the laws and make those arguments to the U.S. courts. The U.S. Supreme Court has expressed its willingness to look with suspicion at gender classifications that

²¹ *Id.* at 78 (“Underlying the United States’ exclusion of Petitioners from labor and employment protections is the same fundamental discriminatory attitude and devaluation of ‘women’s work’ that has motivated the general exclusion of domestic workers from many labor protections.”)

²² *Siri Zúñiga v. Honduras*, Petition No. 12.006, Report No. 87/03, Inadmissibility, Oct. 22, 2003 (“*Siri Zúñiga* Inadmissibility Decision”), ¶ 43. *Accord Chucry & Rodríguez v. Honduras*, Petition No. 12.114, Report No. 22/02, Inadmissibility, Feb. 27, 2002 (“*Chucry & Rodríguez* Inadmissibility Decision”), ¶ 35 (Petitioners’ “fear of obtaining an unfavorable judgment by the judiciary is not sufficient reason to constitute an exception to the prior exhaustion requirement in this case”).

²³ *Siri Zuñiga* Inadmissibility Decision, *supra* note 22, ¶ 46; *Chucry & Rodríguez* Inadmissibility Decision, *supra* note 22, ¶ 36.

²⁴ *Sanchez et al. v. United States* (“Operation Gatekeeper”), Petition No. 65/99, Report No. 104/05, Inadmissibility Decision, Oct. 27, 2005, ¶ 67.

carry the “baggage of sexual stereotypes,” for example, in striking down an Alabama alimony statute that permitted women, but not men, to receive alimony payments after divorce.²⁵

If successful, Petitioners could receive an adequate and effective remedy for the violation of their right to equal protection in employment as domestic workers. Whether Petitioners would be able to present a meritorious claim on any of their claims is unknown, but the U.S. domestic system must be given the opportunity to at least consider the claims. By completely failing to present the bulk of the Petition’s claims to a U.S. court, they have deprived the United States of the opportunity to afford Petitioners a remedy for any violations of their human rights.

* * *

Because none of the Petitioners brought suit on this claim in the United States, they have failed to exhaust domestic remedies and the claim is inadmissible. The Commission should therefore declare the Petition inadmissible because Petitioners have not satisfied their duty to demonstrate that they have “invoked and exhausted” domestic remedies under Article 20(c) of the Commission’s Statute and Article 31 of the Rules.²⁶

b. Petitioners Aisah and Begum failed to file in a timely manner with the Commission.

Article 32(1) of the Rules requires that petitions be “lodged within a period of six-months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies.” If the alleged victim is exempt from the exhaustion requirement, Article 32(2) requires the petition to be presented within a reasonable period of time as determined by the Commission. Article 28(7) stipulates that compliance with this statute of limitations is a threshold requirement for the Commission’s consideration of petitions.

The United States respectfully submits that several of the Petitioners’ claims must be dismissed as untimely because they were filed after the expiration of this time limit. Petitioner Aisah alleges that her rights were violated during her

²⁵ Orr v. Orr, 440 U.S. 268, 283 (1979).

²⁶ See, e.g., Vera Mejías v. Chile, Petition No. 157-06, Report No. 11/13, Inadmissibility Decision, Mar. 20, 2013, ¶ 25 (burden is on petitioner to “resort to and exhaust domestic remedies to resolve the alleged violations”); Move Organization v. United States, Case No. 10.865, Report No. 19/92, Inadmissibility Decision, Oct. 1, 1992, Analysis § (b)(2) (“[T]he remedies acquired, whether they be of a criminal, civil, labor, fiscal, or other nature ... must have been invoked and exhausted as provided [in] the Commission’s Regulations.”).

employment by a diplomat from 1998 to 2000.²⁷ Aisah waited seven years before filing her claims before the Commission. Similarly, Petitioner Begum alleges violation of her rights during employment from 1998 to 1999.²⁸ She waited eight years before petitioning the Commission for relief. Neither has supplied any explanation for her delay in filing. Ms. Aisah has been in touch with organizational Petitioner Andolan since 2000 and, according to her, is now a permanent resident of the United States, fluent in English.²⁹ Similarly, Ms. Begum states that she lives in New York and has had a relationship with organizational Petitioner Andolan for over ten years.³⁰ Given their relationship with Andolan, an organization committed to assisting domestic workers to seek redress for workplace exploitation, both women had ample opportunity to know about the availability of filing a claim before the Commission and to file this Petition in a timely manner.

The Commission has repeatedly dismissed as inadmissible petitions that have been filed after the period of time in Article 32(1).³¹ Even if an exception to the exhaustion requirement applied, the Commission's practice reveals that delays of seven or eight years are unreasonable and are grounds for dismissal. In one case, for example, the Commission rejected a petition as inadmissible because the petitioners waited seven years to approach the Commission.³² In another, the Commission found a petition inadmissible because the petitioner waited three years and seven months to file his petition.³³ In that matter, the Commission found it particularly persuasive that the petitioner lived in safety in the United States, with access to legal assistance, throughout that time,³⁴ much like Petitioners Aisah and Begum since the termination of their employment by diplomats. In yet another matter, the Commission rejected a petition because the petitioner waited five years

²⁷ Petition, Declaration of Siti Aisah, ¶ 3.

²⁸ *Id.*, Declaration of Raziah Begum, ¶¶ 6–7.

²⁹ *Id.*, Declaration of Siti Aisah, ¶ 25.

³⁰ *Id.*, Declaration of Raziah Begum, ¶ 38.

³¹ *See, e.g.*, Echeverría & González v. Chile, Petition No. 4636-02, Report No. 108/13, Inadmissibility, Nov. 15, 2013, ¶ 54; J.C.R. v. Mexico, Petition No. 513-04, Report No. 60/12, Inadmissibility, Mar. 19, 2012, ¶ 36; Lara v. Peru, Petition No. 871-03, Report No. 18/11, Inadmissibility, Mar. 23, 2011, ¶ 30; Forzzani v. Peru, Petition No. 277-01, Report No. 17/11, Inadmissibility, Mar. 23, 2011, ¶ 25; Association of Retired Oil Industry Workers of Peru—Metropolitan Area of Lima & Callao v. Peru, Petition No. 12.119, Report No. 79/10, Inadmissibility, July 12, 2010, ¶ 34; Trinidad v. Brazil, Petition No. 397-04, Report No. 118/09, Inadmissibility, Nov. 12, 2009, ¶ 28; Vera et al. v. Peru, Petition No. 619-00, Report No. 4/08, Inadmissibility, Mar. 4, 2008, ¶ 38.

³² Tapia & Eloy Muñoz v. Ecuador, Petition No. 943-04, Report No. 100/06, Inadmissibility, Oct. 21, 2006, ¶¶ 20–21.

³³ Colmenares Castillo v. Mexico, Petition No. 12.170, Report No. 36/05, Inadmissibility, Mar. 9, 2005, ¶ 45.

³⁴ *Id.* ¶¶ 44–45.

between his last attempt to exhaust domestic remedies and his decision to file with the Commission.³⁵

Thus, in keeping with the requirements of Articles 28(7) and 32 of the Rules, as applied by Commission in many prior matters, the Commission must find the Petition inadmissible with respect to Petitioners Aisah and Begum because their claims were not timely filed.

III. THE PETITION IS INADMISSIBLE FOR FAILURE TO STATE A VIOLATION AND DUE TO SUPERVENING EVENTS; AND IS MERITLESS.

At the core of Petitioners' claims is their dissatisfaction with the United States' application of international law on diplomatic immunity. The Commission should decline to examine any claims that rest on the application of the VCDR or other international law on diplomatic immunity because it lacks the competence under its Statute and Rules to interpret and apply this body of law. OAS member States have not granted the Commission the competence or authority to interpret and apply international law on diplomatic immunity in Commission proceedings, and the Commission should decline the invitation to interpret or apply it in this proceeding.

Even if the Commission somehow decided that it had competence to entertain Petitioners' arguments related to international law on diplomatic immunity, those arguments are inadmissible under the Rules and are meritless. In addition to the grounds of inadmissibility discussed above, the Petition is inadmissible because it fails to state facts that tend to establish a violation of the American Declaration, as required under Article 34(a) of the Rules. Even if the Petition had at one time been admissible, moreover, supervening developments have rendered the Petition inadmissible under Article 34(c) of the Rules. Should the Commission nevertheless declare the case admissible and choose to examine the claims related to the application of diplomatic immunity, it should deny the requested relief because the Petition does not demonstrate a failure by the United States to uphold its commitments under the American Declaration, especially in light of the actions taken and the relevant policies enacted in recent years. The reasons the Petition is inadmissible under Article 34(a) and (c), and the reasons it is meritless in any event, are discussed in tandem throughout this Section of the brief.

³⁵ Díaz Luna v. Peru, Petition No. 430/00, Report No. 85/05, Inadmissibility, Oct. 24, 2005, ¶ 27.

a. The United States is under an international legal obligation to respect diplomatic immunity in these circumstances.

Protections for the diplomatic personnel of states are fundamental and essential to the conduct of diplomatic relations between all sovereign states. There is a well-established history, dating back centuries, of nations honoring the sanctity of diplomats, even when diplomats are accused of committing illegal actions in the receiving state, and extending even to times of war. The VCDR, a multilateral convention binding under international law, to which the United States and 189 other States are Parties, sets forth an agreed framework for how these rules are to be applied. One such vital protection is the immunity diplomats and their families enjoy from the criminal and civil jurisdiction of the receiving State. Specifically, Article 31(1) of the Vienna Convention provides as follows:

A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administration 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.

The Vienna Convention's recognition of the jurisdictional immunity accorded to a diplomat and his or her family codifies a principle that has long been an integral component of customary international law, and that played an important role in the conduct of the United States during and after the time the U.S. Constitution was created.³⁶ As the preamble to the Vienna Convention explains, diplomatic immunities are accorded "not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing

³⁶ See, e.g., *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 143 (1812) ("[I]t is impossible to conceive ... that a Prince who sends an ambassador or any other minister can have any intention of subjecting him to the authority of a foreign power ... "); BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 70 (1969) (reprint of 1803 ed.) (rights of ambassadors were a matter of universal concern recognized in English common law and were adopted by the United States).

States.” By necessity, diplomats must carry out their duties in a foreign—sometimes hostile—environment. Jurisdictional immunities ensure the ability of diplomats to function effectively by insulating them from the disruptions that would accompany litigation in such an environment. This protection was regarded as so important that for almost two centuries the United States accorded diplomats complete immunity.³⁷

The privileges and immunities accorded to diplomats under the VCDR, and other international agreements making that Convention applicable, for example, to diplomats at missions accredited to the United Nations in New York, are vital to the conduct of peaceful diplomatic relations and must be respected. If the United States is prevented from carrying out its international obligations to protect the immunities of foreign diplomats, adverse consequences will very likely result. At a minimum, the United States may hear objections for failing to honor its obligations not only from the mission of the specific country affected, but also from the missions of other States with immunities guaranteed by the Vienna Convention. Moreover, a decision by this Commission that accepts Petitioners’ arguments for limiting the immunities accorded to diplomatic agents by international law could lead to erosion of these essential safeguards, and potentially put all diplomats at increased risk abroad. As the U.S. Court of Appeals for the Second Circuit has observed, “[r]ecent history is unfortunately replete with examples demonstrating how fragile is the security for American diplomats and personnel in foreign countries; their safety is a matter of real and continuing concern.”³⁸

i. The employment of a domestic worker does not constitute “commercial activity” under Article 31(1)(c) of the VCDR.

As the United States has indicated, the employment of a domestic worker by a diplomat is not a “commercial activity” under Article 31(1)(c) of the Vienna Convention. The “commercial activity” exception focuses on the pursuit of trade or business activity that is unrelated to the diplomatic assignment; it does not

³⁷ See 22 U.S.C. §§ 252–54 (enacted 1790; repealed 1978); S. Rep. 95-958, at 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1936 (1790 statute was “adapted from English statu[t]es dating back to the reign of Queen Anne”).

³⁸ 767 Third Avenue Assocs. v. Perm. Mission of Rep. of Zaire to United Nations, 988 F.2d 295, 301 (2d Cir. 1993). *Accord* Case Concerning United States Diplomatic and Consular Staff in Teheran (U.S. v. Iran), [1980] I.C.J. Rep. 3, ¶ 86:

The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State’s obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse But the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established regime

encompass contractual relationships for goods and services that are incidental to the daily life of the diplomat and his family in the receiving State. As explained below, this position is consistent with the origins and purposes of diplomatic immunity, and is confirmed by the Vienna Convention's negotiating history.³⁹ Moreover, this view has been endorsed by all U.S. courts that, to our knowledge, have addressed the issue.⁴⁰

The origins and purposes of diplomatic immunity confirm that employment of a domestic worker is not a commercial activity within the meaning of the Vienna Convention. When the United States became a party to the Vienna Convention, it recognized the small number of limited exceptions to diplomatic immunity provided for in the treaty, including Article 31(1)(c)'s "commercial activity" exception. Consistent with the Vienna Convention's purposes—"not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States"—the term "commercial activity" as used in Article 31(1)(c) focuses on the pursuit of trade or business activity unrelated to diplomatic work. Such commercial activity is normally undertaken for profit or remuneration and, if engaged in by the diplomat himself (as opposed to a member of his family), is undertaken in contravention of Article 42, which provides that a "diplomatic agent shall not in the receiving State practice for personal profit any professional or commercial activity." Indeed, Article 31(1)(c) works in conjunction with Article 42 to make clear that, if a diplomat does engage in such an activity, he does not have immunity from related civil actions. Conversely, the term "commercial activity" in Article 31(1)(c) does not encompass contractual relationships for goods and services incidental to the daily life of the diplomat and the diplomat's family in the receiving State.

This longstanding interpretation is entitled to great weight.⁴¹ Deference is particularly appropriate with respect to the Vienna Convention, which forms the framework of the Department of State's conduct of diplomatic relations with virtually every country in the world, and which the Department accordingly interprets and applies on a regular basis, taking into account not only the interests

³⁹ See *De Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) (treaties are "contracts between independent nations" and, as such, should be construed "so as to carry out the apparent intention of the parties"); *Tabion v. Mufti*, 877 F. Supp. 285, 287 (E.D. Va. 1995) ("[B]ecause the signatories' intent is paramount, courts 'may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" (quoting *Air France v. Saks*, 470 U.S. 392, 397 (1985))).

⁴⁰ See, e.g., *Tabion v. Mufti*, 877 F. Supp. 285 (E.D. Va. 1995), *aff'd*, 73 F.3d 535 (4th Cir. 1996); *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187 (D.D.C. 2007).

⁴¹ See *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982) ("[T]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight") (citation omitted).

of the foreign states with diplomatic representation in the United States, but the interests of the United States in sending diplomats abroad.

The negotiating history of the Vienna Convention confirms that commercial activity did not encompass employment of domestic workers. The United States' interpretation of Article 31(1)(c) is not only consistent with the purposes of diplomatic immunity, but is confirmed by the Vienna Convention's negotiating history.⁴² The final version of the Vienna Convention evolved from an initial draft developed in a series of meetings of the United Nations International Law Commission ("ILC"), a body of international law experts. The ILC draft was then considered by States at a formal diplomatic conference convened by the United Nations in 1961. In each forum, it was clear that, under the Vienna Convention, diplomats would continue to enjoy their traditional immunities for contracts incidental to everyday life.

The ILC began its work in earnest by considering a draft for the Codification of the Law Relating to Diplomatic Intercourse and Immunities proposed by its Special Rapporteur in 1955. The draft contained no exception to immunity for commercial activity.⁴³ An amendment providing an exception to immunity for acts "relating to a professional activity outside [the diplomatic agent's] official duties" was first introduced into the Draft Articles at the 402nd meeting of the ILC, during its Ninth Session, on May 22, 1957.⁴⁴ The author of the proposed amendment, Mr. Verdross, based his proposal on Article 13 of the 1929 resolution of the Institute of International Law, which referred only to "professional" activity. The proposed amendment was also described as being akin to Article 24 of the 1932 Harvard Draft Convention on Diplomatic Privileges and Immunities ("Harvard Draft"), which referred to "business" as well as "professional" activity as follows:

A receiving state may refuse to accord the privileges and immunities provided for in this convention to a member of a mission or to a member of his family who engages in a business or who practices a profession within its territory, other than that of the mission, with respect to acts done in connection with that other business or profession.⁴⁵

That Mr. Verdross's proposed amendment was not intended to address ordinary contractual relationships for goods and services incidental to daily life is evidenced by his reference to the Harvard Draft and his observation that the cases to which

⁴² See *Tabion*, 877 F. Supp. at 292.

⁴³ See Report Presented by Mr. A.E.F. Sandstrom, Special Rapporteur, UN Doc. A/CN.4/91, reprinted in [1955] 2 Y.B. INT'L L. COMM'N 11-12, 16, U.N. Doc. A/CN.4/SER.A/1955/Add.1.

⁴⁴ Summary Records of the 402nd Meeting, [1957] 1 Y.B. INT'L L. COMM'N 97, UN Doc. A/CN.4/SER.A/1957.

⁴⁵ *Id.* at 97 (quoting Harvard Draft, art. 24(2)).

the amendment related were “comparatively rare.”⁴⁶ Indeed, some ILC members suggested that the proposal was unnecessary because it was aimed at activity in which diplomats rarely engaged.⁴⁷

The provisional draft resulting from the ILC’s Ninth Session in 1957 would have eliminated civil and administrative immunity for actions “relating to a professional or commercial activity exercised by the diplomatic agent in the receiving State and outside his official functions.”⁴⁸ This provisional draft was submitted to governments for comment.⁴⁹ In response to the Australian member’s comment that the term “commercial activity” required some definition, the Special Rapporteur explained that “the use of the words ‘commercial activity’ as part of the phrase ‘a professional or commercial activity’ indicates that it is not a single act of commerce which is meant, by [sic] a continuous activity.”⁵⁰ When the U.S. member commented that the commercial activity exception went beyond existing international law, the Special Rapporteur responded by describing the exception in terms of activity that was inconsistent with diplomatic status:

In case (c), the considerations were as follows. A condition of the exercise of a liberal profession or commercial activity must be that the client should be able to obtain a settlement of disputes arising out of the professional or commercial activities conducted in the country. It would be quite improper if a diplomatic agent, *ignoring the restraints which his status ought to have imposed upon him*, could, by claiming immunity, force the client to go abroad in order to have the case settled by a foreign court.⁵¹

⁴⁶ *Id.*

⁴⁷ *Id.* at 97–98.

⁴⁸ Reports of the Commission to the General Assembly, UN Doc. A/3623, reprinted in [1957] 2 Y.B. INT’L L. COMM’N 139, UN Doc. A/CN.4/SER.A/1957/Add.1.

⁴⁹ See Diplomatic Intercourse and Immunities: Summary of Observations Received from Governments and Conclusions of the Special Rapporteur, UN Doc. A/CN.4/116 (1958).

