

IN THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ORGANIZATION OF AMERICAN STATES

SITI AISAH & OTHERS

Petitioners

-and-

UNITED STATES OF AMERICA

Respondent State

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WRITTEN SUBMISSIONS ON BEHALF OF  
THE UNITED NATIONS SPECIAL RAPPORTEUR  
ON TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN

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1. INTRODUCTION

- 1.1 These are written submissions by the United Nations Special Rapporteur on trafficking in persons, especially women and children (“**the Special Rapporteur**”), in respect of this petition. The Special Rapporteur makes these written submissions with the consent of the petitioners.
- 1.2 Special Rapporteurs are independent and impartial experts on thematic human rights or country issues within the Special Procedures of the UN human rights system, and act in accordance with the Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council (“**HRC**”). The current Special Rapporteur, Professor Siobhán Mullally, assumed her mandate on 1 August 2020. HRC Resolution 44/4 recognises the importance of the mandate of the Special Rapporteur “in the prevention of trafficking in persons and the promotion of the global fight against trafficking in persons and in promoting awareness of and upholding the human rights of victims of trafficking”.<sup>1</sup>
- 1.3 The submission of this amicus curiae brief is provided by the Special Rapporteur on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied, of any privileges or immunities applicable to the United Nations (“**UN**”) or its officials or experts on mission pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations. Authorisation for the positions and views expressed by the Special Rapporteur in this amicus curiae brief, in full accordance with her independence, was neither sought from nor given by the United Nations, including the Human Rights Council or the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies.

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<sup>1</sup> pg. 3, UNHRC, Resolution adopted by the Human Rights Council on 16 July 2020 (22 July 2020) UN Doc A/HRC/RES/44/4 < <https://undocs.org/en/A/HRC/RES/44/4> > accessed 17 October 2023.

## Issues

- 1.4 The Admissibility Report of the Inter-American Commission on Human Rights<sup>2</sup> (the “**Commission**”) asks whether diplomatic immunity prevents the petitioners, domestic workers in diplomatic households, from filing suit under the jurisdiction of the United States of America (“**USA**”), and, if so, whether that breaches their rights under the American Declaration of the Rights and Duties of Man 1948 (the “**American Declaration**”) including the prohibition of discrimination.<sup>3</sup>
- 1.5 The Special Rapporteur is uniquely well placed to assist the Commission in the determination of these important issues. Prior to her appointment as Special Rapporteur, Professor Mullally was the former President (2016-18) and First Vice-President (2014-16) of the Council of Europe Group of Experts on Action Against Trafficking in Human Beings, the monitoring body of the Council of Europe Anti-Trafficking Convention on Action against Trafficking in Human Beings (“**ECAT**”). She has also acted as intervener, with permission, in cases concerning the rights of migrant domestic workers employed by diplomatic agents in *Basfar v Wong*,<sup>4</sup> and multiple important cases concerning the rights of trafficked persons at regional and international level, such as the Grand Chamber of the European Court of Human Rights (“**ECtHR**”) in *HF and MF v France*<sup>5</sup> and *JD and AD v France*,<sup>6</sup> and the International Criminal Court (“**ICC**”) in *Prosecutor v Dominic Ongwen*.<sup>7</sup> In her academic capacity as Established Professor of Human Rights law at the University of Galway (Ireland), she submitted an amicus brief to the Constitutional Court of Colombia in the ‘Yolanda’ case,<sup>8</sup> specifically addressing the international and regional human rights law obligations concerning the identification and protection of victims of trafficking in the context of migration.

## Overview of written submissions

- 1.6 The Special Rapporteur seeks to assist the Commission on two legal issues arising under international human rights law: first, the correct interpretation of the commercial activity exception to diplomatic immunity from civil jurisdiction; and second, the positive obligations owed by states to domestic workers in diplomatic households in relation to trafficking and slavery and the application of the non-discrimination principle.

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<sup>2</sup> IACHR, Report No. 224/20, Petition 1481-07. Admissibility. *Siti Aisah and others*. United States of America. 27 August 2020 < <https://www.oas.org/en/iachr/decisions/2020/usad1481-07en.pdf> > accessed 17 October 2023.

<sup>3</sup> pg. 1, *Siti Aisah* Report on Admissibility, supra note 2.

<sup>4</sup> *Basfar v Wong* [2022] UKSC 20, IRLR 879.

<sup>5</sup> *HF and MF v France* (App. No. 24384/19).

<sup>6</sup> *JD and AD v France* (App. No. 44234/20).

<sup>7</sup> *Prosecutor v Dominic Ongwen* No. ICC-02/04-01/15 A A2 (Appeals Chamber, the International Criminal Court).

<sup>8</sup> Sentencia T-236/21, Corte Constitucional Republica de Colombia (23 July 2021).

1.7 In particular, the Special Rapporteur submits that:

- (a) The exploitation of domestic workers by diplomats for personal profit falls within the meaning of a “commercial activity” outside of official functions under Article 31(1)(c) of the Vienna Convention on Diplomatic Relations (“**VCDR**”) 1961,<sup>9</sup> which constitutes an exception to diplomatic immunity from civil jurisdiction.
- (b) This interpretation of the “commercial activity” exception to diplomatic immunity under Article 31(1)(c) is compatible with the VCDR, with the general principles of treaty interpretation, and with international human rights law, including instruments which have been ratified by the USA in relation to human trafficking, slavery, forced labour and domestic servitude, and how those instruments have been interpreted previously by the Commission.
- (c) Where such exploitation falls within the scope of international human rights law prohibitions of slavery, trafficking, and domestic servitude, it cannot properly be considered an activity incidental to the ordinary life of a diplomat. The US courts are wrong to say so, and the approach is also inconsistent with the development of the issue in other jurisdictions and the law on state immunity.
- (d) The petitioners raise circumstances which fall within the internationally recognised definitions of human trafficking for the purpose of exploitation, slavery, forced labour and domestic servitude.
- (e) The failure by the USA to protect domestic workers against exploitation in diplomatic households: (i) breaches the positive obligations of the state to put in place a system of laws which provides for effective remedies against such exploitation, and to take measures to protect this vulnerable category of domestic worker; and (ii) discriminates disproportionately against domestic workers, the majority of whom are women of colour.<sup>10</sup>

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<sup>9</sup> Vienna Convention on Diplomatic Relations 1961, 500 UNTS 95 (signed by the USA 1961, ratified 1972) < [https://legal.un.org/ilc/texts/instruments/english/conventions/9\\_1\\_1961.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf) > accessed 17 October 2023.

<sup>10</sup> See, for instance: Table. 3, pg. 42, Economic Policy Institute, ‘Domestic Workers Chartbook’ (14 May 2020) < <https://files.epi.org/pdf/194214.pdf> > accessed 17 October 2023.

## SUBMISSIONS

### 2. THE “COMMERCIAL ACTIVITY” EXCEPTION TO DIPLOMATIC IMMUNITY IN CASES OF EXPLOITATION

#### Article 31(1)(c) VCDR - the “commercial activity” exception

2.1 The question as to whether the exploitation of the petitioners may fall within the “commercial activity” exemption set out in Article 31(1)(c) of the VCDR,<sup>11</sup> thereby removing the legal immunity of their employers, is a fundamental issue of the petition.

2.2 Principles of legal immunity for diplomatic agents are contained in Articles 1, 22-24, 27-40 and 45 of the VCDR.<sup>12</sup> The fourth recital to the VCDR states 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” [emphasis added].<sup>13</sup> Diplomatic agents enjoy complete immunity from the criminal jurisdiction of the receiving state and generally from its civil jurisdiction, subject to limited exceptions.

2.3 The relevant exceptions to immunity from civil jurisdiction, provided for in Article 31(1)(c) of the VCDR, are as follows:

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

(c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions” [emphasis added].<sup>14</sup>

2.4 Whilst the US courts have interpreted the Article 31(1)(c) exception restrictively in the case of domestic workers, the United Kingdom (“UK”) Supreme Court recently came to a different conclusion. In *Basfar v Wong* (“**Basfar**”),<sup>15</sup> a majority of three UK Supreme Court Justices to two<sup>16</sup> held that the exploitation of a domestic worker in a diplomatic household in the manner alleged constituted the exercise of a “commercial activity” within the exception from civil immunity in Article 31(1)(c) of the VCDR.<sup>17</sup> It is submitted that this judgment is of persuasive value to the Commission in the course of its substantive examination of this petition. In its decision, the UK Supreme Court analysed the meaning of the “commercial activity” exception by reference to the general principles of treaty interpretation, and the specific context of the case. The court considered that some of the

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<sup>11</sup> Art. 31(1)(c), VCDR, supra note 9.

<sup>12</sup> Arts. 1, 22 - 24, 27 - 40, 45, VCDR, supra note 9.

<sup>13</sup> Fourth recital, VCDR, supra note 9.

<sup>14</sup> Art. 31(1), VCDR, supra note 9.

<sup>15</sup> *Basfar v Wong* [2022] UKSC 20, IRLR 879 (henceforth, “*Basfar*”).

<sup>16</sup> Lord Briggs and Lord Leggatt, with whom Lord Stephens agreed. Lord Hamblen and Lady Rose gave a minority judgment.

<sup>17</sup> para. 107, *Basfar*. It was not suggested that the alleged acts of Mr Basfar were a “professional” activity (para. 15).

circumstances of Ms Wong's treatment indicated exploitation for personal profit which could not be considered within a diplomat's official functions.

