HUMAN TRAFFICKING AND DIPLOMATIC IMMUNITY: IMPUNITY NO MORE?

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I. Introduction

In December 2001, a Saudi princess pushed her Indonesian domestic worker down the stairs of her luxurious Florida townhouse.[1] Injured, the domestic worker fled.[2] She found a neighbor and begged him to call the police.[3] But when the police arrived to investigate, the Saudi princess immediately claimed diplomatic immunity.[4] Her unsubstantiated claim of immunity was enough to convince the police to leave.[5] Police only arrested the princess days later when the Department of State determined that the claim to diplomatic immunity had no merit.[6]

When legitimately invoked, diplomatic immunity can serve

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[1] *Maid Accuses Saudi Princess of Abuse*, ABC NEWS, Jan. 18, 2002, *available at* http://abcnews.go.com/2020/story?id=123950&page=1.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Susan Clary, *Saudi princess agrees to deal in battery trial*, ORLANDO SENTINEL, June 5, 2002, *available at* http://articles.orlandosentinel.com/2002-06-05/news/0206050129_1_saudi-princess-saudi-arabia-judge. The princess, who was permitted to return to Saudi Arabia to await trial, pled no contest to misdemeanor battery and paid a $1,000 fine. *Id.* The criminal case stalled when the U.S. government refused to give the domestic worker, who had returned to Indonesia for her mother's funeral, a visa to testify at the trial. *Id.* A separate civil case brought by the domestic worker settled for an undisclosed amount. *Id.*

as a powerful weapon to thwart accountability. Diplomatic immunity has halted civil and criminal efforts to hold diplomats accountable.[7] While diplomatic immunity can be a critical tool to facilitate orderly relations between nations,[8] it comes with a cost. Immunity can also be used to shield flagrant abuse. One commentator noted with dismay that diplomatic immunity "often contradicts fundamental principles of justice."[9] For decades, Exhibit A of immunity's darker side has been trafficking of domestic workers to the United States for forced labor.[10] Impunity has long been the norm.

U.S. government officials have declared publicly that they wish to hold diplomats accountable for trafficking and exploitation of domestic workers. Secretary of State Hillary Clinton made precisely that point at the 2011 meeting of the President's Interagency Task Force to Monitor and Combat Trafficking in

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[7] Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 [hereinafter Vienna Convention on Diplomatic Relations]. Under this Convention, accredited diplomats enjoy near absolute immunity from civil and criminal liability. *Id.* For a full analysis of the Vienna Convention on Diplomatic Relations, *see* EILEEN DENZA, DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS (Oxford Commentaries on International Law Series, 3d ed. 2008).

[8] The premise behind diplomatic immunity is that accountability under the law of the receiving state may hamper a foreign representative's ability to perform his or her official duties. *See* BUREAU OF DIPLOMATIC SECURITY, U.S. DEP'T OF STATE, Pub. No. 10524, DIPLOMATIC AND CONSULAR IMMUNITY: GUIDANCE FOR LAW ENFORCEMENT AND JUDICIAL AUTHORITIES 3 (2011) [hereinafter DIPLOMATIC AND CONSULAR IMMUNITY]; *See also* Emily F. Siedell, *Swarna and Baoanan: Unraveling the Diplomatic Immunity Defense to Domestic Worker Abuse*, 26 MD. J. INT'L L. & TRADE 173, 175 (2011).

[9] Mitchell S. Ross, *Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities*, 4 AM. U. INT'L L. REV. 173, 201 (1989).

[10] Diplomats and international organization staff are permitted to bring domestic workers and other staff into the United States under two special visa regimes: the A-3 and G-5 visas. For a detailed account of exploitation and abuse of domestic workers with A-3 and G-5 visas by diplomats and international organization employees, *see* HUMAN RIGHTS WATCH, HIDDEN IN THE HOME: ABUSE OF MIGRANT DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES 4 (2001).

Persons. She stated, "[w]hether they're diplomats or national emissaries of whatever kind, we all must be accountable for the treatment of the people that we employ."[11] But it is civil litigation against diplomats, not criminal prosecutions, that has brought a hint of accountability.

Until very recently, civil lawsuits against diplomats with full immunity served as a quixotic gesture of protest. No more. Recent case law, guided by State Department intervention in two key cases, has changed the landscape entirely.[12] It is now possible to hold diplomats accountable. It only takes competent counsel and a significant amount of time.

This article addresses four questions. First, is diplomatic immunity a complete shield to criminal trafficking prosecutions and civil suits against diplomats? Second, how have recent civil case precedents limited the impunity typically enjoyed by full diplomats? Third, how can advocates use these new legal precedents to increase deterrence and costs to diplomatic traffickers? Finally, what tools has Congress provided to assist in efforts to hold diplomats stationed in the United States accountable?[13]

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[11] Remarks of Secretary of State Hillary Clinton, THE PRESIDENT'S INTERAGENCY TASK FORCE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS (Feb. 1, 2011), *available at* http://www.state.gov/secretary/rm/2011/02/155831.htm.

[12] *See* Baoanan v. Baja, 627 F. Supp. 2d 155 (S.D.N.Y. 2009); Swarna v. Al-Awadi, 607 F. Supp. 2d 509 (S.D.N.Y. 2009), *aff'd in part, vacated in part, and remanded*, 622 F.3d 123 (2d Cir. 2010).

[13] The data and graphs in this article come from a comprehensive database of all civil cases filed in the United States for trafficking under the Trafficking Victims Protection Act (18 U.S.C. § 1595) and related statutes. The authors created the database through research on PACER and various case law databases.