⁵⁰ *Id.* at 56. Eileen Denza, a leading authority on diplomatic law, described the Vienna Convention’s use of “commercial activity” in these terms:

It is clear that the ideas of remuneration and of a continuous activity are central to the purpose of Article 31(1)(c). Although the provision is drafted in unnecessarily wide terms it is not intended to cover commercial contracts incidental to the ordinary conduct of life in the receiving State. If one accepts that Article 31(1)(c) is to be interpreted in this sense it becomes clear that whereas the speculative activities of a diplomat on the Stock Exchange would come within the exception to immunity, contracts of personal loan would not, nor would contracts entered into for the purpose of educating the children of a diplomatic agent or otherwise supplying him and his family with any kind of goods or services.

EILEEN DENZA, DIPLOMATIC LAW 166–67 (1st ed. 1976) (emphasis in original). Indeed, Denza quotes the decision of the U.S. Court of Appeals for the Fourth Circuit in *Tabion* as correctly describing the scope of Article 31(1)(c). See EILEEN DENZA, DIPLOMATIC LAW 305 (3d ed. 2008) (“DENZA 2008”).

⁵¹ *Id.* at 55–56 (emphasis added).

At its Tenth Session in 1958, the ILC adopted a final draft that contained a commercial activity exception to civil and administrative immunity. As the records from this session show, both the Rapporteur and the ILC Chairman viewed the commercial activity exception as focusing on the pursuit of private trade or business activity. They responded to a member's comment that he had understood the commercial activity exception to cover even isolated commercial transactions as follows:

Sir Gerald FITZMAURICE, Rapporteur, doubted the advisability of Mr. Zourek's suggestion. Paragraph 1(c) of the article applied to cases where a diplomatic agent conducted a regular course of business 'on the side.' Such isolated transactions as, for instance, buying or selling a picture, were precisely typical of the transactions not subject to the civil jurisdiction of the receiving State. Annoying as it might be for the other parties to such transactions in the event of a dispute, it was essential not to except such transactions from the general rule for, once any breach was made in the principle, the door would be open to a gradual whittling away of the diplomatic agent's immunities from jurisdiction.

The CHAIRMAN pointed out that the article referred to 'commercial activity.' A single transaction would hardly constitute 'commercial activity.' Of course, even a single plunge in the waters of trade might suffice, but it must be in the waters of trade.⁵²

The ILC's official Commentary on this provision, as adopted in 1958, also shows that the term "commercial activity" did not encompass the usual procurement of goods and services needed in the diplomat's daily life, but rather focused on activities that were normally inconsistent with a diplomat's position. In that Commentary, the commercial activity exception was explained as follows:

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. It was urged that activities of these kinds are normally wholly inconsistent with the position of a diplomatic agent, and that one possible consequence of his engaging in them might be that he would be declared *persona non grata*. Nevertheless, such cases may occur and should be provided for, and if they do occur the persons with whom the

⁵² Summary Records of the 476th Meeting, [1958] 1 Y.B. INT'L L. COMM'N 244, UN Doc. A/CN.4/SER.A/1958.

diplomatic agent has had commercial or professional relations cannot be deprived of their ordinary remedies.⁵³

The ILC's final draft was considered at the United Nations Conference on Diplomatic Intercourse and Immunities in 1961. The Department of State's instructions to the U.S. delegation at that Conference expressed the following understanding of the commercial activity exception:

Although states have generally accorded complete immunity to diplomatic agents from criminal jurisdiction, there has been a reluctance in some countries to accord complete immunity from civil jurisdiction particularly where diplomats engage in commercial or professional activities which are unrelated to their official functions. While *American diplomatic officers are forbidden to engage in such activities* in the country of their assignment, other states have not all been so inclined to restrict the activities of their diplomatic agents. Subparagraph c) of paragraph 1 would enable persons in the receiving State who have professional and *business* dealings of a non-diplomatic character with a diplomatic agent to have the same recourse against him in the courts as they would have against a non-diplomatic person engaging in similar activities.⁵⁴

... While it may be argued that to permit a diplomat to be subjected to a lawsuit in such a case could interfere with the performance of his functions, that would seem to be a risk the sending State should be required to take when it permits its diplomatic agents to engage in commercial or professional activities of a non-diplomatic nature. ...⁵⁵

The United States' view—that the commercial activity exception in Article 31(1)(c) focused on the kind of activity for profit in which diplomats should not be engaging—was borne out in the treatment of the issue at the Conference. Commercial activity was considered in the context of a new article proposed by the delegate from Colombia, which became Article 42 of the Vienna Convention, and provides that “[a] diplomatic agent shall not in the receiving State practice for personal profit any professional or commercial activity.” The delegates' discussion of Colombia's proposed amendment demonstrates that the

⁵³ Report of the Commission to the General Assembly, UN Doc. A/3859, reprinted in [1958] 2 Y.B. INT'L L. COMM'N 98, UN Doc. A/CN.4/SER.A/1958/Add.1.

⁵⁴ 7 DIGEST OF INT'L LAW 406 (Marjorie Whiteman ed., 1970) (emphasis added).

⁵⁵ *Id.* at 407.

delegates envisioned Article 42 as addressing only the pursuit of active trade or business activity.⁵⁶

Moreover, the Conference delegates saw the commercial activity exception in Article 31(1)(c) and the ban on commercial activity in Article 42 as closely intertwined. Indeed, the delegates from Colombia and Italy proposed deletion of Article 31(1)(c)'s commercial activity exception, viewing it as unnecessary in light of the prohibition in Article 42. However, the Conference voted to retain the exception following a discussion in plenary session in which several delegates pointed out that there could be no assurance that diplomatic agents would not engage in prohibited activities, and that, in any event, Article 42's ban did not apply to diplomats' family members, who would otherwise enjoy immunity for such activities.⁵⁷ All other proposals to provide additional exceptions to immunity for claims for damages caused by a diplomatic agent were rejected.⁵⁸

In sum, as the Vienna Convention's drafting and negotiating history makes clear, diplomats are engaged in "professional or commercial" activity within the meaning of Article 31(1)(c) when they engage in a business, trade, or profession

⁵⁶ See 1 UN CONFERENCE ON DIPLOMATIC INTERCOURSE AND IMMUNITIES: OFFICIAL RECORDS 212 (1962), UN Doc. A. CONF.20/14 (statement of representative of Ceylon that "the supporters of the proposed new article had in mind a regular professional activity from which a permanent income was derived, and not an occasional activity, particularly of a cultural character"); *id.* at 213 (statement of representative of Italy favoring the proposal "provided that it was made clear ... that the intention was to prevent diplomats from engaging in gainful activities such as commerce, industry or a regular profession"); *id.* at 213 (statement of representative of Malaya that the proposal "should be limited to commercial activity for personal profit").

⁵⁷ See *id.* at 19–21. Numerous commentators have discussed the commercial activity exception of Article 31(1)(c) in terms that indicate that the scope of the phrase "professional or commercial activity" parallels the prohibition on a diplomat's engaging in private professional and commercial activity that is prohibited in Article 42. See, e.g., B.S. MURTY, *THE INTERNATIONAL LAW OF DIPLOMACY: THE DIPLOMATIC INSTRUMENT AND WORLD PUBLIC ORDER* 356 (1989) ("'Professional or commercial' should be interpreted alike in Art. 31(1) and Art. 42."); GRANT V. MCCLANAHAN, *DIPLOMATIC IMMUNITY* 130–31 (1989) (although Art. 42 bars diplomats from engaging in commercial or professional activity, Art. 31(1)(c) "covers the few cases where a diplomat's own government and the receiving government waive objections"); LUDWIK DEMBINSKI, *THE MODERN LAW OF DIPLOMACY* 207 (1988) (professional and commercial activity by diplomats is prohibited and the exception is only to make clear that there government immunity); Jonathan Brown, *Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations*, 37 INT'L & COMP. L.Q. 53, 76 (1988) (relating "commercial activity" to the activities barred by Art. 42); SATOW'S GUIDE TO DIPLOMATIC PRACTICE 126–27 (5th ed. 1979) (noting that the exception of Art. 31(1)(c) is "most important" not for diplomats but for their family members who may be employed); PHILIPPE CAHIER & LUKE T. LEE, *VIENNA CONVENTIONS ON DIPLOMATIC AND CONSULAR RELATIONS* 29 (1989) (Art. 31(1)(c) is "probably redundant" because Art. 42 "forbids the diplomatic agent from engaging in such activities"); MICHAEL HARDY, *MODERN DIPLOMATIC LAW* 62 (1968) (discussing Art. 31(1)(c) with reference to Art. 42); *cf. also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 464, Reporters' Note 9, at 468 (1986).

⁵⁸ See UN Conference on Diplomatic Intercourse and Immunities: Report of the Delegation of the United States of America, DEP'T OF STATE PUB. 7289, at 17 (1962).

for profit.⁵⁹ 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 engaged in “commercial activity” as that term is used in the Vienna Convention. Accordingly, diplomats are immune from suits arising out of such contractual relationships.

In addition, specific provisions of the Vienna Convention pertaining to diplomats and private staff, when read together, provide strong evidence that the “professional or commercial” activity exception was never intended to apply to the employment of domestic workers. As discussed above, a diplomatic agent is prohibited from engaging in “professional or commercial activity for profit” by Article 42. At the same time, the Vienna Convention clearly provides for the employment of domestic workers by mission members. The VCDR defines a “private servant” in Article 1(h) as “a person who is in the domestic service of a member of the mission and who is not an employee of the sending State.” Further, the VCDR expressly addresses the social security obligations of diplomats employing private staff at Article 33, and the exemption from taxation on the income of such staff at Article 37(4). The fact that the Vienna Convention anticipates the employment of private staff by diplomats while at the same time prohibiting diplomats from engaging in commercial activity is textual evidence that the “commercial activity” exception to immunity from civil jurisdiction was never intended to include in its scope, activities related to the employment of personal staff by mission members.

All U.S. courts to date have adopted the United States government’s interpretation of Article 31(1)(c). The United States’ view of Article 31(1)(c) has been endorsed by all U.S. courts that have addressed the scope of the “commercial activity” exception. In *Tabion v. Mufti*, a foreign diplomat and his wife were sued by their former domestic worker for, among other things, alleged violations of the Fair Labor Standards Act, breach of contract, and false imprisonment.⁶⁰ The plaintiff, who worked for the defendants in Jordan before accompanying them to the United States, alleged that she was promised a lawful minimum wage and reasonable working hours.⁶¹ Asserting diplomatic immunity, the defendants moved

⁵⁹ It is immaterial that Article 31(1)(c) does not contain the phrase “for profit” because it is clear from the negotiating history that the drafters understood it in that light. Treaties are to be interpreted in good faith to fulfill the intent of the parties. *See, e.g., DeGeofroy v. Riggs*, 133 U.S. 258, 271 (1890).

⁶⁰ *Tabion v. Mufti*, 877 F. Supp. 285, 286 (E.D. Va. 1995), *aff’d*, 73 F.3d 535 (4th Cir. 1996).

⁶¹ *See id.*

to quash; in response, the plaintiff argued that the defendants' conduct fell within Article 31(1)(c)'s "commercial activity" exception.⁶²

Relying on both the Vienna Convention's negotiating history and the position proffered by the United States, the district court held that the defendants were immune from suit because their employment relationship with the plaintiff was not "commercial activity."⁶³ The district court noted that the treaty's negotiating history "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."⁶⁴ The district court also noted that the United States' view—that the term "commercial activity" focuses on the pursuit of trade or business activity—was "significant" and "add[ed] substantial force" to the court's holding.⁶⁵

Finding the district court's opinion "well-reasoned," the U.S. Court of Appeals for the Fourth Circuit affirmed, concluding that "the phrase 'commercial activity,' as it appears in the Article 31(1)(c) exception, was intended by the signatories to mean 'commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.'"⁶⁶ The court continued: "Day-to-day living services such as dry cleaning or domestic help were not meant to be treated as outside a diplomat's official functions. Because these services are incidental to daily life, diplomats are to be immune from disputes arising out of them."⁶⁷

Similarly, in *Gonzalez Paredes v. Vila*, a foreign diplomat and his wife were sued by their former domestic worker, Petitioner González in the present matter before the Commission, for alleged violations of the Fair Labor Standards Act, various District of Columbia wage laws, and breach of contract.⁶⁸ Petitioner González, who was hired in Argentina to provide domestic and childcare services to the defendants in the United States, alleged that the defendants required her to work long hours for low pay and with limited time off.⁶⁹ In response to the defendants' assertion of diplomatic immunity, Petitioner González, like the plaintiff in *Tabion*, argued that the defendants' employment of her was a "commercial activity" excepted from the protections of the Vienna Convention.⁷⁰

⁶² *Id.* at 287.

⁶³ *See id.* at 292.

⁶⁴ *Id.* at 291.

⁶⁵ *Id.* at 292.

⁶⁶ *Tabion*, 73 F.3d at 538 (quoting VCDR art. 31(1)(c)).

⁶⁷ *Id.* at 538–39.

⁶⁸ *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187, 189 (D.D.C. 2007).

⁶⁹ *Id.* at 190; *see also* Compl. ¶ 25, *Gonzalez Paredes v. Vila*, No. 06-89 (D.D.C.) (Jan. 18, 2006) [Dkt. #1].

⁷⁰ 479 F. Supp. 2d at 193.

Notwithstanding Ms. González's argument that diplomats indirectly profit from such arrangements for domestic services because they are, in effect, underpaying for labor, the district court in *Gonzalez Paredes* found "no reason to disagree" with the Fourth Circuit's conclusion in *Tabion* "that a contract for domestic services such as the one at issue in this case is not itself a commercial activity within the meaning of Article 31(1)(c) of the Vienna Convention."⁷¹ In reaching this conclusion, the court found that the United States' view was "entitled to great deference."⁷²

Further, in *Sabbithi v. Al Saleh*, a foreign diplomat and his wife were sued by their former domestic workers under the Trafficking Victims Protection Act of 2000 ("TVPA"), the Fair Labor Standards Act, and assert various contract and tort claims.⁷³ The plaintiffs, who were hired in Kuwait, alleged that the defendants required them to work excess hours and days, for low pay, and subjected them to abuse.⁷⁴ In a slight variant of plaintiffs' arguments in the two prior cases, plaintiffs argued that defendants' alleged trafficking of them was a "commercial activity" excepted from the protections of the Vienna Convention.⁷⁵ Despite plaintiffs' claim that human trafficking is a profitable commercial activity that results in severe human rights violations, the district court endorsed the Fourth Circuit's decision in *Tabion* and the D.C. district court's decision in *Gonzalez Paredes*. As the district court held, "the facts in this case support a conclusion that the defendants' conduct in bringing plaintiffs from Kuwait to the United States and employing plaintiffs as domestic workers, albeit for marginal wages, was not commercial activity"⁷⁶

Additionally, in *Montuya v. Chedid*, a U.S. district court again adopted the United States government's interpretation of Article 31(1)(c). In *Montuya*, a domestic worker brought suit against her former employers, a foreign diplomat and his wife, under the Fair Labor Standards Act and the District of Columbia's minimum wage law.⁷⁷ The plaintiff also raised various common law claims and alleged human rights law violations.⁷⁸ As in *Sabbithi*, *Gonzalez Paredes*, and *Tabion*, the plaintiff argued that defendants' employment of her was a "commercial activity" excepted from the protections of the Vienna Convention.⁷⁹

⁷¹ *Id.* at 193 & n.7.

⁷² *Id.*

⁷³ *Sabbithi v. Al Saleh*, 605 F.Supp.2d 122, 124 (D.D.C. 2009).

⁷⁴ *Id.* at 125.

⁷⁵ *Id.* at 126.

⁷⁶ *Id.* at 128.

⁷⁷ *Montuya v. Chedid*, 779 F. Supp. 2d 60, 61 (D.D.C. 2011).

⁷⁸ *Id.*

⁷⁹ *Id.* at 62–63.

In dismissing plaintiff's case, the district court found "no reason to disagree with the holdings in *Sabbithi, Gonzalez Paredes, and Tabion*."⁸⁰ The court concluded that "[t]he State Department's view remains eminently reasonable, and the hiring of domestic workers cannot be deemed commercial activity outside of a diplomat's official function."⁸¹

Finally, another U.S. court upheld the same interpretation of Article 31(1)(c) in 2014. In *Fun v. Pulgar*, a domestic worker brought suit against her foreign-diplomat former employers. The court held that defendants were entitled to absolute diplomatic immunity, since "the 'commercial activity' exception in Article 31(1)(c) of the Vienna Convention does not apply to the hiring of a domestic employee."⁸²

Petitioners have not established any contrary State practice. Petitioners do not provide evidence demonstrating that any State's courts have persuasively interpreted the commercial activity exception of Article 31(1)(c) as permitting diplomats to be civilly liable for domestic workers' abuse.⁸³ The Court of Appeal of England and Wales, for example, has found that the hiring of a domestic worker does not fall within the "commercial activity" exception of Article 31(1)(c).⁸⁴

Moreover, the decisions in Belgium, Portugal and Switzerland that Petitioners cite either do not address Article 31(1)(c)'s scope or are poorly reasoned. First, Petitioners mischaracterize the Belgian decisions allowing the suit brought against an American diplomat and his wife by their former Filipino domestic workers.⁸⁵ The Brussels Labor Court did not base its decision on Article 31 of the Vienna Convention, and did not construe the meaning of "commercial activity" as used in Article 31(1)(c).⁸⁶ Rather, as explained more fully in Section III(a)(ii) below, the case turned on (1) whether a summons for this type of civil proceedings should be understood as an exercise of jurisdiction to which diplomats are immune; and (2) on whether Article 39(2), which sets forth the scope of immunities diplomats enjoy once they have ceased to perform diplomatic functions,⁸⁷ would cover a diplomat's employment of a domestic workers.⁸⁸ Thus,

⁸⁰ *Id.* at 64.

⁸¹ *Id.*

⁸² *Fun v. Pulgar*, 993 F. Supp. 2d 470, 474 (D.N.J. 2014) (citing *Tabion*, 73 F.3d at 538).

⁸³ See Petition at 114–17.

⁸⁴ See *Reyes & Suryadi v. Al-Malki*, [2015] EWCA 32.

⁸⁵ Petitioners provided only a translated summary of the Brussels Labor Court decision and a French summary of the Brussels Labor Court of Appeals decision in their Appendix.

⁸⁶ See *Brown v. Adorable*, Brussels Labor Court at 1 (Apr. 20, 2001) ("The present dispute does not fall within the exceptions mentioned in article 31.")

⁸⁷ Article 39(2) reads:

the Belgian case is inapplicable to Petitioners' arguments regarding the scope of Article 31(1)(c).

Second, according to the certified English translation that Petitioners provided in their Appendix, in *Fonseca v. Larren*, Portugal's Supreme Court of Justice concluded that, taken together, the exceptions to immunity contained in Article 31 "were intended to exclude *all activities* outside of the diplomat's diplomatic functions," including "the contracting of a domestic maid to perform services in the diplomat's private residence."⁸⁹ However, the court did not address the Vienna Convention's negotiating history, which flatly contradicts this expansive reading of Article 31's exceptions. Indeed, the Portuguese court's opinion does not specifically construe the "commercial activity" exception at all. Moreover, in reaching its conclusion, the court incorrectly described the scope of diplomatic immunity as not extending to the acts of a diplomat not practiced in the name of the state that represents him or her for the purposes of the mission. On the contrary, subject to the exceptions set forth in Article 31, "immunity from jurisdiction applies to all acts of diplomats, private as well as official."⁹⁰ Thus, the *Fonseca* court's reasoning runs counter to both the Vienna Convention's negotiating history and widely accepted principles of diplomatic law, and should not be relied upon.

