

TWENTY-FIRST CENTURY SLAVERY: RECONCILING
DIPLOMATIC IMMUNITY AND THE RULE OF LAW IN THE
OBAMA ERA

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ABSTRACT

*This Article examines how during President Barack Obama's first two years in office his administration has interacted with the judiciary to effect change on the daunting task of combating modern-day slavery during what some have called the "Obama Era." The Article enumerates the various manifestations of modern-day slavery as sex trafficking, forced labor, debt bondage, involuntary servitude, forced marriage, organ harvesting, and child exploitation and explores these crimes' pervasiveness in American society. After discussing the extent of the involvement of diplomats in human trafficking in this country, the Article examines the Obama Administration's involvement in *Baoanan v. Baja*,¹ the most prominent case since Obama's election addressing the lawful limits of a diplomat's "official" and "unofficial" acts under the Vienna Convention on Diplomatic Relations (VCDR). The Article then presents arguments for broader application of the *jus cogens* doctrine to finally strip diplomats of their Teflon authority under the VCDR which allows them to be the only segment of society that can violate the highest moral laws of this country and of the international community against the continuation of slavery and its progeny. In conclusion, the Article predicts other actions President Obama may pursue during the balance of his term in office to contribute to eradicating human trafficking in the twenty-first century.*

Today, America is finally at the point where it has the potential to resolve in a positive way so many of the problems of the past. If we dare ignore this opportunity, the alternative will be to drift into further polarization. The ultimate direction in which this nation moves may well depend on how it interprets the legacy . . . of centuries of slavery assured and guaranteed by the law.²

1. *Baoanan v. Baja*, 627 F.Supp.2d 155 (S.D.N.Y. 2009)

2. A. LEON HIGGINBOTHAM, JR., IN *THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS* ix (1977). Judge Higginbotham was the first African-American Chief Justice of the Third Circuit Court of Appeals. He was a scholar and professor of law at Harvard University and the University of Pennsylvania. The President and Fellows of Harvard recognized Judge Higginbotham as a "survivor of segregation," who "energetically championed integration and civil rights during his lifetime." *Biography: The Honorable A. Leon Higginbotham, Jr.*, HARVARD JOURNAL OF AFRICAN AMERICAN POLICY (2006), available at <http://www.hks.harvard.edu/HJAAP/bio.htm>. In September 1995, he received the Presidential Medal of Freedom from President Clinton, the nation's highest civilian honor. *Id.*

I. INTRODUCTION

More than thirty years ago, the Honorable A. Leon Higginbotham Jr. eloquently questioned the legacy of those who arose from this nation's tumultuous Civil Rights Era. Whether one believes that cultural revolution ended with the assassination of Martin Luther King Jr. or that it continues until the goal of full equality is achieved,³ no stride has been more compelling in the twenty-first century for the United States, and particularly for African-Americans, than the election of Barack Obama as commander-in-chief.⁴ However, this watershed achievement would be minimized if that is all that President Obama⁵ does to effect how this generation's civil rights legacy is interpreted, particularly on the issue of twenty-first century slavery.

Although African-Americans are not currently the primary target of modern-day slavery, interchangeably known as human trafficking,⁶ monumental polarization of largely third-world people exists in and outside the United States.⁷ As President Obama acknowledged during his Race

3. Candace Roy, *Civil Movement, The*, LEARNING TO GIVE, (last visited Jan. 12, 2011), available at <http://learningtogive.org/papers/paper13.html> ("Many accept that the Civil Rights Movement occurred between 1955 and 1965, but the exact time span is debated. There are even some who argue that the Civil Rights Movement has not ended and that discrimination and efforts to oppose it continue.").

4. At least five U.S. presidents had black ancestors: Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Warren Harding, and Calvin Coolidge. *Obama Won't Be First Black President*, Diversity Inc. (Dec. 6, 2008), available at <http://www.americadiversity.net/?p=159> (citing LEROY VAUGHN, BLACK PEOPLE AND THEIR PLACE IN WORLD HISTORY (2002)).

5. President Obama is referred to interchangeably herein as Obama or President Obama.

6. UNITED STATES DEPARTMENT OF STATE, *What is Modern Slavery?* U.S. DEP'T. OF STATE (Jan. 9, 2011), available at <http://www.state.gov/g/tip/what/index.htm> ("Over the past 15 years, 'trafficking in persons' and 'human trafficking' have been used as umbrella terms for activities involved when someone obtains or holds a person in compelled service." United States' Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(b) (1), 114 Stat. 1464, 1466 [hereinafter TVPA], describes this forced servitude using a number of terms: involuntary servitude, slavery, debt bondage, and forced labor. Under the TVPA, individuals may be trafficking victims regardless of whether they once consented, participated in a crime as a direct result of being trafficked, were transported into the exploitative situation, or were simply born into a state of servitude. At the heart of this phenomenon are the myriad forms of enslavement—not the activities involved in international transportation."); see also Dr. Raneé Khooshie Lal Panjabi, *Born Free Yet Everywhere in Chains: Global Slavery in the Twenty-First Century*, 37 DENV. J. INT'L L. & POL'Y 1, 7-9 (2008) (discussing the scope of modern-day slavery); Free the Slaves, *How You Can Help*, (Jan. 17, 2011), available at <http://www.freetheslaves.net/Page.aspx?pid=304>. Free the slaves compares slavery to trafficking:

Slavery is when one person completely controls another person, using violence to maintain that control, exploits them economically, pays them nothing and they cannot walk away. Human trafficking is the modern day slave trade—the process of enslaving a person. It happens when someone is tricked or kidnapped or coerced, and then taken into slavery. If moving a person from one place to another does not result in slavery, then it is not human trafficking. The term 'human trafficking' often has a specific legal definition based on the laws of countries or states or the conventions of international organizations, and those official definitions differ slightly from place to place. For example, under US law, anyone under 18 who is in prostitution is considered a trafficking victim.

7. Women and children are the largest group affected by human trafficking. See Jamaal Bell,

Speech, “words on a parchment” were not enough to deliver slaves from bondage.⁸ Indeed, the conservative estimates are that there are twenty-seven million slaves in the world today.⁹ At any given time there are at least 10,000 in the United States, with 50,000 trafficked through this country every year.¹⁰ Thus, as acknowledged by his own words, Obama

Race and Human Trafficking in the U.S.: Unclear but Undeniable, ALTERNET (May 10, 2010), available at <http://blogs.alternet.org/jrbizzy/2010/05/10/race-and-human-trafficking-in-the-u-s-unclear-but-undeniable/>; see also KEVIN BALES & RON SOODALTER, *THE SLAVE NEXT DOOR: HUMAN TRAFFICKING AND SLAVERY IN AMERICA TODAY* 3 (2009) (“More than twice as many people are in bondage in the world today than were taken from Africa during the entire 350 years of the Atlantic slave trade.”); United Nations Educational, Scientific and Cultural Organization, *Modern forms of Slavery* (Sep. 7, 2010), available at <http://unesco.org/new/en/culture/themes/dialogue/the-slave-route/modern-forms-of-slavery/> (UNESCO notes:

While the means through which modern and traditional forms of slavery have operated differ greatly, the violation of human rights and human dignity are central issues in both practices, such as proclaimed in the 1948 United Nations Universal Declaration of Human Rights. Today, according to the International Organization for Migration (IOM), millions of people, primarily women and children, are subjected to this tragic fate, thus underscoring the imperative of all countries to address and prevent the trafficking of persons.

Id.).

8. Senator Barack Obama, Remarks: A More Perfect Union (Mar. 18, 2008), in *ORGANIZING FOR AMERICA*, available at <http://my.barackobama.com/page/content/hisownwords> (President Obama stated:

Of course, the answer to the slavery question was already embedded within our Constitution—a Constitution that had at its very core the ideal of equal citizenship under the law; a Constitution that promised its people liberty, and justice, and a union that could be and should be perfected over time.

And yet words on a parchment would not be enough to deliver slaves from bondage, or provide men and women of every color and creed their full rights and obligations as citizens of the United States. What would be needed were Americans in successive generations who were willing to do their part—through protests and struggle, on the streets and in the courts, through a civil war and civil disobedience and always at great risk—to narrow that gap between the promise of our ideals and the reality of their time.

Id.). It has been noted that despite Barack Obama’s African heritage, he himself is not directly descended from African-American slaves. Instead, his family lines trace back to slave owners in Kentucky and Maryland. Obama and McCain’s Families Owned Slaves, *THE LIVING CONSEQUENCES* (Nov. 1, 2008), available at <http://living.jdewperry.com/>.

9. KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* 8-9 (1999).

10. Free the Slaves, *supra* note 6. In a 2004 study the University of California, Berkeley and Free the Slaves determined that there are at least 10,000 people in slavery in the United States at any given time. Congress also found in 2001 that “45,000 to 50,000 people, primarily women and children, are trafficked to the U.S. annually.” UNITED STATES DEP’T OF STATE, *VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000: TRAFFICKING IN PERSONS REPORT (2001)* at 3. See also Free the Slaves & The Human Rights Center of the University of California, Berkeley, *Hidden Slaves: Forced Labor in the United States*, 23 *BERKELEY J. INT’L. L.* 47, 58 (2005). Bo Cooper, *A New Approach to Protection and Law Enforcement Under the Victims of Trafficking and Violence Protection Act*, 51 *EMORY L.J.* 1041, 1045 (2002); BALES & SOODALTER, *supra* note 7, at 6; *cf.*, CALIFORNIA ATTORNEY GENERAL’S OFFICE, CRIME AND PREVENTION CENTER, *HUMAN TRAFFICKING IN CALIFORNIA, FINAL REPORT OF THE CALIFORNIA ALLIANCE TO COMBAT TRAFFICKING AND SLAVERY TASK FORCE* 35 (2007) (The report states: “The United States is widely regarded as a destination for trafficking in persons, yet the exact number of human trafficking victims within the United States has remained largely undetermined since the passage of the Trafficking Victims Protection Act (TVPA) in 2000. Initial estimates cited in the TVPA suggested that approximately 50,000 individuals were trafficked into the U.S. annually, but in 2005, the Department of State cited an estimate of 14,500 to 17,500 individuals annually. This large decrease calls into question the reliability of estimates and has potential consequences for the availability of resources to prevent

shoulders the mantle of narrowing this “gap between the promise of our ideals and the reality of [our] time.”¹¹ For those presently subjugated into a woeful life of sex trafficking, forced labor, debt bondage, involuntary servitude, forced marriage, and other atrocities, the gap cannot be closed soon enough.¹²

Obama’s ability to successfully complete this task during his remaining first term in office will not be without a concerted effort. Slavery has existed despite the rise and fall of ancient and modern civilized societies, and the United States is no exception.¹³ Indeed, if prostitution is the oldest profession, slavery is no less than its first, ugly cousin. In fact, slavery and its indicia never truly subsisted in the United States since slavery was outlawed by the Thirteenth Amendment.¹⁴ For example, Douglas Blackmon’s research describes how African-Americans were freed by the issuance of the Emancipation Proclamation¹⁵ and the Thirteenth Amend-

human trafficking, prosecute traffickers and serve the victims of this crime.” *Id.*).

11. Obama, *supra* note 8.

12. See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, THE CAMPAIGN TO RESCUE AND RESTORE VICTIMS OF HUMAN TRAFFICKING, available at http://www.acf.hhs.gov/trafficking/about/fact_sex.html.

Sex traffickers use a variety of methods to ‘condition’ their victims including starvation, confinement, beatings, physical abuse, rape, gang rape, threats of violence to the victims and the victims’ families, forced drug use and the threat of shaming their victims by revealing their activities to their family and their families’ friends.

Victims face numerous health risks. Physical risks include drug and alcohol addiction; physical injuries (broken bones, concussions, burns, vaginal/anal tearings); traumatic brain injury (TBI) resulting in memory loss, dizziness, headaches, numbness; sexually transmitted diseases (e.g., HIV/AIDS, gonorrhea, syphilis, UTIs, pubic lice); sterility, miscarriages, menstrual problems; other diseases (e.g., TB, hepatitis, malaria, pneumonia); and forced or coerced abortions.

Psychological harms include mind/body separation/disassociated ego states, shame, grief, fear, distrust, hatred of men, self-hatred, suicide, and suicidal thoughts. Victims are at risk for Posttraumatic Stress Disorder (PTSD)—acute anxiety, depression, insomnia, physical hyper-alertness, self-loathing that is long-lasting and resistant to change (complex-PTSD).

Id.

13. *History*, INFOPLEASE (2007), available at <http://www.infoplease.com/ce6/bus/A0861124.html#axzz1055AYHxy>; see also *Ethics Guide: Modern Slavery*, BBC, available at http://www.bbc.co.uk/ethics/slavery/modern/modern_1.shtml.

The last country to abolish slavery was the African state of Mauritania, where a 1981 presidential decree abolished the practice; however, no criminal laws were passed to enforce the ban. In August 2007 Mauritania’s parliament passed legislation making the practice of slavery punishable by up to 10 years in prison.

Id.; BALES AND SOODALTER, *supra* note 7, at 251-53 (detailing the long world history of slavery).

14. U.S. CONST. amend. XIII; see also E. BENJAMIN SKINNER, A CRIME SO MONSTROUS: FACE-TO-FACE WITH MODERN-DAY SLAVERY 265 (2008) (“Annually, traffickers now take more slaves into the United States than seventeenth century slave traders transported to pre-independence America.”); DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008); BALES AND SOODALTER, *supra* note 7, at 8-11; Mischa Gaus, *In Florida, Slavery Still Haunts the Fields*, TRUTHOUT (Aug. 5, 2010), available at <http://www.truth-out.org/in-florida-slavery-still-haunts-fields62296>.