- 2.5 In these submissions, the Special Rapporteur will analyse the UK Supreme Court's reasoning regarding the "commercial activity" exception to diplomatic immunity, before dealing with the positive obligations owed by the state to the petitioners in this case.
- 2.6 The assumed facts of *Basfar*, summarised at paras 1 and 6-10 of the judgment, bear similarities to those of the petitioners (see para. 3.31 below), and are important to the UK Supreme Court's reasoning. Ms Wong, a national of the Philippines and a migrant domestic worker, worked in the household of Mr Basfar, a member of the diplomatic staff of the mission of the Kingdom of Saudi Arabia. Ms Wong was brought to the UK on a visa to work for Mr Basfar. She alleged that she was confined to the house except to take out rubbish, held virtually incommunicado, and allowed to speak to her family only twice a year on Mr Basfar's mobile telephone. She worked long hours, with no days off or rest, and was required to wear a doorbell at all times to be at the family's beck and call 24 hours a day. She was verbally abused and not paid her contractual wages. Ms Wong brought a claim against Mr Basfar in an employment tribunal for wages and breaches of employment rights. Mr Basfar applied to strike out the claim on the ground that he was immune from suit because of his diplomatic status, before the case was appealed to the Supreme Court.
- 2.7 The Special Rapporteur was granted permission to intervene by the UK Supreme Court because the "exploitation of migrant domestic workers by foreign diplomats is a significant problem" and because the legal question of diplomatic immunity in cases of exploitation was "one of general importance".<sup>18</sup> Similarly, this petition is likely to affect a large cohort of domestic workers employed by diplomats in the USA.<sup>19</sup> Indeed, the Global Estimates of Modern Slavery in 2022 stated:

"There are 27.6 million people in situations of forced labour on any given day. This absolute number translates to 3.5 people in forced labour for every thousand people in the world. Women and girls make up 11.8 million of the total in forced labour. [...] Eighty-six percent of forced labour cases are imposed by private actors – 63 percent in the private economy in sectors other than commercial sexual exploitation and 23 percent in forced commercial sexual exploitation. [...] The systematic and deliberate withholding of wages, used by abusive employers to

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<sup>18</sup> para. 5, *Basfar*. For the text of the intervention, see: Written Submissions on Behalf of the United Nations Special Rapporteur on Trafficking in Persons Especially Women and Children in *Basfar* and Wong UKSC/2020/0155 < <https://www.ohchr.org/sites/default/files/2022-03/JW-UK%20supreme-court-intervention.pdf> > accessed 17 October 2023.

<sup>19</sup> pg. 35, *Domestic Workers Employed by Diplomats vs The United States of America*, "Petitioner's Final Observations on the Merits Petition No. 1481-07, Siti Aisah and others v. United States of America" (12 March 2021) < [https://www.aclu.org/sites/default/files/field\\_document/petitioners\\_final\\_observations\\_on\\_the\\_merits\\_in\\_support\\_of\\_their\\_petition\\_no.\\_1418-07\\_siti\\_aisah\\_and\\_others\\_vs\\_the\\_united\\_states\\_0.pdf](https://www.aclu.org/sites/default/files/field_document/petitioners_final_observations_on_the_merits_in_support_of_their_petition_no._1418-07_siti_aisah_and_others_vs_the_united_states_0.pdf) > accessed 17 October 2023 (henceforth, "*Final Observations*").

compel workers to stay in a job out of fear of losing accrued earnings, is the most common form of coercion, experienced by 36 percent of those in forced labour”.<sup>20</sup>

### **General rules of treaty interpretation and the meaning of “commercial activity”**

2.8 The text of an international convention is intended to be given the same meaning by all the states which become parties to it by reference to the accepted principles of treaty interpretation, rather than by reference to domestic principles.<sup>21</sup>

2.9 The general rule of treaty interpretation, as set out in Article 31(1) of the Vienna Convention on the Law of Treaties (1969) (the “VCLT”), is that:

“A treaty shall 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 the light of its object and purpose.”<sup>22</sup>

2.10 Article 31(3) VCLT further provides that account shall be taken, “together with the context” of three matters: (a) subsequent agreement regarding the interpretation of the treaty or its application; (b) subsequent practice in the application of the treaty which establishes agreement on its interpretation, and (c) “any relevant rules of international law applicable in the relations between the parties”.<sup>23</sup>

2.11 Article 32 VCLT permits recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or if the application of Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

### **Ordinary meaning**

2.12 First, it is not considered that the answer to the legal question of whether the acts alleged fall within the exercise of a “commercial activity” by a diplomatic agent within the meaning of the exception to diplomatic immunity can be answered solely by reference to either: (a) the general rule of interpretation in Article 31(1) VCLT;<sup>24</sup> or (b) the ordinary meaning of the words, including as interpreted by the courts of the United States or Canada, or by

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<sup>20</sup> pgs. 2-3, International Labour Organization (ILO), Walk Free, and International Organization for Migration (IOM) Geneva, ‘Global Estimates of Modern Slavery: Forced Labour and Forced Marriage’ (ILO, 12 September 2022) < [https://www.ilo.org/global/topics/forced-labour/publications/WCMS\\_854733/lang-en/index.htm](https://www.ilo.org/global/topics/forced-labour/publications/WCMS_854733/lang-en/index.htm) > accessed 17 October 2023.

<sup>21</sup> para. 16, *Basfar*.

<sup>22</sup> Art. 31(1), Vienna Convention on the Law of Treaties, 1155 UNTS 331 (entered into force 2 January 1980) < [https://www.oas.org/dil/vienna\\_convention\\_on\\_the\\_law\\_of\\_treaties.pdf](https://www.oas.org/dil/vienna_convention_on_the_law_of_treaties.pdf) > accessed 17 October 2023.

<sup>23</sup> Art. 31(3), *ibid*.

<sup>24</sup> Art. 31(1), *ibid*.

comparison with the same language in state immunity cases.<sup>25</sup> Instead, it is necessary to look at the purpose and context of the provisions.

### **Purpose and context**

2.13 Second, the purpose of the provision and its context are important.<sup>26</sup> The UK Supreme Court considered that, by failing to address the context of employment in *Tabion v Mufti*,<sup>27</sup> the US Fourth Circuit of Appeals incorrectly interpreted the meaning of a “commercial activity”. In particular, the UK Supreme Court rejected the US Fourth Circuit’s reasoning that the “commercial activity” exception to diplomatic immunity was inapplicable on the grounds that hiring “domestic help” or other activities like dry cleaning are services provided under a “contract incidental to [the] daily life” of a diplomat.<sup>28</sup> The UK Supreme Court noted that the US Fourth Circuit’s conclusion: (a) appears to have been based on the US State Department’s view that day-to-day living services, including acts of purchasing services such as domestic help, were done in a private capacity, and not for or on behalf of the sending state; and (b) has been followed at district court level in the US.<sup>29</sup> Critically, the UK Supreme Court held that those conclusions were wrong because:

“In none of these cases did the court address the question of whether keeping a person in circumstances of modern slavery can reasonably be equated with the ordinary hiring of a domestic employee.”<sup>30</sup>

2.14 The UK Supreme Court held at para. 43 that it could not accept the US Fourth Circuit’s argument for this reason:

“We cannot accept that exploiting a domestic worker by compelling her to work in circumstances of modern slavery is comparable to an ordinary employment relationship of a kind that is incidental to the daily life of a diplomat (and his family) in the receiving state. There is a material and qualitative difference between these activities. Employment is a voluntary relationship, freely entered into and governed by the terms of a contract. Subject to contractual provisions about notice, employees are free to leave when they please, and cannot be compelled to stay by injunction even if they leave in breach of contract. By contrast, the essence of modern slavery is that it is not freely undertaken. Rather, the work is extracted by coercion and the exercise of control over the victim. This usually involves exploiting circumstances of the victim which make her specially vulnerable to abuse. Those constraints generally make it impossible or very difficult for the worker to leave. That is why, on the assumed facts, we describe Ms Wong’s departure from service with Mr Basfar as an “escape” [emphasis added].<sup>31</sup>

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<sup>25</sup> paras 29 and 32, *Basfar*.

<sup>26</sup> para. 32, *ibid*.

<sup>27</sup> paras 35-38 and 57, *Tabion v Mufti*, 73F 4d 535 (4<sup>th</sup> Cir 1996).

<sup>28</sup> para. 37, *Basfar*.

<sup>29</sup> paras 36-38, *ibid*. See for instance: *Gonzalez Paredes v Vila*, 479 F Supp 2d 187, 191 (DDC 2007); *Sabbithi v Al Saleh*, 605 F Supp 2d 122, 127-8 (DDC 2009); *Montuya v Chedid*, 779 F Supp 2d 60, 63-64 (DDC 2011); and *Fun v Pulgar*, 993 F Supp 2d 470, 474 (DNJ 2014).

<sup>30</sup> para. 38, *ibid*.

<sup>31</sup> para. 43, *ibid*.

## Indicators of vulnerability to exploitation

- 2.15 Third, the “commercial activity” exemption must be assessed in its context, namely that migrant domestic workers employed in diplomatic households are extremely vulnerable to exploitation.<sup>32</sup>
- 2.16 There is no exhaustive list of indicators of vulnerability. In *Basfar*, the UK Supreme Court held that these included physical and social isolation which created a situation of dependency and control, and the conditions for exploitation for profit. These factors were aggravated by:
- (a) psychological and verbal abuse, and other forms of humiliation and degradation;
  - (b) withholding pay as a further means of control and preventing the ability to leave;
  - (c) invisibility to the outside world, placing the worker beyond the reach of public authorities or charities who might be able to help if aware of the situation; and
  - (d) the diplomatic status of the employer.<sup>33</sup>
- 2.17 Indeed, as the Special Rapporteur on contemporary forms of slavery has stated:

“Migrant domestic workers employed by diplomats are a particularly vulnerable group. Firstly, their visa status typically depends on continued employment by the diplomat and they are therefore not free to change employers in case of exploitation. Secondly, diplomatic immunities and privileges shield diplomats from the enforcement of national legislation.”<sup>34</sup>

## Exploitation for personal profit

- 2.18 Fourth, the UK Supreme Court held that its interpretation accorded with Article 42 VCDR, which states that “[a] diplomatic agent shall not in the receiving state practise for personal profit any professional or commercial activity”,<sup>35</sup> but noted that the meaning of Article 31(1)(c) is “undoubtedly wider” because of the absence of the words “for personal profit”.<sup>36</sup>

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<sup>32</sup> paras 45-50, *ibid*, citing para. 44, UNHRC, Report of the United Nations Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinian (18 June 2010) UN Doc A/HRC/15/20 < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/151/69/PDF/G1015169.pdf?OpenElement> > accessed 17 October 2023.

<sup>33</sup> The same or substantially the same factors of vulnerability are exhibited in the Petitioners’ cases (see pgs. 5-9, *Final Observations*) and some other Domestic Worker Declarants in Support of the Petitioners (see pgs.10-14, *Final Observations*).