II. Legal Background

A. Not All Immunity Is Created Equal: Diplomatic v. Consular Immunity

Two international agreements govern immunity for foreign officials posted abroad: the 1961 Vienna Convention on Diplomatic Relations (VCDR)[14] and the 1963 Vienna Convention on Consular Relations (VCCR).[15] The immunities outlined in each of the Conventions differ in scope. Full diplomats under the VCDR enjoy almost unlimited immunity from the criminal and civil jurisdiction of the receiving state.[16] In contrast, consular officials posted abroad enjoy much more limited protection under the VCCR: only their official acts are immune from the receiving state's criminal and civil jurisdiction. In lay terms, full diplomats enjoy immunity 24-hours each day, seven days a week under the VCDR. Consular officers and others with mere consular immunity have immunity from criminal and civil jurisdiction only for their official functions under the VCCR. Essentially, consular officials have immunity only from 9 to 5.[17]

This more limited form of immunity has significant consequences. VCCR Article 41(3) states, "If criminal proceedings are instituted against a consular officer, he must appear before the

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[14] Vienna Convention on Diplomatic Relations, *supra* note 7.

[15] Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 3227, 500 U.N.T.S. 95 [hereinafter Vienna Convention on Consular Relations].

[16] *See* Vienna Convention on Diplomatic Relations, *supra* note 7, art. 31. There are three exceptions to a diplomat's immunity from civil jurisdiction. The most relevant exception in cases involving human trafficking relates to commercial activity in the receiving country. Under Article 31(1)(c), diplomats do not have immunity for an action "relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions." *Id.*

[17] Article 43 of the Vienna Convention on Consular Relations states, "Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions." Vienna Convention on Consular Relations, *supra* note 15, art. 43.

competent authorities."[18] Full diplomats have no such duty. Unlike their diplomatic colleagues, consular officers may be arrested and detained. Article 41(1) of the VCCR states, "Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority."[19] In contrast, diplomats' full inviolability is guaranteed under Article 29 of the VCDR.[20]

The distinctions between consular and diplomatic immunity matter most when a foreign official departs his or her post. Article 39 of the VCDR defines the scope of immunity for former diplomats. Paragraph 2 of that Article states:

When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.[21]

Full diplomats retain immunity only for their official acts. Upon departing his or her diplomatic post, the individual's 24-7 immunity shrinks to 9-to-5 immunity. Residual immunity is the key to accountability.

B. Trafficking Is a Crime: Why No Prosecutions?

Despite diplomats' full immunity from criminal prosecution, receiving governments are not completely powerless to hold diplomats accountable. Indeed, it is possible to hold diplomats criminally liable. But prosecution requires a waiver of immunity by

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[18] Vienna Convention on Consular Relations, *supra* note 15, art. 41.

[19] *Id*.

[20] Article 29 of the Vienna Convention on Diplomatic Relations states, "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention." Vienna Convention on Diplomatic Relations, *supra* note 7, art. 29.

[21] Vienna Convention on Diplomatic Relations, *supra* note 7, art. 39.

the sending state.[22]

The United States government has created a protocol designed to comply with the Vienna Convention on Diplomatic Relations. If the Department of Justice determines that, absent immunity, it would prosecute a diplomat, the Department of State must request that the sending government waive immunity.[23] With some investigative techniques off limits, however, reaching even this point can be difficult.[24]

Only a diplomat's sending state has the power to waive the diplomat's immunity.[25] Waivers are rarely requested. And diplomats' sending states almost never agree to such waivers.[26] If, as

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[22] *See* Vienna Convention on Diplomatic Relations, *supra* note 7, art. 32.

[23] *See* U.S. Dep't of State, 2 FOREIGN AFFAIRS MANUAL § 233.3(a)(2) (2012) [hereinafter FAM]. In such instances, the State Department cannot exercise discretion. It is required to request the waiver from the sending state. "The U.S. Department of State will request a waiver of immunity in every case in which the prosecutor advises that he or she would prosecute but for immunity." DIPLOMATIC AND CONSULAR IMMUNITY, *supra* note 8, at 12.

[24] *See* Government Accountability Office, THE U.S. GOVERNMENT'S EFFORTS TO ADDRESS ALLEGED ABUSE OF HOUSEHOLD WORKERS BY FOREIGN DIPLOMATS WITH IMMUNITY COULD BE STRENGTHENED 4 (2008) (identifying factors complicating investigations of abuse by foreign diplomats). Historically, the Department of State faced criticism for blocking investigative methods that it concluded would encroach on diplomatic immunity. Examples of impermissible methods included consensually monitored phone calls, wiretapping, and other techniques used routinely in trafficking investigations involving non-diplomats. *Id.*

[25] *See* DIPLOMATIC AND CONSULAR IMMUNITY, *supra* note 8, at 12 (stating that "[d]iplomatic and consular immunity are not intended to benefit the individual; they are intended to benefit the mission of the foreign government or international organization. Thus an individual does not 'own' his or her immunity and it may be waived, in whole or in part, by the mission member's government.").

[26] *See Georgian's diplomatic immunity waived*, ASSOCIATED PRESS, Feb. 16, 1997, *available at* http://lubbockonline.com/news/021697/georgian.htm (describing a notorious case involving a Georgian diplomat who killed a teenager while driving drunk. After intense public pressure in the United States, Georgian President Eduard Shevardnadze waived the diplomat's immunity. The diplomat was sentenced to seven up to twenty one years for manslaughter). A second case, which may have involved a waiver, concerned a low-level diplomat from the Dominican Republic who used his own diplomatic passport and the passports of his children to smuggle undocumented migrants into the United States. According to the indictment, he charged up to $10,000 for each migrant he brought to the

is most often the case, a sending nation refuses to waive immunity, the United States government can revoke the accreditation of the diplomat. This effectively declares the diplomat persona non grata.[27] The individual, no longer officially recognized as a diplomat, still retains immunity until the deadline for his or her mandated departure from the United States. But the diplomat must leave the United States.[28]

According to the State Department Bureau of Diplomatic Security,

> If the charge is a felony or any crime of violence, and the sending country does not waive immunity, the U.S. Department of State will require that person to depart the United States and not return unless he or she does so to submit to the jurisdiction of the court with subject matter jurisdiction over the offense. Upon departure, the Department will request that law enforcement issue a warrant for the person's arrest so that the name will be entered in [National Crime Information Center] NCIC.[29]

The Department of Justice has requested a waiver of immunity in a trafficking case involving diplomats on just one occasion.[30] The diplomat's home country refused to grant the waiver.[31]

United States on his children's passports. Indictment, U.S. v. Estevez, No. 08-1183 (S.D.N.Y. Dec. 2, 2008). The defendant pled guilty and was sentenced on October 23, 2009. Judgment, United States v. Estevez, No. 08-1183 (S.D.N.Y. Oct. 27, 2009).

