



**Diplomatic Immunity and Modern Slavery: Challenging the  
Conflict between Human Rights and Immunities through the Old  
and New Human Rights Dilemma**

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## I. Introduction

Diplomatic agents frequently employ domestic workers to accompany them abroad and perform a range of household duties, including cooking, cleaning, running errands, and caring for children. However, documented cases indicate that, in certain instances, diplomatic status has been abused, resulting in the employment of domestic workers under conditions that are incompatible with their human rights.<sup>1</sup> A few stories come to light each year where domestic workers face appalling working conditions and are treated as modern slaves by the diplomats who employ them. An illustrative case is the story of Lipenga, a domestic worker for Jane Kambalame, a diplomat in the United States (US) from Malawi. Lipenga was hired by a diplomat to do all kinds of household chores in exchange for decent pay that would enable her to improve her family's financial situation back home. Once she arrived in the US, Lipenga faced appalling working conditions. For starters, she was confined to the house at all times and had her passport taken away. In addition, she was not allowed to contact her family, had to sleep on the floor, was only fed scraps, and was forced to work approximately 17 hours a day for very little pay. This whole time, the diplomat kept repeating: 'I cannot get in trouble because I have immunity. I'm a diplomat. I have immunity.'<sup>2</sup> Miss Lipenga's story is only a glimpse into the countless incidents of abuse that household workers face when employed by diplomatic agents.

Diplomatic agents, including both heads of the mission and members of the diplomatic staff<sup>3</sup>, serve as representatives of one State to another, tasked to maintain and advance international relations. The Vienna Convention on Diplomatic Relations (VCDR) is the main legal framework that governs these diplomatic relations between States. In order to maintain smooth relationships, article 31 of the VCDR grants diplomatic agents immunity for wrongful acts before foreign courts. However, this immunity is not absolute. Article 31(1)(a-c) lists three exceptions to this immunity, wherefore no immunity can be invoked. These three limitations relate to property claims, succession claims, and commercial activity claims. Nevertheless, these exceptions do not touch upon acts of modern slavery, or acts relating to inter alia forced labour, servitude, or slavery. As a result, domestic civil courts generally remain reluctant to examine any cases of modern slavery against diplomatic agents as they can claim immunity before foreign courts. Leaving the abused domestic workers with no means to claim redress through the judicial system.

The widespread diplomatic immunity has been criticized over the past decade, arguing that diplomatic immunity should stop where the abuse of the immunity entitlement starts. New court rulings all over the world are jumping on this debate by limiting the immunity of diplomats and States when very severe international crimes are committed. For example, rulings in Italy, Brazil, and South Korea are limiting the immunity of States, and thereby possibly also the immunity of State representatives, when crimes with a status of *jus cogens*, such as slavery, are in play. In addition, a recent case in the UK shed

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<sup>1</sup> S. R. Subramanian, "Abuse of diplomatic privileges and immunities and the duty to respect local laws and Regulations under the Vienna Conventions" (Chinese Journal of Global Governance 2017) 183-184.

<sup>2</sup> Sarah Birnbaum, "This woman says she was trafficked by a diplomat. And it happens all the time" (The World, 21 July 2017) < <https://theworld.org/stories/2017/07/21/trafficked-diplomats> > accessed at 29 April 2025.

<sup>3</sup> Article 1(e) of the VCDR. Members of the diplomatic staff are defined in article 1(d) of the VCDR as members of the staff of the mission having diplomatic rank.

new light on the exceptions applicable to diplomatic immunity. The Supreme Court in the UK ruled that diplomatic agents who profit by exploiting their workers in conditions akin to modern slavery can no longer use their diplomatic immunity to prevent workers from claiming compensation.<sup>4</sup> The court's reasoning was based on the third exception to diplomatic immunity, also referred to as the commercial activity exception.

The relevance of this thesis lies in assessing whether these domestic developments, in practice, limit the application of the immunity of States and diplomats before national courts. It then examines whether their reasoning is strong enough to convince other jurisdictions to adopt the same exceptions to immunity when the exploitation of domestic workers verges on modern slavery, which has not been thoroughly examined before.

The first avenue this paper explores is the domestic development of a *jus cogens* exception. In particular, this paper analyses what a *jus cogens* exception to immunity entails and whether there is yet recognition of such a *jus cogens* exception for diplomatic immunity. The second legal avenue this paper examines is how the United Kingdom Supreme Court ruling *Basfar versus Wong* expands the jurisdiction of domestic civil courts in allowing for civil actions to be brought for acts of modern slavery performed by diplomats enjoying immunity.

## **II. The New Concept of Modern Slavery**

### **A. Domestic Abuse by Diplomatic Agents**

Diplomatic agents have very demanding tasks, ranging from representing their State, protecting its interests and those of its nationals, negotiating with the government of the other States, reporting to the government of their State on all matters of importance to it, to promoting friendly relations in general between the two States in economic, financial, labour, cultural, scientific, and defence matters.<sup>5</sup> Given the demanding nature of diplomatic responsibilities, diplomatic agents often employ domestic workers to carry out day-to-day household tasks, including cleaning, cooking, and even the education of their children. However, as demonstrated by the example in the introduction, the employment of domestic workers in diplomatic households is sometimes carried out in abusive and exploitative conditions, where domestic workers are deprived of their freedom, dignity, and basic human rights. These situations may involve physical abuse, rape, mental abuse, excessive working hours, non-payment of wages, and restrictions of movement. All of which could be brought under the legal definitions of forced labour, servitude, or sometimes even slavery. International law, however, prohibits domestic workers from being subjected to these forms of severe exploitation. In what follows, the prohibition on slavery, servitude, and forced labour will be explained in more detail.

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<sup>4</sup> Martin Plaut, "World first: British Supreme Court rules Saudi diplomat cannot claim immunity for treating employee as "modern slave"" (Martin Plaut, 06 July 2022) < <https://martinplaut.com/2022/07/06/world-first-british-supreme-court-rules-saudi-diplomat-cannot-claim-immunity-for-treating-employee-as-modern-slave/> > accessed at 29 April 2025.

<sup>5</sup> Article 3 of the VCDR outlines the functions of a diplomatic mission. Ivor Roberts (ed.), *Satow's Diplomatic Practice, 8th Edition (8th Edition)*, (Oxford University Press 2023) 112.

## B. Legal Definitions of Forced Labour, Servitude, and Slavery

Protection of domestic workers against forced labour, servitude, and slavery is safeguarded under multiple international conventions and declarations of a non-binding nature. The prohibitions on slavery, servitude and forced labour are, for example, stated in the Universal Declaration of Human Rights ('UDHR')<sup>6</sup>, the European Convention on Human Rights ('ECHR')<sup>7</sup>, the American Convention on Human Rights (ACHR)<sup>8</sup>, the African Charter on Human and Peoples' Rights (Banjul Charter)<sup>9</sup> and the International Convention on Civil and Political Rights ('ICCPR')<sup>10</sup>. In addition, several international treaties discuss these crimes separately. As a result, domestic workers cannot be subjected to forced labour, servitude, or slavery. The concepts of slavery, servitude, and forced labour are, however, the subject of distinct legal definitions, which will be discussed separately.

As a preliminary remark, the different legal definitions will be discussed based on the jurisprudence of regional and international courts, since national jurisprudence does not add value to the discussion at the regional and international level. For the legal definitions of servitude and forced labour, the case law of the European Court of Human Rights ('ECtHR') will primarily be discussed, as this is the only regional court that has engaged in the debate. The reason why other regional courts have not taken a stand is not clear. It can be presumed that this is due to the easier and more accessible individual complaint mechanism provided by the ECtHR, in contrast to that of the Inter-American Court of Human Rights ('IACtHR') and the African Court on Human and Peoples' Rights ('AfCHPR').<sup>11</sup>

### 1. Slavery

#### (a) The 1926 Slavery Convention

The first international legal definition of slavery can be found in article 1(1) of the Slavery Convention of 1926, which defines 'slavery' as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.<sup>12</sup> The reference to 'status' or 'condition' is widely interpreted to encompass both chattel slavery (or *de jure* slavery) and *de facto* slavery.<sup>13</sup> The prohibition of chattel slavery or *de jure*

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<sup>6</sup> Article 4 of the UDHR (not legally binding but has a strong political and moral authority).

<sup>7</sup> Article 4 of the ECHR (ratified by 46 States).

<sup>8</sup> Article 6 of the ACHR (ratified by 23 States).

<sup>9</sup> Article 5 of the Banjul Charter (ratified by 54 States).

<sup>10</sup> Article 8 of the ICCPR (ratified by 174 States).

<sup>11</sup> Before the IACtHR, Only States and the Commission can bring complaints before the court. When an individual would like to bring a claim, the individual's complaint has to pass through a Commission first, which can submit a case to the court. (Article 44 and article 61(1) of the American Convention on Human Rights). Access to the AfCHPR is limited due to the fact that only 8 African States have issued a declaration under article 34(6) of the Protocol of 1998 to the Banjul Charter allowing for individual complaints.

<sup>12</sup> The Slavery Convention of 1926 has 99 ratifications.

<sup>13</sup> Kärt Pormeister, "The Legal Concept of Slavery in the Modern European Legal Sphere" (Juridica International 2014) 132.; And Jean Allain, "The Definition of 'Slavery' in General International Law and the Crime of Enslavement within the Rome Statute" (Guest Lecture Series of the Office of the ICC Prosecutor 2007) 12-13. See also Nicholas Lawrence McGeehan, "Misunderstood and neglected: The marginalisation of slavery in international law" (The International Journal of Human Rights 2012) 444. See also David Weissbrodt and Anti-Slavery International, "Abolishing Slavery and Its Contemporary Forms" (OHCHR 2002) 5, UN Doc. HR/PUB/02/4. (Hereafter referred to as X.)

slavery holds that under the law, no one can own another person.<sup>14</sup> *De facto* slavery refers to a condition where a person is held in conditions of slavery in the absence of a legal title.<sup>15</sup> While *de facto* slavery is widely accepted by legal scholars, the European Court of Human Rights has adopted a narrower approach. In *Saladin versus France*, the ECtHR had to rule on a situation where a girl was forced to work in exploitative conditions for a family in France. The ECtHR considered whether her conditions amounted to slavery and thereby considered the legal definition of the 1926 Slavery Convention, as the ECHR does not contain a definition of slavery. The ECtHR concluded that for a person to be held in slavery, there is a need for a genuine right of legal ownership, reducing the person to the status of an ‘object’. With this conclusion, the ECtHR interpreted the definition of slavery of 1926 narrowly, implying that it only encompasses *de jure* slavery and not *de facto* slavery.<sup>16</sup> Eventually, this view was overruled by the ECtHR in 2010 in the *Rantsev v. Cyprus and Russia* judgment<sup>17</sup>, where the ECtHR followed the interpretation taken by the ICTY in *Kunarac* and also considered *de facto* slavery as slavery.

(b) Expansion of ‘the Exercise of the Powers Attached to the Legal Right of Ownership’

The definition of slavery, as stated in the 1926 Slavery Convention, has not changed over time and remains applicable. However, ‘the exercise of the legal right to ownership’, which has historically been interpreted as the selling and purchasing of slaves or the claiming of products of their labour<sup>18</sup>, should nowadays be understood as a severe deprivation of liberty through many different forms of coercion and control.<sup>19</sup> This evolution was set into motion by several international and regional courts, which we will now turn to.

In line with the 1926 Slavery Convention, the elements of the crimes under the Rome Statute of the International Criminal Court (ICC)<sup>20</sup> describe the crime against humanity of enslavement as the exercise of any or all of the powers attaching to the right of ownership through selling or purchasing a person, or by imposing on them a similar deprivation of liberty. Especially through this last sentence of ‘imposing a similar deprivation of liberty’, the elements of crimes reflect a broader understanding of the definition of slavery, as this was not included in the historical interpretation of the definition. In the *Prosecutor v. Dominic Ongwen* judgment, the ICC had to pronounce itself on the meaning of ‘a similar deprivation of liberty’. Dominic Ongwen stood trial for restricting and dictating the movement of the women working for him, including by threats, and subjecting them to armed guard, subjecting them to forced labour, and physically and psychologically abusing them. The ICC ruled that Dominic Ongwen, by

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<sup>14</sup> Jean Allain, (n. 13) 11.

<sup>15</sup> Kärt Pormeister, (n.13) 132.

<sup>16</sup> ECtHR 6 July 2005, *Siliadin v. France*, judgment, §122.; Jean Allain, *The Travaux Préparatoires of Multilateral Treaties* (Martinus Nijhoff 2008) 77.; Gábor Gyulai, “Slavery, Servitude and Forced Labour in International Law: Should the Difference Still Matter?” (King's Law Journal 2021) 231.

<sup>17</sup> ECtHR 07 January 2010, *Rantsev v. Cyprus and Russia*, judgment, §142-143.

<sup>18</sup> Jean Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (Martinus Nijhoff 2008) 497.

<sup>19</sup> UN General Assembly, “Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences” (27 July 2018), UN Doc. A/HRC/39/52, §12.

<sup>20</sup> Article 7(1)(c) and 7(2)(c) Rome Statute: Enslavement as a crime against humanity means *the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children*.

depriving several women of their personal liberty, exercised powers attaching to the right of ownership. The ICC clarified that the imposition of a ‘similar deprivation of liberty’ may take various forms, such as situations in which the victims may not have been physically confined, but were otherwise unable to leave, as they would have nowhere else to go and fear for their lives.<sup>21</sup>

In addition, the International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber, as well as the Appeals Chamber in *Prosecutor v. Kunarac et al.*<sup>22</sup>, ruled that Radomir Kovač, who served as a sub-commander of the Bosnian Serb military police, was guilty of the crime against humanity of enslavement. During the Yugoslavian armed conflict, Kovač imprisoned two girls and exercised *de facto* ownership. The girls were required to take care of the household chores, the cooking, and the cleaning, while being sexually assaulted, beaten, threatened, psychologically oppressed, and kept in constant fear. In the judgment, the ICTY recognised that the definition of 1926 has evolved to encompass various contemporary forms of slavery and that the situation of the two girls was included in the crime. Whilst interpreting ‘the exercise of the powers attached to the right of ownership’, the ICTY ruled that the exercise of such powers should be understood as whether or not there was a deprivation of liberty through coercion or control. Consequently, the ICTY and ICC both expanded the interpretation of the 1926 definition of slavery by construing “the exercise of the powers attached to the right of ownership” as a deprivation of liberty through coercion or control.

