



# **Diplomatic and State Immunity in Respect of Claims of Embassy Employees and Domestic Workers: Mapping the Problems and Devising Solutions**

## **REPORT**

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## 1. INTRODUCTION

The report was commissioned by Abvakabo FNV and RESPECT Network, on behalf of also Fairwork, European Federation of Public Service Unions (EPSU) and Union Syndicale Federale (USF) ('Clients').

The report is prompted by concerns over labour and human rights abuse of two categories of workers. The first category is that of household personnel of foreign diplomatic agents<sup>1</sup> (domestic workers),<sup>2</sup> as illustrated by the hypothetical case of the domestic worker Lori from a developing country. Lori was employed by an Ambassador from State X to work as a domestic worker in the Netherlands (receiving State). She got an employment contract for 40 hours a week for €1500 per month. However, on her arrival in the Netherlands, the Ambassador failed to meet the terms of the employment contract: he paid her a small fraction of what she was owed, did not allow her to leave the residence unsupervised, and confiscated her passport. Moreover, she was expected to work around the clock with no days off or adequate rest. Whenever she would protest against her treatment she was subjected to repeated verbal and physical abuse by not only the Ambassador but also his wife. When she threatened to go to the police, she was sexually assaulted by the Ambassador.<sup>3</sup>

Lori's case is reflective of the many exploited domestic workers who are vulnerable to abuse and exploitation by diplomats who employ them.<sup>4</sup> Reported cases concerning abuse of household personnel of diplomats range from less severe labour law infringements (e.g. no remuneration for overtime work, less wages than agreed beforehand) over severe forms of

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<sup>1</sup> Article 1(e) Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964), 500 UNTS 95 ['VCDR' or 'Vienna Convention']: 'A "diplomatic agent" is the head of the mission or a member of the diplomatic staff of the mission.' Although not relevant for the purpose of this report, it is however important to note that there are also other categories of diplomatic personnel who, if involved in a rights abuse cases, would possess immunity to a certain extent. See footnote 15 below.

<sup>2</sup> The VCDR refers to this category of workers as 'private servants': Article 1(h) VCDR: 'A "private servant" is a person who is in the domestic service of a member of the mission and who is not an employee of the sending State'.

<sup>3</sup> See e.g. the analogical case BAG, 22.08.2012, 5 AZR 949/11 of the Berlin Labour Court of a domestic worker from Indonesia. 'Saudi diplomat allegedly abused Indonesian maid in Berlin' *The Jakarta post* (Jakarta, 30 June 2012); 'Allegations Saudi ambassador to Germany enslaved Indonesian maid' *The Jakarta globe* (Jakarta, 29 June 2011). In April 2009, she accepted a position as a domestic worker employed by a diplomat in Berlin. However, after her arrival, she effectively became a slave. With her passport taken away, she was forced into hard labour of 18 hours a day, while working for the diplomat's entire family. During this time Ms Ratnasari did not receive wages. She also suffered unending physical and mental abuse which continued until she saw a chance to escape at the end of 2010. In this case, the Court upheld the immunity of the diplomat as criminal complaint against a member of the diplomatic corps is not allowed (see 2.1.1.1 in this report).

<sup>4</sup> See e.g. Samantha Kimmey, 'Trafficking victim turns the heat on the Philippines US consulate,' UPI.com (17 September 2012); Yuko Narushima, 'Outrageous stories of abuse as immunity shields diplomats in the US from trafficking women,' *The Washington Spectator* (4 March 2013).



labour exploitation (wages far below the minimum wage, overlong working hours, no days off or holidays) to working and living conditions that amount to forced labour and slavery-like practices (low or literally no payment of wages, having to work around the clock, restrictions of liberty, inhuman accommodation and food, physical and sexual violence).<sup>5</sup> These workers are especially vulnerable due to their dependency for work, accommodation, and immigration status. Moreover, the isolated and “invisible” nature of this work and their lack of knowledge about labour rights make that these workers remain with their employers.<sup>6</sup> But even if the workers do find their way to the courts, their employers habitually enjoy diplomatic immunity in the State in which they perform their functions (the receiving State). The recent row over the arrest of the Indian Deputy Consul-General in New York by the US police illustrates this obstacle. The Deputy Consul-General was accused of submitting false documents to US authorities in order to obtain a work visa for her domestic worker as well as of paying her less than the US minimum wage. After the arrest India transferred the Deputy Consul-General to the Indian mission to the United Nations (UN) so as to secure full immunity.<sup>7</sup> When India refused to waive that immunity, the US had to forsake legal proceedings. It subsequently declared the Indian diplomat *persona non grata* and she travelled back to India.<sup>8</sup>

Diplomatic immunity is codified under the Vienna Convention on Diplomatic Relations (‘VCDR’ or ‘Vienna Convention’) and provides diplomats with immunity from jurisdiction,<sup>9</sup> whereby domestic courts have consistently refused to hear domestic workers’ cases. Even in cases of successful adjudication, execution of judgments remains a problem.

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<sup>5</sup> Angelika Kartusch, *Domestic Workers in Diplomats, Households Rights Violations and Access to Justice in the Context of Diplomatic Immunity* (German Institute for Human Rights 2011) 5.

<sup>6</sup> See Mumtaz Lalani, ‘Ending the Abuse: Policies that work to protect migrant domestic workers’ (Kalyaan: Justice of migrant domestic workers 2011) 2.

<sup>7</sup> Since this report does not deal with consular immunity it is good to briefly state the relevant rules here. A consular officer only enjoys immunity for official acts: Article 43(1) of the Vienna Convention on Consular Relations (adopted 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967)) provides: “Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.” This form of immunity can be compared to the immunity of diplomatic agents after function, as discussed in section 2.1.1.2 below. In addition a consular officer enjoys inviolability and cannot be arrested “except in the case of a grave crime” (Article 41 VCCR). As a representative of India at the United Nations, the scope of her immunity is the same as that of a diplomat agent, Section 15, Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations (signed 26 June 1947, approved by the General Assembly 31 October 1947).

<sup>8</sup> See for a detailed discussion of the legal issues raised by this case [ejil.talk.org](http://ejil.talk.org).

<sup>9</sup> Eileen Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* (3<sup>rd</sup> edn, OUP 2008) 1-3.



The second category of workers consists of employees of foreign embassies (i.e. workers with a labour contract with the sending State). This category will be illustrated with the following hypothetical case.<sup>10</sup> Norah, a national of a developing country was recruited by the embassy of her State of nationality, State Y (sending State) in the Netherlands (receiving State) to the post of secretary. During her employment she gained permanent residence in the Netherlands. The contract of employment provided that Norah's responsibilities and tasks were limited by the scope of her secretarial duties. Attached to her employment contract was a schedule which included that her duties were to be *inter alia* typing of texts, providing information, helping with the organising of receptions and parties, photocopying documents and other work in assistance to the diplomats. Furthermore, the contract stipulated that any disputes arising under the contract were to be settled in accordance with the local laws of State Y, a State which is not part of the Council of Europe. However, after working for some time for the embassy she fell ill. Her illness lasted several months and shortly after her return she was dismissed.

If Norah would seize the Dutch courts in respect of her labour dispute, it is likely that the sending state invokes State immunity. State immunity protects States from being sued in foreign courts in respect of their sovereign acts as it would be an infringement of a State's sovereignty to bring proceedings against it in a foreign country. While not all labour contracts are covered by the rule, State immunity regularly blocks access to the courts in case of labour disputes involving a foreign embassy; and even if judgment is given in favour of the employee, immunity from execution forms the next stumbling block.

The first part of the report sets out to map and analyse the relevant aspects of the rules of diplomatic and State immunity in order to explain what the legal obstacles are to redress human rights violations and labour law abuses suffered by domestic workers and embassy personnel in receiving States. The fictive cases presented above will be used as reference material: What if Lori manages to escape and subsequently wants to take legal steps against the Ambassador to get compensated for the sexual assault and for the breach of the contractual obligations created by her employment contract; will she be able to get redress? And what about Norah; can she bring a civil claim against State Y requesting compensation

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<sup>10</sup> See cf. Case C-154/11 *Mahamdia v Algeria* (ECJ 19 July 2012); see further discussion on this under 2.2.1 of this report.



for her unlawful dismissal? The second part of the report will consider various avenues to improve the factual and/or legal situation of embassy employees and domestic workers.

## **2. LEGAL FRAMEWORK OF IMMUNITIES**

### **2.1. DIPLOMATIC IMMUNITY**

Diplomatic immunity is a rule of international law that shields diplomatic agents of the sending State from (most of) the jurisdiction of the foreign State in which they perform their functions.<sup>11</sup> The purpose of diplomatic privileges and immunities is ‘not to benefit the individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.’<sup>12</sup> As the International Court of Justice (ICJ) put it:

There is no more fundamental prerequisite for the conduct of relations between States [...] than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose [...]. The institution of diplomacy, has proved to be "an instrument essential for effective cooperation in the international community, and for enabling States, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means."<sup>13</sup>

Diplomatic immunity is one of the oldest and most established rules of international law.<sup>14</sup> Initially, rules regarding diplomatic immunity were only of customary nature. Today, the immunity of diplomatic agents based in the receiving State is codified in the 1961 Vienna Convention on Diplomatic Relations.

The following sections will set out the legal framework of diplomatic immunity. First diplomatic immunity from jurisdiction will be discussed (2.1.1), both during function (2.1.1.1) and thereafter (2.1.1.2). Secondly, diplomatic immunity from execution will be elaborated on (2.1.2). Additionally, the rules and principles pertaining to waiver of diplomatic immunity will be described (2.1.3). Finally, with the help of the legal framework, Lori’s case

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<sup>11</sup> Denza (n 9) 1.

<sup>12</sup> Denza (n 9) 13; The legal basis of immunities in the Vienna Conventions can be found in the preamble, which explains that ‘the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.’

<sup>13</sup> *United States and Diplomatic and Consular Staff in Teheran (US v Iran)* [Judgment of 24 May 1980] [91].

<sup>14</sup> Denza (n 9) 1.



will be analysed in the event she may file a complaint against the Ambassador with the Dutch courts (2.1.4).

### 2.1.1. Diplomatic Immunity from Jurisdiction

Diplomatic agents enjoy an almost absolute immunity from the jurisdiction of the receiving States during their term of office (immunity *ratione personae* or personal immunity, Article 31(1) VCDR).<sup>15</sup> The same immunity applies to “members of the family of a diplomatic agent forming part of his household” (Article 37(1) VCDR).<sup>16</sup> When a diplomatic agent’s function ends, his or her personal immunity ends as well. However, immunity for acts performed in an official capacity subsists even after function (immunity *ratione materiae* or functional immunity).<sup>17</sup>

#### 2.1.1.1. During Function

During function, a diplomatic agent enjoys personal immunity from jurisdiction as codified in Article 31(1) VCDR and can be divided into immunity from criminal, civil and administrative jurisdiction.<sup>18</sup>

The immunity from the criminal jurisdiction of the receiving State has an absolute character: there are no exceptions.<sup>19</sup> This absolute immunity concerns all possible minor offences as well as grave crimes, such as the crimes against humanity. In the *Arrest Warrant*

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<sup>15</sup> Denza (n 9) 280. This report does not deal with the immunity of other embassy personnel, but it is noted here that a more limited immunity rule applies to them. The administrative and technical personnel employed by the mission for instance possess the same immunity as the diplomatic agents with respect to criminal jurisdiction. However, they enjoy limited immunity with respect to civil jurisdiction to acts performed within the course of their duties (Article 37(2) VCDR). The category service staff responsible for domestic service (Article 1(g) VCDR) is only immune for acts performed in the course of their domestic duties (Article 37(3) VCDR). The final category is the private servants, not employed by the sending State but who provide domestic service for the members of the mission. This category only enjoys privileges and immunities only to the extent admitted by the receiving State with the requirement that the receiving State exercises its jurisdiction over private servants in such a manner as not to interfere unduly with the performance of the functions of the mission (Article 37(4) VCDR).

<sup>16</sup> 37(1) VCDR: “The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 29 to 36.”

<sup>17</sup> Article 39 (2) VCDR. Denza (n 9) 434.

<sup>18</sup> Article 31 (1) VCDR: ‘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 [...]’.

<sup>19</sup> Article 31(1) VCDR. Denza (n 9) 280.



case the ICJ ruled that there is no exception for international crimes.<sup>20</sup> Although, in this case the ICJ was dealing with the immunity of a minister of foreign affairs, the outcome has direct consequence for diplomatic immunity as the protection of the functioning of the office is a prime reason for granting both immunities. It stated that:

It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.<sup>21</sup>

The immunity from civil and administrative jurisdiction is also near absolute, yet subject to three exceptions as provided in Article 31(1) VCDR:

- (a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
- (b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
- (c) *An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions* [emphasis added].

From the perspective of this report there is no relevance to discuss the first two exceptions as they could hardly be used as a ground for jurisdiction in labour disputes. The last exception to immunity provided by Article 31(1)(c) VCDR is in accordance with the rule codified in Article 42 VCDR that diplomats should not practice a second profession or engage in business while serving as a representative of the sending State. Yet, Article 42 does not provide for similar restrictions for the family members of the diplomat. During the process of drafting of Article 31(1)(c) VCDR it was highlighted that the exclusion did not apply to a single act of commerce but to a continuous activity.<sup>22</sup> It is generally understood that the exception does not apply to labour contracts concluded by diplomats with their household personnel.<sup>23</sup> In the *Tabion v Mufti* case the United States Court of Appeal explained that

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<sup>20</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* ICJ, 41 ILM 536.

<sup>21</sup> *ibid* [58]

<sup>22</sup> A/CN.4/116 p 56: comment by Rapporteur to ILC; see *also* Denza (n 9) 305.

<sup>23</sup> Denza (n 9) 305; Emily F. Siedel, 'Swarna and Baoanan: Unravelling the Diplomatic Immunity Defense to Domestic Worker Abuse' [2011] *Md J Int'l L* 173, 183.





[C]ommercial activity, as it appears in the Article 31(1)(c) exception, was intended by the signatories to mean ‘commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.’ Day-to-day living services such as dry cleaning or domestic help were not meant to be treated as outside a diplomat's official functions. Because these services are incidental to daily life, diplomats are to be immune from disputes arising out of them.<sup>24</sup>

Similarly, in the *Paredes v Vila* case claims of Paraguayan domestic worker brought against an Argentinean diplomat and his wife for breach of contract and unjust enrichment were dismissed by the United States District Court on the ground that:

[w]hen diplomats enter into contractual relationships for personal goods or services incidental to residing in the host country, *including the employment of domestic workers*, they are not engaging in ‘commercial activity’ as that term is used in the Diplomatic Relations Convention [emphasis added].<sup>25</sup>

Thus, contracts for goods and services incidental for daily life concluded in the receiving State are outside of the exception and are covered by the immunity. The exception sees to remunerated services by diplomats or members of their family, or an employment outside of the mission.<sup>26</sup>

It is important to note that the immunity and inviolability of diplomatic agents do not stand in the way of investigation by the receiving State into allegations of abuse. The mere issuance of an order to investigate charges of abuse against diplomatic agents in function does not infringe the diplomatic immunity or inviolability. The receiving State can take action and prepare a file in anticipation of the ending of the diplomats’ function. Diplomats may even be asked to give evidence, although only on a voluntary basis (see further 2.1.1.2). In the *Djibouti v France* case for instance, the ICJ first noted that to determine whether or not there has been an attack on immunity, one had to look at whether the Head of State, President of the Republic of Djibouti, was subjected ‘to a constraining act of authority’ and ruled that summons addressed to the President by the French investigating judge could not be construed as measures of constraint or attack by France on immunities from criminal jurisdiction. The

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<sup>24</sup> US Court of Appeals, 4<sup>th</sup> Circuit, No. 95-1732, (Jan. 17, 1996).

<sup>25</sup> *Gonzales Paredes v Vila* [2007] 479 F.Supp.2d 187 [2007]. See also *Sabbithi v Al Saleh*, No. 07-CV-00115-EGS, 2009 WL 737006 4-5 (D.D.C. Mar. 20, 2009).

