

**TO THE HONORABLE MEMBERS OF THE
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,
ORGANIZATION OF AMERICAN STATES**

**PETITION ALLEGING VIOLATIONS BY THE UNITED STATES
OF AMERICA OF THE HUMAN RIGHTS OF DOMESTIC
WORKERS EMPLOYED BY DIPLOMATS**

By the undersigned, appearing as Representatives for the Individual and Organizational Petitioners under the provisions of Article 23 of the Commission's Rules of Procedure:

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Submitted: _____, 2007

“They treated me no better than they would treat a stray dog. They tried to take from me my humanity.”

Raziah Begum, employed by the Deputy Permanent Representative to the Bangladesh Mission to the United Nations.

*

“Worst of all, it was people from my own country who had treated my daughter and I like slaves.”

Otilia Luz Huayta, employed by a Bolivian diplomat in Maryland.

*

“I told them that I knew my rights, that I was not being paid enough, and that I was working too many hours. Ms. Majingo said that I didn’t know my rights because I was uneducated. She told me that I was a slave.”

Hildah Ajasi, employed by a diplomat at the Botswana Embassy.

*

“There should be punishment for those diplomats who cause physical and mental suffering on their domestic workers. We are human too, and we deserve to work with dignity and respect.”

Siti Aisah, employed by the Ambassador to the Qatar Mission of the United Nations.

*

“It was very distressing working for someone who said they can force you to work for someone else, as though I was simply property of theirs to lend out. It is sad that I was treated this way by fellow Chileans.”

Susana Ocares, employed by a diplomat at the Chilean Embassy.

*

“In response to my demand for a decent wage, my employers threatened to get me a plane ticket back home.”

Lucia Mabel Gonzalez Paredes, employed by a diplomat at the Argentine Embassy.

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I. INTRODUCTION

Each year, nearly three thousand migrant domestic workers come to the United States to labor in the homes of foreign diplomats.¹ They travel on special A-3 or G-5 visas² issued by the United States to the “attendant[s], servant[s], or personal employee[s]”³ (hereinafter “domestic workers”)⁴ of foreign officials representing their governments in Embassies, Consulates, Foreign Missions to International Organizations and within International Organizations (hereinafter “diplomats”).⁵ These migrant workers, almost exclusively women, are lured into the country on promises of fair wages and working conditions. However, many of these workers find themselves trapped in situations of exploitation where they are required to perform difficult labor for long hours at illegal and substandard wages. For some domestic workers, the abuse they are

¹ See U.S. Dep’t of Homeland Sec., *Nonimmigrant Admissions (I-94 Only) by Class of Admission: Fiscal Years 1996 to 2005*, available at www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/Table26D.xls [hereinafter *Nonimmigrant Admissions (I-94 Only)*] (In FY 2005, 2,966 migrant workers entered the United States on A-3 and G-5 visas; in FY 2004, 3,167 migrant workers entered on A-3 and G-5 visas; and in FY 2003, 3,504 A-3 and G-5 workers entered the U.S.).

² Domestic workers on A-3 visas are employed by ambassadors, public ministers, diplomat or consular officers and their families, while workers possessing G-5 visas are employed by officers or employees of international organizations or of foreign missions to international organizations and their families. INA § 101(a)(15)(A)(iii), G(v), 8 U.S.C. § 1101(a)(15)(A)(iii), G(v) (2006).

³ 9 Foreign Affairs Manual (FAM) 41.21 N6.1 (2004), available at <http://www.state.gov/documents/organization/87174.pdf>.

⁴ “Domestic workers” are individuals employed part-time or full time in a household or private residence that perform any of the following duties: cook, servant, waiter or waitress, butler, nurse, childminder, caretaker for elderly or disabled persons, personal servant, barman or barmaid, chauffeur, porter, gardener, washerman or washerwoman, or guard. U.N. Comm’n on Human Rights, 60th session, *Specific Groups and Individual: Migrant Workers*, ¶ 12, U.N. Doc. E/CN.4/2004/76 (January 12, 2004), Ex. F(1) [hereinafter *Migrant Workers*] (prepared by Gabriela Rodriguez Pizarro). According to the International Labor Organization, the work of domestic service employees includes: sweeping or vacuuming; cleaning or washing and waxing floors, doors, windows, furniture and various objects; washing, ironing, and mending bed and table linen and other household linen for personal use; washing dishes; preparing, cooking, and serving meals and drinks; buying food and various articles for domestic use; performing related tasks; and supervising other workers. *Id.* at ¶ 13.

⁵ For the purposes of this Petition, the term “diplomat” shall refer to all employers whose domestic workers are eligible for the A-3 or G-5 visa. See INA § 101(a)(15)(A)(iii), G(v).

subjected to is even more extreme. In too many cases, these workers are physically and sexual assaulted and subjected to forced labor and human trafficking.

Though these women come from various parts of the world, they are generally from poor and marginalized communities where women face sizeable socioeconomic challenges to their ability to provide for themselves and their families. Alone and dependent on their employers, these domestic workers face barriers of language, education, and culture, isolation in the home, and discrimination based on race and gender and are, thus, particularly vulnerable to abusive employers. Because of their employer's profession, however, these women are rendered even more defenseless because, in the United States, diplomats are immune from the criminal and civil jurisdiction of United States courts.⁶ In other words, they cannot be held accountable for their illegal actions by United States law.

Unsurprisingly, a culture of impunity has developed and resulted in widespread violations of the human rights of migrant domestic workers by their diplomat employers.⁷

⁶ The U.S. has interpreted its obligations under the Vienna Convention on Diplomatic Relations as requiring it to find that diplomats are immune from criminal and civil jurisdiction. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95 (entered into force Apr. 24, 1964).

⁷ Recent reports indicate an increasing number of cases of foreign diplomats who have subjected their domestic workers to slavery-like conditions in their homes in the Washington, D.C. and New York area. See, e.g., ACLU, Summaries of Cases Publicized in the Media, Reports and Court Filings, Ex. H(2); Frank Langfitt, *Servants: Diplomat Held Us as Suburban 'Slaves'* (NPR radio broadcast Mar. 1, 2007), Ex. H(6) [hereinafter *Diplomat Held Us as Suburban 'Slaves'*]; Henri E. Cauvin, *Workers Allege Abuse by Kuwaiti Attaché*, Wash. Post, Jan. 18, 2007, at A12, Ex. H(7); Colbert I. King, *The Slaves in Our Midst*, Wash. Post, Dec. 23, 2006, at A21, Ex. A(4); Lena Sun, "Modern-Day Slavery" Prompts Rescue Efforts: Groups Target Abuse of Foreign Maids, Nannies, Wash. Post, May 3, 2004, at A1, Ex. H(8) (reporting that a Bangladeshi maid working for a Bahraini diplomat in New York was never paid or allowed to leave the apartment until she was rescued by police; an Indian maid for a diplomat in Potomac, Maryland was paid \$100 for 4,500 hours of work over 11 months and physically and mentally abused; an Indonesian domestic servant employed by a diplomat at the United Arab Emirates Embassy in Washington, D.C. was physically abused, threatened with death, and underpaid); Sandra Evans & John Burgess, *Maid Says Saudi Diplomat Withheld Wages, Food*, Wash. Post, Nov. 30, 1988, at D1, Ex. H(9) (reporting that a Thai domestic worker for a defense attaché to the Saudi Arabian Embassy in Washington, D.C. alleged exploitation after escaping from the diplomat's home by crawling out a window).

Petitioners (“Individual Petitioners”), women formerly employed as domestic workers in the homes of diplomats living in the United States, were victims of such violations.

Individual Petitioners entered the United States with employment contracts promising lawful wages and working conditions, but diplomatic immunity made such contracts unenforceable and meaningless. These women are some of the few migrant domestic workers employed by diplomats who were able to find assistance and attempt, without success unfortunately, to seek justice and redress for the abuses they suffered.

- **Petitioner Raziah Begum** was enslaved in the Manhattan apartment of a Bangladeshi diplomat. For two and a half years, she was only permitted to leave the apartment on a few occasions, denied rest, and paid nothing directly.
- **Petitioner Otilia Huayta** and her young daughter worked in slave-like conditions in the home of a Bolivian diplomat where they were psychologically abused and severely underpaid. The exploitation was so severe that school officials, concerned with her daughter’s malnourishment, alerted the police who helped them escape.
- **Petitioner Hildah Ajasi** was subjected to severe exploitation in the home of a diplomat from Botswana. She worked seven days a week, from early morning until late at night. In return, her husband received \$250 a month. She was also denied medical care, a day of rest and the ability to practice her religion.
- **Petitioner Siti Aisah** worked in the apartment of a Qatari diplomat where she was severely underpaid (about \$150 a month), denied her freedom of movement, and cut off from communication with the outside world.
- **Petitioner Mabel Gonzalez Paredes** worked in the home of an Argentine diplomat for paltry wages and was denied medical care. Her employers refused to give her a copy of her employment contract and forced her to sign fraudulent documents indicating that she received a much higher wage than she actually received.
- **Petitioner Susana Ocares** worked in the home of a Chilean diplomat. She was never paid any overtime wages in violation of her employment contract. She suffered degrading treatment at the hands of her employer, such as being told she could be “lent” out to others at her employer’s will.

Individual Petitioners represent the thousands of domestic workers who have experienced similar situations of abuse and exploitation, but who cannot obtain any remedy for such abuses because of diplomatic immunity.

Reflecting the widespread nature of this problem, organizations that provide social and legal services to domestic workers employed by diplomats and who advocate on their behalf, are also Petitioners (“Organizational Petitioners”). Organizational Petitioners represent several of the dozens of organizations in the Washington, DC and New York region who assist migrant domestic workers, but are unable to obtain legal relief for some of their clients because of diplomatic immunity. Organizational Petitioners report repeated and routine violations by diplomats of the human rights of domestic workers.

To date, the United States government has failed to provide these migrant domestic workers any meaningful protections against such human rights abuses or any avenue of redress for violations of these workers’ rights. By failing to take reasonable steps to protect these domestic workers and ensure that their rights under the American Declaration of the Rights and Duties of Man are enforced and respected, the United States violates its obligations as a member state of the Organization of American States under the Declaration.

The American Civil Liberties Union (ACLU), Global Rights, and the Immigration/ Human Rights Clinic of the University of North Carolina School of Law present this Petition to the Inter-American Commission on Human Rights against the United States in accordance with Articles 41(f), 44 to 51, and 77 of the American Convention on Human Rights, on behalf of Individual Petitioners Otilia Huayta, Hildah

Ajasi, Siti Aisah, Raziah Begum, Mabel Gonzalez Paredes, and Susana Ocares and Organizational Petitioners Andolan, Break the Chain Campaign, and CASA of Maryland. Petitioners call upon the Commission to find the United States government in violation of its obligations under the American Declaration. Petitioners request, *inter alia*, that the United States amend its laws and policies to comport with international legal obligations to protect and enforce the human rights of domestic workers employed by diplomats.

Petitioners request an oral hearing of this Petition at the next session of the Commission.

II. LEGAL AND FACTUAL BACKGROUND

Migrant women domestic workers employed by diplomats are an extremely vulnerable group of workers in the United States. These women perform their work isolated in private homes and often lack exposure to and familiarity with United States law and law enforcement authorities. Moreover, as private household employees, the terms and conditions of their employment are largely unregulated by the U.S. government.⁸ In addition, their lawful immigration status, pursuant to the A-3 or G-5 special visas for private servants of diplomats, is contingent on their employment by a diplomat employer.⁹ The women who occupy these jobs generally come from severely

⁸ The employment relationship between domestic workers and their employers receives fewer protections under U.S. law than most other professions. Under federal law, for example, live-in domestic workers are one of the few categories of employees not entitled to overtime wages under federal law. 29 U.S.C. § 213(b)(21) (2006). Employers of live-in domestic workers are also exempt from the stringent recordkeeping requirements of hours worked that are the norm under federal law. 29 C.F.R. §§ 552.102(b), 552.110(b) (2007). Domestic workers are also exempt from the National Labor and Relations Act (NLRA) and Occupational Safety and Health Act (OSHA), and thus are not entitled to protections of their rights to organize for improved labor conditions. NLRA, 29 U.S.C. § 152(3) (2006); OSHA, 29 C.F.R. § 1975.6 (2007).

⁹ U.S. Dep't of State, Diplomatic Circular Note at 2 (June 19, 2000) [hereinafter Diplomatic Circular Note 2000], Ex. D(2), *available at* <http://www.state.gov/documents/organization/32298.pdf>; 9 FAM 41.22 N4.4(d) (2004), *available at* <http://www.state.gov/documents/organization/87177.pdf>; Human Rights Watch, *Hidden in the Home: Abuse of Domestic Workers with Special Visas in the United States* 6 (2001),

impoverished backgrounds, lack formal education, and speak little English. Their race, ethnicity and social status make these workers vulnerable to racially discriminatory and degrading treatment. Finally, their gender makes them a specific target for gender discrimination, sexual harassment, rape, and other abuses.

These vulnerabilities are exacerbated by the fact that diplomat employers can claim the protection of diplomatic immunity under the Vienna Convention on Diplomatic Relations (“Vienna Convention”).¹⁰ According to the Vienna Convention, although diplomats are required under international law to abide by U.S. federal and local laws,¹¹ they are absolutely immune to the criminal jurisdiction of U.S. courts and immune to the civil jurisdiction of U.S. courts, unless an exception to civil immunity applies. Thus, in most cases, diplomats cannot be held accountable for failure to respect U.S. law.

As a result, diplomats, believing that they will never be called to account for their actions, far too often flout U.S. law and exploit and abuse their domestic workers. By insulating diplomats from criminal accountability and depriving victims of a legal remedy for violations of their rights, diplomatic immunity has the effect of turning constitutional, statutory and international law protections against discrimination, exploitation and abuse of domestic workers into empty aspirations. To date, despite numerous reports of abuse of domestic workers employed by diplomats, no diplomat has ever been held accountable for his actions under U.S. law.¹²

Ex. G(4) [hereinafter *Hidden in the Home*], available at <http://www.hrw.org/reports/2001/usadom/usadom0501.pdf>.

¹⁰ Vienna Convention, *supra* note 6, art. 31(1).

¹¹ *Id.* at art. 41(1) (providing that “it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State”).

¹² Recently, the U.S. Department of Justice sought a waiver of immunity to prosecute a Kuwaiti Diplomat accused of trafficking three Indian domestic workers, but the Kuwait embassy denied the request and the diplomat left the United States. *See* Letter from Robert Moosy, Dir., Human Trafficking Prosecution Unit,

A. Migrant Domestic Workers in the United States

The historical denial of important labor and employment protections to domestic workers by the United States has created an environment of exploitation and disrespect for these workers. The work performed by domestic workers has been traditionally viewed as work in the “private sphere,” outside the scope of government regulation. Their work has also been undervalued as “women’s work” considered “unproductive” and unmeritorious of wage remuneration because it was the work of housewives or African slaves and indentured servants.¹³

The legacy of slavery and discrimination against domestic workers continues to be reflected in laws that provide basic and fundamental protections to America’s workforce today. These laws, written in the 1930s, systematically exclude from protection domestic workers and agricultural workers, the two primary occupations of slaves and women.¹⁴ The National Labor Relations Act, the law that protects a worker’s

Dep’t of Justice, to Claudia Flores, Staff Attorney, Women’s Rights Project, ACLU (Oct. 31, 2007) (on file with ACLU).

¹³ Domestic Workers United & DataCenter, *Home is Where the Work Is: Inside New York’s Domestic Work Industry* 11 (July 14, 2006), Ex. G(5) [hereafter *Home is Where the Work Is*], available at <http://www.datacenter.org/reports/homeiswheretheworkis.pdf>. In 2005, the Members of a Domestic Workers Human Rights Tribunal noted that “the economic development of the United States -- as well as many other countries of the global North -- relied heavily on a stolen, unpaid workforce of domestic workers . . .” Final Statement of the Tribunal Members at the Domestic Workers United & Global Rights Domestic Workers Human Rights Tribunal in New York ¶ 3 (Oct. 8, 2005) [hereinafter Final Statement of the Tribunal Members] (participants included the U.N. Special Rapporteur on Racism, the U.N. Independent Expert on the Rights of Minorities, and representatives from the Mississippi Workers Center for Human Rights; Women’s Rights Project of the ACLU; National Union of Domestic Employees, Trinidad & Tobago; American Rights at Work; Global Rights; National Network for Immigrant and Refugee Rights).

¹⁴ The United States labor laws exclude domestic workers from its definitions of “employee” despite affording protections to almost every other class of worker. The National Labor Relations Act protects the rights of most workers to organize and collectively bargain for their rights, and yet expressly excludes domestic workers from coverage, stating “the term ‘employee’ . . . shall not include any individual employed . . . in the domestic service of any family or person at his home.” 29 U.S.C. §152(3) (2006). The Fair Labor Standards Act (FLSA) requires employers to pay minimum wage and limits the maximum hours worked each week for most workers, but specifically excludes workers who provide babysitting or companionship services to the elderly and infirm. 29 U.S.C. § 213(1)(15) (2006). The FLSA also excludes from its maximum hour limits and overtime protection all domestic workers who live within the homes of

right to organize unions and collectively bargain for better work conditions, excludes domestic workers;¹⁵ the Fair Labor Standards Act, which sets minimum wage and overtime standards, denies the right to overtime compensation to live-in domestic workers;¹⁶ and the regulations implementing the Occupational Safety and Health Act deny domestic workers the right to a safe workplace.¹⁷ Even Title VII of the U.S. Civil Rights Act of 1964, which prohibits discrimination based upon sex, applies only to workplaces with 15 or more employees, for a requirement that excludes most domestic workers who almost always labor alone or with a few other workers.¹⁸

These legal exclusions originally had their most pervasive effect on African-American women, who formed the majority of the domestic worker workforce in the United States from the 1870s to the 1970s.¹⁹ After the U.S. Civil Rights movement in the 1960s, African-American women began to move into other occupations, and they have been replaced by a growing number of migrant women seeking to escape the poverty of their home countries.²⁰ As the demographics of this workforce have changed, the legal exclusions now primarily affect the migrant workers who perform these jobs. The failure to extend basic labor and employment protections and to regulate domestic work effectively sanctions the exploitation of these workers and perpetuates a cultural

their employers, exempting “any employee who is employed in domestic service in a household and who resides in such household.” *Id.* §213(b)(21). Regulations to OSHA, the law providing for safe and healthful working conditions of all workers, specifies that the law excludes any person who privately employs another person to perform “commonly regarded as ordinary domestic household tasks, such as house cleaning, cooking, and caring for children.” 29 C.F.R. § 1975.6 (2007).

¹⁵ 29 U.S.C. § 152 (3).

¹⁶ 29 U.S.C. §213(b)(21)

¹⁷ 29 C.F.R. § 1975.6.

¹⁸ 42 U.S.C. § 2000e(b) (2006).

¹⁹ *Home is Where the Work Is*, *supra* note 13, at 13, Ex. G(5).

²⁰ *Id.*

disregard for the rights of domestic workers because they are women and minorities.²¹ Indeed, the United States' failure to legally protect domestic workers led Doudou Diene, the U.N. Special Rapporteur on Racism, Racial Discrimination, and Xenophobia, to remark, in 2005, that the present day conditions for migrant domestic workers are "deeply tied to the legacy of slavery and colonialism" in the United States.²²

Today, in the United States, it is mostly migrant women who perform domestic work. In 2004, ninety-two percent of all persons employed in services within "private households" were women.²³ Census data confirm that domestic workers in the United States are also disproportionately racial minorities.²⁴ Cities with large immigrant populations tend to have more people of color working as domestic workers. In New York City for example, domestic workers are ninety-nine percent foreign-born and ninety-five percent people of color.²⁵

Socially, domestic work continues to be undervalued labor. According to Human Rights Watch, "[the domestic worker] is often perceived not as a worker but as a 'member of the family,' though as a hired worker, she may be considered inferior to true family members, including the traditional housewife. In this devalued role, she is particularly susceptible to abuse that reinforces her subordination and her employer's power."²⁶

²¹ *Id.* (citing David M. Katzman, *Seven Days a Week: Women and Domestic Service in Industrializing America* 46, 161 (1981)).

²² Final Statement of the Tribunal Members, *supra* note 13, ¶ 3.

²³ Bureau of Labor Statistics, U.S. Dep't of Labor, *Women in the Labor Force: A Databook*, 44 tbl.14 (2005), available at <http://www.bls.gov/cps/wlf-table14-2005.pdf>.

²⁴ Yolanda S. Wu, *Domestic Workers in the Underground Economy: The Lack of Civil Rights Protections*, Poverty & Race, March/April 1998.

²⁵ *Home is Where the Work Is*, *supra* note 13, at 10, Ex. G(5).

²⁶ *Hidden in the Home*, *supra* note 9, at 6, Ex. G(4).

Against this legal and social background, it is unsurprising that the rights of domestic workers are violated with shocking frequency. At the extreme, migrant domestic workers in the United States are the second most likely category of workers, after sex workers, to be subjected to forced labor and human trafficking.²⁷ As reported by Human Rights Watch in 2006, domestic workers are also often the victims of sexual violence in the homes where they work.²⁸ More frequent and equally as disturbing is the common, almost accepted practice, that domestic workers provide their labor for less than a livable wage.²⁹ Recently, domestic work industry surveys in New York and Maryland revealed widespread abuse of labor laws. In a survey of over five hundred domestic workers in New York City between 2004 and 2005, it was found that only thirteen percent of domestic workers earn a livable wage, despite the fact that a majority work full-time or more.³⁰ The same survey found that nearly sixty percent of domestic workers are the primary wage earners for their family, yet twenty-one percent of domestic worker families do not have enough food to eat.³¹ Finally, the surveys found that an overwhelming majority of domestic workers received no overtime pay despite New York and Maryland state law requiring overtime compensation.³²

The United States' consistent failure to ensure that domestic workers receive basic labor and employment protections under federal law has set a baseline for tolerance of abuse, exploitation and discrimination of these workers. As a consequence, the

²⁷ See Free the Slaves & Human Rights Center, Univ. of Cal., Berkeley, *Hidden Slaves: Forced Labor in the United States* 14 (2004).

²⁸ Human Rights Watch, *Swept Under the Rug* (2006), http://hrw.org/reports/2006/wrd0706/2.htm#_Toc139175326.

²⁹ A livable wage is a wage provided to an individual that is sufficient to meet her basic needs such as housing, food and health care. See generally *Home is Where the Work Is*, *supra* note 13, Ex. G(5).

³⁰ *Id.* at 2.

³¹ *Id.*

³² *Id.*; Montgomery County Council, *Working Conditions of Domestic Workers in Montgomery County, Maryland* (2006), available at <http://www.casademaryland.org/Reports.htm>.

poorest most vulnerable women of color in this country face the most exploitative and unprotected work environments.

B. Human Rights Abuses Suffered by Migrant Domestic Workers Employed by Diplomats

Although the numbers of A-3 and G-5 visas issued each year is diminishing,³³ the accounts of flagrant exploitation and abuse by diplomats of their domestic workers are more and more commonplace. In the last decade, such abuses have been increasingly reported, documented by human rights and legal organizations, and publicized in the media.³⁴ In 2001, Human Rights Watch released a report titled *Hidden in the Home* that documented the abuses of these workers and found that the average hourly salary in the cases it reviewed of migrant domestic workers on special visas (including A-3, G-5 and B-1 visas³⁵) in the United States was a mere \$2.14 per hour, including deductions for

³³ U.S. Dep't of State, *Table XVI(B), Nonimmigrant Visas Issued by Classification (Including Crewlist Visas and Border Crossing Cards), Fiscal Years 2002-2006*, available at <http://travel.state.gov/pdf/FY06AnnualReportTableXVIB.pdf> (demonstrating a significant drop in A-3 and G-5 visas issued each year from 2002 to 2006. In 2002, 1,971 A-3 visas were issued, whereas in 2006, only 1,017 A-3 visas were issued. Similarly, in 2002, 1,482 G-5 visas were issued, whereas in 2006, only 940 G-5 visas were issued.).

³⁴ See, e.g., ACLU, *Summaries of Cases Publicized in the Media, Reports and Court Filings*, Ex. H(2); *Hidden in the Home*, *supra* note 9, at 7-11, Ex. G(4) (case studies); *Diplomat Held Us as Suburban 'Slaves'*, *supra* note 7, Ex. H(6); Cauvin, *supra* note 7, at A12, Ex. H(7); King, *supra* note 7, at A21, Ex. A(4); Lena Sun, *supra* note 7, at A1, Ex. H(8) (reporting that a Bangladeshi maid working for a Bahraini diplomat in New York was never paid or allowed to leave the apartment until she was rescued by police; an Indian maid for a diplomat in Potomac, Maryland was paid \$100 for 4,500 hours of work over 11 months and physically and mentally abused; an Indonesian domestic servant employed by a diplomat at the United Arab Emirates Embassy in Washington, D.C. was physically abused, threatened with death, and underpaid); William Branigin, *Domestic Servants Protest Treatment*, Wash. Post, Sept. 29, 1999, at B4, Ex. H(10) (reporting that an Ethiopian domestic worker employed by an Ethiopian official of the International Monetary Fund (IMF) was paid 3 cents an hour for eight years of work and that a 22-year-old Ecuadorian woman was paid \$1 an hour during her employment for an IMF official); Martha Honey, *D.C.'s Indentured Servants*, The Progressive, Dec. 1997, Ex. H(11), available at http://www.findarticles.com/p/articles/mi_m1295/is_n12_v61/ai_20078650 (reporting that a Filipina domestic servant employed by an IMF official was paid \$230 per month for approximately sixteen hours a day, seven days a week); Sandra Evans & John Burgess, *supra* note 7, at D1, Ex. H(9) (reporting that a Thai domestic worker for a defense attaché to the Saudi Arabian Embassy in Washington, D.C. alleged exploitation after escaping from the diplomat's home by crawling out a window).

³⁵ The B-1 visa is issued to migrant domestic workers employed by diplomats when the diplomat is a U.S. citizen. See INA § 101(a)(15)(B); *Hidden in the Home*, *supra* note 9, at 4, Ex. G(4).

room and board – only forty-two percent of the median federal hourly minimum wage at the time of \$5.15.³⁶

The evident exploitation of domestic workers by diplomats in the United States has long been treated with concern in international fora and recognized as a serious human rights problem that demands international attention. In a report to the UNCHR in 2004, the Special Rapporteur on Migrant Workers described the vulnerability of migrant domestic workers employed by diplomats and urged the international community to act to protect the rights of these workers.³⁷ She cited specific cases involving women working for diplomatic staff or representatives of international organizations, emphasizing that domestic work must be recognized as “lawful employment which should bring with it appropriate legal protection.”³⁸ In 2005, two United Nations human rights experts (the Special Rapporteur on Racism and the Independent Expert on the Rights of Minorities) participated in a Domestic Workers Human Rights Tribunal to address the situation of domestic workers in the United States.³⁹ The Tribunal Members acknowledged the “appalling and unfair” working conditions of most migrant domestic workers and the even more exploitative consequences of providing diplomatic immunity to their employers.⁴⁰ In 2006, a report was sent by advocacy organizations to the United Nations Human Rights Committee outlining the human rights abuses occurring against these

³⁶ *Hidden in the Home*, *supra* note 9, at 1, Ex. G(4).

³⁷ *Migrant Workers*, *supra* note 4.

³⁸ *Migrant Workers*, *supra* note 4, ¶ 11.

³⁹ Final Statement of Tribunal Members, *supra* note 12.

⁴⁰ *Id.* ¶¶ 8, 10.

domestic workers in the United States, and describing the ways in which these abuses violate the International Covenant on Civil and Political Rights.⁴¹

On October 14, 2005, the Inter-American Commission on Human Rights also examined the situation of domestic workers employed by diplomats, hearing testimony from two domestic workers whose rights were violated by their diplomat employers and from a number of organizations representing domestic workers. During the thematic hearing, Commissioners expressed concern over the violations described and invited civil society groups to file a petition on behalf of affected individuals.

C. Petitioners

Individual Petitioners are former domestic workers employed by diplomats in the United States. Their stories, along with those documented by Organizational Petitioners, encompass the many types of exploitation and abuse to which these women are often subjected. These stories illustrate the common practice by diplomat employers to require their live-in migrant domestic workers to work long hours for paltry pay from the moment they wake until late into the night, often as much as sixteen to nineteen hours per day. They demonstrate a pattern of denying these workers a day of rest, depriving them of privacy, medical care, food, bathroom access, personal necessities, and/or the opportunity to practice their religion. These stories reveal the various tactics used by diplomat employers to limit workers' freedom of movement, such as confiscating their passports, forbidding workers' to leave the premises of their home alone or without their express permission, threatening the use of the immigration system to deport them or

⁴¹ Andolan, CASA of Maryland, et al., *Domestic Workers' Rights in the United States: A Report Prepared for the U.N. Human Rights Committee* (2006), Ex. G(2) [hereinafter "Shadow Report"], available at http://www.ohchr.org/english/bodies/hrc/docs/ngos/Domestic%20Workers%20report_%20Final.pdf.

physical harm to intimidate workers' from leaving the home or attempting to escape. Finally, these stories describe treatment including verbal insults and other degrading treatment, including in some cases physical and sexual violence.⁴²

Individual Petitioners came to the United States on either an A-3 or G-5 visa, special nonimmigrant employment visas issued to the live-in domestic workers of diplomats and employees of international organizations.⁴³ The A-3 visa is issued to domestic workers of ambassadors, diplomats, consular officers, public ministers and their family members.⁴⁴ The G-5 visa is issued to domestic workers of officers and employees of international organizations or of foreign missions to international organizations and their families.⁴⁵

The work of Organizational Petitioners to provide legal and social services to these workers attests to the widespread nature of these human rights abuses and the failure of the U.S. government to take reasonable steps to address this problem. The abuse and exploitation of domestic workers by diplomats has become so widespread in the Washington, D.C. area that Petitioner CASA of Maryland reports that fifty percent of the domestic workers who requested their services in the past three years were employed by diplomats. Between 1998 and 2004, CASA “rescued” more than 100 domestic workers, many of whom were employed by diplomats, from coercive labor situations.⁴⁶ In their work to assist and provide services to domestic workers, Petitioners CASA of

⁴² See ACLU, Summaries of Cases Publicized in the Media, Reports and Court Filings, Ex. H(2); ACLU, Table of Domestic Worker Cases Publicized in Media, Reports and Court Filings, Ex. H(1).

⁴³ International organizations include, *inter alia*, the United Nations, the World Bank, the International Monetary Fund, and the North Atlantic Treaty Organization (NATO).

⁴⁴ See, e.g., *Nonimmigrant Admissions (I-94 Only)*, *supra* note 1.

⁴⁵ Officers and employees of international organizations include “principals of recognized foreign governments,” “other representatives of recognized foreign governments,” “representatives of nonrecognized or nonmember foreign governments,” and “international organization officers or employees.” See, e.g., *Nonimmigrant Admissions (I-94 Only)*, *supra* note 1.