The Economic Community of West African States (‘ECOWAS’) Community Court of Justice also adopted the view that slavery was a deprivation of liberty through coercion or control and ruled that Hadijatou Mani Koraou was held in slavery by her so-called spouse and condemned Niger for a failure to enforce its own law prohibiting slavery.<sup>23</sup> In addition, the OHCHR<sup>24</sup> and the Bellagio-Harvard Guidelines of 2012<sup>25</sup>, starting from the legal definition of 1926, also used the same interpretation of the formerly discussed criminal courts by stating that ‘the exercise of the powers attaching to the rights of ownership’ should be understood as ‘constituting control over a person in such a way as to significantly deprive that person of his or her individual liberty’. All three also focus on the deprivation of liberty, but the OHCHR and the Guidelines add that the deprivation of liberty should be done ‘with the intent of exploitation through the use, management, profit, transfer or disposal of that person. Usually, this exercise will be supported by and obtained through means such as violent force, deception, and/or coercion’.<sup>26</sup> Remarkably, the Inter-American Court of Human Rights used this exact definition of the Bellagio-Harvard Guidelines of

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<sup>21</sup> ICC (Trial Chamber) 04 February 2021, *The Prosecutor v. Dominic Ongwen*, judgment, §2713 and §3053. Similarly in the *Prosecutor v. Katanga*, the ICC ruled that the exercise of powers of ownership should be interpreted to mean “*the use, enjoyment and disposal of a person who is regarded as property, by placing him or her in a situation of dependence which entails his or her deprivation of any form of autonomy*”. See also ICC (Trial Chamber) 07 March 2014, *The Prosecutor v. Germain Katanga*, judgment, §975.

<sup>22</sup> ICTY (Trial Chamber) 22 February 2001, *The Prosecutor v. Kunarac et al.*, judgment, §543.; ICTY (Appeals Chamber) 12 June 2002, *The Prosecutor v. Kunarac et al.*, judgment; §119.

<sup>23</sup> ECOWAS Community Court of Justice 27 October 2008, *Hadijatou Mani v. Republic of Niger*, judgment, §77.

<sup>24</sup> David Weissbrodt and Anti-Slavery International, (n. 13) 7.

<sup>25</sup> The Bellagio-Harvard Guidelines of 2012 is a non-binding product of scholarly consensus.

<sup>26</sup> Guideline 2 of the Bellagio-Harvard Guidelines of 2012.

2012 in the *Fazenda Brasil Verde Workers v. Brazil* judgment.<sup>27</sup> The case concerned men who were lured under false pretences to work at Fazenda Brazil Verde, where they were subjected to forced labour, denied pay, adequate food, and clean water. The workers were kept under constant surveillance, endured threats of death, and were deprived of any freedom to leave.

In conclusion, the legal definition of slavery has not changed since 1926. However, its practical effect has broadened over the years by expanding the interpretation of ‘the exercise of the powers attached to the right of ownership’. Historically, where the exercise of such powers was seen as purchasing or selling a person, it is now generally interpreted by courts as significantly depriving a person of their liberty and autonomy through coercion and control for the purpose of exploitation. Moreover, all formerly mentioned courts recognized the following indicators of coercion or control over workers as signs of contemporary slavery practices: the confiscation of passports, the use of measures taken to prevent or deter escape, the use of physical sequestration and violence, verbal intimidation, (threats of) non-payment, and threats of reporting undocumented or otherwise vulnerable workers to the authorities.<sup>28</sup>

## 2. Servitude

Unlike in the case of slavery, what constitutes ‘servitude’ is not defined in any binding international legal instrument.<sup>29</sup> A definition was proposed in the seventh revised draft of the Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, which described servitude as ‘the condition of a person who is unlawfully compelled or coerced by another to render any service to the same person or to others and who has no reasonable alternative but to perform the service, and shall include domestic servitude and debt bondage.’<sup>30</sup> However, this definition was omitted from the final text, whereby, as a result, no established definition of servitude as such exists on the international level.

The 1956 Supplementary Convention on the Abolition of Slavery could still be used as a starting point. This convention expanded the Anti-Slavery framework by adding that certain practices similar to slavery or practices with servile status, which do not meet the threshold of exercising the powers attached to the right of ownership, should also be

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<sup>27</sup> IACtHR 20 October 2016, *Fazenda Brasil Verde Workers v. Brazil*, judgment, §269-273.

<sup>28</sup> ICC, “Policy on Slavery Crimes”, (December 2024) §26. ICTY (Trial Chamber) 22 February 2001, *The Prosecutor v. Kunarac et al.*, judgment § 543.; ICTY (Appeals Chamber) 12 June 2002, *The Prosecutor v. Kunarac et al.*, judgment, §119. IACtHR 20 October 2016, *Fazenda Brasil Verde Workers v. Brazil*, judgment, §269-273. ECOWAS Community Court of Justice 27 October 2008, *Hadijatou Mani v. Republic of Niger*, judgment, §39-44.; ICC (Trial Chamber) 04 February 2021, *The Prosecutor v. Dominic Ongwen*, judgment, §2712. ICC (Trial Chamber) 07 March 2014, *The Prosecutor v. Germain Katanga*, judgment, §976.; See also guidelines 3 and 4 of the Bellagio-Harvard Guidelines of 2012 (non-binding document).

<sup>29</sup> Gabor Gyulai, “Slavery, Servitude and Forced Labour in International Law: Should the Difference Still Matter?” (King’s Law Journal 2021) 233.

<sup>30</sup> UN General Assembly, “The United Nations Convention against Transnational Organized Crime (“Draft Trafficking Protocol”)” (2-27 October 2000), UN Doc. A/AC.254/4/Add.3/Rev.7, Article 2 bis(c).

abolished. These practices consist of debt bondage<sup>31</sup>, serfdom<sup>32</sup>, sham marriages<sup>33</sup>, and child exploitation through adoption<sup>34</sup>. However, the 1956 Convention refrains from giving a general definition of servitude.

These four concepts are not the only forms of servitude.<sup>35</sup> As the UN special rapporteur on contemporary forms of slavery explained, the most common form of servitude is debt bondage, which is a situation where a person is forced to work to pay off a debt, but due to the large amount of the debt, it is unreasonable that they will ever pay it off. Nevertheless, other forms of servitude also exist. The special rapporteur, in its report on contemporary forms of slavery, further clarified that servitude often occurs in situations of economic exploitation, where the victim believes that he or she is unable to alter or leave the situation through the formed dependency on the perpetrator, which can be created by economic factors, lack of freedom of movement, and physical and psychological abuse.<sup>36</sup> Following this report, the two key conditions for servitude are thus: (1) economic exploitation and (2) dependency on the perpetrator, which leads the victim to believe that the condition is permanent or unchangeable.<sup>37</sup>

Some international and regional courts have tried to fill the gap created by the lack of a binding definition. The ICC, in its new policy on slavery crimes of 2024, did not provide a definition but clarified that the practices described in the 1956 Supplementary Convention on the Abolishment of Slavery and Slavery-like practices, such as debt bondage, serfdom, non-consensual marriage of a woman upon payment (...), are examples of servitude. In addition, the ICC further elucidated that the difference between servitude and slavery depends on the degree of coercion, whereby servitude is generally understood as a coercive form of exploitation that falls between slavery and forced labour, but when such coercion reaches the point where it results in the exercise of powers attaching to the right of ownership, it becomes slavery.<sup>38</sup> The exercise of ‘any or all of the powers attaching to the right of ownership’ thus distinguishes servitude from ‘slavery’. However, as the UN special

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<sup>31</sup> Debt bondage is the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined. Article 1(a) Supplementary Convention of 1956.

<sup>32</sup> The condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status. Article 1(b) Supplementary Convention of 1956.

<sup>33</sup> Sham marriages are the practices of selling women into marriage or doing the equivalent with family members, and the practice of inheriting widowed women. Article 1(c) Supplementary Convention of 1956.

<sup>34</sup> Any institution or practice whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour. Article 1(d) of the Supplementary Convention of 1956.

<sup>35</sup> Gabor Gyulai, (n. 29) 235.

<sup>36</sup> UN General Assembly, (n.19), §14.

<sup>37</sup> Although this report is not legally binding upon States, it holds great authority due to the role of the special rapporteur within the UN, of which every State is a member, and the expert knowledge of the rapporteur on contemporary forms of slavery.

<sup>38</sup> ICC, “Policy on Slavery Crimes”, (December 2024) §45. See also Bellagio-Harvard Guideline 10 of 2012: “Accepting that both slavery and lesser servitudes such as forced labour or “institutions and practices similar to slavery” may be found in substance in a particular circumstance; the manner to proceed is (...) to ask whether there has been an exercise of the powers attaching to the right of ownership. If so, then the more serious offence of slavery is present.”

rapporteur correctly pointed out, in practice, the distinction is often blurred and depends mainly on the degree of control exerted over the individual.<sup>39</sup>

Only the European Court of Human Rights developed a (regionally) binding definition of servitude. In *Siliadin v. France*, the ECtHR had to pronounce itself on the status of a girl who was brought to France and was lured into a situation of an unpaid housemaid, where she worked seven days a week, without a day off, from early morning to late evening. Additionally, she was confined to the house at all times, had her passport taken away, and was afraid of being arrested by the police due to her undocumented status. The ECtHR classified the case as domestic servitude and stated that ‘servitude’ means ‘an obligation to provide one’s services that is imposed by the use of coercion, and is to be linked with the concept of slavery’.<sup>40</sup> However, it is arguable that the facts of this case could equally be brought under slavery, as many facts accord with the indicators of slavery. A possible explanation for the court’s classification of the case as servitude instead of slavery may lie in the fact that the court at the time had a narrow view of what constitutes slavery, only recognizing *de jure* slavery and not *de facto* slavery, as explained previously.

In *C.N. and V. versus France*, the ECtHR was again asked to rule on the status of two girls who were forced to execute domestic household chores for their aunt after being transferred from Burundi. Especially the first girl endured a situation of unpaid exploitation, mental abuse, threats of being deported, and a feeling of impossibility to change her condition. Therefore, the ECtHR classified the condition of the first girl as domestic servitude and clarified that servitude consists of a ‘particularly serious form of denial of freedom’ and fell back on the same definition of servitude as stated above. In addition, the court clarified that the fundamental distinguishing feature between servitude and forced labour lies in ‘the victim’s feeling that their condition is permanent and that the situation is unlikely to change’.<sup>41</sup> In short, the common determinants to classify a case under domestic servitude following the ECtHR are: the vulnerability of the person, limitations on personal freedom, violation of human dignity, excessive hours of work, no payment or remuneration, or disproportionate payments, and the perceived permanency of the situation.<sup>42</sup>

To conclude, although no international definition exists, two elements of servitude appear to be recurring: (1) an economically abusive labour or service relationship and (2) no reasonable possibility to alter or escape that relationship created through dependency.<sup>43</sup>

### 3. Forced Labour

The prohibition on forced labour is enshrined in multiple international treaties.<sup>44</sup> Notably, the first Convention on Forced Labour (C-029) of the International Labour Organisation

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<sup>39</sup> UN General Assembly, (n.19) §13.

<sup>40</sup> ECtHR 6 July 2005, *Siliadin v. France*, judgment, § 123-124.

<sup>41</sup> ECtHR 11 October 2012, *C.N. and V. v. France*, judgment, §91.

<sup>42</sup> UN General Assembly, (n.19) §13.

<sup>43</sup> Human Rights Watch, “Hidden in the Home: Abuse of Domestic Workers with Special Visas in the United States” (HRW, June 2001) <<https://www.hrw.org/report/2001/06/01/hidden-home/abuse-domestic-workers-special-visas-united-states>> accessed 17 December 2024.

<sup>44</sup> Convention on Forced Labour (C29) (ratified by 181 States). Article 1 of the Abolition of Forced Labour Convention (C105) (ratified by 178 States). Articles 3, 5, 6, 9, 11, 16, and 17 of the Domestic Workers Convention (C189)(ratified by 35 States).

(ILO) is the only international treaty enshrining a definition of forced labour. Article 2(1) of the convention defines forced or compulsory labour as ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’. This definition is almost universally accepted by States, as 181 states have ratified the convention and thereby endorsed the definition. Two requirements emerge from this generally recognized definition: (1) work or service extracted under the menace of a penalty and (2) involuntariness.<sup>45</sup>

It should be noted that under the legal framework of the ILO Convention, the prohibition on forced labour is derogable, meaning that exceptions are allowed.<sup>46</sup> When these exceptions apply, the work demanded shall not be considered ‘forced labour’, even though the individual is not given any choice in whether or not they want to perform the work. As these exceptions do not apply to domestic workers hired by diplomats, they will not be addressed further.

#### (a) Clarification by the ECtHR on the Conditions of Forced Labour

In contrast to the prohibition of slavery, the ECtHR is the only regional court that has ruled on the definition of forced labour. The ECtHR has interpreted the widely accepted definition of the ILO in its case law and thereby clarified the meaning of the two conditions. Even though the ECtHR is a regional court and not an international one, its clarification of the conditions is still meaningful within international law as it draws on the international definition provided by the ILO. However, the court’s interpretation is only binding on the Member States of the Council of Europe and serves, at best, as a source of inspiration for other States.

The first condition requires that a person be coerced to perform labour under the threat or menace of a penalty. Firstly, the court clarified that the labour performed is not limited to ‘manual work’. Any work or service can fall under forced labour.<sup>47</sup> Secondly, the court considered that the classification of a situation as compulsory labour will depend on various factors, including the type and amount of work involved.<sup>48</sup> In the case of *Van der Mussele v. Belgium* of 1983, the court used the notion of ‘disproportionate burden’ in order to decide whether the work required was so demanding or unfair that it would constitute compulsory labour.<sup>49</sup> Furthermore, the court considered that a penalty can be given explicitly through the use of physical force or restraint, or through the use of more subtle forms. More subtle forms include the threat to report the person to the police or immigration authorities in case their employment status is not legal<sup>50</sup> or through the

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<sup>45</sup> Next to the establishment of a definition on forced labour, the ILO drew up 11 indicators of forced labour to identify persons who are possibly trapped in a forced labour situation, such as isolation, abusive working and living conditions, withholding of wages, excessive overtime, restriction of movement, confiscation of documents (...). However, these indicators greatly correspond with the indicators for slavery and, as forced labour and slavery differ in severity, these indicators might have gone a bit too far.; ILO, “ILO indicators of forced labour”, (01 October 2012) < <https://www.ilo.org/publications/ilo-indicators-forced-labour> >.

