

Written Contribution
by the European Group of National Human Rights Institutions
to the General Discussion of the Committee on the Elimination of Discrimination
against Women on Access to Justice (18th February 2013)

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A. Introduction

The European Group is a representative group of thirty six (36) National Human Rights Institutions (NHRIs) within the Council of Europe, of whom, twenty two (22) are deemed to be fully compliant with the United Nations “Paris Principles”.

The recent Eleventh International Conference of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights in Amman, Jordan from 5-7 November 2012 focused on “The human rights of women and girls: Promoting gender equality: The role of national human rights institutions.” The Conference adopted the Amman Declaration and Programme of Action, followed by regional plans of action, elaborated by NHRI regional groups at the Conference, amongst them the European Group. In these documents, NHRIs, inter alia, committed themselves to reinforcing their interaction with the Committee on the Elimination of Discrimination against Women (CEDAW) in relation to women’s human rights. Among the principles and areas of work agreed upon is facilitating women’s and girls’ access to justice, including judicial and non-judicial remedies. The NHRIs consider that there can be no substantial and effective gender equality without effective judicial protection, which includes access to justice, a fair trial, effective sanctions and effective implementation of judicial decisions.

The European Group therefore welcomes the opportunity to contribute to CEDAW’s thematic discussion on women’s access to justice, and submits the following contribution. It focuses on the **right of access to justice for women domestic workers in the context of diplomatic immunity**. Several National Institutions represented in the European Group have addressed the denial of access to justice for domestic workers in diplomat’s households in their work on the domestic level.

B. General Observations

Gender equality is a proactive principle, which goes further than the prohibition of gender discrimination and whose substantive implementation requires positive or affirmative action, women should have the possibility to have the effectiveness of existing national positive measures reviewed by the courts and to demand the adoption of further effective positive measures at national level. It should be stressed in all cases that positive measures are not derogations from gender equality, but means which are necessary for the promotion of substantive gender equality, as Article 4(1) of the CEDAW proclaims.

The International Labour Organisation (ILO) estimates that women represent 83% of domestic workers worldwide.¹ Looking at rights violations experienced by domestic workers working for diplomats from different perspectives - labour rights, migrants’ rights, women’s rights, the rights of victims of crime/trafficked persons - reveals the complexity of the phenomenon. It also demonstrates how a number of factors add up to a risk of dependency and abuse faced by private domestic workers employed by diplomats.

First, the hidden and informal nature of domestic work relegates the working conditions of employees to the so-called “private sphere”, removing it from state control and exacerbating the unequal power relationship between employees and employers. Even where domestic work is regulated by law, protection standards are often weaker compared to general labour laws. Furthermore, the privileged status of diplomats, to whom international law awards immunity from the host country’s jurisdiction and the execution of judgments, creates a barrier for domestic workers seeking to access justice.

¹ <http://www.ilo.org/global/topics/domestic-workers/lang--en/index.htm>.

Spectrum of cases

A study on rights violations and access to justice of domestic workers employed by diplomats, commissioned by the German Institute for Human Rights, showed a broad spectrum of alleged rights violations reported by private domestic workers on the part of their employers in six European countries².

The study highlights a considerable number of labour rights violations of varying degrees of gravity. One end of the case spectrum was marked by breaches of labour law, such as failure on part of the employer to pay the full wage or fully compensate the worker for extra hours or for untaken annual leave, or, in the case of a termination of employment, failing to respect legal notice periods or to pay indemnity. Examples of more severe violations include complete withholding of wages, forcing workers to work excessive hours without days off and without any or with inadequate compensation, or failure to provide them with adequate accommodation and food. At the other end of the spectrum are extreme cases of workers who were forced to sleep on the floor, deprived of food apart from leftovers, denied basic hygiene, and suffered physical, psychological and/or sexual violence. Such cases, involving slavery-like conditions, are the exception, rather than the norm. However, the boundaries between the different types of cases are fluid.³

Rights violations

As indicated above, domestic workers may experience violations of their human rights in various ways:

- Their right to just and favorable working conditions enshrined in Art. 11 CEDAW and Art. 7 of the International Covenant on Social, Economic and Cultural Rights (ICESCR) is violated when they receive less than minimum respectively average wages, are forced to work long hours without adequate rest and periodic holidays with pay.
- The prohibition of slavery enshrined in Art. 6 CEDAW, Art. 8 of the International Covenant on Civil and Political Rights (ICCPR) and Art. 4 of the European Convention on Human Rights (ECHR) is at stake in the most severe cases. Also at stake is freedom from servitude as *Siliadin v France*⁴ and *CN and V v France*.⁵
- The right to health may be violated by unhealthy working conditions without rest periods and insufficient nutrition, as well as the right to an adequate standard of living, including adequate food (Art. 11, 12 ICESCR).
- The right to physical integrity and the prohibition of torture are violated by physical and sexual attacks and degrading treatment (Art. 2 in conjunction with General Recommendation No. 19 of CEDAW, Art. 7 ICCPR, Art. 3 ECHR).
- In addition, the right to privacy is affected when the domestic worker is not provided with a room for herself or himself (Art. 17 ICCPR, Art. 8 ECHR).
- Also, freedom of movement is infringed upon when the worker is not allowed to leave the house on her or his own (Art. 9, 12 ICCPR).

Right to access to justice

The limitations on domestic workers obtaining access to justice through the national legal systems of host countries, arising from the intersection with the law relating to diplomatic immunity, can lead to a situation of *de facto* impunity for rights violations, since the likelihood of domestic workers claiming their rights in the sending state against their employer is remote in most cases.

² Austria, Belgium, France, Germany, Switzerland and the United Kingdom.

³ Kartusch, Angelika: Domestic Workers in Diplomats' Households – Rights Violations and Access to Justice in the Context of Diplomatic Immunity, German Institute for Human Rights 2011, pages 21- 22.

⁴ ECtHR, Second Section, Judgment of 26 July 2005, Application No. 67724/09.

⁵ ECtHR, Fifth Section, Judgment of 11 October 2012, Application No. 73316/01.

Theoretically, victims can bring their claims in the diplomat's sending state. Yet lack of funds for travelling and for local legal advice and lack of knowledge of the legal system or the language render this option factually impossible⁶. This indicates a legislative gap in national legal systems, as international and regional human rights treaties impose a duty on states to guarantee access to justice for such rights violations to victims.

In this regard Art. 8 of the Universal Declaration of Human Rights stipulates the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the constitution or by law. Art. 2, para 3 ICCPR obliges states to provide an effective remedy to any person whose rights or freedoms as recognised in the Covenant are violated. A person's entitlement to a fair and public hearing, within a reasonable time, by an independent and impartial tribunal established by law, is enshrined in Article 6 ECHR, and the right to judicial protection also derives from the state's general duty "to fulfill" as a dimension of every human right.

C. Issues for Consideration by the Committee with a View to Strengthening the Access to Justice for Domestic Workers employed by Diplomats

1. CEDAW General Recommendation No. 26 on Women Migrant Workers

The CEDAW Committee has already addressed the issues of limited access to justice for women migrant workers in the context of diplomatic immunity in paragraph 21 of its General Recommendation No. 26, stating that, "in some cases, diplomats have perpetrated sexual abuse, violence and other forms of discrimination against women migrant domestic workers while enjoying diplomatic immunity."⁷ The Committee recommended States Parties to the Convention train and supervise their diplomatic and consular staff to ensure that they protect the rights of women migrant workers abroad, through the provision of interpreters, medical care, counseling, legal aid and shelter. The question as to how women's right of access to justice in the context of diplomatic immunity can be ensured if these protection mechanisms fail, has not yet been raised by the Committee.

2. Issues relating access to justice for domestic workers employed by diplomats

The duty of States Parties to ensure, on a basis of equality between men and women, access to the justice system, information and education implies an obligation to respect, protect and fulfil women's access to justice. States Parties have the responsibility to ensure that legislation, executive action and policy comply with these three obligations. Failure to do so will constitute a violation of article 2 of CEDAW.

2.1. Obligation to respect

The **obligation to respect** rights requires States Parties to refrain from making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment by women of their rights.⁸

Full use of diplomatic measures in case of criminal offences

In cases of criminal offences by diplomats against domestic workers, states should, as appropriate, make use of the entire range of diplomatic measures at their disposal, from lenient measures to farther-reaching measures under the Vienna Convention. The measures taken

⁶ Denza, Eileen: *Diplomatic Law, Commentary on the Vienna Convention on Diplomatic Relations*, Third Edition, Oxford University Press 2008, page 322.