[27] *See* FAM, *supra* note 23, at § 233.3(a)(3).

[28] *See id.*

[29] *See* DIPLOMATIC AND CONSULAR IMMUNITY, *supra* note 8, at 14.

[30] *See* Sabbithi v. Al-Saleh, et al., 623 F.Supp. 2d 93, 96 (D.D.C. 2009).

[31] A sending state could refuse to grant a waiver, but could prosecute its own diplomat when he/she returned to the sending state. Indeed, under Article 31(4) of the Vienna Convention on Diplomatic Relations, "The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State." Vienna Convention on Diplomatic Relations, *supra* note 7, art 31(4). In other words, a state may prosecute its own diplomat for crimes committed while stationed abroad.

Because diplomatic immunity waivers are rarely requested and almost never granted, domestic workers trafficked by diplomats are trapped.[32] Without a federal prosecution, these victims cannot obtain criminal restitution for lost wages and other out-of-pocket losses.[33] In the absence of a criminal case, a domestic worker trafficked by a diplomat has just one option: to file a civil suit against the diplomat.

C. Diplomatic Immunity, Impunity, and Trafficking Civil Suit

Until very recently, attorneys representing trafficking victims filed civil lawsuits against diplomatic defendants with some trepidation.[34] Serving a civil complaint on a foreign diplomat in the United States routinely prompted a speedy motion to quash service on grounds of immunity.[35] A motion to dismiss premised on the

[32] Waivers are not required in cases involving only consular immunity. Indeed, the U.S. government has brought criminal actions against consular officials in a small number of cases in the United States. *See e.g.* Human Trafficking Rescue Project, *High-Ranking Taiwan Representative Charged With Fraud In Foreign Labor Contracting*, Nov. 10, 2011, *available at* http://www.justice.gov/usao/mow/news2011/liu.com.html; U.S. v. Penzato et al., No. 11-70969 (N.D. Ca., June 24, 2011); Jane Doe v. Penzato, et al., 2011 WL 1833007 (N.D. Cal. 2011) (companion civil case filed before the criminal indictment).

[33] In federal human trafficking cases, criminal restitution is mandatory under the Trafficking Victims Protection Act (TVPA). *See* 18 U.S.C. § 1593 (2008). It is important to note, however, that the federal government prosecutes a relatively small number of human trafficking cases each year. In 2011, for example, the U.S. Attorneys Offices and Civil Rights Division of the Department of Justice prosecuted only forty-two human trafficking cases total. Approximately half of these prosecutions involved forced labor. *See* U.S. Dep't of State, TRAFFICKING IN PERSONS REPORT 361 (2012).

[34] After 2003, federal civil suits could be brought under 18 U.S.C. § 1595 (2008). Before the 2003 reauthorization of the TVPA, attorneys for domestic workers exploited by diplomats frequently brought suit under the Alien Tort Claims Act, 28 U.S.C. § 1350, or the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et. seq.*

[35] 22 U.S.C. § 254(d) states, "[a]ny action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations...shall be dismissed. Such immunity may be established upon motion or suggestion by or on behalf of the

same theory immediately followed.[36] And the diplomats – at least those with full Vienna Convention on Diplomatic Relations immunity – always won.

In case after case, diplomats used their immunity to thwart trafficking victims' efforts to use civil suits to obtain justice for exploitation.[37] In the 1980s and 1990s, the diplomats had a powerful ally in this fight to preserve impunity: the U.S. Department of State. The Department routinely filed briefs in civil suits, including trafficking suits, urging courts to dismiss the cases entirely.[38]

The Fourth Circuit's 1996 holding in *Tabion v. Mufti* decimated advocates' hopes to hold diplomats liable for abuse. The Tabion holding reflected extensive State Department legal analysis.[39] But that analysis – focused on the VCDR Article 31 exceptions to diplomatic immunity for sitting diplomats – prompted dismissals, not accountability.

In November 1994, a Filipina domestic worker brought a civil suit against Faris Mufti. Mufti served as the Jordanian Embassy's First Secretary, and later Counsellor, in Washington, D.C.[40] The plaintiff, Corazon Tabion, filed her suit under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq., as well as under various state law causes of action.[41] She conceded that the diplomat retained full diplomatic immunity, but argued that his hiring of a domestic worker fell under the commercial activity exception in Article 31 of the VCDR.[42] The trial court disagreed. The court dismissed the case on diplomatic immunity grounds.[43] The

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individual, or as otherwise permitted by law or applicable rules of procedure."

[36] The only exception to this rule was a diplomat who defaulted entirely.

[37] *See e.g.*, Tabion v. Mufti, 73 F.3d 535 (4th Cir. 1996); Logan v. Dupuis, 990 F. Supp 26 (D.D.C. 1997); Montuya v. Chedid, 779 F. Supp. 2d 60 (D.D.C. 2011).

[38] *See e.g., Tabion*, 73 F.3d at 538; Statement of Interest of the United States, Begum v. Saleh, No. 99-11834 (S.D.N.Y. March 31, 2000).

[39] *See Tabion*, 73 F.3d at 538.

[40] *See generally* Complaint, *Tabion*, 73 F.3d 535 (No. 94-1481).