<sup>46</sup> Article 2(2) of the Forced Labour Convention of 1930.

<sup>47</sup> ECtHR 23 November 1983, *Van der Mussele v. Belgium*, judgment, §33.

<sup>48</sup> Council of Europe, “Guide on Article 4 of the European Convention on Human Rights” (2018) 9-10.

<sup>49</sup> ECtHR 23 November 1983, *Van der Mussele v. Belgium*, judgment, §39.

<sup>50</sup> ECtHR 11 October 2012, *C.N. and V. v. France*, judgment, §77.

threat of disciplinary sanctions<sup>51</sup>. Threats to send the person back to his or her country of origin were also accepted as threats of punishment.<sup>52</sup>

The second condition requires that the person offers themselves voluntarily for the work in question. The court stated in this regard that prior consent to the tasks performed should be taken into account, but cannot be decisive.<sup>53</sup> In addition, all circumstances of the case should be looked into, such as ‘whether the services rendered fall outside the ambit of the normal professional activities of the person concerned; whether the services are remunerated or not, or whether the service includes another compensatory factor, and whether the obligation is founded on a conception of social solidarity’.<sup>54</sup>

#### 4. Conclusion on the Legal Definitions of Forced Labour, Servitude, and Slavery

In conclusion, the legal definitions of slavery, servitude, and forced labour as elucidated by the rulings of numerous international and regional courts imply that these crimes are distinct but closely related, and sometimes even overlap. As these crimes are becoming more and more intertwined, it should be examined whether these crimes should be brought under one overarching term of ‘modern slavery’. International organizations, such as the UN and the ILO, and several leading NGOs, have done so by adopting the term modern slavery in their recent publications, instead of referring to the crimes of forced labour, servitude, and slavery separately. The following subsection will address this question.

### C. Modern Slavery

#### 1. Modern Slavery under International Law

The prohibitions on forced labour, servitude, and slavery are widely recognised. These prohibited acts of exploitation, together with a few other international crimes, are more recently grouped under the term ‘modern slavery’.<sup>55</sup> It should be noted, however, that modern slavery is not a legal term, nor is it defined under international law. Nevertheless, the ILO and the International Organization of Migration (IOM) defined modern slavery as ‘situations of exploitation that a person cannot refuse or leave because of threats, violence, coercion, deception, and/or abuse of power.’<sup>56</sup> The prohibited acts included by the ILO and the IOM are forced labour, servitude, slavery, and forced marriage. Anti-Slavery International, the oldest international NGO on slavery,<sup>57</sup> and the Freedom Fund<sup>58</sup> confirm the aforementioned crimes, but add that the crimes of child exploitation and sexual exploitation also fall under the term of modern slavery. The term ‘modern slavery’ is thus

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<sup>51</sup> ECtHR 18 January 2011, *Graziani-Weiss v. Austria*, judgment, §39.

<sup>52</sup> ECtHR 11 October 2012, *C.N. and V. v. France*, judgment, §77.

<sup>53</sup> ECtHR 18 January 2011, *Graziani-Weiss v. Austria*, judgment, §40.; and ECtHR 06 February 2018, *Adigüzel v. Turkey*, judgment, §30.

<sup>54</sup> ECtHR 18 January 2011, *Graziani-Weiss v. Austria*, judgment, §38.; and ECtHR 05 July 2011, *Mihal v. Slovakia*, judgment, §64.

<sup>55</sup> UK Supreme Court 06 July 2022, *Basfar v. Wong*, judgment, §73.

<sup>56</sup> ILO, Walk Free and IOM, “Global Estimates of Modern Slavery Forced Labour and Forced Marriage” (September 2022) 13.

<sup>57</sup> Anti-Slavery International, “What is Modern Slavery?” (Anti-Slavery International, 2022) < <https://www.antislavery.org/slavery-today/modern-slavery/> > accessed 15 December 2024.

<sup>58</sup> Freedom Fund, “What is Modern Slavery?” (Freedom fund, 2024) < <https://www.freedomfund.org/what-is-modern-slavery/> > accessed 15 December 2024.

used by several NGOs and international organizations as an overarching term to refer to exploitative practices, mostly in the employment sector.

## 2. Modern Slavery under National Law

Some common law States have also made use of the term ‘modern slavery’. The United Kingdom (UK), in its Modern Slavery Act of 2015, abstained from defining modern slavery as a concept. However, based on the crimes that are included in this act, it can be derived that the UK uses the concept of modern slavery as an umbrella for the crimes of slavery, servitude, forced labour, and human trafficking. Child labour and forced marriage are not included. In that regard, criticism arose recently asking for the inclusion of the crimes of inter alia forced marriage and illegal adoption.<sup>59</sup> Under the Modern Slavery Act of 2018 in Australia, modern slavery constitutes slavery, slavery-like practices, servitude, forced labour, human trafficking, child labour, and debt bondage.<sup>60</sup> Forced marriages are not included in this act. The US Department of State went for a broader inclusion of crimes and clarified that modern slavery includes sex trafficking, child sex trafficking, forced labour, debt bondage, domestic servitude, forced child labour, together with the unlawful recruitment and use of children in armed conflicts.<sup>61</sup> Lastly, Canada recognized in the preamble of the Fighting Against Forced Labour and Child Labour in Supply Chains Act of 2023 that forced labour and child labour are forms of modern slavery. In short, modern slavery as a term is used by Australia, the United Kingdom, and other common law States to refer to exploitative practices, with a common dominator: the exploitation of a person under the control of another person.<sup>62</sup>

## 3. Difference between Modern Slavery and *De Facto* Slavery

Slavery, as the exercise of the powers attached to the right of legal ownership, has, as demonstrated, undergone a true evolution. *De jure* slavery, namely the legal status of ownership over another person, has been abolished. However, *de facto* slavery still persists, and, where the exercise of such powers was historically seen as purchasing or selling a person, *de facto* slavery is now generally interpreted by courts as significantly depriving a person of their liberty and autonomy through coercion and control for the purpose of exploitation.

This *de facto* slavery differs from the concept of modern slavery as *de facto* slavery is used to capture the worst forms of exploitation, whilst modern slavery is generally used as an umbrella term to include all kinds of exploitative practices where individuals are controlled through violence, force, fraud or coercion for others’ commercial or personal

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<sup>59</sup> United Kingdom Modern Slavery Act of 2015, section 1. Modern Slavery Act 2015 Committee, “The Modern Slavery Act 2015: becoming world-leading again” (House of Lords, 16 October 2024) §267.

<sup>60</sup> Australia Modern Slavery Act of 2018 part 1.4.

<sup>61</sup> United States Department of State, “Trafficking in Persons Report” (US Department of State, June 2016) 32-33.

<sup>62</sup> UN Office on Drugs and Crimes, “Global Report on Trafficking in Persons” (December 2016) < [https://www.unodc.org/documents/data-and-analysis/glotip/2016\\_Global\\_Report\\_on\\_Trafficking\\_in\\_Persons.pdf](https://www.unodc.org/documents/data-and-analysis/glotip/2016_Global_Report_on_Trafficking_in_Persons.pdf). > accessed 15 December 2024.

gain<sup>63</sup>, and thus also includes lesser forms of exploitation, such as forced labour and servitude.

As there is still a difference in severity between the different forms of exploitation, courts should continue to treat these classic notions as separate crimes. However, the concept of ‘modern slavery’, reuniting these distinct yet overlapping concepts as part of a larger and modernised category based on common features, can be a valuable tool for international organisations, NGOs, and national legislators to address these phenomena as a whole and develop a comprehensive response to these abuses.<sup>64</sup> Therefore, even though the separate legal definitions should not be abolished, modern slavery as a concept on its own could serve an important role by highlighting the contemporary forms of exploitation that exist in today’s world.

#### **D. Interim Conclusion**

Modern slavery functions as an umbrella term for multiple types of exploitation, the majority of which occur in the workplace. Although modern slavery itself is not defined as such on the international level, the legal definitions of the prohibitions included in the concept are becoming clearer as a result of rulings by international and European courts and tribunals. Therefore, this concept of modern slavery offers a strong framework to address the appalling working conditions some domestic workers face when employed by diplomatic agents.

Despite the gravity of acts of modern slavery, the abused domestic workers, already in a vulnerable situation, frequently find themselves in a situation where they are left without judicial recourse, as diplomats enjoy immunity before national courts. Nonetheless, national courts are increasingly limiting the scope of the immunity granted to States and their representatives, including diplomats, particularly in relation to acts involving, inter alia, modern slavery. The next chapters will explore these current evolutions in greater depth.

### **III. The Old Human Rights Dilemma**

#### **A. Introduction**

As previously mentioned, the employment of domestic workers by diplomatic agents does not always adhere to the law. In recent years, several cases have come to light where diplomats abuse their domestic workers by making them work in appalling conditions that often verge on modern slavery. When these acts of modern slavery are committed by diplomats, victims, in principle, cannot seek compensation before the civil courts for their injuries, lost wages, or mental suffering, due to the immunity these diplomatic agents enjoy. While diplomatic immunity is widely recognised, there is an ongoing debate regarding how far this immunity entitlement extends and whether exceptions apply,

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<sup>63</sup> Katarina Schwarz and Andrea Nicholson, "Collapsing the Boundaries Between De Jure and De Facto Slavery: The Foundations of Slavery Beyond the Transatlantic Frame" (Human Rights Review 2020) 391.

<sup>64</sup> Gabor Gyulai, (n. 29) 259.

including for acts of modern slavery.<sup>65</sup> A central issue in this debate is whether peremptory norms, like the prohibition on slavery, can override diplomatic immunity and grant victims of slavery access to justice. This dilemma is commonly referred to as the old human rights dilemma. For now, the VCDR is silent on any exceptions for immunity regarding severe human rights violations. The present chapter reviews whether an exception to (diplomatic) immunity for the most severe human rights violations might be developing.

## B. The Vienna Convention on Diplomatic Relations (VCDR)

The Vienna Convention on Diplomatic Relations of 1961 (VCDR) serves as the main legal framework governing diplomatic relations between States. The Convention, which has evolved into customary international law, covers the duties as well as the rights, privileges, and responsibilities of diplomatic agents.<sup>66</sup> One of the responsibilities or obligations of diplomatic agents is that they are under the duty to respect the laws and regulations of the State to which they are assigned, also referred to as the receiving or host State.<sup>67</sup> This means that diplomats must treat their domestic workers according to the laws and regulations of the host State and the applicable rules of international law. As a result, they cannot commit any acts included in the concept of modern slavery, such as forced labour, servitude, or slavery.

However, if violations do occur, article 31 of the VCDR shields diplomats from being sued before a civil court of the host State. As a result, victims of the violations of inter alia forced labour, servitude, or slavery are prevented from bringing the diplomatic agents to justice. These rules thus provide a procedural protection mechanism for diplomatic agents, whereby they are protected from being sued in the host State, but this procedural bar does not affect any underlying substantive liability for the crimes committed.<sup>68</sup>

Although diplomatic agents enjoy immunity, this diplomatic immunity is not granted for life. Article 39 of the VCDR puts a temporal scope on this immunity and distinguishes between two types of immunity, functional and personal immunity, which will now be discussed.

### 1. Functional Immunity

First of all, diplomatic agents enjoy immunity for the acts they have performed for or on behalf of the State they are representing, commonly referred to as functional immunity.<sup>69</sup> Functional immunity or immunity *ratione materiae* is thus attached to the acts performed in an official capacity, which are acts performed by a diplomat in the exercise of State authority.<sup>70</sup> For official acts covered under functional immunity, the diplomat can never

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<sup>65</sup> Yuliya Zabyelina, *Between Immunity and Impunity: External Accountability of Political Elites for Transnational Crime* (1st edition) (Cambridge University Press 2023) 23.

<sup>66</sup> Walter Arévalo-Ramirez, "Diplomatic Relations" in Sué González Hauck, Raffaella Kunz, Max Milas (eds.), *Public International Law - A Multi-Perspective Approach* (Routledge 2024) 351.

<sup>67</sup> Article 41 of the VCDR.

<sup>68</sup> Sanderijn Duquet, "Immunities of Diplomatic and Consular Personnel – An Overview", in Tom Ruys and Nicolas Angelet, *Immunities and International Law* (Cambridge University Press 2019) 412-413.

<sup>69</sup> Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts" (EJIL 2011) 825-826.

<sup>70</sup> Rosanne Van Alebeeck, "Functional Immunity of State Officials from the Criminal Jurisdiction of Foreign National Courts" in Tom Ruys and Nicolas Angelet, *Immunities and International Law* (Cambridge University Press 2019) 498.

be asked to appear before a foreign criminal, civil, or administrative court. Additionally, this type of immunity will continue to apply even after the termination of the diplomatic mission.<sup>71</sup> It should be noted that immunity does not mean impunity, as these diplomatic agents can still be tried before the courts of the sending State, although this rarely happens.<sup>72</sup>

## 2. Personal Immunity

A second type of immunity is personal immunity or immunity *ratione personae*, which is not attached to the official acts of the diplomat, but is rather attached to the status of the diplomat.<sup>73</sup> Personal immunity exists throughout the period the diplomat is in office and covers both official and private acts during this period.<sup>74</sup> This type of immunity has as a goal to shield diplomats from being tried or sued before the court of the host State during their mandate, so that they cannot be harassed for minor offences or hindered from doing their job and can carry out the diplomatic mission effectively. Once the diplomatic mission ceases, the personal immunity will come to an end, and the diplomat can be held accountable for acts performed in a private capacity. For official acts, functional immunity will continue to apply. For the reason that acts of modern slavery are committed in a private capacity, as will be proven in a next chapter, diplomatic agents enjoy immunity before foreign courts until they have left office.<sup>75</sup> As a result, victims of inter alia modern slavery may never obtain justice.