Third, the citation Petitioners have provided regarding the Swiss Federal Tribunal does not indicate whether the Tribunal decided to allow diplomats to be civilly liable for claims of domestic worker abuse, nor does it contain a statement of the facts of the case or even a summary of the decision. The citation is to a discussion of Switzerland's report to the United Nations Committee on Economic, Social, and Cultural Rights pursuant to Articles 16 and 17 of the International Covenant on Economic, Social, and Cultural Rights. The Swiss delegate merely reports that "[t]he Federal Tribunal had recently handed down an important decision stating that the Federal Labour Act applied to persons employed in diplomatic missions and that diplomatic immunity covered acts carried out in the

When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

⁸⁸ The United States cannot evaluate the second Belgian case described, in which Petitioners claim that "two diplomats were held accountable for human trafficking, despite their claims to diplomatic immunity," Petition at 115, since the citation provided does not discuss this case.

⁸⁹ *Fonseca v. Larren*, Boletim do Ministério da Justiça 403 (1991) (emphasis added).

⁹⁰ CAHIER & LEE, *supra* note 57, at 29.

performance of official functions but not acts of everyday life.”⁹¹ The only method to address abuse mentioned in that Report is that provided in Vienna Convention Article 9(1), allowing the receiving State to declare a diplomat *persona non grata* at any time without explanation.⁹² There is no discussion of whether this decision meant that diplomats could be civilly liable for domestic worker abuse cases.

ii. The United States’ respect for diplomatic immunity does not impermissibly restrict Petitioners’ access to court.

Petitioners argue that the United States’ failure to permit the exercise jurisdiction over diplomats in civil domestic worker abuse suits on grounds of immunity—and its alleged failure to provide any alternative means to provide adequate compensation—violates their right to a remedy as set forth in Article XVIII of the American Declaration and Articles 8(1) and 25 of the American Convention.⁹³ This restriction, Petitioners argue, is impermissible under the Commission’s practice, which they argue stands for the proposition that a State can only limit or restrict rights if the limitation does not “curtail the very essence and effectiveness of the ... right” and it is imposed in pursuit of a legitimate aim in a “reasonable, objective and proportionate” manner.⁹⁴ While Petitioners concede that respecting diplomatic immunity in such cases has “the legitimate end of fostering diplomacy and the efficient functioning of foreign missions,”⁹⁵ they argue that the restriction is disproportionate because “[d]omestic services performed in a

⁹¹ UN ESCOR, CESCR, 19th Sess., 38th mtg. ¶ 30, UN Doc. E/C.12/1998/SR.38.

⁹² Article 9(1) provides that:

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 *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.

After the Swiss representative mentioned the decision of the Swiss Federal Tribunal, Mr. Riedel, a member of the Committee responded:

The decision of the Federal Tribunal and the new directives issued by the Department for Foreign Affairs were entirely in conformity with that article. It was clear that diplomatic immunities were only functional immunities. Accordingly, the receiving State had a duty to try to secure the waiver of the diplomatic immunity of the person in question so that the necessary proceedings could be brought. If the sending State refused to waive diplomatic immunity, the receiving State still had the possibility of declaring the culpable diplomat *persona non grata*.

UN ESCOR, CESCR, 19th Sess., 38th mtg. ¶ 31, UN Doc. E/C.12/1998/SR.38.

⁹³ Petition at 97. The Commission must dismiss any claims under the American Convention for lack of jurisdiction, as the United States has not ratified the American Convention and it is thus not an “applicable instrument” under Article 27 of the Rules. *See supra* note 8.

⁹⁴ Statehood Solidarity Comm. v. United States, Case No. 11.204, Report No. 98/03, Dec. 29, 2003, ¶ 99. *See also id.*, ¶ 101 (“The Commission should only interfere in cases where the State has curtailed the very essence and effectiveness of an individual’s right ... without adequate justification being shown by the State for this curtailment.”).

⁹⁵ Petition at 106.

diplomat's private home personally benefit that diplomat, but have no bearing on the enumerated functions of diplomatic missions."⁹⁶

Petitioners cite the Labor Court decision discussed above, which found that an American diplomat and his wife were subject to the Labor Court's jurisdiction in a civil suit brought by their former Filipino domestic employees; Petitioners argue that this decision constitutes evidence of state practice supporting their disproportionate restriction argument.⁹⁷ In that case, the Brussels Court of Labor employed the European Court of Human Rights' (ECHR) balancing test to find that summons issued to sitting diplomats for civil cases involving "personal actions" can establish jurisdiction as long as the actual judicial proceedings begin only *after* they cease to be diplomats.⁹⁸ The key finding of the Brussels Court of Labor, however, was that the civil suit could proceed against the former American diplomat and his wife, since these defendants were no longer diplomats when the lower court initiated proceedings. Thus, the basis of the Brussels Court of Labor's decision does not support Petitioners' assertion, because it found that no proceeding could go forward against the diplomat until he had left his diplomatic post and no longer had immunity from civil proceedings.

Moreover, any balancing test is inapplicable, because the United States' failure to exercise jurisdiction on the grounds of diplomatic immunity in these types of suits arises from an external, international legal obligation in a treaty, as explained in Section III(a). The United States cannot be found to have impermissibly restricted Petitioners' access to its courts because under international law its courts never possessed jurisdiction over diplomats for these types of suits. Thus the United States engaged in no balancing test, nor could it do so. The right of access to courts cannot create jurisdiction; its purpose is to ensure a State's existing jurisdiction is accessible on a fair and equal basis. Lord Millet's opinion in the House of Lords case *Holland v. Lampen-Wolfe*, which addressed

⁹⁶ *Id.* at 103.

⁹⁷ While Petitioners give the date of the opinion as 2001, the opinion they describe is actually a Brussels Court of Labor decision of 2002. The Brussels Court of Labor serves as a court of appeals to review decisions made by the lower level labor court, called the Labor Court.

⁹⁸ Citing authoritative commentators on diplomatic law, the United States argued that a summons is an exercise of jurisdiction to which diplomats are immune because of their personal inviolability under Article 29 of the VCDR. *See* DENZA 2008, *supra* note 50, at 268 (asserting that "personal inviolability precludes personal service of legal process on a diplomat" and "it is a manifestation of the enforcement jurisdiction of the receiving State and therefore a contravention of personal inviolability"). As the defendants before the Labor Court enjoyed diplomatic immunity when service was attempted, the United States argued that jurisdiction over them was never properly established. Thus, the United States continues to view the case as wrongly decided.

whether the granting of immunity to another State infringes Article 6(1) of the European Convention on Human Rights, clearly articulates this principle:

At first sight [Article 6(1)] may appear to be inconsistent with a doctrine of comprehensive and unqualified State immunity in those cases where it is applicable. But in fact there is no inconsistency. This is not because the right guaranteed by article 6 is not absolute but subject to limitations, nor is it because the doctrine of State immunity serves a legitimate aim. It is because article 6 forbids a contracting State from denying individuals the benefit of its powers of adjudication; it does not extend the scope of those powers.

Article 6 requires contracting States to maintain fair and public judicial processes and forbids them to deny individuals access to those processes for the determination of their civil rights. It presupposes that the contracting States have the powers of adjudication necessary to resolve the issues in dispute. But it does not confer on contracting States adjudicative powers that they do not possess. State immunity, as I have explained, is a creature of customary international law and derives from the equality of sovereign States. It is not self-imposed restriction on the jurisdiction of its courts that the United Kingdom has chosen to adopt. It is a limitation imposed from without upon the sovereignty of the United Kingdom itself.⁹⁹

In sum, the Commission's and the ECHR's balancing tests are inapplicable because the United States cannot be said to have impermissibly restricted jurisdiction that, under international law, it does not possess.

Even if the Commission were to apply a balancing test, the restriction on access to courts imposed by the United States' international obligations to provide diplomatic immunity from criminal and civil jurisdiction pursues a legitimate aim that is not disproportionate or unreasonable. The ECHR has looked at this question on at least four occasions, and has found that a State's failure to exercise jurisdiction because of international obligations to respect state immunity constitutes a reasonable and proportional restriction on the right to access to court under Article 6(1).¹⁰⁰ First, the Court held that the respondent States had limited

⁹⁹ *Holland v. Lampen-Wolfe*, [2000] UKHL 40; [2000] 3 All ER 833, 846–47 (UK House of Lords 2000).

¹⁰⁰ *Al-Adsani v. United Kingdom*, App. No. 35763/97, 34 Eur. H.R. Rep. 11 (2001); *Fogarty v. United Kingdom*, App. No. 37112/97, 34 Eur. H.R. Rep. 12 (2001); *McElhinney v. United Kingdom*, App. No. 31253/96, 34 Eur. H.R. Rep. 13 (2001), *Jones et. al. v. United Kingdom*, App. Nos. 34356/06 and 40528/06, selected but not yet published in case reports (2014). In *Al-Adsani*, the applicant had filed a claim for compensation against Kuwait in UK court for torture he had allegedly suffered at the hands of Kuwaiti authorities. In *Fogarty*, the applicant had filed a claim before a UK Industrial Tribunal alleging that the United States had not hired her to work in its UK embassies because of a previous successful sex discrimination suit she had brought. In *McElhinney*, the applicant had brought a claim for damages against the Secretary of State for Northern Ireland in Irish court for

the right to access to court on the grounds of State immunity in furtherance of “the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State’s sovereignty.”¹⁰¹ Second, the Court held that granting immunity to foreign States was a proportionate and reasonable measure. Drawing on the customary law of treaty interpretation, as codified in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, the Court held that “[t]he Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms a part, including those relating to the grant of State immunity.”¹⁰² Reading the Convention and the law of state immunity together, the Court held:

It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6(1). Just as the right of access to court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.¹⁰³

As set forth in Section III(a), diplomatic immunity from criminal and civil jurisdiction is a rule of international law that is as widely accepted by the international community as is the rule of State sovereign immunity. Indeed, ECHR Judge Bonello, in a separate opinion in *Draon v. France*, drew such a parallel, writing that “[s]ome immunities, like diplomatic immunity, judicial immunity and partial parliamentary immunity, are the result of historical imperatives and functional necessities. They enjoy the legitimation of long-standing acceptance and tradition.”¹⁰⁴

personal injury arising from the actions one of its soldiers. Likewise, in *Jones et. al.*, several individuals filed a claim for damages in a UK court, claiming damages from the Saudi Arabian state and state officials who carried out or sanctioned alleged illegal detention and torture. In all four cases, the plaintiffs’ claims against respondent States were dismissed on the grounds of state immunity. This stance was further bolstered by the 2012 ICJ case *Jurisdictional Immunities of the State (Germany v. Italy)*, 2012 I.C.J. Rep. 143 (Feb. 3) (“*Germany v. Italy*”), available at <http://www.icj-cij.org/docket/index.php?p1=3&code=gi&case=143&k=60> (last visited Sept. 10, 2015), in which the ICJ found, *inter alia*, that Italy violated Germany’s sovereign immunity by allowing civil claims to be brought against Germany and by allowing attachment of German-held property in Italy as compensation for war crimes German forces had committed in Italy during World War II. The ICJ found, among other things, that even if the judicial proceedings involved violations of *jus cogens* rules, the applicability of customary international law on State immunity was not affected.

¹⁰¹ *Al-Adsani*, *supra* note 100, ¶ 54; *Fogarty*, *supra* note 100, ¶ 34; *McElhinney*, *supra* note 100, ¶ 35.

¹⁰² *Al-Adsani*, *supra* note 100, ¶ 55; *Fogarty*, *supra* note 100, ¶ 35; *McElhinney*, *supra* note 100, ¶ 36.

¹⁰³ *Al-Adsani*, *supra* note 100, ¶ 56; *Fogarty*, *supra* note 100, ¶ 36; *McElhinney*, *supra* note 100, ¶ 37.

¹⁰⁴ *Draon v. France*, App No. 1513/03, 42 Eur. H.R. Rep. 40, ¶ 8 (2005).

iii. *There is no jus cogens exception to diplomatic immunity.*

Petitioners additionally argue that diplomatic immunity cannot bar their right to civil redress because the harms Petitioners Aisah, Ajasi, Begum and Huayta suffered violate *jus cogens* norms prohibiting slavery and similar practices. Petitioners submit that the prohibition of slavery is a *jus cogens* norm; that the Vienna Convention conflicts with that norm because it immunizes slaveholders from suit; that diplomatic immunity is not a *jus cogens* norm; and, therefore, that the Vienna Convention's diplomatic immunity provisions are void under these circumstances.¹⁰⁵

In the view of the United States, there is no *jus cogens* exception to diplomatic immunity. Assuming treaty provisions must comply with *jus cogens* norms, just as they must adhere to constitutional limitations, there is no conflict between the VCDR and *jus cogens* norms, as nothing in the VCDR authorizes any practice that violates any such norm.¹⁰⁶ Further, diplomatic immunity is itself a fundamental principle of international law, as discussed in Section III(a) above. Accordingly, no U.S. court has recognized a *jus cogens* exception to diplomatic immunity, and there is no evidence that the international community has come to recognize such an exception. The United States is not aware of a case in which a foreign court has exercised civil jurisdiction (when none of the exceptions in VCDR Article 31(1) apply) over a sitting diplomat on the grounds that he or she allegedly committed a *jus cogens* violation.

The evidence Petitioners cite for their claim that developments in international law point to a "decline in absolute immunity" for serious violations of international law does not advance their argument that there is a *jus cogens* exception to diplomatic immunity in civil proceedings for several reasons.¹⁰⁷ First, most of the evidence concerns state immunity,¹⁰⁸ not diplomatic immunity. Diplomatic immunity and sovereign immunity are different doctrines. They serve

Petition at 117–23. The Vienna Convention on the Law of Treaties defines a *jus cogens* norm as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331.

¹⁰⁶ Cf. HAZEL FOX, THE LAW OF STATE IMMUNITY 525 (2002) ("State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement.").

¹⁰⁷ Petition at 120.

¹⁰⁸ See, e.g., *id.* ("More recent developments at the United Nations level on the right to reparation, impunity and state responsibility under international law also indicate a move away from the availability of *state immunity* in cases implicating *jus cogens* norms") (emphasis added); *id.* at 122 (discussing decisions of Italian Supreme Court and Greek Supreme Court on state immunity).

different functions and different considerations drive their interpretation.¹⁰⁹ As explained in Section III(a), diplomatic immunity is a doctrine whose purpose is to ensure the ability of diplomatic agents to carry out their duties in a foreign—sometimes hostile—environment. In contrast, state immunity derives from the fundamental equality of States in the international system. The possibility of being subject to judicial proceedings would pose a much greater threat to the ability of diplomatic agents to carry out their functions than to the State’s ability to pursue its affairs internationally. Accordingly, immunity for sitting diplomats is greater than the immunity accorded to States.¹¹⁰

¹⁰⁹ See DENZA 2008, *supra* note 50, at 1–2, 287; *id.* at 284 (“The justifications for diplomatic immunity and for state immunity are different, as are now to an increasing extent the detailed rules and the exceptions in the two areas.”).

¹¹⁰ See FOX, *supra* note 106, at 455:

[T]he major justification for the protection of the diplomat is the need to protect his special vulnerability when he is present within the territory of another State for the purpose of representing his sending State. He will be unable to carry out his diplomatic duties if he is personally subject to arrest or detention, his premises subject to search, or if he is made subject to criminal or civil proceedings in the receiving State. *Ne impediatur legatus* is the foundation of diplomatic law. In contrast, no such principle requires that the State be immune from the adjudication of the local court; the initiation of litigation in another country does not prevent the conduct of the affairs of the State.

Indeed, all but one (South Africa) of the State immunity acts, as well as the European Convention on State Immunity, that Petitioners cite at 121 expressly state in the text or in their legislative history that they are not intended to displace diplomatic and consular immunities. See Foreign Sovereign Immunities Act of 1976, H.R. Rep. No. 94-1487, at 12, *reprinted in* 1976 U.S.C.C.A.N. 6604 (“The bill is not intended to affect the substantive law of liability. Nor is it intended to affect either diplomatic or consular immunity.”); State Immunity Act 1978, § 16(1), July 20, 1978, 17 I.L.M. 1123 (1978) (UK) (“This Part of this Act [Part I Proceedings in the United Kingdom by or Against Other States] does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968”); State Immunity Act, 8 R.S.C., c. S-18, art. 16, (1985) (Can.), *available at* <http://laws-lois.justice.gc.ca/eng/acts/S-18/page-1.html> (last visited Sept. 10, 2015) (“If, in any proceeding or other matter to which a provision of this Act and a provision of the ... Foreign Missions and International Organizations Act apply, there is a conflict between those provisions, the provision of this Act does not apply in the proceeding or other matter to the extent of the conflict.”); Foreign Sovereign Immunities Act 1985, art. 6, Dec. 16, 1985, No. 196 of 1985, *reproduced in* ANDREW DICKINSON ET. AL, STATE IMMUNITY: SELECTED MATERIALS AND COMMENTARY 469 (2004) (Austl.), *available at* <https://www.comlaw.gov.au/Details/C2010C00145> (last visited Sept. 10, 2015) (“This Act does not affect an immunity or privilege that is conferred by or under the Consular Privileges and Immunities Act of 1972 ... the Diplomatic Privileges and Immunities Act of 1967 or any other Act.”); State Immunity Act of 1979, art. 19(1), *reproduced in* DICKINSON, *supra*, at 504 (Sing.), *available at* <http://statutes.agc.gov.sg/aol/search/display/view.w3p;ident=179b0e0e-6e71-48ad-8440-984c7d89de4b;page=0;query=DocId%3A%221be1a8f7-0968-4fcc-ac26-39d3a51b7b70%22%20Status%3Ainforce%20Depth%3A0;rec=0#pr19-he-> (last visited Sept. 10, 2015) (“Part II [Proceedings in Singapore By or Against Other States] does not affect any immunity or privilege applicable in Singapore to diplomatic and consular agents”); European Convention on State Immunity, art. 32, May 16, 1972, 11 I.L.M. 470 (1972) (“Diplomatic and consular immunities and privileges are already governed by rules of international law ... The considerations which underlie these privileges and immunities are different from those underlying the present Convention. ... [I]n the event of conflict between the present Convention and the instruments mentioned above, the provisions of the latter shall prevail.”). Other State immunity acts not cited by Petitioners as well as the United Nations Convention on Jurisdictional Immunities of States and Their Property also contain similar provisions. See, e.g., Immunity of Foreign States from the

Foreign courts have also recognized that diplomatic immunity and sovereign immunity are distinct doctrines, with different scopes. The Supreme Court of Poland explained this difference as follows: “[T]he immunity of the State has a different juridical basis from that of diplomatic agents. The immunity of representatives of a foreign State has the object of safeguarding their liberty in the exercise of their functions, whilst the immunity of the State is juridically based on the democratic principle of equality.”¹¹¹ The German Federal Constitutional Court, in commenting on Article 31(1) of the VCDR, held: “That Article governs the personal immunity of diplomats. The extent of this immunity differs from that of State immunity; generally, it extends further. In principle, therefore, the extent of State immunity cannot be determined from that of diplomatic immunity.”¹¹² Since the doctrines are distinct, any evolving restrictions that may apply to sovereign immunity do not necessarily apply to diplomatic immunity. In contrast, the only exceptions to diplomatic immunity in civil proceedings are the limited ones codified in the VCDR.¹¹³

Second, a more complete examination of State practice than Petitioners offer reveals that the international community has not come to recognize a *jus cogens* exception to sovereign immunity. In addition to the United States, courts in the United Kingdom, Canada, France, Germany and Greece, as well as the ECHR, have declined to find a *jus cogens* exception to sovereign immunity.¹¹⁴ Subsequent

Jurisdiction of Argentinean Courts, art. 6, Law No. 24.488 (May 31, 1995), reproduced in DICKINSON, *supra*, at 461 (Arg.) (“The provisions of this Law shall not affect any immunity or privilege conferred by virtue of the Vienna Convention of 1961 on diplomatic relations or the 1963 Convention on consular relations”); United Nations Convention on Jurisdictional Immunities of States and Their Property, art. 3, G.A. Res. 59/38 (Dec. 2, 2004) (“The present Convention is without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of: (a) its diplomatic missions, consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences; and (b) persons connected with them.”).