<sup>26</sup> Denza (n 9) 306; for example if a diplomat employs a domestic worker for cleaning his/her house.



summons were merely a voluntary invitation to testify which the President could freely accept or decline.<sup>27</sup>

In the *BS and KG v AR and AR* case, the Brussels Labour Court of Appeals ruled in a similar vein. It observed that summoning is possible during function and that it does not entail the exercise of jurisdiction by the Court of the receiving State, which starts at the time of the actual handling of the case.<sup>28</sup>

Finally, it should be underlined that the privileges and immunities of diplomatic agents do not exempt these diplomatic agents from the duty to respect the laws and regulations of the receiving States except where these laws make a specific exception in their favour.<sup>29</sup> For instance, diplomats are to be aware of and conform to the laws regarding firearms, traffic offences, theft and other serious crimes in the receiving States.<sup>30</sup> However, in case a diplomatic agent violates the laws, he or she is exempt from adjudicatory and enforcement jurisdiction; and the only tool available to the receiving State, unless the sending State waives the immunity of its diplomatic agent (2.1.3), is a notification of *persona non grata*. According to Article 9 VCDR:

the receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable.<sup>31</sup>

Once a declaration of *persona non grata* has been made, the sending State should either recall the diplomat or terminate his or her function with the mission in the receiving State. If the sending State refuses to do so, the receiving State may refuse to recognize the diplomat as a member of the diplomatic mission.<sup>32</sup>

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<sup>27</sup> *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment, ICJ Reports 2008 [170-171].

<sup>28</sup> *BS and KG v AR and AR*, Appeal, No 42.534; ILDC 50 (BE 2002), cited in Tijdschrift voor Vreemdelingenrecht 143 [74].

<sup>29</sup> Article 41.1 VCDR; Denza (n 9) 460-461.

<sup>30</sup> Denza (n 9) 462.

<sup>31</sup> Article 9 VCDR.

<sup>32</sup> Denza (n 9) 73.



### 2.1.1.2. After Function

The immunity from jurisdiction of diplomatic agents as provided in Article 31(1) VCDR applies as long as diplomatic agents exercise their official function and ends when their function ends.<sup>33</sup> After function their immunity in the receiving State is limited to that set forth in Article 39(2) VCDR:

When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict.

However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.<sup>34</sup>

This so-called residual immunity is limited to official acts performed by the diplomatic agents within their official capacity because such acts are the acts of the sending State.<sup>35</sup> Therefore, ex-diplomats can only rely on the functional immunity for protection covering official acts performed during his or her time in office.<sup>36</sup> The rationale behind this is to prevent that an official in the receiving State is held responsible for acts that are those of the sending State.<sup>37</sup> The residual immunity is therefore not intended to shield the diplomats, but rather the State that they represent in their official capacity.<sup>38</sup>

For example, if a diplomatic agent ends his/her official function in the Netherlands and moves to Belgium in order to take up a position, he/she ends his/her official function as far as the Netherlands is concerned. It should be noted that even though all the privileges and immunities cease to exist when diplomats depart from the receiving State, they still have a reasonable time to wind up their affairs during which they may continue to enjoy immunities.<sup>39</sup>

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<sup>33</sup> Hazel Fox, *The Law of State Immunity*, (1<sup>st</sup> edn, OUP 2002) 452.

<sup>34</sup> Article 39(2) VCDR.

<sup>35</sup> Denza (n 9) 439.

<sup>36</sup> Dapo Akande, 'International Law Immunities and the International Criminal Court' [2004] 98 Am J Int'l L 407, 412.

<sup>37</sup> *ibid* 413; Denza (n 9) 439: 'This immunity reflects the fact that acts so performed are in law the acts of the sending State' and 'The acts of a diplomatic agent in the exercise of his official functions are in law the acts of the sending State. It has therefore always been the case that the diplomat cannot at any time be sued in Britain in respect of such acts since this would be indirectly to implead a sending State.'

<sup>38</sup> Fox (n 33) 452.

<sup>39</sup> Denza (n 9) 435 – 437.



As far as functional immunity of former diplomats is concerned, tort claims concerning abuse of human and labour rights of domestic workers are normally unrelated to the function,<sup>40</sup> as illustrated by the *Swarna v Al-Awadi* case.<sup>41</sup> Vishranthamma Swarna, an Indian national, had come to work for Al-Awadi, Third Secretary to the Permanent Mission of the State of Kuwait to the United States, in New York City. Swarna was sequestered in the diplomat's house, denied access to the outside world, forced to work long hours with no privacy and little food, beaten and raped. After her escape, she managed to bring a default judgement in the United States against the diplomat after he had left to take up a posting in France. When Al-Awadi responded to the case, he argued that he enjoyed jurisdictional immunity as a result of his diplomatic function. However, the District Court rejected this argument by pointing out that diplomats lose much of their immunity upon leaving their post, but where residual immunity did persist, it related only, in the words of the Vienna Convention, to 'acts performed [...] in the exercise of this function as a member of the mission.' As far as the notion of 'official act' is concerned, the Court explained that it encompasses the functions of the diplomatic mission as given in Article 3(1) VCDR.<sup>42</sup> However, if an act is 'entirely peripheral to the diplomat's official duties,'<sup>43</sup> then it will not fall under the residual immunity. The Court stated that '[not] all employment-related acts by a diplomat are official acts to which residual immunity attaches once the diplomat's duties end.'<sup>44</sup> Employing a person unrelated to the diplomatic mission does not qualify as an act performed on behalf of the sending State.<sup>45</sup> Since Al-Awadi hired Swarna to take care of his family's personal affairs in his private residence, the Court decided that the employment contract between Swarna and Al-Awadi constituted a private act because the employment of a

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<sup>40</sup> The contract with a domestic worker, or the treatment of a domestic worker is not an act performed in the exercise of the functions of a diplomatic agent. As Denza explains, official acts in the sense of article 39(3) VCDR are acts that 'are in law the acts of the sending State', Denza (n 9) 439.

<sup>41</sup> *Swarna v Al-Awadi* 607 F.Supp.2d 509 – Dist. Court, SD New York (2009).

<sup>42</sup> *ibid* [517] & n.10: 'The functions of a diplomatic mission consist inter alia in: (a) representing the sending State in the receiving State; (b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law; (c) negotiating with the Government of the receiving State; (d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting them thereon to the Government of the sending State; (e) prompting friendly relations between the sending State and the receiving State, and developing their economic, cultural, and scientific relations.' (quoting Article. 3(1) VCDR).

<sup>43</sup> *Swarna v Al-Awadi* (n 41) [518].

<sup>44</sup> *ibid* [519].

<sup>45</sup> *ibid* [519-520].



household worker did not fall within the meaning of Article 3 VCDR, nor was it part of the implementation of the official policy of the sending State.<sup>46</sup>

On appeal, the Second Circuit upheld the District Court's decision rejecting Al-Awadi's argument that Swarna's employment and his treatment of her were included within his official acts as a diplomat.<sup>47</sup> While deciding on the case the Court relied on a narrow construction of residual immunity stating that 'Article 39(2) does not immunize acts that are "incidental to" the exercise of his functions as a member of the mission.'<sup>48</sup> The Court of Appeals decided that:

Ultimately, however, Al-Awadi's argument must be rejected, as it assumes a fact that is not supported by the record. The alleged facts clearly show that Swarna was employed to meet Al-Awadi's and his family's private needs and not any mission-related functions [...]. If Swarna's work for the family may not be considered part of any mission-related functions, surely enduring rape [on her] would not be part of those functions either [...]. Although Swarna also cooked and served guests at official functions from time to time and taught other servants how to cook Kuwaiti dishes, these duties were incidental to her regular employment as Al-Awadi's personal servant.<sup>49</sup>

Therefore, Swarna won the default judgment on her labour law claims as Al-Awadi's failure to pay minimum wages for the private employment contract was not covered by residual immunity.

Also the *Baoanan v Baja* case illustrates that domestic workers have access to justice in the receiving State after their employer's functions have ended. In this case, the victim, Marichu Baoanan was asked by a Permanent Representative of the Philippines to the United Nations to travel to the United States from the Philippines with the promise of finding her employment as a nurse. However, upon her arrival, Baoanan was forced to work as a domestic worker in his residence within the Philippine mission. She had to work approximately 126 hours per week, was not allowed to leave the household unaccompanied or use the telephone, was forced to sleep in the basement, and was verbally abused.<sup>50</sup> The diplomat argued that being a former diplomat, he had diplomatic immunity. The Court disagreed. Concurring with the functional approach adopted in the *Swarna* case, it held:

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<sup>46</sup> *ibid* [519-520].

<sup>47</sup> *Swarna v Al-Awadi*, 622 F. 3d 123- Court of Appeals, 2nd Circuit (2010) [140].

<sup>48</sup> *ibid* [134].

<sup>49</sup> *ibid* [138].

<sup>50</sup> *Baoanan v Baja*, 627 F. Supp. 2d 155 - Dist. Court, SD New York (2009) at 159



[A]cts allegedly committed by Baja that were performed in furtherance of his diplomatic functions such that they are ‘in law the acts of the sending State’ (Denza, Diplomatic Law 439) are official acts; all other acts are private acts for which residual immunity [under Article 39(2)] is not available.<sup>51</sup>

The New York District Court rejected the suggestion that ‘a diplomatic agent’s employment of a domestic worker is always an official act encapsulated by Article 39(2) [VCDR].’ It further observed:

Functionally, not all domestic workers hired by diplomats are necessarily alike. While undoubtedly many are routinely employed and assigned to provide services related solely to the official functions of the mission, it does not follow that all such workers are always hired only for such purposes. A diplomat could also employ and pay staff to perform personal or private tasks for the diplomat or the diplomat’s family that the sending State would not recognize as ordinary or necessary to the official functioning of the mission and for which it would not provide compensation.<sup>52</sup>

Before reaching its decision, the Court first looked to the documents that were used to obtain the visa for Baoanan to enter the United States. The Court took note of an Affidavit of Undertaking accompanying the regulations stipulating that the employment of an individual ‘as my private staff is [...] for the sole purpose of meeting my personal household needs at the Post.’ Moreover, the regulations of the United States’ government regarding G-5 visas stated that the recipient of such a visa may be ‘an attendant or *personal employee* of an official or other employee of a diplomatic or consular mission or international organization [emphasis added].’<sup>53</sup>

Taking these documents into consideration, the Court came to the conclusion that, as in the *Swarna* case, Baoanan’s work at official Philippine mission events did not ‘transform her employment into an official act.’<sup>54</sup> As Baoanan’s employment, involving cleaning after parties at the Philippine mission, was only tangentially related to the benefit of the Philippine mission, the Court concluded that ‘Baja’s employment of Baoanan as a domestic worker in

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<sup>51</sup> *ibid* [164].

<sup>52</sup> *ibid* [165].

<sup>53</sup> *ibid* [167–68].

<sup>54</sup> *ibid* [168].



his residence at the Philippine Mission was a private act for which Baja cannot avail himself of residual immunity pursuant to Article 39(2).<sup>55</sup>

The recent practice of national courts on residual immunity questions is reflective of the *Swarna* and *Baja* cases. In *Wokuri v Kassam*<sup>56</sup> for instance, diplomat Kassam was Deputy Head of Mission at the Ugandan High Commission in London and had employed Wokuri as her cook and housekeeper at the residence. The case concerned the lack of an employment contract and Kassam's failure to pay Wokuri's full salary.<sup>57</sup> However, by the time the case came before the London High Court, the diplomat had already departed to Rome. Thereby, the question of residual immunity arose where the Court decided that:

25. A former diplomat will not necessarily have immunity in relation to claims by employees carrying out domestic duties. That view is supported by both *Baoanan v Baja* [627 F. Supp. 2d 155, decided by the United States District Court for the southern district of New York in 2009] and *Swarna v Al-Awadi* [622 F. 3d 123, a 2010 decision of the United States Court of Appeals, 2nd Circuit]. The Court in *Swarna v Al-Awadi* was, as it seems to me, right to consider that the residual immunity “does not apply to actions that pertain to [a diplomat's] household or personal life and that may provide, at best, ‘an indirect’ rather than a ‘direct... benefit to’ diplomatic functions”. Such actions do not ‘indirectly... implead the sending State’ (to use words from *Denza*, ‘diplomatic law’). Neither do they relate to ‘a) acts performed... in the exercise of [the diplomat's] functions as a member of the mission’ (within Article 39(2)).

26. [Counsel for the defendant] placed particular reliance on the passage in *Tabion v Mufti* [73 F. 3d 535, a 1996 decision of the United States Court of Appeals, 4th Circuit] in which the Court said “day to day living services such as dry cleaning, or domestic help were not meant to be treated as outside a diplomat's official functions. Because these services are incidental to daily life, diplomats are to be immune from disputes arising out of them.” However, in *Tabion v Mufti* the Court's concern was essentially as to the meaning of ‘commercial activity’ in Article 31 (1) (c) ... as was pointed out in *Swarna v Al-Awadi*... *Tabion v Mufti* “articulates the scope of acts as they relate to the term ‘commercial activity’ under Article 31 (1) (c) for *sitting diplomats*”. It does not define ‘official functions’, much less define the official acts that are accorded perpetual immunity under Article 39 (2) to former diplomats [emphasis added].

It can be concluded from the *Swarna* and the *Baja* cases that, in cases of residual immunity, there is a distinction between private and official acts of the diplomatic agent. The diplomat would only enjoy residual immunity for official acts performed during function. The

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<sup>55</sup> *ibid* [170]

<sup>56</sup> *Wokuri v Kassam* [2012] EWHC 105 (Ch).

<sup>57</sup> *ibid* [1-7].



employment of a domestic workers, whose duties were limited to fulfilling the personal household needs of the diplomat and his or her family, is a private act that cannot be considered to be ‘performed on behalf of or imputable to the sending State,’<sup>58</sup> ‘even when the provision of those services for the diplomat happens to occur inside the premises that house the diplomatic mission.’<sup>59</sup>

### 2.1.2. Immunity from Execution

Two rules determine the position of diplomats in office in regards to execution measures in the receiving State. Article 31(1) VCDR provides that “[n]o measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a), (b) and (c) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.” Hence, execution is only possible in respect of cases coming within one of the exceptions to immunity from civil jurisdiction, *and* execution may never violate the inviolability of the agent’s person (Article 29 VCDR) and residence (Article 30(1) VCDR).<sup>60</sup>

As far as former diplomats are concerned, execution measures are allowed, and their property in the receiving State is no longer inviolable once their function in the receiving State has ended and the diplomat has moved out permanently (Article 39(2) VCDR).

### 2.1.3. Waiver

Under Article 32 VCDR the receiving State could request the sending State to waive the immunity of the offending diplomat so that the latter could be tried in court for the offences committed by foreign diplomatic agents where admonition is not considered a satisfactory punishment.<sup>61</sup> This would possibly strain the political relations between the two States less than when the receiving State would declare the diplomatic agent *persona non grata* under Article 9(1) VCDR. Waiver has to be express<sup>62</sup> and the possibility to revoke a waiver once it

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<sup>58</sup> Denza (n 9) 441.

<sup>59</sup> *Baoanan v Baja* (n 50) [169].

<sup>60</sup> Denza (n 9) 319.

<sup>61</sup> *ibid* 331, 441.

<sup>62</sup> *ibid* 335.





has been given does not exist.<sup>63</sup> Immunity can only be waived by the sending State, not by the diplomatic agent himself.<sup>64</sup>

Notably, a waiver of immunity from jurisdiction does not signify waiver of immunity from execution.<sup>65</sup> In other words, if the sending State waives the immunity from jurisdiction of the diplomat, the judgment that has been issued as a result of this cannot be enforced in the receiving State unless there is a separate waiver for the immunity from execution.

The question whether the sending State may waive diplomatic immunity or submit to the jurisdiction of the courts of the receiving State prior to a dispute or in regards to future contracts is unsettled. In 1966 the English Court of Appeal in *Empson v Smith* decided that ‘there could be no effective waiver of immunity until the court is actually seized of the proceedings.’<sup>66</sup> However, Denza argues authoritatively that in view of developments since then this should no longer be the prevailing position: ‘if the undertaking was in clear terms and given for consideration, there seems no reason of principle why the State ... should not to be held to its agreement bound’<sup>67</sup>.