It should be noted that the personal immunity of diplomats is not absolute and differs from the personal immunity of heads of State, which is absolute. The difference lies in the three exceptions to immunity, which are listed in article 31 of the VCDR, which could be invoked to set aside the personal immunity of the diplomat, whereby it is made possible to sue the diplomat before local civil courts during their mandate.<sup>76</sup> These exceptions will be explained in more detail in the next section.

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<sup>71</sup> Article 39(2) of the VCDR.

<sup>72</sup> Eileen Denza, *Diplomatic Law: commentary on the Vienna Convention on Diplomatic Relations* (Oxford University Press 2008) 265–266.

<sup>73</sup> Selman Özdan, *The Human Rights Challenge to Immunity in International Law* (Palgrave Macmillan 2022) 168.

<sup>74</sup> Philippa Webb, *International Judicial Integration and Fragmentation* (Oxford University Press 2013) 73.

<sup>75</sup> Personal immunity, likewise, in theory, doesn't mean impunity. However, it is well established that, in practice, the combination of functional and personal immunity will result in impunity. If victims can only file suit for private acts, such as acts of modern slavery, committed during the diplomatic mission after the mandate of the diplomat has ceased, this would impose incredible burdens on the victims as they mostly do not have family or friends in the State they are working where they can shelter, or money to survive in their own because they never received wages.<sup>75</sup> Additionally, serving proceedings in the State that sent the diplomat will often be impossible due to emotional, financial, and practical constraints. This is due to the possible loss of evidence after a long period of time, the unwillingness of the Sending state to prosecute their own diplomats, the high financial cost, the administrative difficulty to institute proceedings for the abused in the Sending State, and the inability of the victim to finance the costs of having legal advice.; See Denza, (n. 72) 265–266.; Jennifer Hoover Kappus, "Does Immunity Mean Impunity - The Legal and Political Battle of Household Workers against Trafficking and Exploitation by Their Foreign Diplomat Employers" (Case Western Reserve Law Review 2010) 291.

<sup>76</sup> Hazel Fox and Philippa Webb, *The Law of State Immunity* (Third Edition) (Oxford University Press 2015) 585-586.

### 3. Why Should There Be Immunity

It is well established under customary international law and the VCDR that diplomats enjoy immunity. However, as mentioned above, this personal immunity can lead to unfortunate circumstances, where victims of modern slavery are hindered from obtaining compensation before civil courts for the maltreatment they have endured. When evaluating whether or not an exception for acts of modern slavery should apply, it is important to focus on the reason why diplomats enjoy immunity.

The most widely accepted justification for diplomatic immunity is the functional necessity theory.<sup>77</sup> Under the functional necessity theory, immunity exists to protect diplomats and the diplomatic mission from undue interference and influence<sup>78</sup> to enable States to secure the objectives of their foreign policies without being pressured by force, propaganda, or law<sup>79</sup>. As can be read in the preamble of the VCDR, ‘immunities contribute to the development of friendly relations among nations and ensure the efficient performance of the functions of diplomatic missions in representing their State’. Concerning functional immunity, the rationale is that one State may not sit in judgment of another State, as this would undermine the sovereign equality of States.<sup>80</sup>

For personal immunity, the institution of diplomacy is essential to enhance communication and to enable States to achieve mutual understanding, despite any constitutional, cultural, or social differences.<sup>81</sup> To enable diplomats to do their work and not be harassed and hauled before courts on false or feigned grounds in an effort to prevent them from doing their job<sup>82</sup>, immunities were created. In order to let the diplomatic agents carry out their mission effectively, without fear of coercion or legal action from the receiving State, and to maintain smooth diplomatic and international relations, the receiving State must show tolerance for the wrongdoing and misconduct of diplomats and grant them immunity before their national courts.<sup>83</sup>

It is noteworthy that the preamble of the VCDR explicitly states that the purpose of such privileges and immunities is to ensure the efficient performance of the functions of diplomatic missions and not to benefit individuals. Unfortunately, there has been a tendency among diplomats to abuse their status and commit severe crimes ranging from driving under the influence of alcohol, assault, kidnapping, rape, the imposition of slavery, and even murder.<sup>84</sup> It is apparent that a lack of restrictions on diplomatic immunity has allowed diplomats to abuse their immunity.<sup>85</sup> Making the balance between the broad protections afforded to diplomats and the ability of victims to seek compensation

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<sup>77</sup> Selman Özdan, (n.73) 159.

<sup>78</sup> Yuliya Zabyelina, (n.65), 23 and 33.

<sup>79</sup> Selman Özdan, (n.73) 154.

<sup>80</sup> Darryl Robinson and others, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2024) 491.

<sup>81</sup> Darryl Robinson and others, *idem* 74, 491.

<sup>82</sup> Jon Kelly, “Should diplomats still have immunity?” (BBC, 2016) < <https://www.bbc.com/news/magazine-35882967> > accessed at 29 April 2025.

<sup>83</sup> Selman Özdan, (n.73) 153.

<sup>84</sup> Mitchell S. Ross, “Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities” (American University International Law Review 1989) 175.

<sup>85</sup> Selman Özdan, (n.73) 156. Robert Longey, “How Far Does Diplomatic Immunity Go?” (ThoughtCo, 2024) < [thoughtco.com/diplomatic-immunity-definition-4153374](https://www.thoughtco.com/diplomatic-immunity-definition-4153374) > accessed at 29 April 2025.

inevitably questionable. Former judge of the International Court of Justice, Higgins, remarked in this regard that the immunity should stop where the abuse starts.<sup>86</sup>

Knowing that diplomats sometimes abuse their immunity, the question arises whether the violation of certain human rights, which have acquired the status of *jus cogens*, could justify an exception to diplomatic immunity, in order to tackle the abuse. This old human rights dilemma will now be revisited.

### **C. The Old Human Rights Debate: A *Jus Cogens* Exception to Immunity**

The old human rights debate, which constitutes one of the most contested topics in contemporary international law<sup>87</sup>, was set in motion during the early 2000s. This dilemma posed the question of whether certain norms that have acquired the status of *jus cogens* could override immunities, creating, admittedly, a *jus cogens* exception to immunity. Whether a *jus cogens* argument can be made for acts of modern slavery to lift diplomatic immunity must be assessed in the light of the old human rights debate on State immunity, which has recently been given a second wind, as recent developments are slightly opening the door to the prevalence of *jus cogens* norms over immunity. In the following subchapters, this evolution will be explored.

#### **1. Are Acts of Modern Slavery Norms of *Jus Cogens***

Article 53 of the Vienna Convention on the Law of Treaties (VCLT) defines *jus cogens* rules or peremptory norms as norms of general international law accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted. In essence, peremptory norms are obligations that reflect and protect fundamental values of the international community. They may never, in any circumstance, be violated, like the prohibition of genocide and the prohibition of torture.<sup>88</sup> This article 53 of the VCLT thus introduces a certain hierarchy of norms, whereby *jus cogens* rules are superior to any other rule of international law. The ICJ, for the first time in judgments of 2006<sup>89</sup> and a second time in 2012,<sup>90</sup> confirmed the existence of *jus cogens* norms and their hierarchical superiority in international law. The ICJ acknowledged that they take precedence over both rules of customary international law and treaties.

To know whether a *jus cogens* exception to diplomatic immunity could be created in the context of modern slavery, it is necessary to first explore the status in international law of the different prohibitions included in the concept of modern slavery. More specifically, it

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<sup>86</sup> Rosalyn Higgins, “The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience” (American Journal of International Law 1985) 644.; “*it is widely felt that diplomats acting in a way incompatible with their diplomatic status should not benefit from an immunity granted to assist the orderly conduct of diplomatic relations*”. Furthermore, she stated that “*a proper interpretation of the Vienna Convention would support the view that immunity and inviolability falls away when diplomats and missions abuse their positions*”.

<sup>87</sup> Yuliya Zabyelina, (n.65) 68.

<sup>88</sup> Gleider Hernandez, *International law (second edition)* (Oxford University Press 2022) 66.; ILC, “Report of the International Law Commission” (June-August 2019), Doc No. A/74/10, 150-151.

<sup>89</sup> ICJ 03 February 2006, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, §64.

<sup>90</sup> ICJ 20 July 2012, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, §99.

is needed to examine whether the prohibitions of forced labour, servitude, and slavery have acquired the status of *jus cogens*.

(a) Slavery

The International Court of Justice (ICJ) in the Barcelona Traction, Light and Power Company judgment elevated the prohibition on slavery to an obligation *erga omnes*<sup>91</sup> and only implicitly recognised the prohibition on slavery as a rule of *jus cogens*. Nevertheless, its *jus cogens* status is explicitly affirmed by the ILC<sup>92</sup>, the IACtHR<sup>93</sup>, the Office of the UN High Commissioner of Human Rights, and the ICC.<sup>94</sup> Consequently, the prohibition on slavery thus has priority over any other rules of international law, which do not have the same status, such as, in theory, diplomatic immunity, which is only of a customary nature. It must be noted that despite the prohibition on slavery, which undoubtedly acquired the status of *jus cogens*, it is unclear which notion of slavery falls under this ban. Does it only include the now-evolved definition of slavery, defined as a severe deprivation of liberty through control or coercion over a person, with the intent of exploitation? Or do all acts included under the concept of modern slavery fall under this *jus cogens* prohibition, including, for example, servitude and forced labour? Dire Tladi, acting as special rapporteur for the ILC, noted in this regard that ‘given the constant refrain contained in the instruments that slavery ‘in all its form’ is prohibited, it can be stated that modern forms of slavery, however they may be defined, fall within the scope of the prohibition’.<sup>95</sup> Following Tladi, not only *de facto* slavery but also other acts of modern slavery, such as servitude and forced labour,<sup>96</sup> may be covered by this ban.

(b) Forced Labour

In accordance with Tladi, the ILO also regards the prohibition of forced labour as a rule of *jus cogens*. Unlike Tladi and the ILO, Jean Allain and Selman Özdan assert that the prohibition on forced labour can be a peremptory norm of international law, but only if the exceptions to the prohibition on forced labour, listed in article 2(2) of the Forced Labour Convention, are abolished. Both argue that the exceptions make the prohibition of forced labour derogable, which excludes them from having a *jus cogens* status.

In contrast to Özdan and Allain, a better approach is to consider the exceptions to forced labour listed in article 2(2) not as exceptions but as limitations on the scope of forced labour. Following this approach, the limitations listed do not create situations in which forced labour is allowed, but, on the contrary, define the boundaries of forced labour. As

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<sup>91</sup> Meaning that the prohibition on slavery is accepted and recognized by the international community of States as a whole as a norm from which there can be no deviation.: ICJ 05 February 1970, Barcelona Traction, Light and Power Company, Limited, judgment, §34.

<sup>92</sup> ILC, “ILC Draft Conclusion on identification and legal consequences of peremptory norms of general international law (*jus cogens*)” (2022), conclusion 23 – Annex.

<sup>93</sup> IACtHR 10 September 1993, *Aloeboeto et al v. Suriname*, judgment, §56-57.

<sup>94</sup> David Weissbrodt and Anti-Slavery International, (n.13), 3. ICC, (n.28) §33.

<sup>95</sup> UN General Assembly, “Fourth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur” (August 2019), UN Doc. A/CN.4/727, §107.

<sup>96</sup> ILO, “Eradication of Forced Labour, General Survey Concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105)” (15 February 2007), xi.; Jean Allain, “The Implications of Preparatory Works for the Debate Regarding Slavery, Servitude and Forced Labour”, in Adelle Blackett and Anne Trebilcock, *Research Handbook on Transnational Labour Law* (Edward Elgar Publishing 2015) 534.; Selman Özdan, (n. 73) 65-66.

the exceptions of article 2(2) concern normal civil duties, military service, and sentences issued by courts, these forms of labour lack an exploitative element, but rather reflect a responsibility owed to the community. Therefore, the limitations do not correspond to the practices that the prohibition on forced labour seeks to ban. Looking back at the definition of forced labour as provided by the ILO, and taken over by the ECtHR, two conditions need to be fulfilled before one can speak of forced labour: (1) work extracted under the menace of a penalty and (2) involuntariness. Regarding this second condition, the ECtHR, when interpreting involuntariness, takes into account several circumstances, such as whether the obligation is founded on a conception of social solidarity.<sup>97</sup> The limitations listed in article 2(2), like military services and civil duties in light of war or other emergencies, are to be considered obligations founded on a conception of social solidarity, and do, as a result, not meet the second condition of involuntariness. Therefore, the limitations in article 2(2) do not provide exceptions, but clarify what does not fall under the definition of forced labour. As a result, this approach creates a forced labour *sensu stricto* norm, which is, in fact, non-derogable and which possibly elevates the prohibition of forced labour to *jus cogens*.

### (c) Servitude

The status of the prohibition on servitude is likewise unclear. As with the prohibition on slavery, no exceptions apply to the prohibition on servitude.<sup>98</sup> One may conclude that servitude, also, over time, has gained the status of a *jus cogens* norm. In addition, as servitude in severity lies between forced labour and slavery, it could well be that servitude, like forced labour and slavery, possibly constitutes a *jus cogens* prohibition.

In short, the prohibition on slavery is widely recognized as a peremptory norm, meaning that neither individuals nor States may engage in acts of slavery. Concerning forced labour and servitude, the question remains open, although strong arguments can be presented in favour of their *jus cogens* status. This raises a critical question: Which rule of international law should prevail when peremptory norms conflict with diplomatic immunity, a well-established rule of customary international law?<sup>99</sup> This question has been heavily debated in national case law. Therefore, it is important to examine how national courts have responded to this issue and whether they give precedence to a *jus cogens* norm, thereby overriding (diplomatic) immunity.

## 2. National Cases on Diplomatic and State Immunity versus *Jus Cogens*

### (a) State Practice on Diplomatic Immunity

In the past, diplomatic immunity has generally been upheld by national courts until the diplomat or diplomatic agent has left office, and thus personal immunity has ceased to exist.<sup>100</sup> In these cases, the domestic worker never raised a *jus cogens* argument to set

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<sup>97</sup> See Chapter 1: ECtHR 18 January 2011, *Graziani-Weiss v. Austria*, judgment, §39.; ECtHR 06 February 2018, *Adigüzel v. Turkey*, judgment, §30.