<sup>34</sup> para. 57, Report of the United Nations Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinian, (18 June 2010) A/HRC/15/20, < [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/15/20](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/15/20)> accessed 17 October 2023; as cited in *Basfar*, paras 44 and 49.

<sup>35</sup> Art. 42, VCDR, *supra* note 9.

<sup>36</sup> para. 40, *Basfar*.



- 2.19 The UK Supreme Court held that the personal profit element in Article 42 VCDR is an element of what makes a particular activity “commercial”.<sup>37</sup> This was critically applied to the factors of vulnerability in Ms Wong’s case: the control exercised over her placed her in a position of domestic servitude, and amounted to a form of modern slavery and exploitation for personal profit.<sup>38</sup>
- 2.20 The meaning of “personal profit” was analysed by reference to the methodology of the International Labour Organisation (“ILO”) to estimate profits from forced labour in domestic work. The ILO report “Profits and Poverty: the economics of forced labour” states that “domestic services create an economic value added, and therefore the savings made by the employer on expenditures count as profits.”<sup>39</sup> The report estimates that profits of nearly US\$8 billion are extracted annually from an estimated 3.4 million domestic workers in forced labour worldwide, based on a comparison of wages earned by domestic workers in reported cases of forced labour with wages which workers should earn from working freely.
- 2.21 The Special Rapporteur notes the petitioners’ evidence of the personal profit of their employers. In particular, Edith Mendoza states that she was denied contractual overtime pay and that, to this day, her former employers owe her roughly US\$75,000 in wages.<sup>40</sup>
- 2.22 In *Basfar*, the UK Supreme Court concluded that exploiting the labour of a domestic worker for personal profit or financial gain is a “commercial activity” exercised by a diplomatic agent outside of their official functions, and that the US Fourth Circuit (and the district courts which had followed the decision) were wrong to hold otherwise, in terms:

“It would be not merely wrong but offensive to suggest that conduct of the kind disclosed by the assumed facts of this case is incidental to daily life, let alone the daily life of an accredited diplomat. Compelling a migrant domestic worker to provide her labour in circumstances of modern slavery cannot reasonably be likened to paying for dry cleaning or ordinary domestic help. Unlike such day-to-day living services, such exploitation is an abuse of the diplomat’s presence in the receiving state and falls far outside the sphere of ordinary contracts incidental to the daily life of the diplomat and family members which the immunity serves to protect.”<sup>41</sup>

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<sup>37</sup> paras 53-55, *ibid.*

<sup>38</sup> para. 52, *ibid.*

<sup>39</sup> pg. 25, ILO, “Profits and Poverty: The Economics of Forced Labour” (2014) < <https://www.ilo.org/global/topics/forced-labour/publications/profits-of-forced-labour-2014/lang--en/index.htm> > accessed 17 October 2023.

<sup>40</sup> paras 22 and 53, Domestic Workers Employed by Diplomats vs The United States of America, “Appendix 3 - Exhibits in Support of Petitioner’s March 12, 2021 Observations Concerning the May 4, 2016 response of the United States Government”, “Exhibit 3A: Declaration of Edith Mendoza, Dated March 5 2021” < [https://www.aclu.org/sites/default/files/field\\_document/domestic\\_worker\\_brief\\_appendix\\_3.pdf](https://www.aclu.org/sites/default/files/field_document/domestic_worker_brief_appendix_3.pdf) > accessed 17 October 2023.

<sup>41</sup> para. 57, *Basfar*.

## Evolutionary interpretation

- 2.23 Fifth, the UK Supreme Court in *Basfar* held that international legal definitions on trafficking, slavery, and domestic servitude were relevant to the interpretive question of the commercial activity exception.<sup>42</sup> These provided the criteria which distinguish between “voluntary employment and slavery and [...] ordinary domestic service and domestic servitude”, and so the circumstances which fall within the “commercial activity” exception and those which do not.<sup>43</sup>
- 2.24 The UK Supreme Court held that account must be taken of developments in the law of trafficking and slavery when interpreting the “commercial activity” exception. That is consistent with an “evolutionary” approach to interpretation, which takes account of circumstances as they are now, not a “static” interpretation which focuses on the circumstances that existed when the VCDR was concluded in 1961.<sup>44</sup> This general principle of evolutionary or “living instrument” interpretation is consistent with that of the Inter-American Court of Human Rights (“**IACtHR**”) (e.g. *Caso Trabajadores de la Hacienda Brasil Verde vs. Brazil*, (“**Hacienda Brasil Verde**”))<sup>45</sup>; the International Court of Justice of 13 July 2009 in *Dispute regarding Navigational and Related Rights*<sup>46</sup> and the ECtHR (e.g. *Rantsev v Cyprus and Russia* (“**Rantsev**”)<sup>47</sup> and *Siliadin v France* (“**Siliadin**”)).<sup>48</sup>

## State Immunity and Diplomatic Immunity

- 2.25 The Special Rapporteur notes that the approach of the US courts to the third exception to diplomatic immunity is inconsistent with both the approach of the UK Supreme Court (above) to the exception, and that of the ECtHR to state immunity. The ECtHR has held that restrictions on the access to court of embassy staff engage the right to a fair trial, and access to a hearing by a tribunal in the determination of civil rights or obligations, under Article 6 of the European Convention of Human Rights (“**ECHR**”).<sup>49</sup> In *Cudak v. Lithuania*<sup>50</sup> and *Sabeh El Leil v. France* (“**Sabeh El Leil**”)<sup>51</sup> the ECtHR found that the application of state immunity in employment disputes involving embassy employees was disproportionate, and constituted a violation of Article 6(1) ECHR. The Grand Chamber in

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<sup>42</sup> paras 72-73, *ibid.*

<sup>43</sup> para. 72, *ibid.*

<sup>44</sup> paras 64-65, *ibid.*, applying Articles 31-33, VCLT (entered into force 2 January 1980).

<sup>45</sup> para. 245, *Caso Trabajadores de la Hacienda Brasil Verde vs. Brazil*, Judgment on Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights, Series C No. 337 (22 August 2017) (henceforth “*Hacienda Brasil Verde*”).

<sup>46</sup> paras 64, 66, 67 and 70, *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 213.

<sup>47</sup> paras 274 and 282, *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1.

<sup>48</sup> *Siliadin v France*, App No. 73316/01, ECHR (26 July 2005).

<sup>49</sup> Art. 6, Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (2002).

<sup>50</sup> *Cudak v Lithuania* (2010) 51 EHRR 15.

<sup>51</sup> *Sabeh El Leil v France* (2012) 54 EHRR 14.

*Sabeh El Leil* emphasised that the ECHR is intended to guarantee rights that are not merely “theoretical or illusory, but practical and effective.”<sup>52</sup>

2.26 Highlighting the importance of the right of access to the courts, the ECtHR held:

“This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial [...] It would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on categories of persons”.<sup>53</sup>

2.27 Legal consistency is important. Currently, the application of exceptions to diplomatic immunity where the domestic worker’s employment is with the embassy mission mean that the state will not be able to claim immunity in respect of trafficking in persons. Victims who are employed by individual diplomats, on the other hand, are denied access to the courts, and to an effective remedy for a serious violation of their human rights.<sup>54</sup>

### **Conclusion**

2.28 The Special Rapporteur agrees with the UK Supreme Court’s reasoning in *Basfar* and submits that it is of persuasive force in the petitioners’ case. In particular, the Special Rapporteur observes that the circumstances presented by the petitioners raise key indicators of vulnerability and exploitation which cannot be regarded as “ordinary contracts incidental to the daily life of the diplomat and family members which the immunity serves to protect” (see further para. 3.31 below).

## **3. INTERNATIONAL HUMAN RIGHTS LAW INCLUDING ON TRAFFICKING, FORCED LABOUR, AND SLAVERY**

3.1 When approaching the issues of this petition, the Commission may have regard to the wider international human rights law framework on trafficking, forced labour and slavery. In the present case, that framework is relevant both to the interpretive question concerning Article 31(1)(c) VCDR, addressed above, and to the substantive examination of the alleged violation by the USA of the petitioners’ rights under the American Declaration, as set out in the Commission’s Report on Admissibility,<sup>55</sup> to which the submissions now turn.

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<sup>52</sup> para. 50, *ibid.*

<sup>53</sup> para. 50, *ibid.*

<sup>54</sup> pg. 719, Murphy and Mullally, *The American Journal of Comparative Law*, Volume 64, Issue 3, 1 October 2016, pgs. 677–720 < <https://doi.org/10.1093/ajcl/avw010> > accessed 17 October 2023.

<sup>55</sup> *Siti Aisah* Report on Admissibility, *supra* note 2; as further elaborated in the *Final Observations* (pgs. 104, 127, and 140, Section III).

- 3.2 The submissions below summarise: (a) the interpretive mandate of the Commission to take into account the wider framework of international human rights law; (b) the relevant international human rights law on definitions of slavery, forced labour, and trafficking, and how these definitions may be applicable to the petitioners in this case; and (c) the concept of the abolition of slavery as an overriding *jus cogens* norm of international law.

### Relevant international human rights law instruments

- 3.3 Article 1 of the American Declaration provides that “[...] every human being has the right to life, liberty and the security of his person.”<sup>56</sup> This has been interpreted to encompass a broad range of prohibited conduct, including the right to life, the right to be free from inhuman and degrading treatment, and also the right to be free from slavery-like practices, including involuntary servitude, forced labour and human trafficking.<sup>57</sup>
- 3.4 Article 1, and all rights guaranteed under the American Declaration, are and must be construed in light of any developments in the field of international human rights law. The Commission has repeatedly endorsed this interpretive position in its jurisprudence, including recent petitions involving the USA:

“[...] the Commission notes that, when interpreting and applying the American Declaration, it takes into account developments in the corpus juris of international human rights law that are relevant in the specific case. These developments may in turn be drawn from the provisions of other prevailing international and regional human rights instruments.”<sup>58</sup>

- 3.5 The Commission has noted an equivalent approach by the IACtHR, commenting: “pursuant to the principles of treaty interpretation, the Inter-American Court of Human Rights has likewise endorsed an interpretation of international human rights instruments and takes into account developments in the *corpus juris* of international human rights law over time and in present day conditions” [own emphasis added].<sup>59</sup> This includes the American Convention on Human Rights (the “**American Convention**”), which “in many instances, may be considered to represent an authoritative expression of the fundamental principles set forth in the American Declaration”.<sup>60</sup>
- 3.6 The USA has signed and ratified multiple legal instruments which prohibit, inter alia: slavery, servitude and forced labour, trafficking, torture, and cruel, inhuman or degrading

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<sup>56</sup> Art. 1, American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992).