⁷ UN, Committee on the Elimination of Discrimination against Women: General Recommendation No. 26 on Women Migrant Workers, CEDAW/C/2009/WP.1/R, 5 December 2008, para 21.

⁸ UN, Committee on the Elimination of Discrimination against Women: General recommendation No. 28 on the core obligations of states parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, 16 December 2010, para 9.

ought to reflect the nature and gravity of the rights violations in question. This should include, for host states, systematic requests for waivers of immunity and applying political pressure on sending states and international organisations to accept such requests; and for sending states, accepting such requests. In cases of grave and/or repeated right violations, states should request the sending states to lift the immunity or declare diplomats “*persona non grata*” (an unwelcome person in the host state).

States, therefore, should devise and apply criteria for the application of each diplomatic measure in response to rights violations of domestic workers. Amongst other considerations, decisions on which measure to apply should be guided by both the gravity of the criminal offence concerned (such as trafficking in human beings, rape, bodily injury, deprivation of liberty, etc.), as well as the degree of economic exploitation.

Criminal cases, as well as measures taken by the state, have to be systematically documented in order to ensure appropriate responses to repeated rights violations.

Guarantee access to justice in labour/civil law cases in the context of diplomatic immunity

In order to fulfil the obligation to respect, states must solve the conflict between diplomatic immunity and the right of access to justice. At national and international level there appear to be at least three possible options states can choose in order to be in compliance with their human rights obligations and, at the same time, achieve a balance between the maintenance of diplomatic relations and the enforcement of individual rights.

By providing for alternative avenues of effective judicial protection

Firstly, states can choose to provide for alternative avenues of effective judicial protection while upholding diplomatic immunity in courts⁹.

The mechanism devised for domestic workers to make complaints of rights violations inflicted by diplomat employers must meet certain requirements. The mechanism should be tasked to facilitate the extra-judicial settlement of employment-related disputes, based on the principles of impartiality, independence, transparency and acceptance by both parties.

Procedural guidelines should be established laying down the steps involved in the proceedings and the roles and responsibilities of the actors involved, as well as guidance for the settlement of claims. The procedure should ensure balance in the otherwise unequal power relationship between domestic workers and diplomat employers, in particular through allowing domestic workers to be accompanied or represented by a lawyer, NGO or trade union representative in negotiations. For negotiations between domestic workers and diplomat employers facilitated by Foreign Offices, guidelines with the same requirements should be put into place. Domestic workers should have access to free legal advice and representation in negotiations with their employers

By granting state compensation

The second option available to states to grant access to justice, without limiting the scope of diplomatic immunity, is for receiving states to grant compensation to domestic workers for rights violations. The ruling of the French Conseil d’Etat in 2011 sets an example for such an approach (see page 11). In states where states may not be held liable for rights violations against domestic workers employed by diplomats, states should provide for access to state compensation funds for this group of rights holders.

By limiting the scope of diplomatic immunity by law or through individual court decision in cases of severe human rights violations

The third option would be to limit the scope of diplomatic immunity by law or through individual court decisions. General international law may offer a solution in cases where a peremptory norm of international law (*ius cogens*) is concerned, i.e. situations amounting to slavery or to inhuman or degrading treatment. International law is to be conceived as a coherent le-

⁹ This concept underlies the holding of the ECtHR in the case of *Waite and Kennedy v. Germany* concerning scope of the immunity of international organisations (see D. 4.).

gal system, as reflected in Article 31(3) (c) of the Vienna Convention on the Law of Treaties (VCLT). Under Article 53(2) VCLT, a treaty rule in conflict with a peremptory norm of international law is null and void. If the rule of diplomatic immunity for private acts prevented victims of slavery or inhuman or degrading treatment from receiving judicial redress, the rule could be incompatible with a peremptory norm, as both prohibitions are individual rights and hence encompass the right to judicial protection. To avoid this result, the Vienna Convention on Diplomatic Relations could be interpreted restrictively, excluding immunity from civil claims and their enforcement in such cases.