<sup>98</sup> See article 4 of the ECHR, article 8 of the ICCPR, article 6(1) of the ACHR, and article 5 of the Banjul Charter.

<sup>99</sup> Selman Özdan, (n. 73) 153.

<sup>100</sup> See in this regard: US Court of Appeals Fourth Circuit 17 January 1996, *Tabion v. Mufti*, judgment, III. US District Court of New York 16 June 2009, *Baoanan v. Baja*, judgment, 32. US District Court of Columbia 29 March 2007, *Gonzalez Paredes v. Vila*, judgment, 11.

aside diplomatic immunity, so State practice on a *jus cogens* exception to immunity is very rare. The *jus cogens* argument was only made before one US court, namely in the *Sabbithi v. Al-Saleh* judgment.<sup>101</sup> Without effectively researching the argument and only referring to one case on State immunity in the UK, the US court ruled that no *jus cogens* exception to diplomatic immunity existed. Recently, in the UK Supreme Court judgment of *Reyes v. Al-Malki*<sup>102</sup>, the UK Supreme Court confirmed that a *jus cogens* exception to diplomatic immunity does not yet exist. The UK Supreme Court based itself on a judgment of the ICJ concerning the Jurisdictional Immunities of the State, which will be discussed further on.<sup>103</sup> Aside from these two judgments, no court has had the opportunity to rule on a possible *jus cogens* exception to diplomatic immunity.

As a result, there is too little State practice currently to effectively decide on the (non-) existence of such an exception. Although a *jus cogens* exception to diplomatic immunity has not yet been recognized, it is not inconceivable that it may be recognized in the future, as recent judgments on State immunity are slightly opening the door to such an exception.

This development is particularly relevant as State immunity and diplomatic immunity are closely related, since diplomatic immunity emanates from State immunity, and the discussion on the relationship between *jus cogens* and State immunity is equally applicable to diplomatic immunity. Moreover, many courts, as presented above, refer to the discussion on State immunity to enhance their arguments on diplomatic immunity. Therefore, examining how State immunity and *jus cogens* norms relate is useful.

#### (b) State Practice on State Immunity before the Turning of the Second Decade

It is widely established that, under customary international law<sup>104</sup>, States also enjoy immunity and cannot be demanded to appear in civil litigation before foreign courts. For a long time, this State immunity was considered to be absolute, meaning that a foreign State enjoys total immunity from being sued before a foreign court, without exception. Currently, there has been a significant shift, with many States adopting a more restrictive approach that allows for exceptions to State immunity in civil proceedings.<sup>105</sup> In parallel with this restrictive approach, the question arose whether one of the exceptions to State immunity could be the violation of a peremptory norm, thereby creating, admittedly, a *jus cogens* exception to State immunity.

Before the turning of the second decade of the twenty-first century, the debate on whether *jus cogens* norms take precedence over State immunity, also known as the old human rights debate, was settled by a judgment of the ICJ. The ICJ was asked to rule on a case between Germany and Italy after several courts in Italy and Greece had set aside State

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<sup>101</sup> US District Court of Columbia 20 March 2009, *Sabbithi v. Al Saleh*, judgment, 5-7.

<sup>102</sup> UK Supreme Court 18 October 2017, *Reyes v. Al-Malki*, judgment, §40. The *Reyes v. Al-Malki* judgment will be discussed in Chapter 3.

<sup>103</sup> UK Supreme Court 18 October 2017, *Reyes v. Al-Malki*, judgment, §39.; Dorotea Girardi, “Human rights and the “commercial activity exception” to diplomatic immunity in employment claims: the Judgment of the UK Supreme Court in *Reyes v Al-Malki*” (IAC 2018) 9-11. The argument referred to was an argument made by the ICJ that State immunity could not be trumped by a rule of *jus cogens* due to the dichotomy between substantive and procedural rules.

<sup>104</sup> ICJ 03 February 2012, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, §56. See also ILC, “Yearbook of the International Law Commission (Volume II)” (1980), 147, §26.

<sup>105</sup> Hazel Fox and Philippa Webb, *The Law of State Immunity (Third Edition)*, (Oxford University Press 2015) 166.

immunity for violations of *jus cogens* norms.<sup>106</sup> More specifically, in 2004, the Italian Court of Cassation in the Ferrini judgment denied that Germany could invoke State immunity for a civil claim of compensation lodged by victims of slave labour in Germany during WWII.<sup>107</sup> The Italian court reasoned that the war crime of slave labour was a *jus cogens* norm and that such a fundamental principle should prevail over State immunity.<sup>108</sup> Germany, which did not agree with this ruling, referred the case to the ICJ, resulting in the Jurisdictional Immunities of the State judgment of 2012. In this judgment, the ICJ, falling back on judgments of national courts of Canada, France, Slovenia, New Zealand, Poland, and the UK, concluded that under customary international law as it presently stands, State immunity should be upheld even when the State is accused of serious violations of international human rights.<sup>109</sup> The ICJ added that the law of immunity is essentially procedural in nature, whilst the *jus cogens* norms are substantive in nature. Hence, both rules are unable to conflict with each other, as the substance and enforcement of *jus cogens* norms are two different things.<sup>110</sup>

The assertion that substantive and procedural rules cannot conflict with each other has drawn substantial criticism. In particular, dissenting judges of both the ICJ<sup>111</sup> and the ECtHR<sup>112</sup> argued that a conflict, in fact, does exist. Indeed, arguing that no conflict exists is too formalistic. In practice, at least an indirect conflict exists between the two, since immunities prevent any ruling on the violation of a *jus cogens* prohibition. In light of this criticism, Jure Vidmar makes a valid point by noting that many peremptory norms, such as slavery, are human rights, and as a result, include not only a negative obligation to abstain from committing such an act but also entail positive obligations upon States to address the breach of the human rights norm.<sup>113</sup> These positive obligations demand that States actively prosecute breaches of peremptory norms, which directly stand in contrast with the procedural bar of immunities. Therefore, the question is not whether substantive rules and procedural rules conflict, but whether the positive obligations inherent to human rights are also part of the *jus cogens* framework, or whether merely the negative obligations or ‘the prohibitions’ are included in the *jus cogens* concept.<sup>114</sup> By making an artificial distinction between substantive and procedural rules, the ICJ avoided this

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<sup>106</sup> Supreme Court of Greece 4 May 2000, *Prefecture of Voiotia v. Federal Republic of Germany*, judgment: The Greek Supreme Court held that violation of peremptory norms would have the legal effect of implicitly waiving the jurisdictional immunity. However, the judgment was not enforced as the Greek minister of justice refused to approve the enforcement.

<sup>107</sup> Italian Court of Cassation 11 March 2004, *Ferrini v Federal Republic of Germany*, judgment.

<sup>108</sup> Philippa Webb, (n. 74) 97.

<sup>109</sup> ICJ 03 February 2012, *Jurisdictional Immunities of the State (Germany v. Italy : Greece intervening)*, Judgment, § 91.

<sup>110</sup> Alexander Orakhelashvili, *Peremptory norms in international law* (OUP 2008) 340.

<sup>111</sup> ICJ dissenting opinion of Judge Cançado Trindade, §295-297.: “The fact remains that a conflict does exist, and the Court’s reasoning leads to what I perceive as a groundless deconstruction of *jus cogens*, depriving this latter of its effects and legal consequences.”

<sup>112</sup> ECtHR 21 November 2001, *Al-Adsani v. the United Kingdom*, judgment, Joint dissenting opinion of judges Rozakis and Caflisch joined by judges Wildhaber, Costa, Cabral Barreto and Vajic, §3. See also the dissenting opinion of judge Loucaides, and the dissenting opinion of judge Ferrari Bravo.

<sup>113</sup> Jure Vidmar, “Rethinking Jus Cogens after Germany v. Italy: Back to article 53?” (Netherlands International Law Review 2013) 16.

<sup>114</sup> Alexander Orakhelashvili, (n. 110) 341.: “it is the natural effect of peremptory norms as superior norms that they trump the rules on the immunity of States and their officials, especially when peremptory norms are intended to protect the fundamental values of the international community overriding traditional State concerns protected by rules on State immunities”.

difficult question. The better view would be to recognize that also positive obligations are included in the concept of *jus cogens*. Stating otherwise would undermine the whole concept of peremptory norms and make the concept ineffective, as they would not be enforceable.

Although the judgments of the ICJ are only binding upon the States involved in the proceedings<sup>115</sup> and the reasoning is not free from criticism, its reasoning is widely followed by other States. Due to the Court's status as the principal judicial organ of the United Nations,<sup>116</sup> its rulings and jurisprudence are given substantial weight, which is strengthened by the fact that the rulings provide a unique instrument for identifying the law and a guide to its application.<sup>117</sup> Due to the high authority of the ICJ, the judgment on State immunity is used by other States and regional courts to deny any peremptory norms exception to State immunity.<sup>118</sup> It should be noted that not all courts follow the ICJ judgment blindly.<sup>119</sup> For example, the Dutch Supreme Court, recognizing that a *jus cogens* exception did not yet exist, hinted that such a *jus cogens* exception might become the law in the future.<sup>120</sup>

In conclusion, looking at the case law discussed above, courts, in general, seem more inclined to uphold, rather than reject, the immunity of States.<sup>121</sup> However, the matter is far from being settled, as there is a small recognition by dissenting judges<sup>122</sup> and the Dutch Supreme Court that, in the future, State immunity might not be upheld when severe breaches of *jus cogens* norms are at stake. The question remains, how near is this future? This future might be closer than first thought. Three recent judgments by Brazil, Italy, and South Korea concluded that State immunity must be delimited when peremptory norms are violated.<sup>123</sup>

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<sup>115</sup> Article 59 of the Statute of the International Court of Justice.

<sup>116</sup> Article 92 of the UN Charter.

<sup>117</sup> Philippe Couvreur, *The International Court of Justice and the Effectiveness of International Law* (Vol. 9) (Brill 2017) 6.

<sup>118</sup> ECtHR 14 January 2014, *Jones v. United Kingdom*, judgment, §88-94.; Dutch Supreme Court 13 April 2012, *Mothers of Srebrenica v. The Netherlands and the UN*, judgment, § 4.3.8.

<sup>119</sup> In the same regard, Finland, Sweden and Norway declared that the rules on State immunity as indicated by the UN Convention on Jurisdictional Immunities of States and their Property are "without prejudice to any future international development in the protection of human rights", thereby also hinting on the possibility that, in the long run, an exception to State immunity might be created.; Sevrine Knuchel, "State Immunity And The Promise Of Jus Cogens" (Northwestern Journal of International Human Rights 2011) 155.

<sup>120</sup> The Dutch Supreme Court acknowledged the growing level of overriding importance of *jus cogens* norms, but it did not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims.; Dutch Supreme Court, (n. 118) 102.

<sup>121</sup> Pierre D'Argent and Pauline Lesaffre, "Immunities and Jus Cogens Violations" in Tom Ruys and Nicolas Angelet, *Immunities and International Law* (CUP 2019) 615.

<sup>122</sup> Not only judge Trindade dissented against the ruling. In a case before the ECtHR in 2001 the minority of judges already pronounced themselves that peremptory norms should prevail over State immunity.: ECtHR 21 November 2001, *Al-Adsani v. the United Kingdom*, judgment, Joint dissenting opinion of judges Rozakis and Cafilisch joined by judges Wildhaber, Costa, Cabral Barreto and Vajic, §3. See also dissenting opinion of judge Loucaides and dissenting opinion of judge Ferrari Bravo. The judges stated that "*due to the interplay of the jus cogens rule on prohibition of torture and the rules on State immunity, the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect*". (8 out of 17 judges thus dissented with the majority on exactly the point of a *jus cogens* exception.)

<sup>123</sup> Marco Longobardo and Frederica Violi, "Access to justice for atrocities in the comparison of landmark cases on state immunity in Brazil and Italy" (The International Journal of Human Rights 2024) 6.

(c) State Immunity after the Turning of the Second Decade

In August 2021, the Brazilian Supreme Court (STF) decided with a slight six-five majority that States do not enjoy immunity from national jurisdiction for ‘unlawful acts committed in violation of human rights, within the national territory’.<sup>124</sup> The case concerned the sinking of a fishing boat during the Second World War, named the *Changri-La*, and the death of the ten fishermen aboard. Sixty years after the sinking of the boat, it was revealed that the vessel was deliberately sunk by a German submarine. Therefore, the descendants of the victims filed a compensation claim against Germany before the Brazilian courts, which classified the act as a war crime.<sup>125</sup> This STF is the first Supreme Court to depart from the 2012 judgment of the ICJ, and the STF did so by waiving this precedent away as binding only on the litigating parties in that case and qualified it as merely a subsidiary means for determining rules of law. In addition, the STF considered that new State practice in Italy and South Korea, and their own constitution, paved the way for this precedent.<sup>126</sup> This judgment of the Brazilian Supreme Court was thus a hybrid decision grounded in both international law and constitutional law. The majority looked into foreign judgments of Italy and South Korea and the dissenting opinion of Judge Trindade of the ICJ, in conjunction with the Brazilian Constitution, which, pursuant to article 4(ii), prioritized human rights.<sup>127</sup> The STF concluded that State immunity must be set aside when human rights, such as access to justice, the truth, and the right to life, are in play. Remarkably, the STF rejected a motion request to limit its precedent to only human rights with a *jus cogens* status.

Two years later, on 23 November 2023, an appellate court in South Korea also prioritized human rights over State immunity.<sup>128</sup> The High Court of Seoul ruled that ‘customary international law does not recognize State immunity for tortious acts committed within the territory of a forum State against its nationals’. This case is a result of the filing of a claim by multiple ‘comfort women’ who sued the State of Japan, accusing the State of forcing the ‘comfort women’ into sexual slavery during the late 1930s. The High Court, after analysing several national cases, such as the Italian *Ferrini* case and the Brazilian *Changri-La* case, together with national and international legislation, concluded that a human rights exception to State immunity exists. The court noted in particular that the UN and European Convention on State Immunities, taken together with national legislation of the United States, United Kingdom, Canada, Australia, Singapore, Japan, and Argentina, all provided exceptions to State immunity for certain illegal acts. With this reasoning, the High Court of Seoul contradicted the ICJ Jurisdictional Immunities judgment of 2012. In doing so, the High Court distinguished the Korean case from the ICJ judgment by declaring that the ICJ case is not relevant as the crime of sexual slavery was not committed during an armed conflict but in times of peace.<sup>129</sup> It should be noted that

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<sup>124</sup> Brazilian Supreme Court 23 August 2021, *Changri-La*, judgment, 105.