15. *Cf.*, *Myth 8: The Emancipation Proclamation Freed All Black People*, ORACLE THINKQUEST (Oct. 26, 2010 11:34 EDT), available at http://library.thinkquest.org/J0112391/myth_8.htm.

ment, only to be coerced, terrorized, and unjustly imprisoned for decades in spite of such national laws.¹⁶ Similarly, because of its intemperate reach, slavery evolved around the world from an Atlantic Triangle Trade controlled by a handful of morally-corrupt countries to the third-most profitable criminal business present today in every nation in the world.¹⁷ The interests of those who continue to traffic humans like chattel around the world are secured in part because a misplaced allegiance to the doctrine of diplomatic immunity guards their heinous acts.¹⁸

This Article explores how during President Obama's first two years in office his administration has interacted with the judiciary to effect change on the daunting task of combating modern-day slavery during what some have called the "Obama Era."¹⁹ Part II sets forth examples of diplomats involved in human trafficking. Part III presents a brief discussion of the scope of diplomatic immunity enjoyed by a select few. Part IV sets forth an analysis of *Baoanan v. Baja*,²⁰ the most prominent case since Obama's

Many people think it did, but the Emancipation Proclamation did not free all the slaves in the United States and here is why. The Emancipation Proclamation didn't actually free any slaves because it related only to areas under the control of the Confederacy. The South broke away from the North, and President Lincoln couldn't make slave owners living in the Confederate states of America obey the Emancipation Proclamation. After the Civil War ended and the South became part of the United States again, the South had to obey Lincoln. The Emancipation Proclamation didn't include slaves in the border states and in some southern areas under the North's control, such as Tennessee and parts of Virginia and Louisiana. Although no slaves were actually freed by the Emancipation Proclamation in 1863, it did lead to the 13th Amendment to the Constitution. The 13th Amendment became a law on December 18, 1865, and ended slavery in all parts of the United States.

Id.

16. BLACKMON, *supra* note 14. See also BALES AND SOODALTER, *supra* note 7 at 8-11; Gaus, *supra* note 13.

17. *Understanding Slavery: Triangular Trade*, UNDERSTANDING SLAVERY INITIATIVE, available at http://www.understandingslavery.com/index.php?option=com_content&view=article&id=369&Itemid=145.

18. Janie A. Chuang, *Achieving Accountability for Migrant Domestic Worker Abuse*, 88 N.C. L. REV. 1627, 1642 (2010) ("Together with the vulnerability factors that migrant domestic workers face, diplomats' immunity to civil and/or criminal proceedings and the political power they may wield into the workers' home countries create a perfect storm of conditions for exploitation with impunity."); Nidhi Kumar, Note, *Reinforcing Thirteenth and Fourteenth Amendment Principles in the Twenty-First Century: How to Punish Today's Masters and Compensate Their Immigrant Slaves*, 58 RUTGERS L. REV. 303, 306 (2005) ("[T]he exemption of foreign officials from criminal suit is a severe obstacle in redressing the grievances of immigrant workers in the United States."); Chisun Lee, *Runaway Justice: Botswanan Domestic Sues UN Diplomat for 'Involuntary Servitude'*, VILLAGE VOICE (July 24, 2001), <http://www.villagevoice.com/2001-07-24/news/runaway-justice/> (describing Keabetswe Letsididi's civil lawsuit alleging involuntary servitude by the deputy permanent representative and chargé d'affaires for Botswana's mission to the United Nations).

19. Massimo Calabresi, *Congress Gets Ready for the Obama Era*, TIME (Nov. 6, 2008), available at <http://www.time.com/time/politics/article/0,8599,1857137,00.html>.

20. *Baoanan v. Baja*, 627 F. Supp. 2d 155 (S.D.N.Y. 2009); *contra*, *Sabbithi v. Saleh*, 605 F. Supp. 2d 122 (D.D.C. 2009). *Sabbithi* is cited as establishing multiple arguments for denying diplomatic immunity in trafficking cases prior to *Baoanan*:

(1) slavery violates the Thirteenth Amendment to the U.S. Constitution, and no treaty can overcome the provisions of the Constitution; (2) slavery and trafficking are fundamentally commercial activities and thus not covered by the Vienna Convention; (3) slavery and traf-

election underscoring the conflict between diplomatic immunity and the *jus cogens* doctrine, and prescribes arguments for broadening its application.²¹ Part V presents a closing discussion of the Obama Administration's prospective efforts to eradicate human trafficking throughout the world.²²

II. THE CURRENT STATUS OF DIPLOMATIC INVOLVEMENT IN HUMAN TRAFFICKING

A. *Global Magnitude of Human Trafficking*

Twenty-seven million children and adults remain in various forms of modern-day slavery, including debt bondage, sex slavery, and involuntary domestic servitude.²³ People are killed to procure organs and skin to traf-

ficking laws and international agreements are accepted as *jus cogens* laws, norms that transcend and trump any other laws, including the treaty concerning diplomatic immunity; and (4) the U.S. Trafficking Victims Protection Act to all victims the right to pursue civil remedies.

BALES AND SOODALTER, *supra* note 7, at 279-80. Although there was an allegation of diplomatic status in *Sabbithi*, it was unsubstantiated by the employer who failed to provide any proof from the Republic of Tanzania through affidavit, statement from the Embassy of Tanzania, or documents with his alleged credentials to prove his claim of immunity. As a result, he could not establish his right to claim he was a diplomat entitled to immunity from a default judgment under the 1961 Vienna Convention on Diplomatic Relations.

21. The *jus cogens* doctrine prohibits conduct that is so heinous that it threatens "the peace and security of mankind and the conduct, or its result, is shocking to the conscience of humanity." M. CHERIF BASSIOUNI, SOURCES AND THEORIES OF INTERNATIONAL CRIMINAL LAW, 1 INTERNATIONAL CRIMINAL LAW 42 (2d ed. 1999); *see also* Rafael Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law*, ICCNOW, available at <http://www.iccnw.org/documents/WritingColombiaEng.pdf>, at 1 ("The notion of *jus cogens* in international law encompasses the notion of peremptory norms in international law. In this regard, a view has been formed that certain overriding principles of international law exist which form 'a body of *jus cogens*.'") (citations omitted); Stanislaw E. Nahlik, *Peremptory Norms (jus cogens) in International Law: Historical Development, Criteria, Present Status*. By Lauri Hannikainen. Helsinki: Lakimiesliiton Kustannus, Finnish Lawyers' Publishing Company, 1988. Pp. xxxii, 781. Index. \$118, 84 AM.J. INT'L L. 779 (1990) (reviewing LAURI HANNIKAINEN, PEREMPTORY NORMS (*JUS COGENS*) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS). Based on Hannikainen's writing Nahlik comments that:

[T]here are, in international law, rules of a peremptory character, referred to by scholars as *jus cogens* norms. . . . To have that status, however, they must comply with four criteria . . . namely: they must be norms of general international law; they must be accepted by the international community of states as a whole; they must not be capable of derogation; and there must be no possibility of modifying them in any other way than by new peremptory norms.

Id. at 779.

22. Chuang, *supra* note 18, at 1643 ("The United States' self-positioning as a global leader in the fight against human trafficking heightens expectations that the United States, in particular, will be vigilant in addressing trafficking within its own borders.")

23. BALES AND SOODALTER, *supra* note 7, at 8-9. Other compelling statistics set forth in the 2010 TIP Report indicate that of the twenty-seven million victims of human trafficking around the world, 12.3 million adults and children have been documented as being in forced labor, bonded labor, and forced prostitution. U.S. DEP'T OF STATE TRAFFICKING IN PERSONS REPORT (2010) at 7. This number may be conservative based on other findings that indicate eighty percent of transnational trafficked persons were women and girls alone. *See* CAROLINE COX & JOHN MARKS, THIS IMMORAL

fic for illegal, clandestine operations and voodoo rituals.²⁴ Networks of pedophiles prey upon children who are forced to pose for photos and visual recordings of brutal sexual crimes.²⁵ According to the United States Department of Justice, as many as 50,000 people are trafficked through the United States every year.²⁶ Today, because of the continued influx of slaves in this country, the number of individuals forced into slavery continues scarcely abated by the efforts of Presidents Bill Clinton and George W. Bush²⁷ since the Victims of Trafficking and Violence Protection Act of 2000 (“TVPA”) was enacted.²⁸ Thus, President Obama bears heavy responsibility of combating slavery at its most prevalent level in human history throughout the world.²⁹

Given that in 1850 slaves cost \$40,000 in today’s dollars, but cost as little as \$30 today,³⁰ for many, the risk of being punished for their crimes

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24. Alyssa Fetini, *Human Trafficking Rises in Recession*, TIME, June 18, 2009, available at www.time.com/time/arts/article/0,8599,1905330,00.html; see also *Trafficking in Human Beings*, INTERPOL (Mar. 5, 2010), available at <http://www.interpol.int/Public/THB/default.asp>. The article notes:

Trafficking in human beings for the purpose of using their organs, in particular kidneys is a rapidly growing field of criminal activity. In many countries waiting lists for transplants are very long, and criminals have seized this opportunity to exploit the desperation of patients and potential donors. Victims are often misinformed about the medical aspects of the organ removal and deceived about the sums they will receive. Their health, even life, is at risk as operations may be carried out in clandestine conditions with no medical follow-up.

Id.

25. *Trafficking in Human Beings*, *supra* note 24; see also Nicholas D. Kristof, *Seduction, Slavery and Sex*, NY TIMES (July 15, 2007), available at <http://www.nytimes.com/2010/07/15/15kristof.html> (in which Kristof explores the sordid exploitation of domestic, under-aged victims of forced prostitution).

26. UNITED STATES DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT*, *supra* note 10.

27. According to the United States Department of State, there were only 5,808 prosecutions and 3,160 convictions for human trafficking throughout the world in 2006. Thus, for every 800 people trafficked, only one criminal is convicted. *Id.* at 45.

28. See TVPA, *supra* note 6, Section 112A, Jan. 7, 2003, H.R. 2620 (empowering the President “through the Council of Economic Advisors, the National Research Council of the National Academies, the Secretary of Labor, the Secretary of Health and Human Services, the Attorney General, the Secretary of State, the Administrator of the United States Agency for International Development, and the Director of National Intelligence” to promote research issues related to human trafficking); *cf.* Money Laundering and Financial Crimes Strategy Act of 1998, 31 U.S.C. § 5341 (2000) (requiring that the President “acting through the Secretary and in consultation with the Attorney General . . . develop a national strategy” to combat money laundering that “shall address any area the President, acting through the Secretary and in consultation with the Attorney General, considers appropriate . . .”).

29. See BALES AND SOODALTER *supra* note 7.

30. Luz Estella Nagle, *Selling Souls: The Effect of Globalization on Human Trafficking and Forced Servitude*, 26 WIS. INT’L. L.J. 131, 139. Estella notes:

The opening of trade barriers and the emergence of new regional and global markets has created a huge demand for cheap or free labor for the service and manufacturing sectors and for sexual exploitation in a burgeoning international sex tourism industry. The ability of many businesses to stay competitive in a globalizing economy depends on the capacity to assemble and retain a labor force for the least amount of investment. A minimal investment in labor will cushion the impact on profits in unpredictable markets where the cost of raw

against humanity is low compared to the benefit of the commodity they gain.³¹ Human trafficking is the third most profitable criminal enterprise behind drug and gun trafficking, yet the United States' annual funding to combat modern-day slavery is equal to what is spent in only one day to suppress the illegal distribution of drugs.³² Traffickers do not worry that governments will curtail their violation of applicable laws, and they are confident that their victims will get little or no help from local law enforcement.³³ Indeed, sustaining criminal enterprises like this annual \$32 billion business worldwide is a paramount goal of corrupt governments, politicians, and traffickers.³⁴ The numbers of innocent individuals affected by this crime, as well as the current magnitude of its scope is staggering:

Annually, according to U.S. Government-sponsored research completed in 2006, approximately 800,000 people are trafficked across national borders, which does not include millions trafficked within their own countries. Approximately 80 percent of transnational victims are women and girls and up to 50 percent are minors. The majority of transnational victims are females trafficked into commercial sexual exploitation. These numbers do not include millions of female and male victims around the world who are trafficked within their own national borders—the majority for forced or bonded labor.³⁵

These numbers have remained consistently at the same levels since the TVPA was enacted.³⁶ Therefore, while some improvements in the prose-

materials, the transportation of goods, and the price of the finished products can fluctuate wildly.

Id.

31. *Slavery Today*, FREE THE SLAVES (last visited Jan. 18, 2011), available at <http://www.freetheslaves.net/Page.aspx?pid=301>.

32. E. Benjamin Skinner, Speaking at the Institute of Politics (Feb. 2010) at Harvard University's John F. Kennedy Forum; *Stop Trafficking! Anti-Trafficking Newsletter*, (Sisters of the Divine Saviour) Mar. 2010, available at <http://www.stopenslavement.org/archives/stoptraff803.pdf>; see also BALES AND SOODALTER *supra* note 6, at 3; Loring Jones et al., *Globalization and Human Trafficking*, 34 J. OF SOC. & SOC. WELFARE 107 (2007) (indicating human trafficking is the fastest growing criminal enterprise in the world behind only drug running).

33. BALES AND SOODALTER, *supra* note 7, at 7.

34. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT (2008) at 34 [hereinafter 2008 TIP REPORT]; see also International Labour Organization estimates of human trafficking as a \$31.6 billion business and as the third-largest grossing section of organized crime behind drugs and weapons; U.N. OFF. ON DRUGS & CRIME (UNODC), ANNUAL REPORT 2008, at 5 (2008), available at http://www.unodc.org/documents/about-unodc/AR08_WEB.pdf.

35. U.S. DEP'T OF STATE, 2008 TIP REPORT, *supra* note 34, at 7; see also OFF. TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, TRAFFICKING IN PERSONS AND INTERNATIONAL MILITARY ORGANIZATIONS 1, U.S. DEP'T OF STATE (2007), available at <http://www.usfk.mil/usfk/Uploads/120/pht.pdf>.