¹¹¹ Aldona S. v. Royaume Uni, Poland Supreme Ct. (Dec. 14, 1981), JDI (1963) 191.

¹¹² Claims Against the Empire of Iran, BVerfG (Apr. 30, 1963), 45 I.L.R. 57, 75 (1963).

¹¹³ See DENZA 2008, *supra* note 50, at 1–2 (“[A]s international rules on state immunity have developed on more restrictive lines there has always been a saving for the rules of diplomatic and consular law and an increasing understanding that although these sets of rules overlap they serve different purposes and cannot be unified.”).

¹¹⁴ See, e.g., Siderman de Blake v. Rep. of Argentina, 965 F. 2d 699, 719 (9th Cir. 1992) (in dismissing civil suit against Argentina for torture, holding that “[t]he fact that there has been a violation of *jus cogens* does not confer jurisdiction under the [Foreign Sovereign Immunities Act]”); Jones v. Ministry of Interior, UKHL ¶ 27 (in dismissing civil suit against Saudi Ministry of Interior for torture, holding that there is “no evidence that states have recognised or given effect to an international law obligation to exercise universal jurisdiction over claims arising from alleged breaches of peremptory norms”); Bouzari and Others v. Islamic Rep. of Iran, Ontario Superior Court of Justice (May 1, 2002), 124 I.L.R. 428, 446 (2003) (Can.), *aff’d* by 128 I.L.R. 586 (2006) (Ontario Court of Appeal) (in dismissing civil suit against Iran for torture, holding that “the decisions of state courts, international tribunals and state legislation do not support the conclusion that there is a general state practice which provides an exception from state immunity for acts of torture committed outside the forum state”); Bucheron v. Fed. Rep. of Germany, Cass. 1e civ., Dec. 16, 2003, Bull. civ. 02-45961, 108 Rev. Gén’l Dr. Int’l Pub. 259 (2004) (Fr.) (dismissing civil claims alleging forced labor against Germany on grounds of

developments in response to decisions of the Italian Supreme Court and the Greek Supreme Court cited by Petitioners further reinforce that the norm in state practice remains to not recognize a *jus cogens* exception to sovereign immunity.¹¹⁵ These rulings, and a further ruling on October 21, 2008, prompted Germany to institute proceedings against Italy before the International Court of Justice (ICJ) in December 2008.¹¹⁶

In its Application to the Court, Germany argued that Italy should bear responsibility for the “Italian judicial bodies [that] have repeatedly disregarded the jurisdictional immunity of Germany as a sovereign State.”¹¹⁷ On February 3, 2012, the ICJ found the decision of the Italian Supreme Court in *Ferrini v. Federal Republic of Germany*¹¹⁸ inconsistent with customary international law. The ICJ concluded that a state is not deprived of sovereign immunity because it is accused of serious violations of international human rights law or the international law of armed conflict. The ICJ also held that even if the proceedings in the Italian courts involved violations of *jus cogens* rules, the application of the customary international law on state immunity would not be affected.¹¹⁹

Prior to the ICJ decision, the UK House of Lords in the *Jones* case had likewise rejected the *Ferrini* court’s holding stating that the Italian court’s approach “is simply not accepted by other states,”¹²⁰ and “cannot ... be treated as

sovereign immunity, even though the German seizure of such persons took place on French soil); *Greek Citizens v. Fed. Rep. of Germany*, BGH III ZR 245/98 (June 26, 2003), 129 I.L.R. 556, 560 (2007) (F.R.G.) (“*Greek Citizens*”), *aff’d* by *Greek Citizens v. Fed. Rep. of Germany*, BVerfG 2 BvR 1476/03 (Feb. 15, 2006), 135 I.L.R. 186 (2009) (German Constitutional Court) (in declining to enforce a Greek civil judgment [*Prefecture of Voiotia v. Federal Republic of Germany*, discussed below] against Germany granting damages to victims of a massacre in World War II on grounds that Greece had improperly exercised jurisdiction over Germany, holding that “there have been ... recent attempts to restrict the principle of State immunity and not to recognize its application in the case of violations of mandatory norms of international law (*jus cogens*). The majority view is, however, that this is not applicable international law.”); *Margellos et al. v. Fed. Rep. of Germany*, Anotato Eidiko Dikastirio 6/2002 (Sept. 17, 2002), 129 I.L.R. 526, 532 (2007) (Greece) (in dismissing civil suit against Germany for unlawful seizure of property during World War II, holding that “a foreign State continues to enjoy sovereign immunity in respect of proceedings relating to a tort committed in the forum State in which its armed forces participated, *without distinction as to whether the actions at issue violated jus cogens*.”) (emphasis added); *Al-Adsani*, *supra* note 100, ¶ 61 (in holding that UK court dismissal of civil suit against Kuwait for torture did not violate Art. 6(1), explaining that “the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.”).

¹¹⁵ Petition at 122.

¹¹⁶ *Germany v. Italy*, *supra* note 100

¹¹⁷ *Id.*, Application of the Federal Republic of Germany at 4, available at <http://www.icj-cij.org/docket/files/143/14923.pdf>. (last visited Sept. 10, 2015).

¹¹⁸ *Ferrini v. Fed. Rep. of Germany*, Cass Sez Un 5044/04 (Mar. 11, 2004), 128 I.L.R. 659 (2006).

¹¹⁹ See especially *Germany v. Italy*, *supra* note 100, ¶¶ 93, 97.

¹²⁰ *Jones v. Ministry of Interior*, UKHL ¶ 63.

an accurate statement of international law as generally understood.”¹²¹ Indeed, Italy’s Supreme Court of Cassation recognized in a series of rulings (involving almost identical facts) reaffirming its 2004 decision that it was not applying an existing norm of customary international law, but was rather attempting to progressively develop a norm it viewed—inaccurately, in the United States’ view—in the process of emerging.¹²² Again the International Court of Justice in 2012 rejected the existence of a *jus cogens* exception to sovereign immunity under international law.

Similarly, the decision of Greece’s Supreme Court in *Prefecture of Voiotia v. Federal Republic of Germany*, allowing a civil suit against Germany for war crimes committed during World War II, has not been followed within Greece or by other States.¹²³ Efforts to enforce the judgment eventually failed because the Minister of Justice denied his approval—a necessary prerequisite for executing a judgment against a foreign state under Greece law—on the grounds that customary international law on State immunity prohibited the judgment.¹²⁴ The Athens Court of Appeal upheld this decision and a complaint filed with the ECHR to enforce the judgment was equally unsuccessful.¹²⁵ Moreover, as discussed above, German courts have refused to enforce the Greek judgment in *Prefecture of Voiotia* in Germany.¹²⁶

Finally, Petitioners’ reliance on the decisions of international criminal tribunals, or the international agreements establishing the authority of such tribunals, is misplaced with respect to diplomatic immunity. In circumstances where an international criminal tribunal asserts jurisdiction over government officials pursuant to a multilateral treaty, such as the Rome Statute, which established the International Criminal Court, the treaty expressly sets forth, for example, that the “[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”¹²⁷ Similarly, the statute of the International Criminal Tribunal for the former Yugoslavia, which

¹²¹ *Id.* ¶ 22.

¹²² See Carlo Focarelli, *Federal Republic of Germany v. Giovanni Mantelli and Others*, 103 AM. J. INT’L L. 122, 124 (2009) (discussing rulings delivered by the Italian Supreme Court of Cassation on May 29, 2008).

¹²³ *Prefecture of Voiotia v. Fed. Rep. of Germany (Distomo Massacre Case)*, Areios Pagos 11/2000 (May 4, 2000), 129 I.L.R. 514, 521 (2007).

¹²⁴ See Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?*, 21 EUR. J. INT’L L. 853, 854 n. 8 (2010).

¹²⁵ *Kalogeropoulou et al. v. Greece & Germany*, Eur. Ct. H.R. 59021/00 (Dec. 12, 2002), 129 I.L.R. 537, 543 (2007).

¹²⁶ See *Greek Citizens*, supra note 114, at 31.

¹²⁷ Rome Statute of the International Criminal Court, art. 27(2), July 17, 1998, UN Doc. A/CONF.183/9.

was adopted by resolution of the United Nations Security Council, provides: “The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”¹²⁸ The statute establishing the International Criminal Tribunal for Rwanda, which was also adopted by UN Security Council resolution, is to the same effect. Thus, each of these statutes speaks directly to the question of official immunity, and each provides for the abrogation of that immunity for limited purposes. As explained above, there is no binding international decision or agreement to abrogate the immunity of a diplomat from the jurisdiction of the receiving State where *jus cogens* violations are alleged.

* * *

For all these reasons, the Petition fails to state any violation of a human right recognized in the American Declaration, and is therefore inadmissible under Article 34(a) of the Rules and must be dismissed; and it is also without merit.

b. The United States has taken significant steps to prevent and respond to allegations of abuse of domestic workers by foreign mission personnel.

i. The United States has adopted strict policies to prevent domestic worker abuse and increased oversight of policy implementation.

Petitioners argue that the United States has “failed to take meaningful steps to prevent the human rights abuses of domestic workers employed by diplomats in violation of its due diligence obligations.”¹²⁹ Petitioners acknowledge that the United States has revised its policies to prevent domestic worker abuse by, for example, requiring employment contracts for A-3 and G-5 domestic workers to address specific provisions as a condition of obtaining a visa and by requiring consular officers to personally interview all applicants and provide information to visa recipients about their rights and to employers about their responsibilities as stipulated in the State Department’s Foreign Affairs Manual (FAM). However, they argue that some additional protections are needed,¹³⁰ and that the United States must improve its “haphazard, inconsistent and irregular” implementation of these policies, their evidence for which comes almost entirely from one report by

¹²⁸ Statute of the International Criminal Tribunal for the former Yugoslavia, art. 7(2), UN Doc. S/25704, May 25, 1993, UN Doc. S/RES/827.

¹²⁹ Petition at 91.

¹³⁰ *Id.* at 93.

Human Rights Watch in 2001.¹³¹ Most of Petitioners' allegations of poor implementation center on the alleged failure of consular officers to carry out their responsibilities to implement Department policies under the FAM.¹³² Additionally, Petitioners allege that "there is no internal accountability within the Department of State to ensure compliance with its policies."¹³³

However, Petitioners claims are out-of-date and do not reflect the significantly stricter system put in place in the years since the Petition was filed to prevent abuse of A-3 and G-5 visa holders. Article 34(c) of the Rules directs the Commission to declare a petition inadmissible when "supervening information or evidence presented to the Commission reveals that a matter is inadmissible or out of order." The Commission must dismiss the relevant claims in the Petition under Article 34(c) because supervening developments now reveal these claims to be moot and therefore inadmissible. Alternatively, should the Commission choose to examine these claims' merits despite their inadmissibility, the information below demonstrates no violation of the American Declaration.

Since Petitioners filed the Petition in 2007, the United States has expanded and strengthened the policy framework preventing domestic worker abuse, and has also instituted a pre-notification system whereby foreign missions must "pre-notify" the Department of State of any prospective domestic worker before the worker can be issued a visa. The notification must come from the mission with the understanding that the Chief of Mission has reviewed and authorized the proposed employment by a mission member of a domestic worker. This process ensures that mission leadership is aware of all domestic workers employed by mission personnel and can share in the oversight responsibility for the workers' fair treatment. Additionally, consular officers are required to reasonably conclude that the mission member will be able to provide the required wages and working conditions prior to issuing a visa to the prospective domestic worker. The United States also produced and distributes at visa interviews of prospective domestic workers a pamphlet that informs domestic workers of their rights and provides a hotline number for them to call if they are mistreated in the United States. Moreover, the United States has taken steps to improve implementation of all of its policies to prevent abuse.¹³⁴

¹³¹ *Id.* at 92.

¹³² *Id.* at 43–47, 92–94.

¹³³ *Id.* at 43.

¹³⁴ *See, e.g.*, U.S. Gov't Accountability Office, Human Rights: U.S. Government's Efforts to Address Alleged Abuse of Household Workers by Foreign Diplomats with Immunity Could Be Strengthened, GAO-08-892 (2008), available at <http://www.gao.gov/products/GAO-08-892> (last visited Sept. 10, 2015). *See also, e.g.*, ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE, HANDBOOK ON HOW TO PREVENT HUMAN

a. New contract provisions

Beginning in 2009, the Department of State added significant requirements to the mandatory employment contracts for A-3 and G-5 domestic workers and for the eligibility requirements for diplomats to be able to employ domestic workers.¹³⁵ The United States now requires that the mandatory employment contracts for A-3 and G-5 domestic workers be written in English and, if the domestic worker does not understand English, also in a language the domestic worker understands. Wage payments must now be made by either check or electronic fund transfer to a bank account in the domestic worker's name only and accessible only by the domestic worker (as of 2015, cash payments are not permissible after 30 days of employment), and no deductions may be taken from wages for lodging, meals, travel, medical insurance, or medical care.¹³⁶ The contracts must specifically describe the work to be performed, the hours of work, and the wage rate, which must be at least the greater of the minimum wage under U.S. federal, state, or local law for all working hours. The contract must state, *inter alia*, that any hours worked in excess of the normal number of hours are compensable time and that hours in which the employee is "on call" also count as work hours. The contract should also include a statement that the domestic worker's presence in the employer's residence will not be mandated except during working hours.

The contracts must clearly require that the domestic worker retain possession of his or her passport, and the State Department advised in the Circular Note announcing these changes that "withholding a person's passport may be evidence of the crime of trafficking in persons or constitute a separate crime of unlawful conduct with respect to immigration documents."¹³⁷ Moreover, mission members employing domestic workers now must provide the domestic worker with records of employment, including a copy of the signed contract, pay slips, and a record of daily and weekly hours worked, including any overtime, and a record of any deductions made from pay relating to Social Security/Medicare or other tax requirements, where applicable, and also maintain these records for the duration of

TRAFFICKING FOR DOMESTIC SERVITUDE IN DIPLOMATIC HOUSEHOLDS AND PROTECT PRIVATE DOMESTIC WORKERS 2014, at 70-71, available at <http://www.osce.org/handbook/domesticsservitude?download=true> (last visited Apr. 7, 2016).

¹³⁵ U.S. Dep't of State, Diplomatic Circular Note (Sept. 16, 2009) ("2009 Circular Note"), available at <http://www.state.gov/documents/organization/153566.pdf> (last visited Apr. 7, 2016) (Circular Note and Attachment).

¹³⁶ U.S. Dep't of State, Diplomatic Circular Note (June 18, 2015) ("2015 Circular Note"), available at <http://www.state.gov/s/cpr/248457.htm>, <http://www.state.gov/s/cpr/248459.htm> (last visited Apr. 7, 2016) (Circular Note and Attachment).

¹³⁷ 2015 Circular Note, *supra* note 136, at 2.

actual employment plus three years.¹³⁸ With regard to a diplomat's eligibility to employ domestic workers, the State Department now requires that, in order for domestic workers to obtain visas to work for diplomatic personnel in the United States, such personnel must either have the diplomatic rank of Minister or above, or be able to demonstrate their ability to pay the employee's salary reflected in the contract, which, as noted, must be at least the greater of federal or the applicable state or local minimum wage.¹³⁹ Finally, the Department of State has already implemented a policy Petitioners seek with regard to these employment contracts¹⁴⁰—the Department of State now keeps copies of contracts on file.

With these new requirements for A-3 and G-5 employment contracts, the United States has concrete means to verify whether diplomat employers are abiding by employment contracts and promote compliance. As discussed more fully in Section (III)(b)(i)(a), in the event of a dispute or complaint regarding wages, it is now State Department policy to request proof of payment of wages into a bank account. The Department of State explicitly advised in its 2009 Circular Note and on several occasions thereafter that it would ultimately look to Chiefs of Missions to ensure that the treatment accorded domestic workers by their employees comports with contractual and other legal requirements. To that end, the State Department has strongly encouraged Chiefs of Missions to implement internal mission policies to ensure adherence to this obligation, such as maintaining copies of signed domestic worker contracts, and having the ability to access mission members' payment records, so that in the event of a dispute, the mission will readily be able to provide such information.¹⁴¹

b. Pre-notification system

Second, the Department of State now requires diplomatic missions to inform the Department, in advance, of anticipated A-3 or G-5 visa applicants.¹⁴² Diplomatic missions and international organizations must now submit a "Pre-Notification" form for all proposed domestic workers. Consular officers worldwide must verify that the Department has received a pre-notification submission (i.e., that a specific mission employee intends to bring a domestic worker to the United States) before they will issue an A-3 or G-5 visa.

¹³⁸ 2015 Circular Attachment, *supra* note 136, at 4.

¹³⁹ 2009 Circular Note, *supra* note 135, at 3.

¹⁴⁰ See Petition at 93 (seeking that "[a] U.S. government agency keep[] on file a copy of the domestic worker's employment contract so that it can be accessed by agents of the U.S. government and the domestic worker through a Freedom of Information Act request.").

¹⁴¹ 2009 Circular Note *supra* note 135, a 6-7.

¹⁴² This policy was also announced in the 2009 Circular Note. See *id.* at 3.

The pre-notification system also provides the Department of State a means to hold processing of a request if the Department of State has reason that the employer may have a history of noncompliance with established domestic worker employment requirements or there have been credible allegations of noncompliance brought to the Department of State's attention. A 2009 Circular Diplomatic Note provided to foreign missions states, "If a mission member seeks to replace a domestic worker or add to his/her existing domestic workers, the A-3 or G-5 visa may be denied if the Department of State has credible evidence that the mission member failed to fulfill his or her obligations to a former or current employee, such as to abide by the contract terms generally, and specifically, to pay a fair wage."¹⁴³ The most recent Circular Note, sent in 2015, advised that consular officers will presume that a prospective domestic worker is not eligible for a visa if the foreign mission employer has had previous instances of noncompliance of contracts with A-3 or G-5 employees, has had a pattern of employee disappearance, or if the Department of State has received credible allegations of mistreatment or abuse by that employer. As discussed in Section III(b)(ii), since implementing this system the Department of State has used this pre-notification system to deny future domestic workers to certain diplomats.

c. Pamphlet on rights

Third, the Department of State collaborated with the Department of Labor and the NGO community to produce a pamphlet informing domestic workers of their rights and including a hotline number to call if they are mistreated in the United States.¹⁴⁴ In June 2009, the Department of State began distributing this pamphlet at all visa-issuing posts to applicants for A-3, G-5, and NATO-7 visas among others.¹⁴⁵ This pamphlet outlines the visa holder's legal rights under federal immigration, labor, and employment laws. This includes information on the illegality of slavery, peonage, trafficking in persons, sexual assault, extortion, blackmail, and worker exploitation in the United States. Particularly relevant for Petitioners' claim that domestic workers are not told they may be able to switch employers once in the United States, this pamphlet also informs domestic workers

¹⁴³ *Id.* at 3.