<sup>57</sup> para. 411, *Galindo v. U.S.*, Case 10.573, Inter-American Commission of Human Rights., Report No. 121/18, OEA/Ser L/V/II.169, Doc 138 (2018); and para. 320, *Caso Trabajadores*, supra note 45.

<sup>58</sup> para. 20, IACHR, Report No. 211/20, Case 13.570. Admissibility and Merits, Lezmond C. Mitchell, United States of America, (24 August 2020).

<sup>59</sup> para. 68, IACHR, Merits Report No.50/16, Case 12.834, *Undocumented Workers*, United States (30 November 2016).

<sup>60</sup> para. 89, Report No. 52/01, Case 12.243, Juan Raul Garza (United States), Annual Report of the IACHR (2000).

treatment; and which impose positive obligations on the state in respect of the actions of private parties. These instruments include: Articles 2(1)-(3), 7, and 8 of the International Covenant on Civil and Political Rights (“**ICCPR**”) (signed by the USA 1977, ratified 1992);<sup>61</sup> Articles 3 and 6 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (signed by the USA 1988, ratified 1994)<sup>62</sup>; and Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination (“**CERD**”) (signed by the USA 1966, ratified 1994).<sup>63</sup>

- 3.7 Further international consensus is shown by those treaties signed but not ratified by the USA, including Article 7 of the International Covenant on Economic, Social and Cultural Rights (“**ICESCR**”) (signed by the USA 1997)<sup>64</sup>; Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women (“**CEDAW**”) (signed by the USA 1980),<sup>65</sup> as well as Articles 6.1 and 6.2 of the American Convention (signed by the USA 1977);<sup>66</sup> and Article 2 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.<sup>67</sup>
- 3.8 The prohibition of slavery, servitude and forced or compulsory labour is also enshrined in Article 4 of the Universal Declaration of Human Rights (“**UDHR**”) 1948.<sup>68</sup>

### **Slavery and enslavement**

- 3.9 Slavery is specifically defined in Article 1(1) of the Convention to Suppress the Slave Trade and Slavery 1926 (the “**1926 Slavery Convention**”) as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”.<sup>69</sup> This is reproduced in the Supplementary Slavery Convention (signed by the USA 1929, in force in the USA),<sup>70</sup> Article 7. Article 6 of the same convention requires the criminalisation

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<sup>61</sup> International Covenant on Civil and Political Rights 1966, 999 UNTS 171, (signed by the USA 1977, ratified 1992), Article 8 reads “*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.*”

<sup>62</sup> Articles 3, 6, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987), 85 UNTS 1465.

<sup>63</sup> Art. 5, International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (signed by the USA 1966, ratified 1994).

<sup>64</sup> Art. 7, International Covenant on Economic Social and Cultural Rights 993 UNTS 3 (signed by the USA 1997).

<sup>65</sup> Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 13 (signed by the USA 1980). Parties must suppress “*all forms of traffic in women and exploitation of prostitution of women.*”

<sup>66</sup> Articles 6.1, 6.2, American Convention on Human Rights, 1969, 1144 UNTS 123 (signed by the USA 1977), “*1. No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women. 2. No one shall be required to perform forced or compulsory labor*”

<sup>67</sup> Art. 2, Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (adopted 9 June 1994, entered into force 5 March 1995), “*Violence against women shall be understood to include physical, sexual and psychological violence: [...] b. that occurs in the community and is perpetrated by any person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place*”

<sup>68</sup> Art. 4, Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III), “*no one shall be held in slavery or servitude; slavery and slave trade shall be prohibited in all their forms.*”

<sup>69</sup> Art. 1(1), United Nations Slavery Convention (adopted 25 September 1926) 60 UNTS 253.

<sup>70</sup> United Nations, Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 226 UNTS 3 (signed by the USA 1929, in force in the USA) <

and punishment of “enslaving another person or of inducing another person to give himself or a person dependent upon him into slavery”.<sup>71</sup> The definition is reproduced in substance in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Article 7),<sup>72</sup> and the definition of “enslavement” in Article 7.2(c) of the statute of the ICC (the “**Rome Statute**”) (1998).<sup>73</sup>

- 3.10 In international criminal law, contemporary forms of slavery are recognised within the scope of the crime of “enslavement” under the Rome Statute, Article 7(1)(c). “Enslavement” is defined as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”.<sup>74</sup> In *Prosecutor v. Kunarac, Vukovic and Kovac*, the International Criminal Tribunal for the Former Yugoslavia (“**ICTY**”) observed at para. 117:

“[...] the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as ‘chattel slavery’ has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership [...] there is some destruction of the juridical personality; the destruction is greater in the case of ‘chattel slavery’ but the difference is one of degree”.<sup>75</sup>

- 3.11 Expanding on the scope of the crime of enslavement, ICTY concluded at para. 119:

“[...] the question whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement [including] the ‘control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour’. Consequently, it is not possible exhaustively to enumerate all of the contemporary forms of slavery which are comprehended in the expansion of the original idea”.<sup>76</sup>

- 3.12 See further *Prosecutor v Dominic Ongwen* and the Special Rapporteur’s amicus.<sup>77</sup>

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<https://www.ohchr.org/en/instruments-mechanisms/instruments/supplementary-convention-abolition-slavery-slave-trade-and#:~:text=> accessed 17 October 2023.

<sup>71</sup> Art 6, *ibid.* See also Art. 9.

<sup>72</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (signed by the USA 1929, in force in the USA) < <https://www.ohchr.org/sites/default/files/slaverytrade.pdf> > accessed 17 October 2023.

<sup>73</sup> Art. 7.2(c), Rome Statute of the International Criminal Court, A/CONF.183/9 (done on 17 July 1998, in force 1 July 2002).

<sup>74</sup> Art. 7(1)(c), *ibid.*

<sup>75</sup> para. 117, International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v Kunarac* (Judgment) ICTY-96-23 and ICTY-96-23/1-A (12 June 2002).

<sup>76</sup> para. 119, *ibid.*

<sup>77</sup> *Prosecutor v Dominic Ongwen*, No. ICC-02/04-01/15 A A2 (Appeals Chamber, the International Criminal Court); and pg. 4, Amicus curiae of the Special Rapporteur on trafficking in persons, especially women and children on the “Situation in Uganda in the Case of The Prosecutor v Dominic Ongwen”, ICC, (21 January 2022).

## Forced or compulsory labour

- 3.13 Forced labour and servitude are prohibited by the Fundamental Conventions of the ILO, in particular the Abolition of Forced Labour Convention (No. 105 of 1957)<sup>78</sup> (ratified by the USA 1991). Article 2 requires the USA to “take effective measures to secure the immediate and complete abolition of forced or compulsory labour as specified in Article 1”. The Forced Labour Convention, 1930 (No. 29),<sup>79</sup> (not ratified by the USA) supplemented by the Protocol of 2014 to the Forced Labour Convention 1930 (P029),<sup>80</sup> defines “forced or compulsory labour” in Article 2(1) as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.<sup>81</sup>

## Servitude

- 3.14 Article 4 UDHR states that “no one shall be held in slavery or servitude”.<sup>82</sup> The term “servitude” is generally understood to refer to a form of exploitation which lies on a scale of gravity or severity between slavery and forced labour and involves coercion. The US Supreme Court has interpreted the phrase “involuntary servitude”, prohibited by the Thirteenth Amendment to the Constitution, to mean “compulsion of services through the use or threatened use of physical or legal coercion”: see *United States v Kozminski*.<sup>83</sup> The ECtHR has held that, in Article 4 of the ECHR, “servitude” means an obligation to provide one's services that is imposed by the use of coercion.<sup>84</sup> The ECtHR has further described servitude as “aggravated” forced or compulsory labour, distinguished by the fact or perception that it is impossible for the individual concerned to change her situation: *CN and V v France*,<sup>85</sup> *Chowdury v Greece*.<sup>86</sup> The concept of trafficking for the purpose of exploitation through domestic servitude, or forced labour, are considered below.

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<sup>78</sup> ILO, Abolition of Forced Labour Convention (Convention No. 105 of 1957) (ratified by the USA on 25 September 1991) < [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C105](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C105) > accessed 17 October 2023.

<sup>79</sup> ILO, Forced Labour Convention (Convention No. 29 of 1930).

<sup>80</sup> ILO, Protocol of 2014 to the Forced Labour Convention, (P029 of 2014) (signed in 2016 but not ratified by the USA) , < [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:P029](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:P029) > accessed 17 October 2023. See also USA Department of Labor, “The Forced Labour Protocol Guide” < <https://www.dol.gov/agencies/ilab/forced-labour-protocol-guide#:~:text=This%20guide%20aims%20to%20explain%20why%20ratification%20and,labor%20practices%20and%20advance%20opportunities%20for%20decent%20work.> > accessed 17 October 2023.

<sup>81</sup> Art. 2(1), ILO Forced Labour Convention (Convention No. 29 of 1930).

<sup>82</sup> Art. 4, UDHR, *supra* note 68.

<sup>83</sup> *United States v Kozminski*, 487 USA 931 (1988).

<sup>84</sup> para. 124, *Siliadin v France*, *supra* note 48.

<sup>85</sup> para. 91, *CN and V France* (Application No 67724/09), 11 October 2012.

<sup>86</sup> para. 99, *Chowdury v Greece* (Application No 21884/15), 30 March 2017.