2.2. Obligation to protect and fulfil

The **obligation to protect** requires that States Parties protect women from discrimination by private actors. The **obligation to fulfil** requires that States Parties take a wide variety of steps to ensure that women and men enjoy equal rights *de jure* (in principle) and *de facto* (in practice). State Parties should consider how to fulfil their legal obligations to all women through designing public policies, programmes and institutional frameworks that are aimed at fulfilling the specific needs of women leading to the full development of their potential on an equal basis with men.¹⁰

In order to meet this obligation states should design a comprehensive approach to both prevent rights violations against domestic workers and to protect their rights. This means the systematic implementation of a broad range of measures encompassing; the revision of visa application schemes; employment conditions; immigration status; information about rights, monitoring and reporting and which includes as a minimum the following¹¹:

Regulating the entry of domestic workers

- States should require domestic workers to pick up their residence permit in person at the stages of first registration and renewal in the host country to enable them to access information and report problems with their employers. At these meetings, which should be held in the absence of the employer, states should ensure that domestic workers are provided with information on their rights and contact details of specialised NGOs who can provide advice and support. Such information should be in writing and in a language the domestic worker understands.
- States should inform employers of their rights and obligations under the host country's laws through appropriate means, including through publishing and distributing written materials.
- States should review existing admission criteria for the employment of private domestic workers, in line with anti-discrimination legislation, and remove those criteria which unduly interfere with the workers' right to privacy, family life and the principle of equal treatment, in particular through allowing workers to be accompanied by close family members.

Immigration Status

- States should provide domestic workers employed by diplomats the possibility to switch to other residence and work permits on the same basis as other domestic workers.
- States should review, in light of the judgement of the European Court of Human Rights in the case of *Rantsev v Cyprus and Russia*¹² and the positive obligations flowing from this decision under Art. 4 of the European Convention of Human Rights, the tying of residence status of domestic workers to their diplomatic employers, especially in connection with the requirement to live in with the employer and the informal character of domestic work.
- In case of prima facie evidence of rights violations, states should enable a domestic worker to stay in the host country as long as necessary to obtain medical treatment, if

¹⁰ See footnote 9.

¹¹ See Kartusch, footnote 3, pages 47-55.

¹² ECtHR, *Rantsev v. Cyprus and Russia*, First Section Judgment of 7 January 2010, Application no. 25965/04.

needed, and to settle their claims under labour law through judicial proceedings or extra-judicial negotiations.

Employment conditions

- States should ensure that private domestic workers employed by foreign diplomats are covered by national labour laws and/or any specific legislation in place covering domestic work.
- States should require written work contracts signed by both parties in line with national labour law and specifying key elements of the work relationship, including salary, work hours and days off. Contracts have to be written in a language the domestic worker understands. They should be made mandatory in the registration process.
- States should require the opening and use of bank accounts for payment of wages to domestic workers, and, upon reports of alleged labour rights violations, require employers to provide account statements to prove payments.
- States should ensure that domestic workers are covered by comprehensive social security, including, at a minimum, health and accident insurance. This aim should be achieved either through requiring employers to provide proof of social security coverage and of payments of premiums or, alternatively, through including domestic workers in the host countries' social security schemes.

Monitoring and Reporting

- States should systematically document alleged rights violations committed by diplomats as well as measures taken in response.
- States should set up annual meetings with specialised NGOs and NHRIs in order to evaluate the existing framework.
- In their reports to the Committee, State Parties should report on the framework set up to protect domestic workers rights. In order to enable the committee to evaluate whether the approach is appropriate, states must report on rights violations and measures taken with reliable data.

D. Background: Access to Justice for Domestic Workers in the Context of Diplomatic Immunity as an Issue on the International Agenda

The issue of rights violations experienced by domestic workers employed by diplomats and the gaps and challenges these workers face in accessing justice as a result of diplomatic immunity, has increasingly emerged on the international agenda over the past decade.

1. UN Level

At the level of the United Nations (UN), in addition to the already mentioned CEDAW General Recommendation No. 26 on Women Migrant Workers, a number of other human rights mechanisms and documents have raised the issue.