[41] *Id.*

[42] *Id.*

[43] *See* Tabion v. Mufti, 877 F. Supp. 285, 293, 294 (E.D.V.A. 1995).

domestic worker appealed the dismissal to the Fourth Circuit. The State Department recommended that the dismissal be affirmed, and again, Tabion lost.[44]

The Fourth Circuit relied heavily on the State Department's statement of interest brief, holding that "substantial deference is due to the State Department's conclusion."[45] The court noted:

> The United States Department of State narrowly interprets the Article 31(1)(c) [commercial activity] exclusion based on the agreement's negotiating history. In a statement of interest filed in the present matter, the State Department concluded that the term "commercial activity" as used in the exception "focuses on the pursuit of trade or business activity; it does not encompass contractual relationships for goods and services incidental to the daily life of the diplomat and family in the receiving State." [46]

For the next two decades, the *Tabion* decision served as the greatest weapon in the diplomatic defendant's arsenal. *Tabion*'s holding halted multiple suits by domestic workers, leaving exploited workers without recourse.[47] Judges dismissing these cases appeared to do so with some dismay, and sometimes even offered strategic suggestions for how such cases might eventually succeed. For example, one judge floated the idea that a case could be brought after the defendants were no longer immune from suit.[48] But practically speaking, the best that a domestic worker plaintiff could hope for

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[44] *See generally* Statement of Interest of the United States, *Tabion*, 73 F.3d 535 (No.94-1481).

[45] *Id.* at 538.

[46] *See generally* Statement of Interest of the United States, *Tabion*, 73 F.3d 538 at 4 (No.94-1481) (emphasis added).

[47] *See e.g.*, Gonzalez Paredes v. Vila, 479 F. Supp.2d 187, 193 (D.D.C. 2007); Sabbithi v. Al Saleh, 605 F. Supp. 2d 122, 128, 129 (D.D.C. 2009); Logan v. Dupuis, 990 F.Supp at 30, 31; Montuya v. Chedid, 779 F.Supp.2d at 64.

[48] Judge Paul Friedman in the District Court for the District of Columbia wrote, "[w]hile the undersigned cannot, of course, control or even predict how another judge might rule in the future, the undersigned recommends that the statute of limitations on plaintiff's claim be tolled until such time as the defendants are not immune from suit." *Gonzalez Paredes*, 479 F.Supp. 2d at 189.

was a default judgment against a diplomat too incompetent to prove up his own immunity.[49] And significant collection problems frequently rendered those judgments pyrrhic victories.

D. The Swarna Decision: Vishranthamma Swarna v. Badar Al-Awadi, Halal Muhammed Al-Shaitan, and State of Kuwait

Even after the unfavorable *Tabion* decision, advocates continued to try to convince courts that hiring domestic workers fell within the commercial activity exception to diplomatic immunity.[50] Those arguments failed.[51] But on April 28, 2009, the State Department filed a brief in a trafficking case that shifted the legal focus away from the commercial activity exception.[52] The Department of State asserted that the relevant question was not whether the commercial activity exception applied, but whether diplomats retained immunity for abuse of domestic workers after the diplomats left their diplomatic postings.[53]

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[49] Such was the case in Mazengo v. Mzengi, 541 F.Supp.2d 96 (D.D.C. 2008). The defendants, a high-ranking Tanzanian diplomat and his spouse, failed to provide evidence of their own diplomatic status in the United States. On January 16, 2008, the District Court for the District of Columbia adopted the magistrate judge's report and recommendation, awarding the plaintiff $1,059,348.79 in damages and attorneys' fees. *See* Order, *Mazengo*, 541 F.Supp.2d 96 (No. 07-756). The judgment remains uncollected. The diplomat returned to Tanzania. TIME Magazine reported that he was promoted, serving as an advisor to the president of the country, President Kikwete. *See* E. Benjamin Skinner, *Modern-Day Slavery on D.C.'s Embassy Row?,* TIME MAGAZINE, June 14, 2010, *available at* http://www.time.com/time/nation/article/0,8599,1996402,00.html.

[50] Vienna Convention on Diplomatic Relations, *supra* note 7, Article 31(1)(c).

[51] Attorneys for victims also argued that trafficking violated *jus cogens* norms, thereby vitiating diplomatic immunity. The *jus cogens* argument, although successful in other legal contexts, has not yet been used successfully in a trafficking case. For the use of *jus cogens* arguments in the torture context, see Yousuf, et al. v Samantar, No. 11-1479 (4th Cir. 2012) (holding that because the case involved violations of *jus cogens norms*, the defendant was not entitled to conduct-based official immunity under the common law).

[52] Statement of Interest of the United States of America, *Baoanan*, 627 F. Supp. 2d 155 (No. 08-5692).

[53] *See id.* at 2.

The district court in *Swarna v. Al-Awadi* had recently arrived at this very conclusion.[54] The district court in *Swarna* had further held that residual immunity did not cover the trafficking and abuse of domestic workers.[55] The Statement of Interest filed by the State Department in the case of *Baoanan v. Baja*, a civil trafficking case pending in the Southern District of New York, urged the *Baja* trial court to adopt the residual immunity reasoning reached by the district court in Swarna.[56] It did.

The defendants in *Swarna* appealed the denial of their motion to dismiss to the Second Circuit. They lost. Again, the State Department filed a persuasive brief, asserting that residual immunity did not cover private acts.[57] This was not a change in U.S. government policy, the brief argued. Rather, this had always been the U.S. government's interpretation of the Vienna Convention on Diplomatic Relations. As the government's brief stated: "[t]he longstanding and consistent practice of the United States is to interpret the scope of immunity under Article 39(2) as a limited immunity for official acts only."[58]

The full history of Vishranthamma Swarna's suit illustrates its importance. Swarna first filed a civil case against her employers, a Kuwaiti diplomat and his wife, in May 2002.[59] Swarna alleged that the defendants had held her in slavery-like conditions in their apartment in New York, forcing her to work long hours as a nanny and housekeeper.[60] She brought her claims under the Alien Tort Claims Act.[61] The court dismissed the complaint in January 2005 on

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[54] *See Swarna*, 607 F. Supp. 2d at 529.