## Trafficking

3.15 “Trafficking in persons” is defined by the UN Protocol to Prevent, Suppress & Punish Trafficking in Persons especially Women and Children, (the “**Palermo Protocol**”) (signed by the USA 2000, ratified 2005), in Article 3, as follows:

- (a) “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) “Child” shall mean any person under eighteen years of age.”<sup>87</sup>

3.16 Article 4 ECAT defines “trafficking in human beings” in similar terms.<sup>88</sup>

3.17 Article 6(6) Palermo Protocol requires each State Party to “ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered”.<sup>89</sup> The Preamble declares that:

“effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights.”<sup>90</sup> [own emphasis added]

3.18 The Office of the High Commissioner for Human Rights, ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking’ (“**OHCHR Principles**”), recommends at Guideline 10, paragraph 7:

“Consistently applying appropriate criminal, civil and administrative sanctions to personnel shown to have engaged in or been complicit in trafficking and related exploitation... [p]rivileges and immunities attached to the status of an employee

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<sup>87</sup> Art. 3, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000 and ratified in 2005) 2237 UNTS 319 (henceforth, “*Palermo Protocol*”) < <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-prevent-suppress-and-punish-trafficking-persons> > accessed 18 October 2023.

<sup>88</sup> Art. 4, Council of Europe Convention on Action against Trafficking in Human Beings, (done 16 May 2005, entered into force 1 February 2008) CETS 197 < <https://rm.coe.int/168008371d> > accessed 18 October 2023.

<sup>89</sup> Art. 6(6), *Palermo Protocol*.

<sup>90</sup> Preamble, *Palermo Protocol*.



should not be invoked in order to shield that person from sanctions for serious crimes such as trafficking and related offences.<sup>91</sup> (emphasis added)

3.19 The requirement for States to put in place “effective measures” for victims of trafficking is an aspect of the rights-based approach to human trafficking called for by the OHCHR Principles. This was emphasised in the 2012 annual report to the Human Rights Council by the Special Rapporteur on trafficking.<sup>92</sup>

3.20 In *Rantsev*, the ECtHR held that the scope of Article 4 ECHR which expressly prohibits “slavery”, “servitude” or “forced and compulsory labour” must be interpreted to include trafficking within the meaning of the Palermo Protocol and ECAT Article 4 in light of “present-day conditions”:

“There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes “slavery”, “servitude” or “forced and compulsory labour”. Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention”.<sup>93</sup>

3.21 The commodification of human beings and the commercial activities underpinning trafficking in persons are further described at para. 281:

“The Court considers that trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere”.<sup>94</sup>

3.22 In *Siliadin*, the ECtHR held at paras 88 and 111, that:

“[...] today's slaves are predominantly female and usually work in private households, starting out as migrant domestic workers [...] numerous international conventions have as their objective the protection of human beings from slavery, servitude and forced or compulsory labour [...] As the Parliamentary Assembly of the Council of Europe has pointed out, although slavery was officially abolished more than 150 years ago, “domestic slavery” persists in Europe and concerns thousands of people, the majority of whom are women”.<sup>95</sup>

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<sup>91</sup> Guideline 10, paragraph 7, Office of the High Commissioner for Human Rights, ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking’, addendum to the report of the United Nations High Commissioner for Human Rights (20 May 2002) UN Doc E/2002/68/Add. 1 < <https://undocs.org/E/2002/68/Add.1> > accessed 17 October 2023.

<sup>92</sup> para. 31, Report of the Special Rapporteur on Trafficking in persons, especially women and children, on the right to an effective remedy for trafficked persons (9 August 2011) UN Doc A/66/283, < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/448/21/PDF/N1144821.pdf?OpenElement> > accessed 17 October 2023

<sup>93</sup> para. 282, *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1.

<sup>94</sup> para. 281, *ibid.* See further paras 283-286.

<sup>95</sup> paras 88 and 111, *Siliadin v France*, *supra* note 48.

- 3.23 Further, the ECtHR held at para. 89 “that States have positive obligations, in the same way as under Article 3 for example, to adopt criminal-law provisions which penalise the practices referred to in Article 4 and to apply them in practice.”<sup>96</sup>

### **Jus Cogens**

- 3.24 *Hacienda Brasil Verde* concerned slave labour used on a farm in the early 2000s in Brazil, and the State’s failure to stop the practice, punish those responsible, and provide victims with remedies. The IACtHR found that the conduct complained of fell within the content and scope of Articles 6.1 and 6.2 of the American Convention, which prohibit slavery and forced labour, having regard to the jurisprudence of other international tribunals, and the following factors including “exploitation” for “profit”:

“Regarding the aspect of “ownership,” this should be understood within the phenomenon of slavery as “possession”; that is, demonstration of control of one person over another. Consequently, “when determining the level of control required to consider an act as slavery, [...] this could be equated to the loss of a person’s own will, or to a considerable decrease in personal autonomy”. In this regard, the so-called “exercise of the powers attaching to the right of ownership” should now be understood as constituting control over a person in such a way as to significantly deprive that person of his or her individual liberty,” with the intent of exploitation through the use, management, profit, transfer or disposal of that person. Usually, this exercise will be supported by and obtained through means such as violent force, deception and/or coercion.” [own emphasis added]<sup>97</sup>

- 3.25 The IACtHR held that the words “slave trade” and “traffic” in Article 6.1 must transcend the literal meaning to protect all victims of human trafficking who fall within the Palermo Protocol, and emphasised the *jus cogens* nature of the prohibition of slavery.<sup>98</sup>

- 3.26 The Committee on the Elimination of Discrimination against Women, in its General Recommendation No.38 (2020) on trafficking in women and girls in the context of global migration similarly found that:

“[...] Obligations flowing to non-State actors to respect the prohibition of trafficking also arise from the peremptory norm (*jus cogens*) prohibiting slavery, the slave trade and torture, and the Committee notes that, in certain cases, trafficking in women and girls may amount to such rights violations.”<sup>99</sup>

- 3.27 States must adopt comprehensive and specific measures to address potential and actual risk factors, provide an adequate legal framework and implement it effectively, strengthen institutions, immediately investigate any evidence or complaint of slavery, punish

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<sup>96</sup> para. 89, *ibid.* See further para. 153, *M.C. v. Bulgaria*, App No. 39272/98, ECHR (4 December 2003).

<sup>97</sup> para. 271, *Hacienda Brasil Verde*, *supra* note 45.

<sup>98</sup> paras 288 and 342, *ibid.*

<sup>99</sup> para. 15, Committee on the Elimination of Discrimination against Women, ‘General Recommendation No.38 on trafficking in women and girls in the context of global migration’, (20 November 2020) CEDAW/C/CG/38 < [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/38&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/38&Lang=en) > accessed 18 October 2023

perpetrators and prevent impunity, and put in place mechanisms to protect and assist the victims, especially at-risk groups.<sup>100</sup>

- 3.28 In the case of *López Soto y otros v. Venezuela*,<sup>101</sup> the IACtHR found, inter alia, a violation of Article 6 of the American Convention in relation to the deprivation of liberty of a woman by a private individual who had subjected her to various acts of physical and psychological violence of, notably, a sexual nature. The IACtHR found that this conduct amounted to sexual slavery.
- 3.29 Further, the Preamble to the VCDR affirms that “the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention”.<sup>102</sup>

### Conclusion

- 3.30 The Special Rapporteur submits that developments in international human rights law are relevant when considering the correct interpretation of the VCDR, and, more fundamentally, when deciding whether there has been a breach of the American Declaration. The correct interpretation of the commercial activity exception under the VCDR enables consistency with international legal obligations to prohibit and create liabilities for human trafficking (or torture, war crimes, or other peremptory norms of international law (*jus cogens*)).<sup>103</sup>
- 3.31 In the context of the international human rights law framework above, the facts of the petitioners’ cases contain indicators which fall within the legal definitions of slavery, domestic servitude and trafficking for the purpose of exploitation.<sup>104</sup> In particular, petitioners and other domestic worker declarants refer to elements of control within and over their work,<sup>105</sup> being watched<sup>106</sup> monitored and controlled,<sup>107</sup> timed on tasks,<sup>108</sup> banned from

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<sup>100</sup> See Part VII, ‘Recommendations’, *ibid.*

<sup>101</sup> *Caso López Soto et al. v Venezuela*, Judgment, Inter-American Court of Human Rights (26 September 2018) < [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_362\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_362_ing.pdf) > accessed 17 October 2023.

<sup>102</sup> pg. 2, Preamble to the Vienna Convention on Diplomatic Relations 1961, 500 UNTS 95 < [https://legal.un.org/ilc/texts/instruments/english/conventions/9\\_1\\_1961.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf) > accessed 17 October 2023. The same is affirmed in the Preamble to the Vienna Convention on Consular Relations, 1963, 596 UNTS 261 < [https://legal.un.org/ilc/texts/instruments/english/conventions/9\\_2\\_1963.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf) > accessed 17 October 2023.

<sup>103</sup> Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012.

<sup>104</sup> Insofar as these relate to the distinction in para. 57, *Basfar*.

<sup>105</sup> pg. 6, *Final Observations*, *supra* note 19: “Ms. Ajasis’ freedom of movement was severely constrained by her employer, and she was forced to go to church with her employer even though she did not belong to her employer’s denomination.”... “Ms. Ajasi... was forced to sleep with her employer’s baby at night.”

<sup>106</sup> para. 8, Declaration of Suzu Gurung, Domestic Workers Employed by Diplomats vs The United States of America, “Appendix 3 - Exhibits in Support of Petitioner’s March 12, 2021 Observations Concerning the May 4, 2016 response of the United States Government”, “Exhibit 3B: Declaration of Suzu Gurung” dated 2 March 2021 < [https://www.aclu.org/sites/default/files/field\\_document/domestic\\_worker\\_brief\\_appendix\\_3.pdf](https://www.aclu.org/sites/default/files/field_document/domestic_worker_brief_appendix_3.pdf) > accessed 17 October 2023.

<sup>107</sup> para. 11, *ibid.*

<sup>108</sup> para. 14, *ibid.*

taking rest breaks,<sup>109</sup> forbidden from leaving their employer's home<sup>110</sup> and having passports confiscated.<sup>111</sup> The petitioners also refer to threats and coercion, threats of deportation, physical violence, sexual assault<sup>112</sup> and "daily mental harassment".<sup>113</sup> These circumstances mirror the internationally recognised standardised operational indicators of trafficking for the purpose of exploitation, in different forms.<sup>114</sup> As the UK Supreme Court held in *Basfar*, where such indicators of vulnerability and exploitation for personal profit exist, this situation cannot properly be considered an ordinary activity incidental to the daily life of a diplomat, such as dry cleaning.<sup>115</sup>

#### 4. **POSITIVE OBLIGATIONS**

4.1 The positive obligations on states under international human rights law include the duty to put in place a comprehensive and effective system of law and policy to protect against breaches of non-derogable rights. These rights include the right to life, the prohibition of torture, inhuman and degrading treatment and punishment, domestic servitude, slavery, and trafficking.