⁴⁶ Sun, *supra* note 7, at A1.

Maryland, Break the Chain Campaign and Andolan have encountered pervasive patterns of abuse by unscrupulous diplomats, a pattern reflected in Individual Petitioners stories and representative of numerous other accounts of similar abuse ranging from wage and hour violations to trafficking and forced labor.

1. *Individual Petitioners*

Petitioner Siti Aisah, a national of Indonesia, worked from October 1998 until March 2000 in the apartment of Mr. Ali Fahad Al-Hajri, the Ambassador to the Qatar Mission of the United Nations, his wife and six children in New York, NY. Ms. Aisah traveled to the United States on a G-5 visa.

As soon as Ms. Aisah arrived in the United States, the Al-Hajris confiscated her passport. On a normal day, Ms. Aisah worked fifteen or sixteen hours a day, and she was denied a single day of rest. Ms. Aisah was responsible for the cooking, cleaning, washing, ironing, and grocery shopping for the household. For this work, the Al-Hajris paid her a mere \$150 per month.

The Al-Hajris kept Ms. Aisah isolated from the outside world. They forbade her to speak to anyone, including their children. They used threats to prevent her from speaking to people outside the apartment. For the first year of her employment, the Al-Hajris would not permit Ms. Aisah to leave the apartment unaccompanied. They forbade her to use the telephone and only allowed Ms. Aisah to communicate with her family by mailing letters – a privilege for which the Al-Hajris charged her money. From her paltry salary, the Al-Hajris also required her to pay for her own basic toiletries. Finally, Ms. Aisah resolved to run away with the assistance of the organization Andolan, also a Petitioner here. Ms. Aisah considered taking legal action against the Al-Hajris, but

feared the consequences of taking action against such powerful individuals and was told that they were entitled to diplomatic immunity. Ms. Aisah was convinced that she would have no chance of recovering her wages and other compensation she was owed because of their diplomatic status.

Petitioner Hildah Ajasi, a national of Zimbabwe, worked in the home of Ms. Poppy Majingo, a diplomat of the Botswana Embassy, her husband and three children in the Washington, D.C. metropolitan area. Ms. Ajasi worked for Ms. Majingo for four years in Zimbabwe and one year in the United States. Ms. Ajasi traveled to the United States on a G-5 visa, although when she arrived, immigration officials found she had been issued the wrong visa, and issued her an A-3 visa. Ms. Ajasi and Ms. Majingo signed an employment contract that they presented with Ms. Ajasi's visa application at the U.S. Embassy in Zimbabwe. The Embassy gave Ms. Ajasi an unsigned copy to keep with her. The contract stated Ms. Ajasi would be given food, accommodations and \$6.80 an hour to work eight hours a day.

In September 2004, Ms. Ajasi began working for Ms. Majingo in the United States and provided cooking, cleaning, and childcare, including for a two-year old child. Ms. Ajasi worked sixteen hours a day and slept with Ms. Majingo's baby at night. She had no time off. She worked seven days a week. Ms. Ajasi had no vacation, holidays, or free time, and often did not even have time to eat lunch. During the only time she was not working at the house, she was required to clean the house of Ms. Majingo's friend once a month. Despite the wage promised in Ms. Ajasi's employment contract, which would have amounted to \$1088 per month, Ms. Majingo paid Ms. Ajasi only \$250.

Ms. Majingo isolated Ms. Ajasi in the house and restricted her ability to exercise her own religion. Ms. Majingo forbade Ms. Ajasi to leave the house alone, and used threats and intimidation tactics so that she would not dare to leave. Ms. Majingo required Ms. Ajasi to attend Ms. Majingo's Seventh Day Adventist church, even though Ms. Ajasi did not belong to that denomination. Ms. Majingo would only allow her to attend her own church on the condition that she bring the children with her.

During her employment, Ms. Ajasi suffered medical problems, but Ms. Majingo refused to provide her medical care, even though it was required by her employment contract.

Finally, after nearly a year, when Ms. Ajasi complained to Ms. Majingo's husband about her working conditions, Ms. Majingo yelled and screamed and told Ms. Ajasi she was an uneducated "slave." Ms. Majingo's yelling was so loud that it raised the concern of a neighbor.

Ultimately, Ms. Majingo bought Ms. Ajasi a plane ticket and attempted to send her back to Zimbabwe. Ms. Ajasi, however, hid in the airport and did not board the plane. Ms. Ajasi obtained legal assistance from Ayuda, a legal services organization in Washington, D.C., and subsequently from the organization, Break the Chain Campaign, also a Petitioner here. Her attorney at Break the Chain Campaign explained to her that Ms. Majingo was a diplomat who was entitled to diplomatic immunity and that a lawsuit would likely be dismissed by the courts. As a result, Ms. Ajasi did not bring a lawsuit against Ms. Majingo.

Petitioner Raziah Begum, a national of Bangladesh, worked for two and a half years, beginning in June 1997, in the apartment of Mr. F. A. Shamim Ahmed, the Deputy

Permanent Representative to the Bangladesh Mission to the United Nations, and his wife, in New York, NY. Ms. Begum does not know what type of visa she possessed to come to the United States because her employers confiscated her passport and believes she was required to sign an employment contract with her employers.⁴⁷

The Ahmeds treated Ms. Begum as a virtual slave. For two years, they confiscated her passport and forbade her to ever leave the premises of their apartment. As a result, for those two years, Ms. Begum never stepped foot outside the Ahmeds' apartment, despite her pleas to go outside. Ms. Begum worked tirelessly around the clock, typically from 6 a.m. until 9 or 10 p.m. or later, without a single day of rest. She performed all the cooking, cleaning and washing for the household and frequent guests. The Ahmeds denied her breaks during the day. In fact, the Ahmeds forbade her to sit anywhere in the apartment, except on a small stool in the kitchen. She was never allowed to eat at the table. Despite her backbreaking work, Ms. Begum's employers paid her nothing directly, sending a mere \$29 per month to her son in Bangladesh.

In addition, the Ahmeds forced Ms. Begum to sleep on the hard floor of their daughter's room with only a thin sari to sleep on and cover herself. When guests came to stay, they made Ms. Begum sleep under the dining room table where she could not be seen.

The Ahmeds isolated Ms. Begum from human contact and anyone who could assist her. When guests were present, they enclosed her in the kitchen so that she could not be seen or interact with the guests. Ms. Begum was never allowed to use the phone.

⁴⁷ Although Ms. Begum does not know with certainty what type of U.S. visa she possessed, she would have obtained a G-5 visa because her employer worked for a foreign mission to the United Nations. Ms. Begum is illiterate but she remembers that her employers had her sign something that she believes was an employment contract as part of the paperwork to apply for her U.S. visa.

Finally after two years, the Ahmeds permitted Ms. Begum to leave the apartment on a few occasions for thirty-minute intervals. During one of these brief episodes when she was allowed to leave the apartment, Ms. Begum met a woman who was a member of the organization Andolan, also a Petitioner here. This woman encouraged Ms. Begum to escape and assured her that Andolan would help her. With this assurance that she would be safe if she fled, Ms. Begum found the courage to escape. After escaping, Ms. Begum was told that the Ahmeds were entitled to diplomatic immunity and that, as a result, there was no way for her to recover the compensation she was owed. Thus, despite the slave-like conditions the Ahmeds subjected her to, Ms. Begum could not pursue legal action against them.

Petitioner Lucia Mabel Gonzalez Paredes, a national of Paraguay and resident of Argentina, worked for one year in the home of Mr. Jose Luis Vila, a diplomat in the Argentine Embassy, and his wife Ms. Monica Nielsen in the Washington, D.C. metropolitan area. Ms. Gonzalez Paredes possessed an A-3 visa and an employment contract that promised \$6.72 an hour, overtime compensation, and health insurance. When Ms. Gonzalez Paredes began working at her employer's house in April 2004, she was paid only \$500.00 a month, and she was denied the overtime compensation and health insurance that was promised to her.

Mr. Vila and Ms. Nielsen expected Ms. Gonzalez Paredes to work more than fifteen hours per day during the week, and nine hours per day on Saturdays. Ms. Gonzalez Paredes' workday began at 7 a.m. and her responsibilities included cleaning house, cooking, washing and ironing clothes and bed sheets, and caring for her employers' epileptic infant daughter. Ms. Gonzalez Paredes was also expected to

perform complex physical therapy on the infant child on a daily basis. Ms. Gonzalez Paredes was also responsible for attending to many other special needs pertaining to the child, including specialized food preparation and feeding methods, weighing and measuring the child's intake and outtake, massage therapy, monitoring the child's health condition, and helping the infant's physical therapist with her tasks.

Mr. Vila and Ms. Nielsen required Ms. Gonzalez Paredes to work from 7 a.m. to 10:30 p.m., Monday through Friday, and from 7 a.m. to 4 p.m. on Saturday. They did not require her to work on Sundays. When Ms. Gonzalez Paredes was hospitalized, Mr. Vila and Ms. Nielsen refused to pay the medical bills, forcing Ms. Gonzalez Paredes to cover them out of her meager salary. Mr. Vila falsified receipts reflecting wages for Ms. Gonzalez Paredes that she was never paid. Ms. Gonzalez Paredes knew the receipt amounts were false, but Mr. Vila coerced her into signing them. When Ms. Gonzalez Paredes requested additional pay or permission to seek other employment, Mr. Vila offered only \$50 more per month and refused her permission to seek outside employment. Ms. Gonzalez Paredes rejected this offer and, refusing to continue working under those conditions, left their home.

Ms. Gonzalez Paredes first sought legal advice from the organization CASA of Maryland, also a Petitioner here. For several months, CASA attempted to negotiate with Ms. Gonzalez Paredes' employer and the Embassy of Argentina, but was unable to reach a settlement. Ms. Gonzalez Paredes' case was then transferred to the International Human Rights Law Clinic at American University's Washington College of Law. On January 18, 2006, Ms. Gonzalez Paredes filed a complaint against Mr. Vila and Ms. Nielsen in the U.S. District Court for the District of Columbia. Mr. Vila and Ms. Nielsen

answered the complaint by asserting diplomatic immunity and sought to have the case dismissed. Ms. Gonzalez Paredes responded that the conduct of Mr. Vila and Ms. Nielsen with respect to her employment fell within the “commercial or professional activities” exception (“commercial activities exception”) to diplomatic immunity in Article 31(1)(c) of the Vienna Convention on Diplomatic Relations (“Vienna Convention”). The District Court requested the opinion of the U.S. Department of State on the application of the “commercial activities” exception. The Department of State intervened to assert that the commercial activities exception to diplomatic immunity in Article 31(1)(c) of the Vienna Convention does not apply to the private employment by a diplomat of a live-in domestic worker. Relying on the views of the Department of State and the findings in *Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996), a case decided in the Court of Appeals for the Fourth Circuit, the Court dismissed Ms. Gonzalez Paredes’ case, holding that Mr. Villa and Ms. Nielsen were immune from suit.

Petitioner Otilia Luz Huayta, a national of Bolivia, worked in the home of a Bolivian diplomat in Maryland.⁴⁸ Ms. Huayta possessed an A-3 visa and signed an employment contract with her employer that required her to be paid the U.S. minimum wage.

Ms. Huayta lived in the home of her diplomat employer with her twelve-year-old daughter Carla. Her employers expected her to work over fifteen hours each day, waking at 6:45 a.m. every morning and finishing her work at 11:00 p.m. each night. Ms. Huayta was required to work every day of the week with no break for the weekends, holidays, or vacation. Her employers allowed her virtually no moment for rest. Her responsibilities

⁴⁸ Due to the terms of a settlement agreement with her employers, Ms. Huayta is prohibited from revealing certain information about her employers.

included cooking, cleaning, serving food to the family, taking care of her employer's four-year-old child, and performing any other chore that was required in the household. The employers expected Carla, Ms. Huayta's daughter, to help with these chores. For all this work, the employers paid Ms. Huayta \$200 per month, a fraction of the amount that had been promised in the contract, and paid Carla \$20 per month. In addition, Ms. Huayta's employer required her to care for the children and clean the home of her friends.

The employers isolated Ms. Huayta and Carla and deprived them of their privacy. They required them to sleep on cots in a six-foot wide hallway in the basement, next to the bedroom of the employer's teenage son. The employers used threats and intimidation to prevent Ms. Huayta from leaving the house. They banned Ms. Huayta from talking on the telephone and forbade her to make or receive phone calls. In order to communicate with her daughter's teachers, Ms. Huayta was forced to send written notes through her daughter. When the employers learned that Ms. Huayta was dissatisfied with her working conditions and wages, the employers confiscated her passport and threatened to deport her if she complained.

The employers subjected Ms. Huayta and Carla to degrading treatment. The employers forbade them to eat at the kitchen table, did not allow Ms. Huayta and Carla to eat the same food as the family, and often accused them of stealing food from the family.

Ms. Huayta was rescued through the assistance of Carla's schoolteacher who had noticed Carla's meager lunches and became aware of the conditions in the household. With the help of police and advocates at the organization CASA of Maryland, also a Petitioner here, Ms. Huayta and Carla finally escaped their employment in June 2006.

Ms. Huayta obtained legal counsel through CASA of Maryland, but was advised that her employer had diplomatic immunity and, as a result, that she had little chance of success for bringing claims against her employer in court. Instead, with the help of CASA, Ms. Huayta pursued an alternative strategy by requesting the intervention of the Bolivian Embassy, the Bolivian Ambassador, Gustavo Guzman, and the Bolivian Minister of Justice, Casimira Rodriguez. With the assistance of the Embassy and these individuals, Ms. Huayta's employer agreed to an out-of-court settlement for Ms. Huayta's wages on the condition that her employers names remain confidential. CASA attorneys also filed complaints with the Department of State, U.S. Immigration and Customs Enforcement, and the Montgomery County Police Department but received no response from these agencies.

Petitioner Susana Ocares, a national of Chile, worked for approximately a year and a half in the home of a diplomat employed by the Chilean Embassy in the Washington, D.C. metropolitan area. Ms. Ocares possessed an A-3 visa and a signed employment contract guaranteeing a minimum wage of \$6.15 an hour, overtime compensation, and one day of rest per week.

Ms. Ocares performed the cooking, cleaning, and childcare for her employer's household. On a typical day, Ms. Ocares worked about twelve hours a day. Although she began work each day at 7:40 a.m., there was no set end time to her work. Ms. Ocares was required to work at least one Sunday per month and sometimes more. Ms. Ocares' employer paid her \$950 per month, the minimum wage for forty hours per week of work. However, he never compensated her for her overtime hours.

Ms. Ocares' employers subjected her to insults and degrading treatment, such as falsely accusing her of taking food from the house and treating her as property that could be lent out for work for friends of the employer's family.

While she was still employed, Ms. Ocares sought legal advice from CASA of Maryland. CASA attorneys told her that her employer could claim immunity from suit due to his diplomatic status. On August 20, 2007, Ms. Ocares' employer threw her out of the house without any money or a place to go. Ms. Ocares is eager to reclaim the estimated \$25,000 in overtime wages she is owed.

2. *Organizational Petitioners*

Andolan - Organizing South Asian Workers is a not-for-profit, membership-based organization that advocates and organizes on behalf of low-wage, immigrant South Asian workers. Andolan was founded in 1998 in New York City by South Asian domestic workers. Andolan's members are primarily domestic workers as well as workers in restaurants and retail stores from Bangladesh, Pakistan, India, Nepal and Sri Lanka. Andolan provides support and resources to the South Asian worker community through a combination of education, peer exchange, community organizing, and litigation. In collaboration with pro bono attorneys, Andolan assists members to file lawsuits against abusive employers. Such cases have included violations of federal and state minimum wage laws, sexual harassment, and assault and false imprisonment.

In the past nine years, Andolan has organized more than 110 workers in the New York City area and assisted approximately one-third of them to seek redress in cases of workplace abuse and exploitation. Andolan has been involved in thirteen cases of domestic workers employed by diplomats and in 2002 launched a Diplomatic Immunity

Campaign to draw public attention to the issue. Given the imbalance of negotiating power and the jurisdictional barriers when diplomats have immunity, Andolan members have found it difficult to pursue lawsuits and have had to accept negotiated settlements as their best option. In seven out of thirteen cases, the worker has received absolutely no redress at all, despite documentation of exploitative working conditions and payment well below the minimum wage. The U.S. State Department has not provided effective interventions in these cases. For example, even when Andolan met with the State Department in regard to a domestic worker who had filed a lawsuit against his diplomat employer, no follow-up action was taken. The employer was shielded by diplomatic immunity and the worker lost his case.

Break the Chain Campaign (“BTCC”) of the Institute for Policy Studies, a non-profit organization, is a direct service and advocacy organization program dedicated to the empowerment and protection of trafficked, enslaved and/or exploited workers, primarily domestic workers. BTCC grew out of a six-month investigation and public forum in 1997 that revealed the extent of the abuse experienced by migrant domestic workers in the Washington, D.C. metropolitan area at the hands of diplomats and employees of the World Bank and the International Monetary Fund. Over twenty-five organizations based in Washington, D.C., came together in this effort. Presently, BTCC provides case management, legal services and social services to trafficked and exploited workers, most of whom are female domestic workers. BTCC has provided services to more than 150 exploited or trafficked domestic workers from Asia, Africa, Europe and Latin America. Diplomats and employees of international organizations exploited a vast majority of these workers. Currently, BTCC has 10 clients (representing 90 percent of

their clients) who are domestic workers exploited by diplomats and employees of international organizations.

BTCC has been unsuccessful in assisting these clients in accessing their rights to civil remedies because their claims are barred by diplomatic immunity under present U.S. law. BTCC, pro bono counsel and BTCC clients themselves have attempted to obtain justice through various legal and administrative means, but have been barred by the defendant's diplomatic immunity or have received very limited compensation in out-of-court settlements. For example, one trafficked client exploited by a diplomat received \$700, her passport and a few possessions after the intervention of the U.S. State Department and the Embassy of the diplomat. For a year, this client worked more than 10 hours a day, every day of the week, and received less than \$150 a month. The employer continued to work at the Embassy with no consequences.

CASA of Maryland, Inc. ("CASA") is a non-profit organization advancing immigrant rights in Maryland. CASA, which was founded in 1985, provides a wide range of social, educational and advocacy services, including legal services for low-wage immigrant workers. In particular, CASA's attorneys have represented hundreds of domestic workers since the early 1990s, many of whom have worked for diplomats and many of whose exploitation was so egregious that it rose to the level of human trafficking. In the last three years, approximately fifty percent of domestic workers seeking legal representation from CASA were exploited by diplomats. CASA attorneys and organizers currently work with ten women who were brought to the United States by diplomats to work as nannies and housekeepers in the homes of diplomats. Six of these

women are victims of human trafficking, laboring in involuntary servitude through a combination of psychological coercion and physical abuse.

In not one of these ten current cases has CASA been able to secure justice for its clients because of diplomatic immunity. Despite going to great lengths to negotiate with the diplomats and their respective embassies, negotiations in these cases are hampered by the diplomats' knowledge that a lawsuit is unlikely to succeed. Even when CASA files lawsuits, as it did recently against a Tanzanian diplomat, the lawsuits are either dismissed or result in a default judgment, but even default judgments are unenforceable because of diplomatic immunity. CASA therefore routinely encourages clients to accept settlement offers that represent only a fraction of the money owed to the worker, knowing that the worker has few other realistic options available to her.

D. Lack of Accountability of Diplomats

Despite documented wide-ranging abuse, the U.S. government has interpreted the diplomatic immunity of diplomat employers to create a complete bar to any enforcement of the rights of the domestic workers who labor for them. As a consequence, the U.S. facilitates the entrance of nearly 3,000 women each year⁴⁹ who cannot enforce their rights and to whom the United States offers scant protection from abuse. Through the A-3 and G-5 visas system, the United States has created a class of individuals who fall entirely outside the scope of government protection and the law. These domestic workers can be subjected to the worst forms of human rights abuses, including slavery, without repercussion from the United States legal system.

⁴⁹ The United States grants almost 3,000 A-3 and G-5 special visas to domestic workers employed by diplomats and special representatives. *Nonimmigrant Admissions (I-94 Only)*, *supra* note 1; *see also Hidden in the Home*, *supra* note 9, at 4, Ex. G(4) (reporting that in the 1990's, over 30,000 visas were issued to domestic workers to work for diplomatic employers and officials of international organizations).

The legal instrument that purportedly justifies the U.S. failure to protect domestic workers from abuse by their diplomat employers is the Vienna Convention on Diplomatic Relations (“Vienna Convention”), a multi-party treaty that sets forth the terms and conditions of the signatories’ diplomatic presence throughout the world. Under the Vienna Convention, “diplomats,” defined as “the head of the mission or a member of the diplomatic staff of the mission,”⁵⁰ are entitled to immunity from the criminal, civil and administrative jurisdiction of the legal system of the United States, including law enforcement and the judicial system.⁵¹ The United States extends the same privileges and immunities of diplomats set forth in the Vienna Convention to the permanent representatives, ambassadors and ministers of foreign nations to the United Nations.⁵² The United States also extends this immunity to diplomats of foreign states that are not party to the Vienna Convention.⁵³

The United States guarantees these diplomats and foreign representatives absolute immunity from the criminal jurisdiction of the United States, subject to no exceptions, and it guarantees a restrictive immunity to the civil and administrative jurisdiction, subject to three exceptions for actions relating to immovable property, succession of

⁵⁰ Vienna Convention, *supra* note 6, art. 1(e).

⁵¹ *Id.* at art. 31.

⁵² Under an agreement between the U.S. and the U.N., these individuals are “entitled in the territory of the United States to the same privileges and immunities, subject to corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it.” Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, Ch. 482, Art. V, § 15, 61 Stat. 756 (1947) [hereinafter U.N. Headquarters Agreement]; see *Ahmed v. Hoque*, No. 01 Civ. 7224, 2002 WL 1964806, at *5 (S.D.N.Y. Aug. 23, 2002), Ex. C(1) (noting that U.N. representatives and ministers are accorded full diplomatic immunity under the Vienna Convention, while staff members and employees of the U.N. are accorded only functional immunity). In addition, the U.S. accords permanent observers to the Organization of American States (OAS) and their staffs, and representatives of OAS member nations and their staffs “the same privileges and immunities, subject to corresponding conditions and obligations, as are enjoyed by diplomatic envoys accredited to the United States.” Exec. Order No. 11931, 41 Fed. Reg. 32689 (Aug. 3, 1976).

⁵³ 22 U.S.C. § 254(b) (2006).

property, and professional or commercial activities.⁵⁴ Domestic workers employed by diplomats can only obtain civil recourse through the courts if either an exception to civil or administrative immunity applies, or if the Department of State requests and receives an express waiver of immunity from the employer's sending state.⁵⁵ The Vienna Convention also affords a separate immunity from execution of civil judgments.⁵⁶ In order to execute a civil judgment, the action must either fall within one of the three exceptions or the Department of State must request and receive a separate waiver of immunity from the employer's sending state.⁵⁷

1. *Consequences of Criminal Immunity for Domestic Workers*

Immune from criminal liability, a diplomat cannot be held criminally accountable for even the most heinous unlawful behavior towards his domestic worker including human trafficking, slavery and involuntary servitude, assault and battery. Moreover, in addition to receiving absolute immunity to the criminal jurisdiction of the receiving state, the person, residence and property of a diplomatic agent enjoy inviolability. This means that a diplomat is not "liable to any form of arrest or detention,"⁵⁸ and "neither their property nor residences may be entered or searched."⁵⁹ They also cannot be required to provide evidence as witnesses or to testify.⁶⁰

The result of this inviolability is that law enforcement is significantly hindered, if not precluded, from protecting domestic workers against violence in the home of a

⁵⁴ Vienna Convention, *supra* note 6, art. 31(1).

⁵⁵ *Id.* at art. 32.

⁵⁶ *Id.* at art. 31(3).

⁵⁷ *Id.* at arts. 31(3), 32(4).

⁵⁸ *Id.* at art. 29.

⁵⁹ 2 FAM 232.1-1(a) (2006), *available at* <http://www.state.gov/documents/organization/84395.pdf>; Vienna Convention, *supra* note 6, arts. 22, 31.

⁶⁰ 2 FAM 232.1-1(a).

diplomat or conducting any investigation of allegations of abuse. Police are prohibited from entering the premises of a diplomat's home when responding to emergency services (911) calls reporting crimes of violence. If a domestic worker is in distress in the home of a diplomat and calls 911, police are not empowered to assist her unless she is able to remove herself from the premises and control of the diplomat. Law enforcement also faces prohibitive challenges to their ability to criminally investigate diplomats who commit trafficking or other crimes against their domestic workers. Because the abuses that domestic workers experience generally occur inside the homes of their employers and rarely in the presence of any witnesses, other than the employer's family members, law enforcement are hamstrung in their efforts to investigate and collect evidence.⁶¹

As a result, law enforcement are reticent to initiate criminal investigations in these cases, and when they do, are often unable to uncover and amass sufficient evidence to enable them to decide to prosecute. Of course, even if investigators were to discover evidence amounting to probable cause to prosecute, diplomatic immunity poses a second and, generally, insurmountable hurdle to prosecution. A diplomat can only be criminally prosecuted if his sending state waives his immunity.⁶² In the event that the sending state

⁶¹ See, e.g., Office to Monitor & Combat Trafficking in Persons, Under Sec'y for Democracy & Global Affairs, Dep't of State, *Trafficking in Persons Report 2007* 15 (Jun. 2007) [hereinafter *TIP Report*].

⁶² It is the policy of the Department of State with respect to criminal conduct by persons with immunity that in all cases where a prosecutor informs the State Department that he or she would prosecute absent immunity, the Department will formally request a waiver of criminal immunity from the sending state in order to allow for prosecution. 2 FAM 233.3(a)(2) (2006), available at <http://www.state.gov/documents/organization/84395.pdf>; U.S. Dep't of State, Diplomatic Circular Note at 4 (May 20, 1996) [hereinafter Diplomatic Circular Note 1996], Ex. D(3), available at <http://www.state.gov/documents/organization/32298.pdf>; *TIP Report*, supra note 61, at 15. Organizational Petitioners know anecdotally or first-hand, through cases they have handled, that the Department of Justice has criminally investigated a handful of cases of diplomats for crimes perpetrated against their domestic workers. Petitioners are aware of only one instance in which the State Department formally requested a waiver of immunity in a domestic worker case. In that case, the State of Kuwait denied the waiver and repatriated its diplomat and his wife back to Kuwait. The State Department did not declare the individuals *persona non grata*, but forbids them from reentering the United States. Letter from Robert Moosy, Dir.,

refuses to waive the immunity of the offending diplomat, the Department of State’s only remaining recourse is to declare the diplomat *persona non grata* and/or oblige the diplomat to leave the United States and not permit him or her to return, “unless [he or she] submit[s] fully to the jurisdiction of the U.S. court with jurisdiction over the offense.”⁶³ To date, no diplomat who has exploited a domestic worker has ever been prosecuted for his actions or declared *persona non grata* by the Department of State.⁶⁴

2. *Consequences of Civil Immunity for Domestic Workers*

According to the U.S. interpretation of the civil immunity provision under the Vienna Convention, migrant domestic workers employed by diplomats are also completely barred from claiming their rights through civil actions in U.S. courts. Unlike the criminal immunity afforded to diplomats, civil immunity is not absolute but subject to three exceptions.⁶⁵ The most relevant exception provided in the Vienna Convention, the commercial activities exception, states that diplomats are not immune to civil actions “relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.”⁶⁶ The Department of State and, as a result, United States courts, however, have interpreted this exception as inapplicable to a

Human Trafficking Prosecution Unit, Dep’t of Justice, to Claudia Flores, Staff Attorney, Women’s Rights Project, ACLU (Oct. 31, 2007) (on file with ACLU).

⁶³ 2 FAM 233.3(a)(3), (a)(5), available at <http://www.state.gov/documents/organization/84395.pdf>; *TIP Report*, *supra* note 61, at 15; Responses to Written Questions from Grace Chung Becker, Deputy Assistant Attorney General for the Civil Rights Div., U.S. Dep’t of Justice to the Record in the Hearing “Legal Options to Stop Trafficking” of the Subcommittee on Human Rights and the Law of the U.S. Senate Committee on the Judiciary (Jun. 7, 2007), Ex. E(2) [hereinafter Becker, Responses to Written Questions] (on file with ACLU).

⁶⁴ Petitioners’ conclusions are based on data compiled from their various cases and on publicly available information. The U.S. Department of Justice claims it does not maintain data “tracking the number of investigations implicating foreign diplomats with immunity, the number of requests for waivers of immunity, or the results of any such requests” nor does it maintain data on the “imposition of *persona non grata* designation.” Becker, Responses to Written Questions, *supra* note 63, Ex. E(2).

⁶⁵ Vienna Convention, *supra* note 6, art. 31(1).

⁶⁶ *Id.* at art. 31(1)(c).

diplomat's employment relationship of a domestic worker, no matter how exploitative and profitable the conduct.⁶⁷ In cases brought by domestic workers where questions of diplomatic immunity have arisen, the Department of State has intervened to assert the immunity of the diplomat.⁶⁸ U.S. courts give "substantial deference" to the conclusions of the State Department.⁶⁹ Consequently, attempts by domestic workers to challenge the interpretation of the commercial activities exception or to argue that the Vienna Convention does not apply have consistently been rejected.

In the first case to confront this issue, *Tabion v. Mufti*, the U.S. Court of Appeals for the Fourth Circuit found that the employment relationship between a diplomat and a domestic worker did not fall within the commercial activities exception to immunity.⁷⁰ The plaintiff in that case, a domestic worker from the Philippines, argued that the domestic service she provided to her diplomat employers amounted to commercial activity exercised outside the scope of the official functions of her diplomat employer.⁷¹ She alleged an array of claims including federal and hour violations, breach of contract, intentional misrepresentations in employment, false imprisonment, and violations of 42 USC §§ 1981 and 1985(3).⁷² Relying on a Statement of Interest of the United States submitted to the Court by the Departments of State and Justice, the *Tabion* Court adopted the executive branch's interpretation that the commercial activity exception "focuses on the pursuit of trade or business activity; it does not encompass contractual relationships for goods and

⁶⁷ See *Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996), Ex. C(1); *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187 (D.D.C. 2007), Ex. C(1).

⁶⁸ See *Ahmed*, 2002 WL 1964806, at *2, Ex. C(1).

⁶⁹ See *Tabion*, 73 F.3d at 538, Ex. C(1).

⁷⁰ *Id.* at 535.

⁷¹ *Id.* at 537.

⁷² *Id.* at 535.

services incidental to the daily life of the diplomat and family in the receiving State.”⁷³ The Court concluded that “commercial activity,” as it appears in the exception, “was intended by the signatories to mean ‘commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.’”⁷⁴ The Court reasoned that “day-to-day living services such as dry cleaning or domestic help” were not outside a diplomat’s official functions because they are services “incidental” to the daily life of a diplomat.⁷⁵ Having concluded that the commercial activities exception is inapplicable to the entire category of domestic worker and diplomat employment relationships, *Tabion* effectively foreclosed any domestic worker claims for civil relief under the exception to immunity.