¹⁴⁴ The most recent version of this pamphlet, which was first published in 2009, is Know Your Rights: An Information Pamphlet Describing Your Rights While Working in the United States, Apr. 2016 ("Know Your Rights"), available at https://travel.state.gov/content/dam/visas/LegalRightsandProtections/Wilberfoce_Pamphlet_English_April2016.pdf (last visited Apr. 25, 2016).

¹⁴⁵ A NATO-7 visa is issued to the domestic employee accompanying someone who is coming to work for the North Atlantic Treaty Organization in the United States. See 9 Foreign Affairs Manual 402.3-2(E), available at <https://fam.state.gov/FAM/09FAM/09FAM040203.html> (last visited Apr. 7, 2016).

that they do not have to stay in their job if their employer is abusing them and that they may be able to switch employers. It states:

- The most important thing is for you to seek safety if you are being abused. You do not have to stay in your job if your employer is abusing you.
- Though your visa status will no longer be valid if you leave your employer, you may be able to change your visa status or employer. You may need to leave the United States to do so. Even if your visa status is not valid, help is available once you leave your abusive employer.
- You may make a formal complaint or file a lawsuit against your employer while you are working or after you leave your employer. If your employer takes action (or retaliates) against you for doing so, they are violating the law.¹⁴⁶

This pamphlet has been translated into several languages understood by the majority of foreign domestic workers.¹⁴⁷ At the time of the visa interview, consular officers must confirm the pamphlet has been received, read, and understood by the applicant.¹⁴⁸ The pamphlet was most recently updated and re-issued in April 2016 and includes input from survivors and civil society.

d. In-person registration program

Fourth, in October 2015, the Department of State began an annual in-person registration program for domestic workers employed by foreign mission personnel. While the initial phase of the program only pertains to A-3 visa holders employed by bilateral missions in the Washington, D.C. area, the program will be expanded at a later date to include domestic workers employed in locations throughout the United States and G-5 visa holders—i.e., workers whose employers are associated with international organizations. During the in-person registration, domestic workers are presented with registration cards, which must be renewed annually.

e. Steps taken to improve implementation

The United States has taken steps to strengthen policy implementation and coordination with the foreign mission community in its continued efforts to protect the welfare and rights of domestic workers employed by foreign missions on A-3

¹⁴⁶ Know Your Rights, *supra* note 144, at 5.

¹⁴⁷ The pamphlet is available in other languages at <http://travel.state.gov/content/visas/english/general/rights-protections-temporary-workers.html> (last visited Apr. 25, 2015).

¹⁴⁸ 9 Foreign Affairs Manual 402.3-9(B)(2)(c), *available at* https://fam.state.gov/fam/09FAM/09FAM040203.html#M402_3_9 (last visited Apr. 7, 2016).

and G-5 visas. To this end, the Department of State has significantly expanded the resources devoted to domestic worker issues. The additional resources are committed to policy implementation and to continue development of increased safeguards for domestic workers employed by foreign mission personnel.

Senior consular managers at post continue to have the responsibility to ensure compliance with visa adjudication procedures and practices in their consular sections, and U.S. consular officers abroad are required to interview domestic workers applying for visas and are trained to look for indicators of human trafficking. With respect to training, U.S. consular officers receive training on the fair labor standards described in the pamphlet required under section 202 of the 2008 TVPA and the Department is also working to advance human trafficking training to U.S. consular and law enforcement officials serving abroad. In an effort to detect abuses and violations of employment standards and to provide domestic workers with any new information relating to their employment, the Department requires that A-3 and G-5 visa holders undergo a visa interview when renewing their visas.

Moreover, the FAM now includes expanded guidance on terms and conditions of employment that are required for domestic workers of foreign diplomats, including what must be included in mandatory employment contracts.¹⁴⁹ The FAM gives consular officers a clear description of the circumstances establishing a reason to believe that the employer is not in a position to pay the appropriate minimum wage such that the officer should refuse an A-3 or G-5 visa to the employee. The State Department's Bureau of Consular Affairs updates the FAM as new visa procedures are put into place, but the entire FAM is also reviewed regularly to make sure that all sections are kept up to date. As updates are made, posts are reminded to review the new guidance through monthly consular cables.

The U.S. Congress has also taken an active role in strengthening the Department of State's implementation of policies to address allegations of domestic worker abuse. In contrast to Petitioners' claim that these policies are only in the FAM and not "codif[ied] in law or regulations,"¹⁵⁰ which they suggest undercuts their implementation, Congress codified key features of these policies in the Wilberforce Act.¹⁵¹ Section 203(b), "Protections and Remedies for A-3 and G-5

¹⁴⁹ See 9 Foreign Affairs Manual 402.3-9(b)(4)(b), *available at* <https://fam.state.gov/FAM/09FAM/09FAM040203.html> (last visited Apr. 7, 2016).

¹⁵⁰ Petition at 92-93.

¹⁵¹ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, 122 Stat. 5044 (2008).

Nonimmigrants Employed by Diplomats and Staff of International Organizations,” sets forth the basic elements of the FAM policies on A-3 and G-5 visa issuance:

- (1) **IN GENERAL.**—The Secretary [of the Department of State] may not issue or renew an A-3 visa or a G-5 visa unless—
 - (A) the visa applicant has executed a contract with the employer or prospective employer containing provisions described in paragraph (2); and
 - (B) a consular officer has conducted a personal interview with the applicant outside the presence of the employer or any recruitment agent in which the officer reviewed the terms of the contract and the provisions of the pamphlet required under section 202.
- (2) **MANDATORY CONTRACT.**—The contract between the employer and domestic worker required under paragraph (1) shall include—
 - (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.
- (3) **TRAINING OF CONSULAR OFFICERS.**—The Secretary shall provide appropriate training to consular officers on the fair labor standards described in the pamphlet required under section 202, trafficking in persons, and the provisions of this section.

As indicated in Section 203(b)(3), Section 202 of the Wilberforce Act also required the Department of State to create and ensure the distribution of the pamphlet on domestic worker rights described above.¹⁵²

¹⁵² Section 202(a)(1) reads: “The Secretary of State, in consultation with the Secretary of Homeland Security, the Attorney General, and the Secretary of Labor, shall develop an information pamphlet on legal rights and resources for aliens applying for employment- or education-based nonimmigrant visas.” *Id.* § 201(a)(1). Amendments to the Trafficking Victims Protection Act in 2013 provided further protections for domestic workers of diplomats, particularly in section 1204, which adds to existing criteria for the minimum standards for the elimination of trafficking by including criteria relating to preventing trafficking by nationals deployed in “diplomatic” missions alongside peacekeeping missions. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, § 1204.

- ii. *The United States has implemented procedures to respond to and remedy domestic worker abuse by foreign diplomats to the extent its international law obligations permit.*

Petitioners next argue that the United States “has also failed to investigate alleged violations and prosecute those found responsible.”¹⁵³ They allege that the Department of State does not regularly refer cases to law enforcement and that law enforcement rarely conducts criminal investigations.¹⁵⁴ Finally, Petitioners allege that the United States “has also failed to take any other reasonable steps to investigate and punish abuses using diplomatic channels that avoid the diplomatic privileges and immunity barriers.”¹⁵⁵

These allegations are inaccurate and meritless. The United States actively investigates allegations of diplomatic abuse to the extent its international law obligations permit. The Department of Justice regularly investigates diplomats accused of abusing their domestic workers, and the Department of State works cooperatively with the Department of Justice to facilitate these investigations. Other federal agencies, such as the Department of Homeland Security, are also actively involved in these cases. Law enforcement action may also take place at the state level.

Beyond cooperating with the Department of Justice in criminal investigations, the Department of State has created an internal working group to track and respond to all allegations of domestic worker abuse and an Anti-Trafficking Unit that has the lead in investigating allegations of domestic worker abuse by diplomats. The working group has created a standard procedure to respond to allegations, which includes asking the Chief of Mission to investigate the alleged abuse, asking the Mission to make alleged abusers available for interviews with U.S. law enforcement agents, and putting on “hold” approval of pre-notification requests for future A-3 and G-5 visas for domestic workers for the specific diplomat against whom allegations have been lodged while the exchange with the Mission is ongoing. Moreover, the U.S. Congress included a provision in the Wilberforce Act requiring that the Secretary of State suspend issuance of A-3 and G-5 visas if there is credible evidence that a diplomat abused a domestic worker, and that the Mission tolerated the abuse. This sanction has proven helpful in prompting Missions to respond to allegations of abuse.

¹⁵³ Petition at 94.

¹⁵⁴ *Id.* at 95–96.

¹⁵⁵ *Id.* at 96.

The Department of State has established a Trafficking in Persons Unit within the Bureau of Diplomatic Security's Criminal Investigations Division. This unit works closely with the Department of Justice's Human Trafficking Prosecutions Unit (HTPU) as well as other federal law enforcement agencies involved in human trafficking investigations. All reports of alleged abuse are brought to the attention of the relevant Chief of Mission, with the requirement that she or he investigate the matter and report promptly back to the Office of the Chief of Protocol. The investigating law enforcement agency may also request a voluntary interview with the employer against whom the allegations are made. The Department of State encourages law enforcement authorities to investigate allegations to the fullest extent possible. Where a prosecutor informs the Department of State that, absent immunity, she or he would prosecute, the Department of State will request a waiver of immunity to enable the prosecution. In the case of a serious offense, if the waiver is not granted, the Department of State will require the departure from the United States of the foreign mission member.

The Department of State has previously requested such waivers and departures. Petitioners' contention that the Department has only done so once is simply incorrect. As noted above, the State Department's regular practice is to request a waiver of immunity whenever a prosecutor indicates that she or he would prosecute but for immunity.

It is also noteworthy that a sending state that does not intend to grant a request for waiver of diplomatic immunity will typically withdraw its diplomat at the same time as communicating this refusal. In addition, as soon as the State Department learns of an allegation of abuse, approval of pre-notification of future domestic workers for the specific diplomat implicated is put on hold pending the Department's investigation of the allegations.

There are also the mechanisms available in the Wilberforce Act. Section 203(a)(2) of that Act provides:

- (2) **SUSPENSION REQUIREMENT.**—Notwithstanding any other provision of law, the Secretary shall suspend, for such period as the Secretary determines necessary, the issuance of A-3 visas or G-5 visas to applicants seeking to work for officials of a diplomatic mission or an international organization, if the Secretary determines that there is credible evidence that 1 or more employees of such mission or international organization have abused or exploited 1 or more nonimmigrants holding an A-3 visa or a G-5 visa, and that the diplomatic mission or international organization tolerated such

actions.¹⁵⁶

Thus, if the Secretary finds “there is credible evidence” of abuse in a single case, as well as credible evidence that a diplomatic mission or international organization tolerated the abuse, the Department of State is required to suspend A-3 and G-5 visas for the *entire* relevant Mission for such period as the Secretary deems necessary. Once a suspension is triggered, Section 203(a)(3) further stipulates that the Secretary may lift the suspension if he or she determines “that a mechanism is in place to ensure that such abuse or exploitation does not reoccur with respect to any alien employed by an employee of such mission or institution.” Thus, this diplomatic sanction may also help prevent future abuse of domestic workers. The Department of State advised Missions of Section 203 of the Wilberforce Act in the June 2009 Circular Note,¹⁵⁷ and it was repeated most recently in the 2015 Circular Note to all Chiefs of Mission.

In the cases of reported abuse that have come to the Department’s attention since enactment of the Wilberforce Act, the Department has referenced its obligations under the Wilberforce Act as part of its demarche to the relevant diplomatic missions, and has found that the possibility of A-3 or G-5 visa suspension has served as useful leverage to address allegations of abuse or exploitation, including by prompting offers of compensation.

In addition, as mentioned in Section II(a)(i), while, absent a waiver of immunity, the United States courts do not have jurisdiction over civil claims filed by domestic workers against diplomats currently assigned in the United States, the

¹⁵⁶ Further, in 2012 appropriations legislation, the U.S. Congress requested the Department of State to assist in obtaining payment of final court judgments awarded to A-3 and G-5 visa holders. Department of State, Foreign Operations and Related Appropriations Act, 2012, Div. I, Pub. L. 112-74, § 7034(j):

Protections and Remedies for Employees of Diplomatic Missions and International Organizations—
The Secretary of State shall implement section 203(a)(2) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (Public Law 110-457): Provided, That in determining whether to suspend the issuance of A-3 or G-5 visas to applicants seeking to work for officials of a diplomatic mission or international organization, the Secretary shall consider whether a final court judgment has been issued against a current or former employee of such mission or organization (and the time period for a final appeal has expired) or whether the Department of State has requested that immunity of individual diplomats or family members be waived to permit criminal prosecution: Provided further, That the Secretary should continue to assist in obtaining payment of final court judgments awarded to A-3 and G-5 visa holders, including encouraging the sending states to provide compensation directly to victims: Provided further, That the Secretary shall include, in a manner the Secretary deems appropriate, all trafficking cases involving A-3 or G-5 visa holders in the Trafficking in Persons annual report for which a final civil judgment has been issued (and the time period for final appeal has expired) or the Department of Justice has determined that the United States government would seek to indict the diplomat or a family member but for diplomatic immunity.

The current version of this provision is Department of State, Foreign Operations and Related Appropriations Act, 2014, Div. K, Pub. L. 113-235, § 7034(k).

¹⁵⁷ 2009 Circular Note *supra* note 135, at 7.

United States has interpreted its international legal obligations to permit courts to exercise jurisdiction over suits filed by domestic employed personnel such as those on A-3 and G-5 visas once their former employers are *former* diplomats. The U.S. Court of Appeals for the Second Circuit relied heavily on the United States' brief in its decision in *Swarna v. Al-Awadi* affirming the district court's decision.¹⁵⁸ Other suits against former diplomats and their spouses or consular personnel have been permitted to proceed and are discussed above.

Moreover, the United States has taken steps to facilitate such suits by domestic workers. Section 203(c)(1) of the Wilberforce Act allows A-3 or G-5 visa holders to remain in the country "for time sufficient to fully and effectively participate in all legal proceedings related to such action[,]" if they have filed a civil action against their former employer alleging abuse.

Finally, as of 2000 Congress amended U.S. immigration laws to provide a special status for trafficking victims. As a result, foreigners in the United States who are identified by the United States government as trafficking victims are eligible for T nonimmigrant status (T visa), which allows them to remain in the United States to assist law enforcement in the investigation or prosecution of acts of trafficking and to work. Such victims can apply for permanent residence after three years—and their immediate family members are eligible for derivative status. As a result of this, some former domestic workers of diplomatic personnel who were trafficking victims are today permanent residents.

* * *

For the above reasons, the Commission should find that supervening developments have rendered the relevant portions of the Petition moot and therefore inadmissible under Article 34(c) of the Rules. Alternatively, these developments show that the claims have lost any merit they may once have had.

¹⁵⁸ 622 F.3d 123 (2d Cir. 2010). The United States filed a lengthy amicus brief in *Swarna*, arguing that (1) residual diplomatic immunity is limited to immunity for official acts; (2) that this position is consistent with the purposes of the VCDR, customary international law, and longstanding U.S. interpretation of the VCDR; and (3) that the defendants in the case were not entitled to residual immunity because employment of domestic workers was a personal, not official act. See *Swarna v. Al-Awadi*, No. 09-2525, Brief for the United States of America as *Amicus Curiae* in Support of Affirmance, June 2, 2010.

c. The United States is not responsible for the misconduct of foreign government personnel.

Petitioners allege that the private conduct of foreign diplomats should be imputed to the United States government because somehow the United States failed to exercise due diligence to protect domestic workers employed by foreign government officials from exploitation. There are two major flaws to the Petitioners' argument that render these claims in the Petition inadmissible under Article 34(a) of the Rules because the facts stated in the Petition do not tend to establish a violation of the rights in the American Declaration. First, human rights violations under international human rights law entail state action, and the American Declaration contains no duty of "due diligence" that could trigger the United States' liability here. Second, even if the Commission were to entertain the notion of a due diligence principle as applying in this matter, the substantive content of due diligence is unclear, is not clarified by the case law cited by Petitioners, and in any event has been satisfied by the conduct of the United States in this matter. Should the Commission nevertheless reach the merits of this matter, it should find that these flaws also render the relevant claims meritless.

i. There is not a due diligence duty in the American Declaration pertinent to this matter.

As the United States recently argued before the Commission in *Lucero v. United States*,¹⁵⁹ with few exceptions not relevant here, a human rights violation under international human rights law entails state action. The American Declaration contains no language indicating that Declaration commitments extend generally to private, non-governmental acts, and no such commitment can be inferred. The United States thus may not be found to have failed to honor a commitment under the American Declaration for the conduct of private individuals acting with no complicity or involvement of the government.

Moreover, Petitioners do not, and cannot, cite to any provision of the American Declaration that imposes on States an affirmative duty—for instance, to exercise "due diligence"—to prevent the commission of crimes or civil wrongs by private parties such as foreign diplomats in their treatment of their domestic employees, even where these might undermine an individual's enjoyment of rights in the Declaration. The States that drafted and adopted the Declaration had no intention to create a commitment that would be so open-ended and impossible to implement. Then as now, despite the best efforts of hard-working law enforcement officials, private individuals commit hundreds of thousands of crimes every year in

¹⁵⁹ Petition No. P-1506-08, Response of the United States of America, Sept. 14, 2015, at 15–20.

this Hemisphere. Moreover, as noted below, Petitioners cite past cases of the Inter-American Court and of the Commission, but none of these constitute the imposition of a broad affirmative obligation upon the United States to prevent private crimes and civil wrongs.

Specifically, individual Petitioners assert that their employers violated the rights recognized in Article I (right to life, liberty, and personal security), Article II (right to equality before law), Article VII (right to protection for mothers and children), Article IX (right to inviolability of the home), Article X (right to inviolability and transmission of correspondence), Article XI (right to preservation of health and well-being), Article XII (right to education), Article XIV (right to work and fair remuneration), Article XV (right to leisure time and the use thereof), and Article XVIII (right to a fair trial) of the American Declaration, and that these violations are imputable to the United States. However, none of these provisions imposes an affirmative duty upon States to prevent acts by private parties that might undermine an individual's enjoyment of these rights. For example, although Article VII speaks of "special protection for mothers and children" it does not define this term, nor address the circumstances in which the State is expected to respect this right. Notably, with respect to the complex issues involved in this matter, none of these rights addresses the rules governing the conduct of police officers who may be aware that domestic workers have been legally admitted to this country, but who are unaware of the exploitation they are suffering within a diplomat's home.