<sup>125</sup> Marco Longobardo and Federica Violi, (n. 123) 6.

<sup>126</sup> Eduardo Cavalcanti De Mello Filho, “International Decisions” (AJIL 2023) 314.

<sup>127</sup> Eduardo Cavalcanti De Mello Filho, (n. 126), 311.

<sup>128</sup> High Court of Seoul 23 November 2023, *Comfort women*, judgment.

<sup>129</sup> Daniel Mandell, “Another Blow to the Sovereign Shield: South Korean Court Rejects Japan’s Sovereign Immunity Defense in “Comfort Women” Case”, (ASIL 2024), < <https://www.asil.org/insights/volume/28/issue/5> > accessed at 29 April 2025.

Japan did not participate in the proceedings and condemned the decision for violating State immunity.<sup>130</sup>

Lastly, likewise in Italy, new court rulings have consistently upheld a *jus cogens* exception to immunities.<sup>131</sup> In the aftermath of the ICJ judgment on Jurisdictional Immunities of 2012, the Italian Constitutional Court did not accept the ruling of the ICJ as state immunity cannot result in the absolute sacrifice of individuals' fundamental right to judicial protection, which was written down in the Italian Constitution.<sup>132</sup> Therefore, the Italian courts kept denying State immunity for Germany in cases filed after the ICJ judgment in 2012.<sup>133</sup> To maintain good relationships with Germany, Italy passed a law under which it assumed full responsibility for compensating successful applicants in merit proceedings against Germany. In light of this law, the Italian Constitutional Court in July 2023 once again had to pronounce itself on the conformity of this law with the right of access to justice, which it answered in the affirmative. Additionally, the court repeated that under customary international law, States enjoy immunity, but explicitly excluded immunity for crimes committed in violation of *jus cogens* norms.<sup>134</sup> Consequently, also in Italy, national constitutional courts developed a human rights exception to immunity.

Recently, courts in Brazil, South Korea, and Italy ruled that foreign States do not enjoy jurisdictional immunity for claims based on *jus cogens* violations of international law committed in the forum state's territory. The rule of state immunity in such cases was incompatible with the constitutional protection of, *inter alia*, the victims' right to access to justice. All three judgments have been criticized for setting a too-low threshold by ruling that human rights prevail over State immunity and thus going further than a *jus cogens* exception to immunity.<sup>135</sup> However, this criticism may oversimplify the courts' reasoning. Although the courts indeed created a human rights exception, the underlying act giving rise to the human rights violations was of a peremptory nature. The better view is to regard the judgments as explaining the three conditions for a *jus cogens* exception to State immunity, which are: (1) the wrongful act must amount to a violation of a peremptory norm, (2) the violation of the *jus cogens* norm must have been committed on the territory of the forum State, and (3) there is no alternative means of seeking judicial redress for the victims.<sup>136</sup> These rulings thus reflect the growing inconsistent State practice and possibly contribute to the emergence of a new rule, clarifying the conditions under which a departure from immunity may be justified for *jus cogens* violations.

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<sup>130</sup> X, "Seoul says Japan inaction means 'comfort women' ruling upheld" (The Asahi Shimbun 2023) < <https://www.asahi.com/ajw/articles/15080003#:~:text=When%20asked%20about%20the%20latest,agreement%20between%20the%20two%20countries.>> accessed at 29 April 2025.

<sup>131</sup> Andrea Maria Pelliconi, "The Italian Constitutional Court's new decision on state immunity and the ICJ Germany vs Italy No. 2" (EJIL:Talk! 2023) < <https://www.ejiltalk.org/the-italian-constitutional-courts-new-decision-on-state-immunity-and-the-icj-germany-vs-italy-no-2/>> accessed at 11 April 2025.

<sup>132</sup> Italian Constitutional Court 22 October 2014, Judgment No. 238/2014, judgment.

<sup>133</sup> As State immunity for Germany was once again denied, Germany filed a new case before the ICJ, which is now pending.

<sup>134</sup> Italian Constitutional Court 04 July 2023, *Judgment No. 159/2023*, judgment, 8.

<sup>135</sup> Eduardo Cavalcanti De Mello Filho, (n. 126) 313.

<sup>136</sup> Vessela Terzieva, "State Immunity and Victims' Rights to Access to Court, Reparation, and the Truth" (ICLR 2022) 787-788.

### 3. Opinio Juris on A *Jus Cogens* Exception to Diplomatic Immunity

As regards opinio juris, some recognition can be detected in favour of a *jus cogens* exception. France, for example, holds that diplomatic staff should abide by the law and that the VCDR does not exist for the personal benefit of the diplomat. Under the French State Protocol for Privileges and Immunities, staff accredited in France must refrain from invoking immunity to attempt to avoid their duty to adhere to the laws and rules of the French State. It specifically states that acts of domestic violence are not compatible with the duties performed by the members of the mission. Italy, in addition, based upon a so-called approach that is gaining ground in many other countries, declared that its Italian judicial practice tends to interpret immunities and privileges narrowly.<sup>137</sup> Furthermore, China, in the Law of the People's Republic of China on Diplomatic Personnel Stationed Abroad of 2009, in article 8(5), explicitly mentions that diplomatic personnel stationed abroad shall not abuse their privileges and immunities. In addition, the Parliamentary Assembly of the COE in 2001, consisting of representatives of 41 Member States, recommended regarding domestic slavery that the VCDR be amended to waive diplomatic immunity for all offences committed in private life.<sup>138</sup> Several States thus agree that diplomatic immunity should not grant diplomats a *carte blanche* to break the law and that diplomatic immunity should be lifted for private acts in cases of severe domestic abuse.

In contrast, other States such as the UK<sup>139</sup>, Australia<sup>140</sup>, and the US<sup>141</sup> strictly repeat the VCDR without any mention of a restricted interpretation to tackle the abuse. The US, for example, acknowledges that severe crimes should be investigated, but adheres to international law, meaning that only the possibilities in the VCDR can be used, such as requesting a waiver of immunity or declaring the diplomat *persona non grata*.<sup>142</sup> Canada, in addition, also reaffirms that diplomatic immunity should not be abused, but that in the absence of a waiver of immunity, the only sanction is expulsion of the diplomat.<sup>143</sup>

It should, in addition, be noted that the United Nations' International Residual Mechanism for Criminal Tribunals waived the immunity of roster judge Mugambe for mentally abusing and subjecting her domestic worker to modern slavery. Following the lifting of immunity, the Oxford Crown Court in the United Kingdom convicted her and, on 2 May 2025, imposed a sentence of more than six years' imprisonment.<sup>144</sup> This case further illustrates that even the United Nations reaffirms the principle that immunity is not intended to shield serious violations of human rights.

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<sup>137</sup> Italy, "Manual on the Treatment of the Diplomatic Corps accredited to the Italian Republic", Ministry of Foreign Affairs, 97.

<sup>138</sup> COE (Parliamentary Assembly), "Recommendation 1523 (2001) on Domestic Slavery" (26 June 2001), article 10(iv).

<sup>139</sup> UK Diplomatic Privileges Act 1964, Articles 31(1)(a-c).

<sup>140</sup> Australia's Diplomatic Privileges and Immunities Act 1967, Articles 31(1)(a-c).

<sup>141</sup> US Diplomatic Relations Act 1978, Articles 31(1)(a-c).

<sup>142</sup> See in this regard, articles 32 and 9 of the VCDR.

<sup>143</sup> Canada, "The Vienna Convention of Diplomatic Relations of 1961" (2013) <[https://www.international.gc.ca/protocol-protocole/vienna\\_convention-convention\\_vienne.aspx?lang=eng](https://www.international.gc.ca/protocol-protocole/vienna_convention-convention_vienne.aspx?lang=eng)> accessed at 29 April 2025.

<sup>144</sup> Oxford Crown Court 2 May 2025, *R v Mugambe*, Sentencing Remarks.

## D. Interim Conclusion

Diplomats and diplomatic agents enjoy functional and personal immunity from civil jurisdiction if accused of severe exploitation of their domestic workers. For victims of severe domestic exploitation, this immunity creates a significant barrier, preventing them from seeking judicial redemption. The prohibition of slavery, and arguably also of forced labour and servitude, is acknowledged as a *jus cogens* norm, and in theory, should prevail over immunities as they are superior under international law. However, a judgment of the ICJ, which is still regarded as highly authoritative, quashed the prevalence of *jus cogens* norms over State immunity and thus quashed a general *jus cogens* exception to immunities. Nevertheless, the future might bring a *jus cogens* exception to life, namely, new case law on State immunity shows that this *jus cogens* exception is emerging. As diplomatic immunity emanates from State immunity, this process might also influence diplomatic immunity. In addition, *opinio juris* to disregard diplomatic immunity in case of severe domestic abuse is growing in several civil law States. Consequently, it is up to States to decide on the existence of a peremptory norm exception to immunities, as case law is becoming more fragmented and unsettled. Nevertheless, a *jus cogens* exception to diplomatic immunity is not the only way to set aside diplomatic immunity for acts of modern slavery. A new Supreme Court ruling in the UK seems promising in diminishing diplomatic immunity in the case of domestic abuse. The next chapter will further elaborate on this judgment.

## IV. The New Human Rights Dilemma

### A. Introduction

The old human rights dilemma, which posed the question of whether *jus cogens* norms, such as slavery, could override diplomatic immunity, did not yet fully open the door for judicial redemption for victims of modern slavery. In contrast to the old human rights dilemma, the new human rights dilemma might be more promising. Under this new human rights dilemma, the question is whether diplomats could be held accountable for human rights violations that occur in an employment context to override immunity.<sup>145</sup> In particular, the new human rights dilemma centers on how diplomats can be held responsible for the severe exploitation of their domestic workers, thereby violating human rights that prohibit forced labour, servitude, or slavery.

To overcome diplomatic immunity before foreign courts, domestic workers have tried to use the third exception to diplomatic immunity, commonly referred to as the commercial activity exception. Whether abusive employment by diplomats that amounts to modern slavery is a commercial activity has already been fiercely debated before national courts. Although such an interpretation is welcomed for a stricter human rights protection, it was generally denied in US courts. Interestingly, a new Supreme Court judgment in the UK, namely *Basfar versus Wong*, shed new light on this exception and used this third exception to cast aside the immunity of diplomats when they engage in severe forms of domestic

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<sup>145</sup> Philippa Webb, “The Immunity of States, Diplomats and International Organizations in Employment Disputes: The New Human Rights Dilemma?” (EJIL 2016), 745.

exploitation. This judgment can be interesting as the reasoning of the UK Court is largely based on international law, and can therefore be useful for other jurisdictions. This chapter will review the reasoning of the UK Supreme Court to determine whether the judgment has a chance at survival.

## **B. Diplomatic Immunity from Civil or Administrative Jurisdiction**

When diplomats engage in acts amounting to modern slavery, they are generally shielded from civil suit before foreign courts through their immunity. The diplomatic immunity thus hinders the domestic worker from obtaining compensation for the mental and physical suffering. This shield is formed by article 31 of the VCDR, which grants diplomatic agents immunity when they violate inter alia the prohibitions of forced labour, servitude, or slavery. As discussed in Chapter 2, a *jus cogens* exception to override the immunity of the diplomatic agents is increasingly being recognized by national courts, although not by all. However, this *jus cogens* exception is not the only way to set aside diplomatic immunity. Diplomatic immunity before civil and administrative courts is not absolute, as article 31(1)(a-c) of the VCDR lists three exceptions to diplomatic immunity. These exceptions allow diplomats to be subject to civil proceedings in certain private affairs unrelated to their official functions. As a result, the personal immunity of diplomatic agents can be set aside by these exceptions for three limited situations of private matters, such as property claims, succession claims, and commercial activity claims.<sup>146</sup>

The third exception is particularly relevant, since it has been invoked a few times before the national courts to set aside the immunity of diplomats in cases of severe abuse of domestic workers. However, until recently, without success.<sup>147</sup> The third exception allows that civil claims against diplomatic agents can be brought before civil courts for any professional or commercial activity. This exception is defined in article 31(1)(c) of the VCDR as ‘an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions’. Article 31(1)(c) thus creates two necessary conditions to invoke the commercial activity exception: (1) the activity should be exercised by the diplomat outside his official functions, and (2) the action must relate to the exercise of any professional or commercial activity. Especially concerning this third exception, new case law emerged from the United Kingdom, which set aside diplomatic immunity in cases of modern slavery, violating the human rights prohibitions of forced labour, servitude, and slavery. The reasoning of this judgment will be examined below.

## **C. Basfar versus Wong – UK Supreme Court in 2022**

### **1. Facts of the Case**

The judgment *Basfar versus Wong* of 2022 fully represents the new human rights dilemma. In this judgment, the UK Supreme Court considered the case of Miss Wong, a Philippine national, who was brought to the United Kingdom in 2016 as a domestic worker

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<sup>146</sup> See respectively article 31(1)(a), 31(1)(b) and 31(1)(c) of the VCDR.

<sup>147</sup> The only successful invocation of the commercial activity was in UK Supreme Court 06 July 2022, *Basfar v. Wong*, judgment.

for the diplomatic agent Mister Basfar. Misses Wong alleged that during her employment, she was not allowed to leave the house or communicate with her family. Beyond this severe restriction of her freedom, she was forced to work more than 16 hours each day, with no rest breaks or days off, and was required to wear a doorbell at all times so that she was at the family's beck and call 24 hours a day. Additionally, she was abused verbally, she was only allowed to eat leftover food, and was obliged to sleep in a cupboard where the family kept their suitcases. For months, Miss Wong was paid nothing and was ultimately paid approximately £1,800 during a trip to Saudi Arabia. These extreme conditions, all of which are clear breaches of her employment contract, caused her to lose 10 kilograms. She endured these abusive conditions until the 24th of May 2018, when she managed to escape.