Since *Tabion* was decided, a few domestic workers have attempted to challenge the narrow interpretation of the commercial activities exception. In each case where a court has decided diplomat employers’ motions to dismiss on diplomatic immunity grounds, the courts have applied the *Tabion* interpretation of the commercial activities exception.⁷⁶ In the recent case of Petitioner Mabel Gonzalez Paredes, the U.S. District Court for the District of Columbia adopted the interpretation of the commercial activities exception of the executive branch and the reasoning and holding in *Tabion*, to find that Petitioner Gonzalez Paredes’ diplomat employer and his wife were protected from her claims of wage and hour exploitation, among other claims. In its filing in *Gonzalez*

⁷³ *Id.* at 538.

⁷⁴ *Id.*

⁷⁵ *Id.* at 539.

⁷⁶ *Gonzalez Paredes*, 479 F. Supp. 2d 187 (D.D.C. 2007), Ex. C(1); *Crum v. Kingdom of Saudi Arabia*, No. 05-275, 2005 WL 3752271, at *4 (E.D.Va. July 13, 2005), Ex. C(1) (finding that where the Plaintiff was employed as a chauffeur for the Ambassador, the Plaintiff’s job, like the domestic worker in *Tabion*, “consisting of driving the Ambassador, his family, staff, and guests, from place to place, was incidental to daily life and Defendants are therefore immune from claims arising out of those duties”).

Paredes v. Vila, the Departments of State and Justice reiterated the position it first articulated in *Tabion* that

[D]iplomats engaged in ‘professional or commercial’ activity within the meaning of the Diplomatic Relations Convention when they engage in a business, trade or profession for profit. When diplomats enter into contractual relationships for personal goods or services incidental to residing in the host country, including the employment of domestic workers, they are not engaging in ‘commercial activity’ as that term is used in the Diplomatic Relations Convention. Accordingly, diplomats are immune from suits arising out of such contractual relationships.⁷⁷

In dismissing Ms. Gonzalez’s complaint, the Court acknowledged that “in upholding defendants’ claim of diplomatic immunity from suit, the Court recognizes that it is leaving plaintiff without recourse.”⁷⁸

Domestic workers have also attempted to argue that the Vienna Convention cannot shield claims of constitutional and customary international law violations of slavery and involuntary servitude. In *Ahmed v. Hoque*, a domestic worker alleging violations of slavery under the U.S. Constitution and international law, argued that a treaty-based immunity defense could not deprive him of his constitutional right to be free from involuntary servitude and that his customary international law claims abrogated diplomatic immunity under the Vienna Convention.⁷⁹ The Court found, however, that his claims did not override or modify properly asserted diplomatic immunity.⁸⁰

Because courts unanimously held that diplomats are immune to suit, in most cases diplomats do not even bother to respond to domestic worker complaints, court orders or otherwise make any appearances.⁸¹ In the case of *Swarna v. Al-Awadi*, an Indian

⁷⁷ Statement of Interest of the United States at 14, *Gonzalez Paredes*, 479 F. Supp. 2d 187 (D.D.C. 2007), Ex. C(1).

⁷⁸ *Gonzalez Paredes*, 479 F. Supp. 2d at 195, Ex. C(1).

⁷⁹ *Ahmed*, 2002 WL 1964806, Ex. C(1).

⁸⁰ *Id.* at *8, Ex. C(1).

⁸¹ Order, *Mazengo v. Mzengi*, Civ. Action No. 07-756 (D.D.C. Oct. 1, 2007) (granting Plaintiff’s motion for default judgment).

domestic worker sued her employer, a diplomat attaché to the Kuwaiti Mission to the United Nations, for slavery, slavery-like practices, and physical and sexual assault.⁸² In that case, the defendants never responded to the pleadings.⁸³ Instead, the Charge d’Affairs of the Kuwaiti Mission communicated to the Court “that the defendants were not participating in the lawsuit because Mr. Al-Awadi ‘is a Kuwaiti diplomat accredited to the U.N. and is entitled to full diplomatic immunity.’”⁸⁴ A subsequent letter to the Court from an attorney communicating on behalf of the defendants stated that Mr. Al-Awadi “‘has no intention of submitting any motion or taking any other action. He intends to rely on his diplomatic immunity with regard to the above case.’”⁸⁵ Despite the fact that the Defendants never responded to or contested the pleadings, the Court in that case nevertheless dismissed the case after the U.S. Government intervened to certify the defendants’ immunity and recommended dismissal of the action.⁸⁶ Two other domestic worker cases, *Velasco v. Peña* before the District Court of the Eastern District of Virginia⁸⁷ and *Mazengo v. Mzengi, et al.* before the District Court of the District of Columbia,⁸⁸ ended in default judgment because the diplomat defendants failed to respond to the pleadings or make any appearances.⁸⁹ In June 2007, in the *Velasco* case, the plaintiff was awarded \$43,486 plus attorney’s fees and costs, but has been unable to

⁸² Complaint, *Swarna v. Al-Awadi*, No. 06cv4880, (S.D.N.Y. filed June 2006).

⁸³ Report and Recommendation at 3-6, *Swarna v. Al-Awadi*, 02 Civ. 3710 (S.D.N.Y. 2005).

⁸⁴ *Id.* at 5.

⁸⁵ *Id.* at 5.

⁸⁶ *Id.* at 2.

⁸⁷ See Complaint, *Velasco Bone v. Peña*, No. 1:07cv147 (E.D.Va. filed in Feb. 2001).

⁸⁸ See Complaint, *Mazengo v. Mzengi*, No. 07-756 (D.D.C. filed in Apr. 2007).

⁸⁹ Order, *Mazengo v. Mzengi*, No. 07-756 (D.D.C. 2007) (granting Plaintiff’s Motion for Default Judgment); Default Judgment and Order, *Velasco v. Peña*, No. 1:07cv147 (E.D.Va. 2007).

recover any of that money from the diplomat Defendants.⁹⁰ In the *Mazengo* case, the Court has ordered a damages trial to commence on December 7, 2007, however the diplomat Defendant is scheduled to return to Tanzania in December 2007.⁹¹ As a result, it will be nearly impossible for the Plaintiff to recover her damages owed from the diplomat through the judicial process.

Furthermore, assuming they are entitled to diplomatic immunity, the defendants in *Velasco* and *Mazengo* can still avoid liability at any time by asserting immunity. Even where a diplomat has participated in a lawsuit, the diplomat or the Department of State is free to raise immunity at any point, which consequently results in dismissal of the case. For example, in *Nchang v. Nyamboli*, the diplomat Defendant failed to raise the defense of diplomatic immunity during the proceedings of a case against him. Although Ms. Nchang, a Cameroonian domestic worker, was severely abused by and compelled to work for a year without any pay by Mr. Nyamboli, a diplomat from Cameroon, she sought only to reclaim her confiscated passport and birth certificate from Nyamboli's possession.⁹² Ms. Nchang won the civil suit to reclaim her passport and birth certificate and the Court awarded her \$1,000 in damages.⁹³ However, after the decision, the diplomat raised the defense of diplomatic immunity and the Department of State certified the diplomat's

⁹⁰ Default Judgment and Order, *Velasco v. Peña*, No. 1:07cv147 (E.D.Va. 2007); Interview with Jayesh Rathod, Practitioner-in-Residence, Int'l Human Rights Law Clinic, Am. Univ. Wash. Coll. of Law (Oct. 10, 2007).

⁹¹ E-mail from Martina Vandenberg, Counsel for Plaintiff Mazengo, Jenner & Block, to Jennie Pasquarella, Staff Attorney/ Kroll Family Human Rights Fellow, Women's Rights Project, ACLU (Oct. 21, 2007, 4:22 PM EST) (on file with ACLU).

⁹² Form Complaint, *Nchang v. Nyamboli* (D.Md. 2005), Ex. C(1).

⁹³ Judgment, *Nchang v. Nyamboli*, Civ. No. 0502-0001794-2005 (D.Md. 2005), Ex. C(1).

entitlement to immunity.⁹⁴ As a result, the Court vacated its judgment, depriving Ms. Nchang of her right to reclaim her passport and recover awarded damages.⁹⁵

Diplomatic immunities and privileges, and particularly the interpretation of the exception to civil immunity under the Vienna Convention affording diplomats blanket immunity for all domestic worker complaints, has ensured that migrant domestic workers employed by diplomats labor outside the law, unprotected from criminal conduct and unable to defend and redress their rights. Despite the Vienna Convention's clear mandate that "it is the duty of all persons enjoying such privileges and immunities to respect the laws of the receiving State,"⁹⁶ the U.S. has allowed diplomats to abuse domestic workers and deprive them of their basic rights with impunity.

E. U.S. Government Policies, Procedures and Guidelines Regarding Special Migrant Domestic Worker Visas

In order for domestic workers to obtain an A-3 or G-5 visa, the special nonimmigrant visas issued to the live-in domestic workers of diplomats and employees of international organizations, they must initially apply for the visas at United States embassies abroad.⁹⁷ The nearly 3,000 A-3 and G-5 visas issued each year are granted for a period of one to three years and can be renewed in two-year increments.⁹⁸ As a result,

⁹⁴ Certification Letter from Holly S. G. Coffey, Acting Assistant Chief of Protocol, Department of State, to the District Court of Maryland for Prince George's County, *Nchang v. Nyamboli*, Civ. No. 0502-0001794-2005 (D.Md. Apr. 2005), Ex. C(1).

⁹⁵ Judgment Stricken/Vacated Notice, *Nchang v. Nyamboli*, Civ. No. 0502-0001794-2005 (D.Md. 2005), Ex. C(1).

⁹⁶ Vienna Convention, *supra* note 6, art. 41(1).

⁹⁷ See 9 FAM 41.21 PN10.1-1 (2001), available at <http://www.state.gov/documents/organization/87175.pdf>.

⁹⁸ See *Hidden in the Home*, *supra* note 9, at 4, Ex. G(4).

the number of A-3 and G-5 visa holders present in the United States greatly exceeds the number of individuals granted such visas.⁹⁹

Currently, the A-3 and G-5 visas are premised on two basic requirements: 1) the visa is conditioned on the worker's employment with the diplomat and valid only so long as a worker remains in the employ of the diplomat sponsor¹⁰⁰ and 2) the domestic worker and diplomat must execute an employment contract with certain terms and conditions as specified by the U.S. government.¹⁰¹ The first requirement ties the domestic worker's lawful immigration status to her employment with the diplomat who sponsors her visa.¹⁰² According to the State Department, its unofficial practice is that "[i]f a G-5 or A-3 domestic worker leaves her job and wishes to transfer to a new qualified employer in the United States" she can "do so prior to expiration of the time period for which she was initially admitted to the United States *and* within 'generally thirty days' after leaving her original employer."¹⁰³ However, information regarding this practice is not provided to A-3 and G-5 visa recipients or their employers, thereby perpetuating the belief of domestic workers that they will lose their immigration status if they forfeit or escape their employment due to exploitative work conditions.¹⁰⁴ Petitioners are aware of no domestic worker who has requested a change of employer or been allowed to do so. The perception that domestic workers must remain with their employer to maintain valid immigration status created by the U.S. government's failure to adopt its unofficial

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 22.

¹⁰¹ 9 FAM 41.21 N6.2(a) (2001), available at <http://www.state.gov/documents/organization/87174.pdf>.

¹⁰² 9 FAM 41.21 N6.2(a)(2).

¹⁰³ *Hidden in the Home*, *supra* note 9, at 26, Ex. G(4).

¹⁰⁴ *Id.*

practice as official policy as well as educate workers as to this possibility, renders these workers extremely vulnerable to abuse.¹⁰⁵

The second relevant requirement of the special visas is that domestic workers must present an employment contract with their application signed by the diplomat employer and the domestic worker guaranteeing basic wages and working conditions.¹⁰⁶ Unlike other temporary employment-based visas, the mandatory employment contract and conditions of employment for domestic workers on A-3 and G-5 visas are currently not established in U.S. law or regulations.¹⁰⁷ Rather, they are set forth in the internal code of policies for the Department of State and the Foreign Service, the Foreign Affairs Manual (FAM), and Department of State Circular Diplomatic Notes.

These policies contain a few basic requirements upon which the granting of a visa is conditioned. Namely, the diplomat must guarantee that he will pay the “domestic’s initial travel expenses to the United States, and subsequently to the employer’s onward assignment, or to the employee’s country of normal residence at the termination of the assignment.”¹⁰⁸ Further, the FAM instructs consular officers charged with issuing visas to refuse an A-3 or G-5 visa application where the applicant does not submit an employment contract, the contract does not guarantee a fair or lawful wage or working conditions, or where the officer has reason to believe the employer will not comply with

¹⁰⁵ *Id.* In a 2004 report, the U.N. Special Rapporteur on the human rights of migrants observed that migrant domestic workers are “an extremely vulnerable category” of workers, noting that “Host country legislation and recruitment methods often leave such workers heavily dependent on the employer, particularly when legal residence in the country depends on the work contract. Debts in their countries of origin put heavy pressure on migrant domestic workers, who generally prefer not to report abuses for fear of being dismissed and repatriated. The practice of withholding migrant domestic workers’ papers contributes to their dependency and helplessness in the face of abuse and violations.” *Migrant Workers*, *supra* note 4, ¶ 6.

¹⁰⁶ 9 FAM 41.21 N6.2(a).

¹⁰⁷ *See Hidden in the Home*, *supra* note 9, at 24, Ex. G(4).

¹⁰⁸ 9 FAM 41.21 N6.2(d).

the contract.¹⁰⁹ This contract must be presented in English and a language understood by the domestic worker.¹¹⁰ Two copies are required: one for the domestic worker and one for the employer.¹¹¹

The required contract contains only four mandatory substantive provisions. First, it must guarantee that the employee is paid at the state or federal minimum or prevailing wage, whichever is greater.¹¹² Consular officers are instructed to refuse A-3 and G-5 visas if the agreed wage falls below the minimum or prevailing wage because of employer deductions for food and lodging and if the consular officer concludes that the remaining wage is insufficient.¹¹³ Second, the contract must contain “a promise by the employee not to accept any other employment while working for the employer.”¹¹⁴ Third, the contract must guarantee “the employer [will] not withhold the passport of the employee.”¹¹⁵ Fourth, the contract must state that “both parties understand that the employee cannot be required to remain on the premises after working hours without compensation.”¹¹⁶

¹⁰⁹ 9 FAM 41.21 N6.2(b).

¹¹⁰ 9 FAM 41.22 N4.4(a); Diplomatic Circular Note 2000, *supra* note 9, at 1, Ex. D(2).

¹¹¹ Diplomatic Circular Note 2000, *supra* note 9, at 1, Ex. D(2).

¹¹² 9 FAM 41.21 N6.2(a)(1). The Department of State instructs consular officers issuing visas in U.S. embassies abroad to rely on the Department of Labor’s prevailing wage statistics for “Maids and Housekeeping Cleaners” in determining whether the wage reflected in the employment contract satisfies the applicable prevailing wage. U.S. Dep’t of State, Determining Prevailing Wage Requirement for Visas of Domestic Workers (Aug. 2005), *available at* http://travel.state.gov/visa/laws/telegrams/telegrams_2773.html [hereinafter Prevailing Wage Requirement for Visas of Domestic Workers]. In 2007, for example, the prevailing hourly wage for “Maids and Housekeeping Cleaners” is \$9.47 per hour in the New York City area and \$7.39 per hour in the Washington, DC area. Cable from Sec. of State, U.S. Dep’t of State to All Diplomatic and Consular Posts Collective (Mar. 2007) [hereinafter Cable Mar. 2007] (subject: Domestic Employees: Determining Prevailing Wage Requirement and Clarification of Visa Issuance Guidelines), Ex. D(1).

¹¹³ 9 FAM 41.21. N6.2(b).

¹¹⁴ 9 FAM 41.21 N6.2(a)(2).

¹¹⁵ 9 FAM 41.21 N6.2(a)(3).

¹¹⁶ 9 FAM 41.21 N6.2(a)(4).

In its internal policies and communications with embassies, the State Department has also put forth some provisions that the contract “should” contain but are not requirements to receive a visa. For example, the contract should describe the work to be performed.¹¹⁷ Employment contracts should also state when the wages will be paid (whether on a weekly or biweekly basis) and state what, if any, deductions will be made from the wages.¹¹⁸ Employment contracts should also stipulate the number of hours to be worked by the domestic worker per day or per week,¹¹⁹ and ensure that the employee will be paid for the time she is required to remain on the premises after hours.¹²⁰ The contract should also state that the employee will be provided at least one full day off per week and stipulate whether the employee will receive paid holidays, vacation days, and sick days.¹²¹ Model employment contracts provided by U.S. embassies also state generally, for example, that the employer agrees to abide by all U.S. federal and state labor laws, that the employer may be required to withhold and pay Social Security taxes, and that the employer is responsible for the domestic worker’s medical expenses while in the United States.¹²²

In addition to ensuring the domestic worker has executed the contract described above, when issuing A-3 and G-5 visas, consular officers also “should” inform domestic workers that “they will be subject to and protected by U.S. law while in the United States, [and] that their contracts create obligations on the part of both employee and employer.”¹²³ They should also advise domestic workers that the “U.S. Government

¹¹⁷ Diplomatic Circular Note 2000, *supra* note 9, at 2, Ex. D(2).

¹¹⁸ *Id.*

¹¹⁹ 9 FAM 41.22 N4.4(b).

¹²⁰ Prevailing Wage Requirement for Visas of Domestic Workers, *supra* note 112.

¹²¹ Diplomatic Circular Note 2000, *supra* note 9, at 2, Ex. D(2).

¹²² See Redacted Model Employment Contracts Provided by the U.S. Embassy in Kuwait, Ex. H(3).

¹²³ Prevailing Wage Requirement for Visas of Domestic Workers, *supra* note 112.

considers ‘involuntary servitude’ of domestic workers [...] to be a severe form of trafficking in persons (TIP) and a serious criminal offense” and that “victims of involuntary servitude are offered protection” under U.S. law.¹²⁴

Finally, the Department of State, through its consular officers, purports to provide an information sheet to domestic workers when obtaining their A-3 or G-5 visas.¹²⁵ The purpose of the information sheet is to inform them of their rights while in the United States and provide a complaint telephone number.¹²⁶ A recent Department of State cable to consular officers instructed them to ensure that domestic workers are additionally aware of the 911 telephone number for police and emergency services and of a Department of State trafficking brochure that is available to handout to domestic workers.¹²⁷

F. Failure to Impose Substantive A-3 and G-5 Visa Requirements and Enforce Existing Policies

Since at least 1981, the State Department has acknowledged that there is a serious problem with diplomats who abuse and exploit the domestic workers they bring to the U.S. on special visas, yet nevertheless has failed to effectively regulate diplomat compliance with employment conditions.¹²⁸ The mandatory employment requirements it does impose on diplomats seeking to employ domestic workers are minimal at best and the legal structure of these special employment-based visas ensures that there is no

¹²⁴ Prevailing Wage Requirement for Visas of Domestic Workers, *supra* note 112.

¹²⁵ Diplomatic Circular Note 2000, *supra* note 9, at 2, Ex. D(2).

¹²⁶ *Id.*

¹²⁷ Cable Mar. 2007, *supra* note 112, Ex. D(1).

¹²⁸ See Letter from U.S. Dep’t of State to Foreign Missions 3 (October 23, 1990) (providing guidance on the application of employment laws to foreign missions).

government accountability or oversight over employer compliance with the visa requirements that do exist.

In contrast to the formal regulations that have been provided for other types of workers on temporary visa programs,¹²⁹ or for temporary workers who take part in the au pair program,¹³⁰ the laws and regulations of the United States do not set forth enforceable standards for the employment conditions for domestic workers on A-3 and G-5 visas. In fact, none of the standards or requirements relating to the visa requirements and employment conditions of domestic workers on A-3 or G-5 visas are codified in statutes or regulations. Moreover, there is no internal accountability within the Department of State to ensure compliance with their stated policies, and thus implementation of the policies regarding employment contracts, consular interviews and written information about the rights of domestic workers is inconsistent and shoddy at best, and not implemented at worst.¹³¹

Despite imposing a mandatory contract requirement, the Department of State asserts that it is “not in a position to enforce” contracts once the parties are in the United States.¹³² Although A-3 and G-5 visas are registered with the Office of the Protocol of the Department of State, the Department does not currently maintain records of

¹²⁹ See INA §§ 212(n)(2)(A)(i), 212(n)(2)(C)(viii), 8 U.S.C. §§ 1182(n)(2)(A)(i), 1182(n)(2)(C)(viii) (2006); see also 20 C.F.R. § 501.5(A) (2007) (outlining immigration law and Department of Labor regulations that establish mandatory employment conditions for H-2A temporary agricultural workers and H-1B skilled and high-technology workers).

¹³⁰ See 22 C.F.R. 62.31 (2007) for regulations governing the au pair program, an exchange program where visitors to the country reside with a host family and provide child-care while pursuing educational credits. The regulations require the host families to adhere to strict rules in limiting childcare hours, providing vacations, and signing binding and written agreements. The program also entails a system of sponsoring organizations that ensure compliance with the regulations.

¹³¹ *Hidden in the Home*, *supra* note 9, at 24, Ex. G(4).

¹³² 9 FAM 41.21 N 6.2(c).

employment contracts.¹³³ Recognizing the problem, in a recent cable, the Department of State instructed consular officers to scan the employment contracts into a database so that the contracts would form part of the visa file of the domestic worker.¹³⁴ Petitioners are unaware of whether such a database currently exists. Regardless, unlike other special visas for migrant workers, the Department of Labor does not review A-3 and G-5 visa applications, conduct investigations to verify employer compliance with the employment contracts, or review employer compliance before renewing an A-3 or G-5 visa.¹³⁵

Since the Department of State made employment contracts mandatory in 2000,¹³⁶ consular officers generally do not issue A-3 and G-5 visas without an employment contract.¹³⁷ However, many employment contracts that consular officers approve contain only the basic requirements and do not meaningfully set forth the terms and conditions of employment, or include the provisions recommended by the State Department.¹³⁸ For example, none of the contracts viewed by Petitioners have contained language that the diplomat employer should maintain records on the hours worked by the domestic workers.¹³⁹

Even where such a contract is executed, domestic workers often remain completely unaware of the existence of the employment contract, unaware of its contents, unaware that the contract is considered legally binding, or are never given a copy of the contract. Department of State guidelines instruct consular officers to ensure that the contract

¹³³ *Hidden in the Home*, *supra* note 9, at 23, Ex. G(4).

¹³⁴ Cable Mar. 2007, *supra* note 112, Ex. D(1).

¹³⁵ *Hidden in the Home*, *supra* note 9, at 22, 25, Ex. G(4).

¹³⁶ Diplomatic Circular Note 2000, *supra* note 9, at 1, Ex. D(2).

¹³⁷ *See also Hidden in the Home*, *supra* note 9, at 24, Ex. G(4) (“The vast majority of domestic workers whose cases Human Rights Watch reviewed had either written or verbal employment contracts.”).

¹³⁸ *See Redacted Model Employment Contracts Provided by the U.S. Embassy in Kuwait*, Ex. H(3).

¹³⁹ *See Diplomatic Circular Note 2000*, *supra* note 9, at 3, Ex. D(2) (requiring employment contracts to contain provisions that the employer will maintain a record of hours worked by a domestic service employee for the duration of the employment plus three years).

presented is in English and a language the employee can understand.¹⁴⁰ However, rarely is the contract in the possession of a domestic worker translated into a language she understands. Department of State guidelines also instruct consular officers to tell domestic workers to keep a copy of their employment contract¹⁴¹ and explain to the worker that the contract is legally binding and guarantees certain rights.¹⁴² Individual Petitioners, however, did not receive such information during their consular officer interview. In the case of Petitioner Ajasi, the consular official only spoke to her employer.¹⁴³ When Petitioner Ocares went for her consular interview, she did not have with her a copy of her employment contract. Although she suspects that her employers had already submitted her employment contract, the consular officer failed to mention the contract and ensure that she had knowledge of it.¹⁴⁴ Organizational Petitioners and Counsel to this Petition believe that only in rare instances do consular officers verbally inform domestic workers of their employment contracts.

Domestic workers are also often unaware of their employment contracts because employers frequently obstruct domestic workers from having information about their contract. In the experience of Organizational Petitioners and Counsel to this Petition, employers often prevent domestic workers from reading the contract they require them to sign; lie, deceive or fail to explain to the worker what the contract is; fail to provide a copy or withhold the worker's copy of the contract; or forge the signature of the worker. Petitioner Begum remembers signing something that she believes was an employment contract, but does not know with certainty or have knowledge of the contents of the

¹⁴⁰ Cable Mar. 2007, *supra* note 112, Ex. D(1).

¹⁴¹ *Id.*

¹⁴² Prevailing Wage Requirement for Visas of Domestic Workers, *supra* note 112.

¹⁴³ Declaration of Hildah Ajasi, ¶ 7, Ex. A(2).

¹⁴⁴ Declaration of Susana Ocares, ¶ 8, Ex. A(6).

contract because she is illiterate, and she was never told her she had a contract nor given a copy of the contract.¹⁴⁵

Even when workers are given copies of their contract and can understand its contents, the unenforceability of the contract seriously undermines its protective force. Domestic workers describe their employers as treating the contracts as mere meaningless formalities.¹⁴⁶ For example, when Petitioner Ocares asked her employer about the overtime wages she was owed under her employment contract, her employer responded that the contract was simply an “example” and did not reflect her actual wages.¹⁴⁷ As soon as Petitioner Huayta began work in the United States, her employer told her that her employment contract “did not mean anything” and told her she would be paid \$200 per month.¹⁴⁸ Petitioner Gonzalez Paredes’ employer told her even before arriving in the United States that he did not intend to pay her the amount set forth in her employment contract.¹⁴⁹ When Petitioner Ajasi, who had a copy of her employment contract, complained to her employer that she was not receiving the wage promised to her in the contract, her employer yelled at her.¹⁵⁰ Much later, when Petitioner Ajasi complained that she was not being paid enough and working too many hours in violation of her rights, her employer responded that she did not know her rights because she was “uneducated” and did not deserve such rights because she was a “slave.”¹⁵¹

¹⁴⁵ Declaration of Raziah Begum ¶ 8, Ex. A(3).

¹⁴⁶ See *Hidden in the Home*, *supra* note 9, at 24, Ex. G(4) (explaining that “[s]even domestic workers explained to Human Rights Watch that their employers explicitly told them that their employment contracts were signed to satisfy U.S. consular offices’ requirements, were not binding, and were not intended to govern their employment relationships in the United States.”).

¹⁴⁷ Declaration of Susana Ocares ¶ 20, Ex. A(6).

¹⁴⁸ Declaration of Otilia Luz Huayta ¶ 15, Ex. A(5).

¹⁴⁹ Declaration of Mabel Gonzalez Paredes ¶ 8, Ex. A(4).

¹⁵⁰ Declaration of Hildah Ajasi, ¶ 10, Ex. A(2).

¹⁵¹ Declaration of Hildah Ajasi ¶ 28, Ex. A(2).

Additionally, the State Department does not consistently provide the information sheet that it is supposed to give to all visa applicants. Individual Petitioners never received the information sheet or any other written information about their rights when they obtained their visas. Organizational Petitioners and Counsel to this Petition, furthermore, have never represented or assisted an A-3 or G-5 domestic worker who received any kind of information sheet. Individual Petitioners also did not receive any information about their rights during their interviews with consular officers. In the experience of Organizational Petitioners and Counsel to this Petition, it is only the rare domestic worker who is interviewed by a consular officer who gives her any verbal information about her rights in the United States. When domestic workers are given such information, however, it can mean the difference between a woman entrapped in an exploitative situation that she believes she has no way to escape and her ability to secure her freedom.¹⁵²

When the terms of the domestic worker's contract are violated or she is abused in any other way by the diplomat, there is no designated mechanism for the worker to file a complaint against him to seek redress. Unlike other temporary work visas, there is no government department or agency responsible for receiving, investigating and responding to such complaints.¹⁵³ And, unlike any other worker, domestic workers employed by diplomats are excluded from filing a complaint through the courts. These workers could conceivably file complaints with the Department of Labor Wage and Hour Division,

¹⁵² For example, Joaquina Quadros, an Indian domestic worker who brought suit against her employer, a military attaché to the Kuwait Embassy for trafficking and forced labor violations, sought help for herself and two other domestic workers from a neighbor because she remembered the words of her consular officer explicitly advised her that if she or her colleagues found themselves in an exploitative or abusive situation that there were people in the United States that would help them.

¹⁵³ See *Hidden in the Home*, *supra* note 9, at 24, Ex. G(4).

although they rarely do.¹⁵⁴ The Department of Labor has no oversight over or involvement in the administration of A-3 and G-5 visas and therefore does not perform the follow-up monitoring or investigation to verify employer compliance with employment contracts, as it does for many other temporary worker visas.¹⁵⁵ Moreover, were the Department of Labor to find a violation, it would have no enforcement power over a diplomat with immunity.

The Department of State encourages domestic workers to report abuses to the Office of the Protocol, but the Department is not legally obligated to respond or follow-up on such reports. The State Department maintains that it will “examine closely any case of alleged abuse of a personal servant, attendant or domestic that is brought to its attention”¹⁵⁶ and that it will “notify law enforcement agencies when potential cases of trafficking in persons come to [its] attention.”¹⁵⁷ The Department also states that it will “bring the allegations to the attention of the mission and take such other action as may be appropriate.”¹⁵⁸ However, Organizational Petitioners report that the Protocol Office is generally unresponsive to complaints of domestic worker abuse brought to its attention. Most often their phone calls and messages go unanswered and the State Department neglects to inform law enforcement of cases or bring the cases to the attention of the foreign missions.¹⁵⁹

Finally, though it is effectively the only avenue available for the worker to seek compensation for violation of her rights, the State Department rarely, if ever, has assisted

¹⁵⁴ See *id.* at 22.

¹⁵⁵ See *id.*

¹⁵⁶ Diplomatic Circular Note 1996, *supra* note 62, at 4, Ex. D(3).

¹⁵⁷ Letter from John B. Bellinger, III, Legal Advisor, U.S. Dep’t of State, to Claudia Flores, Staff Attorney, Women’s Rights Project, ACLU (Feb. 21, 2007) (on file with ACLU), Ex. D(5).

¹⁵⁸ Diplomatic Circular Note 1996, *supra* note 62, at 4, Ex. D(3).