In arguing that the United States has an "affirmative obligation ... to prevent private acts of violence," Petitioners rely on incorrect and unduly expansive interpretations of the rights and duties set forth in the American Declaration.¹⁶⁰ To the extent that Petitioners are arguing international human rights law and the non-binding views of international bodies are embodied in the American Declaration and are, in turn, binding upon the United States, the United States disagrees. More specifically, the United States disagrees with the view, put forward by Petitioners, that the substantive obligations of human rights treaties can be imported into the American Declaration. And as a legal matter, the United States is also not bound by other obligations contained in human rights treaties to which it has not joined. Nor should any norm of customary international law be applied by the Commission independent of the American Declaration which, as explained above, is itself nonbinding.¹⁶¹ As the United States pointed out over 30 years ago:

¹⁶⁰ See Petition at 84.

¹⁶¹ See *supra* note 6 and accompanying text.

As the Commission noted when it concluded that it was not competent to investigate acts imputed to terrorist groups, “the Commission on its own is not competent to establish its statutory norms in accordance with the changing preferences of its members. Its basic structure, including, of course, its functions and powers, are determined by the norms which the member states of the OAS have agreed to establish.”¹⁶²

The Declaration contains no language that addresses the implementation of the rights enumerated therein. By contrast, the American Convention—which imposes legal obligations on those States that, unlike the United States, have chosen to ratify or accede to it—includes a provision that describes the nature of obligations of States Parties regarding implementation of the rights enumerated under the Convention. Specifically, in Article 1(1), the American Convention describes an obligation to *respect* the rights protected by that Convention and to *ensure* their enjoyment without discrimination. Although the United States is not a party to the American Convention, it has ratified the International Covenant on Civil and Political Rights (ICCPR), which in Article 2(1) contains a similar language regarding a State Party’s obligation “to respect and to ensure” the protected rights.¹⁶³

The Convention’s “ensure” provision in Article 1(1) has no equivalent in the American Declaration or, for that matter, in the OAS Charter. Yet, Article 1(1) is central to the cases that the Petitioners urge the Commission to rely upon in the present case. Specifically, Petitioners extensively rely upon *Velásquez Rodríguez* of the Inter-American Court. The United States recognizes that, in *Velásquez Rodríguez*, the Court, in applying the American Convention, took the view that the Convention obligates States Parties to “prevent, investigate and punish any violation of the rights recognized by the Convention.”¹⁶⁴ In other words, a State Party purportedly has a due diligence obligation to prevent and respond to human rights abuses by private actors that would otherwise not be imputable to the State

¹⁶² Disabled Peoples’ International & International Disability Law, Inc., v. United States (“Grenada Hospital case”), Case No. 9.213, Letter to Dr. Edmundo Vargas Carreno, Executive Secretary, Inter-American Commission on Human Rights, from Amb. Richard T. McCormack, Permanent Representative, U.S. Mission to the OAS, Aug. 26, 1985, at 2 (quoting Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Argentina, OEA/Ser. L/V/II.49 doc. 19 corr. 1, Apr. 11, 1980, p. 25).

¹⁶³ In addressing similar assertions about the ICCPR, the United States has expressed to UN Human Rights Committee that Article 2(1) does not impose a categorical obligation to prevent criminal conduct by private or non-State actors. *See, e.g.*, Observations by the United States of America on Human Rights Committee General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Dec. 27, 2007, available at <http://2001-2009.state.gov/s/l/2007/112674.htm> (last visited Apr. 25, 2016).

¹⁶⁴ *Velásquez Rodríguez* Case, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser.C) No. 4 (1988) (“*Velásquez Rodríguez* Judgment”), ¶166.

Party.¹⁶⁵ What Petitioners do not discuss, however, is that the Court’s expansive interpretation of the American Convention with respect to acts by private actors does not flow from the specific rights articulated therein, some of which may be similar to those in the American Declaration. Rather, as noted above, the obligation to “prevent, investigate and punish” flows from Article 1(1) of the American Convention, with its “ensure” language. For this reason, holding the United States to the *Velásquez Rodríguez* standard would be tantamount to treating the United States as if it were a party to the American Convention, which would be contrary to the Rules, which only allow the American Declaration to be applied with respect to the United States.¹⁶⁶

The absence of language in the American Declaration imposing a duty or a commitment on the part of the State to prevent crimes or civil wrongs by private parties or non-State actors is all the more notable when contrasted with other international instruments which specifically do impose obligations upon States Parties to prevent, in certain circumstances, particular types of misconduct by private parties or non-State actors. For instance, both the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) contain provisions that impose obligations upon State Parties, in the specific context of preventing discrimination, respectively, “by any persons, group or organization”¹⁶⁷ and “by any person, organization or enterprise.”¹⁶⁸ Importantly, even under the CEDAW and CERD, where a State obligation is spelled out regarding prevention of discrimination by non-state actors or private parties, the obligation is not as categorical and far-reaching as that propounded by Petitioners. State Parties are bound only to take “all appropriate measures” in this regard.

¹⁶⁵ *Id.* ¶¶ 172–77.

¹⁶⁶ *See supra* note 8.

¹⁶⁷ Convention on the Elimination of All Forms of Racial Discrimination art. 2(1)(d), *entered into force* Jan. 4, 1969, 660 U.N.T.S. 195 (U.S. ratification Nov. 20, 1994) (providing that States Parties undertake to “prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.”). Additionally, it should be noted that the United States has taken a reservation to the CERD precisely because of the broad reach of the aforementioned provision and the possibility that it could require the United States to prohibit purely private conduct permitted under the laws of the United States. *See* Initial Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination 55 (2000), *available at*: http://www.state.gov/www/global/human_rights/cerd_report/cerd_report.pdf (last visited Apr. 25, 2016).

¹⁶⁸ Convention on the Elimination of All Form of Discrimination Against Women art. 2(e), *entered into force* Sept. 3, 1981, 1249 U.N.T.S. 13 (providing that States Parties undertake “[t]o take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.”). The United States is not a party to CEDAW.

Within the Western Hemisphere, some States have chosen to assume an affirmative obligation in their efforts to prevent, punish and eradicate violence against women by ratifying the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará). That Convention requires States Parties to take a number of affirmative steps to prevent, punish and eradicate violence against women, including an obligation to “undertake to ... apply due diligence to prevent, investigate and impose penalties for violence against women.”¹⁶⁹ Although the United States is committed to the important policy goal of eliminating violence against women, it has not ratified the Convention of Belém do Pará, and thus has assumed no legal obligations thereunder. Furthermore, that the CERD, CEDAW, Convention of Belém do Pará, and other conventions include provisions creating state obligations relating to private actors reveals that drafters of international treaties know how to craft such provisions and include them where they deem them appropriate, and that States are free to decide whether or not to undertake international obligations on these subjects.

ii. The content of due diligence and related standards is substantively unclear.

As an initial matter, the content of “due diligence” is not clear and, likewise, it is not clear what standard the Petitioners seek to have the Commission apply. According to the Petition, a State incurs liability under international human rights law where it fails to act with due diligence to create an appropriate legal framework to “prevent *any threat* to individual rights [and] to take all necessary measures to prevent and punish serious deprivations of rights as a consequence of the criminal acts of other individuals.”¹⁷⁰ This characterization of due diligence illustrates its impracticality, because it provides no guidance to the State with respect to its putative duties to prevent private violence other than to be “effective,” which is the objective of all crime prevention measures. Further, under this standard, it would seem that, if State crime prevention efforts fail to be effective even just once, the State would be liable for a due diligence failure. The standard the Petitioners embrace would be an impossible one for law enforcement to meet.

Petitioners also argue that because of the gender aspects of the case, it must be evaluated in light of a purported heightened obligation to ensure that rights are

¹⁶⁹ Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, art. 7(b), June 9, 1994, 27 U.S.T. 3301, 1438 U.N.T. S. 63.

¹⁷⁰ Petition at 87 (emphasis added).

not violated by private actors.¹⁷¹ The substance of this heightened obligation is unclear. Nevertheless, Petitioners state that “the United States has failed to take meaningful steps to prevent the human rights abuses of domestic workers employed by diplomats in violation of its due diligence obligations.”¹⁷² Again, this formulation is lacking in any substantive content and is conclusory.

The due diligence concept has found expression in the specific context of violence against women, and indeed the Commission itself applied it in a domestic violence case brought against the United States. In *Lenahan v. United States* in 2011, the Commission recognized a due diligence duty with respect to Articles I, II, and VII of the Declaration “in cases of violence against women and girl-children taking place in the domestic context.”¹⁷³ It found the United States responsible under those articles for a purported failure to protect the Petitioner’s daughters from being murdered by their father.¹⁷⁴ The United States has repeatedly acknowledged that these murders were unmistakable tragedies that should never have occurred. Yet as the Commission is aware, the United States has consistently expressed its strong disagreement with the due diligence line of legal reasoning put forward by the Commission, and we continue to respectfully disagree with the Commission’s conclusions and recommendations in *Lenahan*,¹⁷⁵ even as we have made substantial efforts to implement the recommendations that are appropriate and feasible.¹⁷⁶

Moreover, noted experts in the field acknowledge that the meaning of due diligence in the context of domestic violence is subject to debate. In her 2006 Report to the UN Commission on Human Rights, which focused on due diligence, then-UN Special Rapporteur on Violence Against Women Yakin Erturk wrote that “there remains a lack of clarity concerning its scope and content.”¹⁷⁷ Indeed, in the context of violence against women, “due diligence” has often been expressed less as a legal standard to be applied to the facts of a specific case and more as a

¹⁷¹ *Id.* at 84.

¹⁷² *Id.* at 91.

¹⁷³ *Lenahan (Gonzales) v. United States*, Case No. 12.626, Response of the Government of the United States to the July 21, 2011 Report No. 80/11, Nov. 1, 2012 (“*Lenahan* Merits Report”), ¶ 130. *See also id.* ¶¶ 115–35, 160–70 (explaining the Commission’s reasoning and applying it to the facts of that case).

¹⁷⁴ *Id.* ¶ 199.

¹⁷⁵ *See, e.g., Lenahan v. United States*, Case No. 12.626, Response of the Government of the United States to the July 21, 2011 Report No. 80/11, Nov. 1, 2012 (“*Lenahan* U.S. Nov. 2012 Response”); *Lenahan* Merits Report, *supra* note 173, ¶¶ 55–58 (describing U.S. arguments on due diligence); [Lenahan] *Gonzales v. United States*, Petition No. 1490-05, Response of the Government of the United States of America, Sept. 18, 2006, at 25–39.

¹⁷⁶ *See, e.g., Lenahan* U.S. Nov. 2012 Response, *supra* note 175.

¹⁷⁷ Yakin Erturk, Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women—The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, E/CN.4/2006/61, Jan. 20, 2006, ¶ 14.

broader principle, under which States are urged—but not legally required—to “prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.”¹⁷⁸ Professor and former Commissioner Dinah Shelton has analyzed due diligence outside of the specific context of violence against women.¹⁷⁹ Her analysis of cases decided by international tribunals suggests a rather high threshold for application of such a concept:

Liability for lack of due diligence results from more than mere negligence on the part of state officials and, of course, from willful conduct. Due diligence consists of the reasonable measures of prevention that a well-administered government could be expected to exercise under similar circumstances It is not lightly assumed that a state is responsible [for acts of private violence].¹⁸⁰

Any attempt to interpret the scope of due diligence must take into account that such interpretation must be capable of being applied across the Hemisphere and could prove influential elsewhere in the world, regardless of the cultural, ideological, or other circumstances or level of economic development. Accordingly, the interpretation and application of the concept must account for the multi-faceted nature of the problem of exploitation of workers more broadly, not merely gender-based exploitation.

For these reasons, the Commission should dismiss the Petition as inadmissible under Article 34(a) of the Rules for failure to state facts that tend to establish a violation of the American Declaration. Nevertheless, should the Commission decide to enter this complex domain of due diligence, the evidentiary record in this matter demonstrates unequivocally that the United States has satisfied even the broadest interpretation of due diligence, as discussed more fully below in the context of the case law that has invoked the concept or one of its variants. Further, as detailed in Section III(b), the United States has taken significant steps to prevent the abuse of domestic workers and to investigate allegations of abuse.

¹⁷⁸ Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, art. 4(c), Dec. 20, 1993.

¹⁷⁹ See Dinah L. Shelton, *Private Violence, Public Wrongs, and the Responsibility of States*, 13 *FORDHAM INT'L L.J.* 1, 22–23 (1990).

¹⁸⁰ *Id.*

iii. *Relevant case law does not support Petitioners' view that the United States breached a duty in the present case.*

Proceedings before the Inter-American Court involving acts committed by paramilitary or related personnel and to which the State contributed are wholly distinguishable from the facts of this matter. Below we discuss in turn those relied upon by Petitioners. We reiterate at the outset that the United States has not accepted the jurisdiction of the Inter-American Court, nor is it a State Party to the American Convention. Accordingly, the jurisprudence of the Inter-American Court interpreting the American Convention does not govern U.S. commitments under the American Declaration.

a. Velásquez Rodríguez v. Honduras

One articulation of due diligence is found in the Inter-American Court's *Velásquez Rodríguez* case, on which Petitioners rely heavily and which they cite repeatedly for the proposition that a State has a duty to protect against private violence.¹⁸¹ As discussed above, this case is not applicable here because the Court held that a State's obligation to "prevent, investigate, and punish any violation"—including those by private actors—is derived from Article 1 of the American Convention, which has no parallel in the American Declaration. Nevertheless, were the Commission to draw from this case, its facts are readily distinguishable from those in the present matter.

In *Velásquez Rodríguez*, the Court found that there was a systematic "practice of disappearances carried out or tolerated by [government] officials," that "Manfredo Velásquez disappeared at the hands of or with the acquiescence of those officials within the framework of that practice," and that the government "failed to guarantee the human rights affected by that practice."¹⁸² In light of those egregious facts, the Court held that in certain circumstances, "[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of *the lack of due diligence* to prevent the violation or to respond to it as required by the Convention."¹⁸³

The Inter-American Court did not state that such international responsibility arose any time the State had failed to prevent a crime committed by a private party. Rather, the Court emphasized, "[w]hat is decisive is whether a violation of the

¹⁸¹ See e.g., Petition at 85.

¹⁸² *Velásquez Rodríguez* Judgment, *supra* note 164, ¶ 148.

¹⁸³ *Id.* ¶ 172 (emphasis added).

rights recognized by the Convention has occurred with the support or acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible.”¹⁸⁴ The Court then articulated a standard of reasonableness to govern a State’s obligation to prevent human rights abuses and to investigate such abuses, prosecute the perpetrators and provide compensation to the victims.¹⁸⁵

In applying this interpretation to the egregious facts of that case, the Court found Honduras responsible under the American Convention for the involuntary disappearance of Mr. Velásquez because the “evidence show[ed] a complete inability of the procedures of the State of Honduras, which were theoretically adequate, to carry out an investigation into the disappearance of Manfredo Velásquez, and of the fulfillment of its duties to pay compensation and punish those responsible.”¹⁸⁶ The Court then noted the failure of the judicial system to act upon any of the writs of *habeas corpus*, and the failure of the Executive Branch to carry out a serious investigation to establish the fate of Mr. Velásquez.¹⁸⁷ The Court noted that the “duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared.”¹⁸⁸ The Court found that the disappearance of Mr. Velásquez was carried out by “agents who acted under cover of public authority” but that even if that had not been proven, “the failure of the State apparatus to act, which is clearly proven,” amounted to a violation by Honduras under the American Convention.¹⁸⁹

The wrongs alleged in the Petition, while appalling, are dissimilar in fundamental respects from those in *Velásquez Rodríguez*. Notably, unlike the widespread and systematic abuses carried out or tolerated by government officials or their agents in *Velásquez Rodríguez*, the wrongs in the Petition were committed by private individuals, acting completely at their own initiative and not under “cover of public authority.” Furthermore, there is no evidence to indicate that U.S. authorities at any level of government supported or acquiesced in abusive conditions imposed by the foreign diplomats, or that the public authorities even had knowledge that the diplomats posed a threat to the staff they sponsored.

Moreover, unlike in *Velásquez Rodríguez*, there is nothing to suggest that the United States allowed the exploitation to take place by failing to take measures to

¹⁸⁴ *Id.* ¶ 173.

¹⁸⁵ *Id.* ¶ 174.

¹⁸⁶ *Id.* ¶ 178.

¹⁸⁷ *Id.* ¶ 179–80.

¹⁸⁸ *Id.* ¶ 181.

¹⁸⁹ *Id.* ¶ 182.

protect these domestic workers. As described in detail in Section III(b), the United States has gone to great lengths to monitor the situation of domestic workers brought into this country. Employers are required to give their workers a signed contract in a language they can understand, guaranteeing their rights to a livable wage and certain benefits. Each employer is required to pay wages directly into a bank account or by check, and withholding money for lodging is not permitted. Each domestic worker speaks with a representative of the Department of State who informs him or her of his or her rights, and gives the worker resources to obtain help should he or she become a victim of their employer. For the reasons discussed above, the Inter-American Court's decision in *Velásquez Rodríguez* does not support a finding that the United States has failed to live up to any commitment in the American Declaration in the present matter.

b. Ximenes Lopes v. Brazil

Petitioners also invoke the 2006 decision of the Inter-American Court in *Ximenes Lopes v. Brazil*, but that case, too, is inapposite.¹⁹⁰ There, a petitioner brought a claim on behalf of her mentally-ill brother, who died under the care of a private hospital engaged by Brazil to provide psychiatric care as a public health care unit.¹⁹¹ The Court found that there was an atmosphere of violence and brutality at the facility,¹⁹² and that Mr. Ximenes Lopes died in violent circumstances.¹⁹³ In that case, Brazil took partial responsibility for the violations because the facility was acting on behalf of the State, providing health care to vulnerable persons.¹⁹⁴

Petitioners erroneously rely on expansive language in *Ximenes Lopes* to invoke broad duties of States to protect individuals from violations committed by non-State actors.¹⁹⁵ This language, however, rests explicitly on the supposed affirmative obligations imposed on States Parties to the American Convention, which as noted does not govern U.S. commitments under the Declaration. Furthermore, the case is factually distinguishable from the present matter because the “private actors” were, for all intents and purposes, the agents of the State. They were working under contract with the State to provide public health services. In the present matter, the foreign diplomats can in no way be considered agents of the

¹⁹⁰ *Ximenes Lopes v. Brazil*, Judgment of July 4, 2006, Inter-Am. Ct. H.R. (Ser. C) No. 149 (2006) (“*Ximenes Lopes* Judgment”).

¹⁹¹ *Id.* ¶¶ 5, 112(55).

¹⁹² *Id.* ¶ 112(56).

¹⁹³ *Id.* ¶ 121.

¹⁹⁴ *Id.* ¶ 122.

¹⁹⁵ See Petition at 87 (quoting *Ximenes Lopes* Judgment, *supra* note 190, ¶ 85, for the proposition that a State has an affirmative obligation to project their efforts to guarantee human rights beyond state actors).