## 2. The Commercial Activity Exception

After classifying the endured abuse as domestic servitude, the Supreme Court went on to determine whether diplomatic immunity could be set aside. Normally, diplomats enjoy diplomatic immunity from civil jurisdiction and cannot be brought before a foreign court for violations of the law. However, as mentioned, article 31 of the VCDR contains three exceptions to diplomatic immunity, allowing individuals to bring suit against diplomatic agents before foreign civil courts. Especially the interpretation of the third exception to diplomatic immunity, also known as the commercial activity exception, was put into question before the court.

The Supreme Court applied the commercial activity exception and held that the exploitation of domestic workers constitutes a private act beyond the diplomat's official functions. Furthermore, the UK Court ruled that the acts of modern slavery constituted a commercial activity, as the diplomat was personally profiting from exploiting the vulnerable domestic worker. As a result, the UK Supreme Court allowed that article 31(1)(c) of the VCDR could be invoked to override diplomatic immunity in the case of modern slavery. This judgment is widely regarded in legal scholarship as groundbreaking or a landmark case, as it was the first to apply this interpretation of the commercial activity exception.<sup>148</sup> The question remains whether the reasoning of the UK Supreme Court to consider acts of modern slavery as a commercial activity is convincing enough for other national courts to set aside diplomatic immunity. In what follows, the reasoning of the court will be analysed to determine what the future might hold for this exception.

### **D. Does Basfar v. Wong have a Chance at Survival**

The Court's decision is particularly significant as it granted the exploited workers access to justice and the opportunity to find redemption for the first time.<sup>149</sup> Moreover, this approach aligns with the current trend in international law to diminish the immunity of States and State representatives, as argued before. Although this judgment strengthens the protection of the victims of modern slavery, the question remains whether the

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<sup>148</sup> Chris Stephen, *Diplomatic Immunity, Modern Slavery and the "Commercial Activity" Exception: The UK Supreme Court in Basfar v Wong*, (EJIL:Talk! 2022) < <https://www.ejiltalk.org/diplomatic-immunity-modern-slavery-and-the-commercial-activity-exception-the-uk-supreme-court-in-basfar-v-wong/> > accessed at 09 April 2025.; Sophie Ryan, "Modern Slavery and the Commercial Activity Exception to Diplomatic Immunity From Civil Jurisdiction: The UK Supreme Court's Decision in Basfar v Wong" (Modern Law Review 2023) 202.

<sup>149</sup> Xinxiang Shi, "Opening the Pandora's Box: The UK Supreme Court's Decision in Basfar v. Wong" (Chinese Journal of International Law 2022) 619.

reasoning of the Court is strong enough to survive in the long term and will be applied by the courts of other States.

#### 1. Condition 1: Act Outside of the Official Functions

Firstly, the Court in *Basfar v. Wong* classified the employment of a domestic worker as a private act and thus an act falling outside of the official functions of the diplomat. Whether severe exploitation of domestic workers constitutes an official act or a private act remains a subject of debate, as several national courts have different opinions. Official acts of diplomatic agents are defined in article 3 of the VCDR and comprise all acts ranging from promoting international relations and protecting the interests of the State to negotiating with the government of the receiving State. In short, official acts are those acts that the diplomat performs for or on behalf of the sending State. All acts of diplomats that fall outside of these official functions are considered private acts. The classification of the employment of a domestic worker by the UK Supreme Court as a private act was not new. This evolution was already outlined in case law of the Supreme Court in *Reyes v. Al-Malki*, and also by courts in other jurisdictions, such as Australia, Belgium, and a few courts in the US.

##### (a) Evolution in Case Law

###### §1. *Interpretation of Official Acts by US Courts*

The first case that openly engaged in the discussion is the *Tabion v. Mufti* case of the US Fourth Circuit Court of Appeals.<sup>150</sup> In this judgment, the court clarified that 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, as these services are incidental to the daily life of the diplomat. The US court considered the normal employment of domestic workers to be an official act and not a private act. Numerous district courts in the United States have upheld the *Tabion v. Mufti* ruling and used it as a precedent. In contrast, some US courts did not.<sup>151</sup> In *Baoanan v. Baja* and *Swarna v. Al-Awadi*<sup>152</sup>, the US courts ruled that the employment of a domestic worker by a diplomatic agent predominantly for his own and his family's personal needs is a private act rather than one carried out in the course of his duties.

###### §2. *Interpretation of Official Acts in Other Jurisdictions*

The UK Supreme Court in *Reyes v. Al-Malki* differed from the reasoning in *Tabion v. Mufti* by going in the opposite direction. The UK Supreme Court in this case unanimously found that hiring Ms. Reyes to handle household chores did not constitute an act in the exercise of Mr. Al-Malki's diplomatic obligations, even though it assisted him in the performance

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<sup>150</sup> US Court of Appeals (4<sup>th</sup> circuit) 17<sup>th</sup> of January 1996, *Tabion v. Mufti*, judgment, 537-539.

<sup>151</sup> See US District Court of Columbia 29<sup>th</sup> of March 2007, *Gonzalez Paredes v Vila*, judgment, 191.; US District Court of Columbia 20<sup>th</sup> of March 2009, *Sabbithi v Al Saleh*, judgment, 127-8.; US District Court of Columbia 26<sup>th</sup> of April 2011, *Montuya v Chedid*, judgment, 63-64.; US District Court of New Jersey 14<sup>th</sup> of January 2014, *Fun v Pulgar*, judgment, 474. These judgments, without further examination, referred to the *Tabion v Mufti* judgment and concluded that the (normal) employment of a domestic worker is an official act. These judgments did not look into the question of whether *the* exploitation of domestic workers could constitute a private act.

<sup>152</sup> US Court of Appeals (2<sup>nd</sup> circuit) 24<sup>th</sup> of September 2010, *Swarna v. Al-Awadi*, judgment, §520.; US District Court for the Southern District of New York 16<sup>th</sup> of June 2009, *Baoanan v. Baja*, judgment, §171.

of his official functions.<sup>153</sup> Nor was it done on behalf of Saudi Arabia, the sending State.<sup>154</sup> Consequently, the employment and exploitation of the domestic worker was classified as a private act. Five years later, in *Basfar versus Wong*, the UK Supreme Court explicitly considered *Tabion v. Mufti* and reaffirmed the reasoning in *Reyes v. Al-Malki* by stating that acts of purchasing domestic services are manifestly done in a private capacity and not for or on behalf of the sending State.<sup>155</sup>

In addition, in *Danaratna v. Arunatilaka* and in *Sherill v. Singh*, the Federal Court of Australia confirmed that the hiring of domestic workers falls outside of the official functions or outside the functions of the diplomatic mission and is therefore a private act.<sup>156</sup> The Federal Court of Australia explicitly referred to the *Reyes v. Al-Malki* judgment of the UK Supreme Court to back up their reasoning. Moreover, two Belgian lower courts have classified the hiring of a domestic worker as a private act.<sup>157</sup> The classification of the employment of domestic workers as private acts is thus becoming less controversial in light of these recent rulings in Australia, Belgium, and the UK.

(b) Draft Articles on the Immunity of State Officials – *International Law Commission*

Next to the evolution in case law, the draft articles of 2022 on the immunity of State officials from foreign criminal jurisdiction adopted by the International Law Commission (ILC)<sup>158</sup>, provide further guidance on when to classify certain acts of State representatives as official acts or private acts. Albeit soft law, the draft articles confirm more or less the conclusion of these recent judgments.

Issued a month before the ruling of *Basfar versus Wong*, the ILC considered in these draft articles that ‘official act’ is ‘any act performed by a State official in the exercise of State authority’. Such official acts require a ‘direct connection between the exercise of State functions and powers, since it is this connection that justifies the recognition of immunity in order to protect the principle of the sovereign equality of State.’<sup>159</sup> This reasoning can easily be transposed to diplomats, as they are also performing acts in the name of or on behalf of the State, and it is the exercise of such State powers that justifies the immunity of diplomats. Hiring a migrant worker cannot be directly linked to the exercise of the functions of the diplomatic mission, as the domestic work does not directly contribute to the carrying out of the diplomatic mission. Therefore, hiring a domestic worker cannot be an official act of the diplomat. In addition, the ILC examined several domestic cases and reached the conclusion that acts performed by State officials, that ‘are (...) for the official’s

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<sup>153</sup> UK Supreme Court 18 October 2017, *Reyes v. Al-Malki*, judgment, §23.

<sup>154</sup> UK Supreme Court 18 October 2017, *Reyes v. Al-Malki*, judgment, §48.

<sup>155</sup> UK Supreme Court 06 July 2022, *Basfar v. Wong*, judgment, §37.

<sup>156</sup> Federal Court of Australia 03 November 2023, *Shergill v. Singh*, judgment, §61.; Federal Court of Australia 15 August 2024, *Danaratna v. Arunatilaka*, judgment, §30.

<sup>157</sup> Dutch Court of First Instance (Brussels) 15 December 2021, no. 21N003187, judgment, 5.; Dutch Court of First Instance (Brussels) 22 June 2023, no. 21N003187, judgment, 7. In both judgments, the courts explicitly referred to the UK judgment of *Reyes v. Al-Malki*.

<sup>158</sup> Although soft law, the draft articles are still highly authoritative, as under article 13 (1) (a) of the Charter of the United Nations the ILC is the main body of the UN to “initiate studies and make recommendations for the purpose of (...) encouraging the progressive development of international law and its codification”.

<sup>159</sup> ILC, “Draft articles on immunities of State officials of 2022 adopted by the Commission on first reading” (2022), commentary 23. It should be noted that the UK Supreme Court did not refer to these draft articles to enhance their reasoning.

personal enrichment, which do not benefit the sovereign, have been viewed as falling outside the official functions.<sup>160</sup> Acts of modern slavery are, inter alia, performed for the diplomat's personal enrichment, since by exploiting the worker, the diplomat does not have to pay for a second worker or saves money by not paying the worker at all. As the State, in addition, has absolutely no gain in hiring or abusing domestic workers, the recent judgments, including *Basfar versus Wong*, have rightly classified the hiring of domestic workers as private acts.

## 2. Condition 2: The Exercise of a Commercial Activity

The groundbreaking aspect of the *Basfar versus Wong* judgment is not the classification of the employment as a private act, but rather the reasoning of the court on the second condition of the exception, namely, 'the exercise of a commercial or professional activity'. The approach of the UK Supreme Court to consider acts of modern slavery in the employment context as 'an exercise of a commercial activity' breaks with the former tradition of US courts to interpret the exceptions to diplomatic immunity strictly. In that sense, the case law on this second condition has undergone an evolution.

### (a) Evolution in Case Law

#### §1. *Tabion v. Mufti* – US Court of Appeals (1996)

In *Tabion v. Mufti*, the US Court of Appeals, in addition to classifying the hiring of a domestic worker as an official act, further clarified that the interpretation of 'any commercial or professional activity' should be constructed narrowly. This reasoning stands in contrast with the argument advanced by *Tabion*, the domestic worker, who contended that "commerce" simply refers to the exchange of goods and services and that 'commercial activity' necessarily encompasses contracts for goods and services, including employment contracts.<sup>161</sup> The court, however, disagreed. Taking into account a statement of interest of the US State Department, the US Court of Appeals concluded that 'any commercial or personal activity' only relates to trade or business activities engaged in for personal profit. Consequently, the court held that an employment contract for domestic workers did not fall within the scope of the commercial activity exception. This narrow interpretation of 'any commercial activity' was followed by several US courts.<sup>162</sup>

#### §2. *Reyes v. Al-Malki* – UK Supreme Court (2017)

In *Reyes v. Al-Malki*, the UK Supreme Court was confronted with the same legal question, namely, whether the commercial activity exception could be used to set aside immunity when diplomats engage in acts of modern slavery. During this civil procedure, Mr. Al-Malki had already left office and was therefore, pursuant to article 39(2) of the VCDR, only entitled to functional immunity or immunity attached to the official acts of the diplomat. As the Supreme Court considered that the alleged acts of maltreatment were

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<sup>160</sup> ILC, (n. 157), commentary 33.

<sup>161</sup> US Court of Appeals (4th circuit) 17th of January 1996, *Tabion v. Mufti*, judgment, 537-539.

<sup>162</sup> The latest decision in this regard was made by the US District Court in US District Court of New Jersey 14<sup>th</sup> of January 2014, *Fun v Pulgar*, judgment, 474. The court decided that the claim did not relate to commercial activity within article 31(1)(c), applying *Tabion v. Mufti*. However, the court blindly followed *Tabion v. Mufti*, without regarding the conditions under which she worked as capable of converting her employment into a commercial activity.

private and fell outside of the official functions of the diplomat, the court concluded that Mr. Al-Malki did not enjoy functional immunity, allowing the civil procedure to proceed.<sup>163</sup> Although the court did not need to go into the commercial activity exception, since the diplomat had already left office and personal immunity did not apply, the court still touched upon the meaning of ‘any commercial activity, without making a definitive decision.

A minority of the court asserted that if Mr. Al-Malki was still in post, he would have enjoyed immunity as the employment of Miss Reyes did not amount to a professional or commercial activity.<sup>164</sup> The court made two points to clarify the meaning of the concept ‘any commercial or professional activity’. Firstly, the court examined the *travaux préparatoires* of the VCDR and concluded that any commercial activity should be understood as a continuous activity and not a single act of commerce.<sup>165</sup> Secondly, the minority judges argued that the ‘exercise of a professional or commercial activity means practicing the profession or carrying on the business’. The court hereby argued that contracts of employment are not business activities, but are incidental to daily life, hereby adhering to a strict interpretation of article 31 (1)(c) as expressed by the federal courts of the United States in relation to ‘any commercial activity’.<sup>166</sup> In addition, the minority of the court expressed that the illegality of the conduct, which is contrary to international policy and morally repugnant, does not have the effect of bringing the conduct under the commercial activity exception. However, the majority of the judges in the Supreme Court expressed doubts about the minority's reasoning, ‘especially in the light of what we would regard as desirable developments in this area of the law’, thereby hinting that the exploitation of domestic workers might fall under the scope of article 31(1)(c) of the VCDR.<sup>167</sup>

### §3. *Basfar v. Wong – UK Supreme Court (2022)*

The situation in *Basfar v. Wong* differed from the above judgment, as in this case, the diplomat was still in office and therefore enjoyed not only functional, but also personal immunity. The court, as a result, needed to clarify whether the third exception listed in article 31 of the VCDR was applicable and could be used to set aside the personal immunity of the diplomat. As a starter, all judges seemed to agree that the ordinary employment of a domestic worker does not in itself constitute the “exercise of a commercial activity”.<sup>168</sup> Thus, purchasing goods for personal consumption or buying legal, educational, or domestic services for private use, which are activities incidental to the ordinary conduct of daily life, do not fall under ‘exercising any commercial activity’, thereby partially reinstating the view of the minority in *Reyes v. Al-Malki*.<sup>169</sup>

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<sup>163</sup> UK Supreme Court 18 October 2017, *Reyes v. Al-Malki*, judgment, §48 - §55 and §69.