4.2 The ECtHR in *SM v Croatia* summarised a clear line of jurisprudence as to the "general framework of positive obligations" which arise in respect of potential trafficking, forced labour, and domestic servitude within the scope of Article 4 of the ECHR, namely:

"(i) the duty to put in place a legislative and administrative framework to prohibit and punish trafficking [the systems duty]; (ii) the duty, in certain circumstances, to take operational measures to protect victims, or potential victims, of trafficking [the protection duty]; and (iii) a procedural obligation to investigate situations of potential trafficking [the investigative duty]. In general, the first two aspects of the positive obligations can be denoted as substantive, whereas the third aspect designates the States' (positive) procedural obligation" [wording in square brackets our own].<sup>116</sup>

4.3 These provisions must be interpreted and applied so that the safeguards are "practical and effective" not theoretical and illusory.<sup>117</sup>

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<sup>109</sup> para. 18, Declaration of Edith Mendoza, supra note 40.

<sup>110</sup> pgs. 6-7, *Final Observations*, based on Declaration of Raziah Begum to the Inter-American Commission on Human Rights < <https://www.aclu.org/documents/declaration-razia-begum-inter-american-commission-human-rights?redirect=cpreirect/32693> > accessed 17 October 2023.

<sup>111</sup> *ibid.*

<sup>112</sup> para. 11, Declaration of Suzu Gurung, supra note 106. See also pg. 2, Petition Alleging Violations by the United States of America of the Human Rights of Domestic Workers Employed by Diplomats, < <https://www.aclu.org/files/womensrights/employ/unworkers/petition.pdf> > accessed 17 October 2023; and para. 41, Declaration of Edith Mendoza, supra note 40.

<sup>113</sup> *ibid.*

<sup>114</sup> ILO, Operational indicators of trafficking in human beings, 4 May 2009, < [https://www.ilo.org/global/topics/forced-labour/publications/WCMS\\_105023/lang--en/index.htm](https://www.ilo.org/global/topics/forced-labour/publications/WCMS_105023/lang--en/index.htm) > accessed 17 October 2023.

<sup>115</sup> paras 38, 43, 57, *ibid.*

<sup>116</sup> para. 306 (and para. 305, citing *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, paras 283-287), *SM V Croatia*, App. No. 60561/14 judgment (Grand Chamber) (25 June 2020) < [https://hudoc.echr.coe.int/eng/#{%22itemid%22:\[%22001-203503%22\]}](https://hudoc.echr.coe.int/eng/#{%22itemid%22:[%22001-203503%22]}) > accessed 17 October 2023.

<sup>117</sup> para. 295, *ibid.*

## The systems duty and the right to an effective remedy

- 4.4 States owe this ‘systems duty’ in relation to trafficking (*SM v Croatia*), domestic servitude (*CN v UK, CN v France*), violence against women (*Buturugă*), and the protection from ill-treatment at the hands of individuals (*Ćwik*).<sup>118</sup> The right to provide effective systems for redress is an important manifestation of the positive obligations placed on states by international human rights law, including, critically, an effective remedy.
- 4.5 The systems duty applies in this petition in particular by virtue of both: (a) Article 2 ICCPR, which requires that “States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations”, as per the UN Human Rights Committee general comment no. 31;<sup>119</sup> and (b) Article 7 ICCPR, which enshrines the duty “to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by Article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.”<sup>120</sup>
- 4.6 Articles 5 and 6 Palermo Protocol are also relevant: specifically, Article 6(5): “Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory”; and 6(6): “Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.” Article 9(1) of that Protocol further provides that “States Parties shall establish comprehensive policies, programmes and other measures: (a) To prevent and combat trafficking in persons; and (b) To protect victims of trafficking in persons, especially women and children, from revictimization [...]”.<sup>121</sup>
- 4.7 Article 2 ILO Convention 105 – Abolition of Forced Labour (ratified by the USA 1991) further requires that: “Each Member of the International Labour Organisation which ratifies this Convention undertakes to take effective measures to secure the immediate and complete abolition of forced or compulsory labour as specified in Article 1 of this Convention.”<sup>122</sup>

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<sup>118</sup> pgs. 4-5, ECtHR, Overview of the Court’s Caselaw 2020 (2021) < [https://www.echr.coe.int/documents/d/echr/Short\\_Survey\\_2020\\_ENG](https://www.echr.coe.int/documents/d/echr/Short_Survey_2020_ENG) > accessed 17 October 2023.

<sup>119</sup> para. 7, UN Human Rights Committee, ‘General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant’, (26 May 2004) CCPR/C/21/Rev.1/Add.13 < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G04/419/56/PDF/G0441956.pdf?OpenElement> > accessed 17 October 2023.

<sup>120</sup> para. 2, OHCHR, ‘General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)’, 10 March 1992 < <https://www.refworld.org/docid/453883fb0.html> > accessed 18 October 2023.

<sup>121</sup> Arts. 6(5), 6(6), 9(1), *Palermo Protocol*.

<sup>122</sup> Art. 2, ILO, Abolition of Forced Labour Convention (Convention No. 105 of 1957) (ratified by the USA on 25 September 1991) < [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C105](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C105) > accessed 17 October 2023.

## Effective remedies for domestic workers in diplomatic households

4.8 Domestic workers are uniquely vulnerable to exploitation. Domestic workers in the USA on employer-specific visas are exposed to heightened risk of abuse by their employers (see paras 2.15 to 2.17 above) as a result of diplomatic immunity applied by US courts. The systems duty and right to an effective remedy are therefore of distinct importance in issues involving domestic workers in diplomatic households.

4.9 The Special Rapporteur, along with other UN Mandates (e.g. the UN Human Rights Council), has urged states to take “all necessary measures” to protect workers who are vulnerable to trafficking and exploitation<sup>123</sup> in domestic households.<sup>124</sup>

4.10 The former Special Rapporteur on trafficking, Joy Ngozi Ezeilo, explained that:

“In the context of trafficking in persons, States are under an obligation to provide remedies for trafficked persons where they fail to exercise due diligence to prevent and combat trafficking in persons or to protect the human rights of trafficked persons [...] the right to an effective remedy [...] encompasses [compensation], recovery, restitution, satisfaction and guarantees of non-repetition, as well as a set of ancillary procedural rights that enable trafficked persons to exercise the right to an effective remedy in a meaningful manner.”<sup>125</sup>

4.11 The former Special Rapporteur recommended at para. 31 of that report:

“The Special Rapporteur reiterates that States have an obligation to provide remedies for trafficked persons where they fail to exercise due diligence to prevent and combat trafficking in persons or to protect the human rights of trafficked persons. Furthermore, States have a duty to respect, protect and fulfil the right to an effective remedy under international human rights law. To this end, States’ responses to trafficking should be guided by the objective of implementing the right to an effective remedy for trafficked persons. Trafficked persons must be recognized as holders of rights from the moment when they are identified as trafficked and States should implement measures to facilitate their realization of these rights. As different components of the right to an effective remedy are interrelated with each other, it is crucial for States to provide for a continuum of assistance and support, aimed at restitution, recovery, compensation, satisfaction and guarantees of non-repetition, as appropriate in each individual case.”<sup>126</sup>

4.12 The Special Rapporteur on contemporary forms of slavery, the Special Rapporteur on the human rights of migrants, and the Special Rapporteur on trafficking have noted that:

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<sup>123</sup> Siobhán Mullally, “Statement delivered at International Migration Review Forum (Round Table 2)” (2022) UN Doc A/66/283; < <https://undocs.org/Home/Mobile?FinalSymbol=A%2F66%2F283&Language=E&DeviceType=Desktop&LangRequested=False> > accessed 17 October 2023.

<sup>124</sup> See para. 65, ‘Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, on her mission to Paraguay’ (27 July 2018) UN Doc A/HRC/39/52 < <https://undocs.org/A/HRC/39/52> > accessed 17 October 2023.

<sup>125</sup> paras 12 and 13, Special Rapporteur on Trafficking in Persons, especially women and children, “The right to an effective remedy for trafficked persons” (9 August 2011) UN Doc A/66/283 < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/448/21/PDF/N1144821.pdf?OpenElement> > accessed 17 October 2023.

<sup>126</sup> para. 31, *ibid.*

“In respect of migrant domestic workers employed by diplomats, it reportedly remains challenging to enforce their rights, given the diplomatic immunity enjoyed by the employers including in the event of a contemporary forms of slavery and/or trafficking claim. This suggests that the scope of diplomatic immunity may be too broad.”<sup>127</sup>

- 4.13 The Special Rapporteurs cited the UK Supreme Court judgment in *Basfar* and the amicus of the Special Rapporteur in that case (“**Basfar Amicus**”), which stated:

“The scope of diplomatic immunity must be defined with reference to States’ positive obligations arising under international human rights law, including article 4 ECHR, which prohibits slavery, servitude, and forced or compulsory labour. These positive obligations include the prevention, investigation, and prosecution of trafficking for the purpose of labour exploitation and are linked to duties to ensure access to the courts (article 6 ECHR) and to effective remedies for human rights violations (article 13 ECHR, article 15 ECAT, article 2 ICCPR, and articles 2 (e) and (f) CEDAW)”.<sup>128</sup>

- 4.14 The former Special Rapporteur on trafficking, in a report on her mission to the USA, raised specific concerns about diplomatic immunity for perpetrators of trafficking, and the increased vulnerability to trafficking of domestic workers due to “tied visas”.<sup>129</sup> She recommended that the USA should:

“Enhance the investigation and prosecution of cases involving labour trafficking, including in the hospitality, agricultural and construction industries and, with respect to domestic workers, also seek the waiver of diplomatic immunity, where relevant.”<sup>130</sup>

- 4.15 Similar concerns have been raised by the Special Rapporteur previously, in a report to the UN Human Rights Council,<sup>131</sup> and by other UN experts including the Special Rapporteur on the human rights of migrants, Felipe González Morales,<sup>132</sup> and his predecessor,

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<sup>127</sup> pg. 3, Mandates of the Special Rapporteur on Contemporary Forms of Slavery, Including Its Causes and Consequences’, the Special Rapporteur on the Human Rights of Migrants and the Special Rapporteur on Trafficking in Persons, Especially Women and Children’ (1 June 2022) < <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=27215#:~:text=In%20particular%2C%20the%20Special%20Rapporteur,%2C%20which%20prohibits%20slavery%2C%20servitude%2C> > accessed 17 October 2023.