While States have in recent years more readily waived the immunity of their diplomatic agents<sup>68</sup>, waiver is still the exception. Notably, a resolution to the Final Act of the Vienna Conference on Diplomatic Relations urging States to adopt a waiver in respect of civil claims was not supported by many States.<sup>69</sup>

#### **2.1.4. Interim Conclusion: Application of the Legal Framework**

In Lori’s case, the legal analysis would mean that as long as the Ambassador is in function, he cannot be prosecuted for the sexual assault he has committed, nor can his wife, or any other family member forming part of his household. In the light of such absolute nature of immunity from criminal jurisdiction, the only feasible tools for the Netherlands as the

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<sup>63</sup> *ibid* 337.

<sup>64</sup> Ivor Roberts, *Satow’s Diplomatic Practice* (6<sup>th</sup> edn, OUP 2009) 135.

<sup>65</sup> Article 32(4) VCDR.

<sup>66</sup> Denza (n 9) 338.

<sup>67</sup> *ibid* 339.

<sup>68</sup> *ibid* 345.

<sup>69</sup> United Nations Conference on Diplomatic Intercourse and Immunities, A/CONF.20/14/Add.1, (Vienna, 1961), 90: ‘[...]the sending State should waive the immunity of members of its diplomatic mission in respect of civil claims of persons in the receiving State when this can be done without impeding the performance of the functions of the mission, and that, when immunity is not waived, the sending State should use its best endeavours to bring about a just settlement of the claims.’



receiving State would be a request for waiver of immunity, or a notification of *persona non grata* (2.1.1.1). Immunity granted to diplomats during office is far reaching and attempts by Lori to bring labour law claims against the Ambassador would therefore be unsuccessful. The labour contract between Lori and the Ambassador would be ‘incidental’ to the Ambassador’s daily life and will not be considered to fall under the ‘commercial activity’ as described in Article 31(1)(c) VCDR. The position of the Ambassador is to a large extent comparable to that of the Indian Deputy Consul-General in New York after her transfer to the Indian mission to the UN, as was discussed in the introduction to this Report.

However, Lori could bring a claim, or the Ambassador could be prosecuted if criminal law has been violated, after the Ambassador has left his function in the Netherlands. In this case, according to Article 39(2) VCDR, the Ambassador would only enjoy residual immunity for acts committed in his official capacity (2.1.1.2). The employment of Lori is a private rather than an official act of the diplomat for which the diplomat enjoys no immunity from jurisdiction. If the Ambassador’s wife is also included in Lori’s complaint, her immunity would not continue to subsist for any acts, as she was never a member of State X’s Mission to the Netherlands and could not have conducted any acts under Article 39(2) VCDR ‘as a member of the mission.’ Thus, the Ambassador’s family would enjoy no residual immunity and would be subject to the civil and administrative jurisdiction of the Netherlands.<sup>70</sup>

The residence and property of the Ambassador would remain inviolable from execution, as long as he is in function. However, if the Ambassador has left the Netherlands, his private property would no longer enjoy inviolability or immunity from execution.

## 2.2. STATE IMMUNITY

Under customary international law a State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State.<sup>71</sup> Currently, no international treaty of universal participation dealing with State immunity is in force. The rule of State immunity has been subjected to codification efforts by the International Law Commission (ILC),<sup>72</sup> and on 2 December 2004 the UN General Assembly adopted the United Nations

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<sup>70</sup> See Article 37(1), 39(2) VCDR; Cf. *Swarna v Al-Awadi* (n 47) [10-11].

<sup>71</sup> See for instance Article 5 UNCJIS; Xiaodong Yang, *State Immunity in International Law* (CUP 2012) 6.

<sup>72</sup> See ILC, ‘Report of the International Law Commission on the Work of its 32nd Session’ (5 May–25 July 1980) 149, stating that ‘in the general practice of States as evidence of customary law, there is little doubt that a

Convention on the Jurisdictional Immunity of States and their Property ('UNCJIS' or 'UN Convention').<sup>73</sup> The UN Convention opened for signature in 2005, but still has to enter into force.<sup>74</sup> The rule of State immunity covers administrative, civil, and criminal proceedings (jurisdictional immunity), as well as enforcement measures (enforcement immunity).<sup>75</sup> This principle applies to all States and is best expressed by the doctrine of *par in parem non habet imperium* (Latin: an equal has no power over its equal) which reflects the sovereign equality of States as a central pillar of the international legal order. As Lord Browne-Wilkinson put it in *Ex Parte Pinochet* (No. 3):

[It] is a basic principle of international law that one sovereign State (the [receiving] State) does not adjudicate on the conduct of a foreign State. The foreign State is entitled to procedural immunity from the processes of the [receiving] State. This immunity extends to both criminal and civil liability.<sup>76</sup>

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general rule of State immunity has been firmly established as a norm of customary international law'; Peter Malanczuk, *Akehurst's modern introduction to international law* (7 edn, Routledge 1997) 118; Article 38(1) of the ICJ Statute refers to 'international custom, as evidence of a general practice accepted as law,' as a source of international law. Customary international law arises if two conditions are met: state practice and *opinio juris*. State practice could be created by multilateral treaties if they are 'fundamentally norm-creating character' such as could be regarded as forming the basis of a general rule of law. The ICJ has required that practices amount to a 'constant and uniform usage' or be 'extensive and virtually uniform' to be considered binding. After a practice has been established, it must be accepted as *opinio juris sive necessitatis* (English: 'opinion that an act is necessary by rule of law'). In the *North Sea Continental Shelf* cases, the ICJ stated that the practice in question must have 'occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.' See *North Sea Continental Shelf* cases (*Federal Republic of Germany v Denmark*; *Federal Republic of Germany v The Netherlands*) (Judgment) [1969] ICJ Rep [72, 73-75]; ILC, *Yearbook* (Law Com No 231, 1979) [23]. In this regard the ILC observed that customary international law on State immunity had developed 'principally and essentially out of the judicial practice of States on the matter, although in actual practice other branches of the government, namely, the executive and the legislature, have had their share in the progressive evolution of rules of international law.'

<sup>73</sup> Parallel to these codification efforts on the international level, some states enacted national legislation on sovereign immunity, including the USA with its Foreign Sovereign Immunity Act (FSIA). Other states include the UK, Australia, Canada, and South Africa. States that for whatever reasons have forgone the opportunity to pass national legislation rely on international custom to determine the scope of immunity which foreign states might claim. In doing so, most states – or, to be more precise, their courts – assume that sovereign immunity serves as the basic rule until the existence of an exception has been proven. See UK, State Immunity Act 1978, 17 ILM (1978) 1123; Canada, State Immunity Act 1982, 21 ILM (1982) 798; Australia, Foreign States Immunity Act 1985, 25 ILM (1986) 715; South Africa, Foreign States Immunity Act, reprinted in Ernest K Bankas, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts* (Springer 2005) 455 ff.

<sup>74</sup> As of April 2013, UNCJIS has 28 signatories, whereas 13 instruments of ratification have been deposited and as required by Article 30, will only come into force when ratified by 30 States as stated in Article 6 UNCJIS.

<sup>75</sup> Article 5 UNCJIS; See for definition of 'state,' Article 2(1)(b)(i-iv) UNCJIS.

<sup>76</sup> *R. v Bow Street Metropolitan Stipendiary Magistrate & Others, ex p. Pinochet Ugarte* (no 3) [2000] 1 AC 147.



This principle stems directly from the sovereign equality of States, which means that one State shall not interfere with the internal matters of another State.<sup>77</sup> Therefore a State cannot be subjected to another State's judicial or enforcement jurisdiction.<sup>78</sup>

It has become generally accepted that the immunity of States in civil proceedings is not absolute.<sup>79</sup> As reflected in the majority of cases on State immunity concerning immunity from jurisdiction, States continue to enjoy immunity for public acts, but not for private acts. As far as the immunity from execution is concerned, the restrictive approach looks at the purpose of the property to be executed.

The exact scope of the customary restrictive State immunity rule remains opaque due to divergent interpretations by national and international courts. The UN Convention can be seen as a major step towards uniformity and enhanced legal certainty in the area of law of State immunity as it intends to achieve 'the codification and development of international law and the harmonization of practice in this area,' embracing the restrictive approach to State immunity.<sup>80</sup> Despite the fact that UNCJIS has not yet entered into force, it is often, but not without controversy as will be discussed below, regarded as reflecting customary international law.<sup>81</sup> Notably, in the *Cudak v Lithuania* case the ECtHR concluded that Article 11 UNCJIS (dealing with immunity in employment disputes) reflects a rule of the customary international law,<sup>82</sup> observing that:

it is a well-established principle of international law that, even if a State has not ratified a treaty, it may be bound by one of its provisions in so far as that provision reflects customary international law, either "codifying" it or forming a new customary rule.<sup>83</sup>

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<sup>77</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) Article 2.

<sup>78</sup> An important manifestation of the principle of state sovereign immunity is that national courts do not have jurisdiction over other states and is laid down in art. 5 of the UNCSI: 'A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention.'

<sup>79</sup> See generally Malcolm N Shaw, *International Law* (6<sup>th</sup> edn, CUP 2008) 701.

<sup>80</sup> Preamble UNCJIS.

<sup>81</sup> Roger O'Keefe and Christian J. Tams, 'General Introduction' in Roger O'Keefe and Christian J. Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (OUP 2013) xli; See generally, MPA. Kindall, 'Immunity of States for Non-commercial Torts: A Comparative Analysis of the International Law Commission's Draft' [1987] *California Law Review* 1849.

<sup>82</sup> See *Cudak v Lithuania*, (App no 15869/02) ECHR 23 March 2010 [66-67]; According to the Court in *Sabeh El Leil v France* (App no 34869/05) ECHR 29 June 2011 [58] the entire UN Convention reflects customary international law.

<sup>83</sup> *Cudak v Lithuania* (n 82) [66]. See also the *North Sea Continental Shelf* cases (n 72) [71].



The low number of States that have ratified UNCJIS and the fact that it has not entered into force, therefore need not be an indication of ‘the significance of a text’;<sup>84</sup> rather it is ‘acknowledged as an accurate, extensive, learned and systematic reflection of this field of the law, and is widely used as a basis for legal practice and scholarly reflection.’<sup>85</sup>

The following sections will set out the legal framework of State immunity. Firstly, immunity from jurisdiction will be discussed (2.2.1), including the labour contract exception (2.2.1.1) and the territorial tort exception (2.2.1.2). Secondly, the discussion will turn to immunity from execution (2.2.2). Additionally, the waiver of State immunity will be briefly set out (2.2.3). Finally, with the help of the legal framework, Norah’s case will be analysed in the event she may file a complaint against State Y with the Dutch courts (2.2.4).

### **2.2.1. Immunity from Jurisdiction**

In order to understand who enjoys State immunity it is important to consider the definition of State and how this is related to diplomatic missions. In the UN Convention the term State is used to convey

- (i) the State and its various organs of government;
- (ii) constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity;
- (iii) agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State;
- (iv) representatives of the State acting in that capacity.<sup>86</sup>

Embassies and diplomatic agents (including ambassadors) belong to the categories under Articles 2(1)(b)(i) and 2(1)(b)(iv) UNCJIS respectively.<sup>87</sup> Thus under Article 2(1)(b)(i) UNCJIS, consular posts, delegations, diplomatic missions, and permanent missions in their representative capacity all fall under the category of the various organs of government of the

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<sup>84</sup> O’Keefe & Tams (n 81) xli.

<sup>85</sup> Peter-Tobias Stoll, ‘State Immunity’ [2011] MPEPIL <<http://opil.ouplaw.com/home/epil>> accessed 10 July 2013.

<sup>86</sup> Article 2(1)(b) UNCJIS.

<sup>87</sup> ILC, Commentary on ILC Draft Articles on Jurisdictional Immunities of States and Their Property, reproduced in *Yearbook of the International Law Commission 1991*, vol. II(2), 13, Article 2, paras 6, 10, 17-18 [‘ILC Commentary’].



State.<sup>88</sup> Furthermore, if proceedings are started against ambassadors, heads of missions, diplomatic agents or consular officers in their representative capacity (*ratione materiae*) under Article 2(1)(b)(v) UNCJIS,<sup>89</sup> they can be held to be proceedings against the State.<sup>90</sup>

State immunity from jurisdiction essentially refers to the restrictions imposed on the adjudicatory power of the national courts in respect of foreign States.<sup>91</sup> While State immunity from criminal jurisdiction is generally considered to be absolute,<sup>92</sup> States are only accorded immunity from civil jurisdiction in respect of their sovereign acts (Latin: *acta jure imperii*), and not in respect of commercial transactions or ‘private law’ activities (Latin: *acta jure gestionis*). This customary international law immunity is *inter alia* formulated in Article 5 and Articles 10 to 17 UNCJIS which represent ‘the heart of the restrictive doctrine of State immunity.’<sup>93</sup> Since this report is concerned with labour disputes and abuse of embassy employees, only Article 11 UNCJIS on contracts of employment and Article 12 UNCJIS on the territorial tort exception are likely to be relevant for our purposes.<sup>94</sup>

### 2.2.1.1. Labour Disputes

While some national courts have held that employment disputes with employees of an Embassy are *always* covered by State immunity,<sup>95</sup> there seems increasing agreement that today disputes over contracts of employment of Embassy personnel will at times be covered by the State immunity rule, and at times not.<sup>96</sup> A range of factors play a role in the qualification of labour contracts as public or as private State acts. These include the nature of the employment, the subject-matter of the proceeding, the nationalities or permanent residence of the parties involved and the terms of the labour contract. However, these factors and especially the question which factor prevails remains unclear since the practice of

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<sup>88</sup> *ibid* paras 6, 10.

<sup>89</sup> *ibid* paras 17-18: note that the 1991 Article 2(1)(b)(v) is Article 2(1)(b)(iv) in the 2004 UN Convention.

<sup>90</sup> *ibid* paras 17-18.

<sup>91</sup> August Reinisch, ‘European Court Practice Concerning State Immunity from Enforcement Measures’ [2006] 17 *Eur J Int Law* 803; see also Articles 5 and 18 to 21 UNCJIS respectively.

<sup>92</sup> Hazel Fox and Philippa Webb, *The Law of State Immunity* (3<sup>rd</sup> edn, OUPress 2013) 89.

<sup>93</sup> Rosanne van Alebeek, ‘Part III: Proceedings in which State Immunity cannot be invoked’ in Roger O’Keefe and Christian J Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (OUP 2013) 153.

<sup>94</sup> *ibid* 158.

<sup>95</sup> Joanne Foakes and Roger O’Keefe, ‘Article 11’ in Roger O’Keefe and Christian J. Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (OUP 2013) 187.

<sup>96</sup> *ibid* 184.



national courts is not uniform.<sup>97</sup> In his Opinion in the ECJ *Mahamdia* case Advocate General Mengozzi even considered that “[t]hese national differences are so pronounced that any codification at international level is very difficult and may even cast doubt on the actual existence of a rule of customary international law in this regard which is any more than an undeniable tendency”<sup>98</sup>.

Nevertheless, Article 11 UNCJIS is increasingly held to reflect customary international law by European courts, including the ECtHR,<sup>99</sup> and in this report it will be used as a template to explain the most relevant issues concerning disputes arising out of contracts of employment. It should, however, at the outset be noted that the customary law status of Article 11 is not uncontroversial. The Advocate-General of the European Court of Justice (ECJ) in the case of *Mahamdia v Algeria* disagreed emphatically with the position of the ECtHR on this point, writing that “national differences are so pronounced that any codification at international level is very difficult [...] and may even cast doubt on the actual existence of a rule of customary international law in this regard which is any more than an undeniable tendency.”<sup>100</sup>

Under Article 11 UNCJIS, a State cannot invoke State immunity for labour cases when the labour is performed in the territory of the host (forum) State, unless one of the exceptions under paragraph 2 applies:

1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.
2. Paragraph 1 does not apply if:
  - (a) the employee has been recruited to perform particular functions in the exercise of governmental authority;
  - (b) the employee is:
    - (i) a diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations of 1961;
    - (ii) a consular officer, as defined in the Vienna Convention on Consular Relations of 1963;

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<sup>97</sup> Fox & Webb (n 92) 439 ff.