[55] *See id.* at 619.

[56] *See* Statement of Interest at 10, *Baoanan*, 627 F. Supp. 2d 155 (No. 08-5692).

[57] *See* Brief for the United States of American as *Amicus Curiae* in Support of Affirmance [hereinafter Brief for the U.S.] at 4, *Swarna*, 607 F. Supp. 2d 509 (No. 09-2525).

[58] Brief for the U.S. at 11, *Swarna*, 607 F. Supp. 2d 509 (No. 09-2525).

[59] Complaint, *Swarna*, 607 F.Supp.2d 509 (No. 02-3710).

[60] *See id.* at 5-16.

[61] *See id.* at 19-21. The Trafficking Victims Protection Act passed in 2000. As noted above, Congress created the federal private right of action for civil trafficking cases, 18 U.S.C. § 1595, in 2003. In 2002, when attorneys for Ms.

grounds of diplomatic immunity.[62] However, the court's decision provided two small reeds of hope. First, the dismissal was without prejudice.[63] Second, the court opined that the defendants might no longer enjoy diplomatic immunity if they left their diplomatic posting in the United States.[64]

The defendants did indeed leave. According to Swarna's second complaint, filed in 2006, the government of Kuwait posted the pair to Paris.[65] In her second suit, Swarna again alleged that the defendants had tricked her into accompanying them to the United States with promises of good wages and decent working conditions.[66] The complaint alleged that after her arrival, the defendants stripped her of her passport, forced her to work long hours, and cut her off entirely from the outside world.[67] Swarna also alleged that Al-Awadi raped her on numerous occasions.[68]

The second complaint, filed in 2006, named the State of Kuwait as a defendant, in addition to the individual defendants.[69] The district court granted a default judgment against the individual defendants and dismissed Kuwait as a defendant.[70] All sides appealed to the Second Circuit Court of Appeals. As noted above, the State Department filed an amicus brief in the Second Circuit recommending that the judgment against the individual defendants

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Swarna filed her original case, the Alien Tort Claims Act was one of just a tiny handful of federal causes of action available to trafficking victims in the United States. The allegations in Ms. Swarna's case occurred 1996-2000, before the enactment date of the Trafficking Victims Protection Act. The legal standard for proving a violation under the Alien Tort Claims Act is a higher standard than under the Trafficking Victims Protection Act. For a discussion of pre-enactment date conduct in the civil context, *see generally* Ditullio v. Boehm, 662 F.3d 1091 (9th Cir. 2011).

[62] *See* Order Adopting Report and Recommendations at 148, *Swarna*, 607 F. Supp. 2d 509 (No. 02-3710).

[63] *See id.*

[64] *Id.*

[65] *See* Complaint at 15, *Swarna*, 607 F. Supp. 2d 509 (No. 06-4880).

[66] *See* Complaint at 15, *Swarna*, 607 F. Supp. 2d 509 at 4 (No. 06-4880).

[67] *Id*. at 5.

[68] *Id*. at 13.

[69] *Id.* at 1, 2.

[70] *See* Memorandum and Order, *Swarna*, 607 F. Supp. 2d 509 (No. 06-4880).

should stand.[71]

In its brief, the State Department explained that Article 39(2) of the Vienna Convention provides the basis for residual immunity – the immunity that survives even after a diplomat leaves a post. That article states:

> When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.[72]

After analyzing this provision, the State Department concluded:

> Because Al-Awadi's employment of Plaintiff [Swarna] as a personal domestic servant was not an official act performed in the exercise of his diplomatic functions for Kuwait, the district court correctly held that Al-Awadi is not entitled to residual diplomatic immunity from Plaintiff's claims. Because Al-Shaitan, as Al-Awadi's spouse, did not hold a position at the Kuwait Mission to the United Nations, her employment of Plaintiff could not be an official act, and the district court correctly held that she is not entitled to residual diplomatic immunity.[73]

The U.S. government's intervention in *Swarna* marked a tectonic shift. The Second Circuit's decision changed the litigation playing field for victims trafficked to the United States by diplomats.[74] No longer was civil litigation against diplomats a

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[71] Brief for the U.S., *Swarna*, 607 F. Supp. 2d 509 (No. 06-4880).

[72] Vienna Convention on Diplomatic Relations, *supra* note 7, Article 39(2).

[73] Brief for the U.S. at 3, *Swarna*, 607 F. Supp. 2d 509 (No. 06-4880).

[74] The State Department had refused to take a position on the question whether residual immunity covered the acts alleged in the complaint in the

quixotic gesture doomed to failure. In its amicus brief in *Swarna*, the State Department effectively ended *permanent* impunity for diplomat traffickers in the United States.[75] It did so by pointing out that even though diplomats may be immune to suit, former diplomats may be held accountable for these same acts.[76] A case previously barred by immunity could now survive a motion to dismiss. Plaintiffs just had to wait for the end of the diplomatic posting and then re-file the suit. The State Department opened the door to diplomatic accountability.[77]

The genius of the residual immunity holding in *Swarna* is that it places former diplomats on equal footing with consular officers, at least in the long run. For former diplomats, employees of international organizations, and consular officers, the ultimate question is whether the abuse alleged by the domestic worker falls within the defendants' official functions. Courts have uniformly answered that question with a resounding no.

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previous statement of interest filed in Baoanan v. Baja. *See* Statement of Interest at 3, *Baoanan*, 627 F. Supp. 2d 155 (No. 08-5692). The statement of interest in that case took no position on whether the diplomatic defendant in that case, the former ambassador of the Philippine Permanent Mission to the United Nations, retained residual immunity for the abuse alleged by Ms. Baoanan. *See id.* The State Department did opine that the ambassador's wife, who had no official function as the spouse of a diplomat, did not retain residual immunity for the acts alleged in the complaint. *See id.* at 7. "As [Mrs. Baja] was never a member of the Philippine Mission to the United Nations, she could not have conducted any acts… 'as a member of the mission,' and her immunity does not continue to subsist for any acts." *Id*. This position, adopted by the court, permitted the case to proceed against the ambassador's spouse. The case settled in 2011.