<sup>128</sup> Amicus curiae of the Special Rapporteur on trafficking in persons, especially women and children in the case of *Basfar v Wong* [2022] UKSC 20, IRLR 879 < <https://www.ohchr.org/sites/default/files/2022-03/JW-UK%20supreme-court-intervention.pdf> > accessed 17 October 2023.

<sup>129</sup> paras 11, 13, 17, 62, UNCHR ‘Report of the Special Rapporteur on trafficking in persons, especially women and children on her mission to the United States of America’ (21 July 2017) UN Doc A/HRC/35/37/Add.2. < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/219/45/PDF/G1721945.pdf?OpenElement> > accessed 17 October 2023.

<sup>130</sup> para. 92(f), *ibid*.

<sup>131</sup> paras 16-17, UNCHR, ‘Trafficking in Persons in the Agriculture Sector: Human Rights Due Diligence and Sustainable Development: Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Siobhán Mullally’ (25 April 2022) UN Doc A/HRC/50/33 < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/327/46/PDF/G2232746.pdf?OpenElement> > accessed 17 October 2023.

<sup>132</sup> para. 35, UNCHR, ‘How to expand and diversify regularization mechanisms and programmes to enhance the protection of the human rights of migrants, Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales’ (20 April 2023) UN Doc A/HRC/53/26 < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/075/40/PDF/G2307540.pdf?OpenElement> > accessed 17 October 2023. See further para. 89(n), Report of the Special Rapporteur on the human rights of migrants, Right to freedom of association of migrants and their defenders (13 May 2020) UN Doc A/HRC/44/42 < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/112/28/PDF/G2011228.pdf?OpenElement> > accessed 18 October 2023.

François Crépeau.<sup>133</sup> The Special Rapporteur on contemporary forms of slavery has stated that:

“It will require greater efforts by States to hold each other accountable for violations of the right to be free from slavery and servitude, especially in the most egregious cases where forced labour or other prohibited conduct results from public policy.”<sup>134</sup>

4.16 As was previously raised by the Special Rapporteur in the *Basfar Amicus*, the CEDAW Committee has particularly recognised that “women migrant workers may become victims of trafficking due to various degrees of vulnerability they face”<sup>135</sup> and that women are also “forced into gender-specific exploitative labour (for example, forced prostitution, domestic work)”.<sup>136</sup> Further, “[a]ccessing justice is very difficult for domestic workers in diplomatic households owing to the immunity of the employer”.<sup>137</sup>

4.17 Despite clear obligations to provide effective systems of redress, the circumstances of the petitioners in this case indicate the clear difficulties of obtaining an effective remedy against an exploitative employer in the USA. As noted at para. 2.28 above, the UK Supreme Court rejected the interpretation by US courts of the VCDR, offering an alternative interpretation which, in the Special Rapporteur’s submission, accords with the positive obligations on states to provide an effective remedy for human rights violations.

## 5. EQUALITY BEFORE THE LAW AND THE OBLIGATION NOT TO DISCRIMINATE

5.1 The positive obligations above must comply with the non-discrimination principle and ensure equal protection before the law.

5.2 Article 2 of the American Declaration provides 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.”<sup>138</sup> Article 18 of the American Declaration provides a right of access to a court and the right to fair trial.<sup>139</sup>

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<sup>133</sup> para. 52, UNCHR, ‘Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Labour exploitation of migrants’ (3 April 2014) UN Doc A/HRC/26/35 < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/129/15/PDF/G1412915.pdf?OpenElement> > accessed 17 October 2023.

<sup>134</sup> para. 42, UNCHR, ‘Current and emerging forms of slavery – Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences’, (25 July 2019) UN Doc A/HRC/42/44 < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/226/64/PDF/G1922664.pdf?OpenElement> > accessed 17 October 2023.

<sup>135</sup> Footnote 4, CEDAW Committee, ‘General recommendation No. 26 on women migrant workers’ (5 December 2008) CEDAW/C/2009/WP.1/R < [https://www2.ohchr.org/english/bodies/cedaw/docs/gr\\_26\\_on\\_women\\_migrant\\_workers\\_en.pdf](https://www2.ohchr.org/english/bodies/cedaw/docs/gr_26_on_women_migrant_workers_en.pdf) > accessed 17 October 2023.

<sup>136</sup> pg. 172, Janie Chuang, “Article 6” in Christine Chinkin et. al., “The UN Convention on the Elimination of all Forms of Discrimination Against Women: A Commentary” (OUP, 2012).

<sup>137</sup> para. 37, UNCHR, ‘Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences’, (27 July 2018) UN Doc. A/HRC/39/52 < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/235/72/PDF/G1823572.pdf?OpenElement> > accessed 17 October 2023.

<sup>138</sup> Art. 2, American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992).

<sup>139</sup> Art. 18, *ibid.*



- 5.3 The Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking, in its Preamble, recognises “the obligation of States to protect the rights of all persons, regardless of their migration status, pursuant to the Charter of the Organization of American States; the American Declaration on the Rights and Duties of Man” and a wealth of other American and international instruments.<sup>140</sup> Principle 4 recognises the right to recognition as a person before the law, of every migrant, regardless of migration status.<sup>141</sup>
- 5.4 The non-discrimination principle is a core standard of international human rights law<sup>142</sup> and is widely considered a *jus cogens* norm.<sup>143</sup> Relevantly, the non-discrimination principle is found in Article 14(2), Palermo Protocol,<sup>144</sup> Articles 1 and 7 UDHR,<sup>145</sup> Article 1, UN Charter of 1945,<sup>146</sup> Article 2, ICCPR,<sup>147</sup> Article 2(2), ICESCR,<sup>148</sup> Article 2, CEDAW,<sup>149</sup> and Articles 1(4) and 2(1), CERD.<sup>150 151</sup>
- 5.5 In *Jessica Lenahan Gonzales v United States of America*, the Commission found that the USA was responsible for systemic and serious failures to protect the petitioner and her three deceased daughters from acts of domestic violence, including through the UN criminal justice system.<sup>152</sup> At paras 162 – 163:

“The Commission underscores that all States have a legal obligation to protect women from domestic violence: a problem widely recognized by the international community as a serious human rights violation and an extreme form of discrimination. This is part of their legal obligation to respect and ensure the right not to discriminate and to equal protection of the law. This due diligence obligation in principle applies to all OAS Member States. [...] The States’ duties to protect and guarantee the rights of domestic violence victims must also be implemented in practice. As the Commission has established in the past, in the discharge of their

<sup>140</sup> pg. 1, Inter-American Commission on Human Rights, ‘Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking’, (Resolution 04/19 approved by the Commission on 7 December 2019) < <https://www.oas.org/en/iachr/decisions/pdf/Resolution-4-19-en.pdf> > accessed 17 October 2023.

<sup>141</sup> Principle 4, *ibid.*

<sup>142</sup> See for instance 514-17, *Barcelona Traction Case (Second Phase)*, ICJ Reports (1970), and para. 57, *Namibia (South West Africa Case)* (1970) ICJ Reports (1971).

<sup>143</sup> See for instance, Inter-American Court of Human Rights, “Juridical Condition and Rights of the Undocumented Migrants”, Advisory Opinion (ser. A) No. 18 (2003) < <https://core.ac.uk/download/pdf/288221944.pdf> > accessed 17 October 2023.

<sup>144</sup> Art. 14(2), *Palermo Protocol*.

<sup>145</sup> Arts. 1 and 7, Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

<sup>146</sup> Art. 1, United Nations, Charter of the United Nations, (signed 26 June 1945, entered into force 24 October 1945), 1 UNTS XVI.

<sup>147</sup> Art. 2, International Covenant on Civil and Political Rights, *supra* note 61.

<sup>148</sup> Art. 2(2), International Covenant on Economic Social and Cultural Rights 993 UNTS 3 (signed by the USA 1997).

<sup>149</sup> Art. 2, Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 13 (signed by the USA 1980).

<sup>150</sup> Arts. 1(4) and 2(1), International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (signed by the USA 1966, ratified 1994).

<sup>151</sup> See further: para 10, General Comment 18, Human Rights Committee, 37<sup>th</sup> session (1989) UN Doc HRI/GEN/1/Rev.1 (duty to take affirmative action); para 9, General Comment No 28, Article 3, 68<sup>th</sup> session, 2000, UN Doc CCPR/C/21/Rev.1/Add.10; Committee on the Elimination of Racial Discrimination, *Yilmaz-Dogan v Netherlands*, CERD Communication No. 1/1984 (1984) UN Doc CERD/C/36/D/1/1984.