<sup>164</sup> Chris Stephen, (n. 146).

<sup>165</sup> ILC, “Yearbook of the International Law Commission (Volume I)” (1958) 244, §26-34.

<sup>166</sup> Dorotea Girardi, “Human rights and the “commercial activity exception” to diplomatic immunity in employment claims: the Judgment of the UK Supreme Court in *Reyes v Al-Malki*” (AIC 2018) 4.

<sup>167</sup> UK Supreme Court 18 October 2017, *Reyes v. Al-Malki*, judgment, §57 and 69.

<sup>168</sup> UK Supreme Court 06 July 2022, *Basfar v. Wong*, judgment, §27 and §111.

<sup>169</sup> Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th ed) (Oxford University Press 2016), 251.

The majority of the judges went on to explain that the situation is different when the domestic worker is being exploited, as exploiting a domestic worker by compelling her to work in circumstances of modern slavery is not comparable to an ordinary employment relationship that is incidental to the daily life of a diplomat.<sup>170</sup> The majority considered that there is a ‘*material and qualitative difference between these activities*’ as employment is voluntary, in the sense that the employment contract is freely entered into. By contrast, acts of forced labour, servitude, and slavery, which make up the concept of modern slavery, are not freely undertaken. Rather, the work is extracted by coercion and the exercise of control over the victim. What was critical for the majority was the exercise of control over Ms. Wong for personal profit. The substantial financial gain, albeit not in cash but in benefits of monetary value, earned by severely exploiting the domestic worker and paying her little to no money at all, amounted to a personal profit and transformed the case from a simple employment dispute to a suit where the commercial activity could apply. It should, in addition, be noted that the majority did not base their reasoning on the illegality of the conduct<sup>171</sup>, which was in this case classified as domestic servitude, but on the vulnerability of or control over the victim and the personal profit made. As the majority considered that the exploitation performed by Mr. Basfar was, in addition, a systematic activity carried on over a significant period, immunity was lifted based on the commercial activity exception.<sup>172</sup>

The interpretation of the majority of judges in *Basfar versus Wong* thus represented a shift in legal reasoning, as for the first time, the commercial activity exception was used to override diplomatic immunity for severe situations of domestic exploitation. Essentially, the court drew up two criteria that would enable future judges to distinguish normal employment from abusive employment: (1) vulnerability and (2) personal profit due to exploitation<sup>173</sup>, and thereby clarified when employment is to be considered a commercial activity. However, this judgment was not free from criticism.

(b) Criticism related to *Basfar versus Wong*

By considering employment in some instances as a commercial activity, some legal scholars have issued the criticism that the judgment of *Basfar versus Wong* of the UK Supreme Court has created a rather vague framework. On the one hand, the criticism was issued that the UK Supreme Court should not have made a distinction between normal employment and abusive employment, and that the exception should also cover normal employment.<sup>174</sup>

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<sup>170</sup> UK Supreme Court 06 July 2022, *Basfar v. Wong*, judgment, §43.

<sup>171</sup> UK Supreme Court 06 July 2022, *Basfar v. Wong*, judgment, §25.

<sup>172</sup> UK Supreme Court 06 July 2022, *Basfar v. Wong*, judgment, §56.

<sup>173</sup> Jason Haynes, “Revisiting the relationship between human trafficking and diplomatic immunity” (L.Q.R. 2023) 208.

<sup>174</sup> They draw a comparison to shoplifting, where, like the exploitation of domestic workers, the shoplifter is not paying for the goods. Based on the reasoning of *Basfar v. Wong* they suggest that shoplifting could be a commercial activity as it is financially beneficial. However, since it would be odd to come to this conclusion, they propose to consider employment in general as a commercial activity. Ingrid Brunck, “No Immunity for Diplomats Who Hold Domestic Workers in Conditions of Modern Slavery” (2022) < <https://tlblog.org/no-immunity-for-diplomats-who-hold-domestic-workers-in-conditions-of-modern-slavery/> > accessed at 29 April 2025.

On the other hand, most legal scholars seem to agree with the distinction made by the court between ordinary employment and employment in circumstances of modern slavery. The criticism of most scholars is not on the division between ordinary and abusive employment, but on the lack of attention by the court on how to distinguish “ordinary employment” from “abusive employment” and which illegal acts performed by the diplomat turn the employment relationship into a commercial activity.<sup>175</sup> Following these scholars, instead of creating guidance on this distinction, the UK Supreme Court simply stated that “the distinction is not always a clear one” and that criteria are needed. They argued that the court refrained from drawing this difficult line, but in the absence of any guidance on the matter, the decision on what falls under the commercial activity exception becomes largely subjective.

(c) Assessing the Framework’s Vagueness

Although both criticisms are understandable, they are not entirely accurate. The court’s framework, although not flawless, does offer guidance on when employment can be considered a commercial activity.

As an answer to the first critique, the approach to include all forms of employment under the commercial activity cannot be followed by applying article 32 of the Vienna Convention on the Law of Treaties (VCLT). This article 32 provides that in order to clarify the meaning of the provisions of the VCDR, one is allowed to look at the preparatory works of the VCDR. The draft history of the VCDR makes clear that it was never the intention of the drafters to include normal employment issues, such as dismissing servants without just cause or due notice, in the scope of the exceptions to immunity.<sup>176</sup> In addition, as normal employment does not result in any profit for the diplomat, the normal employment of a domestic worker should fall outside of the commercial activity exception.

In addition, the second criticism is also not fully justified, as the Supreme Court did not entirely refrain from giving any guidance on how to distinguish abusive employment from normal employment and why the latter is to be considered a commercial activity. Critics such as Xinxiang Shi and Sophie Ryan fail to see that the court did draw up two narrow criteria which need to be satisfied before the abusive employment of a domestic worker is classified as a ‘commercial activity’, namely: (1) vulnerability arising from a situation of modern slavery; and (2) profitability. However, the Court could indeed have done a greater job in clarifying both criteria.

For the first condition, namely vulnerability, the court considered that the concepts in international law of forced labour, servitude, and slavery, which make up the concept of modern slavery, should be present in order to turn employment into a commercial activity. The Court, relying on the work of the United Nations Special Rapporteur on contemporary forms of slavery, found that indicators of vulnerability inter alia include physical and

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<sup>175</sup> Xinxiang Shi, “Opening the Pandora’s Box: The UK Supreme Court’s Decision in *Basfar v. Wong*” (Chinese Journal of International Law 2022) 621. Sophie Ryan, “Modern Slavery and the Commercial Activity Exception to Diplomatic Immunity From Civil Jurisdiction: The UK Supreme Court’s Decision in *Basfar v. Wong*” (Modern Law Review 2023) 210.

<sup>176</sup> See the travaux préparatoires in this regard that excluded the invocation of the commercial activity exception in cases where diplomats were accused of dismissing servants without just cause or due notice. ILC, *The Yearbook of the International Law Commission* (Volume I) (1957), 95.

social isolation, psychological abuse, withholding of pay, and the diplomatic status of the perpetrator, all of which created a situation of extreme dependency. This situation, combined with the ‘invisibility’ of the situation to the outside world, created vulnerability.<sup>177</sup> Remarkably, the indicators mentioned are very similar to the indicators set forth by the ECtHR on servitude, as explained in Chapter 1.<sup>178</sup> The indicators, as mentioned in the first chapter, for each of the concepts of modern slavery, could thus be used by future courts to prove the vulnerability of the situation.

Considering the second profit criteria, one of the few clarifications that the court provided was that the economic benefit from paying the domestic worker wages that are lower than the market rate does not mean that the diplomat is engaging in a commercial activity.<sup>179</sup> In addition, the court explained that profit can also exist in monetary value by not paying the domestic workers, and not only in extra money made. Other than that, the Supreme Court has been unclear on how much of a disparity in wages is needed to establish that the diplomat is unfairly profiting and to turn the employment into a commercial activity. Ultimately, even though the Court created a framework for differentiating abusive employment from normal employment, the unclear meaning of the profit criteria leaves room for uncertainty in future rulings. Future courts could further refine the judgment by clarifying this profit element by considering relevant economic factors such as advance or deferred payment designed to increase dependency, payment that keeps workers below the poverty level, or payment in kind only<sup>180</sup>, as these kinds of payments reflect the control over the worker and thus the exploitative situation. By clarifying this second condition, future rulings will be more consistent and predictable.

### **E. Interim Conclusion**

The chances of survival of the judgment of *Basfar versus Wong* are not slim. Although it is a very progressive and bold ruling, it is not illogical. First of all, the Court’s classification of the hiring of a domestic worker as a private act is not new, but aligns with established case law in other jurisdictions. Secondly, in considering what falls under ‘exercise of a commercial or professional activity’, the court’s distinction between ordinary and abusive employment provides a new way of granting access to justice for victims of modern slavery. However, critics highlight the lack of practical criteria for distinguishing these categories. Although the court outlined two key criteria, vulnerability created by acts of modern slavery and profitability, the latter remains underdeveloped. Clarifying the profit element, such as by looking at whether the payment creates dependency, would strengthen the judgment’s application.

Although this ruling of the UK Supreme Court is not binding on other States, it is to be presumed that it will be relied upon by other common law jurisdictions, as common law jurisdictions do not shy away from referring to each other’s case law and using it as a

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<sup>177</sup> Rosana Garcíandia, “Domestic Servitude and Diplomatic Immunity: The Decision of the UK Supreme Court in *Basfar v Wong*” (Industrial Law Review 2023) 457.

<sup>178</sup> See Chapter 1, subsection 1.3.2 on servitude; Common determinants for domestic servitude following the ECtHR are: the vulnerability of the person, limitations on personal freedom, violation of human dignity, excessive hours of work, no payment or remuneration or disproportionate payments and the perceived permanency of the situation.

<sup>179</sup> UK Supreme Court 06 July 2022, *Basfar v. Wong*, judgment, §62.

<sup>180</sup> UN General Assembly, (n. 19) §48.

precedent in their jurisdiction. The High Court of Australia has, for example, referred to the UK ruling of *Reyes*, and the UK Supreme Court, in its turn, has referred to the US judgment of *Tabion v. Mufti* in its reasoning. However, it is too early to tell how influential exactly this judgment will be in the future. Nevertheless, the court, with its reasoning, created a new interpretation of the commercial activity exception, which will potentially shape the emergence of a new rule. It will be up to the courts in other States to decide whether this interpretation is to be followed. In light of protection for victims of modern slavery, we can only hope that they will.

## V. Final Conclusion

Domestic workers employed by diplomatic agents have at times found themselves trapped in conditions amounting to modern slavery. Especially, they have found themselves trapped in a situation of forced labour, servitude, or *de facto* slavery. Over time, the legal understanding of these types of abuse has been increasingly refined through court rulings on the international and European level. In addition to refining the legal definitions, these courts have provided key indicators to help judges and other legal practitioners classify specific cases. However, despite the seriousness of such violations and their increasing legal clarity, judicial redress for these vulnerable workers is often blocked due to the jurisdictional immunity the diplomats enjoy before foreign courts.

Recent domestic judgments all over the world are increasingly recognizing the unjust balance between the wide protections granted by immunities and the ability of victims to seek compensation before national courts. In particular, two key legal developments have emerged at the national level, potentially providing new avenues for redress for domestic workers subjected to modern slavery by diplomats. A first key legal development is the increased recognition of a *jus cogens* exception to immunity. This peremptory norm exception entails that the immunity of States or State officials should be lifted as *jus cogens* norms rank higher in the hierarchy of norms in international law than rules on immunity, which are only of a customary nature. A second key legal development is the classification of acts of modern slavery as private acts and as a commercial activity. This interpretation allows domestic workers to invoke the commercial activity exception to diplomatic immunity, thereby allowing certain cases of modern slavery to go to court that would otherwise be barred.

Remarkably, these key developments at the national level are not odd ones out but are part of a wider trend to limit the application of jurisdictional immunity before foreign courts. Especially throughout the 21<sup>st</sup> century, although only one quarter has passed, immunities have undergone a major shift as major developments have limited the scope of immunities for all kinds of situations. Where the immunity of States and State representatives before civil courts was first absolute, meaning that no State, or representative, could be hauled before a foreign court, many jurisdictions are now adopting a more restrictive approach, allowing for exceptions. In parallel with the restrictive approach towards immunities, the new developments on the national level have diminished immunities even further by creating new or reinterpreting existing exceptions to immunities. These judgments in Italy, the United Kingdom, South Korea, and Brazil thus illustrate the current trend in international law to limit the immunity of States and

State representatives. As a result, these decisions do not stand in isolation but rather reflect the new restrictive approach regarding immunities.

Moreover, these national judgments strengthen the concept of peremptory norms. Considering slavery, together with arguably forced labour and servitude, as prohibitions with the status of *jus cogens*, these decisions prioritized the enforcement of *jus cogens* norms over immunities. In doing so, they helped to ensure that these peremptory norms are not made ineffective or undermined by procedural barriers, leading to the increased recognition of procedural rules as integral to the concept of peremptory norms. These national developments thus contribute to the effective exercise of peremptory norms, guaranteeing that their role as the highest norms under international law is fully realized.

In short, all these judgments send a clear message: immunity should never prevail over accountability when it comes to the gravest violations of human rights. When the most fundamental human rights protected by norms of *jus cogens* are violated, immunity should not be equal to impunity.