[75] *See* Brief for the U.S. at 3, *Swarna*, 607 F. Supp. 2d 509 (No. 06-4880).

[76] *See id.* at 5-10.

[77] This legal conclusion applied not only to foreign diplomats stationed in the United States, but also to U.S. diplomats posted abroad. *See, e.g.*, Doe v. Howard, No. 11-1105 (E.D.V.A. October 12, 2011).

E. The World After Swarna*: Trafficking Suits Against Diplomats in the Post-*Tabion *Age*

Tabion remains good law on the question of the commercial activity exception to diplomatic immunity.[78] Unless a diplomat incorporates and operates a for-profit entity in the United States or conducts business for profit on the side, it is unlikely that civil litigation against a sitting diplomat will stick under the commercial activity exception. Merely hiring a domestic worker is not enough. As summarized by the *Tabion* court: "Day-to-day living services such as dry cleaning or domestic help were not meant to be treated as outside a diplomat's official functions. Because these services are incidental to daily life, diplomats are to be immune from disputes arising out of them."[79] And it is highly unlikely that the U.S. government's interpretation of the commercial activity exception will ever change. That interpretation is accorded a high level of deference by U.S. courts.[80]

Under *Tabion*, economic transactions that are "incidental to daily life" are "not commercial" and "not outside" [diplomats'] official functions.[81] But the *Swarna* court noted that this does not necessarily place those acts within a diplomat's official functions. In its Statement of Interest in *Baoanan v. Baja*, the U.S. government explained that "even if a diplomat's conduct is determined to fall outside the commercial activity exception of Article 31(1)(c), . . . a court must conduct a separate analysis regarding a former diplomat's

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[78] Most recently, two federal district court judges rejected the argument that employment of a domestic worker constitutes "commercial activity" under the exception outlined in Article 31(1) of the Vienna Convention. *See* Elat v. Ngoubene, No. 11-02931 (D. Md. Oct. 13, 2011); Montuya v. Chedid, 779 F.Supp.2d 60, 64 (D.D.C. 2011).

[79] *Tabion*, 73 F.3d at 539. The main impetus for the Fourth Circuit's decision appears to be comity, the potential impact on U.S. diplomats. *See id.* In Footnote 9, the court noted that the opposite decision would leave U.S. diplomats vulnerable to similar suits abroad. *See id.*

[80] The Second Circuit opinion in Swarna cites the "well established canon of deference with regard to Executive Branch interpretation of treaties." *Swarna,* 622 F.3d at 136 (citing Abbott v. Abbott, 130 S.Ct. at 1983 (2010)).

[81] *Tabion*, 877 F. Supp. at 290, 292.

conduct to determine whether or not that conduct would constitute an official act and qualify for residual immunity under Article 39(2)."[82] The State Department embraced the "not commercial, not official" carve-out in its own *Swarna* amicus brief to the Second Circuit.

As full diplomats depart their posts, all human trafficking cases will fall within the realm of mere consular immunity. In *Gurung v. Malhotra*, a domestic worker sued a high-ranking diplomat serving with the permanent mission of India to the United Nations.[83] The Indian diplomat enjoyed only consular immunity.[84] The complaint named the diplomat's husband as a second defendant.[85] The domestic worker alleged that she had worked for three years in the defendants' home, performing significant housework and caring for the defendants' children for nearly no pay.[86] The diplomat and her husband left the country. The plaintiff, represented pro bono, sought to serve the defendants in India.[87] Unable to do so, the plaintiff sought leave of the court to serve the defendants by alternative means.[88] In December 2010, the District Court for the Southern District of New York granted that request, permitting the plaintiff to serve the defendants through publication in India.[89] The plaintiff's attorneys published the notice in multiple journals in India and then requested a default judgment, which was granted.[90] After an inquiry on damages, the court awarded the

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[82] Statement of Interest at 15, *Baoanan*, 627 F. Supp. 2d 155 (No. 08-5692).

[83] Gurung v. Malhotra, 279 F.R.D. 215 (S.D.N.Y. 2011).

[84] Consular immunity alone would not have protected the defendants from the suit, even if they had remained in the United States. But even a suit against a diplomat with mere consular immunity must rely on the premise that abuse of a domestic worker is outside the scope of the diplomat's official functions.

[85] *See* Complaint, *Gurung*, 279 F.R.D. 215 (No. 10-5086).

[86] *See id.* at 5-8.

[87] Order Appointing International Process Server, *Gurung* 279 F.R.D. 215 (No. 10-5086).

[88] Memorandum of Law in Support of Plaintiff's Motion for an Order Granting Use of Alternative Means of Service on the Defendants, *Gurung* 279 F.R.D. 215 (No. 10-5086).

[89] Order Granting Plaintiff's Motion for Use of Alternative Means of Service on the Defendants, *Gurung* 279 F.R.D. 215 (No. 10-5086).

[90] Decision and Order, *Gurung* 279 F.R.D. 215 (No. 10-5086).

plaintiff more than $1.4 million.[91] The Indian Government intervened, disputing service on grounds that the method used did not comport with the Hague Convention.[92] Unable to unravel the judgment in the U.S. courts, the defendants and the government of India filed a civil lawsuit against the domestic worker and her U.S. counsel in India, enjoining enforcement of the judgment.[93]

Post-*Swarna*, if you can serve the defendants, you can sue the defendants.[94] Without residual immunity, diplomatic immunity no longer provides an impenetrable defense for domestic worker abuse. That leaves just two remaining impediments to justice: service and collection.[95] As difficult as it is to serve defendants residing abroad, it can be even more difficult to collect the judgments from those defendants. But those are technical legal issues, not complete bars to accountability.

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[91] Report and Recommendation to the Honorable Victor Marrero, *Gurung* 279 F.R.D. 215 (No. 10-5086).