36. According to the Polaris Project, the number of trafficking victims across international borders since 2001 have been as follows: 700,000 in 2001 and 2002; 800,000 to 900,000 in 2003; 600,000 to 800,000 from 2004 to 2006; and 800,000 from 2007 to the present. Polaris Project, HUMAN TRAFFICKING STATISTICS, <http://www.cicatelli.org/titex/downloadable/Human%20Trafficking%20Statistics.pdf> (last visited May 2, 2012).

cution of human traffickers globally can be attributed to the passage of the TVPA, the vast impunity that remains overshadows these successes.³⁷

B. Concerted Efforts to End Slavery and Its Progeny

After the emancipation of slaves in 1865, slavery and slave-like conditions continued to openly and clandestinely exist throughout the United States. The federal and state governments conspired with the ruling, white aristocracy and racists to turn a blind eye to the plight of millions of African-Americans victimized by the Black Codes,³⁸ Jim Crow laws legalized by the United States Supreme Court's decision, *Plessy v. Ferguson*,³⁹ and other sanctioned forms of discrimination, terrorism, torture, and murder. A number of international conventions outlawed slavery and human trafficking, including the *Slavery Convention* of March 9, 1927, and the *Forced Labour Convention* of 1930. However, similar to the manner in which diplomats are currently able to violate the human rights of their victims by trafficking them into the United States, individuals of the right skin color, wealth, or political connections continued to exploit, mistreat, and, in many instances, kill African-Americans despite the fact that this nation had long ago banned the slave trade.⁴⁰

With chattel slavery no longer openly vogue in the early twentieth century, the trend in human exploitation changed globally to the trafficking of defenseless women.⁴¹ In 1904, European leaders concerned about the traf-

37. BALES AND SOODALTER, *supra* note 7, at 7.

38. At the close of the Civil War different measures had been proposed or enacted to ensure that African-Americans would be able to create their own independent source of income. See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 179 (1988). However, all of these measures were eliminated and replaced with the "Black Codes" that were harsh reminders of the policies that had fueled the economic success of slavery, and the economic deprivation of the African-American:

Aside from abolishing slavery, the South would voluntarily make no provision at all for the African American. His liberation had cost the plantocracy between two and three billion dollars, using the pre-war auction-block price per head as the basis for calculation. That was a great deal of value to lose overnight. The very sight of a former slave was reminder to his former owner that the world had changed drastically . . . Whites of all classes viewed any deviation from the antebellum fashion of subservience as a display of impudence by the black man and did not hesitate to beat him for it.

RICHARD KLUGER, SIMPLE JUSTICE 44-45 (2nd ed. 2004). These state laws allowed local authorities to arrest any of the freedmen that they deemed to be vagrants. Thereafter, the authorities were empowered to send the "vagrant" to a plantation where they were forced to work off their fine. Frequently, the freedmen would find themselves on the plantation of their former owners for over a year at a time. The first state to enact these codes was Mississippi with Mississippi Laws, 1865, c. 14. These laws often perpetuated the poverty of the freedmen, to continue the cycle that took them from court on vagrancy charges to the plantation owned by others and prevented the free African-American from starting a new life of financial independence and self-determination.

39. *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Citizens United v. Fed. Elec. Comm'n*, 130 S. Ct. 876 (2010).

40. BLACKMON, *supra* note 14.

41. Despite numerous, well-intentioned treaties and statutes to change this reality, women remain

ficking of European and Asian women conducted the first Convention on Trafficking to combat the metamorphosis of chattel slavery.⁴² Further, to prevent more atrocities, such as those committed by the Nazis during World War II, the United Nations General Assembly recognized that human trafficking is a crime against humanity that higher law compels be eradicated: “prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community.”⁴³

The United Nations Charter provided the first comprehensive protection for all individuals when it published the Charter, Universal Declaration of Human Rights, International Covenant on Civil and Political Rights (with Optional Protocol) and International Covenant on Economic, Social and Cultural Rights which together form the “International Bill of Human Rights.”⁴⁴ The International Bill of Human Rights sets forth the basic civil and political rights of individuals and nations, including the right to self-determination and the right to own, trade, and dispose of their property freely and not be deprived of their means of subsistence. Article 8 of the International Covenant of Civil and Political Rights, proscribing the institution of slavery and involuntary servitude, states:

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

the primary target of human traffickers. Approximately seventy percent of the 600,000-800,000 people trafficked across international borders every year are women. Trafficking of Women: U.S. Policy and International Law, Women Engaging Globally n.2, <http://www.wedo.org/wp-content/uploads/trafficking.pdf> (citing Wendy Patten, “U.S.: Efforts to Combat Human Trafficking and Slavery,” HUMAN RIGHTS WATCH TESTIMONY BEFORE THE U.S. SENATE JUDICIARY COMMITTEE (July 6, 2004).

42. International Agreement for the Suppression of the “White Slave Traffic,” May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83 (entered into force July 18, 1905), *available at* <http://www1.umn.edu/humanrts/instree/whiteslavetraffic1904.html>. The preamble to the White Slave Traffic Act states:

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India; His Majesty the German Emperor, King of Prussia, in the name of the German Empire; His Majesty the King of the Belgians; His Majesty the King of Denmark; His Majesty the King of Spain; the President of the French Republic; His Majesty the King of Italy; Her Majesty the Queen of the Netherlands; His Majesty the King of Portugal and of the Algarves; His Majesty the Emperor of all the Russias; His Majesty the King of Sweden and Norway; and the Swiss Federal Council, being desirous of securing to women of full age who have suffered abuse or compulsion, as also to women and girls under age, effective protection against the criminal traffic known as the “White Slave Traffic”, have decided to conclude an Agreement with a view to concerting measures calculated to attain this object. . . .

Id.

43. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, pmbi., Dec. 2, 1949, 96 U.N.T.S. 271 (entered into force July 25, 1951).

44. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, UN Doc. A/RES/217(III) (Dec. 10, 1948), *available at* http://www.un.org/events/humanrights/2007/hrphotos/declaration%20_eng.pdf.

2. No one shall be held in servitude.

3. (a) No one shall be required to perform forced or compulsory labour⁴⁵

Article 55 of Chapter 9 of the Charter of the United Nations provides for the observance of “human rights and fundamental freedoms for all without distinction as to race, sex, language or religion”⁴⁶ Further, Article 56 states that “all members pledge themselves to take joint and separate action . . . [for] the purposes set forth in Article 55.”⁴⁷

The White Slave Traffic Act was followed by issuance of the *Protocol Amending the Slavery Convention* of December 7, 1953.⁴⁸ The 1956 United Nations’ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery expressly declared, “as a common standard of achievement for all peoples and all nations . . . no one shall be held in slavery or servitude and that slavery and the slave trade shall be prohibited in all their forms.”⁴⁹ The latter convention outlawed slavery practices, such as debt bondage, serfdom,

45. International Covenant on Civil and Political Rights, Dec. 16, 1966 (entered into force Mar. 23, 1976); see also Panjabi, *supra* note 6, at 1. Although the International Covenant on Civil and Political Rights was finally ratified by the United States in 1992, there are several other treaties that this country’s leaders have not ratified which would strengthen the fight against human trafficking. See Jimmy Carter, *U.S. Finally Ratifies Human Rights Covenant*, THE CARTER CENTER (June 29, 1992), available at <http://www.cartercenter.org/news/documents/doc1369.html> (“The US has yet to ratify several other widely accepted human rights treaties, including the International Covenant on Economic, Social, and Cultural Rights.”). President Carter further stated, “Because of this historic action, the US removes its name from the list of pariah countries, such as China, Saudi Arabia, and South Africa, that have refused to accede to international human rights instruments.”

46. Charter of the United Nations, Chapter IX: International Economic and Social Cooperation, art. 55, available at <http://www.un.org/en/documents/charter/chapter9.shtml>.

47. *Id.* at art. 56; see also WIKTOR OSIATYŃSKI, HUMAN RIGHTS AND THEIR LIMITS 40 (2009). OSIATYŃSKI notes:

In the 1900s, human rights were advancing to the center of international relations. Paragraph 4 of the 1933 Vienna Declaration of Human Rights stated that ‘the promotion and protection of all human rights is a legitimate concern of the international community.’ Thus, one obstacle to the implementation and protection of rights was rejected: namely, ‘the artificial distinction between domestic and international human rights concern.’ Also refuted were the most radical arguments against human rights based on cultural relativism. Paragraph 5 announced that ‘all human rights are universal, indivisible and interdependent and interrelated.’ Considered similarly ‘interdependent and mutually reinforcing’ were democracy, development, and respect for human rights and fundamental freedoms. The Vienna Declaration also increased the catalog of human rights by adding rights that had turned out to be inadequately protected, such as the rights of refugees and internally displaced persons, the rights of minorities and indigenous people, the rights of women and of children, the rights of the disabled, and rights emphasizing humanitarian law issues.

Id.

48. Protocol Amending the Slavery Convention, 7 U.S.T. 479, 182 U.N.T.S. 51 (entered into force Dec. 7 1953), available at <http://www1.umn.edu/humanrts/instree/f2psc.htm>.

49. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 18 U.S.T. 3201, 266 U.N.T.S. 3 (entered into force Apr. 30, 1957).

bride price, and exploitation of child labor.⁵⁰ Moreover, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women explicitly prohibits “exploitation of prostitution of women” and “all forms of traffic in women.”⁵¹

Countries have also sought to close the door on the exploitation of children and migrant workers. The Convention on the Rights of the Child mandates that States Parties must take all appropriate measures to prevent “the abduction of, the sale of or traffic in children for any purpose or in any form.”⁵² The Worst Forms of Child Labour Convention similarly prohibits “the use, procuring or offering of a child for prostitution”⁵³ In addition to recognizing the need to protect women and children—statistically, two of the most victimized targets of modern human traffickers⁵⁴—the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families went into effect on July 1, 2003.⁵⁵ This treaty provides that “[n]o migrant worker or member of his or her family shall be held in slavery or servitude” and that “[n]o migrant worker or member of his or her family shall be required to perform forced or compulsory labour.”⁵⁶

Human exploitation, therefore, whether couched as modern-day slavery or human trafficking,⁵⁷ has been universally denounced as an intolerable institution that has no protection under any contemporary, international law. Tragically, despite these many advancements and undisputable repudiations of slavery, it still exists on every continent and many powerless individuals have their liberty or lives taken from them just as African-Americans did for more than 100 years after they were “set free” in 1865.

50. *Id.*

51. Convention on the Elimination of All Forms of Discrimination against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 14, *available at* <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>.

52. Convention on the Rights of the Child art.35, Nov. 20 1989, U.N.T.S 1577 (entered into force 2 Sept. 1990).

53. Worst Forms of Child Labour Convention, June 17, 1999, art. 3(b) (entered into force Nov. 19, 2000), *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182>.

54. Bell, *supra* note 7, in which Bell, the media relations manager for the Kirwan Institute, cites the Polaris Project studies indicating seventy-seven percent of victims in alleged human trafficking incidents reported in the U.S. were people of color, according to a Bureau of Justice Statistics Report. In addition, Bell notes, “Domestically, 50 percent of trafficked victims are children and an overwhelmingly are girls, according to the U.S. Department of Justice.” *Id.*

55. Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by GA Res. 45/158 art. 2, Dec. 18, 1990, *available at* <http://www2.ohchr.org/English/law/cmw.htm>.

56. *Id.* at art. 11.

57. U.S. DEP’T OF STATE, *supra* note 6, at Section II.

C. Diplomatic Corruption In Defiance of Existing Anti-Trafficking Laws.

Approximately one-third of domestic servitude cases involve diplomats with immunity.⁵⁸ In one recent situation, a Tanzanian diplomat, Alan Mzengi, was convicted of forcing a twenty-year-old woman to be his domestic servant for four years after confiscating her passport.⁵⁹ Zipora Mazengo proved in court that she was routinely beaten by Mzengi's wife and performed more than 100 hours of work a week for no pay. Despite the fact Mazengo was awarded \$1 million in damages from her employer, she never received any money. Due to his assertion of diplomatic immunity, Mzengi was able to escape liability by fleeing to his country without ever paying Mazengo damages.⁶⁰

Raziah Begum, a native of Bangladesh who worked for F.A. Shamim Ahmed, a diplomat from the Bangladesh Mission to the United Nations, alleged that for two and a half years, the Ahmeds kept her a prisoner in their house and forced her to work for them.⁶¹ Begum worked for Ahmed and his wife for sixteen to nineteen hours a day. Her \$29 per month salary was not even given to Begum; instead, the money was purportedly sent to Begum's son in Bangladesh. The Ahmeds forbade Begum to leave the apartment and confiscated her passport to ensure she could not escape. They also hid her from their guests, forcing her to sleep underneath the

58. Krista Friedrich, Note, *Statutes of Liberty? Seeking Justice Under United States Law When Diplomats Traffic in Persons*, 72 BROOK. L. REV. 1139, 1160 (2007) (citing Lena H. Sun, 'Modern-Day Slavery' Prompts Rescue Efforts: Groups Target Abuse of Foreign Maids, Nannies, WASH. POST, May 3, 2004, at A1) ("Advocacy groups estimate that one-third of their domestic servitude cases implicate diplomats with immunity."). See also Abid Aslam, *Plight of Domestic Workers Wins Congressional Ear*, INTERPRESS SERVICE, available at <http://www.globalexchange.org/campaigns/wbimf/ips021600.html> (last updated Mar. 23, 2011) ("One organization in Washington, D.C. has seen approximately a thousand cases of domestic worker exploitation by employers with immunity since its inception in 1967."); Henri E. Cauvin, *Diplomat's Ex-Employee Sues for Wages, Damages*, WASH. POST, Jan. 19, 2006, at B2; Sarah Fitzpatrick, *Diplomatic Immunity Leaves Abused Workers in Shadows*, WASH. POST, Sept. 20, 2009, at A4; Daniela Gerson, *A Slavery Case Nears Hearing in Manhattan*, N.Y. SUN, Aug. 10, 2004, at 1; Colbert I. King, *The Slaves in Our Midst*, WASH. POST, Dec. 23, 2006, at A21; Ernesto Londono, *Former Domestic Worker Sues Tanzanian Diplomat*, WASH. POST, May 2, 2007, at B6; Kirk Semple, *Government Report Points to Diplomats' Mistreatment of Workers Brought from Abroad*, N.Y. TIMES, July 30, 2008, at B3; Somini Sengupta, *U.S. supports Bid to Dismiss Maid's Suit Against Envoy*, N.Y. TIMES, Apr. 4, 2000, at B4; Lena H. Sun, 'Modern-Day Slavery' Prompts Rescue Efforts: Groups Target Abuse of Foreign Maids, Nannies, WASH. POST, May 3, 2004, at A1; Matt Kelley, *Some Embassy Workers Enslave Domestic Help, Enjoy Immunity*, NEW STANDARD, June 28, 2005, <http://newstandardnews.net/content/index.cfm/items/1985>; Frank Langfitt, *Servants: Diplomats Held Us as Suburban 'Slaves'* (NPR radiobroadcast Mar. 1, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=7626754>; Libby Lewis, *Diplomatic Abuse of Servants Hard to Prosecute* (INPR radio broadcast Mar. 1, 2007), available at <http://www.npr.org/templates/transcript/transcript.php?storyId=7672967>.