¹⁵⁹ See, e.g., Interview with Elizabeth Keyes, Attorney, Formerly with CASA of Maryland (Oct. 19, 2007).

a worker to pursue some form of compensation from her employer or foreign mission for the abuses she suffered. The State Department's official policy is that when domestic workers have civil claims against employers with immunity it will "intervene" when presented with "satisfactory evidence" that a debt or civil liability is owed, that the matter was raised with the foreign mission unsuccessfully, and that immunity would preclude civil action.¹⁶⁰ However, only in rare and limited instances has the State Department intervened in cases involving diplomats. It has appeared to advocates and service providers that the Department only intervenes in high profile cases where the Department is pressured to act through the media, and public awareness and letter writing campaigns.¹⁶¹ In those cases where the Department has successfully assisted in mediating a settlement between the domestic worker and the diplomat employer, the settlement amounts provided inadequate compensation that pale in comparison to the amounts owed the domestic worker in unpaid wages and overtime.¹⁶²

III. PROCEDURAL REQUIREMENTS

A. Exhaustion of Domestic Remedies

For this Petition to be found admissible, Article 31 of the Commission's Rules of Procedure requires that remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.¹⁶³ Exhaustion is not required, however, under Article 31(2)(a) when "the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that

¹⁶⁰ 2 FAM 234.2(b)(1-3) (2006), available at <http://www.state.gov/documents/organization/84395.pdf>.

¹⁶¹ Adrienne Allison, Shilpa Sejjal, and Christine Williams, UNC Law Clinic, *Best Practices and Policies of Domestic Worker Organizations* 20 (May 2005) (on file at Law Clinic at the University of North Carolina School in Chapel Hill) (describing media campaigns of CASA and Break the Chain Campaign).

¹⁶² See *infra* Part II(C)(2) ("Organizational Petitioners").

¹⁶³ Inter-Am. C.H.R., Rules of Procedure of the Inter-American Commission on Human Rights, art. 31.

have allegedly been violated.”¹⁶⁴ The Commission has interpreted this provision to require that available domestic remedies “be both adequate, in the sense that they must be suitable to address an infringement of a legal right, and effective, in that they must be capable of producing the result for which they were designed.”¹⁶⁵ In other words, the only legal remedies that need to be exhausted under Article 31 are those which are “available, appropriate and effective for solving the presumed violation of human rights.”¹⁶⁶

In interpreting these characteristics, the Commission has established that “when, for factual or [...] legal reasons, domestic remedies are unavailable, the Petitioners are exempted from the obligation of exhausting same.”¹⁶⁷ The Commission has also emphasized that “if the exercise of the domestic remedy is such that, on a practical basis, it is unavailable to the victim, there is certainly no obligation to exhaust it, regardless of how effective in theory the action may be for remedying the allegedly infringed legal situation.”¹⁶⁸ Following this rationale, in *Salas and Others v. United States*, for example, the Commission found that the Petitioners had “no appropriate possibility of redress” because any attempts to secure access to courts in the United States was unlikely to prevail due to sovereign immunity and Article VIII(2) of the Panama Canal Treaty, which

¹⁶⁴ *Id.* at art. 31(2)(a).

¹⁶⁵ *Tracy Lee Housel v. United States*, Case 129/02, Inter-Am. C.H.R., Report No. 16/04, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 ¶ 31 (2004); *see also Gary T. Graham (Shaka Sankofa) v. United States*, Case 11.193, Inter-Am. C.H.R., Report No. 97/03, OEA/Ser.L/V/II.114 Doc. 70 rev. 1 ¶ 55 (2003); *Ramon Martinez Villareal v. United States*, Case 11.753, Inter-Am. C.H.R., Report No. 52/02, Doc. 5 rev. 1 ¶ 60 (2002); *Velasquez Rodriguez* Case, Judgment of July 29, 1988, Inter-Am. Ct.H.R. (Ser. C) No. 4 ¶ 64-66 (1988).

¹⁶⁶ *Elias Gattass Sahih v. Ecuador*, Case 1/03, Inter-Am. C.H.R., Report No. 9/05, OEA/Ser.L/V/II.124 Doc. 5 ¶ 30 (2005).

¹⁶⁷ *Id.* (interpreting exhaustion requirements under Art. 46 of the American Convention on Human Rights).

¹⁶⁸ *Id.*; *see also Akdivar and Others v. Turkey*, 1 Eur. Ct. H.R. 137, ¶ 66 (1996), (finding that “[t]he existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness”).

granted U.S. officials immunity from suit in Panamanian courts.¹⁶⁹ Where there simply is no effective remedy under domestic law or pursuit of such a remedy would have “no reasonable prospect of success,” the Commission has stated that Petitioners need not resort to domestic courts.¹⁷⁰

Exhaustion is also not required under Article 31(2)(b) of the Commission’s Rules of Procedure 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.”¹⁷¹ The Court has interpreted this exception to apply in situations where “there is proof of the existence of a practice or policy ordered or tolerated by the government, the effect of which is to impede certain persons from invoking internal remedies that would normally be available to others.”¹⁷²

Petitioners seek redress against the United States for the violation of rights guaranteed by the American Declaration, specifically, the United States’ failure to exercise “due diligence” to effectively prevent, punish and provide remedies for the harms caused Petitioners by the unlawful acts of their foreign diplomat employers, and the United States’ discriminatory treatment and failure to afford Petitioners special

¹⁶⁹ *Salas and Others v. United States*, Case 10.573, Inter-Am. C.H.R., Report No. 31/93, OEA/Ser.L/V/II.85 Doc. 9 rev. at 312 (1994).

¹⁷⁰ *See, e.g., Disabled Peoples’ International, et al. v. the United States*, Case No. 9213, Inter-Am. C.H.R., (Sept. 22, 1987) (concluding that the formal exhaustion requirements did not apply to petitioners who had not pursued remedy in U.S. courts because under prevailing U.S. Supreme Court precedent they did not have standing to sue as organizations representing individuals residing in a foreign country, and because U.S. laws precluded any claims arising from military actions.); *Isamu Carlos Shibayama, et al. v. United States*, Inter-Am. C.H.R., Case 434-03, Report No. 26/06, ¶¶ 46-48 (March 16, 2006) (finding that “remedies may be considered ineffective when it is demonstrated that any proceedings raising the claims before domestic courts would appear to have no reasonable prospect of success, for example because the State’s highest court has recently rejected proceedings in which the issue posed in a petition had been raised.”).

¹⁷¹ Inter-Am. C.H.R., Rules of Procedure of the Inter-American Commission on Human Rights, art. 31(2)(b).

¹⁷² *Velasquez Rodriguez Case*, Judgment of July 29, 1988, *supra* note 165, ¶ 68; *Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights*, Advisory Opinion OC-11/90, Inter-Am. Ct. H.R. (Ser. A) No. 11 ¶¶ 17, 34 (1990).

measures of protection. U.S. laws, policies and practices, including official interpretations of the nature and scope of immunity granted diplomats under the Vienna Convention, do not currently provide adequate or effective remedies for any of Petitioners' claims against the United States or their diplomat employers. Resort to domestic remedies by Petitioners was and would have proved futile.

1. *Domestic Law Does Not Provide Remedies for Claims Brought by Domestic Workers Against Foreign Diplomat Employers*

U.S. courts have repeatedly interpreted the Vienna Convention to grant foreign diplomats absolute immunity from any civil suit brought against them by domestic workers seeking redress for violation of their rights under the Constitution, federal or state statutes and international law, including their right to be free from physical and psychological harm, slavery and slave-like practices and basic wage and hour violations.

As discussed *infra* Part II(D)(2), in *Tabion v. Mufti*¹⁷³ the Fourth Circuit Court of Appeals held that diplomatic immunity extended to any claims arising out of the employment of domestic workers by foreign diplomats. Deferring to the U.S. State Department's interpretation of the scope of the "commercial activity" exception to diplomatic immunity in the Vienna Convention,¹⁷⁴ the *Tabion* court held that domestic worker contracts and all claims pertinent thereto fell within the grant of immunity afforded by the Vienna Convention. Numerous other U.S. courts have since adopted the rationale of the *Tabion* court, including the deference to be given to Executive interpretations of

¹⁷³ 73 F. 3d. 535 (4th Cir. 1996).

¹⁷⁴ *Id.* at 538.

the scope of diplomatic immunity.¹⁷⁵ Given this now long line of authorities, claims brought by domestic workers against their foreign diplomat employers in U.S. courts are summarily dismissed on immunity grounds. Indeed, this was the outcome of Petitioner Mabel Gonzalez Paredes' attempt to sue her diplomat employers in a federal court.¹⁷⁶ No other Petitioner sought civil redress against their diplomat employers because they knew that doing so would either prove futile or have little prospect of success.¹⁷⁷

2. *Domestic Laws Do Not Provide Remedies Against the United States or its Agents for Failing to Exercise “Due Diligence” to Prevent, Punish and Provide Remedies to Individuals For the Unlawful Acts of Private Actors*

In *DeShaney v. Winnebago County Department of Social Services*¹⁷⁸ the U.S. Supreme Court held that the Constitution did not impose obligations on the State or its agents where they failed to act with respect to violence committed by private actors. Chief Justice Rehnquist, writing for a majority of six, held that the due process clause “forbids the State itself to deprive individuals of life, liberty, or property without ‘due process of law,’ but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other

¹⁷⁵ See, e.g., *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187 (D.D.C. 2007), Ex. C(1); *Ahmed v. Hoque*, No. 01 Civ. 7224, 2002 WL 1964806 (S.D.N.Y. 2002), Ex. C(1); *Crum v. Kingdom of Saudi Arabia and Royal Embassy of Saudi Arabia*, Civ. Action 05-275, 2005 U.S. Dist. LEXIS 38483 (E.D. Va. 2005), Ex. C(1).

¹⁷⁶ *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187 (D.D.C. 2007), Ex. C(1).

¹⁷⁷ Declaration of Hildah Ajasi, ¶ 38, Ex. A(2) (“I wanted to claim the wages I was owed however, [my lawyer] informed me that there was no way to get compensation through a lawsuit because Ms. Majingo was a diplomat who has diplomatic immunity”); Declaration of Raziah Begum, ¶ 39, Ex. A(3) (“I learned that, because of immunity, my employers had even more power than I thought. I understood that there was no way I could ever get from them the money they owed me in wages.”); Declaration of Siti Aisah, ¶ 24, Ex. A(1) (“I never sought the wages my employer owed me because I was so afraid and I was convinced I would have no chance against my employers because of their diplomatic status.”); Declaration of Susana Ocares, ¶ 26, Ex. A(6) (“A CASA attorney explained to me that I cannot recover overtime wages from my employer in court because he is a diplomat.”). Because of diplomatic immunity, Petitioner Otilia Luz Huayta did not pursue remedies in court and did not receive any assistance from the U.S. government, rather she received assistance from the Bolivian ambassador who helped her obtain a small settlement from her employers to compensate her for her lost wages. Declaration of Otilia Luz Huayta, ¶ 39, Ex. A(5).

¹⁷⁸ 489 U.S. 189 (1989).

means.”¹⁷⁹ Accordingly, U.S. law does not recognize a remedy under the Constitution where the United States or its agents fails to exercise “due diligence” to effectively prevent, punish and provide remedies for domestic workers trafficked, enslaved and otherwise abused by their foreign diplomat employers. Any attempt to raise such a claim by Petitioners, therefore, would have been futile.

3. *Domestic Laws Do Not Provide Remedies for Petitioners Claims Against the United States for Failing to Provide Special Protection for Women and for Discrimination Based on Disparate Impact of Laws, Policies and Practices*

Petitioners’ claims against the United States alleging discriminatory treatment and seeking special measures of protection were not first pursued in domestic courts because domestic law does not recognize such claims. Petitioners allege that the United States violates the principle of non-discrimination by excluding domestic workers employed by diplomats from the rights and remedies it affords other workers on account of their gender, race and national origin. Petitioners claim that the exclusions of domestic workers from basic federal labor laws and the interpretation of the “commercial activities” exception under the Vienna Convention are evidence of discriminatory treatment of domestic workers employed by diplomats, resulting in the complete lack of protection for these workers. In cases alleging discriminatory treatment in the United States, long-established Supreme Court precedent requires plaintiffs to prove a decision-maker’s specific intent to discriminate.¹⁸⁰ In cases alleging racial discrimination brought

¹⁷⁹ *Id.* at 195; *see also Gonzales v. City of Castle Rock*, 125 S. Ct. 2796 (2005).

¹⁸⁰ *See, e.g., Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 265 (1977) (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”) According to the United States Supreme Court, “official action will not be held unconstitutional solely because it results in a racially disproportionate impact. ‘Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.’” *Id.* at 264-65 (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)).

under the Equal Protection Clause of the Constitution, for example, it is not enough for a plaintiff to show that the defendant acted with knowledge that its actions would have a discriminatory impact on an identifiable racial group. Instead, plaintiffs must show that the defendant “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”¹⁸¹ If a plaintiff cannot overcome these hurdles, the law will not recognize the discrimination he or she has experienced, even though some form of discrimination has come into play. By contrast, under Article II of the American Declaration, individuals need not show discriminatory intent to prevail on their claims of discrimination; all they need demonstrate is that the law, policy or practice at issue had this effect.¹⁸² In short, Article II of the American Declaration, unlike the U.S. Constitution, recognizes an effects-based standard for assessing allegations of discriminatory treatment. Because of the futility of advancing their claims of discriminatory treatment against the United States in domestic courts, Petitioners are not required to raise them before proceeding before this Commission.

¹⁸¹ *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

¹⁸² *See, e.g., Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (Ser. A) No. 18, ¶ 103 (Sept. 17, 2003). Article II, should be interpreted in light of universal and regional human rights laws which also protect against effects-based discriminatory treatment. *See, e.g.,* Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994) (stating that Article 26 of the ICCPR “prohibits discrimination in law or *in fact* in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof.”).

B. Timeliness

Where, as here, an exception to the exhaustion requirement applies, a Petition must be “presented within a reasonable period of time.”¹⁸³ Petitioners complied with this requirement bringing this Petition at the first opportunity after learning of the existence of their rights under the American Declaration, learning of the jurisdiction of this Commission, and obtaining the support of the ACLU, Global Rights and the Immigration/ Human Rights Clinic of the University of North Carolina School of Law to bring this Petition. Based on legal advice that their diplomat employers were immune from suit, Petitioners Aisah, Ajasi, Begum, Huayta and Ocares did not pursue their claims before domestic courts.¹⁸⁴ Petitioner Gonzalez Paredes brought her claims before a domestic court, although doing so proved futile because her case was dismissed on diplomatic immunity grounds.¹⁸⁵ Moreover, Petitioners did not appreciate that they had valid claims against the United States, and in any event, had they been so aware, as explained *infra*, U.S. domestic law does not recognize their claims and pursuing such claims in domestic courts would have been futile. Under these circumstances, Petitioners submit that their petition is timely.

C. Parallel Proceedings are not Pending in International Arenas

Petitioners confirm that the subject matter of this petition is not pending with any other international tribunal, nor has it been previously examined and settled by the Commission or another international tribunal.

¹⁸³ Inter-Am. C.H.R., Rules of Procedure of the Inter-American Commission on Human Rights, Art. 32(2).

¹⁸⁴ *See supra* note 177.

¹⁸⁵ *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187 (D.D.C. 2007), Ex. C(1).

IV. APPLICATION OF THE AMERICAN DECLARATION TO THE UNITED STATES AND THE COMMISSION’S INTERPRETIVE MANDATE

A. The American Declaration is Binding on the United States

As the United States is not a party to the Inter-American Convention on Human Rights (“American Convention”) it is the Charter of the Organization of American States (“OAS Charter”) and the American Declaration on the Rights and Duties of Man (“American Declaration”) that establish the human rights standards applicable in this case. Signatories to the OAS Charter are bound by its provisions,¹⁸⁶ and the General Assembly of the OAS has repeatedly recognized the American Declaration as a source of international legal obligation for OAS member states including specifically the United States.¹⁸⁷ This principle has been affirmed by the Inter-American Court, which has found that that the “Declaration contains and defines the fundamental human rights referred to in the Charter,”¹⁸⁸ as well as the Commission, which recognizes the American Declaration as a “source of international obligations” for OAS member states.¹⁸⁹

Moreover, the Commission’s Rules of Procedure establish that the Commission is the body empowered to supervise OAS member states’ compliance with the human rights

¹⁸⁶ Organization of American States Charter, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 48, *entered into force* Dec. 13, 1951 [ratified by the United States, June 15, 1951]; amended by Protocol of Buenos Aires, 721 U.N.T.S. 324, O.A.S. Treaty Series, No. 1-A, *entered into force* Feb. 27, 1970; amended by Protocol of Cartagena, O.A.S. Treaty Series, No. 66, 25 I.L.M. 527, *entered into force* Nov. 16, 1988; amended by Protocol of Washington, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), 33 I.L.M. 1005, *entered into force* September 25, 1997; amended by Protocol of Managua, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 I.L.M. 1009, *entered into force* January 29, 1996 [hereinafter OAS Charter]. *See also James Terry Roach and Jay Pinkerton v. United States*, Case 9647, Inter-Am. C.H.R. Res. 3/87, Annual Report 1986-87, ¶ 46 (Sept. 22, 1987).

¹⁸⁷ *See, e.g.*, OAS General Assembly Resolution 314 (VII-0/77) (June 22, 1977) (charging the Inter-American Commission with the preparation of a study to “set forth their obligation to carry out the commitments assumed in the American Declaration of the Rights and Duties of Man”).

¹⁸⁸ *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. Ser. A N° 10, ¶ 43, 45 (July 14, 1989).

¹⁸⁹ *See Hector Geronimo Lopez Aurelli (Argentina)*, Annual Report of the IACHR 1990, Inter-Am. C.H.R., Report No. 74/90, Case 9850, ¶ III.6 (1990) (quoting Inter-Am. Ct. H.R., Advisory Opinion OC-10/89, ¶ 45); *see also Mary and Carrie Dann v. United States*, Case 11.140, Inter-Am. C.H.R. Report No. 75/02, ¶ 163 (Dec. 27, 2002).

norms contained in the OAS Charter and the American Declaration. Specifically, Article 23 of the Commission's Rules provides that "[a]ny person . . . legally recognized in one or more of the Member States of the OAS may submit petitions to the Commission . . . concerning alleged violations of a human right recognized in . . . the American Declaration of the Rights and Duties of Man,"¹⁹⁰ and Articles 49 and 50 of the Commission's Rules confirm that such petitions may contain denunciations of alleged human rights violations by OAS member states that are not parties to the American Convention on Human Rights.¹⁹¹ Likewise, Articles 18 and 20 of the Commission's Statute specifically direct the Commission to receive, examine, and make recommendations concerning alleged human rights violations committed by any OAS member state, and "to pay particular attention" to the observance of certain key provisions of the American Declaration by states that are not party to the American Convention including significantly the right to life and the right to equality before law, protected by Articles I and II respectively.

Finally, the Commission itself has consistently asserted its general authority to "supervis[e] member states' observance of human rights in the Hemisphere," including those rights prescribed under the American Declaration, and specifically as against the United States.¹⁹²

In sum, all OAS member states, including the United States, are legally bound by the provisions contained in the American Declaration. Here, Petitioners have alleged

¹⁹⁰ Rules of Procedure of the Inter-American Commission on Human Rights, art. 23 (2000).

¹⁹¹ *Id.* at arts. 49, 50 (2000).

¹⁹² *Detainees in Guantánamo Bay, Cuba*, Request for Precautionary Measures, Inter-Am. C.H.R. at 2 (March 13, 2002), available at <http://www1.umn.edu/humanrts/cases/guantanamo-2003.html>. See also *James Terry Roach and Jay Pinkerton v. United States*, Case 9647, *supra* note 186, ¶¶ 46-49 (affirming that, pursuant to the Commission's statute, the Commission "is the organ of the OAS entrusted with the competence to promote the observance of and respect for human rights").

violations of the American Declaration and the Commission has the necessary authority to adjudicate them.

B. The United States Must Respect and Ensure the Rights Guaranteed in the American Declaration

As well as imposing binding obligations on the United States, the American Declaration requires signatories such as the United States to respect and ensure the full and free exercise of human rights guaranteed therein. This obligation arises from the text of the Declaration itself as well as the duties undertaken by each OAS member state upon ratification of the Charter of the OAS.¹⁹³ As a member of the OAS, the United States owes a general duty to other member States as well as all persons under its jurisdiction and control to respect and ensure the fundamental rights guaranteed by the American Declaration. The *erga omnes* nature of this duty is reflected in the Preamble to the OAS Charter, whereby States parties express “that the true significance of American solidarity and good neighborliness can only mean the consolidation . . . of a system of individual liberty and social justice based on respect for the essential rights of man.”¹⁹⁴ As the settled jurisprudence of the Inter-American Court confirms, the obligation to respect and ensure rights is owed by each State to the community of Inter-American States as a whole.¹⁹⁵ In ratifying the OAS Charter and signing the American Declaration, the United

¹⁹³ OAS Charter, *supra* note 186.

¹⁹⁴ *Id.* at prml; see *Barcelona Traction, Light & Power Company, Ltd.* (Belgium v. Spain), 1970 I.C.J. 3, ¶¶ 33-34 (July 24) (concluding that every State, by virtue of its membership in the international community, has a legal interest in the protection and fulfillment of certain basic rights and essential obligations, including “the principles and rules concerning the basic rights of the human person”).

¹⁹⁵ See, e.g., *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, *supra* note 182; *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, *supra* note 188, ¶ 38; *Ximenes Lopes v. Brazil*, Inter-Am. Ct. H.R. (ser. C) No. 149, ¶ 85 (July 4, 2006); *Mapiripán Massacre case*, Inter-Am. Ct. H.R. (ser. C) No. 134 (Sep. 15, 2005); *Pueblo Bello Massacre case*, Inter-Am. Ct. H.R. (ser. C) No. 140 (Jan. 31, 2006).

States undertook to faithfully fulfill “obligations derived from treaties and other sources of international law,”¹⁹⁶ and promote the “fundamental rights of the individual.”¹⁹⁷

As the Commission has explained, “the obligation of respecting and protecting human rights is an obligation *erga omnes* . . . toward the inter-American community as a whole, and toward all individuals subject to its jurisdiction, as direct beneficiaries of the human rights recognized by the American Declaration.”¹⁹⁸ The Commission has found that OAS member States “must assume” the obligation to guarantee human rights “whether or not they are signatories of the American Convention on Human Rights.”¹⁹⁹ And, the Commission has concluded that States have affirmative obligations to respect and ensure the human rights expressed in the Declaration:

Member States of the OAS such as Canada have undertaken to respect and ensure the fundamental rights of all persons subject to their jurisdiction. Respect for human rights is a fundamental principle of the Organization, guiding the actions of each member State.²⁰⁰

Thus, the Commission has found that States, such as Canada and the United States, whose legal obligations are defined by the American Declaration rather than the Convention, have an obligation to “respect and ensure” the fundamental rights protected in the Declaration.

C. The Commission’s Interpretive Mandate

¹⁹⁶ OAS Charter, *supra* note 186, art. 3(b).

¹⁹⁷ *Id.* at art. 3(1).

¹⁹⁸ *Victims of the Tugboat “13 de Marzo” v. Cuba*, Case 11.436, Inter-Am. C.H.R., Report No. 47/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶¶ 77-78, at 127 (1997); *Alejandro v. Cuba*, Case 11.589, Inter-Am. C.H.R., Report No. 86/99, OEA/Ser.L/V/II.106, doc. 3 rev. ¶ 39, at 586 (1999).

¹⁹⁹ *Alejandro v. Cuba*, Case 11.589, *supra* note 198, ¶ 39, at 586.

²⁰⁰ Inter-Am. C.H.R., *The Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106, doc. 40, ¶ 29 (Feb. 28, 2000); *see also Alejandro v. Cuba*, *supra* note 198, ¶ 39; *Victims of the Tugboat “13 de Marzo” v. Cuba*, *supra* note 198, ¶¶ 77-78.

The Inter-American Commission has consistently concluded that international human rights instruments should be construed in light of the developing standards of human rights law articulated in national, regional, and international frameworks. In 1971, the International Court of Justice declared “an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of interpretation.”²⁰¹ The Inter-American Court recently cited this principle in ruling that “to determine the legal status of the American Declaration it is appropriate to look to the inter-American system of today in light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948.”²⁰² This idea of maintaining an “evolutive interpretation” of international human rights instruments within the broad system of treaty interpretation brought about by the Vienna Convention was again cited in 1999 by the Inter-American Court.²⁰³ Following this analysis, the Court found that the U.N. Convention on the Rights of the Child (CRC), an international instrument ratified by nearly every OAS member, signaled expansive international consent (*opinion juris*) on the provisions of that instrument, and can therefore be used to

²⁰¹ *Legal Consequence for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. (June 21, 1971).

²⁰² *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, *supra* note 188, ¶ 37.

²⁰³ *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶¶ 114-15 (October 1, 1999) (citing, *inter alia*, the decisions of the Eur. Ct. H.R. in *Tryer v. United Kingdom* (1878), *Marckx v. Belgium* (1979), and *Louzidou v. Turkey* (1995)); *see also Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, *supra* note 182, ¶ 120 (citing Advisory Opinion OC-16/99).

construe the American Convention and other international instruments pertinent to human rights in the Americas.²⁰⁴

The Commission has consistently applied this interpretative principle, specifically in relation to its interpretation of the American Declaration. In the *Villareal* case, for example, the Commission found that “in interpreting and applying the American Declaration, it is necessary to consider its provisions in the context of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to member States against which complaints of violations of the Declaration are properly lodged. Developments in the corpus of international human rights law relevant in interpreting and applying the American Declaration may in turn be drawn from the provisions of other prevailing international and regional human rights instruments.”²⁰⁵ Adopting this principle, the Commission has relied upon various universal and regional human rights treaties and other instruments as well as the jurisprudence of other international tribunals and human rights institutions to construe rights recognized in the American Declaration.²⁰⁶

²⁰⁴ *Juridical Status and Human Rights of the Child*, Advisory Opinion OC-17/2002, Inter-Am. Ct. H.R. (ser. A) No. 17, ¶¶ 29-30 (Aug. 28, 2002).

²⁰⁵ *Ramon Martinez Villareal v. United States*, Case 11.753, Inter-Am. C.H.R., Report No. 52/02, doc. 5 rev. 1 at 821 (2002) ¶ 60 (citing *Juan Raul Garza v. United States*, Case 12.243, Report No. 52/01, OEA/Ser.L/V/II.111, doc. 20 rev. at 1255 ¶¶ 88-89 (2000)); see also *Maya Indigenous Community of the Toledo District v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 paragraph 727 (2004), ¶¶ 86-88; *Mary and Carrie Dann v. United States*, Case 11.140, *supra* note 189, ¶¶ 96-97.

²⁰⁶ See, e.g., *Report On The Situation Of Human Rights of Asylum Seekers Within The Canadian Refugee Determination System*, Inter-Am. C.H.R., Country Report, OEA/Ser.L/V/11.108, doc. 40 rev. (Feb. 28, 2000), ¶¶ 28, 159, 165 (referencing the U.N. Convention on the Rights of the Child to interpret Canada’s responsibilities to asylum seekers under the American Declaration and the OAS Charter); *Maya Indigenous Community of the Toledo District v. Belize*, *supra* note 205, ¶¶ 112-120, 163, 174 (2004) (referencing the American Convention, jurisprudence of the Inter-American Court, and the United Nations Convention on the Elimination of Racial Discrimination (CERD) to interpret the rights to property, equality before the law, and judicial protection for indigenous peoples contained in the American Declaration); *Maria da Penha*

V. PETITIONERS' EMPLOYERS VIOLATED THEIR RIGHTS GUARANTEED UNDER THE AMERICAN DECLARATION

Petitioners were subjected to numerous deprivations of their rights under the American Declaration by their diplomat employers. Petitioners suffered deprivations of their right to life, liberty, and security under Article I; their right to privacy under Articles I, V, IX, X, and XV; as well as their rights to fair and decent work conditions under Article XIV and to preservation of health and well-being under Article XI. Ultimately, Petitioners, some of whom were victims of trafficking and forced labor, and others who were subjected to abuse and exploitation, were deprived of the most basic rights guaranteed by the American Declaration and other fundamental human rights instruments.

Petitioners' Article I rights were violated in numerous ways. Petitioners were deprived of their freedom of movement and privacy and suffered cruel, inhuman and degrading treatment and conditions of slavery, involuntary servitude, forced labor, and trafficking. Article I, as interpreted in the light of analogous provisions of the American Convention, universal and other regional human rights instruments, as well as customary international law, protects against such violations.

Both the Commission and the Inter-American Court have adopted an expansive interpretation of the right to life, liberty and security guaranteed under Article I.²⁰⁷ The

Maia Fernandes v. Brazil, Case 12.051, Inter-Am. C.H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 704 (2001) (referring to the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belém do Pará) in determining Brazil's obligations under the American Declaration to effectively prosecute domestic-violence related crimes).

²⁰⁷ In the Inter-American system, the right to life is the most fundamental right, as without it the enjoyment of other rights cannot be fulfilled. See, e.g., *Graham (Shaka Sankofa) v. United States*, Case 11.193, Inter-

Commission has repeatedly interpreted this article broadly to encompass assaults on both an individual's physical and psychological integrity. For example, the Commission has defined the right as "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation."²⁰⁸ In its 2002 Report on Terrorism and Human Rights, the Commission noted that while the American Declaration lacks a general provision on the right to humane treatment, Article I should be interpreted to incorporate a prohibition similar to that of Article 5 of the American Convention, which protects against cruel, inhuman, and degrading treatment.²⁰⁹ The jurisprudence of the Inter-American Court supports such an interpretation. In the *Castillo Paez Case*, for instance, the Court noted that the protections encompassed by Article 5 of the American Convention – and hence Article I – are much broader in scope than mere protection from physical mistreatment. Rather, they extend to any act that is "clearly contrary to respect

Am. C.H.R., Report No. 97/03, OEA/Ser.L./V/II.114 doc. 70 rev. 1 ¶ 26 (2003) ("[T]he right to life is widely recognized as the supreme right of the human being, respect for which the enjoyment of other rights depends."). The importance of the right is reflected in its incorporation in every major international human rights instrument. Universal Declaration of Human Rights, GA Res. 217A (III), U.N. GAOR, 3rd Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter Universal Declaration of Human Rights]; International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, U.S.T. 521, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter International Covenant on Civil and Political Rights]; African [Banjul] Charter on Human and Peoples' Rights, art. 4, *adopted* June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (entered into force Oct. 21, 1986) [hereinafter African [Banjul] Charter on Human and Peoples' Rights]; Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L./V/II.82 doc. 6 rev.1 at 25 (1992) (entered into force July 18, 1978) [hereinafter American Convention on Human Rights]; Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222, *amended by* Protocols Nos 3, 5, and 8 which entered into force on Sept. 21, 1970, Dec. 20, 1971, and Jan. 1, 1990, respectively (entered into force Sept. 3, 1953) [hereinafter European Convention on Human Rights].