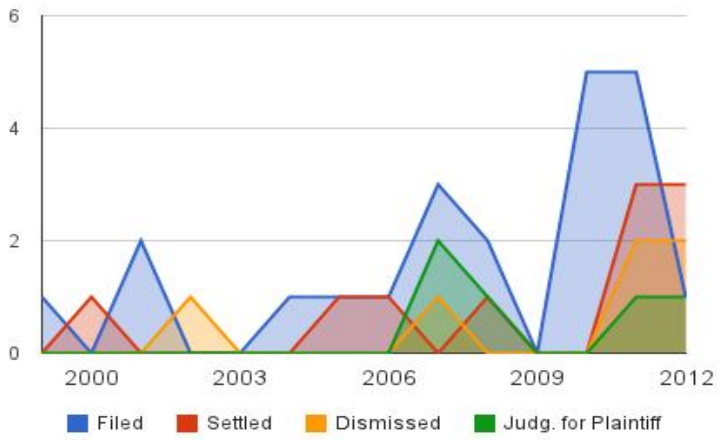
[92] Order in the High Court of Delhi at New Delhi at 7, 8, *Gurung* 279 F.R.D. 215 (No. 10-5086) (referencing The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361, T.I.A.S. No. 6638 (1969)).

[93] Endorsed Letter, *Gurung*, 279 F.R.D. 215 (No. 10-5086). Although the Indian government argued that Malhotra enjoyed full diplomatic immunity, the defendant held only consular immunity. *See id.* at 11.

[94] This is often more easily said than done. In *Sabbithi v. Al Saleh*, the individual defendants and the State of Kuwait fought on service grounds for more than three years.

[95] The statute of limitations can also provide a roadblock to lawsuits. Attorneys have successfully argued that the statute of limitations must be tolled for the period during which a diplomat enjoys full immunity.

Civil Trafficking and Labor Exploitation Cases Brought Against Diplomatic, Consular, and International Organization Officials, 1999 – Present



The Impact of Swarna: Since the Second Circuit's September 2010 decision in *Swarna*, domestic workers have filed seven new cases against their diplomat-employers alleging labor exploitation or trafficking. Since the Second Circuit's decision, eight such cases have been voluntarily dismissed or settled, and one case has ended in a $1.4 million judgment for the plaintiff.

F. Congress Provides Additional Tools: The Trafficking Victims Protection Act

Congress passed the Victims of Trafficking and Violence Protection Act (TVPA) in 2000.[96] This landmark legislation established new crimes and new penalties for human trafficking in the United States. In the 2003 TVPA reauthorization, Congress created a federal private right of action permitting trafficking victims to sue their traffickers for damages. In 2008, pressed by the ACLU and the anti-trafficking advocacy community, Congress adopted further amendments designed to safeguard the rights of domestic workers brought to the United States by diplomats and international organization staff. The 2008 reauthorization of the TVPA also permitted trafficked domestic workers residing in the United States on special A-3 and G-5 visas to remain in the United States to pursue civil lawsuits against their diplomat abusers.[97]

Under the 2008 amendments to the Trafficking Victims Protection Act, trafficking victims can obtain a temporary, special immigration status for the pendency of their lawsuits. The status amounts to deferred action.[98] To apply, a domestic worker need only submit a cover letter, a copy of his or her civil complaint, and an application for temporary work authorization. The work authorization remains valid as long as the domestic worker diligently pursues his or her civil claims.[99]

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[96] 22 U.S.C. § 7101 *et. seq.* (2000).

[97] Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), § 203 (c) (2008): *Protection from Removal During Legal Actions Against Former Employers.*

[98] Although the application must be sent to the Department of Homeland Security's Vermont Service Center, this is not the equivalent of a T visa. A T visa permits longer-term immigration relief with the opportunity to adjust to permanent residence status. Regulations for this complaint-related immigration relief may be found at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=6e7bf0a4017ae210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

[99] The civil suit need not be for trafficking. Rather, any civil complaint relating to abuse by a diplomat or international organization employer – including suits for contract damages – qualified an A-3/G-5 visa holder for deferred action

Temporary immigration relief for A-3/G-5 visa holders filing civil complaints allows trafficking victims to pursue justice without fear of deportation. The law created new incentives for civil suits.[100]

III. Human Trafficking Civil Suits: Notes for Practitioners

Over the past twenty-five years, anti-trafficking advocates have learned significant lessons in litigating lawsuits against diplomats in the United States.

First, it is always better to sue. Even if dismissal on immunity grounds is inevitable while the diplomat remains in the United States, the lack of residual immunity creates powerful incentives for diplomats to settle. A quick dismissal no longer permanently squelches the matter. Diplomatic postings end. The ability to sue the former diplomat does not. And a dismissed suit is more likely to toll the various statutes of limitations than an unfiled one.

Second, it is always better to sue immune and non-immune individuals together. Diplomats will often settle when they see non-immune family members as defendants on the docket.[101] Family members in the diplomat's country of origin frequently participate in the trafficking, recruiting the domestic worker for the position in the United States or accompanying her to the U.S. Embassy to obtain a visa. Non-immune family members living in the United States may

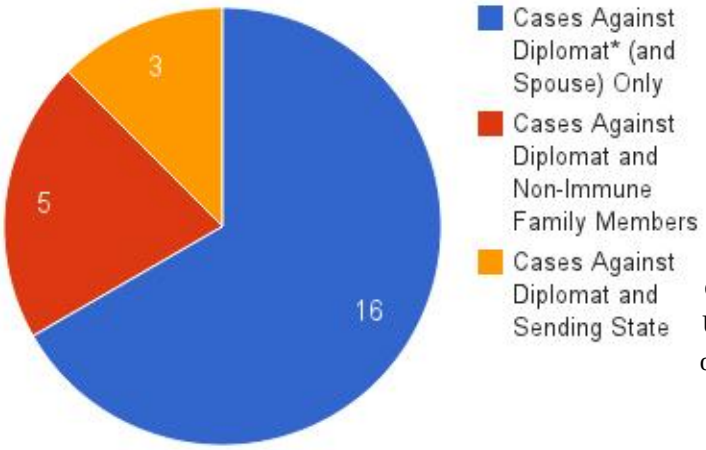
status. TVPRA § 203 (c)(1)(A).