59. E. Benjamin Skinner, *Modern-Day Slavery on D.C.'s Embassy Row?*, TIME, June 14, 2010, <http://www.time.com/time/nation/article/0,8599,1996402,00.html>.

60. *Mazengo v. Mzengi*, 542 F. Supp. 2d 96 (D.D.C. 2008).

61. American Civil Liberties Union, *Domestic Workers Petition Inter-American Commission on Human Rights* (Nov. 7, 2007), available at <http://www.aclu.org/human-rights-womens-rights/domestic-workers-petition-inter-american-commission-human-rights>.

dining room table so that she could not be seen. When Begum found the opportunity and the courage to escape, she fled the apartment without her passport, money, or English-language skills.

An immigrant from Bolivia, Otilia Luz Huayta, and her twelve-year-old daughter, Carla, worked for a Bolivian diplomat and her family in suburban Maryland.⁶² In violation of her employment contract, Huayta was paid \$200 per month. Huayta was required to work at least sixteen hours a day without rest. As in the previously described situations, the Bolivian diplomat prevented Huayta from having contact with the outside world by confiscating her passport, forbidding her to leave the house alone, and prohibiting her from using the telephone. The diplomat also deprived Huayta and Carla of adequate food. When Carla's school teacher noticed Carla literally only had bread and water for lunch, the teacher enlisted the aid of police and attorneys from CASA of Maryland, Inc. to help Huayta and her daughter escape their circumstances.

In addition, a recent article in the *Washington Examiner* noted that diplomats' exploitative labor conditions can make their employees vulnerable to trafficking, even if the diplomats are not the traffickers.⁶³ Soripada Lubis entered a plea agreement in a trafficking ring case in February 2009 that included allegations of forced labor and sexual assault. The *Examiner* article indicated: "According to court documents, the women enticed into Lubis' network came to the United States as domestic servants for diplomats from Saudi Arabia, Bahrain, Yemen and other countries. . . . Prosecutors believe Lubis found the women by using contacts at the Indonesian Embassy, where he was once a driver."⁶⁴ The women purportedly earned \$250 to \$400 a week and worked twelve hour days. Lubis took at least half of their earnings in exchange for allowing the women to live in the basement of his Falls Church, Virginia home on weekends. Two of the women under Lubis's control claimed he sexually abused them.⁶⁵

62. *Id.*

63. Freeman Klopott, *Prosecutors Say Wealthy Residents Used Slave Labor*, WASH. EXAM'R, June 30, 2009, available at <http://washingtonexaminer.com/local/2009/07/prosecutors-say-wealthy-residents-used-slave-labor>.

64. See also *Diplomatic Immunity*, THE HUMAN TRAFFICKING PROJECT (Aug. 31, 2009), available at <http://traffickingproject.blogspot.com/2009/08/diplomatic-immunity.html>.

65. Chuang, *supra* note 18, at 1636-37. The article notes:

The Lubis case demonstrates how migrant domestic workers' otherness often plays into their mistreatment. . . . Using information from his contacts at the Indonesian embassy, Lubis approached these women at their places of employment, introduced himself as Indonesian, and enticed them to work for him 'with promises of higher pay and less work' than was required by their Middle Eastern employers. . . . Lubis also sexually assaulted some of the women, threatening to call their family members in Indonesia to falsely accuse the women of promiscuity if they rejected his advances. Cultural and gender norms, ethnicity, and immigration status were all strategically used to perpetrate abuse against these workers.

Id. See also Freeman Klopott, *Forced Labor Operation Busted*, WASH. EXAM'R, Nov. 24, 2008, available at http://www.washingtonexaminer.com/local/112408_Forced_labor_operation_

According to a recent Government Accountability Office (GAO) report, since 2000 there have been forty-two documented allegations of diplomats engaging in human trafficking in the United States.⁶⁶ The GAO report further indicated that the total number of alleged incidents is undoubtedly higher.⁶⁷ In the State Department's 2010 TIP Report, the Obama Administration explored the reasons for the uncertain numbers:

Because domestic servants working for diplomats work behind closed doors—cleaning, cooking, and caring for children—they can become invisible to the neighborhoods and communities they live in. Domestic workers brought into a country by diplomats face potentially greater isolation than other workers because of language and cultural barriers, ignorance of the law, and sheer distance from family and friends. They work for government officials who may appear to them to hold exceptional power and/or influence. The resulting invisibility and isolation of such workers raises concerns about the potential for diplomatic employers to ignore the terms of their employment contracts and to restrict their domestic workers' freedom of movement and subject them to various abuses. Because diplomats generally enjoy immunity from civil and criminal jurisdiction while on assignment, legal recourse and remedies available to domestic workers in their employ—and the criminal response otherwise available to the host government—are often significantly limited.⁶⁸

busted.html.

66. U.S. GOV'T ACCOUNTABILITY OFFICE, HUMAN RIGHTS: U.S. GOVERNMENT'S EFFORTS TO ADDRESS ALLEGED ABUSE OF HOUSEHOLD WORKERS BY FOREIGN DIPLOMATS WITH IMMUNITY COULD BE STRENGTHENED (July 2008), available at <http://www.gao.gov/assets/280/278797.pdf>; see also Sarah Fitzpatrick, *Diplomatic Immunity Leaves Abused Workers in Shadows*, WASH. POST, Sept. 20, 2009; U.S. DEP'T. OF STATE TRAFFICKING IN PERSONS REPORT 7 (2010), available at <http://www.state.gov/documents/organization/142979.pdf> (noting that the overall ratio of victims identified to the estimated victims in 2009 was only 0.4); *Id.* at 45 (Of 5,606 prosecutions worldwide for trafficking in 2009, only 432 involved labor trafficking, and of that number only 335 resulted in convictions.).

67. See GAO, *supra* note 66. The four reasons given by the GAO for impediments to calculating the number exploited by diplomats are (1) household workers' fear of contacting law enforcement, (2) nongovernmental organizations' protection of victim confidentiality, (3) limited information on some cases handled by the U.S. government, and (4) federal agencies' challenges identifying cases. Of those forty-two documented allegations, in the past three years the Department of Justice has investigated nineteen. See also Friedrich, *supra* note 58, at 1144. ("Statistics on trafficking tend to be underestimates because of the underground nature of the crime and fear of reporting by its victims.") *Id.* (citing ELZBIETA M. GOZDZIAK & ELIZABETH A. COLLET, INTERNATIONAL ORGANIZATION FOR MIGRATION DATA AND RESEARCH ON HUMAN TRAFFICKING: A GLOBAL SURVEY 116 (2005) ("There is also a general 'lack of precision and methodological transparency in providing estimates of the number of trafficked victims in North America.'")).

68. U.S. DEP'T OF STATE 2010 TIP REPORT, *supra* note 23, at 38. The 2010 TIP Report indicates the emphasis on sex trafficking is attributable to local law enforcement relying on its pre-existing vice units devoted to prostitution enforcement, whereas there were no comparable pre-existing structures

As indicated in the 2010 TIP Report setting forth the first assessment of human trafficking in this country, the picture of how domestic servants are victimized is also unclear because “more investigations and prosecutions have taken place for sex trafficking offenses than for labor trafficking offenses, but law enforcement identified a comparatively higher number of labor trafficking victims, as these cases often involve more victims.”⁶⁹

In the shadow of inconsistent and unreliable law enforcement, diplomats from autocracies that cater to human traffickers come to the United States with diplomatic credentials and human chattel in tow.⁷⁰ Thus, foreign governments that the United States favors for political reasons have leverage because no politician wants to jeopardize destabilizing already tense relations.⁷¹ This not only undermines United States law enforcement efforts, but further leads to increased political tensions,⁷² illegal immigration,⁷³ increases in health-care costs,⁷⁴ a rise in criminal activities, and the exposure of underage runaways to the wiles of pimps and pedophiles.⁷⁵ Therefore, the logic, resulting harm and moral irony of protecting diplomats who flaunt their Teflon autonomy is not greater than ensuring they are punished for violating the international rule of law,⁷⁶ the laws of their sending states, and the laws of this country.⁷⁷ The victims of human trafficking who are subjugated into a life of want, physical and emotional abuse, and depravation deserve rights equal with their oppressors. Although our government may have limited ability to curtail what happens

for domestic cases. *Id.* See also Shelley Case Inglis, *Expanding International and National Protections Against Trafficking for Forced Labor Using a Human Rights Framework*, 7 BUFF. HUM. RTS. L. REV. 55, 70 (2001) (“human rights reporting on trafficking has focused on the sex work or sexual exploitation dimension of the practice”).

69. U.S. DEP’T OF STATE 2010 TIP REPORT, *supra* note 23, at 338.

70. BALES AND SOODALTER, *supra* note 6, at 237. Bales and Soodalter note:

Many people feel that for the United States to set up a scoring system, which only they control, to rank all other countries is not a helpful way to move forward. Several governments have reacted strongly to what they felt were unfair rankings. Moreover, an examination of those placed in the lowest tier and slapped with sanctions since 2001 shows political concerns creeping into the process. Cuba, North Korea, Sudan, and Burma are regularly sanctioned; ‘friendly’ countries with significant amounts of slavery and trafficking (India, Pakistan, or Nigeria, for example) are not sanctioned.

Id.

71. *Id.*

72. ANTHONY M. DEStEFANO, *THE WAR ON HUMAN TRAFFICKING: U.S. POLICY ASSESSED* (2007).

73. *Trafficking in Human Beings*, *supra* note 24 (indicating that human trafficking and illicit migration is a \$28 billion enterprise, “steadily catching up with drug and arms trafficking.”).

74. Panjabi, *supra* note 6, at 15 (“The scope of human trafficking has been manifested in the global spread of sexually transmitted diseases and the higher incidence of HIV among victims.”).

75. U.S. DEP’T OF STATE 2010 TIP REPORT, *supra* note 23.

76. “A legal principle, of general application, sanctioned by the recognition of authorities, and usually expressed in the form of a maxim or legal proposition.” BLACK’S LAW DICTIONARY. See also Lelia Mooney et al, *Promoting the Rule of Law Abroad: A Conversation on its Evolution, Setbacks, and Future Challenges*, 44 INT’L LAWYER 837 (2010).

77. The “receiving state” is the country in which the diplomat is stationed and the “sending state” is the country he or she represents.

within foreign borders, the Obama Administration is positioned to send a resounding message that there is no greater internationally recognized human right⁷⁸ than to be free from the bounds of slavery, and that right is paramount to diplomatic immunity.⁷⁹

III. HISTORY AND PROCEDURE OF DIPLOMATIC IMMUNITY IN THE UNITED STATES

A. *Denouncing the Narrow Confines of Individualistic Concerns*⁸⁰

Nations predating the codification of diplomatic law have continually adhered to the basic notion of diplomatic immunity, including ancient India, Greece, and Rome.⁸¹ For centuries, nations have recognized that granting diplomatic immunity is necessary to solidify intergovernmental relations.⁸² The United States Supreme Court summarized the vital significance of diplomatic relations among nations in the case of *Boos v. Barry*:⁸³

The need to protect diplomats is grounded in our Nation's important interest in international relations. As a leading commentator observed in 1758, "[i]t is necessary that nations should treat and hold intercourse together, in order to promote their interests,—to avoid injuring each other,—and to adjust and terminate their disputes."⁸⁴

The contemporary form of diplomatic immunity is rooted in the English Parliament's passage of the Diplomatic Privileges Act of 1708.⁸⁵ Its

78. OSIATYŃSKI, *supra* note 47, at 1 (defining the scope of human rights as consisting of at least six fundamental ideas: The power of a ruler (a monarch or the state) is not unlimited; Subjects have a sphere of autonomy that no power can invade and certain rights and freedoms that must be respected by a ruler; There exist procedural mechanisms to limit the arbitrariness of a ruler and protect the rights and freedoms of the ruled (points 1 and 2, above, have already transformed "subjects" into the "ruled") who can make valid claims on the state for such protection; The ruled have rights that enable them to participate in the decision making (with this concept, the "ruled" are transformed into the "citizens"); The authority has not only powers but also certain obligations that may be claimed by the citizens; All these rights and freedoms are granted equally to all persons. This transforms individual rights/ privileges into human rights).

79. Friedrich, *supra* note 58.

80. Martin Luther King, Jr., THINKEXIST.COM, [http:// thinkexist.com/ quotation/ an_individual_has_not_started_living_until_he_can/ 146451.html](http://thinkexist.com/quotation/an_individual_has_not_started_living_until_he_can/146451.html) ("An individual has not started living until he can rise above the narrow confines of his individualistic concerns to the broader concerns of all humanity.").