²⁰⁸ *Haitian Ctr. for Human Rights v. United States*, Case 10.675, Inter-Am. C.H.R., Report No. 51/96, OEA/Ser.L./V/II.95 doc. 7 rev. ¶ 170 (1997).

²⁰⁹ Inter-Am. C.H.R., Report on Terrorism and Human Rights, ¶ 155, OEA/Ser.L./V/II.116, doc. 5 rev. 1 corr. 22 (Oct. 22, 2002) (citing Juan Antonio Aguirre Ballesteros, Case 9437, Inter-Am. C.H.R. 43, OEA/Ser. L./V/II.66, doc. 10 rev. 1 (1985) (Annual Report 1984-1985). Article 5 of the American Convention provides that "[e]very person has the right to have his physical, mental, and moral integrity respected" and "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person." American Convention on Human Rights, *supra* note 207.

for the inherent dignity of the human person.”²¹⁰ Similarly, in the *Street Children Case*, the Court reiterated that position, noting that the right to life “includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence.”²¹¹ As a result, the Commission has found the right implicated in a wide range of situations, including detentions, forcible repatriations, and environmental pollution.²¹² Other international bodies have come to similar conclusions that the right to life should be interpreted broadly and may be implicated in a range of circumstances.²¹³

Adopting this broad definition here, Article I should be read to include the guarantee of Petitioners’ right to be free from slavery, involuntary servitude, forced labor, child labor and trafficking;²¹⁴ freedom of movement; privacy; and freedom from cruel, inhuman or degrading treatment.

²¹⁰ *Castillo Páez Case*, 1997 Inter-Am. Ct. H.R. (ser. C) No. 35, ¶¶ 63, 66 (Nov. 3, 1997).

²¹¹ *Villagrán Morales v. Guatemala (The Street Children Case)*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, ¶144 (Nov. 19, 1999).

²¹² *See, e.g., Parque São Lucas v. Brasil*, Case 10.301, Inter-Am. C.H.R., Report No. 40/03, OEA/Ser.L./V/II.114, doc. 70 rev. 1, at 677 (2003) (detention of prisoners); *Haitian Ctr. for Human Rights*, OEA/Ser.L./V/II.95 doc. 7 rev. ¶ 170 (forcible repatriation of Mariel Cubans); Inter-Am. C.H.R., Report on the Situation of Human Rights in Ecuador, at 88, OEA/Ser.L./V/II.96, doc. 10 rev.1 (1997) (environmental pollution).

²¹³ *See, e.g., Inter-Am. C.H.R., Annual Report of the Inter-American Commission on Human Rights*, O.A.S. Doc. OEA/Ser.L./V/III.25 doc. 7 at 213 (Feb. 14, 1992) (finding that “respect for rights linked to life and integrity should go hand in hand with improvements in the population’s living standards ...”); Human Rights Comm., General Comment No. 6, The Right to Life (Art. 6), 37 U.N. GAOR, 16th Sess., Supp. No. 40, Annex V, ¶ 5, U.N. Doc. A/37/40 (1982).

²¹⁴ Interpreting Article I to include the right to be free from slavery and slave-like practices is also compelled when read in light of Article XIV, guaranteeing the right to fair remuneration, and Article 6 of the American Convention providing the right to be free from slavery (providing that “[n]o one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women” and that “[n]o one shall be required to perform forced or compulsory labor”) and Article 7 of the American Convention on the right to personal liberty. American Convention on Human Rights, *supra* note 207, arts. 6, 7. Interpreting Article I to include the right to be free from slavery is also compelled through reference to universal and regional human rights treaties and other instruments, which have long recognized the prohibition of slavery and other slavery-like practices as an assault on physical and psychological integrity and the dignity of the individual. A broad array of universal and regional human rights treaties and other instruments, both multilateral and bilateral, now contain these prohibitions and proscribe such practices in both times of war and peace. *See, e.g., Universal Declaration of Human Rights*, *supra* note 207, at 71 (“no one shall be held in slavery or servitude”); International Covenant on

Petitioners were deprived of their freedom of movement by both the government and their employers creating coercive conditions of employment in violation of Article I.²¹⁵ All of the Petitioners were deprived of the liberty to leave their employment at will on account of the conditions of their A-3 and G-5 visas, which tie lawful immigration status to the continued employment with the diplomat who sponsored the visa.

Petitioners Begum, Aisah, Ajasi and Huayta were further deprived of their liberty because their employers used deliberate tactics to isolate them and deprive them of freedom of movement, creating conditions amounting to forced labor, involuntary servitude or trafficking. Petitioners' employers restricted their movement by confiscating their passports, forbidding them to leave the home unaccompanied or without permission, and cutting off their communication with the outside world.²¹⁶ Furthermore, their employers exerted control and influence over them by requiring them to work excessively long hours without a day off and subjected them to verbal insults, threats and humiliating and degrading treatment.²¹⁷ For example, Petitioner Ajasi's employers used intimidation and threats to confine her to the house by telling her that Americans would kill her if she

Civil and Political Rights, *supra* note 207, at 52 (“(1) no one shall be held in slavery; slavery and slave-trade in all their forms shall be prohibited. (2) no one shall be held in servitude.”); African [Banjul] Charter on Human and Peoples' Rights, *supra* note 207, art. 5; [European] Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 207, art. 4; Convention to Suppress the Slave Trade and Slavery, preamble, *opened for signature* Sept. 25, 1926, 60 L.N.T.S. 253 (“[abolishing] slavery in all its forms); Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271 (entered into force July 25, 1951); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (Nov. 15, 2000), (entered into force Dec. 25, 2003); Geneva Convention Relative to the Treatment of Prisoners of War, arts. 14, 49, 53, 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950).

²¹⁵ The “[l]iberty of movement is an indispensable condition for the free development of a person” and thus should be encompassed within the Article 1 right to life and liberty. Human Rights Comm., General Comment No. 27, Freedom of Movement (Art. 12), U.N. Doc. CCPR/C/21/Rev.1/Add.9 (Feb. 11, 1999).

²¹⁶ Declaration of Raziah Begum, ¶ 7, 25-31, Ex. A(3); Declaration of Siti Aisah, Ex. A(1); Declaration of Hildah Ajasi, ¶ 18-23, Ex. A(2); Declaration of Otilia Luz Huayta, ¶ 25-35, Ex. A(5).

²¹⁷ *See generally* Declarations of Raziah Begum, Siti Aisah, Otilia Luz Huayta, and Hildah Ajasi, Ex. A.

left the house and that they would tell her husband in Zimbabwe that she was going out with other men.²¹⁸ According to Petitioner Begum, for two and half years “[my employers] kept me as a prisoner in their house, and made me a slave to their demands. They treated me no better than they would treat a stray dog.”²¹⁹ Petitioner Huayta reflected “[t]hroughout my ordeal, I did not have anybody to talk to and share my suffering Worst of all, it was people from my own country who had treated my daughter and I like slaves. We lived within the four walls of the home and had no communication with anybody.”²²⁰ Petitioners were so isolated and confined to the home that they could only extract themselves from their situations of servitude through the intervention of others.²²¹

The employers of Petitioners Ajasi, Begum, Aisah and Huayta further subjected them to cruel, inhuman or degrading treatment in violation of their rights to life, liberty and personal security under Article I and their right to protection of honor, personal reputation, and private and family life under Article V.²²² Petitioner Ajasi’s employer called her an uneducated “slave” when she complained about her work conditions.²²³ When Petitioner Ajasi’s employer found that her underwear had been discolored in the washing machine, she required Petitioner Ajasi to wash her underwear by hand to punish

²¹⁸ Declaration of Hildah Ajasi, ¶ 20, Ex. A(2).

²¹⁹ Declaration of Raziah Begum, ¶ 6, Ex. A(3).

²²⁰ Declaration of Otilia Luz Huayta, ¶ 35, Ex. A(5).

²²¹ *Id.* at ¶ 34 (describing how the police and local advocates “rescued” her from her employers’ home); Declaration of Siti Aisah, ¶¶ 18-19, 21, Ex. A(1) (describing how she managed to escape through the encouragement and assistance of another employee and a woman she met in the supermarket); Declaration of Raziah Begum, ¶ 35, Ex. A(3) (describing her encounter with a woman from Andolan who gave her the encouragement and help to escape); Declaration of Hildah Ajasi, ¶ 30, 33, Ex. A(2) (describing her interaction with a neighbor who told her she had a right not to be treated so poorly and how she hid in the airport to avoid boarding the plane back to Zimbabwe).

²²² Article V of the American Declaration provides that “[e]very person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.” American Declaration of the Rights and Duties of Man, Apr. 30, 1948, O.A.S. Official Rec., OEA/Ser.L./ V./11.23, doc. 21, rev. 6 (1998).

²²³ Declaration of Hildah Ajasi, ¶ 28, 30, Ex. A(2).

and humiliate her.²²⁴ According to Petitioner Ajasi, “[h]er actions toward me in this regard were degrading and demeaning.”²²⁵ Petitioner Begum’s employer forbade her to ever leave the confines of their Manhattan apartment for two full years, causing her to feel as though she was suffocating.²²⁶ Petitioner Begum’s employers kept her isolated from guests by confining her to the kitchen so that she could not be seen or interact with guests.²²⁷ They also demeaned and degraded her by denying her adequate sleeping conditions and requiring her to sleep on the floor of the daughter’s room without any blankets or mattress.²²⁸ When guests came to stay, they required her to sleep under the dining room table so that she could not be seen.²²⁹ Her employers forbade her to sit anywhere in the house except on one stool they kept in the kitchen.²³⁰ Her employer sometimes berated her after she used the bathroom by telling her to clean it after using it.²³¹ Petitioner Begum was subjected to such regular cruel, inhuman and degrading treatment that, as she put it

I never felt like a human being in my employers’ home. They treated me as they would treat a dog. Not the way people in America treat their dogs, but the way people in Bangladesh treat stray dogs on the street. They treated me like a piece of property. They tried to deny me of my dignity.²³²

Petitioner Huayta’s employer forbade Petitioner Huayta and her daughter Carla to eat the family’s food, deprived them of adequate food, required them to stand while eating, and

²²⁴ *Id.* at ¶ 27.

²²⁵ *Id.*

²²⁶ Declaration of Raziah Begum, ¶ 30, Ex. A(3) (“After two years of being a prisoner in their apartment, I was desperate to go outside. I tried to convince my employers that I did not feel well and that I needed to get some air outside.”).

²²⁷ *Id.* at ¶ 28.

²²⁸ *Id.* at ¶ 23.

²²⁹ *Id.* at ¶ 24.

²³⁰ *Id.* at ¶ 20.

²³¹ *Id.* at ¶ 22.

²³² *Id.* at ¶ 32.

constantly accused them of eating the family's food.²³³ Petitioner Aisah felt that she was treated as "less than human" and made to feel like "a slave in their household."²³⁴

Petitioners' rights to privacy under Articles I, and the implied right to privacy under Articles V, IX, X, and XV of the American Declaration were also routinely violated by their employers.²³⁵ The diplomat employers of Petitioner Huayta, Ajasi, and Begum deprived them of their rights to privacy by denying them separate living quarters or sleeping arrangements. Petitioner Begum was required to sleep on the floor of her employer's daughter's bedroom and, when there were overnight guests, made to sleep under the dining room table.²³⁶ Petitioner Huayta and her daughter, Carla, were made to sleep in a hallway in the basement.²³⁷ The hallway was also a corridor to the laundry room that members of the household and tenants could walk through at any time.²³⁸ Petitioner Ajasi lived in the guest bedroom in her employer's house, but had to move out anytime guests came to stay. Petitioner Ajasi also was required to sleep with her employer's baby four nights per week.²³⁹ Under Articles I and X, Petitioners' right to the privacy of their communications was violated in a routine and continuous fashion by their employers.²⁴⁰ Petitioner Huayta's employer forbade her to make and receive phone calls

²³³ Declaration of Otilia Luz Huayta, ¶ 18, 20, Ex. A(5).

²³⁴ Declaration of Siti Aisah, ¶ 3, Ex. A(1).

²³⁵ This implied right to privacy found in the Declaration is an explicit right that the United States must protect under Article 17 of the ICCPR. The right to privacy in the ICCPR protects the domestic worker from "arbitrary or unlawful interference with her privacy, family, home or correspondence." International Covenant on Civil and Political Rights, *supra* note 207, art. 17(1).

²³⁶ Declaration of Raziah Begum, ¶ 23-24, Ex. A(3).

²³⁷ Declaration of Otilia Luz Huayta, ¶ 24, Ex. A(5).

²³⁸ Declaration of Otilia Luz Huayta, ¶ 24, Ex. A(5).

²³⁹ Declaration of Hildah Ajasi, ¶ 12, Ex. A(2).

²⁴⁰ The right to privacy of communications that Articles I and X protect are informed also by the right to privacy under Article 17 of the International Covenant on Civil and Political Rights (ICCPR), which protects against "arbitrary or unlawful interference with her privacy, family, home or correspondence." International Covenant on Civil and Political Rights, *supra* note 207, art. 17(1). ICCPR Article 17 has been interpreted to provide that "correspondence should be delivered to the addressee without interception and without being opened or otherwise read. Surveillance ... interceptions of telephonic, telegraphic and other

and would not tell her if someone called for her.²⁴¹ Her employers restricted her communication so severely that Petitioner Huayta could only communicate with her daughter's teacher by passing handwritten notes through her daughter.²⁴² Petitioner Aisah was never allowed to use the telephone.²⁴³ Over the course of two and a half years, Petitioner Begum's employers allowed her to receive phone calls from her son only on two or three occasions and only permitted her to speak to him for a few minutes at a time.²⁴⁴ Petitioner Ajasi was only permitted to use the phone when her employer was home.²⁴⁵ All Petitioners were deprived of adequate personal time in violation of their rights to privacy and personal liberty.²⁴⁶

In addition to denying their rights to privacy and liberty, Petitioner Huayta's twelve-year-old daughter, Carla, was subjected to child labor in violation of her right to life and liberty.²⁴⁷ By requiring Carla to work, Petitioner Huayta's employers also violated her right to special protection, care and aid as a child under Article VII and her right to education under Article XII. Petitioner Huayta's employers required Carla to do work around the house for which they paid her \$20 per month.²⁴⁸ As a result, Carla was prevented from completing her homework²⁴⁹ and denied free time,²⁵⁰ while she

forms of communication... should be prohibited." Human Rights Comm., General Comment No. 16 (Art. 17), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/Rev.1, at 21 (July 29, 1994).

²⁴¹ Declaration of Otilia Luz Huayta, ¶ 26, Ex. A(5).

²⁴² *Id.* at ¶ 26-27.

²⁴³ Declaration of Siti Aisah, ¶ 14, Ex. A(1).

²⁴⁴ Declaration of Raziah Begum, ¶ 26, Ex. A(3).

²⁴⁵ Declaration of Hildah Ajasi, ¶ 19, Ex. A(2).

²⁴⁶ *See generally* Declarations of Ajasi, Huayta, Gonzalez Paredes, Ocares, Begum and Aisah.

²⁴⁷ Declaration of Otilia Luz Huayta, ¶ 13, 19, Ex. A(5).

²⁴⁸ *Id.* at ¶ 15.

²⁴⁹ *Id.* at ¶ 19 (stating that Carla "was often forced to play with my employer's four-year old child. If Carla did homework instead, the child would complain to her parents. My employer would then call Carla to play with the child again. Carla was unable to do her homework because of this.").

²⁵⁰ *Id.* at ¶ 23.

simultaneously endured the stresses of being treated as a virtual slave in her employers' home.²⁵¹

Petitioners' rights to fair remuneration and decent work conditions under Article XIV were also violated.²⁵² The labor rights protected by Article XIV are reflected in the OAS Charter.²⁵³ Article 34(g) of the Charter states that States Parties will seek to provide "fair wages, employment opportunities, and acceptable working conditions for all," and Article 45(b) states that "[w]ork is a right and a social duty, it gives dignity to the one who performs it," and that "it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working."²⁵⁴

In violation of Article XIV, the employers of Petitioners Begum, Aisah, Ajasi, Gonzalez Paredes and Huayta denied them fair and adequate remuneration for their work. They were paid paltry salaries, far below the U.S. federal minimum wage of \$5.15 per hour, and spanning from \$29 to \$500 per month.²⁵⁵ The salaries of these Petitioners were

²⁵¹ *Id.* at ¶ 35 (stating "[they] treated my daughter and I like slaves" and "I was suffering and it hurt me that Carla had to witness all this and go through it with me").

²⁵² Article XIV of the American Declaration provides that "[e]very person has the right to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit. Every person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family." American Declaration, *supra* note 222.

²⁵³ OAS Charter, *supra* note 186.

²⁵⁴ *Id.*

²⁵⁵ *See* Declaration of Raziah Begum, ¶ 12, Ex. A(3) (stating her employers paid her son in Bangladesh \$29 per month, although they paid nothing for her final seven months of work); Declaration of Siti Aisah, ¶ 11, Ex. A(1) (stating she was paid \$150 per month); Declaration of Hildah Ajasi, ¶ 11, Ex. A(2) (stating she was paid \$250 per month); Declaration of Otilia Luz Huayta, ¶ 15, Ex. A(5) (stating she was paid \$200 per month); Declaration of Mabel Gonzalez Paredes, ¶ 8, Ex. A(4) (stating she was paid \$500 per month).

so inadequate and unsuitable for living that, for example, Petitioner Huayta was unable to provide her daughter with sufficient meals, causing her daughter's school to intervene to provide her free lunches.²⁵⁶ Petitioner Begum was “never paid ... a cent directly during the time [she] worked for [her employers],” and therefore had no money with which to escape her employers.²⁵⁷ In addition to their paltry wages, the employers of Petitioners Huayta, Ajasi and Ocares “lent out” Petitioners to their friends for cleaning and childcare services without additional or adequate compensation for their extra work.²⁵⁸ In fact, when Petitioner Huayta was paid \$300 for two weeks of childcare for a friend of her employer's, her employer told Petitioner Huayta the money belonged to her and claimed \$100 for herself.²⁵⁹ Petitioner Huayta's employer's husband scolded her and told her that he was “disappointed” that she accepted the money and “that [she] only cared about material things.”²⁶⁰ According to Petitioner Ocares, “[i]t was very distressing working for someone who said they can force you to work for someone else, as though I was simply property of theirs to lend out.”²⁶¹

Petitioners were all denied decent work conditions in further violation of Article XIV. All Petitioners were required to work extremely long and arduous hours on a daily basis.²⁶² Petitioners Begum, Aisah, Ajasi and Huayta were refused any days of rest,²⁶³

²⁵⁶ Declaration of Otilia Luz Huayta, ¶ 18, Ex. A(5), (stating “[t]he wages that I made were not enough to support my daughter. Because I had to work all of the time, and because my pay was so inadequate, I could not arrange for proper meals or nutrition for my daughter. Carla did not have proper lunches when she went to school. She was only taking slices of bread and water.”).

²⁵⁷ Declaration of Raziah Begum, ¶ 14, 36, Ex. A(3).

²⁵⁸ Declaration of Otilia Luz Huayta, ¶ 16-17, Ex. A(5); Declaration of Susana Ocares, ¶ 17, Ex. A(6); Declaration of Hildah Ajasi, ¶ 15, Ex. A(2).

²⁵⁹ Declaration of Otilia Luz Huayta, ¶ 17, Ex. A(5).

²⁶⁰ Declaration of Otilia Luz Huayta, ¶ 17, Ex. A(5).

²⁶¹ Declaration of Susana Ocares, ¶ 23, Ex. A(6).

²⁶² Declaration of Hildah Ajasi, ¶ 12, Ex. A(2) (“I worked anywhere from sixteen hours up to twenty-four hours a day, if one counts sleeping with the baby as working hours.”); Declaration of Lucia Mabel Gonzalez Paredes, ¶ 15, Ex. A(4) (stating that she typically worked fifteen hours and thirty minutes per day); Declaration of Otilia Luz Huayta, ¶ 14, Ex. A(5) (stating that she typically worked approximately

while Petitioner Ocares was only permitted some Sundays off per month.²⁶⁴ Petitioners also endured extremely harsh conditions of work. For example, Petitioner Begum was required to do so much cooking, cleaning and washing that as soon as one task was complete there was another waiting.²⁶⁵ Her employers never permitted her to take a break or rest, required her to wash everything by hand, and, as a result, her skin was “always broken and cracked from the washing and cleaning.”²⁶⁶ Petitioner Ajasi was required to sleep with her employers’ baby four nights a week, requiring her to constantly wake up to feed the baby and to work virtually twenty-four hours a day.²⁶⁷ Petitioner Gonzalez Paredes, in addition to all her household chores, was required to care for her employers’ epileptic infant daughter: “I was responsible for learning to perform and for performing complex physical therapy on the child. I was trained to perform these physical therapy tasks by my employers’ part-time physical therapist, who was paid approximately \$180.00 per hour.”²⁶⁸

The employers of Petitioners Gonzalez Paredes and Ajasi denied them adequate medical care in violation of their right to preservation of health and to well being under

sixteen hours per day); Declaration of Susana Ocares, ¶ 14, Ex. A(6) (stating that she typically worked twelve hours and thirty minutes per day); Declaration of Raziah Begum, ¶ 11, Ex. A(3) (stating that she typically worked fifteen to sixteen hours per day); Declaration of Siti Aisah, ¶ 9, Ex. A(1) (stating that she worked fifteen to sixteen hours on a normal day).

²⁶³ Declaration of Raziah Begum, ¶ 6, 25, Ex. A(3) (stating that she was never allowed to leave her employer’s apartment); Declaration of Otilia Luz Huayta, ¶ 14, Ex. A(5) (stating that eventually she was required to work every day of the week); Declaration of Hildah Ajasi, ¶ 14, Ex. A(2) (stating that she was never given a day off); Declaration of Siti Aisah, ¶ 9, Ex. A(1) (stating that she was not allowed a single day of rest).

²⁶⁴ Declaration of Susana Ocares, ¶ 15, Ex. A(6) (stating that she worked at least one Sunday out of every month and sometimes more).

²⁶⁵ Declaration of Raziah Begum, ¶ 15, Ex. A(3).

²⁶⁶ *Id.* at ¶ 15-17.

²⁶⁷ Declaration of Hildah Ajasi, ¶ 12, Ex. A(2).

²⁶⁸ Declaration of Lucia Mabel Gonzalez Paredes, ¶ 16, Ex. A(4).

Article XI.²⁶⁹ When Petitioner Gonzalez Paredes became sick and hospitalized with a virus her employers refused to pay the costs of her medical bills, which amounted to \$300, sixty percent of her monthly salary.²⁷⁰ Similarly, Petitioner Ajasi has asthma, but her employer refused to pay for her medication and insisted that she use her daughter's medication instead.²⁷¹ When Ms. Ajasi had backaches from her work or fell ill, her employer refused to take her to see a doctor despite her pleas.²⁷²

These are just some examples of the numerous violations of their rights under the American Declaration that Petitioners experienced. These violations are representative of the panoply of rights violations similarly situated domestic workers employed by diplomats routinely experience while working in the United States.

VI. THE UNITED STATES VIOLATES PETITIONERS' RIGHT TO EQUALITY UNDER ARTICLE II BY EXCLUDING PETITIONERS FROM THE RIGHTS AND PRIVILEGES IT AFFORDS OTHER WORKERS AND FAILING TO ADOPT SPECIAL MEASURES OF PROTECTION AGAINST ABUSE BY DIPLOMATS OF THESE WOMEN WORKERS

Article II of the American Declaration affirms the equality of all human beings and prohibits discrimination on the grounds of sex, race and national origin, providing that “all persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed, or any other factor.”

Article II establishes a principle of non-discrimination that “permeates the guarantee of all other rights and freedoms” provided in the Declaration, as well as other sources of

²⁶⁹ Article XI states that “[e]very person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.” American Declaration, *supra* note 222.

²⁷⁰ Declaration of Lucia Mabel Gonzalez Paredes, ¶ 19, Ex. A(4).

²⁷¹ Declaration of Hildah Ajasi, ¶ 25, Ex. A(2).

²⁷² *Id.* at ¶ 26.

international law and domestic law.²⁷³ As the Inter-American Court has explained, the principle of non-discrimination requires that States not discriminate against groups by imposing “any exclusion, restriction or privilege that is not objective and reasonable, and which adversely affects human rights.”²⁷⁴

Moreover, as the Commission has explained, the guarantee of equality in the American Declaration goes well beyond prohibiting discrimination by States in the application of legal rights and remedies on the basis of sex, but also establishes an affirmative obligation on the State to ensure that such discrimination does not occur in its jurisdiction by private individuals.²⁷⁵ Where a group, such as women, is particularly vulnerable to discrimination by others, the American Declaration imposes a special obligation on States to adopt special measures to protect and ensure their right to equality.

By depriving domestic workers employed by diplomats of equal rights and allowing violations of their rights by their diplomat employers, the United States has violated Petitioners’ right to equality and failed in its duty to provide them with special protections. The United States has excluded this group of domestic workers – a group made up overwhelmingly of migrant women workers performing traditional “women’s work” – from its legal protections against all forms of violence and labor exploitation. Further, the United States has allowed Petitioners to be subjected to gender discrimination in the form of gender-based violence, sexual harassment and unequal

²⁷³ *Maya Indigenous Cmities. of the Toledo Dist. v. Belize*, *supra* note 205, ¶ 163.

²⁷⁴ *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, *supra* note 182, ¶¶ 84, 105, 119.

²⁷⁵ *Id.* ¶ 86. In its opinion, the Court referenced the OAS Charter, the American Declaration, the Charter of the United Nations, the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Racial Discrimination, among several other international and regional human rights instruments. *Id.* at n.33.

compensation and work conditions, thereby furthering the unequal treatment of women within its jurisdiction.

A. The United States Has Deprived Petitioners and Similarly Situated Domestic Workers of the Legal Rights and Remedies it Affords Other Workers in Violation of Article II

The United States violates the principle of non-discrimination by excluding domestic workers employed by diplomats from the rights and remedies it affords to other workers because of their gender, race and national origin and based on stereotypes associated with these identities. In depriving Petitioners of the right to be free from violence and exploitation, the United States has continued its long practice of discriminating against women of color who perform domestic work.

As explained *infra* Part II(A), the United States excludes all domestic workers from many fundamental labor protections it affords to other workers. Domestic workers are explicitly excluded from the three major federal labor laws that were enacted on behalf of all workers – the National Labor Relations Act, the Fair Labor Standards Act, and the Occupational Safety and Health Act.²⁷⁶ These exclusions have selectively left domestic workers without basic protections afforded to most other workers of the right to organize for better working conditions, the right to overtime compensation, and the right

²⁷⁶ The United States labor laws exclude domestic workers from its definitions of “employee” despite affording protections to almost every other class of worker. The National Labor Relations Act protects the rights of most workers to organize and collectively bargain for their rights, and yet expressly excludes domestic workers from coverage, stating “the term ‘employee’ ... shall not include any individual employed...in the domestic service of any family or person at his home.” 29 U.S.C. §152(3) (2006). The Fair Labor Standards Act (FLSA) requires employers to pay minimum wage and limits the maximum hours worked each week for most workers, but specifically excludes workers who provide babysitting or companionship services to the elderly and infirm. 29 U.S.C. § 213(1)(15) (2006). FLSA also excludes from its maximum hour limits and overtime protection all domestic workers who live within the homes of their employers, exempting “any employee who is employed in domestic service in a household and who resides in such household”. 29 U.S.C. §213(b)(21). Regulations to the Occupational Health and Safety Act, the law providing for safe and healthful working conditions of all workers, specifies that the law excludes any person who privately employs another person to perform “commonly regarded as ordinary domestic household tasks, such as house cleaning, cooking, and caring for children.” 29 C.F.R. § 1975.6 (2007).

to work in safe and healthy conditions. Recently, in June 2007, the U.S. Supreme Court, in *Long Island Care at Home, Ltd. v. Coke*, denied a challenge to the exclusions of home health care workers from overtime provisions under federal wage and hour laws, thereby reaffirming that these workers are entitled to lesser and unequal protections under basic U.S. labor and employment laws.²⁷⁷ Domestic workers are also *de facto* excluded from all federal laws and most state laws guaranteeing the rights to be free from discrimination in the workplace because these laws generally only apply to employers with fifteen or more employees.²⁷⁸

Not only are domestic workers already unequally and inadequately protected under labor and employment laws, but the United States, by relying on diplomatic immunity and a discriminatory interpretation of the application of the “commercial activities” exception, further deprives domestic workers employed by diplomats of any of their existing legal protections, such as the right to a binding contract and to a minimum hourly wage, by effectively rendering their rights unenforceable. Even more shocking, the United States deprives these women of protection from violations of their most fundamental rights, including, *inter alia*, the right to be free from gender-based violence, sexual abuse and harassment, physical and emotional abuse, forced labor and human trafficking. The United States, thus, denies these women all of the rights guaranteed to them under the American Declaration, including the core right to life, liberty and personal security, and empowers diplomat employers to treat their domestic workers without regard to the law. The only “protection” against abuse the United States provides

²⁷⁷ *Long Island Care at Home, Ltd. v. Coke*, No. 06-593, 2007 WL 950948 (2007)

²⁷⁸ Americans with Disabilities Act (ADA), 42 U.S.C. § 12111(5)(A) (2006); Title VII, 42 U.S.C. § 2000e(b) (2006).

these domestic workers is an employment contract that the United States itself has rendered entirely unenforceable.

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. Nowhere is this discriminatory approach more evident than in the justifications provided by the United States for why domestic workers employed by diplomats are not entitled to a remedy for violation of their rights. As set forth *infra* Part II(D)(2), in *Tabion v. Mufti*, the United States Court of Appeals for the Fourth Circuit held that a diplomat's contract for domestic worker services does not fall within the commercial activities exception to diplomatic immunity under the Vienna Convention on Diplomatic Relations and, therefore, that the worker could not seek compensation for the diplomat's violation of her employment rights.²⁷⁹

The assertion that the employment of a person to perform domestic work is not an activity that is "commercial" in nature but one that is "incidental" to the life of a diplomat resembles the justifications used to exclude domestic employees from general labor protections. As has been noted repeatedly in academic literature, the exclusion of this workforce from labor protections is supported by stereotypical assumptions about the nature of household work: that the relationship between an employer and a domestic "servant" is a private "personal" matter, rather than a commercial employment relationship; that employment within a household is not "real" productive and

²⁷⁹ 73 F.3d 535 (1996).

remunerative work; and that women do not work to support their own families.²⁸⁰

Historically, consistent with the discriminatory attitude that excludes traditional “women’s work” from government protection, state employment and welfare statutes often exempted domestic workers and labor laws enacted to protect women workers drew a line between industrial and domestic workers.²⁸¹

As evidenced in its interpretation of the “commercial activities” exception, the United States continues to devalue traditional “women’s work,” albeit with severe consequences for Petitioners and similarly situated domestic workers. Contrary to the position of the United States, employing a worker to perform difficult and time consuming activities such as childcare, housecleaning and meal preparation is not an activity “incidental to daily life” within the “scope of a diplomat’s official functions,” but provides an economic benefit specifically commercial in nature. The domestic worker, like an architect, tutor, counselor or chef, applies her expertise to the benefit of the diplomat in exchange for a fee or wage. Characterizing this relationship as “incidental to the daily life” of the diplomat fails to recognize the separate economic value of these laborers’ work because women and minorities perform these jobs.