[100] Unfortunately, very few domestic workers accepted this invitation to file suit. Since March 2011, when the Department of Homeland Security issued the regulations activating the statute, domestic workers have initiated only six suits against diplomats and international organization officials in the United States that might have led to temporary immigration relief.

[101] Not all family members who travel to the United States with a diplomat enjoy full diplomatic immunity. Only those family members "forming part of the households of diplomats" enjoy the same privileges and immunities as do their sponsoring diplomats. Family members enjoying immunity include spouses, unmarried children under the age of 21, and unmarried children under the age of 23 if they are full-time college or university students who habitually reside in the diplomat's home. 8 C.F.R. 214.2(a)(2).

also exploit the forced labor extracted from trafficking victims. These overt acts can constitute conspiracy or may even rise to the level of trafficking.

Breakdown of Cases by Defendant Type



*includes full diplomats, consular officials, U.N. officials, and employees of international organizations.

Twenty-four trafficking and labor exploitation cases were filed against diplomats between 1994 and 2012:

- Sixteen cases were filed against the diplomat alone, or the diplomat and his/her spouse. Among these, five were voluntarily dismissed or settled, five were dismissed, and four ended with a judgment for the plaintiff. Two are ongoing.

- Five cases also named non-immune family members as defendants. Among these, four were voluntarily dismissed or settled for an undisclosed sum. One is ongoing.

- Three cases also named the diplomat's sending state as a defendant. All three were voluntarily dismissed.

Third, judgments send a powerful message. Two significant federal judgments – $1 million against a Tanzanian diplomat in the U.S. District Court for the District of Columbia,[102] and $1.4 million against an Indian official assigned to her country's U.N. permanent mission in the Southern District of New York[103] – provide diplomatic defendants with concrete examples of the alternatives to settlement. U.S. federal judges have demonstrated their willingness to award not just back wages, but also punitive, contract, and tort damages for the egregious abuses suffered by domestic workers trafficked by diplomats.[104]

Fourth, litigation in federal court is only part of the advocacy required to prevail in a lawsuit against a diplomat. Attorneys must also engage in a bit of diplomacy. The 2008 amendments to the Trafficking Victims Protection Reauthorization Act included a provision known as the "suspension clause." Under TVPRA Section 203(a)(2), the Secretary of State shall suspend "the issuance of A-3 visas or G-5 visas to applicants seeking to work for officials of a diplomatic mission or an international organization have abused or exploited 1 or more nonimmigrants holding an A-3 visa or a G-5 visa, and that the diplomatic mission or international organization tolerated such actions."[105]

As of November 2012, no country had been suspended from the visa regime. But the provision nevertheless sparked demands for suspension of specific countries, such as Tanzania.[106] Advocates also called for ex gratia payments by the diplomats' sending states.[107]

Finally, in addition to the immigration relief now available to A-3/G-5 visa holders who sue their diplomat-employers, a civil suit

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[102] *See* Report and Recommendation at 19, *Mazengo*, 542 F.Supp.2d 96 (No. 07-756).

[103] *See* Decision and Order at 1, *Gurung*, 279 F.R.D. 215 (No. 10-5086).

[104] *See id*. at 7-16. *See also* Ditullio v. Boehm, 662 F.3d 1091, 1094 (9th Cir. 2011) (establishing that punitive damages are available under the TVPA).

[105] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Sec. 203 (a)(2).

[106] *See* Martina E. Vandenberg, *Why Are Diplomats Allowed to Abuse in America?*, THE WASHINGTON POST, June 2011.

[107] *See id.*

invites the Department of State to take the case seriously. A civil suit creates a public record. And, in the best of circumstances, the State Department may suspend an individual diplomat from the A-3/G-5 visa scheme. That suspension leaves the diplomat unable to bring additional domestic workers to the United States. Because there are serial abusers among the diplomatic corps, forcing those individuals to hire nannies and domestic workers on the U.S. labor market provides some hope that future abuses may be prevented. Exploiting a U.S. citizen or permanent resident presents a greater challenge to would-be abusers. Even in cases where the diplomat hires another immigrant, the local employee usually has a support system to rely upon in the United States. She also may have more opportunities – and greater inclination – to report abuse.While many factors that make abusing foreign domestic workers easy – such as language barriers, ignorance of local customs, and mistrust of police – are still present,[108] there is one significant difference. The very fabric of the A-3/ G-5 visa facilitates abuse, as it puts the worker's immigration status entirely in the hands of the diplomat.[109]

IV. Conclusion

The U.S. government has an obligation to "vigorously pursue. . .investigations, to prepare cases carefully and completely, and to document properly each incident so that charges may be pursued [against diplomats] as far as possible in the U.S. judicial system." [110] That obligation remains aspirational. But recent legal developments have radically altered the risks for diplomats accused of domestic worker abuse in the United States. Swarna has effectively ended permanent civil impunity. The result so far has been a slight increase in the number of civil suits filed. In the wake

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[108] *See generally* Amy Tai, *Unlocking the Doors to Justice: Protecting the Rights and Remedies of Domestic Workers in the Face of Diplomatic Immunity*, 17 AM. U. J. GENDER & SOC. POL'Y & L. 175 (2007).

[109] *See generally* HUMAN RIGHTS WATCH, *supra* note 10.

[110] *See* FAM, *supra* note 23, at § 233.3(a)(1).

of *Swarna*, those cases are more likely to end in settlement than in dismissal on immunity grounds.

For potential victims, this may be the best outcome of all. *Swarna* has heralded a new era of diplomatic accountability. One must simply be patient.