81. Joshua D. Groff, Note, *A Proposal for Diplomatic Accountability Using the Jurisdiction of the International Criminal Court*, 14 TEMP. INT'L & COMP. L.J. 209, 218 (2000); see also United States v. Enger, 472 F. Supp. 490, 504-05 (D.N.J. 1978) (detailing the history and development of diplomatic relations and immunities amongst nations).

82. Enger, 472 F. Supp. 490.

83. *Boos v. Barry*, 485 U.S. 312 (1988).

84. *Id.* at 323 (citing E. Vattel, *The Law of Nations* 452 (J. Chitty ed. 1844)).

85. *Id.* The Diplomatic Relations Act of 1978, 22 U.S.C. § 254 and 28 U.S.C. § 1364 (DRA), repealed the Crimes Act of 1790, 22 U.S.C. § 252-54. See also Nick Hanrahan, *A History of Diplomatic Immunity and the Development of Internal Organisation Immunity*, CAIO, at 7, available at

provisions were modified by the Congress of Vienna in 1815 and further revised in 1961 through the Vienna Convention on Diplomatic Relations (the Convention).⁸⁶

In 1972, the United States ratified the Convention pursuant to Article II of the Constitution.⁸⁷ As a treaty, the Convention has the full force of law in the United States and is recognized as part of the supreme law of the land pursuant to Article VI of the Constitution.⁸⁸ Legal scholars, including James E. Hickey and Annette Fisch, have argued that a diplomat's mission is undermined if he or she is continually concerned about unwarranted reprisals during political standoffs involving the sending and receiving states.⁸⁹ Accordingly, one of the central tenets of the Convention is to "ensure the efficient performance of functions of diplomatic missions as representing States."⁹⁰ Thus, for centuries officials believed that in order to carry out the difficult task of diplomacy, the diplomat must be allowed uninhibited rights to maximize dialogue and movement.⁹¹ The United States has exhibited particular concern about reprisals against its diplomats in this century given the contemporary wars on terror⁹² and drugs,⁹³ as

http://www.caio-ch.org/reforms/Intern_Paper_I.pdf.

86. Vienna Convention on Diplomatic Relations, Art.31, Apr. 18, 1961, 23 U.S.T. 3227 (ratified by U.S. Senate, Sept. 14, 1965; ratification deposited, Nov. 13, 1972; entered into force for the United States, Dec. 13, 1972, adopted by the Diplomatic Relations Act of 1978, 22 U.S.C.A. § 254a (West 1979 & West Cum.Supp.1983).

87. Abelardo L. Valdez, *Privileges and Immunities under the Vienna Convention on Diplomatic Relations and the Diplomatic Relations Act of 1978*, 15 INT'L LAW. 411, 413 (1981).

88. U.S. CONST. art VI; see also *Asakura v. Seattle*, 265 U.S. 332, 341 (1924) (treaties are "on the same footing of supremacy as do the provisions of the Constitution and laws of the United States").

89. James E. Hickey, Jr. & Annette Fisch, *The Case to Preserve Criminal Jurisdiction Immunity Accorded Foreign Diplomatic and Consular Personnel in the United States*, 41 HASTINGS L.J. 351, 379 (1990).

90. The Convention, *supra* note 86, pmbl.

91. Hickey & Fisch, *supra* note 89, at 356.

92. OSIATYŃSKI, *supra* note 47, at 44-45. OSIATYŃSKI writes:

In the United States, the war on terror has dominated the internal political agenda, pushing away civil liberties and being used to justify undue increase of unaccountable presidential power. In Western Europe, the need to deal with growing immigration and the fear of Muslim minorities has taken priority over the protection of human rights. In post communist countries, many former human rights defenders who today hold positions of power are preoccupied with economic problems, the frustrated expectations of the masses, and the deterioration of law and order. Fear of crime breeds repressive attitudes rather than sensitivity to human rights. At times, leaders of transition countries have discounted their former human rights activities in exchange for popularity and votes. They have come to believe that a strong, centralized government would be more suitable for dealing with problems of transition. Some of them end up turning to traditional conservative and right-wing ideas that are skeptical, if not hostile, to human rights, separation of powers, and checks and balances. In many post-Soviet countries, former elites have tried to find new sources of legitimacy. Often, it has been nationalism that has posed the greatest threats to minorities. In multiethnic Yugoslavia, nationalism led to the disruption of a state, to war, and to mass atrocities. In Central Asia, Belarus, and recently Russia, post communist regimes have become clearly authoritarian, oppressive and opposed to human rights.

Id.

well as anti-American sentiment that intensified during Bush's presidency.⁹⁴

Conversely, others have suggested diplomats violate the basis for protecting their action by engaging in conduct unrelated to their political directives:⁹⁵

The representative theory posits that the diplomat is the personification (or mouthpiece) of the sovereign from the state which he represents. Thus, the diplomat is entitled to the same privileges as the sovereign himself, since the diplomat is his "alter ego." This theory, a model originating in antiquity, has been largely disregarded as a plausible justification because modern governments typically are not monarchies; rather, power is theoretically derived from the governed, who themselves are not immune from prosecution in foreign states. Furthermore, while a representative theory might justify immunity for *official acts* (i.e., those which the sovereign would carry out), it fails to explain why immunity for private acts, outside of the scope of diplomats duties, are protected. The propriety of this theory is also severely questioned by the transformation of the concept of "sovereign immunity" and the development of the [International Criminal Court] itself.⁹⁶

As indicated, *supra*, it is widely documented that diplomats abuse their authority to engage in human trafficking, which is wholly peripheral and inconsistent with their official diplomatic missions.⁹⁷ Such conduct emboldens others to do the same, particularly in countries failing to adequately protect human rights.⁹⁸ Nonetheless, nations have adhered to the laws

93. *What's Wrong with the War on Drugs*, GOD GAVE US CANNABIS, <http://www.godgaveuscannabis.com/marijuana-law-reform/whats-wrong-with-the-drug-war> (last visited Mar. 6, 2012). The article states:

Few public policies have compromised public health and undermined our fundamental civil liberties for so long and to such a degree as the war on drugs.

The United States is now the world's largest jailer, imprisoning nearly half a million people for drug offenses alone. That's more people than Western Europe, with a bigger population, incarcerates for all offenses. Roughly 1.5 million people are arrested each year for drug law violations—40% of them just for marijuana possession. People suffering from cancer, AIDS and other debilitating illnesses are regularly denied access to their medicine or even arrested and prosecuted for using medical marijuana. We can do better.

94. Oxford Analytica, *Anti-American Sentiment Grows Worldwide*, FORBES.COM, http://www.forbes.com/2007/08/22/bush-anti-americanism-cx_0823oxfordanalytica.html.

95. Groff, *supra* note 81, at 215-16 (citations omitted) (*emphasis added*).

96. *Id.*

97. *Supra* Part II.

98. *Id.*; see also Caroline Frederickson & Vania Leveille, *Eradicating Slavery: Preventing the Abuse, Exploitation, and Trafficking of Domestic Workers by Foreign Diplomats and Ensuring Diplomat Accountability*, Am. Civ. Liberties Union, at 8 (Oct. 18, 2007), http://www.aclu.org/images/asset_upload_file359_32786.pdf ("Without measures to prevent abuse and to provide an avenue for redress for victims, the United States will unwittingly continue to facilitate patterns of labor abuse and

protecting diplomats despite the fact that diplomats abuse their authority for personal gain in violation of the rule of law, the laws of their sending states, and the law of the receiving state.⁹⁹

B. The Spectrum of Official and Unofficial Acts under the Convention

1. Current and Former Diplomats

To fully comprehend the protection diplomats receive and the corresponding abuse they subject others to, it is instructive to examine the scope of a diplomat's authority under the Convention. Pursuant to Article 31 of that treaty, current diplomatic agents have near-absolute immunity from civil and criminal liability in the receiving state:

A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of: (a) a real action relating to private immovable property . . . ; (b) an action relating to succession . . . ; (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.¹⁰⁰

A necessary corollary to the provisions stated in Article 31 is the notion that a diplomat's person is inviolable and thus free from any "arrest or detention."¹⁰¹ The receiving state has an absolute duty to protect diplomatic agents even from prosecution for violating state and federal laws: "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."¹⁰²

trafficking.").

99. Michael B. McDonough, Note, *Privileged Outlaws: Diplomats, Crime and Immunity*, 20 SUFFOLK TRANSNAT'L L. REV. 475, 478 n. 20 (1997) ("abuse of privilege extends at least to sixteenth century"); Leslie Shirin Farhangi, Note, *Insuring Against Abuse of Diplomatic Immunity*, 38 STAN. L. REV. 1517, 1518-19, 1519 n.9 (1986) (detailing abuses of diplomatic immunity).

100. The Convention, *supra* note 86, art. 31(1).

101. *Id.* Article 9 of the Convention states:

The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.

Id.

102. *Id.* at art. 29.

Article 29 sets forth the “inviolability” of the diplomat with respect to criminal prosecution. In addition to immunity from “any arrest or detention,” the receiving state is obligated to “take all appropriate steps to prevent any attack on [the diplomat’s] person, freedom or dignity.”¹⁰³ The treaty further provides that the diplomat shall enjoy the same protection for his or her private residence. Article 37 extends the same immunity to the diplomat’s household members if they are not nationals of the host state and also provides immunity to members of the administrative and technical staff of the mission, members of the service staff, and private servants in varying degrees.¹⁰⁴

As the preamble to the Convention recognizes, however, immunity is not intended to benefit the individual diplomat.¹⁰⁵ Instead, the immunity is meant to advance the legitimate interests of the sending state through the diplomat’s representation.¹⁰⁶ Article 41 of the Convention specifically commands that a diplomat has the duty to “respect the laws and regulations of the receiving State.”¹⁰⁷ Nonetheless, if a diplomat fails to comply with United States law our government has no authority over the diplomat equal to what could be exercised against a common citizen or visiting foreigner who violates another’s human rights.

Although the receiving state may not criminally or civilly prosecute immunized diplomats, Article 32 allows the receiving state to request that the sending state rescind the diplomat’s immunity.¹⁰⁸ It has been noted, however, that the United States has infrequently requested waivers of diplomatic immunity to allow trafficking claims to proceed,¹⁰⁹ and there is not even a State Department policy on requests for waivers of immunity.¹¹⁰ Even if the State Department requests a waiver to enable prosecution the sending country can refuse to grant it.¹¹¹ If the waiver is granted, the dip-

103. *Id.*

104. *Id.* at art. 37.

105. *Id.* at pmb1. (“[T]he purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States”).

106. *Id.* (emphasizing that the Convention is meant to serve “the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations.”).

107. *Id.* at art. 41(1).

108. *Id.* at art 32.

109. Friedrich, *supra* note 57, at 1159 n.157 (“Lawyers have repeatedly filed suits [on behalf of domestic workers] in the face of diplomatic immunity, only to be stonewalled by the United States or other governments.”) (citing Matt Kelley, *Some Embassy Workers Enslave Domestic Help, Enjoy Immunity*, NEWSTANDARD, June 28, 2005, <http://newstandardnews.net/content/index.cfm/items/1985/>).

110. Friedrich, *supra* note 58; Ahmed v. Hoque, No. 01 Civ. 7224, 2002 WL 1964806, at *1 (S.D.N.Y. Aug. 23, 2002) (State Department submitted a statement of interest supporting immunity rather than requesting waiver of immunity from the government of Bangladesh); Knab v. Republic of Georgia, No. 97CV3118, 1998 WL 34067108, at *3 (D.D.C. May 29, 1998) (holding that a country’s waiver of immunity from criminal jurisdiction does not also constitute waiver from civil jurisdiction).

111. U.S. DEP’T OF STATE, DIPLOMATIC AND CONSULAR IMMUNITY: GUIDANCE FOR LAW ENFORCEMENT AND JUDICIAL AUTHORITIES 13 (2011), available at <http://www.state.gov/docu->

lomat will be forced to answer for his or her crimes in a criminal or civil court like anyone else.

Another remedy found in the Convention is the ability of the receiving state at any time to declare a diplomat a *persona non grata*,¹¹² requiring the diplomat leave the country or face arrest. As set forth in Article 9(2), “If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this article, the receiving State may refuse to recognize the person concerned as a member of the mission.”¹¹³ This purportedly deters diplomats from breaking the laws of the receiving state and stands as a considerable resource in the receiving state’s arsenal of tools to control a rogue diplomat. However, such action may lead to political discourse that jeopardizes intergovernmental relations.

State recognition is vital to a nation gaining independence and receiving equal treatment among other sovereign nations. Pursuant to Article 2 of the Convention, “[t]he establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent.”¹¹⁴ The President has exclusive authority to recognize another nation for the purpose of establishing intergovernmental relations.¹¹⁵ If a nation does not receive recognition from the President, an exchange of diplomats usually does not occur.¹¹⁶ However, after recognition occurs, the Convention’s provisions apply to protect the diplomat’s efforts to advance the sending state’s objectives.¹¹⁷ The State Department is responsible for certifying the diplomatic status of various persons and resolving any future questions of their immunity.¹¹⁸ The courts rely on the State Department’s determination that an individual is entitled to immunity when presented with civil or criminal claims brought against the individual by United States citizens.¹¹⁹

The receiving state may also take action against the sending state due to the diplomat’s egregious conduct. The Convention permits the receiv-

ments/ organization/ 150546.pdf.

112. The Convention, *supra* note 86, at art. 9.

113. *Id.* at art. 9(2).

114. *Id.* at art. 2.

115. *National Petrochem. Co. of Iran v. M/T Stolt Sheaf*, 860 F.2d 551, 553 (2d Cir. 1988) (“As an incident to the President’s express constitutional powers to appoint, U.S. Const., art. II, § 2, and to receive ambassadors, *id.* § 3, and to his implied power to maintain international relations . . . the Supreme Court has acknowledged the President’s exclusive authority to recognize or refuse to recognize a foreign state or government and to establish or refuse to establish diplomatic relations with it.”) (citations omitted).