In her 2010 report to the Human Rights Council, the UN Special Rapporteur on Contemporary Forms of Slavery, explored how the specificities of domestic work as an industry put domestic workers at risk of economic exploitation, abuse and domestic servitude. For migrant domestic workers employed by diplomats or international civil servants with diplomatic status, the report points to a "specific protection gap", due to the dependency of the workers' visa status on the ongoing employment relationship and diplomatic immunity which shields abusive employers from enforcement of national legislation.¹³

Furthermore, the UN Committee on Migrant Workers, in January 2011, published its first General Comment on "Migrant Domestic Workers", in which it analyzes human rights viola-

¹³ UN, Special Rapporteur on Contemporary Forms of Slavery, Including its Causes and Consequences, 2010: para 33, 57, 58, 96.

tions experienced by migrant domestic workers as well as protection gaps of both a legal and practical nature. The Committee recommends States parties to the Migrants Rights Convention, among others, to “ensure that migrant domestic workers can obtain legal redress and remedies for violations of their rights by employers who enjoy diplomatic immunity under the Vienna Convention on Diplomatic Relations.”¹⁴

The ILO Recommendation 2011 (No. 201) to the Domestic Workers Convention (No. 189) suggests that states adopt policies and codes of conduct for diplomatic personnel aimed at preventing violations of domestic workers’ rights in the context of diplomatic immunity.¹⁵

2. European Level

At the regional level, the Parliamentary Assembly of the Council of Europe (PACE) adopted a recommendation on “Domestic Slavery”¹⁶ in 2001, in which it called for a number of measures to prosecute and prevent domestic slavery and to protect the rights of the victims thereof. It further called for an amendment to the Vienna Convention on Diplomatic Relations so as to exclude diplomatic immunity for all offences committed by diplomats in their private life. In a 2004 follow-up resolution¹⁷, PACE recommended the adoption of a charter of rights of domestic workers, which should, among others, recognise domestic work as labour.

The issue was also addressed in a research paper published in 2011 by the Office of the OSCE Special Representative on Trafficking in Human Beings. The study concludes with a number of recommendations addressed to the organization and its Participating States, including measures to prevent rights violations committed by diplomats and staff members of international organisations, designed to improve the access of private domestic workers to assistance and redress.¹⁸

3. Diplomatic Immunity and Access to Justice in Academic Research

As far as can be seen, the problem of access to justice of domestic workers in the context of diplomatic immunity has not yet been reflected in European legal sciences. By contrast the issue has increasingly become a subject of legal commentary in the United States.¹⁹ The proposed approaches to defuse the problem *de lege lata* (the law as it exists) and *de lege ferenda* (the law as it should be) are diverse. Envisaged and discussed is, for instance, an expanded interpretation of the commercial activity clause of Article 31 No. 1 c Vienna Con-

¹⁴ UN, Committee on Migrant Workers: General Comment on Migrant Domestic Workers: CMW/C/GC/1, 23 February 2011, para 49.

¹⁵ ILO, The General Conference of the International Labour Organization: Domestic Workers Recommendation, No. 201, 2011 and Recommendation concerning Decent Work for Domestic Workers, No. 26, 2011, para 4.

¹⁶ Council of Europe, Parliamentary Assembly: Recommendation 1325, Domestic Slavery, 26 June 2001.

¹⁷ Council of Europe, Parliamentary Assembly: Recommendation 1663, Domestic Slavery: servitude, au pairs and “mail order brides”, 22 June 2004.

¹⁸ Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, Unprotected Work, Invisible Exploitation: Trafficking for the Purpose of Domestic Servitude, Occasional Paper Series No. 4, Research Paper on Trafficking in Human Beings for Domestic Servitude in the OSCE Region: Analysis and Challenges, 2010, page 66.