United States. Additionally, Brazil had complete access to monitor and inspect the health facilities involved in *Ximenes-Lopes*, while the United States has no standing authority to enter diplomats' homes to inspect the situation of their domestic workers.

Petitioners' reliance on this case is therefore misplaced. To apply *Ximenes Lopes*' statement of liability for third-party actors in the matter at hand would be to treat the United States as if it were a State Party to the American Convention and subject to the jurisdiction of the Inter-American Court. Such a result would seriously undermine the process of international lawmaking, by which sovereign States voluntarily undertake specified legal principles.

c. Pueblo Bello Massacre v. Colombia

Petitioners likewise seek to rely on the Court's 2006 decision in *Pueblo Bello Massacre v. Colombia* for the proposition that the State may be held responsible for purely private acts.¹⁹⁶ Like *Ximenes Lopes*, this case was brought to enforce the States Parties' obligations under the American Convention, which are not relevant to this matter. Furthermore, the facts of *Pueblo Bello Massacre* are readily distinguishable from those in this matter.

Pueblo Bello Massacre involved the torture, disappearance, and extrajudicial executions of more than 43 peasants in Pueblo Bello, Colombia in 1990. Colombia argued that the "massacre," which was perpetrated by an illegal paramilitary group, was not attributable to the State because "[t]he State's ability to react was limited by a critical situation of public order that made it impossible to cover all its territory," and that the response from law enforcement was "in keeping with the State's reaction capability."¹⁹⁷ The State argued that "the treaty-based obligations cannot be an unacceptable burden for States; the State *cannot* be the guarantor of everything everywhere."¹⁹⁸

The Inter-American Court acknowledged that Colombia had taken legislative and other measures to prevent and punish the activities of paramilitary groups in the region in question. Nevertheless, the Court found it responsible for the private acts of extreme violence.¹⁹⁹ The Court stated that the measures taken by the State "did not translate into the specific and effective deactivation of the danger that *the State itself had contributed to creating*."²⁰⁰ Although Colombia had

¹⁹⁶ Pueblo Bello Massacre v. Colombia, Judgment of Jan. 31, 2006, Inter-Am. Ct. H.R. (Ser. C) No. 140 (2006).

¹⁹⁷ *Id.* ¶ 120 (internal quotation marks omitted).

¹⁹⁸ *Id.* ¶ 121 (emphasis in original; internal quotation marks omitted).

¹⁹⁹ *See id.* ¶¶ 125–26.

²⁰⁰ *Id.* ¶ 126 (emphasis added).

subsequently declared the relevant paramilitary groups to be illegal, it had previously

encouraged the creation of self-defense groups with specific objectives; however [they] exceeded these objectives and began to act illegally. Thus, by having encouraged the creation of these groups, the State objectively created a dangerous situation for its inhabitants and failed to adopt all the necessary or sufficient measures to avoid these groups continuing to commit acts such as those of the instant case.²⁰¹

As the Commission itself had argued to the Court, in support of the victims in *Pueblo Bello Massacre*, this case involved complicity of the State in the perpetration of abuses by non-State actors.²⁰²

The role played by Colombia in *Pueblo Bello Massacre* bears no resemblance to the role played by the United States in the present matter. Rather, Petitioners allege acquiescence—and from that, responsibility under the Declaration—because the United States is honoring its international legal obligations to provide diplomatic immunity to foreign diplomats. As discussed in detail elsewhere in this brief, the United States has put extensive, rigorous mechanisms in place and dedicated substantial resources to preventing this type of exploitation. Similarly, in no way did the United States create the danger that resulted in this exploitation. Issuing visas for private domestic workers employed by foreign mission personnel upon proof of a written contract is standard practice for many immigration units. The Department of State actively communicates the obligation of foreign mission personnel to treat domestic workers in accordance with U.S. laws. The United States has worked diligently to improve the situation of domestic workers sponsored by foreign diplomats during their time in the United States.

d. Mapiripán Massacre v. Colombia

Petitioners also rely on the 2005 case before the Inter-American Court concerning the Mapiripán Massacre in Colombia.²⁰³ The case is factually similar to the *Pueblo Bello Massacre* case, which also took place during the civil unrest in Colombia. The considerable State involvement in the human rights violations in this massacre, however, sets it apart from the allegations in the Petition here. Furthermore, the *Mapiripán Massacre* case, like the cases discussed above, rests on the application of the American Convention and a string of Inter-American

²⁰¹ *Id.*

²⁰² *Id.* ¶ 96(c).

²⁰³ *Mapiripán Massacre v. Colombia*, Judgment of Sept. 15, 2005, Inter-Am. Ct. H.R. (Ser. C) No. 134 (2005).

Court cases that are not binding on the United States or relevant to its commitments under the American Declaration.

Much like the *Pueblo Bello Massacre* case, the tragedy in Mapiripán was carried out by paramilitary forces whose actions were, according to the Court, encouraged by Colombia. In Mapiripán, paramilitary forces massacred 49 individuals between July 15 and July 21, 1997.²⁰⁴ The forces tortured and dismembered the bodies, making it extremely difficult to identify all of the victims.²⁰⁵ Although the paramilitary forces were non-State actors, the Court found considerable State complicity in the violence. While Colombia took several steps to criminalize this type of activity, its material support for the paramilitary group's conduct elided Colombia's claim that its only violation was a failure to control the area. The Court found that the massacre had been meticulously planned over the course of several months.²⁰⁶ The Colombian Army permitted the paramilitary troops to arrive at the airport, without official record of their trip, and board transit vehicles wearing uniforms that are normally reserved for the Army and carrying weapons ordinarily restricted to State use.²⁰⁷ The Court found that the Army not only facilitated the logistics of the incursion in Mapiripán, but provided munitions and communications to assist the endeavor.²⁰⁸

The Court found that Colombia also failed to take steps to protect Mapiripán or to investigate allegations of the massacre.²⁰⁹ According to the Court, the Attorney General's office concluded that the military was mobilized in an unjustified manner that made it impossible to protect Mapiripán. When the municipal judge of Mapiripán sent urgent messages about the situation to the Deputy Attorney for Human Rights and the High Court of the Court Circuit of Meta, both "refrained from conducting investigations."²¹⁰ Eventually, Colombia took partial responsibility and conducted criminal trials that led to the convictions of several of the perpetrators and collaborators.²¹¹ But the Inter-American Court held Colombia liable for the egregious human rights violations in Mapiripán because of what the Court found to be considerable state involvement in the events.²¹²

²⁰⁴ *Id.* ¶ 96.39.

²⁰⁵ *Id.* ¶ 96.41.

²⁰⁶ *Id.* ¶ 96.43.

²⁰⁷ *Id.* ¶¶ 96.31–96.34.

²⁰⁸ *Id.* ¶ 96.35.

²⁰⁹ *Id.* ¶ 96.38.

²¹⁰ *Id.* ¶ 96.36.

²¹¹ *Id.* ¶ 96.126.

²¹² *Id.* ¶¶ 120–23.

Unlike the human rights violations that occurred in Mapiripán, the United States was in no way a collaborator in the alleged exploitation of the Petitioners. The United States did not encourage—and indeed *discouraged*—the exploitation of workers brought to the United States on A-3 and G-5 visas. Furthermore, the only assistance given to these allegedly abusive diplomats is the U.S. policy of permitting these visas at all. There is no basis to conclude that the United States knew that any of the Petitioners were suffering mistreatment at the hands of their employers. The police were notified about only one of the Petitioners' cases—by a third party—and promptly interceded to help Petitioner Otilia Luz Huayta to obtain her freedom from her employers.²¹³

While it is true that diplomatic immunity erects some bars to recovery from the employers via civil suit in the United States during their diplomatic tour, the United States has been far from indifferent to the plight of these domestic workers. In fact, the opposite is true. By increasing preventative measures, the United States has demonstrated its firm commitment to protecting domestic workers from exploitation. This conduct is wholly distinguishable from the relevant conduct in relation to the Mapiripán massacre. Even if this case were somehow relevant to this matter, the United States should not be considered liable for the private actions of the foreign diplomats in question.

e. Advisory Opinion OC-18/3

Finally, Petitioners rely on an advisory opinion of the Inter-American Court on the rights of undocumented migrant workers. The opinion recognizes a positive obligation of States to protect human rights against private violation of them.²¹⁴ But the authority upon which the Court rests this right is the American Convention, the precedent of the Court itself, and the jurisprudence of the ECHR,²¹⁵ none of which are binding authority with respect to the United States, none of which impose legal obligations on the United States, and none of which are relevant to U.S. commitments under the American Declaration. Thus, the Petitioners' reliance on this broad statement of State liability for the actions of non-State actors cannot justify the relief they seek, nor can it justify ruling against the United States because of a failure to exercise due diligence to prevent, protect, or remedy the alleged abuses here. The United States took all reasonable steps that it could to protect Petitioners and other domestic workers employed by foreign diplomats in the United States.

²¹³ See Petition, Declaration of Otilia Luz Huayta, ¶ 34.

²¹⁴ Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Sept. 17, 2003, ¶ 140.

²¹⁵ See *id.* ¶¶ 141–43.

* * *

As the arguments in this subsection demonstrate, the United States cannot be held liable under the American Declaration for the conduct of private actors. More specifically, the relevant claims in the Petition do not state facts that tend to establish a violation of the American Declaration because the Declaration does not impose upon the United States a duty to prevent private violence, especially not under the circumstances alleged in the Petition, and as such these claims are inadmissible. If the Commission chooses to nevertheless apply a due diligence standard to U.S. conduct, it must find that standard satisfied. The United States in no way encouraged the abuses at issue in this matter. Indeed, the United States took numerous steps to regulate the visa process for these staff in order to protect them. Although what happened to Petitioners in this matter is extremely regrettable, the United States' conduct has at all times been manifestly reasonable.

d. The exclusion of domestic workers from some U.S. labor laws does not rise to a violation of Petitioners' right to equality.

i. The restrictions in U.S. labor laws that exclude domestic workers are objective and reasonable.

Petitioners contend that U.S. labor laws are discriminatory because they include "an[] exclusion, restriction or privilege that is not objective and reasonable, which adversely affects human rights."²¹⁶ In deriving this standard, Petitioners rely on a decision of the Inter-American Court, which as discussed above has no jurisdiction with respect to the United States and whose decisions are not relevant to U.S. commitments under the American Declaration. Even if this jurisprudence were somehow applicable here, however, Petitioners have failed to present evidence suggesting that U.S. labor laws are not objective and reasonable or that they exclude domestic workers or any other category of workers on the basis of their sex, race, nationality, migrant status or other protected status. First, Petitioners mischaracterize the Fair Labor Standards Act (FLSA), which does provide significant wage protections to domestic workers. Second, the express exclusion of domestic workers from the National Labor Relations Act (NLRA) and the lack of coverage of domestic workers by the Occupational Safety and Health Act (OSHA)²¹⁷ are objective and reasonable responses to the extraordinary administrative and personal costs that would be imposed if those acts protected

²¹⁶ Petition at 74–75.

²¹⁷ Even if OSHA were applicable to domestic workers, Petitioners have not alleged any fact that, if true, would state a cognizable claim under OSHA.

domestic workers. For these reasons and as elaborated in the subsections that follow, these claims in the Petition are inadmissible under Article 34(a) of the Rules because they do not tend to establish a violation of the rights in the American Declaration. Should the Commission nevertheless reach the merits of this matter, it should find these claims meritless.

a. Fair Labor Standards Act

The minimum wage requirements of the FLSA are applicable to domestic workers like Petitioners. Petitioners correctly note that the FLSA provides an exemption for compliance with its minimum wage and overtime provisions for “any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves.”²¹⁸ Although under certain circumstances, the FLSA excludes domestic service employees from its overtime provisions if they reside in the household in which they are employed, the employer nonetheless has an obligation to pay the worker at least the federal minimum wage for all hours actually worked.²¹⁹ Additionally, if the employee is employed or jointly employed by a third party employer such as an agency (or any entity other than the family/household receiving services), then that employee must be paid minimum wage for all hours worked and overtime compensation for any hours worked over 40 in a workweek.²²⁰

Live-in domestic workers like the individual Petitioners in this matter are protected by federal minimum wage laws.²²¹ Although they might be exempted from overtime protections, the Department of Labor has made clear that while the parties may have an agreement that sets forth the parties’ expectations regarding the normal schedule of work time, and they may agree to exclude sleep, meal and other related periods from the hours worked, the agreement does not control the compensation due each week. Rather, records must be kept of the actual hours worked in order to ensure that the employee is properly compensated for all hours worked.²²²

²¹⁸ 29 U.S.C. § 213(a)(15)(2006); *see also* 29 C.F.R. §§552.6, 552.109(a) (defining “companionship services” and precluding third party employers from claiming the companionship services exemption, respectively).

²¹⁹ 29 U.S.C. § 213(b)(21) (2006).

²²⁰ 29 C.F.R. § 552.109(c).

²²¹ 29 CFR § 552.102 (2010).

²²² 78 Fed. Reg. 60479 (Oct. 1, 2013). This Final Rule extends minimum wage and overtime protection to most of the nation’s home care workers who provide essential home care assistance to the elderly and people with disabilities. This change ensures that nearly two million workers—such as home health aides, personal care

b. National Labor Relations Act

The NLRA is the main piece of federal legislation that gives workers in the United States the right to organize and engage in collective bargaining. Passed during the New Deal era in 1935, the NLRA excludes domestic workers from its protections for four main reasons: first, a concern over ballooning administrative costs; second, a belief that domestic workers would not need the protections of collective bargaining; third, a concern about intruding into a purely personal relationship between domestic worker and homeowner; and fourth, a concern for regulating within the scope of Congress's commerce power under the U.S. Constitution, as it was then defined.

First, according to the U.S. Senate Committee on Education and Labor, Congress adopted these exclusions because of the perceived administrative difficulties in permitting domestic workers to organize.²²³ The NLRA concentrated on improving the lives of workers in factories and other large, somewhat anonymous company jobs. The situation of domestic workers stands in stark contrast to this paradigm. Often employed on a one-worker-per-household basis, Congress reasonably considered the costs of regulating the organization of those individual workers to participate in a collective action bargaining scheme with each employer were too burdensome.

Furthermore, Congress may have simply considered it less likely that domestic workers would need the protections of the NLRA. In the context of factory jobs, many people could suffer at the hands of one employer. Additionally, Congress may have considered an individual's home to be a far safer atmosphere for work than a dirty and dangerous industrial factory.

In addition, Congress regarded "domestic service" as a personal and individual relationship between employee and employer in a private household, which was not amenable to intercession by a third party. Congress viewed the resulting one-on-one relationship as closely resembling a familial relationship, which Congress considered as falling outside the scope of labor law. Where this one-on-one relationship does not exist, such as where domestic workers are employed by an enterprise in the business of providing personal care and

aides, and certified nursing assistants—will have the same basic protections already provided to most U.S. workers.

²²³ S. Comm. on Education and Labor, S. Rep. No. 74-573, at 1, 7 (1935).

housekeeping services, such as hotels, hospitals or condominiums, the NLRA exclusion does not apply.²²⁴

Finally, Congress may have excluded domestic workers because it wanted to ensure that it operated only within its proper commerce power,²²⁵ which was interpreted by the Supreme Court considerably less expansively at that time. It would have been substantially more difficult for Congress to make the case that domestic workers operated in interstate commerce than it would to make the case that a large industrial factory did.

Petitioners argue that domestic workers were excluded from the protections of the NLRA because Congress held discriminatory attitudes towards “women’s work,”²²⁶ but as this subsection has demonstrated, Congress acted reasonably in creating the NLRA exclusion. The domestic service exception reflects objective assessments of the administrative costs to regulate collective bargaining for these individuals and congressional calculation of what social needs would be best served by collective bargaining.

c. Occupational Safety and Health Act

The lack of coverage of domestic workers by OSHA is an objective and reasonable policy choice. OSHA was designed to ensure safe and healthful working environments.²²⁷ It governs the conduct of each “employer,” defined in pertinent part as “a person engaged in a business affecting commerce who has employees.”²²⁸ Similarly, an “employee” is defined as “an employee of an employer who is employed in a business of his employer which affects commerce”²²⁹ Thus, OSHA covers businesses, commercial enterprises and non-profit institutions, not individuals engaged in personal activities, like eating. The lack of coverage of domestic workers is addressed by 29 C.F.R. § 1975.6, which provides that OSHA does not apply to “individuals who, in their own residences, privately employ persons for the purpose of performing . . . ordinary domestic household tasks.” The lack of coverage is rational because OSHA has limited resources to regulate millions of businesses in the United States. Its inspection program is, of necessity, directed primarily toward industrial and

²²⁴ See 30 Sutton Place Corp. & Local 32B-32J, Service Employees Int’l Union, 240 NLRB 752,753 n.6 (1979) (quoting Success Village Apartments, Inc. v. Local 376, UAW, 397 A.2d 85, 87 (Conn. 1978)).

²²⁵ Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45, 63–64 (2000).

²²⁶ Petition at 78.

²²⁷ 29 U.S.C. § 651(b).

²²⁸ 29 U.S.C. § 652(5).

²²⁹ 29 U.S.C. § 652(6).

construction worksites where the vast majority of workers who are exposed to dangerous conditions are employed.

Petitioners claim that U.S. labor laws have selectively “discriminated against women of color who perform domestic work.”²³⁰ However, U.S. labor laws afford domestic workers wage protections. The exclusion of domestic workers from coverage under OSHA was an objective and reasonable response to the government’s assessment of social needs, without consideration of the gender or race of the workers at issue.

ii. The United States provides protections for new mothers and children in the labor force, consistent with Article VII of the Declaration.

Petitioners allege that the United States has failed to provide special protections for women and children in the workplace in violation of Article VII of the American Declaration.²³¹ Petitioners cite the Convention of Belém do Pará for the proposition that the United States has special, legally enforceable duties to provide these special protections. This is incorrect. The United States is not a party to the Convention of Belém do Pará and thus cannot be held legally accountable for the obligations of that Convention, nor does that Convention govern or have relevance to U.S. commitments under the American Declaration.

Moreover, the U.S. legal system prohibits gender discrimination in the workplace and provides comprehensive enforcement machinery to ensure compliance with the law. The United States has federal standards to permit individuals to take family or medical leave from their employment without reprisal, and has long-standing restrictions on child labor. For these reasons and as elaborated in the subsections that follow, these claims in the Petition are inadmissible under Article 34(a) of the Rules because they do not tend to establish a violation of Article VII or any other right in the American Declaration. Should the Commission nevertheless reach the merits of this matter, it should find these claims meritless.

a. Protections against Gender Discrimination

Title VII of the U.S. Civil Rights Act of 1964 prohibits discrimination on the basis of sex in “hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment” by employers of

²³⁰ Petition at 76.

²³¹ *Id.* at 80–81.