116. William G. Morris, Note, *Constitutional Solutions to the Problem of Diplomatic Crime and Immunity*, 36 HOFSTRA L. REV. 601, 603 (2007).

117. The Convention, *supra* note 86, pmb1.

118. U.S. DEP’T OF STATE, *A Citizen’s Guide to Foreign Affairs*, at 6 (Apr. 20, 2010), available at <http://www.state.gov/documents/organization/141872.pdf>.

119. *See, e.g., Baoman*, 627 F. Supp. 2d at 163.

ing state to limit the size of a diplomatic mission or even shut down an individual embassy.¹²⁰ Additionally, as “a last resort, if the receiving state does not have the cooperation of the sending state in applying the above sanctions or if the crimes committed by immune persons are especially egregious and offensive to the receiving state, it may break diplomatic relations with the sending state.”¹²¹ This broad remedy allowed by the Convention can deter a country from continually failing to bring its diplomats to justice.

Pursuant to Article 39, former diplomatic officials enjoy only “functional” or “residual” immunity from civil liability in the receiving state:

When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.¹²²

Under this provision, a former diplomat benefits from immunity under the Convention only for official acts undertaken “in the exercise of his functions as a member of the mission.”¹²³

2. *The Diplomatic Relations Act of 1978*

The Diplomatic Relations Act of 1978 (DRA) is also an important part of the United States’ diplomatic immunity doctrine.¹²⁴ The Convention was a self-executing treaty entitled to immediate application in United States law.¹²⁵ However, the language of the Convention persuaded Congress to pass the DRA in order to repeal an act¹²⁶ that granted diplomats more protection than the Convention required.¹²⁷ The DRA also clarified

120. The Convention, *supra* note 86, art. 11.

121. Hickey and Fisch, *supra* note 89, at 378.

122. The Convention, *supra* note 85, art. 39(2).

123. *Id.*; see, e.g., *Brzak v. United Nations*, 551 F. Supp. 2d 313, 317 (S.D.N.Y.2008).

124. DRA, *supra* note 85.

125. *Cf. Asakura*, 265 U.S. at 341 (describing a self-executing treaty as one which “operates of itself without the aid of any legislation”); *Foster v. Neilson*, 27 U.S. 253, 314 (1829) (stating that a non-self-executing treaty exists when “either of the parties engage to perform a particular act . . . and the legislature must execute the contract before it can become a rule for the Court”).

126. Mitchell S. Ross, Note, *Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities*, 4 AM. U. J. INT’L L. & POL’Y 173, 180 (1989) (“This statute was so protective of diplomats that one provision made it a crime merely to bring suit against any person possessing diplomatic immunity. Sanctions for bringing suit under this provision included a fine and imprisonment for up to three years.”)

127. The Convention, *supra* note 86; see also Terry A. O’Neill, Comment, *A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978*, 54 TUL. L. REV. 661, 662-64 (1980)

that the Convention was “the essential United States law on the subject.”¹²⁸ In addition to clarifying United States immunity obligations, Congress authorized the President to treat foreign diplomats with the requisite level of inviolability that United States diplomats received in the other country.¹²⁹ Therefore, if another country grants American personnel greater privileges while in their country, the president may allow similar benefits for that nation’s diplomats operating in the United States. In the absence of presidential intervention, pursuant to the Convention, actions or proceedings brought against individuals entitled to immunity with respect to such actions or proceedings under the Convention must be dismissed.¹³⁰ In light of this mandatory dismissal, Courts construe the DRA’s provisions as a jurisdictional limitation.¹³¹

C. *The Conflict between the Rule of Law and Diplomatic Immunity*

As previously indicated, pursuant to Article VI of the Constitution, federal statutes and treaties are both a part of the supreme law of the land.¹³² However, the Constitution is silent as to which of the two would apply to a situation in which there is a conflict between a treaty and a federal statute. The Supreme Court has faced this question before in the case of *Whitney v. Robertson*.¹³³ Its answer was to create a judicial standard that became known as the “last in time rule.”¹³⁴ The last in time rule states that “if there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control.”¹³⁵ The Supreme Court further stated that “[t]he duty of the courts is to construe and give effect to the latest expression of the sovereign will.”¹³⁶ Finally, the Supreme Court cautioned that the last in time rule can work in the opposite fashion.¹³⁷ As such, self-executing treaties that occur later in time may supplant federal statutes.¹³⁸ Therefore, although the Convention and the DRA have been law in the United States for several decades, a federal

(detailing the concept of enforcement jurisdiction in relation to diplomatic immunity).

128. President Jimmy Carter, *Statement on Signing H.R. 7819 into Law*, AMERICAN PRESIDENCY PROJECT (Oct. 2, 1978), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29902#axzz1ovE3R2xr>.

129. 22 U.S.C. § 254(c) (2006).

130. 22 U.S.C. § 254(d) (2006).

131. See, e.g., *Ahmed*, 2002 WL 1964806, at *8 (“This Court is without subject matter jurisdiction to consider the plaintiff’s claims, for the defendants[, the foreign minister to the U.N. and his wife,] are immune from suit.”); *Weixum v. Xilai*, 568 F. Supp. 2d 35, 39 (D.D.C. 2008) (dismissing for “lack of jurisdiction” action against foreign official entitled to immunity).

132. U.S. CONST. art. VI.

133. *Whitney v. Robertson*, 124 U.S. 190 (1888).

134. *Id.* at 194.

135. *Id.*

136. *Id.* at 195.

137. *Id.* at 194.

138. *Id.*

statute aimed at limiting or abolishing diplomatic immunity could constitutionally supersede both.¹³⁹

In the American Civil Liberties Union's (ACLU) Statement before the House Foreign Affairs Committee in 2007, the ACLU challenged the paradox between the Convention and our nation's constitutional obligations to eradicate slavery:

In 1865, the United States outlawed slavery and involuntary servitude with the ratification of the Thirteenth Amendment to the U.S. Constitution. In 1872, the U.S. Supreme Court ruled in the *Slaughter-House Cases* that the Thirteenth Amendment was intended to eliminate "any other kind of slavery, now or hereafter." In 2000, with the passage of the TVPA, Congress extended the protection of the Thirteenth Amendment by recognizing trafficking in persons as a form of slavery and providing civil, criminal, and immigration remedies to victims of slavery. We fail to uphold this promise to eliminate slavery in all of its manifestations within the United States if we turn a blind eye to the trafficking abuses occurring behind the closed doors of foreign diplomats' homes.¹⁴⁰

However, no such law or concerted effort exists to override a diplomat's *carte blanche* to unrestrained violations of universally recognized human rights. Despite numerous treaties, statutes, and constitutional provisions, the enforcement of diplomatic immunity and the ethos of abolishing slavery have competed for superior recognition for centuries. A clash of diplomatic immunity and the human right to be free from forced servitude arises because the Congress in Vienna failed to reconcile how, on one hand, slavery can be construed as intolerable, but the Convention requires society to turn a blind eye to a diplomat's wrongful conduct. This irony exists despite the fact that slavery was abolished in most of the world dur-

139. It has previously been decided that the TVPA does not override diplomatic immunity. *Sabbithi*, 605 F.Supp. 2d at 129 (citing *Kappus v. CIR*, 337 F.3d 1053, 1056 (D.C.Cir. 2003) ("The subsequent-in-time rule applies '[w]here a treaty and a statute 'relate to the same subject,' and the two cannot be harmonized"). The *Sabbithi* court further stated:

[t]he TVPA concerns peonage, slavery, and trafficking in persons, whereas the Vienna Convention provides immunity from criminal prosecution and civil actions to foreign diplomats. Because the treaty and statute do not relate to the same subject, the subsequent in time rule is inapplicable. 'A treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed.' . . . There has been no such action on the part of Congress, and inaction is not sufficient to abrogate a treaty. . . . Moreover, '[i]n the view of the United States, the TVPA does not override diplomatic immunity. First, the TVPA is silent as to whether it limits the immunity of diplomats, and courts should not read a statute to modify the United States's treaty obligations in the absence of a clear statement from Congress.'

Sabbithi, 605 F. Supp. 2d at 129-30.

140. ACLU, *supra* note 98, at 4 (citations omitted).

ing the nineteenth century, well before publication of the Convention, but not before diplomatic immunity became a cornerstone of intergovernmental relations.

In light of the global rejection of slavery, customary international law categorizes slavery as a violation of *jus cogens* norms.¹⁴¹ Article 53 of the Vienna Convention on the Law of Treaties 1969 (Vienna Law of Treaties) sets out the current internationally accepted definition of *jus cogens*:¹⁴²

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.¹⁴³

The Vienna Law of Treaties further affirmed *jus cogens* as an accepted doctrine in international law that its signers must advance. As indicated in *Statutes of Liberty*:

Under *jus cogens*, the U.S. could argue that the Vienna Convention on Diplomatic Relations should not apply to immunize a defendant in a trafficking case because the prohibition against slavery supersedes treaty law. Thus, a court accepting this premise could proceed with a prosecution against a diplomat accused of trafficking for domestic servitude, or a civil suit brought by his or her victim in pursuit of damages, without regard to diplomatic immunity.¹⁴⁴

Yet, diplomats are not exposed to criminal or civil liability for violating any anti-trafficking laws unless the sending state waives the diplomat's protection—a privilege not afforded to any other person on earth.¹⁴⁵ In fact, in *Sabbithi v. Saleh*, the court specifically held the *jus cogens* doc-

141. Traditional *jus cogens* norms include slavery, piracy, and genocide. See Pia Zara Thadhani, Note, *Regulating Corporate Human Rights Abuses: Is UNOCAL the Answer?*, 42 WM. & MARY L. REV. 619, 625 (2000); OLIVIER DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW 61-62 (2010).

142. Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 344.

143. *Id.*

144. Friedrich, *supra* note 58, at 1169.

145. The failure to mitigate *jus cogens* violations, in and of itself, amounts to a breach of a *jus cogens*. *Id.* It was determined at the Nuremberg Trials that “to prepare, incite, or wage a war of aggression . . . and that to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with such a war, or to exterminate, enslave, or deport civilian populations, is an international crime.” *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 2002) (citing R. Jackson, *The Nuremberg Case* xiv-xv (1971)).

trine does not apply to diplomatic immunity.¹⁴⁶ Thus, like the white aristocracy in this country following the Civil War, diplomats are able to skirt liability for violating the most sacred constitutional principles and millions of powerless individuals are forced to pay the price with the loss of their liberty, and in many instances, their lives.

IV. OBAMA ADMINISTRATION'S INTERACTION WITH THE JUDICIARY TO OVERCOME DIPLOMATS FROM ENGAGING IN HUMAN TRAFFICKING

A. *The Impact of Baoanan v. Baja on Exposing Diplomats to Liability Pursuant to the Trafficking Victims Protection Act*

In light of many countries' allowance of corrupt government officials and law enforcement to engage in human trafficking,¹⁴⁷ the United States has taken steps to identify and influence those nations through the TVPA.¹⁴⁸ That law authorizes the president to take steps against persons who engage in certain types of human trafficking.¹⁴⁹ The TVPA defines "involuntary servitude" broadly to include "any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint," or "the abuse or threatened abuse of the legal process."¹⁵⁰

However, enactment of the TVPA was not precipitated by our nation's attempts to address the wrongdoing of rogue foreign officials, but instead in response to the United States Supreme Court's decision in *United States*

146. *Sabbithi*, 605 F. Supp. 2d at 129.

147. *See, e.g.*, Iqbal Hussain Khan Yousafzai, *Swiss team begins probe into charges against its diplomats in Pakistan*, ASIAN TRIBUNE (May 9, 2006), <http://www.asiantribune.com/node/32>.

148. TVPA, *supra* note 6; *see also* Groff, *supra* note 81, at 218. Groff notes:

Another diplomatic incident occurred in 1995, when a Nigerian diplomat's wife, after learning of her daughter's pregnancy, slashed the girl's wrist, and stabbed another daughter as she tried to intervene. In 1985, a Soviet military attaché, driving under the influence, struck and injured three pedestrians in Washington, D.C. In 1982, the grandson of the Brazilian ambassador shot a bouncer outside a nightclub in Washington, D.C. In all of these cases no charges were brought against the offenders due to diplomatic immunity.

Id.; Friedrich, *supra* note 58, at 1159-60, 1163 (arguing that the reported rate of diplomatic crime, specifically with regard to human trafficking among diplomats, is different from the actual rate of diplomatic crime because the crimes are often not reported at all, or not fully investigated).

149. 22 U.S.C. § 7108 (2006). The President may exercise the authorities in the United States Foreign persons that materially assist in, or provide financial or technological support for or to, or provide goods or services in support of, activities of a significant foreign trafficker in persons identified pursuant to subparagraph; and Foreign persons that are owned, controlled, or directed by, or acting for or on behalf of, a significant foreign trafficker identified pursuant to subparagraph (A). The President shall report to the appropriate congressional committees identifying publicly the foreign persons that the President determines are appropriate for sanctions pursuant to this section and the basis for such determination.

150. TVPA, *supra* note 6; 22 U.S.C. § 7102(5) (2006).

v. Kozminski.¹⁵¹ In that case, the Supreme Court narrowly interpreted the involuntary servitude statute, 18 U.S.C. § 1584, holding that the statute only prohibited compulsion of services through either physical or legal coercion.¹⁵² The Supreme Court expressly rejected an interpretation of the involuntary servitude statute that would have also prohibited obtaining labor through psychological coercion.¹⁵³

Human trafficking first garnered mainstream attention in the United States when President Clinton issued an anti-trafficking directive on March 11, 1998. Subsequently, and concurrent with international discussions regarding an anti-trafficking protocol, Congress began a flurry of legislative activity on the subject.¹⁵⁴ The TVPA was enacted in October 2000, and President Clinton signed it into law to close the loophole that the *Kozminski* decision exposed.¹⁵⁵ The TVPA created the first comprehensive federal law to address trafficking in persons. Prior to that, a comprehensive federal law did not exist to protect victims of trafficking or to prosecute their traffickers.¹⁵⁶

Less than six months after President Obama took office, the federal courts issued a decision in yet another case examining the scope of a diplomat's ability to thwart the TVPA's application.¹⁵⁷ In *Baoanan*, Marichu

151. United States v. Kozminski, 487 U.S. 931 (1988), *superseded by statute*, 18 U.S.C. § 1589 (2006).

152. *Id.* at 952.