Even if the exclusion of domestic workers from labor and employment rights and remedies were not grounded in discriminatory motives, the United States violates Article II by interpreting the Vienna Convention to deprive domestic workers of a remedy because doing so has a discriminatory impact on these workers. Where a State deprives a group of its rights by way of a neutral policy that impacts that group in a discriminatory

²⁸⁰ See, e.g., P. Palmer, *Domesticity and Dirt: Housewives and Domestic Servants in the United States, 1920-1945* (1989); Peggie R. Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 AM. U.L.Rev. 851, 880-918 (1999).

²⁸¹ Smith, *supra* note 280, at 853-55 & n.15.

manner, the State violates Article II. As the Commission has explained, “international human rights law prohibits not only deliberately discriminatory policies and practices, but also policies and practices with a discriminatory impact on certain categories of persons, even though a discriminatory intention cannot be proved.”²⁸²

By drawing the distinction between “genuine” commercial activities and those incidental to the diplomat’s daily life, the United States has created a severe discriminatory impact on domestic workers. The only significant employment relationship the diplomat is likely to have that falls outside the exception is that with his domestic employee. Clearly others who enter into casual contractual relationships with a diplomat, such as a dry cleaner, will be much less impacted by the diplomat’s immunity to accountability for violating a contract.

B. The United States Fails to Abide by its Special Obligation to Protect Women Workers from Discrimination and Gender-Based Violence

Article VII of the American Declaration, as interpreted in light of other regional and universal human rights instruments, also requires that a State provide every vulnerable person or class of persons with special protections sufficient to ensure the free exercise of their rights.²⁸³ Towards that end, the State must adopt “positive measures, determined according to the particular needs of protection of the individual, be it the personal condition or specific situation of the individual.”²⁸⁴ The Court has previously recognized the existence of special duties to protect, *inter alia*, undocumented migrant

²⁸² Inter-American Commission’s brief to Inter-American Court, as quoted in *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, *supra* note 182, (p. 22, English).

²⁸³ American Declaration, *supra* note 222, art. VII; *Ximenes Lopes v. Brazil*, *supra* note 195, ¶ 103; *Pueblo Bello Massacre case*, *supra* note 195, ¶ 123; *Sawhoyamaya Indigenous Community case*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 154 (Mar. 29, 2006); *Mapiripán Massacre case*, *supra* note 195, ¶ 117.

²⁸⁴ *Id.*

workers,²⁸⁵ street children,²⁸⁶ indigenous communities,²⁸⁷ and persons suffering from mental disorders from private acts of violence.²⁸⁸

The American Declaration imposes a special obligation on its signatories to protect women and children because of their particular vulnerabilities to violence, abuse and exploitation. Through the establishment of the Special Rapporteurship on the Rights of Women in 1994 and the adoption of numerous country reports, the Commission has repeatedly highlighted the importance of “ensuring that the rights of women are fully respected and ensured in each member State,”²⁸⁹ reflecting the priority that OAS Member States have accorded the development of “policies and practices to combat violence against women, including domestic violence.”²⁹⁰ Recently, in a comprehensive report issued in January 2007, “Access to Justice for Women Victims of Violence in the Americas,” the Commission highlighted the grave situation of violence and discrimination suffered by women in the region and the obstacles that women face in accessing effective and adequate judicial resources.²⁹¹

²⁸⁵ *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, *supra* note 182.

²⁸⁶ *Street Children* case (*Villagrán Morales, et al.*), *supra* note 211, ¶ 144.

²⁸⁷ *Sawhoyamaya Indigenous Community* case, *supra* note 283, ¶¶ 83, 168; *Yakye Axa Indigenous Community* case, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 63 (June 17, 2005). For examples of cases applying the American Declaration, see *Maya Indigenous Communities of the Toledo District v. Belize*, *supra* note 205, ¶¶ 169-170; *Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 5 rev. ¶ 126 (2002).

²⁸⁸ *Ximenes Lopes*, *supra* note 195, ¶¶ 103, 123-49 (interpreting the right to life and personal integrity, as well as the right to respect for the inherent dignity of the human person, in the context of persons with disabilities, and holding the State to a more exacting duty to prevent human rights violations and protect potential victims).

²⁸⁹ Inter-Am. Comm’n on Human Rights, *Special Rapporteurship on the Rights of Women: Background and Mandate*, <http://www.cidh.oas.org/women/mandate.htm> (last visited Nov. 6, 2007).

²⁹⁰ See, e.g., III Summit of the Ams., *Plan of Action* (Apr. 20-22, 2001), available at <http://www.summit-americas.org/Documents%20for%20Quebec%20City%20Summit/planofaction-template-eng.htm>.

²⁹¹ Inter-Am. Comm’n on Human Rights, *Rapporteurship on the Rights of Women: Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/V/II., doc. 68 (Jan. 20, 2007), available at <http://www.cidh.org/women/Access07/exesummary.htm>.

Article VII of the American Declaration reflects this commitment by explicitly recognizing the right of women to special protection “during pregnancy and the nursing period.” Reading this Article in light of contemporary understanding of the rights of women reflected in international standards governing the protection of women, the Commission has further recognized that “[v]iolence against women is, first and foremost, a human rights problem” cognizable under the American Declaration and the American Convention.²⁹² Similarly, the Inter-American Court, addressing the vulnerability of women to workplace violence, has recognized a heightened obligation of member states to provide “special care for women workers.”²⁹³

In the Inter-American system, the need for and right of women to special measures of protection finds its maximum expression in the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará).²⁹⁴ The Convention of Belém do Pará “reflect[s] a hemispheric consensus” as to the gravity of the problem of violence against women and expresses the fundamental commitment of the American States to take concrete steps to address this issue.²⁹⁵ The Convention addresses acts of gender-based violence even where the violence has not been perpetrated or condoned by the State.²⁹⁶ The Convention further

²⁹² Inter-Am. Comm’n on Human Rights, *The Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination*, OEA/Ser.L/V/II.117, doc. 44, ¶ 122 (Mar. 7, 2003).

²⁹³ *Id.* ¶ 157.

²⁹⁴ Organization of American States: Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (“Convention of Belém do Pará”), June 9, 1994, 33 I.L.M. 1535 [hereinafter Convention of Belém do Pará].

²⁹⁵ See *The Situation on the Rights of Women in Ciudad Juárez*, *supra* note 292, ¶ 103; *da Penha Fernandes v. Brazil*, Case 12.051, Inter-Am. C.H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 51 (2000).

²⁹⁶ The Convention protects, *inter alia*, the right to a life free of violence (Article 3), the right to respect for life, physical, mental, and moral integrity, personal safety, and personal dignity (Article 4), and the right to a simple and prompt recourse to a competent court for protection against acts that violate those rights (Articles 4 (g)). Convention of Belém do Pará, *supra* note 294.

requires States Parties to “apply due diligence to prevent, investigate and impose penalties for violence against women”;²⁹⁷ “adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property”;²⁹⁸ and ensure “fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures.”²⁹⁹ The broad hemispheric adherence to the Convention of Belém do Pará³⁰⁰ constitutes compelling evidence that the basic principles reflected in the Convention, focused on protecting women from private acts of violence, reflect general principles of international law. Therefore, all OAS Member States, even those not party to the American Convention or the Belém do Pará Convention, have a duty to act with special diligence in ensuring that women may exercise and enjoy the rights articulated in the American Declaration.³⁰¹

The United States has failed to abide by its special obligation to protect women workers from gender discrimination and gender-based violence. As set forth above, domestic workers are widely recognized in the United States as particularly vulnerable to human trafficking, sexual violence and exploitation, yet the United States has abdicated its responsibility to protect these women.

VII. BY FAILING TO PREVENT, PROTECT AND REMEDY THE VIOLATIONS OF PETITIONERS’ RIGHTS BY DIPLOMATS, THE

²⁹⁷ *Id.* at art. 7(b).

²⁹⁸ *Id.* at art. 7(d).

²⁹⁹ *Id.* at art. 7(f).

³⁰⁰ Only three States, the United States, Canada and Jamaica, are not party to the treaty. *See* Inter-Am. Comm’n on Women, *Status of Signing and Ratification of the Convention of Belém do Pará*, <http://www.oas.org/cim/English/Laws.Rat.Belem.htm> (last visited Nov. 6, 2007).

³⁰¹ *Cf. Domingues v. United States*, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, OEA/Ser.L./V/II.117, doc. 5 rev. ¶ 64 (2002).

UNITED STATES VIOLATES ITS DUTY TO RESPECT AND ENSURE THEIR RIGHTS UNDER THE AMERICAN DECLARATION

The United States allows and facilitates the abuse and exploitation of domestic workers employed by diplomats, a group to which it owes a special duty of protection. By failing to take reasonable steps to protect these workers, the United States failed to meet its obligation to respect and ensure their rights under the American Declaration. Petitioners were exploited, abused and, in some cases, held in slave-like conditions by their diplomat employers. They were deprived of their human rights to life, liberty and security, their right to humane treatment, their right to fair and decent working conditions and their right to privacy, all rights either expressly or implicitly protected by the American Declaration and Convention. The violations experienced by Petitioners form part of a persistent and pervasive pattern of human rights abuses by diplomats of their domestic workers that has been prevalent in the United States for decades. The United States has failed to conduct due diligence to guarantee the full and free exercise of the human rights of migrant domestic workers within its jurisdiction by failing to prevent, investigate, prosecute and remedy such abuses. As a consequence, the United States must be held responsible for the violations of their rights under American Declaration.

A. The United States is Obligated to Take Reasonable Measures to Protect Individuals Against Violations of their Rights Under the American Declaration by Private Actors

The affirmative obligation imposed upon the United States by the American Declaration and Convention to “ensure” fundamental rights incorporates the obligation to ensure that these rights are not violated by private actors. Moreover, this obligation is heightened towards women and children because of their particular vulnerabilities.

Under the Inter-American system, States are responsible for their failure to take reasonable steps to prevent, investigate, punish, and remedy any violations by private actors of the rights enshrined in the American Declaration. In this case, the United States is obligated to exercise such “due diligence” by implementing its laws, policies and practices and organizing its government structures to protect domestic workers from human rights violations by their employers, even when those employers are subject to diplomatic immunity.

In *Velásquez Rodríguez*, the Inter-American Court set forth the basic principles under which human rights violations by private actors can be imputed to a State.³⁰² The Court found that Article 1(1) of the American Convention imposes on States Parties both negative obligations to “respect” the rights contained in the Convention and positive obligations to “ensure” the full and free exercise of those rights.³⁰³ As the Inter-American Court explained, “when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention ... the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.”³⁰⁴ The obligation of States to ensure the free and full exercise of rights under the American Declaration and the Convention requires States “to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full

³⁰² See *Velasquez Rodriguez Case*, Judgment of July 29, 1988, *supra* note 165, ¶ 160. These principles have more recently been cited by the Court in the *Pueblo Bello Massacre* case, *supra* note 195, ¶ 120, *Ximenes Lopes*, *supra* note 195, ¶¶ 124-25, *Mapiripán Massacre*, *supra* note 195, ¶ 232, and the *Sawhoyamaxa Indigenous Community* case, *supra* note 283, ¶ 153.

³⁰³ American Convention, *supra* note 207, art. 1(1) (“The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”).

³⁰⁴ *Velasquez Rodriguez Case*, *supra* note 165, at ¶ 176.

enjoyment of human rights.”³⁰⁵ The obligation to create a “legal system designed to make it possible to comply with [the duty to ensure the free and full exercise of rights],” is not fulfilled unless States take affirmative steps to prevent, investigate and punish any violation of rights.³⁰⁶ Additionally, States must attempt to “restore the right violated, actually restore it if possible, and provide compensation for damages.”³⁰⁷

The Court in *Velasquez Rodriguez* thus found that State responsibility is incurred for the acts of private actors when the State fails to conduct “due diligence to prevent the violation or to respond to it” in a manner appropriate under the circumstances.³⁰⁸ A State’s failure to conduct due diligence is demonstrated when the violation of rights occurred “with the support or the acquiescence of the government” or when “the State has allowed the act to take place without taking measures to prevent it or to punish those responsible.”³⁰⁹ The State, thus, “has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”³¹⁰

In three recent decisions, *Ximenes Lopes*, *Pueblo Bello Massacre*, and *Mapiripán Massacre* cases, the Inter-American Court reaffirmed that the State is obligated to protect

³⁰⁵ *Id.* at ¶ 166.

³⁰⁶ *Id.* (“States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.”).

³⁰⁷ Naomi Roht-Arianza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 Cal. L. Rev. 449, 470-71 (1990).

³⁰⁸ *Velasquez Rodriguez Case*, *supra* note 165, ¶ 172.

³⁰⁹ *Id.* at ¶ 173.

³¹⁰ *Id.* at ¶ 174.

against violations committed by non-State actors.³¹¹ As the Court explained in *Ximenes*

Lopes

The *erga omnes* obligations of States to respect and ensure the norms of protection and to guarantee the effectiveness of the rights, project their effect beyond the relationship between its agents and the persons subject to its jurisdiction, since they exist in the affirmative obligation of the State to adopt the measures necessary to ensure the effective protection of human rights in inter-personal relations.³¹²

In furtherance of this duty, States must not only create an appropriate legal framework to prevent any threat to individual rights, but must also take all necessary measures to prevent and punish serious deprivations of rights as a consequence of the criminal acts of other individuals.³¹³ While, as an initial matter, the acts of purely private individuals are not imputable to the State, the State may be held responsible if it fails to take reasonable

³¹¹ *Ximenes Lopes*, *supra* note 195, ¶¶ 124-25; *Pueblo Bello Massacre* case, *supra* note 195, ¶ 120; *Mapiripán Massacre* case, *supra* note 195, at ¶ 232; *see also Sawhoyamaxa Indigenous Community* case, *supra* note 283, ¶ 153; *Juan Humberto Sánchez* case, 2003 Inter-Am. Ct. H.R. (ser. C) No. 99, ¶ 110 (June 7, 2003); *Street Children* case (Villagrán Morales et al.), *supra* note 211, ¶ 144.

³¹² *Ximenes Lopes*, *supra* note 195, ¶ 85 (unofficial English translation of “Las obligaciones erga omnes que tienen los Estados de respetar y garantizar las normas de protección, y de asegurar la efectividad de los derechos, proyectan sus efectos más allá de la relación entre sus agentes y las personas sometidas a su jurisdicción, pues se manifiestan en la obligación positiva del Estado de adoptar las medidas necesarias para asegurar la efectiva protección de los derechos humanos en las relaciones inter-individuales.”). *Cf. Pueblo Bello Massacre* case, *supra* note 195, ¶ 113; *Mapiripán Massacre* case, *supra* note 195, ¶ 111; *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, *supra* note 182, ¶ 140.

³¹³ *Pueblo Bello Massacre* case, *supra* note 195, ¶ 120 (stating that “los Estados deben adoptar las medidas necesarias, no sólo a nivel legislativo, administrativo y judicial, mediante la emisión de normas penales y el establecimiento de un sistema de justicia para prevenir, suprimir y castigar la privación de la vida como consecuencia de actos criminales, sino también para prevenir y proteger a los individuos de actos criminales de otros individuos e investigar efectivamente estas situaciones.”); *Ximenes Lopes*, *supra* note 195, ¶¶ 124-25; *Sawhoyamaxa Indigenous Community* case, *supra* note 283, ¶ 153; *Mapiripán Massacre* case, *supra* note 195, ¶ 232; *Juan Humberto Sánchez* case, 2003 Inter-Am. Ct. H.R. (ser. C) No. 99 (June 7, 2003), ¶ 110; and “*Street Children*” case (Villagrán Morales et al.), *supra* note 211, ¶ 144. *Cf. Kiliç v. Turkey*, Eur. Ct. H.R. Application No. 22492/93 (Mar. 28, 2000), ¶ 62 (recalling that the State must “take appropriate steps to safeguard the lives of those within its jurisdiction ... by putting in place effective criminal-law provisions ..., backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.” The European Court of Human Rights observed that the State’s duty “also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from the criminal acts of another individual.”).

measures to prevent the injurious acts.³¹⁴ The Court has explained that, as a result of the *erga omnes* obligation of the State to respect and ensure the norms of protection, the State must take the measures necessary to ensure the effective protection of human rights in private relationships.³¹⁵

Similarly, in Advisory Opinion OC-18/03, concerning the rights of undocumented migrant workers, the Inter-American Court unequivocally stated that “the positive obligation of the State to ensure the effectiveness of the protected human rights gives rise to effects in relation to third parties (*erga omnes*).”³¹⁶ The Court observed that, because the State determines the laws that regulate the private employment relations between individuals and because migrant workers must resort to State mechanisms for the protection of their rights, the State may be held responsible if it does not “ensure that human rights are respected in these private relationships between third parties.”³¹⁷

The obligation of States to protect the human rights of individuals within their jurisdiction from harm by private actors is reflected in other fundamental international human rights treaties, as well. For example, Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR), which mirrors the “respect and ensure” language of Article 1(1) of the American Convention, also is held to impose a positive obligation on States Parties to prevent and protect against private action.³¹⁸

³¹⁴ *Pueblo Bello Massacre* case, *supra* note 195, ¶ 113; *Ximenes Lopes*, *supra* note 195, ¶ 85; *Mapiripán Massacre* case, *supra* note 195, ¶ 111; *Velásquez Rodríguez*, *supra* note 165, ¶ 172.

³¹⁵ *Pueblo Bello Massacre* case, *supra* note 195, ¶ 113; *Ximenes Lopes*, *supra* note 195, ¶ 85; *Mapiripán Massacre* case, *supra* note 195, ¶ 111.

³¹⁶ *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, *supra* note 182, ¶ 140.

³¹⁷ *Id.* at ¶¶ 147, 150.

³¹⁸ The U.N. Human Rights Committee explained that

the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents,

As such, the American Declaration imposes an affirmative obligation on the United States to exercise due diligence to ensure that migrant domestic workers employed by diplomats are protected from violations of the rights it guarantees. The duty of the United States to take steps to protect and ensure the rights of these workers was unquestionably triggered decades ago. In 1981, the United States acknowledged patterns of human rights abuses committed by diplomats against their domestic workers.³¹⁹ As media and case filings illustrate, these patterns of abuse have only multiplied, becoming increasingly public, pervasive and persistent.³²⁰ The on-going and long-standing patterns of abuse oblige the United States to take reasonable measures to protect these domestic workers and evidence United States responsibility for failing to exercise due diligence to protect their rights.³²¹ To satisfy its obligations under the American Declaration that United States must implement effective protections against rights violations that prevent

but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons and entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.

Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 ¶ 8 (2004).

³¹⁹ See Letter from Gilda Brancato, Attorney-Advisor, Office of the Legal Advisor, Diplomatic Law and Litigation Division, Department of State to Foreign Missions, Oct. 23, 1990, Ex. D(4).

³²⁰ See ACLU, Table of Domestic Worker Cases Publicized in the Media, Reports, and Court Filings, Ex. H(1); ACLU, Summaries of Cases Publicized in the Media, Reports and Court Filings, Ex. H(2); Rebecca J. Cook, *State Responsibility for Violations of Women's Human Rights*, 7 Harv. Hum. Rts. J. 125, 151 (1994) ("The behavior of private individuals or agencies may indirectly indicate a state's lack of due diligence. Indeed, a state may be considered to have facilitated an international wrong or to be complicit in its commission when the wrong is of a pervasive or persistent character.").

³²¹ See generally *Velasquez Rodriguez* Case, *supra* note 165 (in *Velasquez* the court relied on a pattern of violations as evidence of state involvement in the disappearance of Velasquez). See also Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 Cal. L. Rev. 449, 472 (1990) (stating that "[a]lthough the [*Velasquez Rodriguez*] court relied on a pattern of violations as evidence of state involvement in Velasquez's disappearance, it did not limit its holding to cases where a consistent pattern of violations is shown. Thus, even a single violation might trigger the state's obligation to act.").

human rights abuses, investigate them when they occur, and ensure punishment of rights offenders and compensation for victims.

B. The United States Failed to Take Reasonable Measures to Protect Petitioners by Condoning or Acquiescing to the Violations by Diplomats

The United States is responsible for the violations of Petitioners' rights because it failed to exercise due diligence to prevent the abuses and the violations occurred "with the support or the acquiescence of the government."³²² The United States government supported or acquiesced to the violations by creating and sustaining a legal regime governing domestic workers employed by diplomats that categorically deprives them of effective labor protections.

First, the government has excluded them from basic federal labor protections, instead, requiring workers to sign a contract that sets forth rights that cannot be enforced. Second, the United States has instituted no effective mechanism to protect these women from abuse by their diplomat employers. The United States has failed even to legislate or adopt as regulations the existing Department of State A-3 and G-5 visa policies aimed at preventing abuse of domestic workers, responding to domestic worker complaints, and providing remedial assistance. By failing to implement in law or regulations these policies, the Department of State is not accountable for its failure to implement these policies. In fact, the United States has failed to charge any agency with oversight over the A-3 and G-5 employment visas to monitor employer compliance with visa requirements. Third, the U.S. government has failed to clarify in guidelines, regulations or law that domestic workers on A-3 or G-5 visas may change their employers, thereby

³²² *Velasquez Rodriguez Case*, *supra* note 165, ¶ 173.

perpetuating domestic workers' belief that they must remain in their employment in order not to lose their lawful immigration status. Fourth, the United States has failed to employ any means to punish diplomats for their unlawful behavior. Though diplomats are entitled to absolute criminal immunity, the United States should insist on criminal punishment, waivers of immunity, or other repercussions by their sending state. Finally, by way of its interpretation of the commercial activities exception of the Vienna Convention on Diplomatic Relations, the United States has provided blanket immunity for diplomats who abuse their domestic workers and had eliminated any possibility of redress for the exploitation these workers endure.

These individual and combined failures of the U.S. government to legislate and regulate the employment conditions of domestic workers employed by diplomats are evidence of the U.S. government's acquiescence to the human rights abuses of these domestic workers. Rather than create a legal system that ensures the free and full exercise of the human rights of domestic workers, the U.S. government has created a legal system that systematically excludes and deprives them of meaningful labor rights and protections. As a result, the United States has created a legal regime that encourages and invites the score of rights violations that migrant domestic workers employed by diplomats routinely experience.

C. The United States Failed to Take Meaningful Steps to Prevent Violations of Petitioners' Rights

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. According to the Inter-American Court, the

duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages.³²³

As discussed *infra* Part II(E), the Department of State has adopted policies to prevent abuse and protect domestic workers by requiring employment contracts for A-3 and G-5 domestic workers and requiring consular officers to provide information to visa recipients about their rights. Also discussed *infra* Part II(E), some of these policies are scarcely implemented and those policies that are, such as the employment contract requirement, are implemented in a haphazard, inconsistent and irregular fashion.

The duty of states to prevent human rights abuses requires the state to “put into place a system that prevents, as far as possible, the occurrence or repetition of the acts in question.”³²⁴ Meaningful steps to prevent and protect domestic workers from human rights abuses require the United States to ensure that every domestic worker on A-3 and G-5 visas and every diplomat employer are systematically informed of their rights and obligations under U.S. law and that domestic workers understand how and where to access legal and social services and assistance. Given the vacuum of legal protections for the rights of domestic workers employed by diplomats and, as a result, the lack of any real deterrents for diplomats to commit human rights abuses against these workers, the United States’ due diligence duty to prevent these abuses is of paramount importance.

The United States can fulfill its duty to prevent by codifying in law or regulations its policies or guidelines aimed at preventing abuses of domestic workers, so that they are

³²³ *Velasquez Rodriguez Case*, *supra* note 165, ¶ 175.

³²⁴ Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 Cal. L. Rev. 449, 481 (1990).

implemented in a routine, systematic and consistent fashion. Furthermore, it must ensure implementation of preventative measures that, at the very least, guarantee the following:

- (1) All A-3 and G-5 visa recipients possess signed employment contracts, in English and a language understood by the worker, that oblige the employer to abide by all U.S. federal and state labor and employment laws;
- (2) All A-3 and G-5 visa recipients receive a personal copy of their employment contract;
- (3) A U.S. government agency keeps 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;
- (4) Consular officers, in issuing the A-3 and G-5 visas, have a confidential conversation with the domestic worker, outside the presence of the employer, during which the officer explains the terms of the contract and that it is binding under U.S. law, the rights of the domestic worker under U.S. law, and where and how to access assistance if any of her rights are violated;
- (5) Consular officers must also be required to inform domestic workers that they can change employers and retain their A-3 or G-5 visas;
- (6) Consular officers provide written information to A-3 and G-5 visa recipients about their rights and that contain contact information for legal, social, and emergency services near their place of employment;
- (7) Consular officers provide oral and written information to the diplomat employers of A-3 and G-5 visa recipients about their obligations under the employment

contract and U.S. laws. Consular officers should also provide warnings to diplomat employers about diplomatic sanctions that the U.S. government is prepared to take against employers who subject their domestic workers to conditions of forced labor or trafficking in persons;

- (8) Institute a system for periodic check-ins and information sessions with the domestic worker once she arrives in the United States to ensure her rights are being respected, she is fully aware of her rights, and has access to available services.

D. The United States Failed to Take Reasonable Steps to Investigate and Prosecute Diplomats or to Otherwise Levy Diplomatic Sanctions for Violations of the Rights of Petitioners and Similarly Situated Domestic Workers

In addition to the failure of the United States to exercise due diligence to prevent anticipated human rights abuses of domestic workers employed by diplomats, it has also failed to investigate alleged violations and prosecute those found responsible. According to the Inter-American Court,

[t]he State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.³²⁵

When foreign diplomats commit criminal acts against their domestic workers, such as human trafficking and slavery, the United States allows them “to act freely and with

³²⁵ *Velasquez Rodriguez Case*, *supra* note 165, ¶ 176.

impunity.” As discussed *infra* Part II(D)(1), the United States fails to seriously investigate diplomat conduct in the majority of domestic worker cases where criminal acts allegedly occurred. In the rare cases where law enforcement does conduct criminal investigations, such investigations are severely hampered by diplomatic privileges and have never resulted in prosecution as a result of diplomatic immunity.

Criminal investigations and prosecutions of diplomats are decidedly difficult under the terms of the Vienna Convention. However, the United States acts beyond mere faithful execution of the Vienna Convention to prevent investigations, prosecutions and avoid issuing diplomatic sanctions. During one recent criminal investigation of a Tanzanian diplomat, Alan Mzengi, and his wife, Stella Mzengi, for the trafficking of a Tanzanian domestic worker, Zipora Mazengo, the Department of State routinely denied the requests by the Department of Justice to utilize investigative techniques that law enforcement believed did not violate diplomatic privileges and inviolability.³²⁶

When diplomatic privileges and immunities hamper a criminal investigation or prevent prosecution, the Department of State maintains that it will conduct its own investigation of alleged abuses. But Organizational Petitioners, Counsel to this Petition and other legal representatives of domestic workers employed by diplomats have no knowledge of such investigations ever being fully carried out.³²⁷ Furthermore, the Department of State maintains that when it receives reports of abuse it will contact law

³²⁶ Telephone Interview with Martina Vandenberg, Attorney for Zipora Mazengo, Jenner & Block (Oct. 17, 2007).

³²⁷ Interview with Elizabeth Keyes, Attorney, Formerly with CASA of Maryland (Oct. 19, 2007) (stating that an agent from Diplomatic Security Services of the Department of State interviewed two of her clients and said an investigation would be commenced, but she never heard anything more about the investigation); Statement of Zipora Mazengo, *International Trafficking in Persons: Taking Action to Eliminate Modern Day Slavery: Hearing Before the House Committee on Foreign Affairs*, 110th Cong. (Oct. 18, 2007), Ex. E(1) (stating that “in 2006, my lawyer asked the Diplomatic Security Services at the Department of State to begin an investigation, but they did not”).

enforcement, bring the alleged abuse to the attention of the foreign mission to encourage inquiry into the abuses, and negotiate out-of-court settlements with the foreign mission where appropriate.³²⁸ In only a few rare instances is the Department of State known to have followed through on these commitments. Furthermore, the Department of State has only on one occasion requested a waiver of criminal immunity from a foreign mission to allow prosecution for abuse of a domestic worker and has never, to the knowledge of Petitioners, designated a diplomat with *persona non grata* status.³²⁹ In Petitioners' cases, the United States government failed to conduct any investigations into their alleged abuses and took no action to otherwise punish the perpetrators through diplomatic means or to provide redress to the victim through negotiations for compensation from the foreign mission.³³⁰

Not only has the United States failed to exercise due diligence to enforce its criminal laws through investigations and prosecutions of known abuses, but it 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. For example, the United States should insist that the sending state prosecute criminal acts such as trafficking and forced labor in the diplomat's home country. According to the Inter-American Court, "[w]here the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby

³²⁸ See Diplomatic Circular Note 2000, *supra* note 9, Ex. D(2).

³²⁹ See Letter from Robert Moossy, Director, Human Trafficking Prosecution Unit, Department of Justice, to Claudia Flores, Staff Attorney, ACLU, Oct. 31, 2007.

³³⁰ See, e.g., Declaration of Otilia Luz Huayta, ¶ 37-40, Ex. A(5) (stating that she formally denounced her employer to the "Department of State, Immigration and Customs Enforcement (ICE), and the Montgomery County Police Department" by filing a written report but did not hear back from these agencies).

making the State responsible on the international plane.”³³¹ The United States has thus aided the criminal acts of diplomats against domestic workers by failing to seriously investigate and ensure that perpetrators are punished.

E. The United States Denied Petitioners a Remedy for Violations of their Protected Rights

Inherent in the United States’ general duty to provide effective human rights protection, is the legal duty to provide domestic remedies for alleged victims. This duty applies to violations perpetrated both by agents of the State as well as private actors.³³² As the Court explained in *Velasquez*, “[t]he State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal ... to ensure the victim adequate compensation.”³³³ Practice has consistently and convincingly shown that, unless an individual has an effective right to have recourse to independent and impartial courts or administrative authorities at the national level for the purposes of remedying an alleged human rights violation, the true enjoyment of human rights will remain illusory.³³⁴ Where a State fails to provide access to compensation, it fails in its duty to protect human rights and violates the American Declaration.

The obligation to ensure a remedy requires that a State provide adequate compensation where the rights of an individual are violated. The Inter-American Court views the obligation on States under the American Declaration to take positive steps to ensure the full and free exercise of rights within its jurisdiction as intertwined with its obligations under Article XVIII of the American Declaration and Articles 8(1) and 25 of

³³¹ *Velasquez Rodriguez Case*, *supra* note 165, ¶ 177.