¹⁹ See: Chuang, Janie A.: “Achieving Accountability for Migrant Domestic Worker Abuse”, in: North Carolina Law Review June 2010, page 1627 et seq. (=88 NCLR 1627); Howard, Derrick: “Twenty-First Century Slavery: Reconciling Diplomatic Immunity and the Rule of Law in the Obama Era”, in: Alabama Civil Rights & Civil Liberties Law Review 2012, page 121 et seq. (=3 ALCRLLR 121); Hoover Kappus, Jennifer: “Does Immunity Mean Impunity? The Legal and Political Battle of Household Workers Against Trafficking and Exploitation by the Foreign Diplomat Employers”, in: Case Western Reserve Law Review 2010, page 269 et seq. (= 61 CWRLR 269); Tai, Amy: “Unlocking the Doors to Justice: Protecting the Rights and Remedies of Domestic Workers in the Face of Diplomatic Immunity”, in: American University Journal of Gender, Social Policy and the Law 2007, page 175 et seq. (=16 AMUJGSP 175); Morris, William G.: “Constitutional Solutions to the Problem of Diplomatic Crime and Immunity”, in: Hofstra Law Review Winter 2007, page 601 et seq. (= 36 HOF LR 601); Ríos, Greta L. and Flaherty, Edward P.: “Mr. Ban, Tear Down the U.N.’s Wall of Immunity/Impunity (Before a National Court Does)!!!”, in: ILSA Journal of International and Comparative Law Spring 2012, page 439 et seq. (=18 ILSAJICL 439); Siedell, Emily F., Swarna and Baoanan: “Unraveling the Diplomatic Immunity Defense to Domestic Worker Abuse”, in: Maryland Journal of International Law 2011, page 173 et seq. (=26 MDJIL 173).

vention on Diplomatic Relations²⁰ or a limitation of diplomatic immunity because of a violation of peremptory norms of international law (*ius cogens*)²¹. Proposals in the legislative area comprise changes in the granting of visas or the obligation of diplomats to take out insurance and the creation of a compensation fund²².

Whilst there is uncertainty in the debate on the question of the preferable approach, the problem as such is not disputed and some form of legal measures are unanimously considered to be urgently required.²³

4. Examples of Employment-related Case Law addressing Diplomatic and State Immunity

European Court of Human Rights

In a number of cases the European Court of Human Rights (ECtHR) has touched upon issues around diplomatic immunity, but has not yet ruled on the relationship between the entitlement to protection through diplomatic immunity and the right to be granted access to a court (Art. 6 ECHR).

In a recent case against France in 2012 the Court held that Art. 4 ECHR (Prohibition of slavery and forced labour) was violated because the state did not provide effective legal and administrative framework conditions to combat forced labour. The case concerned domestic servitude in the household of an UNESCO employee. The immunity of the diplomat was lifted by the UNESCO during the national criminal proceedings. Therefore the ECtHR did not have to deal with the scope of the right to access to justice in the context of diplomatic immunity.²⁴

All other cases the court ruled on, in relation to diplomatic immunity, concerned the concept of state immunity, which has evolved in recent years. The notion of absolute immunity had clearly weakened, in particular with the adoption of the 2004 UN Convention on Jurisdictional Immunities of States and their Property. That convention had created a significant exception in respect of state immunity through the introduction of the principle that immunity did not apply to certain kinds of employment contracts between states and the employees of its diplomatic missions abroad.

In *Sabeh El Leil v. France*²⁵ the Grand Chamber held unanimously that there had been a violation of Art. 6 (1) of the ECHR (right of access to a court) in respect of the applicant, a former employee of the Kuwaiti Embassy in Paris, whose claim against the Embassy for compensation in respect of his dismissal was declared inadmissible by the French Courts on grounds of state immunity. The Court observed that the applicant had been employed as an accountant at the Kuwaiti Embassy, and not to act officially in a diplomatic or consular capacity on behalf of the Kuwaiti State. Furthermore, it had not been demonstrated that the applicant's duties could be linked to the sovereign interests of the State of Kuwait. The Court therefore concluded that by upholding the State of Kuwait's objection based on state immunity and dismissing the applicant's claim without giving relevant and sufficient reasons as required under the French Civil Code "failed to preserve a reasonable relationship of proportionality". In the judgement, the Court reaffirms its previous case-law on the boundaries of state immunity.

²⁰ Tai, Amy: "Unlocking the Doors to Justice: Protecting the Rights and Remedies of Domestic Workers in the Face of Diplomatic Immunity", in: American University Journal of Gender, Social Policy and the Law 2007, page 222.

²¹ Howard, Derrick: "Twenty-First Century Slavery: Reconciling Diplomatic Immunity and the Rule of Law in the Obama Era", in: Alabama Civil Rights & Civil Liberties Law Review 2012 page 164.