153. *Id.* at 944, 949-50; see also Kathleen Kim, *Psychological Coercion in the Context of Modern-Day Involuntary Labor: Revisiting United States v. Kozminski and Understanding Human Trafficking*, 38 U. Tol. L. Rev. 941, 963-71 (2007).

154. The United Nations Convention Against Transnational Organized Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children art. 3, opened for signature Dec. 15, 2000, T.I.A.S. No. 13127, 2225 U.N.T.S. 209 (entered into force Sept. 29, 2003) [hereinafter Palermo Protocol]. The Palermo Protocol was the first international consensus on the definition of trafficking. The United Nations set clear standards with the Palermo Protocol for a concerted international effort to combat trafficking and took the lead in providing assistance to the victims. Article 3 of the Palermo Protocol defines trafficking as:

the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.

Id.

155. See United States v. Bradley, 390 F.3d 145, 150 (1st Cir. 2004), *vacated on other grounds*, 545 U.S. 1101 (2005); U.S. DEP'T OF HEALTH & HUMAN SERV., TRAFFICKING VICTIMS PROTECTION ACT OF 2000, FACT SHEET, available at http://www.acf.hhs.gov/trafficking/about/TVPA_2000.pdf.

156. Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. § 7101 (2000); United States v. Peterson, F. Supp. 2d 1359 (M.D. Ga. 2008).

157. *Baoanan* also calls into question prior federal court decisions indicating the TVPA did not override diplomatic immunity under the Convention, because the TVPA and the Convention do not relate to the same subject. See *Baoanan*, 627 F. Supp. 2d 155; see *Sabbithi*, 605 F. Supp. 2d at 129. Prior to *Baoanan* the impetus for enacting the TVPA was undermined by the fact victims of trafficking were still subject to the loophole exposed by *Kozminski*.

Baoanan asserted fifteen causes of action under various federal and state laws against Lauro Baja Jr., the permanent representative of the Philippines to the United Nations from May 2003 to February 2007.¹⁵⁸ Baoanan alleged she was lured to the United States with false promises of employment as a nurse by Baja and his wife, Norma Baja, and two other defendants from the Philippines.¹⁵⁹ However, when she arrived, the Bajas forced her to work as a domestic servant in their house at the Philippine Mission.¹⁶⁰

In reaching its decision, the *Baoanan* court relied upon a Statement of Interest (SOI) submitted by the Obama Administration setting forth what constitutes official acts entitling a diplomat to residual immunity.¹⁶¹ The Convention does not define this important distinction. Thus, the Obama Administration and the Courts had an opportunity and obligation to narrowly define such acts to avoid granting rights to diplomats who seek to escape liability for human trafficking. According to the government's SOI, Article 3 of the Convention provides a list of the "functions of a diplomatic mission."¹⁶² Article 3 provides:

The functions of a diplomatic mission consist, inter alia, in

- (a) Representing the sending State in the receiving State;
- (b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
- (c) Negotiating with the Government of the receiving State;
- (d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State; [and]

158. *Baoanan*, 627 F. Supp. 2d at 157.

159. The two other defendants were Maria Elizabeth Baja Facundo and Labaire International Travel, Inc. Baoanan alleged Labaire was a travel agency and employment agency in which Mrs. Baja and Ms. Facundo served as corporate officers. *Id.* at 158. The parties conceded that the court had jurisdiction over Labaire and Facundo. *Id.* at 160.

160. *Id.* at 157.

161. *Id.* at 160. "While the Government's interpretation of the scope of Article 39(2) is 'not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.'" *Id.* at 162-63 (citing *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982); *Tachiona v. United States*, 386 F.3d 205, 216 (2d Cir. 2004); *Tabion v. Mufti*, 73 F.3d 535, 538 (4th Cir. 1996) (holding that "[s]ubstantial deference is due to the State Department's conclusion" as to the scope of diplomatic immunity under the Convention); *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187, 193 (D.D.C.2007)).

162. *Baoanan*, 627 F. Supp. 2d at 163.

(e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.¹⁶³

In furtherance of this analysis, the *Baanan* court also cited *Swarna v. Al-Awadi*¹⁶⁴ to underscore the distinction between official acts and private acts that expose a diplomat to liability for violating the TVPA and similar laws. In the latter case, the district court relied on Eileen Denza's *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*¹⁶⁵ to conclude residual diplomatic immunity applies to official acts attributable to the sending state. However, and more importantly for the purposes of overriding claims of diplomatic immunity, the same protection does not apply to private acts because implicitly such acts are not related to or necessary for the diplomatic agent's representation of the sending state.¹⁶⁶

Swarna distinguished these as "indisputably official acts," and recognized additional acts not encompassed by Article 3 that are nonetheless properly considered to be "official."¹⁶⁷ Such acts include those (1) taken "in the regular course of implementing an official program or policy of the mission" and (2) "hiring and employing an individual to work at the diplomatic mission."¹⁶⁸ However, the *Swarna* Court recognized that "residual diplomatic immunity does not extend to lawsuits based on actions that were entirely peripheral to the diplomatic agent's official duties."¹⁶⁹

As noted in *Baanan*, *Swarna* summarized the current state of the law as follows:

[T]he case law and critical commentary point to the conclusions that the residual diplomatic immunity provided by Art. 39 is a functional immunity that applies to a former diplomatic agent's official acts but not private acts; that official acts include acts directly related to the "functions of a diplomatic mission" listed in Art. 3, as well as acts related to the employment of subordinates at the diplomatic mission; and that official acts do not include acts

163. *Id.*

164. *Id.* at 161-62 (citing *Swarna v. Al-Awadi*, 607 F. Supp. 2d 509, 516 (2009)).

165. *Id.* at 162; EILEEN DENZA, *DIPLOMATIC LAW: A COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS* 439 (3d ed. 2008).

166. *Baanan*, 627 F. Supp. 2d at 165-70.

167. *Swarna v. Al-Awadi*, 607 F. Supp. 2d 509, 517 (2009), *vacated on other grounds by Swarna v. Al-Awadi*, 622 F.3d 123 (2d Cir. 2010).

168. *Id.* at 517-18.

169. *Id.* (citing *U.S. v. Guinand*, 688 F.Supp. at 774; *In re Application of Noboa*, Nos. M18-302, M19-111, 1995 WL 581713, at *1, *3 (S.D.N.Y. Oct. 4, 1995)).

that were completely peripheral to the official's diplomatic duties.¹⁷⁰

The *Baoanan* Court concurred with the functional approach adopted in *Swarna* and held that the acts allegedly committed by Baja that furthered his diplomatic functions such that they were “in law the acts of the sending State” were official acts.¹⁷¹ All other acts were private acts for which residual immunity was not available.¹⁷²

In addition, the *Baoanan* Court accepted the Obama Administration’s recommended two-prong examination of the immunities afforded to a diplomat pursuant to the Convention: “[E]ven if a diplomatic agent’s conduct is determined to fall outside the ‘commercial activity’ exception of Article 31(1)(c), the Court must conduct a separate and independent analysis regarding a former diplomat’s acts to determine whether those acts constitute ‘official acts’ entitling him to residual immunity under Article 39(2).”¹⁷³ The Court’s acceptance of this analytical framework is critical because it marked a divergence from other decisions in which it was concluded that immunity under the “commercial activity exception” of Article 31(1)(c) was bootstrapped to residual immunity under Article 39(2).¹⁷⁴ Based on the Court’s thorough analysis and careful consideration of the defendants’ arguments that certain diplomatic conduct should automatically be immune, it was determined that Baoanan’s claims concerned allegations of acts that were entirely peripheral to Baja’s official duties as a diplomatic agent.¹⁷⁵ The *Baoanan* court concluded that it had subject matter jurisdiction over Baja, including for violations of the TVPA, involuntary servitude, and forced labor.¹⁷⁶

Baoanan is significant because it opens the door for claims against former diplomats for violating anti-trafficking rules of law in a clear and dramatic way. It strengthens the arguments of domestic-trafficking victims who are employed by diplomats, even those who reside or work within the diplomat’s home on the grounds or away from an embassy:

The Court rejects Baja’s suggestion that a diplomatic agent’s employment of a domestic worker is always an official act encapsulated by Article 39(2). Such employment, without more, is not *inherently* an “act [] performed . . . in the exercise of his functions as a member of the mission,” Article 39(2), nor is it *inherently* re-

170. *Swarna*, 607 F. Supp. 2d at 519.

171. *Baonan*, 627 F. Supp. 2d at 162.

172. *Id.*

173. *Id.* at 164, n.9.

174. *Id.*

175. *Id.* at 171.

176. *Baoanan*, 627 F. Supp. 2d at 171.

lated to any of the “functions of a diplomatic mission” provided in Article 3(a)-(e).¹⁷⁷

Moreover, it provides valuable insight to how the Obama Administration may further protect immigrant workers in embassies and international missions by carefully scrutinizing the private nature of work to be performed as indicated in documentation submitted upon entry into the United States.¹⁷⁸ The decision also improves a litigant’s chances of holding individuals like Labaire and Facundo liable for violating anti-trafficking rules of law, instead of hiding behind diplomats.¹⁷⁹ Finally, the *Baoanan* decision is instructive because it could lead to a policy of denouncing current diplomats who are proven to have violated anti-trafficking rules of law, thereby stripping them of immunity under Article 31 of the Convention.¹⁸⁰

Although *Baoanan* is a very useful weapon for reconciling diplomatic immunity with the rule of law, the Court did not go far enough to chill the conduct of all diplomats whose acts are or may be *erga omnes*.¹⁸¹ To determine what kinds of acts are immunized by Article 39 of the Convention, it is instructive to closely examine the purpose behind its provision of residual diplomatic immunity. However, the Court did not address the larger issue of why current diplomats’ official acts should include viola-

177. *Id.* at 165.

178. *Id.* at 166-68. There, the *Baoanan* Court indicated the applicability of the “commercial activity” exception to diplomats allegedly engaging in human trafficking. The Court cited *Tabion*, 73 F.3d 535, to underscore employment of a domestic servant is not “commercial activity” for the purposes of the commercial activity exception to diplomatic immunity under the Convention. In *Tabion*, the court on appeal initially noted that the Convention provides diplomats with protection from most civil and administrative actions, but that Article 31 lists three exceptions to a diplomat’s civil immunity. Chief among them, the court pointed out, is the elimination in Article 31(1)(c) of immunity from actions “relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.” *Tabion*, 73 F.3d at 537; *see also* DRA § 5, 22 U.S.C. § 254(d); *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187 (D.D.C. 2007) (Contract for domestic services between a diplomat and a worker was not itself a “commercial activity” within the meaning of the commercial activity exception to diplomatic immunity found within the Convention); *cf.*, *Swarna*, 607 F. Supp. 2d at 518 (“[A] diplomatic agent’s act of hiring and employing an individual to work at the diplomatic mission is an official act.”). The *Baoanan* court was “persuaded” that the scope of the decisions that influenced the *Swarna* court was limited by the parties actually involved in the employment relationship. *Baoanan*, 627 F. Supp. 2d at 169.

179. *Baoanan*, 627 F. Supp. 2d at 159.

180. *Id.* at 163. *Baoanan* states:

The United States Government has consistently interpreted Article 39 of the VCDR to permit the exercise of U.S. jurisdiction over persons whose status as members of the diplomatic mission has been terminated for acts they committed during the period in which they enjoyed privileges and immunities expect for acts performed in the exercise of the functions as a member of the mission.

Id.

181. Eric A. Posner, *Erga Omnes Norms, Institutionalization, and Constitutionalism in International Law*, 165 J. INST. AND THEORETICAL ECON. 5 (2009) (“*Erga omnes* norms arise when states recognize that a norm violation injures multiple states and that states have an incentive to free ride rather than retaliate against the violator”).

tions of internationally recognized laws banning slavery and human trafficking in all forms.

From an executive level, Obama must resolve how his administration can continue to overcome the federal court's perceived limitations to holding even current diplomats accountable for violating anti-trafficking rules of law, while at the same time protecting the sanctity of diplomatic immunity. Given the recent retirements of Supreme Court Justices John Paul Stevens and David Souter, President Obama has the rare opportunity to redirect the federal judiciary on this subject. As Justice Elena Kagan noted following her confirmation on the Supreme Court, an obligation exists to "protect and preserve the rule of law in this country an obligation to uphold the rights and liberties afforded by our remarkable Constitution; and an obligation to provide what the inscription on the Supreme Court building promises: equal justice under law."¹⁸²

B. Applying the Jus Cogens Doctrine to Proscribe Diplomatic Immunity

Baoanan demonstrates that although there is little quibble with immunity for the acts of a diplomatic agent in the exercise of his lawful, official functions, the justifications for granting near-absolute immunity to even current diplomats should be negated when considering private acts that are illegal based on international treaties and the laws of both the sending and receiving states. Essentially, under such circumstances, diplomats are no more than terrorists, undeserving of unfettered protection of their criminal activities. However, the Obama Administration did not take a position on the scope of the term "official acts" as used in the Convention.¹⁸³

As suggested by *Baoanan*, in order to hold current diplomats accountable for engaging in human trafficking, the Obama Administration and the courts must construe such conduct as "unofficial" and, therefore, unprotected by the Convention. Thus, it is clear that the Obama Administration must take steps to influence how the judiciary defines a diplomat's unofficial acts to remain within the scope of the TVPA. An extension of the *jus cogens*' application in such cases and, by necessity, reconciliation of *Sabbithi* and *Baoanan*, would open the door to this interpretation.