<sup>152</sup> paras 160-161, Inter-American Commission of Human Rights *Lenahan v. United States* (2011) Case 12.626, Report No. 80/11.

duties, States must take into account that domestic violence is a problem that disproportionately affects women, since they constitute the majority of the victims.”<sup>153</sup>

5.6 The Commission recommended at para. 215(4) that the USA, inter alia:

“Adopt multifaceted legislation at the federal and state levels, or to reform existing legislation, making mandatory the enforcement of protection orders and other precautionary measures to protect women from imminent acts of violence, and to create effective implementation mechanisms.”<sup>154</sup>

5.7 In *Caso Gonzalez y otras v the Mexican States*, the Commission held that, by failing to conduct an investigation into the deaths of eight women who had been killed by their families, and allowing the perpetrators of “femicide” to act with “impunity”, Mexico had discriminated against women and breached its obligations to legislate and act with due diligence to prevent, investigate and sanction violence against them.<sup>155</sup>

5.8 The ECtHR has also emphasised the duty to protect women from violence as an inherent part of the right to freedom from discrimination and equal protection of the law. In *Opuz v Turkey* the ECtHR recognised that discriminatory judicial passivity can create a climate that is “conducive to domestic violence”.<sup>156</sup> An “overall unresponsiveness of the judicial system” and the “impunity enjoyed by aggressors” was found to indicate an insufficient commitment to take action to address domestic violence as well as a failure to provide equal protection before the law.<sup>157</sup> The ECtHR has further stressed that a failure to investigate and prevent violence against women is “particularly alarming”<sup>158</sup> where it takes place in a context of repeated and documented failures to prevent such violence. The court has found that such consistent failures can amount to “condoning” violence against women and “reflect a discriminatory attitude” towards them.<sup>159</sup>

5.9 In *Hacienda Brasil Verde*<sup>160</sup> the IACtHR established that the victims shared characteristics of “specific victimization” (e.g. being poor, illiterate, from the poorest and least developed regions in the country, from black and minority ethnic communities). These factors made them more prone to be recruited into slavery by means of false promises and deceit. The court determined that the state knew about this situation of structural economic discrimination, contravening Article 1.1 American Convention which provides that “economic status” is an expressly prohibited ground of discrimination. The IACtHR ruled

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<sup>153</sup> paras 162-163, *ibid.*

<sup>154</sup> para. 215(4), *ibid.*

<sup>155</sup> Inter-American Commission of Human Rights, *Gonzalez v. Mexico* (16 November 2009) Series C No. 205.

<sup>156</sup> para. 198, *Opuz v Turkey*, App No. 33401/02, ECHR (9 June 2009).

<sup>157</sup> para. 200, *ibid.*

<sup>158</sup> para. 74, *Gaidukevich v. Georgia*, App No. 38650/18, ECHR (15 June 2023).

<sup>159</sup> para. 42, *A and B v Georgia*, App No. 73975/16, ECHR (10 February 2022).

<sup>160</sup> para. 339, *Hacienda Brasil Verde*, *supra* note 45.

that Brazil did not adopt appropriate measures to address the victims' situation, thereby perpetuating historical and structural economic discrimination.

- 5.10 The Special Rapporteur notes the petitioners' evidence of the discriminatory impact of the approach of the USA to diplomatic immunity in respect of domestic workers who are women and/or members of black and minority ethnic communities.<sup>161</sup> The petitioners' evidence is that domestic workers disproportionately suffer discrimination on grounds of gender, race, ethnicity and other statuses, including immigration status, as a result of their legal exclusion from basic labour and employment protections.<sup>162</sup> This reflects a wider global issue.
- 5.11 The Special Rapporteur has observed that "[t]he majority of migrant domestic workers are women and are at heightened risk of trafficking and slavery where the State fails to effectively protect their human rights as migrant workers".<sup>163</sup> The Special Rapporteur has highlighted the state's obligations to protect gender equality and to ensure non-discrimination in all measures to protect the human rights of migrant workers and to effectively prevent trafficking in persons.
- 5.12 The mandates of the Special Rapporteurs on trafficking, the human rights of migrants, contemporary forms of slavery, torture and other cruel, inhuman or degrading treatment or punishment, and violence against women, in a Joint Urgent Appeal to Saudi Arabia and to Vietnam recently raised concerns about the exploitation of a group of Vietnamese women and girls allegedly recruited to work as domestic workers in the Kingdom of Saudi Arabia.<sup>164</sup> The mandates raised concerns about the reported abuses by private actors, possibly with the acquiescence of state officials, and stressed that the obligation of non-discrimination in international human rights law is "critical" to anti-trafficking measures".<sup>165</sup>
- 5.13 The Office of the Special Representative of the Organisation for Security and Co-operation in Europe (the "OSCE") and Coordinator for Combating Trafficking in Human Beings has recognised that "cases of abuse and human trafficking have been identified in a

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<sup>161</sup> pgs. 109-113, *Final Observations*.

<sup>162</sup> pgs. 36-61, 88-103, *Final Observations*.

<sup>163</sup> pg. 2, Mandates of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on trafficking in persons, especially women and children; (27 May 2021) AL GBR 6/2021 < <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26423> > accessed 19 October 2023

<sup>164</sup> Mandates of the Special Rapporteur on trafficking in persons, especially women and children; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on violence against women, its causes and consequences (25 October 2021) UA SAU 12/2021 < <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26747> > accessed 19 October 2023.

<sup>165</sup> pg. 5, *ibid*, citing the Report of the Special Rapporteur, 'Implementation of the non-punishment principle' (17 May 2021) UN Doc A/HRC/47/34 < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/108/00/PDF/G2110800.pdf?OpenElement> > accessed 17 October 2023.

considerable number of OSCE participating states”,<sup>166</sup> and that private domestic workers are more vulnerable to exploitation and trafficking. At p.13, the OSCE recognised that:

“Trafficking for domestic servitude covers a range of situations, all of which share certain features: subjugation, intimidation and an obligation to provide work for a private individual, excessively low or no salary, few or no days off, psychological and/or physical violence, limited or restricted freedom of movement, denial of a minimum level of privacy and health care. Living in the household of the employer, the domestic worker may constantly be required to be available to work day and night, often in living conditions that are unacceptable and subject to abuse, humiliation, discriminatory behaviour and punishment.”<sup>167</sup>

- 5.14 The UN and others have also recognised the need to take into account intersectional discrimination, which includes data and information about groups most at risk because of the socio-structural nature of discrimination, marginalisation and exclusion, as well as the experiences of those groups.<sup>168</sup> The ECtHR has also acknowledged the need to take account of the intersecting characteristics of race and gender when determining the scope of state authorities’ duties to investigate violence against women. In *B.S. v Spain*<sup>169</sup> the ECtHR recognised the “particular vulnerability” inherent in the applicant’s position as an “African woman working as a prostitute”<sup>170</sup> when finding a breach of ECHR Articles 14 (non-discrimination) and 3 (prohibition on torture or degrading treatment) for failure to investigate the violent incidents that occurred, and concluded that the State had failed to comply with its duty under Article 14 of the Convention taken in conjunction with Article 3 to take all possible steps to ascertain whether or not a discriminatory attitude might have played a role in the events.<sup>171</sup> The Court held that the duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of the State’s procedural obligations arising under Article 3 of the Convention, and also held that such an obligation “may also be seen as implicit in their responsibilities under Article 14 of the Convention to secure respect without discrimination for the fundamental value enshrined in Article 3.”<sup>172</sup>
- 5.15 It is therefore important to take account of the particular characteristics of domestic workers in diplomatic households making them more vulnerable to abuse and disproportionately affected by diplomatic bars to civil immunity in cases of exploitation, so as to apply the non-discrimination principle and ensure equal protection before the law.

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<sup>166</sup> pg. 9, Office of the Special Representative of the Organisation for Security and Co-operation in Europe and Coordinator for Combating Trafficking in Human Beings Handbook, ‘How to prevent human trafficking for domestic servitude in diplomatic households and protect private domestic workers’ (2014) < <https://www.osce.org/files/f/documents/2/c/126303.pdf> > accessed 19 October 2023.

<sup>167</sup> pg. 13, *ibid.*

<sup>168</sup> UN Guidance Note on Intersectionality, Racial Discrimination & Protection of Minorities, published September 2022 < <https://www.ohchr.org/sites/default/files/documents/issues/minorities/30th-anniversary/2022-09-22/GuidanceNoteonIntersectionality.pdf> > accessed 17 October 2023

<sup>169</sup> *B.S. v Spain*, App No. 47159/08, ECHR (24 July 2012).

<sup>170</sup> para. 62, *ibid.*

<sup>171</sup> *ibid.*

<sup>172</sup> para. 59, *ibid.*

## 6. CONCLUSION AND RECOMMENDATIONS

6.1 In conclusion, the Special Rapporteur submits that:

- (a) The diplomatic immunity exception under Article 31(1)(c) VCDR applies to the exploitation of domestic workers by diplomats for profit, which constitutes a “commercial activity” outside of official functions.
- (b) Exploitation which falls within the scope of international human rights law prohibitions on slavery, trafficking, and domestic servitude cannot be considered an activity incidental to the ordinary life of a diplomat within official functions.
- (c) The USA owes positive obligations to: put in place an effective system of laws to protect against human trafficking, which ensure the right to an effective remedy; to protect victims and those at risk of trafficking without discrimination; and to undertake effective investigations into human trafficking.
- (d) The petitioners’ evidence presents circumstances of exploitation and indicators of human trafficking, slavery, domestic servitude and forced labour, as well as wider evidence of discrimination against domestic workers, a majority of whom are women from minority ethnic communities.<sup>173</sup>
- (e) In the circumstances, diplomatic immunity from civil jurisdiction must be interpreted consistently with the wider framework of international human rights law, including the requirement to protect the petitioners’ rights without discrimination.

6.2 The Special Rapporteur respectfully invites the Commission to grant the relief sought by the petitioners<sup>174</sup> and in particular to make recommendations to the USA under Article 41(b) of the American Convention which promote the observance of human rights of domestic workers in diplomatic households.

6.3 Recognising the obligation of states to ensure effective access to remedies for domestic workers who are victims of trafficking, the Commission should recognise the exception to diplomatic immunity from civil jurisdiction under Article 31(1)(c) VCDR where the exploitation of domestic workers by diplomats for personal profit falls within the meaning of a “commercial activity” outside of their official functions. In doing so, the Commission can highlight that the purpose of diplomatic immunity is not to benefit the individual diplomat, but to ensure comity between nations and friendly relations between states. These

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<sup>173</sup> See, for instance: fig. 3, pg. 42, Economic Policy Institute, ‘Domestic Workers Chartbook’ (14 May 2020) < <https://files.epi.org/pdf/194214.pdf> > accessed 17 October 2023.

<sup>174</sup> pgs. 162-167, *Final Observations*.

purposes are not undermined by limiting diplomatic immunity from civil jurisdiction in this case.

- 6.4 Finally, the Commission is respectfully invited to recognise the intersections of gender, race, and migration status as significant factors leading to discrimination and serious violations of human rights, including trafficking, against domestic workers. Recognising the fact that migrant domestic workers are particularly vulnerable to trafficking, the Commission should affirm the right to equality before the law, equal protection of the law, and non-discrimination for domestic workers.

**24 October 2023**

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