<sup>98</sup> C-154/11 *Mahamdia v Algeria* (n **Error! Bookmark not defined.**), Opinion of AG Mengozzi [24].

<sup>99</sup> See for example *Sabeh El Leil v France* (App no 34869/05) ECHR 29 June 2011, *Cudak v Lithuania* (n 82) [69], *Fogarty v UK* (App no 37112/97) ECHR 21 November 2011; Foakes & O’Keefe (n 95) 185.

<sup>100</sup> C-154/11 *Mahamdia v Algeria* (n **Error! Bookmark not defined.**), Opinion of AG Mengozzi [24].



- (iii) a member of the diplomatic staff of a permanent mission to an international organization or of a special mission, or is recruited to represent a State at an international conference; or
- (iv) any other person enjoying diplomatic immunity;
- (c) the subject-matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;
- (d) the subject-matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State;
- (e) the employee is a national of the employer State at the time when the proceeding is instituted, unless this person has the permanent residence<sup>101</sup> in the State of the forum; or
- (f) the employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

In sum, four factors are relevant: (1) the type of activities performed by the employee; (2) the subject-matter of the proceedings; (3) the nationality of the employee and his or her residence status; and (4) an agreement between the employer State and the employee to exclude jurisdiction from the forum State. We discuss these factors in turn:

*First*, based on Articles 11(2)(a) and 11(2)(b) UNCJIS, the immunity from jurisdiction of the sending State should be upheld if the embassy employee is engaged in inherently sovereign activities.<sup>102</sup> Thus if embassy employees are diplomats or employed as ‘private secretaries, code clerks, interpreters, translators and other persons entrusted with functions related to State security or basic interests of the State’<sup>103</sup> their tasks would likely include inherently sovereign activities. Employees performing menial routine functions related to administration, clerical duties and maintenance, as well as guards and chauffeurs, are not covered by this aspect of the immunity rule<sup>104</sup> since they are not tasked with duties inherent to the exercise of governmental authority.<sup>105</sup> By their performance of ‘menial duties, [they] are little different from their counterparts in the private sector and so should be entitled to sue.’<sup>106</sup> In the *Moroccan Secretary* case the Dutch Supreme Court ruled that a secretary, working for

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<sup>101</sup> Note that the addition of the permanent residence is an important and recent change, since the ILC Draft Articles from 1991.

<sup>102</sup> Foakes & O’Keefe (n 95) 188.

<sup>103</sup> ILC Commentary (n 87) art 11(2)(a) UNCJIS.

<sup>104</sup> Foakes & O’Keefe (n 95) 188.

<sup>105</sup> *Sabeh El Leil v France* (n 99) [61].

<sup>106</sup> Richard Garnett, ‘State Immunity in Employment Matters’ [1997] 46 International and Comparative Law Quarterly 81, 84.





the Moroccan embassy in the Netherlands was not hired for a function to exercise governmental authority. Her work as a secretary was not of a diplomatic nature nor closely linked to State sovereignty but merely auxiliary to it.<sup>107</sup> And in *Barrandon v USA*, the French Court of Cassation also excluded a nurse and medical secretary at an Embassy from the category of workers engaged in sovereign activity. Her tasks, the Court held, “did not give her any special responsibility for the performance of the public service of the Embassy so that her dismissal constituted an ordinary act of administration”.<sup>108</sup>

*Second*, States may enjoy immunity also in respect of labour disputes with employees that are *not* involved in sovereign activities due to the subject-matter of the proceedings (Article 11(2) sub c and d UNCJIS). While claims concerning financial aspects, such as remuneration or unpaid wages, are generally allowed to proceed,<sup>109</sup> immunity will normally be upheld in case the court would trespass on the foreign State’s sovereignty by examining organizational or security policies of a foreign State.<sup>110</sup>

*Third*, State immunity will apply when the employee has the nationality of the sending State *and* has not acquired permanent residency in the receiving State (Article 11(2) sub e UNCJIS).<sup>111</sup> Since the secretary of the Moroccan Embassy, mentioned above, had her permanent residency in the Netherlands, Morocco could not successfully claim immunity even though the employee had Moroccan nationality.<sup>112</sup>

*Fourth*, a State and an employee may always agree in a(n) (employment) contract, that the State will enjoy immunity from the jurisdiction of the forum State, in excess of the immunity provided for by Article 11 UNCJIS. In the ILC Commentary we read that Article 11(2)(f) “provides for the freedom of contract, including the choice of law and the possibility of a chosen forum or *forum prorogatum*”.<sup>113</sup> This explanation, however, does not fully clarify matters. Should a State and an employee agree to assign exclusive jurisdiction to the courts of the employer State, this would be a question of jurisdiction that precedes the immunity question. Article 11(2)(f) UNCJIS seems only relevant where there *is* jurisdiction, but a

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<sup>107</sup> *Moroccan Secretary* case, LJN BK6673 [2013] NLHR.

<sup>108</sup> *Barrandon v United States of America*, France, Court of Cassation, 10 November 1998, 116 ILR 622, 624.

<sup>109</sup> Foakes & O’Keefe (n 95) 189

<sup>110</sup> *ibid* 189.

<sup>111</sup> *Moroccan Secretary* case (n 107).

<sup>112</sup> *Moroccan Secretary* case (n 107).

<sup>113</sup> ILC Commentary (n 87) art 11, para 13.



contract between the State and the employee provides that the State will enjoy immunity in respect of any claims following from the labour contract.

By way of conclusion, brief consideration of the ECJ preliminary ruling in *Mahamdia v Algeria* is called for.<sup>114</sup> The case turned on a jurisdiction clause in an employment contract between the State of Algeria and Mr. Mahamdia – a dual Algerian and German national employed as driver at the Algerian Embassy in Berlin – assigning exclusive jurisdiction to Algerian courts in the event of a dispute over the contract. The ECJ ruled that the exclusive jurisdiction clause violated EU Regulation No 44/2001 which provides for jurisdiction over employment disputes to the courts of the State in which the “establishment” of an employer domiciled outside the EU, is situated, with the purpose of ensuring protection of the employee. In order to come to this decision, the ECJ had to assess the scope of the rule of State immunity for labour disputes, since it proceeded from the understanding that the Regulation did only apply in as far as a labour dispute was not covered by the State immunity rule.<sup>115</sup> Interestingly, the ECJ adopted an approach largely along the lines of Article 11 UNCJIS, but without direct reference to it. The ECJ ruled that a State acts *jure gestionis* “where it concludes contracts of employment with persons who do not perform functions which fall within the exercise of public powers”.<sup>116</sup> It further explained that no immunity applies “where the court seized finds that the functions carried out by that employee do not fall within the exercise of public powers or where the proceedings are not likely to interfere with the security interests of the State”.<sup>117</sup>

In sum, the *Mahamdia* ruling limits the freedom of national courts of EU states to recognise forum choices in an employment contract if the clause limits access to court of an employee, where the employer would not enjoy immunity under public international law. It is interesting to compare the ruling to Article 11(2)(f) UNCJIS in that the latter explicitly allows for contractual deviation. It could be argued that the ECJ has elevated Regulation 44/2001 to a ‘public policy consideration’ in the sense of Article 11(2)(f) that forbids EU states to recognise these forum choices, regardless of their acceptability under public international law.

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<sup>114</sup> C-154/11 *Mahamdia v Algeria* (n **Error! Bookmark not defined.**).

<sup>115</sup> *ibid* [53-57].

<sup>116</sup> *ibid* [49].

<sup>117</sup> *ibid* [56].

### 2.2.1.2. Territorial Tort Exception

In addition to the private–public distinction, the tort exception has also played an important role in limiting the immunity of a State in respect of tortious activity resulting in physical injury.<sup>118</sup> This ‘tort exception’ has found expression in Article 12 of the UNCJIS:

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.<sup>119</sup>

It is not without debate whether this territorial tort exception reflects customary international law and its scope is controversial.<sup>120</sup> While the abovementioned case law shows that the ECtHR considers the UN Convention to reflect customary international law, the ICJ has avoided answering this question as seen in *Germany v Italy*.<sup>121</sup> The relevance of the territorial tort exception arises in the case where embassy personnel are subjected to physical abuse amounting to torts and the sending State would somehow bear legal responsibility in this regard.<sup>122</sup>

<sup>118</sup> In general see Christoph H Schreuer, *State Immunity: Some Recent Developments* (CUP 1998) 93.

<sup>119</sup> Article 12 UNCJIS; Foakes & O’Keefe (n 95) 209; Article 11 of the 1972 European Convention on State Immunity. The latter text reads as follows: ‘A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.’

<sup>120</sup> Hazel Fox, *The Law of State Immunity*, (2<sup>nd</sup> edn, OUP 2008), 569–91, 577–79.

<sup>121</sup> *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (Merits) [2012] ICJ Reports 2012 [69].

<sup>122</sup> Summarily put, the territorial tort exception requires a proceeding relating to pecuniary compensation, alleging the States’ tortious liability as the occupier of its diplomatic, consular, or cognate premises, or alleging its liability for death or personal injury or damage to or loss of tangible property. It is required that these acts or omissions occur in the territory of the receiving State are attributable to its agents or officials of the State exercising their official functions (including the Head of State and diplomatic agents). Even though, Article 12 UNCJIS mainly seems to be concerned with injuries to persons or damage to tangible property involved in ‘traffic accidents, such as moving vehicles, motor cycles, locomotives or speedboats,’ (This has also been acknowledged in *Jurisdictional Immunities of the State* (n 121) para 64) and it also covers ‘intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination.’ See Yang (n 71) 202. Therefore, the scope of this provision is not restricted to only ‘accidents occurring routinely within the territory of the [receiving] State’ or insurable risks as the ILC commentary put it (ILC Commentary (n 87) art 12, para 4). The territorial tort exception can be distinguished from the exception of Article 11 UNCJIS in that it does not depend on whether the impugned act was performed in the exercise public or private authority. The law of the place where the delict (tort) was committed creates a considerable territorial

### 2.2.2. Immunity from Execution

Immunity from execution is attached to State property and protects it against judicially ordered measures such as arrest, attachment, and execution.<sup>123</sup> These measures of constraint cover “both interlocutory, interim or pre-trial measures prior to final judgments and the execution or enforcement of judgments [...] [for the purpose of] guaranteeing payment of debt [...] or of satisfying a final judgment rendered by the competent court.”<sup>124</sup>

Immunity from execution does not automatically flow forth from immunity from jurisdiction,<sup>125</sup> and is a distinct matter with different applicable rules of customary international law, as reflected in the relevant provisions of UNCJIS.<sup>126</sup> The UNCJIS uses a restrictive approach: Article 19(c) makes an exception to the prohibition of execution in respect of property that “is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum” (the other exceptions are the existence of consent<sup>127</sup> and earmarked property.<sup>128</sup> One can distinguish between two main types of enforcement measures: prior to or after the final judgment.<sup>129</sup> In this report, the latter type will be discussed. In order for there to be a situation of immunity from execution there has to be an enforceable judgment and the property has to be available for execution under international law.<sup>130</sup>

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connection ‘regardless of the motivation of the act or omission, whether intentional or even malicious, or whether accidental, negligent, inadvertent, reckless or careless, and indeed irrespective of the nature of the activities involved.’ (ILC Commentary (n 87) para 8).

<sup>123</sup> Chester Brown and Roger O’Keefe, ‘Introduction to Part IV’ in Roger O’Keefe and Christian J. Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (OUP 2013) 287.

<sup>124</sup> Yang (n 71) 343.

<sup>125</sup> Gerhard Hafner, ‘Historical Background to the Convention’ in Roger O’Keefe and Christian J. Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (OUP 2013) 13.

<sup>126</sup> Part IV, Articles 18-21 UNCJIS deal with execution of immunity. While the UNCJIS is the most relevant treaty for the purpose of this report, the European Convention on State Immunity (adopted 16 May 1972, entered into force 11 June 1976) 495 UNTS 182 [‘ECSI’] also plays a minor role. The ECSI has been ratified by eight states only. The UNCJIS is the intended successor for the ECSI. In the ECSI an absolute approach towards immunity from execution can be found, requiring consent of the owner state in order to execute under Article 23 ECSI. The supplemental optional provisions that were created later, allow for limited possibilities of execution. See article 26 ECSI; Hafner (n 125) 15.

<sup>127</sup> Article 19(a) UNCJIS.

<sup>128</sup> Article 19(b) UNCJIS.

<sup>129</sup> Yang (n 71) 345.

<sup>130</sup> See e.g. Article 19 UNCJIS.



In principle, immunity from execution covers any property owned, possessed or controlled by a State,<sup>131</sup> which includes ‘immovable, land, premises, movable property, and all sorts of rights including intellectual property rights and bank accounts.’<sup>132</sup> The existence of immunity from execution is dependent on the purpose of the property facing enforcement measures.<sup>133</sup> The distinction between sovereign and non-sovereign purposed property should be made,<sup>134</sup> as there is a proclivity to deny State immunity for property purposed for commercial activities.<sup>135</sup> In this respect, Article 19(c) UNCJIS provides that immunity from execution does not apply when

it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.<sup>136</sup>

The UN Convention indicates what type of property is considered in use for government non-commercial purposes in Article 21(1) UNCJIS:<sup>137</sup>

The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19, subparagraph (c):

- (a) property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences.

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<sup>131</sup> Chester Brown and Roger O’Keefe, ‘Article 19’ in Roger O’Keefe and Christian J. Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (OUP 2013) 316.

<sup>132</sup> Stoll (n 85) para 52.

<sup>133</sup> Reinisch (n 91) 803.

<sup>134</sup> According to Yang (n 71) 370-372, the purpose test is applied in *inter alia* the Philippine embassy case, and at German, Swiss, Austrian, Italian, French, South African, Belgian, Greek, and Dutch courts.

<sup>135</sup> Yang (n 71) 343.

<sup>136</sup> Article 19(c) UNCJIS.

<sup>137</sup> See also Chester Brown and Roger O’Keefe, ‘Article 21’ in Roger O’Keefe and Christian J. Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (OUP 2013) 340, referring to consular posts, bank accounts of *inter alia* diplomatic missions: ‘What Article 21(1)(a) in effect does is to render by definition immune from post-judgment measures of constraint any property of a State used or intended for use in the performance of the functions of the diplomatic mission etc. of the State insofar as such property is not already covered by the special immunity regimes of diplomatic and cognate international law.’



- (b) property of a military character or used or intended for use in the performance of military functions;
- (c) property of the central bank or other monetary authority of the State;
- (d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale
- (e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.

Generally speaking, States tend to follow the rule expressed in Article 21 UNCJIS by considering even potentially mixed bank accounts as having a sovereign purpose, and therefore forced execution is not allowed. This was expressed by the German Federal Constitutional Court in the *Philippine Embassy Bank Account* case,<sup>138</sup> which has been followed in subsequent cases.<sup>139</sup> It has been observed that overall, ‘courts have remained adamantly opposed to the taking of forcible measures against foreign embassy bank accounts, and have generally erred on the side of being over-cautious and over-protective.’<sup>140</sup> Therefore, embassy accounts are now generally seen to be protected by absolute immunity.<sup>141</sup>

Similarly, all movable and immovable diplomatic property<sup>142</sup> is considered to be absolutely immune from execution.<sup>143</sup> There is agreement that the operation of a diplomatic mission is a quintessentially sovereign activity<sup>144</sup> and therefore diplomatic premises, diplomatic bank accounts and so on should be shielded from measures of constraint as these would harm the functioning of the missions.<sup>145</sup> This rests on customary international law as well as treaties relating to diplomatic immunities<sup>146</sup> and on the law of State immunity which stretches the scope of protection of diplomatic property mentioned to include embassy bank accounts specifically.

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<sup>138</sup> *Philippine Embassy Bank Account* case, Germany, Federal Constitutional Court, 13 December 1977, 46, BVerfG, 342; 65 ILR 146, 150, 164.

<sup>139</sup> Stoll (n 85) para 65.

<sup>140</sup> Yang (n 71) 407.

<sup>141</sup> Yang (n 71) 409.