³³² *See Velasquez Rodriguez Case*, *supra* note 165, ¶174.

³³³ *Id.*

³³⁴ Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 Cal. L. Rev. 449, 481 (1990).

the American Convention to provide remedies for rights violations by private actors.³³⁵

Without an effective remedy for rights violations, the law is stripped of any deterrent or coercive value to prevent violations. In the words of one legal scholar, “[r]ights without remedies are ineffectual, rendering illusory the government’s duty to respect such rights. Even the symbolic value of rights could disappear if it becomes obvious that rights can be violated with impunity.”³³⁶

Article XVIII of the American Declaration should be read in light of other universal and regional human rights instruments which also recognize the right of an effective remedy as a component part of a state’s obligation to respect and ensure effective human rights protections.³³⁷

³³⁵ The Inter-American Court articulated the interconnectedness of these obligations in its preliminary ruling on the case of *Velásquez Rodríguez*, explaining that “States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8(1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1).” *Velásquez-Rodríguez Case, Preliminary Objections*, 1987 Inter-Am. Ct. H.R. (ser. C) No. 1, at 808-810 (June 27, 1987). Similarly, under the ICCPR, the Human Rights Committee has clarified for States Parties that the positive obligations to ensure rights under article 2 and the “need to provide effective remedies in the event of breach under article 2, paragraph 3” are interrelated. According to the Committee, “[t]he Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities. Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 ¶ 8 (2004).

³³⁶ DINAH SHELTON, *REMEDIES IN INT’L HUMAN RIGHTS LAW* 100 (2nd ed. 2005).

³³⁷ The ICCPR requires the United States to provide a judicial or administrative forum for addressing rights violations under domestic law and the Covenant, which include the rights to be free from discrimination, slavery, servitude, and forced labor. ICCPR, *supra* note 207, art. 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”), art. 8(1) (“No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited”), art. 8(2) (“No one shall be held in servitude.”); art. 8(3)(a) (“No one shall be required to perform forced or compulsory labour”); *see also* DINAH SHELTON, *REMEDIES IN INT’L HUMAN RIGHTS LAW* 117 (2nd ed. 2005). The Human Rights Committee has explained that Article 2(3) requires States Parties to make reparation to an individual when their rights are violated. Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 ¶ 16 (2004). Such reparation generally requires adequate compensation, but, “where appropriate, reparation can also involve restitution, rehabilitation, and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition, and changes in relevant laws and practices, as well as bringing to justice perpetrators of human rights violations.” DINAH SHELTON, *REMEDIES IN INT’L HUMAN RIGHTS LAW* 117 (2nd ed. 2005).

To meet its due diligence obligation to ensure the rights of domestic workers employed by diplomats, the United States must provide access to an effective remedy to “undo, repair, and compensate for violations” of the rights of domestic workers.³³⁸ This can be achieved either through a judicial or administrative process. Yet the United States provides neither.

Petitioners’ efforts to seek assistance from the U.S. government in achieving redress were either ignored³³⁹ or never raised because Petitioners had a valid reason to believe such efforts to be futile.³⁴⁰ Although Petitioner Gonzalez Paredes actually

Moreover, when slavery or slavery-like violations occur, the United States is bound by the Trafficking Protocol and the Slavery Convention to ensure a remedy for victims. *See* Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, art. 6(6), Nov. 15, 2000, U.N. Doc. A/55/25 (States Parties are required to “ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered”); United Nations Slavery Convention, art. 6, Sept. 25, 1926, 60 U.N.T.S. 253, *entered into force* Mar. 9, 1927 (directing States Parties “to adopt the necessary measures in order that severe penalties may be imposed in respect of such infractions” of anti-slavery laws and regulations).

When race discrimination occurs, the Convention on the Elimination of All Forms of Racial Discrimination (CERD) requires the United States ensure a remedy for violations. Convention on the Elimination of All Forms of Racial Discrimination, art. 6, 21 Dec. 1965, *entered into force* 4 Jan. 1969, 660 U.N.T.S. 195 (requiring the United States “assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”). CERD requires the United States to not only ensure an effective remedy and adequate compensation for victims, but to also to adopt injunctive or other preventative measures to combat racial discrimination of domestic workers employed by diplomats. *See* General Recommendation No. 26: Article 6 of the Convention (General Comments), UN Doc. A/55/18, annex V, (Fifty-sixth session, 2000), *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/c11647a2f7823d62802568bd0055ac51?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/c11647a2f7823d62802568bd0055ac51?Opendocument) (notifying “States parties that, in its opinion, the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination, which is embodied in article 6 of the Convention, is not necessarily secured solely by the punishment of the perpetrator of the discrimination; at the same time, the courts and other competent authorities should consider awarding financial compensation for damage, material or moral, suffered by a victim, whenever appropriate”).

³³⁸ Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 Cal. L. Rev. 449, 480 (1990).

³³⁹ Declaration of Otilia Luz Huayta, ¶ 38, Ex. A(5) (“I filed a written report with each of these agencies. I have not heard back from these agencies, and do not expect that I will get a response. From what I understand, they usually do not intervene in cases involving diplomats.”).

³⁴⁰ Declaration of Hildah Ajasi, ¶ 38, Ex. A(2) (“I wanted to claim the wages I was owed.... however, [my lawyer] informed me that there was no way to get compensation through a lawsuit because Ms. Majingo was a diplomat who has diplomatic immunity”); Declaration of Raziah Begum, ¶ 39, Ex. A(3) (“I learned

brought civil suit against her employer, her case was dismissed on diplomatic immunity grounds before it could proceed to the merits.³⁴¹ Only Petitioner Huayta was able to achieve a small settlement from her employers to compensate her; however, this settlement was effected, not through any system of redress created by the U.S. government, but rather through the direct intervention of the Bolivian Ambassador.³⁴²

In sum, the United States has failed in its duty to provide effective human rights protections to domestic worker employed by diplomats in a number of separate but related ways. First, it has acquiesced to the abuses by diplomats of their domestic workers by structuring its laws, policies, and practices in such a way as to allow diplomat employers to act with impunity. Second, the United States has failed to take reasonable measures to prevent such abuses from occurring. Third, it has failed to effectively investigate and prosecute violations of domestic workers' rights. Finally, the United States has failed to establish a system whereby Petitioners can seek civil redress, including compensation, against their diplomat employers. As a result, the United States is liable for the human rights abuses Petitioners experienced at the hands of their diplomat employers.

VIII. THE OBLIGATION OF THE UNITED STATES TO PROTECT PETITIONERS FROM VIOLATIONS OF THEIR RIGHTS IS NOT MODIFIED BY THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS

that, because of immunity, my employers had even more power than I thought. I understood that there was no way I could ever get from them the money they owed me in wages.”); Declaration of Siti Aisah, ¶ 24, Ex. A(1) (“I never sought the wages my employer owed me because I was so afraid and I was convinced I would have no chance against my employers because of their diplomatic status.”); Declaration of Susana Ocares, ¶ 26, Ex. A(6) (“A CASA attorney explained to me that I cannot recover overtime wages from my employer in court because he is a diplomat.”).

³⁴¹ Declaration of Mabel Gonzalez Paredes, ¶ 24-31, Ex. A(4).

³⁴² Declaration of Otilia Luz Huayta, ¶ 39, Ex. A(5).

The United States has eliminated Petitioners' right to protection from violations of their rights under the American Declaration through its failure to take reasonable steps to prevent such violations from occurring and by failing to hold their diplomat employers accountable through criminal punishment and provision of civil redress. In justifying its denial of the right of protection to these workers, the United States relies on its obligations under the Vienna Convention. However, as explained below, the United States' application of diplomatic immunity under the Vienna Convention to domestic worker claims violates its due diligence obligations under the American Declaration because it eviscerates their right to protection and, moreover, because the grant of immunity in such cases does not serve any legitimate government interest and therefore represents a disproportionate restriction on Petitioners' rights.

A. The United States' Invocation of Diplomatic Immunity Eviscerates Petitioners' Right to Protection and Represents a Disproportionate Restriction on the Right

As explained above, as part of the United States due diligence obligation, Petitioners should be afforded access to a remedy, including compensation, whenever their rights under the American Declaration are violated. This Commission has articulated legal principles that prevent Member States from nullifying fundamental rights under the American Declaration. When limitations are placed on fundamental rights, States must prove that the barriers they erect (1) do not undercut the very meaning of the fundamental right and (2) are reasonable and proportional to a legitimate

governmental end.³⁴³ The United States' application of diplomatic immunity and attendant failure to create any alternative measures to provide adequate compensation eviscerates the domestic workers' rights and is disproportionate to the purpose of diplomatic immunity.

First, this Commission has stated that any conditions on a fundamental right must not "curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness."³⁴⁴ In *Statehood Solidarity Committee v. United States*, the Commission found that the United States' disenfranchisement of voters in the District of Columbia was an unreasonable and disproportionate restriction on their fundamental right to vote and participate in government.³⁴⁵ Although District residents had other opportunities to participate in the political process, including voting for President and electing "shadow" members of Congress, the Commission found that these opportunities were insufficient to create a meaningful opportunity for residents to participate in their own government.³⁴⁶ Noting that Congress exercised "significant and direct legislative authority" over the petitioners while the petitioners had no meaningful participation in the selection or oversight of legislators, the Commission held that the United States had impaired the very essence of the right to vote.³⁴⁷

In the instant case, Petitioners suffered violations of numerous fundamental rights. By failing to protect Petitioners and provide them access to an effective remedy to seek compensation, the United States failed in its obligation to ensure respect and realization

³⁴³ *Statehood Solidarity Comm. v. United States*, Case 11.204, Inter-Am. Comm. H.R. 727, OEA/ser. L/V/II.118 doc. 5 rev. 2 ¶ 90 (2003); see also DINAH SHELTON, REMEDIES IN INT'L HUMAN RIGHTS LAW 125 (2nd ed. 2005).

³⁴⁴ *Statehood Solidarity*, *supra* note 348, at ¶ 90.

³⁴⁵ *Id.* at ¶ 109.

³⁴⁶ *Id.* at ¶¶ 96-97.

³⁴⁷ *Id.* at ¶ 103.

of Petitioners' rights. It has effectively impaired the very essence of the fundamental rights it is duty-bound to enforce and protect, rendering the rights of domestic workers to be free from various forms of harm, discrimination and exploitation meaningless.

Second, as the Commission has previously explained, “[any] restriction [of a fundamental human right] requires sufficient justification that it is a necessary, reasonable, and proportional means of attaining the end sought by the state.”³⁴⁸

According to the Vienna Convention, the purpose of diplomatic immunity “is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States” by enabling diplomats to fulfill their official duties without undue interference from the receiving State.³⁴⁹ The Convention defines the “functions of a diplomatic mission” as (a) representing the sending State in the receiving State; (b) protecting in the receiving State the interests of the sending State and of its nationals; (c) negotiating with the government of the receiving State; (d) ascertaining and reporting on the conditions and developments in the receiving State; and (e) promoting friendly relations between the sending State and the receiving State.³⁵⁰ While the purpose of diplomatic immunity is legitimate, its application in cases where domestic workers are abused or exploited by their diplomat employers is wholly disproportionate to the aims of diplomatic immunity to ensure the efficient performance of the functions of diplomatic missions.

Domestic services performed in a diplomat's private home personally benefit that diplomat, but have no bearing on the enumerated functions of diplomatic missions.

³⁴⁸ See *id.* at ¶ 90 (2003); see also *Andres Aylwin Azocar v. Chile*, Case 11.863, Inter-Am. Comm. H.R. 536, OEA/ser. L/V/II.106 doc. 3 rev. ¶ 102-05 (1999).

³⁴⁹ Vienna Convention, *supra* note 6, preamble; see Leslie Shirin Farhangi, *Insuring Against Abuse of Diplomatic Immunity*, 38 *Stan. L. Rev.* 1517, 1521-22 (1986).

³⁵⁰ Vienna Convention, *supra* note 6, art. 3(1).

Indeed, the U. S. Department of State, Circular Diplomatic Note of June 19, 2000 reiterates that domestic workers are personal employees of the mission member and not of the mission.³⁵¹ Moreover, ensuring that diplomats have a free pass to abuse their domestic workers impedes the efficient functioning of diplomatic missions by encouraging diplomats to trample on the laws and protections of the receiving State (the United States) and, when human rights abuses occur, straining relations between the United States and the sending State of the diplomat. Contrary to the intent and purpose of the Vienna Convention, denying domestic workers legal protections by dismissing their cases on diplomatic immunity grounds serves only to personally benefit individual diplomats by ensuring their freedom from accountability and liability, and fails to improve the functioning of the diplomatic mission.³⁵²

As this Commission has explained in *Statehood Solidarity*, the practices of other countries inform the proportionality of a State's restriction on an individual's exercise of

³⁵¹ Diplomatic Circular Note 2000, *supra* note 9, at 3, Ex. D(2).

³⁵² Also instructive, here, to a proportionality analysis is the case of *Osman v. United Kingdom* in which the European Court of Human Rights explained that States “enjoy a certain margin of appreciation” in regulating when victims of human rights violations can petition a court for violations of their rights. *Osman v. United Kingdom*, 23452/94 Eur. Ct. H.R. 101, 289 (1998). Similar to the IACHR jurisprudence, the Court clarified that “[i]t must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired... Furthermore, a limitation will not be compatible with Article 6(1) [of the European Convention] if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.” *Id.* In *Osman*, Applicants argued that the police failed to protect the lives of applicants after being notified of an individual's threatening behavior, resulting in the shooting of Applicants. *Id.* They further argued that because the English Courts held that an exclusionary rule to protect police from negligence suits applied and, therefore, dismissed their case without examining the merits, the Applicants were denied an effective remedy for the State's failure to protect them under Article 6(1) of the Convention ensuring the right to access a court. *Id.* The European Court of Human Rights reviewed the exclusionary rule that immunized police from negligence actions and found that the aim of the rule was legitimate. *Id.* at 249. Although the exclusionary rule constituted a legitimate aim, the Court found that the English Court of Appeal interpreted and applied the exclusionary rule in an overly broad manner, creating a disproportionate restriction on the Applicants' right of access to a court. *Id.* at 250. The European Court reasoned that the Appeals Court's interpretation of the exclusionary rule conferred a blanket immunity on the police that precluded any inquiry into “the existence of competing public interest considerations.” *Id.* at 249. As a result, the Court concluded that it “amounts to an unjustifiable restriction on an applicant's right to have a determination on the merits of his or her claim against the police in deserving cases.” *Id.*

a fundamental right.³⁵³ Other countries have declined to apply diplomatic immunity to the employment relationship of the domestic worker and diplomat in favor of preserving the domestic worker's fundamental right to a remedy.³⁵⁴ For example, in 2001, the Belgian Court of Labor Law relied, in part, on the proportionality analysis to find an American diplomat and his wife civilly liable to their Filipino domestic employees for breach of their employment contract, including failure to pay the workers any salary.³⁵⁵ The Court found that the interests of the domestic worker in a remedy outweighed the interest of the sending State of the diplomat to provide him immunity from liability.³⁵⁶ According to a summary of the Court's opinion, the Court conducted a balancing test weighing the domestic workers' right to access a court, under Article 6(1) of the European Convention on Human Rights,³⁵⁷ and the diplomat's right to diplomatic immunity.³⁵⁸ The Court noted that diplomatic immunity cannot limit the right to access a court in such a way as to undermine the essence of that right, and noted that the limitation on the right to access a court is only acceptable so long as there is a proportional relationship between the aim of diplomatic immunity and the means used to affect that aim.³⁵⁹ The Court concluded that applying diplomatic immunity in that case would

³⁵³ See generally *Statehood Solidarity*, *supra* note 343.

³⁵⁴ *TIP Report*, *supra* note 61, at 63 (stating “[t]o combat trafficking, special ID cards are issued to diplomatic household personnel, whose employers can be tried in Belgium’s system of Labor Courts”).

³⁵⁵ See Centre pour l’egalite des chances et al lutte contra le racisme, *Lutte contre la traite des etres humains: Plaidoyer pour une approche integree, Analyse de la legislation et de la jurisprudence* 75-77 (2003) [hereinafter *Lutte contre la traite des etres humains*] (summarizing the initial decision and the result on appeal, affirming the lower court’s decision), Ex. C(2).

³⁵⁶ *Id.* at 77, n. 149.

³⁵⁷ Article 6(1) of the European Convention on Human Rights provides that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” European Convention on Human Rights, *supra* note 207.

³⁵⁸ *Lutte contre la traite des etres humains*, *supra* note 355, at 77, n. 149.

³⁵⁹ *Id.*

practically eviscerate the right to a judicial remedy.³⁶⁰ As a result, the Court concluded that a finding that immunity protected the diplomats from the Court's jurisdiction would fail to balance the right of access to a court with the right to immunity of the diplomat.³⁶¹

The jurisprudence of this Commission and national courts together demonstrate that the United States' failure to deny diplomatic immunity or to find other ways to protect workers and allow them to be compensated constitutes a disproportionate means to achieve the legitimate end of fostering diplomacy and the efficient functioning of foreign missions. The application of diplomatic immunity in U.S. courts undercuts the very essence of Petitioners' right to legal protection and an effective remedy, including compensation. Thus, the Commission must find that the United States has an obligation to apply the Vienna Convention without completely eradicating the rights and entitlements of domestic workers employed by diplomats.

B. Correctly Interpreted, the Vienna Convention on Diplomatic Relations Does Not Preclude the United States from Providing Petitioners Access to a Judicial Remedy

As stated above, the United States has adopted an interpretation of the Vienna Convention that requires elimination of the right of domestic workers employed by diplomats to a judicial remedy to enforce their legal rights and seek compensation for violations of these rights. The United States' interpretation of the Vienna Convention is overly narrow and impermissibly eviscerates domestic workers' rights to a judicial remedy.

When the Vienna Convention was signed in 1961, it codified the longstanding customary international law rule that provided diplomats absolute immunity from the

³⁶⁰ *Id.*

³⁶¹ *Id.*

criminal jurisdiction of the receiving State.³⁶² For immunity to the civil and administrative jurisdiction of the receiving State, however, the Convention adopted a restrictive form of immunity containing three exceptions.³⁶³ One of these exceptions, the “commercial activities” exception, strips diplomats of immunity for civil actions “relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.”³⁶⁴

As discussed *infra* Part II(D)(2), U.S. courts have uniformly interpreted this provision to hold that the commercial activities exception does not apply to the employment relationship between a diplomat and his or her domestic worker.³⁶⁵ The interpretation advanced by the United States and adopted in *Tabion* and *Gonzalez* which posits that a diplomat’s employment of a domestic worker is within the scope of a diplomat’s official functions because it is incidental to those functions serves to narrow the scope of the commercial activities exception beyond the original intent and purpose of the Vienna Convention. The United States has disproportionately limited Petitioners ability to enforce their rights under the law and seek a remedy to attain compensation by

³⁶² Vienna Convention, *supra* note 6, art. 31(1).

³⁶³ It is unclear whether at the time, under customary international law, an exception for commercial and professional activities existed. The practice of the United States at the time was to grant full immunity for both criminal and civil jurisdiction, and the United States argued in formal comments on the International Law Commission’s draft articles, prior to the Vienna Convention, that the commercial activities exception was not recognized under customary international law and should be excluded from the Convention. *See Yearbook of the Int’l Law Comm’n 1958*, [1958] 2 Y.B. Int’l L. Comm’n 89, 136, U.N. Doc./A/CN.4/SER.A/1958/Add.1. However, the Special Rapporteur assigned the task of creating the International Law Commission draft articles conceded that the professional or commercial activities exception “cannot be said to be sanctioned by international law,” but also argued that it “cannot, on the other hand, be said to be in conflict with international law.” *Id.* at 139 (quoting U.N. Doc. A/CN.4/116 at 8 (1958)). According to Eileen Denza, several States had expressly provided “in their national legislation for an exception to immunity in the case of private commercial activities.” DIPLOMATIC LAW: A COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 249 (2nd ed. 1998) (1st ed. 1978) (describing legislation enacted by India, Norway, Switzerland and South Africa).

³⁶⁴ Vienna Convention, *supra* note 6, art. 31(1)(c).

³⁶⁵ *Tabion*, 73 F.3d 535 (4th Cir. 1996), Ex. C(1); *Gonzalez Paredes*, 479 F.Supp. 2d 187 (D.D.C. 2007), Ex. C(1).

adopting an overly narrow interpretation of the commercial activities exception. This excessively restrictive view is not supported by the negotiation and drafting history of the Vienna Convention, but also is not reflected in the interpretations of other States Parties to the Vienna Convention.

1. *The Negotiation and Drafting History of the Commercial Activities Exception to the Vienna Convention Demonstrates that the United States Overstated the Narrow Scope of the Exception*

The negotiation and drafting history of the Vienna Convention suggest that the commercial activities exception was intended to apply when diplomats engage in conduct inconsistent with their diplomatic functions, broadly conceived as commercial and professional activities. The exception was intended to preserve the rights of individuals when diplomats engage in such conduct. The International Law Commission's published commentary on its final draft Convention stated the following regarding the commercial activities exception:

It is 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 occur the persons with whom the diplomatic agent has had commercial or professional relations cannot be deprived of their ordinary remedies.³⁶⁶

According to a representative of the U.S. Department of State during the negotiation of the Convention, the commercial activities exception was intended to “enable persons in the receiving State who have professional or business dealings of a non-diplomatic

³⁶⁶ [1958] 2 Y.B. Int'l L. Comm'n 98, *supra* note 363.

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.”³⁶⁷

Members of the International Law Commission that drafted the initial text of the Vienna Convention, including the commercial activities exception, appear to have conceived of the commercial activities exception broadly, suggesting that the term “commercial” included a range of private for-profit activities that were inconsistent with a diplomat’s official functions.³⁶⁸ At the Vienna Convention itself, several states asked for clarification on the scope of the phrase “professional or commercial activity.”³⁶⁹ The debate focused on whether activities like artistic or literary work, university lectures, and personal loans and investments were “professional or commercial” without reaching a consensus.³⁷⁰ While the negotiation history indicates that the meaning of “commercial” was left broad, the history does suggest that the States Parties to the Convention did not intend “commercial” to include a single act of commerce, but rather continuous remunerative activity.³⁷¹ It also suggests consensus that commercial activity was to refer

³⁶⁷ U.S. Dep’t of State, 7 Digest of Int’l Law 406 (Whiteman 1970). A representative of the Egyptian government on the International Law Commission stated during the initial drafting of article 31 of the Vienna Convention that a diplomat that engages in commercial activity “should enjoy no immunity, but be treated on precisely the same footing as other persons who...engaged in the same commercial activities.” *Yearbook of the Int’l Law Comm’n 1957*, [1957] 1 Y.B. Int’l L. Comm’n 97-98, U.N. Doc. A/CN.4/SER.A/1957.

³⁶⁸ For example, one member, Mr. Abdullah El-Erian of Egypt, in response to another member who noted that under customary international law diplomats are immune from jurisdiction in the receiving State even in cases of divorce, argued, distinguishing divorce from commercial activity, that the “dignity itself of a diplomatic agent required that he should not engage in activities outside his official duties.” [1957] 1 Y.B. Int’l L. Comm’n 97-98, *supra* note 367. Other members supported drafting the exception based on a Harvard model codification of diplomatic law which provided that the receiving State may refuse immunity to any diplomat “who engages in 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”). *Id.*; see EILEEN DENZA, *DIPLOMATIC LAW: A COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS* 248 (2d ed. 1998) (1st ed. 1978).

³⁶⁹ See Ernest Kerley, *Some Aspects of the Vienna Convention on Diplomatic Intercourse and Immunities*, 56 Am. J. Int’l L. 88, 122 (1962) (citing U.N. Doc. A/Conf. 20/C.1/SR. 36).

³⁷⁰ See *id.*

³⁷¹ See EILEEN DENZA, *DIPLOMATIC LAW: A COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS* 250 (2d ed. 1998) (1st ed. 1978) (citing comments by the ILC Special Rapporteur).

to trade and business and include, at least, investments in shares or in business enterprises within the receiving State.³⁷²

Nowhere in the negotiation and drafting history is it evident that contracts for domestic services were to be regarded as within the scope of a diplomat's official functions. Indeed, live-in domestic services are not essential or incidental to ordinary daily life. Rather, live-in domestic services are an extraordinary privilege for those who can afford to pay for them and provide lawful working conditions. Moreover, when diplomats engage in routine practices of exploitation of their domestic workers, these employment relationships cease to be anything but ordinary or incidental.

The negotiation history indicates that the States Parties to the Vienna Convention intended for the exception to have significant scope so as to limit civil immunity to conduct necessary for the functions of the diplomatic mission. The “functional necessity” theory of diplomatic immunity - which links diplomatic immunities “to the performance of diplomatic functions and refuses them [immunities] where no such links exist”³⁷³ – guided the drafting of the Convention generally, and the formation of the commercial activities exception specifically.³⁷⁴ This theory is reflected in the Convention's Preamble.³⁷⁵ It is also reflected in the commercial activities exception,

³⁷² See *id.* at 251. United States regulations do not permit U.S. diplomats overseas to invest in local companies. See *id.*

³⁷³ Michael McDonough, *Privileged Outlaws: Diplomats, Crime and Immunity*, 20 *Suffolk Transnat'l L. Rev.* 475, 486 (1996-97).

³⁷⁴ Members of the International Law Commission argued early on for the functional necessity theory of immunity to guide their work. The British representative, Sir Gerald Fitzmaurice, argued that the functional necessity theory was the “correct” basis for granting diplomatic immunity. See [1957] 1 *Y.B. Int'l L. Comm'n*, *supra* note 367, at 2. Similarly, Mr. El-Erian of Egypt argued that “the time has come for the International Law Commission to come out plainly in favor of the realistic modern theory as the basis of diplomatic privileges and immunities, namely, the so-called functional or demands of office theory.” *Id.* at 4.

³⁷⁵ Vienna Convention, *supra* note 6, *preamble* (stating that the “purpose of [diplomatic] privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States”).

which juxtaposes commercial activity, for which there is no immunity, with activities that form part of a diplomat's official functions, for which there is immunity. Indeed, the International Law Commission's published commentary on the final draft of the Convention stated that the "Commission was guided by this third [functional necessity] theory in solving problems on which practice gave no clear pointers."³⁷⁶ Furthermore, commenting on the exceptions to civil immunity, a representative of the United States delegation at the Vienna Convention argued

[t]he decision of the Conference to limit the immunity from civil jurisdiction in accordance with the recommendations of the International Law Commission is itself a significant manifestation of the development of the international law of diplomatic immunities. Perhaps more significant is the impressions which emerges from the conference ... that support for even greater limitations on that immunity was present. Such support may foreshadow the development of international law in this area, and raises the questions whether an even more stringent interpretation of the 'functional necessity' theory of diplomatic privileges and immunities may be anticipated.³⁷⁷

Moreover, the States Parties to the Convention debated the inclusion of an article explicitly stating that diplomatic privileges and immunities should be defined in reference to the functional necessity theory.³⁷⁸ Although the final Convention did not include such an article, the preamble clause seen to express the functional necessity theory was adopted by a vote of 68 in favor, 0 against and 4 abstentions – suggesting near universal support for the functional necessity theory of diplomatic immunity.

Even during the Convention's ratification hearings in the United States Senate, the U.S. Department of State revealed its support for the functional necessity theory of

³⁷⁶ [1958] Y.B. Int'l L. Comm'n, *supra* note 363, at 95.

³⁷⁷ Ernest Kerley, *Some Aspects of the Vienna Convention on Diplomatic Intercourse and Immunities*, 56 Am. J. Int'l L. 88, 125-26 (1962).

³⁷⁸ *See id.* at 91-94 (noting that the debate on the Preamble "concentrated almost entirely on this paragraph", that is, the paragraph stating "the purpose of [diplomatic] privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions.")

diplomatic immunity. In hearings on the Vienna Convention in July 1965 of the Senate Committee on Foreign Relations, Leonard Meeker, representing the Department of State, testified that “if the diplomatic agent engages in any professional or commercial activity outside his official duties as a diplomatic agent, then he would be subject to the jurisdiction of the receiving state with respect to those nonofficial acts of a professional or commercial character.”³⁷⁹ Mr. Meeker’s testimony reinforces the idea that “commercial activity” is defined in juxtaposition to “official diplomatic acts,” suggesting that a certain amount of private activity falls within the exception and is not protected by immunity.³⁸⁰ Mr. Meeker continued “[t]hese diplomatic privileges and immunities are not benefits for the individuals concerned, for the diplomats themselves. Instead they are protections [that] experience has long established are essential to assure the effective performance of the functions of diplomatic missions.”³⁸¹

The nature of the relationship between diplomats and domestic workers as set forth in guidance provided by the U.S. State Department Circular is one that can only be described as commercial in nature. Diplomats are advised as to the incidentals of commercial, not personal relationships. For example, they are instructed as to the necessity of entering into a formal written contract, and of the need to include a full and complete description of the terms of labor and employment. They are advised to maintain records relating to labor and employment.³⁸² These practices fall within the

³⁷⁹ *Vienna Convention on Diplomatic Relations: Hearings before the Subcommittee of the Senate Committee on Foreign Relations*, 88th Cong. 1, 7 (1965).

³⁸⁰ *Cf. id.* at 19 (discussing a situation in which a diplomatic agent violates traffic laws, arguing that such conduct would be illegal but that remedies would be limited to diplomatic rather than judicial action because such conduct does not fall within an exception to immunity under Article 31).

³⁸¹ *Id.* at 3.

³⁸² *See* Diplomatic Circular Note 2000, *supra* note 9, Ex. D(2).

realm of commercial activity and are not incidental to ordinary and daily life, except as lived in the realm of business and the market.

Just as the functional necessity theory guided the drafting of the Convention and particularly the commercial activities exception, it must guide the interpretation of the scope of the exception in order for it to be true to the intent and purpose of the treaty. When a diplomat ignores the restraints of his official diplomatic status and duties, and acts privately for his own personal financial gain – whether to invest in shares in a company, open a private business, or exploit or enslave his domestic workers for his own personal profit – such activity falls within the intended scope and purpose of the commercial activities exception. In Petitioners’ cases, their diplomat employers engaged in continuous, remunerative conduct to exploit Petitioners such that they could not claim the wages they were legally entitled. When the exploitation by diplomats of their domestic workers rises to the level of trafficking and forced labor, such conduct unquestionably forms part of the modern slave trade: human trafficking.

At the time of the drafting of the Vienna Convention and its signing in 1961, human trafficking and the rights of domestic workers were not yet concepts or recognized problems. As such, the drafters could not have contemplated whether such conduct would deprive diplomats of their civil immunity. Treaties, however, are to be interpreted in “good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”³⁸³ Today, the global community has aligned against human trafficking and recognized the widespread human

³⁸³ Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), 1155 U.N.T.S. 332, *entered into force* Jan. 27, 1980 [hereinafter Vienna Convention on the Law of Treaties].

rights abuses experienced by domestic workers worldwide.³⁸⁴ Undoubtedly, such conduct is both abhorrent and unrelated to the official functions of a diplomat, and as commercial conduct aimed at making profits for diplomats, falls within the intended scope of the commercial activities exception. Domestic workers who experience significant exploitation, like Petitioners, must have equal access to the remedy provided by the commercial activities exception that any aggrieved investor would have. Such an interpretation is supported by the functional necessity theory because domestic services are anything but *necessary* to the functioning of the diplomatic mission.