²² Siedell, Emily F., Swarna and Boanan: "Unraveling the Diplomatic Immunity Defense to Domestic Worker Abuse", in: Maryland Journal of International Law 2011, page 190.

²³ See: Siedell, page 191; Howard, page 165 et seq.; Tai, page 222; Rios / Flaherty, page 444; Chuang, page 1628; Hoover Kappus, page 271; Morris, page 601 (respectively see footnote 17).

²⁴ C.N. and V. v. France, Chamber Judgment of 11 October 2012, Application No. 67724/09.

²⁵ Sabeh El Leil v. France, Grand Chamber Judgment of 29 June 2011, Application No. 34869/05; see a summary of the ruling: <http://www.ihrac.ie/enquiriesandlegal/eurocourtcases.html>.

In 1999, before the 2004 UN Convention on Jurisdictional Immunities of States and their Property entered into force, the ECtHR issued an important judgment (Waite and Kennedy v. Germany²⁶) concerning the scope of the right of access to a court (Art. 6 ECHR) in the context of the immunity of international organisations. The case concerned a labour law dispute between the European Space Agency (ESA) and some of its employees. Before the national courts ESA relied on its immunity from jurisdiction under Article XV(2) of the ESA Convention. The Labour Court accepted the arguments and declared the actions inadmissible. The ECtHR found that there had been no violation of Art. 6 ECHR since the applicants could have applied to the ESA Appeals Board, which is “independent of the Agency” and which has jurisdiction “to hear disputes relating to any explicit or implicit decision taken by the Agency and arising between it and a staff member”. The Court noted that, although the immunity limited the right to access to court, it had not impaired the very essence of it as the applicants had available to them a reasonable alternative mechanism to protect effectively their rights under the Convention.

Other regional human rights protection systems

Most of the other regional human rights protection systems, like human rights courts or commissions, have not yet issued decisions concerning the conflict between immunity and the right of access to justice.²⁷

In 2007, the Women’s Rights Project and the Human Rights Program of the American Civil Liberties Union (ACLU) filed a petition²⁸ with the Inter-American Commission on Human Rights (IACHR) on behalf of five domestic workers employed by diplomats. The petition is still pending.

Petitioners argue that the United States violated their rights under The American Declaration of the Rights and Duties of Man. The United States is responsible for violations of petitioners’ rights to be free from trafficking and forced labour (Article I) and associated rights including petitioners’ rights to fair and decent work conditions (Article XIV), to health and well-being (Article XI) and their right of access to U.S. courts (Article XVIII). Responsibility for these violations is imputed to the United States as it failed to act with “due diligence” to prevent the violations. Diplomatic immunity does not circumvent the United States responsibility to act with “due diligence” because the *jus cogens* norm prohibiting slavery and slave-like practices is superior to the treaty norm of the Vienna Convention on Diplomatic Relations and thus remains applicable.

Petitioners request that the Commission provide them with a number of measures of relief.²⁹ These measures would bring the United States into compliance with its obligation to protect against violations of domestic workers rights. The United States should, inter alia, make laws, policies and practices that allow domestic workers of diplomats to change or leave their employers while they remain in the United States, institute a system to allow for periodic check-ins with the domestic workers after their arrival and establish an effective mechanism to ensure that domestic workers of diplomats are provided with adequate compensation when their rights are violated.

National judicial systems

A comprehensive overview of existing domestic case law on the issue cannot be provided.

²⁶ ECtHR, Waite and Kennedy v. Germany, Grand Chamber Judgment of 18 February 1999, Application No. 26083/94.

²⁷ Database research on the case law African Commission on Human and Peoples’ Rights, Inter-American Commission on Human Rights, Inter-American Court of Human Rights.

²⁸ <http://www.aclu.org/files/womensrights/employ/unworkers/petition.pdf>.

²⁹ See IX. Conclusion and Petition for Relief, p. 123 of the petition.