15 or more individuals.²³² Additionally, an employment policy or practice that applies to everyone, regardless of sex, can be illegal if it has a disproportionately negative impact on the employment of people of a certain sex and is not job-related and necessary to the operation of the business. It can also be unlawful to harass a person because of that person's sex. Harassment can include "sexual harassment" or other unwelcome sexual advances and requests for sexual favors, and other verbal or physical harassment of a sexual nature.²³³ Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex or based on sex stereotypes. For example, frequent or severely offensive comments made about women in general may create a hostile or offensive work environment for female employees, which is a form of illegal harassment. The Equal Employment Opportunity Commission (EEOC) vigorously enforces these laws by permitting individuals to file charges against employers, investigating the charges, attempting to resolve them, and in some circumstances, filing lawsuits to secure remedies on behalf of harmed individuals and the public.²³⁴ In addition, after exhausting any administrative requirements, the individual has the right to file suit in federal court.

The EEOC also enforces the Equal Pay Act, which requires that employers provide equal pay for equal work regardless of sex.²³⁵ This law applies to all forms of compensation, not just salary. It applies to employers regardless of the number of employees, and individuals need not file a charge with EEOC to enforce their rights.²³⁶

For small businesses or individuals that employ fewer than 15 individuals, state law is the primary vehicle of protection against gender discrimination. States generally adopt very similar language to the federal protections in order to simplify interpretation and enhance consistent application. Some states cover smaller employers, while others mirror the federal jurisdictional requirements. Regardless, the combined efforts of the state and federal governments provide extraordinary legal protection for women in the workplace.

²³² U.S. Equal Emp't Opportunity Comm'n, *Sex-Based Discrimination*, at <http://www.eeoc.gov/laws/types/sex.cfm> (last visited Sept. 3, 2015) (describing coverage available for sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*).

²³³ *Id.*

²³⁴ U.S. Equal Emp't Opportunity Comm'n, *Overview*, at <http://www.eeoc.gov/eeoc/index.cfm> (last visited Sept. 3, 2015); *see also* 42 U.S.C. § 2000e-4 (creating and outlining powers of the EEOC).

²³⁵ U.S. Equal Emp't Opportunity Comm'n, *Equal Pay/Compensation Discrimination*, at <http://www.eeoc.gov/laws/types/equalcompensation.cfm> (last visited Sept. 3, 2015); *see also* U.S. Equal Emp't Opportunity Comm'n, *Compliance Manual*, § 10: Compensation Discrimination (2000), *available at* <http://www.eeoc.gov/policy/docs/compensation.html> (last visited Apr. 26, 2016).

²³⁶ *Id.* § 10-VI.

b. Pregnancy Discrimination

The United States also provides legal protection for women during pregnancy and shortly after they give birth—the time periods specifically identified for protection in Article VII of the American Declaration. Further, U.S. law, under Title VII of the Civil Rights Act of 1964, also forbids employers from acting on assumptions about the fitness of women to perform a particular job because they are caregivers to young children.²³⁷

Under the Pregnancy Discrimination Act (PDA) amendments to Title VII of the Civil Rights Act of 1964, discrimination in employment on the basis of pregnancy, childbirth, or related medical condition is a form of unlawful sex discrimination.²³⁸ Under the PDA, an employer may not refuse to fire or refuse to hire a woman because of pregnancy, a pregnancy-related condition, or the prejudices of other employees.²³⁹ The law also requires employers to treat women affected by pregnancy, childbirth, or related medical conditions the same for all employment-related purposes, including receipt of benefits, as other persons not so affected who are similar in their ability or inability to work.²⁴⁰ The PDA ensures that women have equal opportunities and benefits of employment, regardless of their childbirth decisions. The EEOC, together with partner state enforcement agencies, robustly enforces the PDA, obtaining resolutions in 4,952 cases in fiscal year 2011, while 5,053 new charges were received.²⁴¹

The Family and Medical Leave Act (FMLA) provides additional important benefits for parents. Eligible employees working for covered employers are entitled to 12 work-weeks of unpaid, job-protected leave within a one-year period to care for a newborn.²⁴² Employees may also take this leave to care for a parent,

²³⁷ U.S. Equal Emp't Opportunity Comm'n, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* (June 2015), available at http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last visited Apr. 7, 2016); U.S. Equal Emp't Opportunity Comm'n, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 2007), available at <http://www.eeoc.gov/policy/docs/caregiving.html> (last visited Apr. 26, 2016).

²³⁸ U.S. Equal Emp't Opportunity Comm'n, *Pregnancy Discrimination*, at <http://www.eeoc.gov/laws/types/pregnancy.cfm> (last visited Sept. 3, 2015).

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ U.S. Equal Emp't Opportunity Comm'n, *Pregnancy Discrimination Charges, EEOC & FEPAs Combined: FY 1997–FY 2011*, at <http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm> (last visited Apr. 26, 2016). Note that the cases resolved exceed the charges filed because some cases carry over from the previous fiscal year before they are resolved.

²⁴² U.S. Dep't of Labor, *Family and Medical Leave Act*, at <http://www.dol.gov/whd/fmla/> (last visited Sept. 3, 2015). Covered employers include public agencies, public and private secondary schools, and all private companies with 50 or more employees. Eligible employees must have worked at the company for one year, logged at least 1,250 hours during that time period, and work in a location where the company has 50

spouse, or child with a serious health condition, or for their own serious health condition, including pregnancy.²⁴³ This federal law provides job security for women during pregnancy and while they are recovering from giving birth. Additionally, the FLSA also provides certain new mothers with a right to express breast milk in the workplace, and requires employers to provide workers with the time and appropriate space to do so.²⁴⁴ Although the FMLA does not cover all private employers, several states have adopted more expansive versions of the act.²⁴⁵ As this information demonstrates, the growing U.S. protections for pregnant women, and for parents more generally, are fully consistent with U.S. commitments under Article VII of the American Declaration.

c. Laws Criminalizing Gender-Based Violence

In addition to providing equal opportunity in employment for women, the United States is committed to combating gender-based violence. The U.S. Congress has passed a series of laws targeted at improving the safety of women in the United States. Furthermore, the Department of Justice is dedicated to enforcing those laws at the federal level and encouraging state and local governments to develop comparable enforcement regimes.²⁴⁶

In the Violence Against Women Act (VAWA) of 1994,²⁴⁷ Congress significantly improved federal protections for women both before and after they have been victims of violent crime. Some of the provisions included increased federal penalties for sex offenders;²⁴⁸ grants to law enforcement agencies to help them improve their response to violent crimes against women;²⁴⁹ conditioning the acceptance of some funds on state agreement to pay for forensic rape examinations of victims;²⁵⁰ allocating funds to increase security in public places with lighting,

employees within 75 miles. U.S. Dep't of Labor, *Leave Benefits: Family and Medical Leave*, at <http://www.dol.gov/dol/topic/benefits-leave/fmla.htm> (last visited Sept. 3, 2015).

²⁴³ U.S. Dep't of Labor, *Family and Medical Leave Act*, at <http://www.dol.gov/whd/fmla/> (last visited Sept. 3, 2015).

²⁴⁴ 29 U.S.C. § 207(r).

²⁴⁵ Nat'l Partnership for Women and Families, *State Paid Family Leave Insurance Laws*, at <http://www.nationalpartnership.org/research-library/work-family-paid-leave/state-paid-family-leave-laws.pdf> (last visited Sept. 5, 2015).

²⁴⁶ See, e.g., U.S. Dep't of Justice, *Office on Violence Against Women: Overview*, at <http://www.ovw.usdoj.gov/overview.htm> (last visited Apr. 7, 2016) ("By forging state, local, and tribal partnerships among police, prosecutors, judges, victim advocates, health care providers, faith leaders, and others, OVW grant programs help provide victims with the protection and services they need to pursue safe and healthy lives, while simultaneously enabling communities to hold offenders accountable for their violence.").

²⁴⁷ See Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. 4, ch. 1, 108 Stat. 1902 (codified as amended in scattered sections of 8, 18, and 42 U.S.C. (2006)).

²⁴⁸ *Id.* § 2247.

²⁴⁹ *Id.* § 2002.

²⁵⁰ *Id.* § 2005.

surveillance, and cameras;²⁵¹ and establishing new evidentiary rules to shield victims of sexual assault from the embarrassment of having their prior sexual history used against them in a trial.²⁵² VAWA established two federal crimes against women: interstate travel to commit domestic violence and interstate violation of a protection order.

Congress reauthorized and expanded VAWA in 2005.²⁵³ In that legislation, Congress added an additional federal crime against women—interstate stalking²⁵⁴—while continuing to expand social services for victims of sexual assault²⁵⁵ and domestic violence.²⁵⁶ It also made findings of fact about the negative impact on society that these private acts of violence can have.²⁵⁷

On March 7, 2013, President Obama signed into law the Violence Against Women Reauthorization Act of 2013 (VAWA 2013).²⁵⁸ This was the third reauthorization of the Violence Against Women Act of 1994. VAWA 2013 includes crucial new provisions to improve services for victims, expand access to justice, and strengthen the prosecutorial and enforcement tools available to hold perpetrators accountable. VAWA 2013 finally closes a loophole that left many Native American women without adequate protection by providing significant new jurisdiction by tribal courts over cases alleging abuse of Native American women on tribal lands by an attacker who is not Native American. Tribes and the federal government can better work together to address domestic violence against Native American women. The law also provides funding to improve the criminal justice response to sexual assault, ensuring that victims can access the services they need to heal. VAWA 2013 will also help to build on evidence-based practices for reducing domestic violence homicides, prevent violence against children, teens, and young adults, and protect everyone—women and men, gay and straight, and children and adults of all races, ethnicities, countries of origin, and tribal affiliations.

Since 1995, the Office of Violence Against Women in the Department of Justice has worked to enforce and implement the provisions of VAWA.²⁵⁹ The

²⁵¹ *Id.* § 40131.

²⁵² *Id.* § 40141.

²⁵³ See Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162, 119 Stat. 2960 (2006) (codified as amended in scattered sections of 8, 18, and 42 U.S.C. (2006)).

²⁵⁴ *Id.* § 2261A.

²⁵⁵ *Id.* § 2014.

²⁵⁶ *Id.* § 3990.

²⁵⁷ *Id.* § 201.

²⁵⁸ Pub. L. No. 113-4, 127 Stat. 54 (Mar. 7, 2013).

²⁵⁹ U.S. Dep't of Justice, *Office on Violence Against Women: Overview*, at <http://www.justice.gov/ovw/about-office> (last visited Sept. 3, 2015).

office is charged with administering 24 grant programs and coordinating special initiatives to raise awareness about crimes against women.²⁶⁰ It also works with state and local governments to improve their practices of prevention and response on issues of sexual assault. The Obama Administration has launched several initiatives aimed at providing legal, housing, and other support services to victims of domestic violence.²⁶¹ Additionally, President Obama appointed the first-ever White House Advisor on Violence Against Women to collaborate with the many federal agencies working together to end violence against women.

Indeed, each year, all 50 states, the District of Columbia, and various U.S. territories are awarded Department of Justice Office for Victims of Crime grants to support community-based organizations that serve crime victims. Approximately 5,600 grants are made to domestic violence shelters, rape crisis centers, child abuse programs, and victim service units in various agencies and hospitals. On September 22, 2014, then-Attorney General Eric Holder announced that the Justice Department had selected four sites for its first-ever Domestic Violence Homicide Prevention Demonstration Initiative grant awards, through which the Justice Department will distribute \$2.3 million to support innovative programs dedicated to predicting potentially lethal behavior, stopping the escalation of violence, and saving lives.²⁶²

Thus, Petitioners' broad assertions that the United States has abdicated its responsibility to protect women are wholly unfounded.²⁶³ Contrary to these assertions, the United States is actively engaged in addressing the issue at all levels of government. Although the United States regrets that individuals have been exploited by their foreign national employers, those incidents in no way reflect a systemic problem of worker exploitation in the United States or government ambivalence to it. From comprehensive nondiscrimination in employment legislation to the emphasis on preventing and redressing gender-based violence, the United States has established numerous special protections for women and children and formidable enforcement machinery, in fully conformity with and furtherance of our political commitments under the American Declaration.

²⁶⁰ *Id.*

²⁶¹ See Nia-Malika Henderson, *Obama Launches Initiatives to Fight Domestic Violence*, WASHINGTON POST (Oct. 27, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/27/AR2010102705307.html> (last visited Apr. 6, 2016).

²⁶² U.S. Dep't of Justice, Office of Public Affairs, *Attorney General Holder Announces \$2.6 Million in Grants for Domestic Violence Homicide Prevention* (Sept. 22, 2014), at <http://www.justice.gov/opa/pr/attorney-general-holder-announces-26-million-grants-domestic-violence-homicide-prevention> (last visited Apr. 26, 2016).

²⁶³ Petition at 83.

d. Child Labor Laws

Petitioners raise the question of special protection for children because Petitioner Otilia Luz Huayta's daughter Carla was also expected to work in the home.²⁶⁴ Since 1938, the FLSA has established federal workplace protections for children. The FLSA applies to child workers who, for example, are engaged in interstate commerce or in the production of goods for commerce during their employment, such as a child who in the course of his or her employment regularly uses the telephone, internet, or mail services to communicate with persons in another state.²⁶⁵

The child labor standards in FLSA focus on wages, hours, and safety to ensure that children are not exploited by unscrupulous employers. In nonagricultural employment, the FLSA permits children to begin working at age 14 in specified occupations for limited hours.²⁶⁶ The standard minimum age for employment is set at age 16. At that age, children may work in nonagricultural employment for an unlimited number of hours in any non-hazardous occupation.²⁶⁷ The Secretary of Labor designates hazardous occupations and closely monitors the extent to which children may engage in any such work.²⁶⁸ An employer who violates these laws may be subject to significant fines. The FLSA also authorizes the Department of Labor to seek injunctions to halt the shipment of any goods tainted by oppressive child labor.²⁶⁹

States may also regulate the workplace. If a state and federal law conflict on minimum wage, minimum age for employment, or overtime provisions, nothing in the FLSA excuses noncompliance with the more protective standard. Twenty-two states, for example, provide greater protection than the FLSA in terms of limiting the number of hours or consecutive days that children aged 16 and 17 can work.²⁷⁰ As of January 1, 2016, 29 states had higher minimum wage laws than the federal

²⁶⁴ *Id.* at 22.

²⁶⁵ See *supra* Section III(d)(i)(a). Some jobs are specifically exempted from the FLSA's coverage: newspaper delivery, casual babysitting, and jobs in the entertainment industry. U.S. Dep't of Labor, Bureau of Labor Statistics, *Child Labor Laws and Enforcement*, at <http://www.bls.gov/opub/rylf/pdf/chapter2.pdf> (last visited Sept. 3, 2015).

²⁶⁶ U.S. Dep't of Labor, Wage and Hour Division, *Child Labor Provisions for Nonagricultural Occupations under the Fair Labor Standards Act*, Child Labor Bulletin 101, WH-1330 (Feb. 2013), at 3 available at <http://www.dol.gov/whd/regs/compliance/childlabor101.pdf> (last visited Sept. 3, 2015).

²⁶⁷ *Id.*

²⁶⁸ See, e.g., *id.* at 8–23 (documenting 17 hazardous occupation orders).

²⁶⁹ *Id.* at 26.

²⁷⁰ U.S. Dep't of Labor, *Selected State Law Child Labor Standards Affecting Minors Under 18 in Non-Farm Employment as of January 1, 2015*, at <http://www.dol.gov/whd/state/nonfarm.htm> (last visited Sept. 3, 2015).

level.²⁷¹ Thirty-two states regulate employment of children in the entertainment industry.²⁷² Twenty-one states prohibit or regulate door-to-door sales by minors.²⁷³ These statistics demonstrate the active interest of states in protecting children from safety hazards and exploitation in the workplace. Similarly, even though the federal Age Discrimination in Employment Act only applies to workers who are 40 years of age or older, some states have passed laws protecting younger workers from age discrimination.²⁷⁴

Many general labor laws also contribute to broad protections for child labor in the United States. Like other workers, children are protected by minimum wage, overtime, and workplace safety standards. Children are also covered by nondiscrimination and harassment laws, such as the Civil Rights Act of 1964 and the Americans with Disabilities Act. Thus federal and state laws offer substantial protection.

The alleged actions of Petitioner Huayta's employer with respect to Ms. Huayta's daughter violated U.S. labor laws because the daughter was at a minimum paid far less than the minimum wage, even though she participated in tasks regulated by the FLSA like housekeeping.²⁷⁵ But a private individual's actions in violation of U.S. laws does not mean that U.S. laws have failed to afford children special protections. On the contrary, the existence of this panoply of laws which are vigorously enforced by the U.S. government demonstrates that the United States has met its political commitments to protect individuals under Article VII of the American Declaration.

²⁷¹ U.S. Dep't of Labor, *Minimum Wage Laws in the States—January 1, 2016*, at <http://www.dol.gov/whd/minwage/america.htm> (last visited Apr. 6, 2016).

²⁷² U.S. Dep't of Labor, *Child Entertainment Laws as of January 1, 2015*, at <http://www.dol.gov/whd/state/childentertain.htm> (last visited Sept. 3, 2015).

²⁷³ U.S. Dep't of Labor, *State Regulation of For-Profit Door-to-Door Sales by Minors*, at <http://www.dol.gov/whd/state/doortodoor.htm> (last visited Sept. 3, 2015).

²⁷⁴ U.S. Equal Emp't Opportunity Comm'n, *Age Discrimination*, at <http://www.eeoc.gov/laws/types/age.cfm> (last visited Sept. 3, 2015).

²⁷⁵ See Petition at 22.

IV. CONCLUSION

Petitioners describe egregious circumstances in the homes of the foreign diplomats for whom they worked, but the questions of law raised in this case are not difficult. The Petition is plainly inadmissible on several grounds, as discussed in detail above. First, while the United States recognizes the challenges to pursuing these cases domestically in light of U.S. legal obligations to respect diplomatic immunity, some of the claims presented in the Petition could have been pursued without regard to diplomatic immunity, and Petitioners have therefore failed to satisfy the exhaustion requirement in Article 31 of the Rules. Second, at least two of the Petitioners' claims are inadmissible under Article 32 of the Rules because they were not filed with the Commission in a timely fashion. Third, several of the claims are inadmissible under Article 34(c) due to supervening information; as discussed in detail above, the United States has taken significant steps to strengthen the framework preventing abuse of domestic workers. Fourth, the Petition is also inadmissible under Article 34(a) because it fails to state facts that tend to establish a violation of the American Declaration.

If the Commission reaches the merits on any of the claims presented in the Petition, the United States respectfully asks the Commission to find them unsupported in both law and fact. The United States has fully complied with its commitments under the American Declaration with respect to Petitioners. Even though it cannot go against its international legal obligation to respect diplomatic immunity, the United States has taken significant steps to protect individuals such as Petitioners from workplace exploitation. The Department of State has created extensive policies, requirements, and procedures to monitor the domestic workers admitted to the United States on work visas for foreign mission personnel. Furthermore, the U.S. domestic system provides workplace protection, complete with special protections for women and children who may be most vulnerable to exploitation. Appropriate government officials respond to reports, as happened in the case of Petitioner Huayta, that come to the authorities' attention via the report of a third party. Finally, the U.S. judicial system provides adequate and effective remedies for individuals whose rights are violated either by discriminatory labor laws or by the unscrupulous actions of exploitative employers.

For these reasons, the United States respectfully requests that the Petition be dismissed as inadmissible. Should the Commission choose to consider its merits, it should decide in favor of the United States, as all the claims are without merit.