<sup>142</sup> Diplomatic property is not to be confused with diplomatic immunity. Brown & O’Keefe (n 137) referring to consular posts, bank accounts of *inter alia* diplomatic missions: ‘What Article 21(1)(a) in effect does is to render by definition immune from post-judgment measures of constraint any property of a State used or intended for use in the performance of the functions of the diplomatic mission etc. of the State insofar as such property is not already covered by the special immunity regimes of diplomatic and cognate international law.’

<sup>143</sup> Yang (n 71) 405.

<sup>144</sup> Yang (n 71) 404-405.

<sup>145</sup> Yang (n 71) 404-405.

<sup>146</sup> Articles 22, 23, 24, 30 and 45 VCDR on inviolability and protection of diplomatic premises, property and archives.



Articles 18 and 19 UNCJIS provides for the option to allocate or earmark property for enforcement purposes. Such earmarking would give a degree of certainty, as it would allow the court and litigants to bypass the public or private purpose test.<sup>147</sup> The certainty provided by earmarking also serves to maintain friendly relations, as denial of immunity of execution may cause diplomatic friction.<sup>148</sup>

In practice, the immunity from execution leaves little room for embassy employees to ensure enforcement in the receiving State, in case they would get a favourable judgment at the receiving State courts. They will need to locate property of the sending State within the receiving State that is in use “for other than government non-commercial purposes”. Furthermore, waiver of the immunity provides for another possibility as will be discussed below.<sup>149</sup>

### 2.2.3. Waiver

A State may consent to the exercise of jurisdiction, which is also known as a waiver. It is a voluntary submission<sup>150</sup> which requires that the State consents explicitly as is provided in Article 7 UNCJIS.<sup>151</sup> Both immunity from jurisdiction and immunity from execution<sup>152</sup> can be waived by the receiving State. When one is waived, the other immunity continues to exist, until the State expresses explicit consent for it to be waived. In the absence of explicit waiver such consent to the exercise of jurisdiction over a State by the receiving State’s courts cannot simply be presumed.<sup>153</sup> As a consequence of the UNCJIS’s presumption of lack of consent to jurisdiction on the part of a defendant State, Article 7(1) UNCJIS requires that, for the purposes of the provision, a State’s consent to the exercise of jurisdiction over it by a court of another State be express.<sup>154</sup> Also, as the ILC commentary puts it, there is ‘no room for implying the consent of an unwilling State which has not expressed its consent in a clear [...]’

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<sup>147</sup> Yang (n 71) 394.

<sup>148</sup> Yang (n 71) 362; *Philippine Embassy Bank Account* case (n 138).

<sup>149</sup> See Reinisch (n 91) 803.

<sup>150</sup> Yang (n 71) 316.

<sup>151</sup> See cf. art 2 of the ECSI.

<sup>152</sup> Articles 18 and 19 UNCJIS; Article 23 ECHR.

<sup>153</sup> ILC Commentary (n 87) art 7, paras 3-5.

<sup>154</sup> Roger O’Keefe ‘Article 7’ in Christian J. Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (OUP 2013) 116.

manner.’<sup>155</sup> Therefore, Article 7 UNCJIS demands that the consent should be explicit.<sup>156</sup> The ILC commentary further elaborates that any theory of ‘implied consent [...] should be viewed not as an exception in itself, but rather as an added explanation or justification for an otherwise valid and generally recognized exception.’<sup>157</sup> Explicit consent can be expressed in only three ways as enumerated in Article 7(1) (a) to (c) UNCJIS.<sup>158</sup> Consent given by any other means will be ineffective for the purposes of the UNCJIS and the State giving such consent will retain its presumptive immunity embodied in Article 5 UNCJIS.<sup>159</sup>

It is important to mention that Article 7 UNCJIS has to be read alongside Article 20 UNCJIS according to which consent to exercising jurisdiction does not imply consent to taking of pre- or post-judgement measures of constraint for the purposes of Articles 18 and 19 UNCJIS as immunity from jurisdiction is different from immunity from measures of constraint.<sup>160</sup>

A State cannot invoke immunity in a case where it itself instituted the proceedings, intervened in such proceedings, or has taken any other step relating to the merits (Article 8(1) UNCJIS).<sup>161</sup> However ‘failure on the part of a State to enter an appearance in proceeding before a court of another State [should] not be interpreted as consent by the former State to the exercise of jurisdiction by the court.’<sup>162</sup> Lastly, consent also plays a part in the context of counterclaims. A State cannot invoke immunity where it instituted a proceeding before a court of another State and a counterclaim is lodged which arises out of the same legal relationship or facts (Article 9 (1) and (2) UNCJIS) and conversely where a State advances a counterclaim

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<sup>155</sup> ILC Commentary (n 87) art 7, para 8.

<sup>156</sup> ILC Commentary (n 87) art 8, para 1, see cf. art 8(4) UNCJIS.

<sup>157</sup> ILC Commentary (n 87) art 7, para 8.

<sup>158</sup> Article 7 (a) International agreement: such an expression of consent to jurisdiction of a court of another State can come by way of a provision in an international agreement to which the consenting state is party (see cf. Article 2(a) ECSI) but just to the extent prescribed in that agreement and only to that extent. (ILC Commentary (n 87) art 7, para 10); (b) Written Contract: this consent to exercise foreign jurisdiction comes through a written contract to which the consenting State is party (see cf. Article 2(b) ECSI) but the contractual expression of such a consent to proceedings will depend on the proper law of the contract and any generally applicable principles of agency or relevant special rules cognizable by the court; (c) Declaration before the court or written communication: such consent can be conveyed, to proceedings already initiated in a court of another State, an oral declaration before the court on behalf of the respondent State or a written communication on its behalf relayed ‘through diplomatic channels or any other generally recognized channels of communication (ILC Commentary (n 87) art 7, para 9), see cf. Article 2(c) ECSI). See Roger O’Keefe, ‘Article 7’ in Roger O’Keefe and Christian J. Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (OUP 2013) 118-121.

<sup>159</sup> O’Keefe (n 158) 116.

<sup>160</sup> Brown & O’Keefe (n 123) 287-328.

<sup>161</sup> Cf. Article 3(1) ECSI.

<sup>162</sup> Article 8(4) UNCJIS.





in proceedings in a foreign court in response to a claim brought against it by another party to the proceedings (Article 9(3) UNCJIS).<sup>163</sup>

In sum, if the receiving State were to waive its immunity of jurisdiction and immunity of execution by explicit consent, the embassy employees would face no difficulties in having their claim heard by the receiving State's courts; and if successful on the merits, the judgment may then be enforced.

#### **2.2.4. Interim Conclusion: Application of the Legal Framework**

Based on Articles 11(2)(a) and 11(2)(b) UNCJIS, the immunity from jurisdiction of State Y should only be upheld if through her employment at the embassy Norah was engaged in inherently sovereign activities. Still, the category of employees entrusted with functions related to State security or the basic interests of the State is not clearly defined, and it is not evident that Norah is entrusted with tasks involving inherently sovereign activities. Yet, given that the *Moroccan Secretary*<sup>164</sup> case bears similarities to Norah's case, it is likely that the Dutch courts would consider that Norah's work was also merely auxiliary to the functioning of the embassy of State Y. Moreover, the subject-matter of her claim does not require the court to trespass on the foreign State's sovereignty by examining its organizational or security policies.

Norah has gained permanent residency in the Netherlands, so the fact that she has the nationality of the sending State does not result in the applicability of State immunity (it is important to note though, that had she *not* gained permanent residence, the rule of State immunity *would* apply). Therefore following the rule of customary international law reflected in Article 11 UNCJIS, Norah is likely to be entitled to sue State Y.

Further, given the *Mahamdia v Algeria* case, the clause in Norah's contract which assigns exclusive jurisdiction to the courts of State Y is forbidden under EU legislation and therefore it does not validly exclude Dutch court jurisdiction.

Next, the territorial tort exception is not applicable as Norah suffered no personal injury by physical abuse, attributable to the sending State.

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<sup>163</sup> See cf. article 1(2)(a) ECSI.

<sup>164</sup> *Moroccan Secretary* case (n 107).



Finally, even if Norah manages to secure a favourable judgment by the Dutch courts concerning her unfair dismissal claim, she would face new difficulties in the execution and enforcement of the judgment. Norah would only be able to execute the judgment in the Netherlands if she succeeded in locating non-immune property of State Y in the Netherlands.

### **2.3. ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: THE RIGHT OF ACCESS TO COURT**

It is important to explain at this point that States party to the ECHR are not allowed to grant foreign States and their officials more immunity than required under international law. In a string of cases before the ECtHR, applicants have argued that various international immunity rules violate the right of access to court under Article 6 ECHR.<sup>165</sup> The ECtHR has dismissed the argument, ruling that:

measures taken by a High Contracting Party which reflect generally recognized rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6(1) [of the ECHR].<sup>166</sup>

However, the ECtHR has also recognized that where States provide *more* immunity than required under public international law, Article 6 may in fact be violated. In the *Cudak v Lithuania* case the ECtHR found that Lithuania had granted Poland State immunity in a labour dispute with Ms. Cudak, while under international law the rule of State immunity did not apply since Ms. Cudak had Lithuanian nationality and performed non-sovereign functions at the Embassy. It came to the conclusion that:

by upholding in the present case an objection based on State immunity and by declining jurisdiction to hear the applicant's claim, the Lithuanian courts, in failing to preserve a reasonable relationship of proportionality, overstepped their margin of appreciation and thus impaired the very essence of the applicant's right of access to a court.<sup>167</sup>

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<sup>165</sup> The right of access to court is inherent in article 6, cf. *Golder v United Kingdom* (App no 4451/70) Series A-18.

<sup>166</sup> *Fogarty v UK* (n 99) [36].

<sup>167</sup> *Cudak v Lithuania* (n 82) [76].



The *Cudak* principle has since been applied in other cases like *Guadagnino v Italy and France*,<sup>168</sup> *Sabeh El Leil v France*,<sup>169</sup> and *Oleynikov v Russia*.<sup>170</sup> The consequence of this jurisprudence is that individuals who see their claim dismissed in the national courts of a Council of Europe State, while arguably no immunity exists under international law, may bring a successful claim to the ECtHR.

## 2.4. INTERIM CONCLUSION

Diplomatic immunity and State immunity are distinct and differ in applicability and in their scope of protection. Diplomatic protection granted to diplomats ensures that they are able to carry out their functions in the receiving State without interference by the receiving state. A functioning diplomat enjoys personal immunity while a former diplomat only enjoys protection for acts undertaken in public capacity during his or her function. Diplomatic immunity can be divided into two types: immunity from jurisdiction where diplomats are immune from both civil and criminal jurisdiction, and immunity from execution where the personal assets of a diplomat are immune from enforcement measures. However, the immunity of the diplomat can be waived by the sending State or he or she can be declared *persona non grata* which essentially means that the diplomat is sent back to the sending State by the receiving State. Based on the legal analysis of diplomatic immunity, Lori can only bring a suit under the residual immunity for judicial relief against the Ambassador if she waits until his term inside the Netherlands is expired. Filing a complaint against an accredited Ambassador would not be an option as in this case he would enjoy absolute immunity in not only criminal proceedings but also in a civil or administrative case. For the Netherlands as receiving State, possible – yet less likely – steps would be to give a notification of *persona non grata* or to ask State X to waive the Ambassador's immunity.

As concerns State immunity, it flows forth from the sovereign equality of States. Similarly to diplomatic immunity it can be divided into immunity from jurisdiction and immunity from execution, both of which are generally applied restrictively. While the exceptions to the first are mainly governed by Article 11 and 12 UNCJIS, immunity from

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<sup>168</sup> *Guadagnino v Italy and France* (App no 2555/03 ) ECHR 2011.

<sup>169</sup> *Sabeh El Leil v France* (App no 334869/05) ECHR 2011.

<sup>170</sup> *Oleynikov v Russia* (App no 36703/04 ) ECHR 2013.



execution falls under Articles 18 and 19 UNCJIS. Therefore, an employee of an embassy will face different legal issues depending on which immunity is relevant to the issue at hand. Nonetheless, in practice the results may be the same: where there is immunity from jurisdiction, no judgment by the foreign courts can be passed. Where there is no immunity from jurisdiction, States can invoke immunity from execution and it may be difficult to have the judgment enforced; thus in the end, even a favourable judgment may leave a litigating employee with empty hands. For Council of Europe states, it is moreover important to note that they will not be able to grant foreign States and their officials more immunity than required by international law. Considering disputes arising from her contract of employment, Norah would be able to bring her case to the Dutch courts based on the menial nature of her tasks as a secretary, her permanent residency in the Netherlands, the nature of her claim which concerns compensation for her alleged unfair dismissal, and the clause assigning exclusive jurisdiction to the Dutch courts. Furthermore, the territorial tort exception does not apply, but there is always the theoretical possibility that State Y waives its immunities by explicit consent.

### **3. SOLUTIONS**

This report will conclude with a discussion of possible solutions and recommendations to the Clients for further courses of action. These may help in preventing the violation of rights committed by diplomats and embassy staff members, as well as improve access of the workers to (legal) assistance and redress.<sup>171</sup>

Firstly, this section will give an overview of existing compensation practices which may be an inspiration for resolving the disputes concerned and mitigate the effects of immunity. The report will consider sending States' Codes of Conduct for Foreign Service civil servants (3.1). However, the most promising operational solutions would be found at the level of the receiving State through the implementation and enforcement of its obligations towards people within its territory (3.2). Finally the benefits and downsides of arbitration as a dispute resolution mechanism will be considered (3.3).

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<sup>171</sup> See also Kartusch (n 5).

### 3.1. THE SENDING STATE

The sending State is first and foremost responsible for ensuring the rights of domestic workers and Embassy personnel, as well as providing access to court and proper prosecution of transgressors. Nonetheless, this report will mainly focus on the receiving State's legal obligations for reasons of effectiveness.<sup>172</sup>

Apart from any legal responsibilities, sending States can help to protect workers through codes of conduct<sup>173</sup> for their representatives in foreign States. Such a code of conduct is generally used to set (ethical) standards and offer guidance for diplomatic missions. By signing a code, the State representatives show their willingness to abide by standards therein while in function. As both an internal tool and a public document of intent, it can be a valuable instrument in the discussion of a State's policy and the problems migrant domestic workers faces on the territory of a receiving State.

By incorporating moral and legal standards, codes of conduct can raise awareness of the issues faced by domestic workers and embassy employees. While in principle they are not binding and also voluntarily enforced by States, receiving States can make acceptance of diplomatic staff conditional upon the existence of an acceptable code of conduct. Also, the receiving State could require that the code of conduct recognizes the perils and abuses faced by domestic and embassy workers in their labour relations. Furthermore, it could also contain a clarification by the sending States of its stance on diplomatic immunity for specific acts. By way of example, the Dutch code of conduct includes the Dutch State's stance on minor traffic offenses, for which diplomats cannot invoke their diplomatic immunity.<sup>174</sup> The Australian code affirms the obligations contained in the Vienna Convention on Diplomatic Relations concerning adherence to the law of the receiving State.<sup>175</sup> Furthermore, codes can contain

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<sup>172</sup> The Council of Europe and EU States operate in a well-defined regional order that allows holding them to account for failures to live up to their legal obligations. Furthermore, the focus on the receiving State was chosen given the disparity between the theory of successfully invoking sending States' responsibility in case of failure of their human rights obligations towards their employees, and the reality wherein this rarely happens.

<sup>173</sup> See for example the USA 'Foreign Affairs Manual' <<http://www.state.gov/m/a/dir/regs/fam/>> accessed 29 May 2013; <<http://www.state.gov/documents/organization/85125.pdf>> accessed 29 May 2013; See also the Dutch 'BZ-gedragscode'

<[http://www.minbuza.nl/binaries/content/assets/minbuza/nl/import/nl/nieuws/2011/08/buitenlandse\\_zaken\\_publiceertrapport\\_over\\_subsidie\\_advies\\_door\\_mariko\\_peters/gedragscode-integriteit-bz](http://www.minbuza.nl/binaries/content/assets/minbuza/nl/import/nl/nieuws/2011/08/buitenlandse_zaken_publiceertrapport_over_subsidie_advies_door_mariko_peters/gedragscode-integriteit-bz)> accessed 10 July 2013.