2. *Other State Parties to the Vienna Convention on Diplomatic Relations Have Allowed Similarly Situated Domestic Workers to Pursue a Remedy*

As noted above, other countries have declined to grant diplomatic immunity to diplomatic employers accused of exploiting domestic workers, and instead favored preserving the domestic worker's fundamental right to a remedy. Belgian jurisprudence, for example, holds that diplomats cannot rely on the defense of diplomatic immunity in cases involving personal contractual obligations, such as labor contracts.³⁸⁵ Belgian jurisprudence in domestic worker cases relies on a theory of relative immunity. "Acts that clearly have a private character and are in no way related to the execution of the diplomatic function, can not enjoy the advantages of immunities or privileges and can

³⁸⁴ One hundred and seventeen countries of the world condemn acts of trafficking. See Signatories to the U.N. Trafficking Protocol, available at http://www.unodc.org/unodc/crime_cicp_signatures_trafficking.html (last visited May 19, 2007).

³⁸⁵ Wendy De Bondt, Assistant Criminal Law, Institute for International Research on Criminal Policy, Ghent University, *Diplomats and Domestic Servants* 3 (Sept. 12, 2007), Ex. C(2); *TIP Report*, *supra* note 61, at 63 (stating "[t]o combat trafficking, special ID cards are issued to diplomatic household personnel, whose employers can be tried in Belgium's system of Labor Courts").

therefore be judged by a court.”³⁸⁶ In the 2001 case, discussed above, where the Belgian Court of Labor Law held an American diplomat and his wife civilly liable to their domestic workers, the Court, in addition to conducting a proportionality analysis, found that the diplomat and his wife who had returned to the United States were no longer entitled to immunity from the Court’s jurisdiction under Article 39(2) of the Vienna Convention, which states that a diplomat’s privileges and immunities terminate at the time he leaves the country except with respect to acts he performs in the exercise of his functions as a member of the mission.³⁸⁷ The Court reasoned that a diplomat’s employment of a domestic worker constituted personal conduct that was not performed in exercise of his diplomatic functions.³⁸⁸ A summary of the opinion explained that the Court found that the diplomat’s treatment of his domestic workers “were acts that the employer committed under the employer’s own name and that did not enter into the framework of the employer’s function as a diplomatic employee.”³⁸⁹ Because the employment relationship between the diplomat and the domestic worker were not performed in exercise of the diplomat’s official functions, the Court found that the diplomat and his wife were not entitled to immunity after leaving the country.

In a second Belgian case, two diplomats were held accountable for human trafficking of domestic workers, despite their claims to diplomatic immunity.³⁹⁰ The

³⁸⁶ Wendy De Bondt, Assistant Criminal Law, Institute for International Research on Criminal Policy, Ghent University, *Diplomats and Domestic Servants* 3 (Sept. 12, 2007), Ex. C(2).

³⁸⁷ *See id.* at 76; Vienna Convention, *supra* note 6, art. 39(2) (“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 the 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.”).

³⁸⁸ *See Lutte contre la traite des etres humains*, *supra* note 355, at 76, Ex. C(2).

³⁸⁹ *Id.*

³⁹⁰ U.S. Dep’t of State, Country Reports on Human Rights Practices, The Democratic Republic of Congo, <http://www.state.gov/g/drl/rls/hrrpt/2003/27721.htm>

2007 U.S. State Department Report on Trafficking of Persons remarks on the progress made in Belgium, recognizing that domestic workers are permitted to seek redress against their employers with immunity in Belgium's Labor Courts.³⁹¹

Similarly, in Portugal, a domestic worker successfully established that a diplomat employer could not claim immunity under the Vienna Convention for acts constituting economic exploitation that were considered to be personal acts and outside of his diplomatic status.³⁹² The Court noted that abuses committed in the realm of private lives of diplomats were not protected acts and did not relate to functional immunities.³⁹³ The Court therefore found that the case fell within the spirit of the exceptions to civil immunity under Article 31(1) of the Vienna Convention.³⁹⁴

Additionally, in Switzerland, the Federal Tribunal has held that the Swiss Federal Labour Act applied to persons employed in diplomatic missions and further specified that diplomatic immunity covered acts carried out in the performance of official functions but *not* acts of everyday life.³⁹⁵ Furthermore, the U.N. Committee on Social, Cultural, and Economic Rights found the Swiss court decisions, as well as Switzerland's Department for Foreign Affairs' new directives with regard to diplomatic immunity to be appropriate and in keeping with international legal principles. These cases and reports support Petitioners' claims that diplomatic immunities are only functional immunities and should not apply to exploitation of domestic workers hired by diplomats, and that the United States has erroneously interpreted the commercial activities exception.

³⁹¹ *TIP Report*, *supra* note 61, at 63.

³⁹² *Fonseca v. Larren*, [1991] Boletim do Ministério da Justiça 403 (Acórdão do Supremo Tribunal de Justiça, Portugal), Ex. C(2).

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ See U.N. ESCOR, CESCR, 17th Sess., 38th mtg. ¶ 30, 31, Ex. C(2), E/C12/SR 38 (Feb. 6, 1999), Ex. C(2).

Because the United States has shielded diplomats from civil suit in all domestic worker cases and failed to adopt any other comparable remedy, the application of diplomatic immunity in these cases imposes a disproportionate restriction on the rights of domestic workers employed by diplomats to an effective remedy to achieve compensation and enforce their rights.

C. The United States Cannot Immunize Diplomats from Accountability Under the Vienna Convention for Violations of the *Jus Cogens* Norm Prohibiting Slavery and Slavery-like Practices

Petitioners Aisah, Ajasi, Begum and Huayta cannot be prevented from accessing domestic courts by the United States invocation of diplomatic immunity. The harms these four women suffered constitute involuntary servitude, forced labor and trafficking prohibited under Article I of the American Declaration. These violations are modern manifestations of the long-established customary international *jus cogens* prohibition of slavery and slavery-like practices. Slavery is one of a handful of international law violations that do not require state action for liability to attach and, because of its *jus cogens* status, imposes the *erga omnes* obligation on states to prevent, investigate and hold accountable perpetrators of such acts through both criminal punishment and civil redress for victims. The United States grants diplomats immunity from suit for acts of slavery under the Vienna Convention on Diplomatic Relations, a codification of the customary international law on diplomatic privileges and immunities. In so doing, the United States gives precedence to a norm hierarchically inferior to Petitioners' entitlements to civil redress for slavery and slavery-like practices and accordingly violates Article I of the American Declaration.

1. *The Prohibition of Slavery and Slavery-Like Practices Has Attained the Status of a Jus Cogens Norm Requiring States to Prevent, Punish and Remedy Such Violations When They Occur*

The prohibition of slavery incorporated in Article I of the American Declaration is so fundamental that it has attained *jus cogens* status.³⁹⁶ *Jus cogens*, or “peremptory norms,” are those rules of customary international law that are “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.”³⁹⁷

The prohibition of slavery is the first violation of human rights to be banned under international law, and has been codified in widely ratified treaties dating back to the nineteenth century. The norm has evolved to outlaw not only the exercise of dominion over and the trade in human beings,³⁹⁸ but all modern manifestations of slavery, including involuntary servitude, forced labor and trafficking.³⁹⁹ A broad array of universal and regional human rights treaties and other instruments, both multilateral and bilateral, now contain these prohibitions and proscribe such practices in both times of war and peace.⁴⁰⁰

³⁹⁶ See, e.g., *Barcelona Traction, Light and Power Co. Ltd (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5) (Ammoun, J., separate opinion) (finding that obligations of *jus cogens* derive “from the principles and rules concerning the basic rights of the human person, including *protection from slavery* and racial discrimination”) (emphasis added); see also *Domingues v. United States*, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, OEA/Ser.L./V/II.117, doc. 5 rev. 1 ¶ 49 (2002) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 cmt n. (1987) [hereinafter RESTATEMENT (THIRD)]).

³⁹⁷ Vienna Convention on the Law of Treaties, *supra* note 383, art. 53; see also RESTATEMENT (THIRD), *supra* note 1, § 102, cmt. k, Reporter’s Note 6.

³⁹⁸ Convention to Suppress the Slave Trade and Slavery (Slavery Convention of 1926), art. 1, *opened for signature* Sept. 25, 1926, 60 L.N.T.S. 253 (entered into force Mar. 9, 1927) [hereinafter Slavery Convention of 1926].

³⁹⁹ See, e.g., M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT’L L. & POL. 445 (1991).

⁴⁰⁰ See, e.g., Universal Declaration of Human Rights, *supra* note 207, art. 4 (“no one shall be held in slavery or servitude”); International Covenant on Civil and Political Rights, *supra* note 207, art. 8 (“(1) no one shall be held in slavery; slavery and slave-trade in all their forms shall be prohibited. (2) no one shall

Taken together, these universal and regional human rights instruments provide clear evidence that the prohibitions against slavery and other slavery-like practices have also attained the level of customary international law and *jus cogens* status.⁴⁰¹

Moreover, slavery is one of a handful of crimes to which international law attributes individual liability.⁴⁰² As well as imposing individual liability by virtue of its *jus cogens* status, the prohibition carries with it the *erga omnes* obligation on states to prevent, investigate, and hold perpetrators accountable.⁴⁰³ Accountability in this context requires not only criminal punishment of perpetrators, but also provision of civil redress for victims.⁴⁰⁴

2. *The Jus Cogens Obligation To Hold Accountable Perpetrators Of Slavery Trumps Any Claims To Diplomatic Immunity Under The Vienna Convention On Diplomatic Relations*

be held in servitude.”); African [Banjul] Charter on Human and Peoples’ Rights, *supra* note 207, art. 5; American Convention on Human Rights, *supra* note 207, art. 6; European Convention on Human Rights, *supra* note 207, art. 4; Slavery Convention of 1926, *supra* note 398, preamble (“[abolishing] slavery in all its forms”); Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271 (entered into force July 25, 1951); Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (Nov. 15, 2000), (entered into force Dec. 25, 2003); Geneva Convention Relative to the Treatment of Prisoners of War, arts. 14, 49, 53, 130, 75 Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950).

⁴⁰¹ *Domingues v. United States*, *supra* note 396, ¶ 46-48.

⁴⁰² See *Kadic v. Karadzic*, 70 F.3d 232, 242-43 (2d Cir. 1995) (finding that like slave trading, genocide and war crimes do not require state action for individual liability to attach); Hersch Lauterpacht, *The Subjects of the Law of Nations*, 63 L.Q. REV. 438, 441-42 (1947); see also RESTATEMENT (THIRD) § 404 (listing slave trade as a crime of international concern that is actionable without state action).

⁴⁰³ See, e.g., *Barcelona Traction, Light and Power Co. Ltd (Belg. v. Spain)*, *supra* note 396 (holding that protecting people from slavery is an obligation *erga omnes*); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 156 (Dec. 10, 1998), reprinted in 38 I.L.M. 317 (1999); see also M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE, THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* (1995).

⁴⁰⁴ See, e.g., Universal Declaration of Human Rights, *supra* note 207, art. 8 (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating . . . fundamental rights”); International Covenant on Civil and Political Rights, *supra* note 207, art. 2(3) (requiring states “to develop the possibilities of judicial remedy,” and “to ensure that the competent authorities shall enforce such remedies when granted”).

The existence of *jus cogens* norms evidences the establishment of a hierarchy in the international legal order whereby certain norms -- including the prohibition of slavery and slavery-like practices and the concomitant obligation on states to prevent, punish and remedy such violations -- take precedence over other norms of lesser status.

As a *jus cogens* norm, no state can agree to contravene the prohibition against slavery and it “enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules.”⁴⁰⁵ In the event of a conflict between a *jus cogens* norm and any other rule of international law, the former prevails and the conflicting treaty or customary rule is rendered void.⁴⁰⁶

Unlike the prohibition of slavery, immunity of diplomats is not a *jus cogens* norm. This is borne out by the text of the Vienna Convention on Diplomatic Relations, and, since its signing in 1961, developments in international law recognizing increased accountability for serious violations of international law and a corresponding decline in absolute immunity.⁴⁰⁷

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

⁴⁰⁵ *Prosecutor v. Furundzija*, *supra* note 403, ¶ 153.

⁴⁰⁶ See Vienna Convention on the Law of Treaties, *supra* note 383, art. 53 (“A treaty is void if ... it conflicts with a preemptory norm of general international law.”), art. 64 (“If a new preemptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates”); *Furundzija*, *supra* note 403, ¶ 153; see also RESTATEMENT (THIRD) § 102, cmt. k.

⁴⁰⁷ See Vienna Convention, *supra* note 6, art. 9 (permitting the host state to declare a member of a foreign mission as no longer “acceptable”), art. 31 (recognizing explicit exceptions to diplomatic immunity), art. 32 (allowing an express waiver of diplomatic immunity by the sending state); see also Rome Statute of the International Criminal Court, art. 27(2), *entered into force* July 1, 2002, 2187 U.N.T.S. 90 (“Immunities or special procedural rules which may attach to the official capacity of a person ... shall not bar the Court from exercising its jurisdiction over such a person”); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993) at 36, U.N. Doc. S/25704 (1993) (adopted by Security Council on May 25, 1993); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955, 33 I.L.M. 1598, 1600 (1994).

the availability of state immunity in cases implicating *jus cogens* norms.⁴⁰⁸ State practice, including that of the United States, also recognizes increased accountability of government officials over grants of immunity when the state or its agents commit tortious acts.⁴⁰⁹

Because diplomatic immunity is not a *jus cogens* norm but rather an ‘ordinary’ rule of treaty and customary international law, it cannot be invoked to shield diplomats from accountability for acts of slavery, particularly so when these acts were perpetrated

⁴⁰⁸ See, e.g., U.N. Econ. & Soc. Council [ECOSOC], *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, U.N. Doc. E/CN.4/RES/2005/35, Annex (Apr. 20, 2005) (‘Van Boven-Bassiouni Principles’); U.N. ECOSOC, Comm’n on Human Rights, *Promotion and Protection of Human Rights: Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, Diane Orentlicher: Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, U.N. Doc. E/CN.4/2005/102/Add 1 (2005) (‘The Joinet--Orentlicher Principles’); Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001). Similar developments have also taken place at the regional level. See Council of Europe, European Convention on State Immunity, May 16, 1972, E.T.S. No. 74, 11 ILM 470 (1972) (entered into force June 11, 1976) (providing that a state cannot claim immunity from the jurisdiction of a court in another state in proceedings to redress for injuries to persons or damage to property, “irrespective of whether the tort was carried out by the contracting State *jure imperii* or *jure gestionis*”).

⁴⁰⁹ See, e.g., United States’ Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1605(a)(5) (“[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property . . . caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment . . .”) (emphasis added); see also 28 U.S.C. § 1605, note (amending FSIA to incorporate a category of non-immune conduct to a limited range of acts committed by nation states designated by the United States as “state sponsors of terrorism” and permitting actions in U.S. courts by a U.S. citizen that allege “personal injury or death [. . .] caused by an act of torture, [or] extrajudicial killing.” Significantly, no immunity applies to such conduct when it is “engaged in by an official, employee or agent . . . while acting within the scope of his or her office, employment or agency.”); Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350, stat. note 2(a) (authorizing suits against government officials for acts of torture perpetrated “under color of foreign law” even when the foreign government official is in office); State Immunity Act 1978, § 5, ch. 33, July 20, 1978, 17 I.L.M. 1123 (U.K.) (denying immunity to foreign government officials who commit tortious acts within the scope of their employment); State Immunity Act, 8 R.S.C., ch. S-18, § 6 (1985) (Can.) (same); Foreign States Immunities Act 1985, § 13, ch. 196 (Austl.) (same); Foreign State Immunity Act of 1981, reprinted in Materials on Jurisdictional Immunities of States and Their Property, § 6, U.N. Doc. ST/LEG/SER.B/20, U.N. Sales No. E/F.81.V.10 (1982) (S. Afr.) (same); State Immunity Act of 1979, reprinted in Materials on Jurisdictional Immunities of States and Their Property, § 7, U.N. Doc. ST/LEG/SER.B/20, U.N. Sales No. E/F.81.V.10 (1982) (Sing.) (same).

within the jurisdiction of the forum state. This is a long standing principle of international law.⁴¹⁰

Two relatively recent cases from the highest state courts in Greece and Italy applied this principle, finding that State immunity is not available as a bar to jurisdiction in cases concerning *jus cogens* violations. In *Ferrini v. the Federal Republic of Germany*,⁴¹¹ Mr. Ferrini brought a civil claim before the Italian courts, alleging that he was forcibly deported from Italy to Germany by the German military during the Second World War for the purposes of forced labor. The Italian *Corte di Cassazione* acknowledged that Germany's military action was a sovereign act of state (*acta jure imperii*) that would normally enjoy the protection of immunity. However, the Court found that because the underlying act involved the prohibition of forced labor, a *jus cogens* norm, Germany's claim to state immunity, an 'ordinary' customary international law rule, was 'trumped' by it. Similarly, in *Prefecture of Voiotia v. the Federal Republic of Germany*,⁴¹² the Greek Areios Pagos held that Germany did not enjoy immunity in another civil claim for reparation arising out of *jus cogens* violations, in this case, war crimes committed during the Second World War. The Court found that Germany's actions, because they were in breach of rules of peremptory international law were not sovereign acts and when they were perpetrated by the state or its agents, did not attract

⁴¹⁰ See International Military Tribunal (Nuremberg), Judgment and Sentences (1946), *reprinted in* 41 AM. J. INT'L L. 172, 221 (1947) ("The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law.").

⁴¹¹ Cass., sez. un., 6 Nov. 2003, n. 5044, 87 Rivista diritto internazionale 539, *translated in* Pasquale De Sena & Francesca de Vittor, *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, 16 EJIL 89 ("Ferrini v. Federal Republic of Germany").

⁴¹² Areios Pagos [AP] [Supreme Court] 11/2000 (Greece) *discussed in* Bernard H. Oxman, et al., *Sovereign Immunity - Tort Exception - Jus Cogens Violations - World War II Reparations - International Humanitarian Law*, 95 AJIL 198, 198-204 (2001) ("Prefecture of Voiotia v. Federal Republic of Germany").

sovereign immunity. By violating a *jus cogens* norm, the Court held, Germany had impliedly waived any immunity that might otherwise have attached.⁴¹³

Accordingly, the obligation imposed on the United States to hold perpetrators of slavery accountable, through criminal and civil sanctions, prevails over any claims to diplomatic immunity. And, in giving precedence to the hierarchically inferior assertions of diplomatic immunity over Petitioners' claims for civil redress here, the United States violated Petitioners' rights under Article I of the American Declaration.

IX. CONCLUSION AND PETITION FOR RELIEF

For the foregoing reasons, the United States of America has violated the rights of Petitioners Aisah, Ajasi, Begum, Gonzalez Paredes, Huayta, and Ocares under Articles I, II, VII, IX, X, XI, XII, XIV, XV, and XVIII of the American Declaration. Petitioners suffered egregious human rights abuses at the hands of the diplomat employers as a result of the United States' discriminatory treatment and failure to adopt special protections for

⁴¹³ In contrast, despite underlying allegations of torture – like slavery, a *jus cogens* norm - the Ontario Court of Appeal in Canada granted the Islamic Republic of Iran immunity in *Bouzari v. Iran*, [2004] 220 O.A.C. 1 (Can.) (torture perpetrated by Iranian officials in Iran) and the European Court of Human Rights upheld the immunity of Kuwait in *Al-Adsani v. United Kingdom*, 2001 Eur. Ct. H.R. 752 (torture perpetrated by Kuwaiti officials in Kuwait). However, the Committee Against Torture in its consideration of Canada's Country Report subsequently determined that Canada's failure to provide a remedy to all victims of torture, including Mr. Bouzari, did not comport with its obligations under the U.N. Convention Against Torture. See Comm. Against Torture, *Summary Record of the Second Part (Public) of the 646th Meeting*, ¶ 67, CAT/C/SR.646/Add 1 (May 6, 2005). The European Court's judgment in *Al-Adsani* also can be criticized on a number of levels. First, the judgment accords a wide margin of appreciation to the United Kingdom, without conducting any significant analysis as to whether State immunity pursues a legitimate aim and presents a proportionate restriction on an individual's right of access to a court under Article 6(1) of the European Convention. Second, the Court did not take into consideration all pertinent developments on the law of *jus cogens* vis-à-vis State immunity. Factually, these two cases are distinct from the instant case. Whereas *Bouzari* and *Al-Adsani* concerned allegations of torture perpetrated by foreign officials in foreign countries, here the Commission is concerned with enslavement perpetrated by foreign officials within the United States. See also Case Concerning the Arrest Warrant of 11 April 2000 (*Congo v. Belg.*) 2002 I.C.J. 3, at 92 (Feb. 14) (separate opinion of Judge Rezek) (noting that because the *jus cogens* violations at issue were perpetrated *outside* the jurisdiction of the Belgian court, Belgium was not obligated to prosecute.) Although there may be some dispute as to whether international law currently gives precedence to the *jus cogens* norm over immunity where the violations occurred abroad, it is firmly established that *jus cogens* prevails over grants of immunity where the violations occurred within the jurisdiction of a State's courts.

domestic workers employed by diplomats. The United States also failed to use due diligence to prevent and protect domestic workers employed by diplomats from these abuses or to provide an appropriate remedy for such violations. The United States' obligation to exercise due diligence and provide a remedy for violations is not modified by the Vienna Convention on Diplomatic Relations. Therefore, Petitioners, request that this Honorable Commission grant the following relief:

1. Declare this Petition to be admissible;
2. Provide an oral hearing for Petitioners;
3. Investigate, with hearings and witnesses as necessary, the facts alleged by Petitioners herein;
4. Declare the United States of America in violation of Articles I, II, VII, IX, X, XI, XII, XIV, XV, and XVIII of the American Declaration;
5. Recommend such remedies as the Commission considers adequate and effective for the violation of Petitioners' fundamental human rights, including, *inter alia*:
 - a. Amendment of laws, regulations and policies to bring all domestic workers within the protection of federal labor laws;
 - b. Amendment of laws, policies and guidelines on the application of diplomatic immunity under the Vienna Convention on Diplomatic Relations to the relationship between a diplomat employer and a domestic worker, including:
 - i. Reinterpretation of the "commercial activities" exception so that it does not erroneously and discriminatorily provide blanket immunity for diplomats who abuse their domestic workers;
 - ii. Adoption of policies and practices that ensure that when diplomatic immunity applies, other punitive, investigatory and compensation schemes are pursued to make certain that immunity does not equal impunity;
 - c. Codification in laws or regulations the policies, guidelines and practices of the Department of State aimed at preventing domestic worker abuse to ensure agency accountability for consistent and systematic implementation of such policies;

- d. Promulgation of a law, policy or guideline establishing that domestic workers on A-3 and G-5 visas may change their employers or leave their employment without jeopardizing their legal status;
- e. Adoption and implementation of preventative measures that, at a minimum, guarantee the following:
 - i. All A-3 and G-5 visa recipients possess signed employment contracts, in English and a language understood by the worker, that oblige the employer to abide by all U.S. federal and state labor and employment laws;
 - ii. All A-3 and G-5 visa recipients receive a personal copy of their employment contract;
 - iii. A U.S. government agency keeps 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;
 - iv. Consular officers, in issuing the A-3 and G-5 visas, have a confidential conversation with the domestic worker, outside the presence of the employer, during which the officer explains the terms of the contract and that it is binding under U.S. law, the rights of the domestic worker under U.S. law, and where and how to access assistance if any of her rights are violated;
 - v. Consular officers must also be required to inform domestic workers that they can change employers and retain their A-3 or G-5 visas;
 - vi. Consular officers provide written information to A-3 and G-5 visa recipients about their rights and that contain contact information for legal, social, and emergency services near their place of employment;
 - vii. Consular officers provide oral and written information to the diplomat employers of A-3 and G-5 visa recipients about their obligations under the employment contract and U.S. laws. Consular officers should also provide warnings to diplomat employers about diplomatic sanctions that the U.S. government is prepared to take against employers who subject their domestic workers to conditions of forced labor or trafficking in persons;

- viii. Institute a system for periodic check-ins and information sessions with the domestic worker once she arrives in the United States to ensure her rights are being respected, she is fully aware of her rights, and has access to available services.
- f. Mandate that the United States take reasonable steps to investigate and punish diplomats who commit criminal offenses against their domestic workers by ensuring, at a minimum, the following:
- i. Serious investigations of diplomatic personnel for trafficking and forced labor are carried out by the U.S. Department of Justice;
 - ii. Serious investigations of diplomatic personnel for domestic worker exploitation and abuse are carried out by Diplomatic Security Services of the U.S. Department of State;
 - iii. Cooperation between the Department of Justice and the Department of State on allowing and permitting investigative techniques that do not affect diplomatic privileges and immunities and training on these techniques to be provided to all relevant personnel;
 - iv. The Department of State follows up on reports of abuse by diplomats of domestic workers by informing law enforcement and the foreign mission of the diplomat and encouraging both to investigate alleged abuses;
 - v. The Department of State utilizes its diplomatic channels to levy penalties, sanctions and/or punishment on diplomats and foreign missions in cases of abuse in the following ways:
 - 1. Request foreign missions waive the criminal and/or civil immunity of the offending diplomat or family member of the diplomat;
 - 2. Designate an offending diplomat or a diplomat's family member a *persona non grata*;
 - 3. Negotiate through foreign missions monetary settlements to provide restitution and/or compensation to domestic worker victims;
 - 4. Diplomatically penalize foreign missions or governments that fail to cooperate in waiver or settlement negotiations;

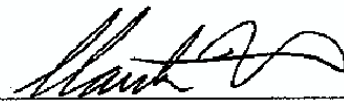
- g. Mandate that the United States ensure that victims of trafficking, exploitation and abuse by diplomats can obtain compensation and restitution in the following ways:
 - i. Preserve the right of domestic workers to a judicial remedy, on balance with diplomatic immunity, and enable domestic workers can seek compensation and redress through civil actions;
 - ii. Create an administrative compensation scheme that would enable victims to present claims against their diplomat employers and obtain adequate compensation for their losses;
 - iii. Engage in diplomatic negotiations with foreign missions to achieve compensation.
- h. Direct the United States to provide monetary compensation to Individual Petitioners in an amount to be assessed by the Commission.
 - i. Request the Inter-American Court of Human Rights to deliver an advisory opinion on the nature and full extent of the United States' obligations under the American Declaration in light of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention Belém do Pará") and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

Respectfully Submitted,

Petitioners

Siti Aisah
 Hildah Ajasi
 Raziah Begum
 Otilia Luz Huayta
 Lucia Mabel Gonzalez Paredes
 Susana Ocares

Andolan – Organizing South Asian Workers
 Break the Chain Campaign
 CASA of Maryland



Representatives

American Civil Liberties Union
 Jennie Pasquarella
 Claudia Flores
 Steven Watt
 Lenora Lapidus

Global Rights – Partners in Justice
 Margaret Huang

Immigration/ Human Rights Clinic

University of North Carolina School
of Law

Deborah Weissman

Sireesha Manne

Dan MacGuire

Lauren Joyner

ABBREVIATED LIST OF EXHIBITS

A. Documents Related to Individual Petitioners

1. Siti Aisah
2. Hildah Ajasi
3. Raziah Begum
4. Lucia Mabel Gonzalez Paredes
5. Otilia Luz Huayta
6. Susana Ocares

B. Organizational Statements of Interest

1. Statement of Boat People SOS
2. Statement of Domestic Workers United
3. Statement of the International Human Rights Law Clinic at American University's Washington College of Law

C. U.S. and Foreign Case Law

1. U.S. Case Law
2. Foreign Case Law

D. U.S. Department of State Documents

1. Department of State, Unclassified Cable, *Domestic Employees: Determining Prevailing Wage Requirement and Clarification of Visa Issuance Guidelines*, Mar. 2007.
2. Department of State, Diplomatic Circular Note, Jun. 19, 2000.
3. Department of State, Diplomatic Circular Note, May 20, 1996.
4. Letter from Gilda Brancato, Attorney-Advisor, Office of the Legal Advisor, Diplomatic Law and Litigation Division, Department of State to Foreign Missions, Oct. 23, 1990.
5. Correspondence between Department of State and NGOs

E. U.S. Congressional Hearings and Briefings

1. Hearing: House of Representatives, Committee on Foreign Affairs, *International Trafficking in Persons: Taking Action to Eliminate Modern Day Slavery*, Oct. 18, 2007.
2. Hearing: Senate, Committee on the Judiciary, Subcommittee on Human Rights and the Law, *Legal Options to Stop Trafficking*, Mar. 26, 2007.
3. Briefing: Senate, *Examining the Exploitation of Domestic Workers by Diplomats and Other International Staff*, Apr. 28, 2006.

F. United Nations Documents

1. U.N. Commission on Human Rights, Report of the Special Rapporteur, Ms. Gabriela Rodriguez Pizarro, submitted pursuant to Commission on Human Rights resolution 2003/46, Jan. 2004.
2. U.N. Commission on Human Rights, Resolution: 2004/49, Violence Against Women Migrant Workers, Apr. 20, 2004.

G. Non-Governmental Organization Documents

1. American Civil Liberties Union and Global Rights, Joint Written Statement to the U.N. Commission on Human Rights, *Ending the Exploitation of Migrant Domestic Workers Employed by U.N. Diplomats and Staff*, Feb. 28, 2005.
2. Andolan, CASA of Maryland, et al., *Domestic Workers' Rights in the United States*, Shadow Report to U.N. Human Rights Committee in response to the Second and Third Periodic Report of the United States (Violations of ICCPR).
3. Inter-American Commission on Human Rights Hearing on the Situation of Domestic Employees of Diplomats and International Officials and Staff, Oct. 14, 2005.
4. Human Rights Watch, *Hidden in the Home: Abuse of Domestic Workers with Special Visas in the United States*, Jun. 2001.
5. Domestic Workers United and Data Center, *Home is Where the Work Is*, Jul. 2006.

H. Documents Related to Other Publicized Cases of Abuse of Domestic Workers Employed by Diplomats

1. ACLU, Table of Domestic Worker Cases Publicized in Media, Reports and Court Filings
2. ACLU, Summaries of Cases Publicized in the Media, Reports and Court Filings
3. Redacted Model Employment Contracts Provided by the U.S. Embassy in Kuwait for Domestic Workers on A-3 or G-5 Visas
4. Ikimulisa Livingston, *Nanny Sues U.N. 'Slave' Employers*, N.Y. Post, Oct. 9, 2007.
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