Interesting examples of national case law include a judgement of the Conseil d'Etat³⁰ (French Administrative Supreme Court) which allowed, for the first time, the regulations concerning state liability to be applied to the issue of human rights violations experienced by a domestic worker in a diplomat's household. The reasoning developed by the court resulted in getting round the barrier of immunity from execution by obliging the host state to provide compensation to the victim. The domestic worker was awarded remuneration and compensation against her former employer by the labour courts of first and second instance but immunity from execution hindered the enforcement of the judgement. In the end the dispute was settled by the Conseil d'Etat under the doctrine of state liability resulting from the state's international commitments. This doctrine is based on the principle of equality of citizens in enduring the potential negative consequences of an international Convention that was ratified by France, meaning a person who has suffered specific, serious and extraordinary damage immediately caused by an international Convention is entitled to compensation by the state.

In 2007, the ACLU documented 60 cases of diplomats who had sexually, psychologically and physically abused domestic workers in the United States. Advocates representing some of these workers filed civil litigation on their behalf seeking compensation and other relief for their injuries. In *Swarna v. Al-Awadi*³¹ the domestic worker of a Kuwaiti diplomat, Ms. Swarna, initially filed suit against her employer while he was still serving as a diplomat in New York. The case was dismissed without prejudice by a federal court in New York for lack of jurisdiction following the diplomat's assertion of diplomatic immunity. Once the diplomat left his post, Ms Swarna filed a second case against him. In this suit Ms Swarna also sued the State of Kuwait, alleging that Kuwait had aided and abetted or been otherwise complicit in the diplomat's trafficking, forced labour and sexual abuse of Ms Swarna. The court held, that upon leaving office the diplomat could be sued in U.S. courts for her trafficking, forced labour and other abuses, allegedly committed while he was based as a diplomat in New York. Considering the meaning of Article 39 of the Vienna Convention on Diplomatic Relations (VCDR), the Second Circuit Court of Appeals determined that the employment of Ms Swarna was a private act on the part of the diplomat and that immunity did not therefore extend to conduct arising out of that employment. The court, dismissed the claims against Kuwait, finding them barred by the Foreign Sovereign Immunities Act (FSIA). The court determined that no exceptions to foreign sovereign immunity under the FSIA were applicable. First, the court held that the tortious acts of the diplomat cannot be imputed to Kuwait, since they arose from personal motives and were not committed within the scope of the diplomat's employment. Second, the court found that Kuwait's alleged failure to institute procedures or a system to monitor its employees was not conduct that brings Kuwait's action (or inaction) within one of the exceptions from foreign sovereign immunity under the FSIA. The case was settled out of court for an undisclosed sum.³²

A case similar to the Swarna case is currently pending before a German labour court, supported by the German Institute for Human Rights. However, the defendant has completed his diplomatic service, and the plaintiff returned to her country of origin two years ago. Therefore evidence gathering is very difficult. The possibility of an award of remuneration and compensation is very remote in this scenario, where a female Indonesian domestic worker has the task of enforcing her title against a former diplomat in Saudi-Arabia, a country in which women do not have legal capacity.

To sum up, so far law suits of domestic workers against diplomats have only been successful after the defendants have completed their missions and left the country or after their diplomatic status has been revoked. As far as known these judgements could only rarely be enforced. Therefore a judgement against the sending or the host state might be considered

³⁰ Conseil d'État, Judgment of 11 February, N°325253, see the judgment in French and an English summary: <http://www.institut-fuer-menschenrechte.de/de/projekt-zwangsarbeit-heute/veranstaltungen/2011.html>.

³¹ <http://caselaw.findlaw.com/summary/opinion/us-2nd-circuit/2010/09/24/252121.html>.

³² The same legal strategy and arguments were followed in the Sabbithi v. Al-Saleh and Kuwait case: Three domestic workers filed a civil suit against their employer, a Kuwaiti diplomat and his wife and against Kuwait. The case was settled with Kuwait out of court for an undisclosed sum: <http://www.aclu.org/human-rights-womens-rights/case-profile-sabbithi-et-al-v-al-saleh-et-al>.

more beneficial for domestic workers as seen in the French case. However, this requires national legislation under which states can be held liable for rights violations caused by tortious acts of diplomats.

The European Group of National Human Rights Institutions therefore consider it necessary to effectively grant access to justice to domestic workers employed by diplomats and calls upon the Committee to include the issue in its future General Comment.