<sup>174</sup> See also the Dutch code of conduct 'BZ-gedragscode'

<[http://www.minbuza.nl/binaries/content/assets/minbuza/nl/import/nl/nieuws/2011/08/buitenlandse\\_zaken\\_publiceertrapport\\_over\\_subsidie\\_advies\\_door\\_mariko\\_peters/gedragscode-integriteit-bz](http://www.minbuza.nl/binaries/content/assets/minbuza/nl/import/nl/nieuws/2011/08/buitenlandse_zaken_publiceertrapport_over_subsidie_advies_door_mariko_peters/gedragscode-integriteit-bz)> accessed 10 July 2013, 15.

<sup>175</sup> Australian 'DFAT Code of Conduct for Overseas Service'

<[http://www.dfat.gov.au/dept/code\\_of\\_conduct200598.html](http://www.dfat.gov.au/dept/code_of_conduct200598.html)> accessed 29 May 2013, para 3.2.



provisions with regard to appropriate workplace conduct. For instance, Article 2 of the Icelandic code of conduct specifies that sexual harassment of co-workers is not allowed, nor abuse towards subordinates.<sup>176</sup> Also, some codes contain clauses on workplace violence,<sup>177</sup> including examples and categories of workplace violence such as what constitutes violent behaviour.<sup>178</sup>

Furthermore, the codes (together with other national legislation) may specify the actions to be taken by the sending State as a consequence of a breach of the code by its representative in a foreign State. These may include discipline, the suspension of the employment and the reassignment of duties,<sup>179</sup> or even arrest or prosecution.<sup>180</sup>

Finally, States could strengthen their codes of conduct by periodically sharing good practices, such as their approach to immunities in dealing with disputes arising out of employment contracts. Nonetheless, the effectiveness of codes remains dependent on States' good will.

## 3.2. THE RECEIVING STATE

### 3.2.1. Obligations

States have a customary international law obligation to respect and ensure the human rights of all persons within their jurisdiction and to provide for effective remedies in case of a breach.<sup>181</sup> This obligation has been codified in various international and regional human rights treaties. Article 1 ECHR, for example, provides that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'<sup>182</sup> As seen above (2.3) the right of access to court under Article 6 ECHR

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<sup>176</sup> Icelandic 'Code of Conduct of the Employees of the Foreign Service' <[http://www.mfa.is/media/PDF/Code\\_of\\_Conduct\\_of\\_the\\_Employees\\_of\\_the\\_Foreign\\_Service.PDF](http://www.mfa.is/media/PDF/Code_of_Conduct_of_the_Employees_of_the_Foreign_Service.PDF)> accessed 29 May 2013 ; <[http://www.dfat.gov.au/dept/code\\_of\\_conduct200598.html](http://www.dfat.gov.au/dept/code_of_conduct200598.html)> accessed 29 May 2013.

<sup>177</sup> USA 'Foreign Affairs Manual' <<http://www.state.gov/documents/organization/85125.pdf>> accessed 29 May 2013.

<sup>178</sup> The Dutch 'BZ-gedragscode' (n 174) 18.

<sup>179</sup> Australian 'DFAT Code of Conduct for Overseas Service' (n 175) art 12.111.

<sup>180</sup> USA 'Foreign Affairs Manual' (n 177).

<sup>181</sup> See Francisco Forrest, *International Human Rights and Humanitarian Law: Treaties, Cases, and Analysis*, (CUP 2008) 172.

<sup>182</sup> See also e.g. art 2 ICCPR; and the African Charter of Human Rights (ACHR) Article 1 which provides: 'The [...] parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and



prohibits States to grant more immunity than required by international law. But arguably, there are other human rights that may be infringed by the grant of immunities by a State within the framework of public international law. Human rights do not only entail the (negative) obligation to refrain from human rights abuses; States also have the positive obligation to ensure effective enjoyment of a human right or fundamental freedom. This means that States have the obligation to protect individuals from human rights abuses by other individuals.<sup>183</sup> Moreover, States have the obligation to take measures within the scope of their powers if they ‘knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party [and] these measures might have been expected to avoid that risk.’<sup>184</sup>

While not all States are party to all human rights conventions such as the ECHR, the International Covenant on Civil and Political Rights (ICCPR),<sup>185</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>186</sup> the rights most relevant in the context of abuse of domestic workers have attained the status of customary international law. Human rights that may be at issue include, but are not limited to, the following: the prohibition of slavery and forced labour (Article 4 ECHR), the prohibition of torture (Article 3 ECHR and Article 7 ICCPR), the right to self-determination (Article 1 ICESCR) the right to work and the right to favourable working conditions (Articles 6 and 7 ICESCR), the right to an adequate living standard (Article 11 ICESCR), the right to social security (Article 9 ICESCR), the right to health (Article 12 ICESCR), the right to participate in trade unions (Article 22 ICCPR) and the right of access to justice for rights violations (Article 2(3) ICESCR).<sup>187</sup>

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shall undertake to adopt legislative or other measures to give effect to them.’; Other relevant human rights instruments include the Universal Declaration of Human Rights (UDHR).

<sup>183</sup> See e.g. *Osman v United Kingdom* (App no 23452/94) Reports 1998-VIII [115]; *Opuz v Turkey* (App no 33401/02) 50 EHRR 28 [128-130]; *Z and Others v UK* (App. No. 29392/95) ECHR 2001-V.

<sup>184</sup> *Osman v United Kingdom* (n 183) [116].

<sup>185</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 [‘ICCPR’].

<sup>186</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 [‘ICESC’].

<sup>187</sup> See Kartusch (n 5) 5 for additional human rights violations: ‘Their right to just and favourable working conditions enshrined in Art. 7 of the International Covenant on Social, Economic and Cultural Rights (ICESCR) is violated when they receive less than minimum wages, are forced to work over long periods without adequate rest and without periodic holidays with pay. The prohibition of slavery, servitude and forced labour, enshrined in Art. 8 of the International Covenant on Civil and Political Rights (ICCPR) and Art. 4 of the European Convention on Human Rights (ECHR), is at stake in the most severe cases. The right to health may be violated by unhealthy working conditions without rest periods and insufficient nutrition, as well as the right to an



In the context of the social and economic rights of for example the ICESCR,<sup>188</sup> it is widely agreed that States have an obligation to respect, protect and secure rights through progressive development.<sup>189</sup> This so-called vertical effect of human rights concerns the relationship between States and individuals. Additionally, these rights can affect the horizontal relations between individuals, such as the employer and employee. Thus the State will not only have to refrain from violating these rights itself, it also has the obligation to protect individuals against infringements by others, including for instance the prevention of domestic slavery by employers.<sup>190</sup>

The States' positive obligations under human rights law include the duty to adopt and effectively implement national (criminal) law provisions which penalise violations of human rights.<sup>191</sup> For example, in the *Siliadin v France* case, the ECtHR found that Siliadin, a Togolese national working as a servant in France, had by her employers (private individuals) been subjected to forced labour as prohibited by Article 4 ECHR. France was found to have violated this provision because it had failed to afford the victim 'sufficient protection in the light of the positive obligations incumbent on France under Article 4 [ECHR],'<sup>192</sup> by insufficiently taking action to 'penalise and punish any act at maintaining a person in a situation incompatible with Article 4[ECHR].'<sup>193</sup>

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adequate standard of living, including adequate food (Art. 11, 12 ICESCR). The right to physical integrity and the prohibition of torture are violated by physical and sexual attacks and degrading treatment (Art. 7 ICCPR, Art. 3 ECHR). The right to privacy is affected when the domestic worker is not provided with a room for herself or himself (Art. 17 ICCPR, Art. 8 ECHR). Freedom of movement is infringed upon when the worker is not allowed to leave the house on her or his own (Art. 9, 12 ICCPR). The restriction of liberty entails violations of other rights, such as the freedom of religion when the worker cannot go to a place of worship, or the right to family life, when he or she is not allowed to go out to visit or make a phone call to family members (Art. 18, Art. 17 ICCPR). International human rights treaties furthermore impose the duty on states to guarantee access to justice for such rights violations to victims (Art. 2 Para 3 ICCPR, Art. 13 ECHR).'

<sup>188</sup> Article 2(1) contains the general obligations the ICESCR lays upon States: 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.' Some Articles contain explicit mention of the required steps.

<sup>189</sup> Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties Obligations under the International Covenant on Economic, Social and Cultural Rights' [1987] 9 Human Rights Quarterly 156, 172.

<sup>190</sup> See e.g. Daniel Moeckli and others (eds), *International Human Rights Law* (OUP 2010) 130-132.

<sup>191</sup> The existence of the positive obligations doctrine was developed from 1968 in *Strasbourg case* and further enforced in cases like *Marckx v Belgium* (App no 6833/74) Series A no 31 and *X and Y v The Netherlands* (App no 8978/80) Series A no 091; See Alastair Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004).

<sup>192</sup> *Siliadin v France* (App no 73316/01) ECHR-2005 [148].

<sup>193</sup> *ibid.*





A culture of impunity may exist where States repeatedly turn a blind eye to human rights violations. The granting of immunity does not provide effective deterrence against human rights abuse in the horizontal relations between diplomatic agents and their workers. Instead, it could be seen to green light a culture of impunity in which authorities fail to take action<sup>194</sup> and perpetrators of these abuses are not brought to justice.<sup>195</sup> The ECtHR has discussed such cultures of impunity in its case law, suggesting for instance the enactment of criminal law provisions which penalise actions contrary to Article 3 ECHR on torture<sup>196</sup> and Article 4 ECHR on slavery and forced labour.<sup>197</sup> It would be in line with their human rights obligations for receiving States to take action against this culture by seeking to eliminate abuses between individuals, including embassy employees and domestic workers.

### 3.2.2. Implementation of Obligations

The first step in ensuring implementation of the receiving State's obligations is to raise awareness of their existence at the national level. As will be discussed below, the above mentioned obligations of the receiving States are already being implemented. There are various forms of implementation, including diplomatic measures and the rules governing the entrance of immigration domestic workers (admission and monitoring). As a second step, all categories of workers – be it migrant domestic workers or local embassy employees – would benefit from accessible and comprehensible information about their labour rights and human rights. For that purpose, receiving States could offer state-funded legal aid and/or work together with non-governmental organizations (NGOs), law firms, trade unions as well as international human rights institutions to make such information easily accessible.<sup>198</sup>

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<sup>194</sup> See e.g. *Certain Questions of Mutual Assistance in Criminal Matters* (n 27) [170-171]; *BS and KG v AR and AR* (n 28) [74]. Even where there is immunity, the receiving State may still undertake steps to investigate incidents. Failure to do so may contribute to the culture of impunity.

<sup>195</sup> See for instance the *Oleynikov v Russia* (n 170), wherein the receiving State (Russia) had failed to effectively provide for the right of access to justice (and thereby violated its obligation) by granting more immunity than was required by international law.

<sup>196</sup> *M.C. v Bulgaria* (App no 39272/98) ECHR 2003-XII [150,153,166]; *Nikolova and Velichkova v Bulgaria* (App no 7888.03) ECHR 20 March 2008 [57].

<sup>197</sup> *M.C. v Bulgaria* (n 196) [153].

<sup>198</sup> One can think of UN treaty bodies established under *inter alia* the ICCPR and ICESCR as well as several UN Special rapporteurs; Kartusch (n 5) 56.



It is arguable that the receiving State should clearly inform entering workers of diplomats or embassies of their legal rights under national labour laws,<sup>199</sup> and that it should also emphasize the labour law obligations of the diplomats it receives.<sup>200</sup> When diplomats come from a State whose labour law standards fall below those of the receiving State or the sending State is known for violations of human rights of the workers by the diplomats, it could be an indication that additional attention has to be paid by the receiving State to safeguard the workers. The labour laws of the receiving State may help to ensure that the workers will have a minimum wage, normal working hours, health and accident insurance.

### 3.2.2.1. Monitoring at the Entrance Stage

In the case of a migrant domestic worker, the employing embassy is required by the receiving State to apply for a visa for the worker prior to his or her arrival in the receiving State.<sup>201</sup> Since employment depends on a visa, these workers are often in a weak position and thereby vulnerable to abuse.<sup>202</sup> The receiving State can play a vital role in monitoring labour law compliance at the stage of entrance of the worker into the receiving State, but also afterwards when visas are extended.

States have different admission criteria for the issuance of visas. For example, they may require that domestic workers must be single, divorced or widowed.<sup>203</sup> Furthermore, the workers may be required to live at the employer's household,<sup>204</sup> and generally they do not have the possibility to be joined by a spouse or family members.<sup>205</sup> Given the isolated and often "invisible" nature of their work, these criteria may impact negatively on the position of the domestic workers.

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<sup>199</sup> Example on a State level can be taken from the Switzerland and the Netherlands who have published multilingual leaflets; Kartusch (n 5) 50.

<sup>200</sup> This stems from the principle that despite the procedural immunity, the material liability of the diplomat for breaches of the Host State's laws remains under Article 41 (1) VCDR.

<sup>201</sup> Kartusch (n 5) 23; For instance the EU requires a visa and work permit for non-EU citizens who are planning on working in the EU. See Norbert Cyrus, 'Being Illegal in Europe: Strategies and Policies for Fairer Treatment of Migrant Domestic Workers' in Helma Lutz, *Migration and Domestic Work: A European Perspective on a Global Theme* (Ashgate 2008) 177.

<sup>202</sup> See for instance the sponsorship system in Qatar, called 'kafeel'. See Qatar (CAT/C/QAT/CO/2), para 18; See also CERD/C/QAT/CO/13-16, para. 15 which discusses the fact that legal provisions against passport-withholding and wage-withholding may not be effective in the case of a visa sponsorship system.

<sup>203</sup> Example Switzerland, as of 2011, Kartusch (n 5) 23.

<sup>204</sup> Example Germany, as of 2010, Kartusch (n 5) 23.

<sup>205</sup> However, France, Belgium, the Netherlands and the United Kingdom do allow this; Kartusch (n 5) 23.



As recommended by the Special Rapporteur on trafficking in persons,<sup>206</sup> workers could be empowered by making work permits (and thereby residence permits) independent from one specific employer, and thereby also allowing workers to switch employers.<sup>207</sup> In situations involving rights violations by a certain diplomat or a State, it is also suggested that the affected worker is offered help to find new employment.

Further, receiving States can add an element of control by implementing a payment system similar to that used in Austria, which requires the opening of local bank accounts for the payment of the salaries of the workers.<sup>208</sup> Visa and work permit extensions can be made dependent on proof of payment.

Furthermore, receiving States may also make visa issuance dependent on certain factors, including the history of the diplomat or State with regard to the treatment of (domestic) workers.

### **3.2.2.2. Post-Admission Monitoring and Investigation**

Together with monitoring the admission of workers, receiving States should ensure sufficient opportunities for follow-ups and if necessary, investigation of serious allegations to protect migrant workers from exploitation. A variety of measures can be envisaged in this respect, post-admission personal meetings and providing workers with (emergency) telephone numbers or email addresses; giving workers contact details of locally active NGOs, including trade unions, which specialize rights of migrant workers;<sup>209</sup> and also stronger investigative practices such as gathering evidence from diplomats following serious allegations. Prevention begins by checking up on employment relationship, and offering necessary support. Indeed, several EU Member States have taken such steps.<sup>210</sup> However, authorities of the receiving State will not be able to oblige the diplomat to oblige with such investigative practices as they can only be done on voluntary basis without infringing the principle of inviolability.<sup>211</sup>

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<sup>206</sup> UNHRC, Report of the special rapporteur on trafficking in persons especially women and children, Sigma Huda, Mission to Bahrain Oman and Qatar, A/HRC/4/23/Add.2, para 95.

<sup>207</sup> See *Rantsev v Cyprus and Russia* (App no 25965/04) ECHR 2010, on cross border human trafficking and receiving State obligations; Article 4 ECHR.

<sup>208</sup> Kartusch (n 5) 24.

<sup>209</sup> See *Cyrus* (n 201) 184.

<sup>210</sup> Even though this is a pervasive practice, it is not applicable in the UK, Kartusch (n 5) 25.

<sup>211</sup> See e.g. *Certain Questions of Mutual Assistance in Criminal Matters* (n 27) [170-171]; *BS and KG v AR and AR* (n 28) [74].

### 3.2.2.3. Diplomatic Measures

In addition to monitoring and investigation, the receiving State can take diplomatic measures once a violation or a situation of abuse has been established. The more drastic diplomatic measures, generally reserved for serious criminal offences, include the request for waiver of immunity<sup>212</sup> (2.1.3) and the *persona non grata* declaration (2.1.1.1). NGOs could play a role in exerting pressure on the sending as well as the receiving States to take such actions.<sup>213</sup> States have already been criticized for their hesitation with regard to the waiver of immunities and are encouraged to resort more frequently to *persona non grata* declarations.<sup>214</sup>

Additionally, less stringent measures are available which can improve the position of the victim, these include opening up a dialogue by contacting the chief of mission for more information on the case and possible out-of-court settlements, delay or refusal in the issuing of the work and residency permit in case of persisting issues, and (threats of) withdrawal of unilateral privileges including VAT-exemptions.<sup>215</sup> The use of these measures differs per country and on a case-to-case basis. To increase legal certainty for the workers, a more structural approach would be preferable. If receiving States clarify and offer guidelines on what actions they will undertake for each type and level of violation, transparency improves and arguably they will have a more deterrent effect.

### 3.2.3. Enforcement of Obligations through Litigation

In order to ensure the enforcement of the obligations of the receiving State - even where the political will to implement measures is lacking - strategic litigation against the receiving State, first at the domestic level and eventually at the international level, remains an option. At the national level it may be possible for NGOs to lodge a complaint on behalf of the victims to gain legal redress for insufficient implementation of the positive obligation by the receiving State. It should be noted that under Article 1 of the ECHR, national authorities hold

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<sup>212</sup> Kartusch (n 5) 30.

<sup>213</sup> *ibid* 31.

<sup>214</sup> This is *inter alia* suggested by the Gulnare Shahinian, UN Special Rapporteur on Contemporary Forms of Slavery, Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, 2010 UN Doc. A/HRC/15/20/Add.4, paras 33, 57, 58, 96; see also Kartusch (n 5) 13.

<sup>215</sup> In one country (Belgium) these measures have been applied to involving rights violations of domestic workers. It was underlined that such measures needed to be chosen in a way that they did not negatively influence the diplomat's ability to perform her/his official duties. See Kartusch (n 5) 29.



the primary responsibility for the implementation and enforcement of the rights and fundamental freedoms of the ECHR. Therefore, going to the ECtHR is only a subsidiary option, after effective and available domestic remedies have been exhausted (Article 35(1) ECHR) and the State has failed to uphold its obligations as specified in Article 1 ECHR.

The ECtHR deals with both interstate cases (Article 33 ECHR) and individual applications (Article 34 ECHR). The latter is especially of interest to NGOs with an eye on facilitating strategic litigation. However, the claimant has to be the victim of the violation of the ECtHR by a party to the ECHR and/or its protocols and cannot be lodged anonymously (Article 34 and 35(2)(a) ECHR). Furthermore, in order for the case to be admissible, it cannot be substantially the same as a prior matter at the Court (Article 35(2)(b) ECHR) or submitted to another international investigation. As seen in Section 2.3, the ECtHR can ensure that States do not grant more immunity than is required by international law. However, this in itself does not provide relief against the current framework of State and diplomatic immunity. Nonetheless, the ECtHR may oblige receiving States to make effective use of the limits that exists to immunity.

In conclusion, litigation may serve to clarify the obligations of receiving States with regard to personnel of diplomats and foreign embassies, and may in the long run ensure more effective use of the tools already available to receiving States. Further, it may possibly lead to the development of new practices that should be taken in order to comply with the obligations under the ECHR. The benefit of judgments by the ECtHR is that these binding on States parties to the ECHR (Article 46 ECHR). Here an example can be taken from other NGOs advocating the interests of minority groups, such as ILGA Europe,<sup>216</sup> the ERRC<sup>217</sup> and many others. In sum, strategic litigation can be a powerful tool to compel States to sufficiently fulfil their obligations under the ECHR with respect to embassy employees and domestic workers.

### **3.2.4. Acceptance of State Liability without Fault: Compensation by the Receiving State**

It has been argued that the burden of diplomatic and State immunity should not be borne by the individual that happens to have a dispute with a foreign State or a foreign diplomat, but by

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<sup>216</sup> ILGA Europe, 'Strategic litigation in the European Courts' <[http://www.ilga-europe.org/home/how\\_we\\_work/litigation](http://www.ilga-europe.org/home/how_we_work/litigation)> accessed 14 June 2013.

<sup>217</sup> ERRC, 'European Roma Rights Centre' <<http://www.errc.org/strategic-litigation-european-court-of-human-rights>> accessed 14 June 2013.



the community at large, since these rules benefit a communal good. Apart from scholarly support,<sup>218</sup> this idea has found expression in various legislative proposals, and, notably, in French jurisprudence.

In the United States, the so-called Solarz Bill proposed the establishment of a Claims Fund so that ‘whenever a person is injured or suffers financial loss due to action by a foreign state official covered by the immunity statute, that person can apply for redress from the United States Government’.<sup>219</sup> While the bill was not adopted, it merits brief consideration since it provides insight into the underlying principle. The Solarz Bill was supported by the State Department:

The beneficiary of diplomatic immunity is fundamentally the United States Government because the United States diplomatic personnel abroad could not function without diplomatic immunity. It therefore appears reasonable to spread the cost [...] among U.S. taxpayers [...] rather than let it fall on the injured individuals. The funding required [...] should be viewed as the necessary cost of (the) conduct of foreign relations.<sup>220</sup>

The bill not only required the State Department to report annually on crimes committed by foreign diplomats in the US,<sup>221</sup> but also to educate the local police on the implementation of the VCDR allowing investigation. Although it seemed reasonable for the State Department to formulate procedures and inform the foreign missions about them, the Solarz Bill was found unreasonable for other reasons. The idea that the US government i.e. US taxpayers, would first have to bear the financial burden of sustaining such a fund to fully compensate the victims after which the State Department could seek reimbursement from the foreign mission was found to be objectionable.<sup>222</sup>

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<sup>218</sup> Henry G Schermers, ‘Diplomatic Immunity in Modern International Law’ in E Deters and N Schrijver (eds), *Reflections on International Law from the Low Countries in Honour of Paul de Waart* (Martinus Nijhoff Publishers 1998) 156, 162; Attila Tanzi, *L'immunità dalla giurisdizione degli agenti diplomatici* (Cedam 1991) 189.

<sup>219</sup> Diplomatic Privileges and Immunities, Hearings and Markup Before the Subcommittee on International Operations of the House Committee on International Relations, 95<sup>th</sup> Congress 1<sup>st</sup> session 1977 p. 45.

<sup>220</sup> Grant V McClanahan, *Diplomatic Immunity, Principles, Practices, Problems* (C Hurst & Co Publishers 1989) 172.

<sup>221</sup> *ibid* 168.

<sup>222</sup> R Scott Garley, ‘Compensation for Victims of Diplomatic Immunity in the United States: A Claims Fund Proposal’ [1980] 4 Fordham Int'l L J 135, 150-154; Mitchell Ross, ‘Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities’ [1989] 4 Am U J Int'l L & Pol'y 173, 193; David H Goodman, ‘Reciprocation as a Means of Curtailing Diplomatic Immunity Abuse in the United States: The United States Needs to Play Hard Ball’ [1989] 11 Hous J Int'l L 393, 410. In response to the failure of the Solarz Bill Goodman proposed the less costly ‘limited victim compensation fund’ as an alternative.

In France, a limited form of this principle – i.e. the principle of communal burden-bearing – has been accepted through the jurisprudence of the French Supreme Court for administrative matters (*Conseil d'État*). In French administrative law the French State can be held liable for the application of laws or international treaties (e.g. VCDR) under the principle of “l'égalité des citoyens devant les charges publiques” in case someone suffers disproportionately from their application and should be compensated for loss that can be characterised as ‘special and severe.’ In the cases *Dame Burgat et autres*<sup>223</sup> and *Tizon et Millet*<sup>224</sup> the *Conseil d'État* ruled that in exceptional circumstances, the French State could be held liable without fault when private individuals were denied access to court because of the rule of diplomatic immunity. In *Dame Burgat* the French State was held liable since the individual that had a rental dispute with a diplomat could not have foreseen his diplomatic status at the time of concluding of the tenancy contract.<sup>225</sup> The case of *Tizon et Millet*, however, made clear that the liability of the French State only arises in exceptional circumstances.<sup>226</sup> The refusal to execute a judgment establishing a debt owed by an individual protected by diplomatic immunity to two French merchants was held not to give rise to State liability. According to the *Conseil d'État*, the prejudice was not sufficiently serious and the claimants had not exhausted all available civil remedies before proceeding to public law.

Two recent judgments, however, evidence the potential of the principle. The Indonesian domestic worker Ms. Susilawati, worked at the residence of an Omani diplomat at the Permanent Representation of Oman to UNESCO in Paris. When the diplomat failed to honour the contract, the French Labour Court ordered the diplomat to pay her €33.000 in unpaid salaries. However, as the French judgment could not be enforced because of the immunity from execution enjoyed by the diplomat, the domestic worker petitioned the State to pay and when it refused, she challenged that decision before the French administrative courts. Even though the lower courts found that there was nothing uncommon in the non-enforcement of the judgment, the *Conseil d'Etat* ruled to the contrary. It held that the loss suffered was ‘special and severe’ and ordered the French State to pay €33.380 to Ms. Susilawati.<sup>227</sup> In another judgment, also issued in 2011, the same principle was confirmed in a

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<sup>223</sup> *Dame Burgat et autres* 104 JDI 1977 630 (Conseil d'État, 1976).

<sup>224</sup> *Tizon et Millet* 31 AFDI 1985 928 (Conseil d'État, 1984).

<sup>225</sup> *Dame Burgat et autres* (n 223) 631.

<sup>226</sup> *Tizon et Millet* (n 224) 929.

<sup>227</sup> *Susilawati* ECLI:FR:CESSR:2011:325253.20110211 (Conseil d'État, 2011) <<http://www.legifrance.gouv.fr>> accessed 10 July 2013.



case concerning State immunity from execution.<sup>228</sup> The exact scope of the principle is difficult to define. It is for example unclear whether it would also apply where there is State immunity for a labour dispute with an Embassy employee. Nevertheless, this principle of French national law deserves further study, and could prove instrumental in advancing the cause of embassy workers and domestic workers in other States as well.

In sum, it is clear that the interests protected by immunities are necessary to maintain international relations. However, this should arguably not mean that the handful of individuals that suffer denial of justice as a consequence of these immunities should bear the financial burden themselves. Eventually, it is the community as a whole that stands to benefit from laws related to diplomatic intercourse and it is therefore arguable that it is the community that should bear the (financial) burden.<sup>229</sup> While this line of argument has not found wide acceptance in State practice, parallels in domestic laws should be sought when considering litigation and as a tool when campaigning for legislative change.

### 3.3. ARBITRATION

Given the difficulties of litigation, the aim of this section is to look at whether arbitration could be a viable option in resolving disputes involving embassy employees and domestic workers. It goes beyond the scope of this report to fully deal with all aspects relating to arbitration of the disputes at hand. Rather, we will consider possible procedures and institutional frameworks, the main advantages of arbitration, as well as possible legal obstacles. Should one wish to pursue this option, further legal research is recommended, especially as concerns ways in which to deal with the obstacles set out below.

Compared to litigation, arbitration has several advantages, several of which may apply to the cases discussed in this report. Eliasoph explains:

[A]rbitration provides a forum that is mutually acceptable and a procedure agreed upon by the parties. The judges in foreign national courts are all presumably citizens from one single country and only bring that perspective. Arbitration, however, allows for arbiters from various countries and/or neutral countries. Thus, arbitration is seen as a shield from local biases of foreign tribunals and offers a measure of predictability

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<sup>228</sup> *Mme D et autres* ECLI:FR:CESEC:2011:329788.20111014 (Conseil d'État, 2011) <<http://www.legifrance.gouv.fr>> accessed 10 July 2013.

<sup>229</sup> Rosanne van Alebeek, *The Immunities of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP 2008) 404-406.





and certainty to commercial transactions. Furthermore, the factors that favor arbitration in a domestic context may also apply in the international context. These factors include ‘speed of determination, informality, monetary savings, expertise of the arbitrators as compared to judges, and protection of confidential business information.’<sup>230</sup>

Arbitration can be defined as ‘a process by which parties consensually submit a dispute to a non-governmental decision-maker selected for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures according the parties an opportunity to be heard.’<sup>231</sup> As revealed by this definition, there are two important characteristics of arbitration: (i) the requirement of consent by the disputing parties, and (ii) the binding nature of the decision. As such, arbitration must be distinguished from mediation and conciliation, as the outcome of the two latter dispute settlement procedures can only be binding if accepted by the parties *post facto*.

### **3.3.1. Possible Procedures and the Applicable Institutional Framework**

It is unlikely that States will agree on a multilateral framework for arbitration, at least not within the foreseeable future. Therefore, this section will focus on possibilities within a bilateral framework between receiving and sending States. It should be added that next to setting out a procedure for the settlement of disputes, such treaty could – if the States so wished – also provide substantive standards of treatment of domestic workers. Depending on the wording of the treaty, a dispute concerning the observance of these standards could fall within scope of the dispute settlement provision. In the following, we address issues related to procedure.

Arbitration can take place between various constellations of parties including inter-state, individual-state and individual-individual. For the purpose of this report, we will look at the constellation individual-state. The individual here would be the victim that will start arbitration proceedings against the sending State on the basis of a bilateral agreement between the receiving State, where the abuse has taken place, and the sending State.

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<sup>230</sup> Ian H Eliasoph, ‘A Missing Link: International Arbitration and the Ability of Private Actors to Enforce Human Rights Norms’ [2004] 10 New Eng J Int'l & Comp L 83, 96-97 [references omitted].

<sup>231</sup> Gary Born, *International Arbitration: Law and Practice* (Kluwer Law International 2012).



As the respondent party may be reluctant to agree to arbitration once a dispute has arisen, it is advisable that an arbitration agreement is reached that encompasses future disputes. For a bilateral agreement to be effective, it should therefore explicitly set out the consent of the sending states. Further, it should specify the categories of workers eligible to bring arbitration proceedings as well as the categories of claims they can bring.

The agreement could also contain an express waiver of immunity by the sending State; yet as a rule, immunity from jurisdiction will be considered waived by the prior consent to arbitration as stipulated in the bilateral treaty. As provided in Article 17 of the United Nations Convention on the Jurisdictional Immunity of States and their Property ('UNCJIS'):

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

- (a) the validity, interpretation or application of the arbitration agreement;
- (b) the arbitration procedure; or
- (c) the confirmation or the setting aside of the award, unless the arbitration agreement otherwise provides.

The bilateral treaty would include an offer of arbitration, which the individual could take up when instituting arbitration proceedings; and combined, this offer and acceptance would constitute the written arbitration agreement. It is noted that it only works one way: the consent of the individual would only be perfected at the time he or she starts proceedings so that it is not possible for the State to start arbitration proceedings against the individual. Still, and depending on the wording of the treaty, it might be possible for the sending state to bring counterclaims against the individual once the latter has started arbitration proceedings.<sup>232</sup>

In line with the consensual and flexible nature of arbitration, the parties are free to determine the applicable procedural rules. One possibility would be to provide in the agreement that arbitration shall be governed by the Permanent Court of Arbitration (PCA) Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State ('PCA Arbitration Rules').<sup>233</sup> The PCA is not a court composed of a fixed body of judges; rather it is 'administrative organization with the object of having permanent and readily

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<sup>232</sup> On counterclaims in (investment) arbitration, see generally Hege Elisabeth Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law* (OUP 2013) 105.

<sup>233</sup> Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State <[http://pca-cpa.org/showfile.asp?fil\\_id=194](http://pca-cpa.org/showfile.asp?fil_id=194)> accessed 10 July 2013; Shaw (n 79) 1051.



available means to serve as the registry for purposes of international arbitration and other related procedures [...].'<sup>234</sup> Next to registry services, the PCA's Secretariat, the International Bureau, headed by its Secretary-General, provides legal and administrative support to arbitration tribunals.<sup>235</sup>

The PCA Arbitration Rules leave much freedom to the disputing parties and arbitrators; yet it provides for default rules where the parties cannot agree and in case of inalcitrant parties. One stage at which this can prove crucial is the composition of the arbitration tribunal itself. The Rules provide that if the parties cannot agree on the number of arbitrators, three arbitrators shall be appointed (Article 5). Article 7 specifies the procedure in case three arbitrators are to be appointed: each party shall appoint one arbitrator, and these two arbitrators shall choose the third arbitrator. In the event that the respondent state would choose not to cooperate in the composition of the tribunal, the individual claimant may ask an appointing authority (which may be designated in the bilateral agreement) to appoint the second arbitrator. In case there is no appointing authority, or the latter refuses to act or fails to appoint the arbitrator within thirty days, the claimant may request the Secretary-General of the PCA to designate the appointing authority that will appoint the second arbitrator. Further, if within thirty days after the appointment of the second arbitrators, the two arbitrators have not agreed on the choice of the third arbitrator, the latter shall be appointed by an appointing authority, which may be designated by the Secretary-General of the PCA.

When selecting their arbitrator, each party may consult the list of PCA Members of the Court, which comprises experts of 'known competency in questions of international law, of the highest moral reputation and disposed to accept the duties of an arbitrator.'<sup>236</sup> Yet, the parties are not restricted by this list in their choice of arbitrators.

### 3.3.2. Advantages

There are several reasons why arbitration may be more advantageous than litigation in the cases discussed in this report. The first and perhaps the most important advantage is that the

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<sup>234</sup> Shabtai Rosenne, *The Hague Peace Conferences of 1899 and 1907 and International Arbitration: Reports and Documents* (T.M.C. Asser Press 2001) xxi.

<sup>235</sup> PCA 'About us' <[http://pca-cpa.org/showpage.asp?pag\\_id=1027](http://pca-cpa.org/showpage.asp?pag_id=1027)> accessed 10 July 2013.

<sup>236</sup> Article 44 of the 1907 Convention for the Pacific Settlement of International Disputes <[http://www.pca-cpa.org/showfile.asp?fil\\_id=193](http://www.pca-cpa.org/showfile.asp?fil_id=193)> accessed 10 July 2013.



tribunal would have jurisdiction over claims brought by individual victims against the sending state as its consent would already be laid down in the bilateral treaty.

Second, it would allow the parties to keep the proceedings confidential, something which is generally not possible in courts proceedings.<sup>237</sup> Confidentiality may be especially important for the State whose reputation may be at stake, but also the employees may want their case to be kept from public scrutiny.

Third, arbitration is flexible. Within certain mandatory limits, such as a fair process, it generally allows the parties to tailor the proceedings to their needs. Hence, the parties may agree on issues such as the seat of the arbitration, as well as the language and the applicable law. With regard to the latter, it is also possible to agree to a decision *ex aequo et bono* [English: according to the right and good]. Moreover, they may stipulate that the award must be rendered within a specific time frame, which also can keep costs down.

Fourth, arbitration allows the parties to select arbitrators. This may enhance both the expertise of the dispute settlement body, as well as the parties' perception of neutrality in comparison to a particular domestic court.<sup>238</sup>

Fifth, as provided in PCA Arbitration Rules, “[t]he award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay” (Article 32). From the viewpoint of public international law, the binding nature of the award also flows from the bilateral agreement between the receiving and the sending state; and to leave any doubt, the obligation of the States to carry out the award can be expressly provided in the agreement.

Sixth, in case the respondent state fails to abide by the award on its own accord, there is a possibility that the party in whose favour the award is made can obtain leave for enforcement under the (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>239</sup> Designed to encourage and strengthen arbitration as a means of dispute resolution, the New York Convention provides that all contracting states “*shall* recognize arbitral awards as binding and enforce them in accordance with the rules of

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<sup>237</sup> Shaw (n 79) 1055

<sup>238</sup> Clayton Utz, *A Guide to International Arbitration* (2nd edn, Clayton Utz 2012) 3.  
<<http://www.claytonutz.com>> accessed 18 December 2013.

<sup>239</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 UNTS 38, 48 [hereinafter New York Convention]  
<[http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII\\_1\\_e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf)> accessed 18 December 2013.  
International awards are enforced by national courts under this convention, which permits them to be set aside only in very limited circumstances.



procedure of the territory where the award is relied upon, under conditions laid down [in the Convention].”<sup>240</sup> While it is possible for Contracting States to stipulate that they will apply the Convention only a reciprocal basis, i.e. only to awards rendered in a State also party to the Convention,<sup>241</sup> not all States have made such reservation.<sup>242</sup> Further, the number of Contracting Parties is 149;<sup>243</sup> hence, it may still be easier to enforce a foreign arbitral award than a foreign judgment.

### 3.3.3. Possible Obstacles

Yet, there are certain obstacles. First, Article I(3) of the New York Convention allows States to declare that they will apply the Convention ‘only to differences arising out of legal relationships, whether contractual or not, which are considered as *commercial* under the national law of the State making such declaration’.<sup>244</sup> Several States have made such declaration.<sup>245</sup> As mentioned before (2.1.1.1) labour contracts with domestic workers are not considered to qualify under the commercial activity exception to diplomatic immunity from civil jurisdiction in the sense of Article 31(1)(c) VCDR.<sup>246</sup> This does not however mean that the legal relationship between the diplomatic agent and the domestic worker is not of a commercial nature. The exception of article 31(1)(c) VCDR does not turn on the nature of a

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<sup>240</sup> *ibid* art. III [emphasis added].

<sup>241</sup> *ibid* art I(3).

<sup>242</sup> On this website, the letter (a) next to the name of the State concerns the commercial relationship reservation <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)> accessed 18 December 2013.

<sup>243</sup> See United Nations Commission on International Trade Law, Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)> accessed 18 December 2013).

<sup>244</sup> New York Convention, art. I(3) [emphasis added].

<sup>245</sup> New York Convention, art. I(3) [emphasis added]. On this website, the letter (c) next to the name of the State concerns the commercial relationship reservation (scroll down to see the meaning of (c)): <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)> accessed 18 December 2013). There is also this helpful compilation on the implementation of the New York Convention in each contracting State:

<[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_implementation.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_implementation.html)> accessed 18 December 2013. See link on page to ‘Compilation’. In this Excel document, under Tab L, the commercial relationship reservation is mentioned (not for all states, though). In fact, the Excel document seems to contain additional useful information. One example is Poland. On the ‘status’ website (point 1), the letter (c) indicates that Poland made this reservation. Yet in the Excel document, the following clarification is made (under Tab L): ‘Poland accepted the Convention without reservations. Above mentioned reservation was made by the Polish government at signing the document. However, it was not confirmed upon ratification as evidence by Poland’s instrument of ratification.’

<sup>246</sup> US Court of Appeals, 4<sup>th</sup> Circuit, No. 95-1732, (Jan. 17, 1996)



particular act that is performed, but on the nature of the broader activity of the diplomat: is he or she engaged in commerce? The purchase of bread, for example, clearly concerns a commercial contract, but a diplomatic agent is not considered to engage in commercial activity by concluding this contract. In the same vein, a labour contract between two private individuals is arguably always of a commercial nature, even though the exception of article 31(10)(c) VCDR does not apply to it.

Second, the issue of arbitrability could prove problematic.<sup>247</sup> This is so not only at the enforcement stage. The State in which the arbitration is seated ('seat') may deem the subject-matter of the dispute non-arbitrable, and in that case the respondent state may obtain an annulment of the award in the domestic courts of the seat.<sup>248</sup> Next to the fact that under the New York Convention, States may deny enforcement of awards on the ground that they have been set aside by the courts of the seat of the arbitration,<sup>249</sup> non-arbitrability is also a separate ground for non-enforcement under the New York Convention: 'Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that [...] [t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country.'<sup>250</sup>

States differ as to what types of dispute they consider non-arbitrable because of their public importance or a perceived need for judicial protections.<sup>251</sup> For the purposes of this report, it should be noted that labour disputes may fall in that category. For instance, the Greek Code of Civil Procedure stipulates that labour disputes, as defined by law, cannot be referred to arbitration.<sup>252</sup> And in a case of 2010, the Brazilian Superior Labour Court held that an arbitral tribunal lacked jurisdiction to decide upon the rescission of a labour contract in an individual labour dispute, on the ground that it was not arbitrable.<sup>253</sup> A rationale behind non-arbitrability of labour disputes is that it protects the weaker party's right to access to court.<sup>254</sup> In the case of embassy employees and domestic workers, it works the other way around:

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<sup>247</sup> On the topic of arbitrability, see generally Loukas A Mistelis and Stavros L Brekoulakis, *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009).

<sup>248</sup> UNCITRAL Model Law on Commercial Arbitration, art 34(2)(b)(1).

<sup>249</sup> New York Convention, art V(1)(e).

<sup>250</sup> New York Convention, art V(2)(a).

<sup>251</sup> Born (n 231).

<sup>252</sup> Greek Code of Civil Procedure, art 867. Cf. Mistelis and Brekoulakis (n 247) 267.

<sup>253</sup> Valeria Galíndez and Ana Gerdau De Borja, 'Arbitrability of Labour Disputes in Brazil' (*Practical Law*, 6 May 2010) <<http://uk.practicallaw.com/3-502-2236#>> accessed 18 September 2013).

<sup>254</sup> See Ian H Eliasoph, 'A Missing Link: International Arbitration and the Ability of Private Actors to Enforce Human Rights Norms' [2004] 10 New Eng J Int'l & Comp L 83, 84.



arbitration would protect the weaker party's right to access to justice. The force of this argument notwithstanding, it is uncertain at best whether courts would set aside statutory provisions restricting arbitration of labour disputes.

A further category of disputes that may be deemed non-arbitrable are those concerning criminal law; indeed, virtually all states regard criminal matters as falling within that category.<sup>255</sup> Yet, according to Born, this means that arbitrators may not impose criminal sanctions; otherwise, they may consider allegations of conduct that would amount to a criminal offense.<sup>256</sup>

Third, confidentiality, being one of the main advantages of arbitration, could be jeopardized if the sending State decides to seek the annulment or non-enforcement of the award. Such claims are handled by the domestic courts, thereby making the matter public. Yet, this could also strengthen the arbitration process, as the respondent state may be less likely to seek annulment or argue against the enforcement of awards.

Fourth, also in arbitration the possibility exists for States against whom an award is rendered to plead immunity against execution. As explained by De Stefano, 'the express waiver of immunity from adjudication contained in arbitration agreements may not be interpreted as an implicit waiver of immunity from enforcement measures in regard to the arbitral award.'<sup>257</sup> Consequently, a successful party may not necessarily obtain the monetary damages stipulated in the award. Still, and while recognizing that sovereignty issues continue to be a 'stumbling block in the smooth enforcement of judgments and awards involving foreign states,' de Stefano observes that 'courts of some Western countries, notably France and the United States, have recently provided liberal interpretations of the waiver to State immunity from execution in the context of international arbitration.'<sup>258</sup>

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<sup>255</sup> Born (n 231) 81, 84.

<sup>256</sup> Born (n 231) 84.

<sup>257</sup> Carlo de Stefano, 'Arbitration Agreements as Waivers to Sovereign Immunity' [2013] 29:4 Arbitration International [forthcoming], at Section 2.3 [references omitted].

<sup>258</sup> *ibid* (quoting Gilbert Delaume). See also Antonio Remiro Brotons, 'La reconnaissance et l'exécution des sentences arbitrales étrangères' [1984] *RdC*, I, Tome 184, 260 ('l'on peut se sentir soulagé par le fait que, en règle générale, les États respectent aussi, spontanément, les sentences qui les touchent').



### **3.3.4. Conclusion**

Arbitration may be possible by virtue of an offer to arbitrate future disputes set out by the sending State in a bilateral agreement between it and the receiving State. In line with the principle *pacta sunt servanda* (English: agreements must be kept), the agreement would create an international obligation for the sending State to comply with the award. Yet, in case of a recalcitrant respondent, non-arbitrability could be a potential obstacle in terms of the possibility of annulment under the national arbitration laws of several states, and it may also hamper the enforceability of awards under the New York Convention. Further, some states may deny enforcement on the basis that the legal relationship between the arbitrating parties is not considered to be commercial in nature. While the bilateral agreement would function as a waiver against the enforcement of the award, the defence of sovereignty immunity – although within certain limits – is still available for a respondent State at the stage of execution.

### **3.4. INTERIM CONCLUSION**

Sending and receiving States have various tools to help prevent the violation of the labour and human rights of embassy employees and domestic workers. These include a code of conduct for the representatives of the sending State, as well as its anticipatory acceptance of an institutionalized waiver for specific labour related criminal behaviour. Additionally, the receiving State has various positive and negative obligations towards the workers within its territory through the human rights framework. Raising awareness of these obligations can lead to improved implementation of these obligations and in case of breach, to the enforcement through national courts and the ECtHR. Receiving States can play an important role in safeguarding the well-being of immigrant workers through visa monitoring policies and decreasing dependency on visas and employers by changing or additional legislation. Finally, arbitration has many benefits over litigation, but its use depends on the good will of the States concerned.

While the primary actors are the States, NGOs can nonetheless effectuate these options. Especially in the field of receiving States' obligations, they can share their expertise with States in order to empower the workers. Finally, they can make a difference within the legal field by facilitating strategic litigation cases and helping victims receive redress.





#### 4. GENERAL CONCLUSIONS

The aim of this report was to map and analyse the relevant aspects of the rules of diplomatic and State immunity in order to explain what the legal obstacles are to redress human rights violations and labour law abuses suffered by domestic workers, such as Lori, and embassy personnel, such as Norah, in receiving States. The analysis revealed inadequacies of the legal remedies within the existing framework of diplomatic and State immunity. Both types of immunities present their own challenges to the victims.

A diplomat enjoys immunity during and after function under the Vienna Convention on Diplomatic Relations. During function, diplomatic immunity can be divided in immunity from jurisdiction where diplomats enjoy absolute immunity in both civil and criminal proceedings, and immunity from execution protects diplomatic assets from enforcement measures in receiving States. Nonetheless, although not frequently used by States, the existing remedies such as waiver (by the sending State) and *persona non grata* (by the receiving State) may offer some relief for the victims. It has also been established that victims do not necessarily need to stand empty handed in cases where the diplomat is no longer in function, i.e. enjoys residual immunity.

In case of labour disputes between embassy employees and a sending State, the victim will run into State immunity from jurisdiction when bringing the case to the receiving State's courts, unless such immunity is waived. Although a restrictive approach towards immunity is applied under the United Nations Convention on the Jurisdictional Immunity of States and their Property, only a narrow and specific category of workers will be able to avoid the obstacle of State immunity in court. Further, State immunity from execution may prevent favourable judgments from being enforced, unless the property at issue is deemed non-sovereign purposed.

As both diplomatic and State immunity have proven to be difficult obstacles for victims looking for legal redress, this report has explored alternatives or supplementary options to strengthen the workers' position. Key is to prevent situations of labour rights and human rights abuses, wherein both the sending and receiving State can play a significant role through the implementation of international and national instruments. Furthermore, the receiving State has human rights obligations towards the workers within its territory, and should be made aware of its duty to implement them. Measures taken can have a deterrent effect for the sending State and its diplomatic agents, and can safeguard the workers' rights



e.g. through changes to the visa system. Failure by the receiving State to take suitable steps may be addressed through court litigation, thereby transferring the conflict from the sending State and/or its agents versus the victim, to a claim by the victim against the receiving State before national courts or the European Court of Human Rights. Finally, while arbitration may seem a legitimate alternative to litigation, its viability depends on the readiness of States to consider and eventually agree to arbitrate the disputes. Further research is recommended in this respect, especially on how to draft a bilateral agreement that best ensures the enforcement and execution of awards against recalcitrant states.

Finally, NGOs can play an important role in changing the system through raising awareness of these issues and advocating for the victims.