182. Office of the Press Secretary, Remarks by the President and Elena Kagan at Reception Honoring Her Confirmation (Aug. 06, 2010), <http://www.whitehouse.gov/the-press-office/2010/08/06/remarks-president-and-elena-kagan-reception-honoring-her-confirmation>. Interestingly, the judge who issued the *Baoanan* decision, Victor Marrero, was nominated by President Clinton on May 27, 1999, to a seat vacated by Sonia Sotomayor as Sotomayor was elevated to a judgeship on the Second Circuit Court of Appeals. President Obama nominated Justice Sotomayor to the United States Supreme Court to fill the seat of the retiring Justice David Souter in May 2009.

183. *Baoanan*, 627 F. Supp. 2d at 162; *see also* Statement of Interest of the United States of America, Apr. 28, 2009 at 5 n.4 ("The Government takes no position on the scope of the term 'official acts' as used elsewhere in the VCDR.").

Arguably, the paramount enabling mechanism of *jus cogens* is its ability to bind states regardless of whether the state is a party to any international legal instrument.¹⁸⁴ The *Restatement (Third) of Foreign Relations Law of the United States* (Restatement Third), § 102, comment k, supports the interpretation of *jus cogens* norms as binding on all nations:

Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character.¹⁸⁵

The *jus cogens* doctrine is binding on all nations, “[w]hereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent, as exemplified by the theories underlying the judgments of the Nuremberg tribunals following World War II.”¹⁸⁶ The International Court of Justice notes that violations of these norms constitute *ergo omnes*—violations of obligations owed to all.¹⁸⁷ As a result, they are generally interpreted as restricting the freedom of nations to contract while voiding treaties whose object conflicts with norms that have been identified as peremptory.

Several courts and international legal scholars posit an emerging legal theory that when states violate a *jus cogens* norm by engaging in “unofficial acts,” their sovereign immunities dissolve, and they can be tried in domestic or international tribunals without their consent.¹⁸⁸ This theory should be extended to diplomats to strip them of their immunity pursuant to the Convention if the diplomat is proven to have breached a *jus cogens* norm such as modern-day slavery. Mark R. von Sternberg, a senior attorney with the Catholic Legal Immigration Network, Inc., has suggested violation of a *jus cogens* norm gives rise to universal jurisdiction,¹⁸⁹ pu-

184. Vienna Convention on the Law of Treaties, *supra* note 142, at art. 53.

185. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (2004).

186. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992).

187. The International Court of Justice is the principal judicial organ of the United Nations.

188. Thus, treaties providing for diplomatic immunity may be void where their application would shield perpetrators of slavery-like practices prohibited under *jus cogens*. See, e.g., Jacques Hartmann, *The Gillon Affair*, 54 INT’L & COMP. L.Q. 745, 754 (2005) (arguing that if the prohibition of torture is a *jus cogens* norm, “this norm would necessarily trump any other rule of international law, even immunity”).

189. Universal jurisdiction provides a mechanism whereby a state may obtain jurisdiction over matters deemed offensive to the international community. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 513 (7th ed. 2008). Further, the act must constitute a breach of *jus cogens*, an international treaty, or international customary law. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 57 (1995); STEVEN R. RATNER & JASON S. ABRAMS,

nishable by any state, because the violator becomes a *hostes humani generis*.¹⁹⁰ Recognizing this emerging theory of *jus cogens* violations and universal jurisdiction would allow diplomats to be prosecuted for violation of anti-trafficking and slavery laws because they could not argue that their conduct was an official act protected under the Convention and, therefore, able to override the rule of law. However, this analysis would have to be tempered by respect or recognition of the political ramifications that would arise if bias was alleged.¹⁹¹

Further, this would not diverge from established precedent; rather, it would properly balance the true intent of the Convention as well as treaties and other laws banning human trafficking. As a result of the Nuremberg Trials at the end of World War II the *jus cogens* doctrine has been extended to deprive governments and their officials of their right to rely upon sovereign immunity to avoid prosecution for acts that violate peremptory norms of international law pursuant to the "Nuremberg Charter."¹⁹² Such acts generally involve the most heinous crimes including the enslavement of another person.¹⁹³ The violations giving rise to individual liability contravene *jus cogens* norms.¹⁹⁴ Accordingly, when individuals acting under color of law perpetrate such atrocities, they can and should be held responsible regardless of rank, title, or diplomatic status.¹⁹⁵

The Obama Administration and the courts may find support in decisions because the Nuremberg Trials holding violations of human rights that are protected as *jus cogens* norms supersedes sovereign immunity.¹⁹⁶ The overall premise of these decisions is that violation of *jus cogens* norms cannot fall within the scope of an official's authority because they cannot be considered sovereign acts, thereby exposing the official to liability for his or her conduct. As an example, several cases relate to the doc-

ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 141 (3d ed. 2009); Roman Boed, *The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations*, 33 CORNELL INT'L L.J. 297, 299 (2000).

190. A common enemy of all mankind.

191. Eric Langland, *Decade of Descent: The Ever-Shrinking Scope and Application of Universal Jurisdiction*, 39 ABA INTERNATIONAL LAW NEWS 1, 4 (2010).

192. See, e.g., Charter of the International Military Tribunal for the Trial of the Major War Criminals, appended to Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (Nuremberg Charter), art. 7, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280, available at <http://www.icrc.org/ihl.nsf/FULL/350?OpenDocument> ("The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."); *R v. Bow Street Metropolitan Stipendiary Magistrate and Others*, [2000] 1 A.C. 147 (H.L.) (U.K.).

193. *Bow Street*, [2000] 1 A.C. 147 (H.L.) (U.K.).

194. Vienna Convention on the Law of Treaties, *supra* note 142, art. 53.

195. *Id.*

196. See, e.g., *Al-Adsani v. Gov't of Kuwait*, 100 I.L.R. 465, 471 (A.C. 1994) (U.K.) (sovereign immunity may not be a defense to allegations of torture); see also 4 AM. JUR. 2d *Ambassadors, Diplomats & Consular Officials* § 8 (2005) ("Diplomatic immunity is not a privilege of the person, but of the state that the diplomatic agent represents.").

trine's ability to counteract the abuses of foreign governments and their officials under the *Foreign Sovereign Immunities Act* of 1976 (FSIA).¹⁹⁷ According to the Supreme Court, "Congress intended the FSIA to adopt the restrictive theory of sovereign immunity, which recognizes immunity 'with regard to sovereign or public acts (*jure imperii*) of a state, but not . . . private acts (*jure gestionis*).'"¹⁹⁸

For example, in *In Re Estate of Marcos, Human Rights Litigation*,¹⁹⁹ the former president of the Philippines was charged with committing acts of torture and summary executions, in addition to disappearances. The *Marcos II* court held that the "illegal acts of a dictator are not 'official acts' unreviewable by federal courts"²⁰⁰ and that actions which exceed statutory limitations are considered "*individual and not sovereign* [because] the officer is not doing the business which the sovereign has empowered him to do."²⁰¹ Therefore, the court concluded, "Marcos' acts of torture, execution, and disappearance were clearly acts outside of his authority as President."²⁰²

In *Enahoro v. Abubakar*,²⁰³ the Seventh Circuit Court of Appeals indicated that "officials receive no immunity for acts that violate international *jus cogens* human rights norms." Other circuits have expressed this view when examining application of the *jus cogens* doctrine to violation of high crimes such as slavery.²⁰⁴ Because no state can ever derogate from such a peremptory norm of international law, diplomats from those states who violate such norms should similarly be deemed as acting outside their lawful capacity. In this way a diplomat's entitlement to immunity for official

197. 28 U.S.C. § 1602 *et seq.*; 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1601-1611.

198. Permanent Mission of India to the United Nations v. New York, 551 U.S. 193, 194 (2007).

199. *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994).

200. *Id.* at 1471

201. *Id.* at 1470.

202. *Id.* at 1472; *see also* Jimenez v. Aristeguieta, 311 F.2d 547, 557-58 (5th Cir. 1962), *cert. denied*, 373 U.S. 914, (1963) (former Venezuelan chief executive's crimes committed in violation of his position and not in pursuance of it were not acts of a sovereign).

203. *Enahoro v. Abubakar*, 408 F.3d 877, 893 (7th Cir. 2005).

204. *See, e.g.*, Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1198 (S.D.N.Y.1996) (noting that defendant could not argue that torture fell within the scope of his lawful authority or was permitted under his nation's laws because no government claims legitimate authority to torture; *Siderman*, 965 F.2d at 718 ("International law does not recognize an act that violates *jus cogens* as a sovereign act."); *Prosecutor v. Milošević*, Case No. IT-02-54-PT, Decision on Preliminary Matters, 32 (Nov. 8, 2001) ("He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.") (*quoting* Nuremberg Judgment, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10); *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶ 155 (Dec. 10, 1998) ("The fact that torture is prohibited by a peremptory norm of international law . . . delegitimize[s] any legislative, administrative or judicial act authorizing torture."); *R v. Bow Street Metropolitan Stipendiary Magistrate and Others*, [2000] 1 A.C. 147, 278 (H.L.) (U.K.) (Opinion of Lord Millett) ("International law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose.").

acts would never include violations of anti-slavery laws and the rule of law.²⁰⁵

The *Chuidian v. Philippine Nat'l Bank*²⁰⁶ court accepted the principle that no head of state sued in his individual capacity can claim immunity for acts that violate *jus cogens* norms.²⁰⁷ The *Chuidian* court recognized that “[w]here the officer’s powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do. . . .”²⁰⁸

Even in the international arena it has been held that every state has an absolute right to prosecute and punish crimes that are universally condemned wherever they occur. For example, as indicated by the Supreme Court of Israel in *Attorney General of Israel v. Eichmann*, and echoed by *In the Matter of the Extradition of John Demjanjuk*,²⁰⁹ the universal character of the crimes in question vests in every state the authority to prosecute allegations that someone has misused his or her authority in violation of the rule of law outlawing the institution of slavery. In granting extradition of John Demjanjuk to Israel for war crimes committed during World War II, the latter court stated:

International law provides that certain offenses may be punished by any state because the offenders are “common enemies of all mankind and all nations have an equal interest in their apprehension and punishment.” Universal jurisdiction over certain offenses is established in international law through universal condemnation of the acts involved and general interest in cooperating to suppress them, as reflected in widely-accepted international agreements and resolutions of international organizations. Piracy is the paradigm

205. *Siderman*, 965 F.2d at 714 (noting that torture is violation of *jus cogens* norm); *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 133-37 (E.D.N.Y. 2005) (quoting M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY, IN CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW 107-08 (Roy Gutman & David Rieff, eds., 1999) (noting *jus cogens* norms have existed in customary international law for over half a century)); see also RESTATEMENT (THIRD), *supra* note 184, at § 702 (Reporter’s notes indicate slavery is a *jus cogens* norm that may not be disregarded at any time, including time of emergency).

206. *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1106 (9th Cir. 1990), *abrogated by*, *Santamar v. Yousuf*, 130 S. Ct. 2278 (2010).

207. *Id.*; see also *In re Estate of Ferdinand Marcos*, 25 F.3d at 1472; *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992). In so holding, the Ninth Circuit correctly observed that the FSIA only provides immunity for government officials who act in their official capacities, but “will not shield an official who acts beyond the scope of his authority.” *Chuidian*, 912 F.2d at 1106; *Enahoro v. Abubakar*, 408 F.3d 877, 893 (7th Cir. 2005) (Cudahy, J., dissenting); *Princz*, 26 F.3d at 1179 (Wald, J., dissenting).

208. *Chuidian*, 912 F.2d at 1106 (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949)).

209. *Attorney General of Israel v. Eichmann*, 36 I.L.R. 277, 298 (S. Ct. 1962) (Isr.); *Extradition of Demjanjuk*, 612 F. Supp. 544 (D.C. Ohio 1985).

of an offense “against the common law of nations”. *Other crimes which are universally condemned include participation in the slave trade* and attacks on or hijacking of aircraft. The power to try and punish an offense against the common law of nations, such as the law and customs of war, stems from the sovereign character of each independent state, not from the state’s relationship to the perpetrator, victim or act.²¹⁰

Following this reasoning the Obama Administration could effectively argue in a future statement of interest that application of the *jus cogens* doctrine to prevent a diplomat from violating higher law would not limit even a current diplomat’s proper authority or immunity under the Convention. Instead, such a determination would merely indicate that the diplomat has engaged in acts that no sending state or its representative can expect to be protected from civil or criminal liability.²¹¹

C. Limitations to Giving Federal Court Recognition to the *Jus Cogens* Doctrine

Although an argument can be made for broader recognition of the *jus cogens*, decisions prior to *Baoanan* must also be addressed. *Sabbithi v. Al Saleh*²¹² highlights how the Bush Administration had the opportunity to set the course for courts to follow when examining the conflict between diplomatic immunity and the rule of law. However, the position the Bush Administration took significantly hardened the road victims of human trafficking must travel to obtain equal justice through the federal court system.

In *Sabbithi*, the court examined whether the *jus cogens* doctrine, the Thirteenth Amendment, and the TVPA were reliable authority in the United States to combat human trafficking.²¹³ The plaintiffs argued that the defendants’ human trafficking conduct violated these watershed anti-slavery and trafficking laws, and as such, defendants’ diplomatic immunity pursuant to the Convention should have been denied.²¹⁴ As in *Baoanan*, the court invited the executive branch, under President Bush, to provide a Statement of Interest reflecting the government’s view on the issues in this case exposing the conflict of diplomatic immunity and the *jus cogens* doc-

210. *Demjanjuk*, 612 F. Supp. at 566 (citations omitted) (emphasis added).

211. RESTATEMENT (THIRD), *supra* note 184, at § 111, cmt. a (“In their character as law of the United States, rules of international law and provisions of international agreements of the United States are subject to the Bill of Rights and other prohibitions, restrictions, and requirements of the Constitution, and cannot be given effect in violation of them.”).

212. *Sabbithi*, 605 F. Supp. 2d at 122.

213. BALES AND SOODALTER, *supra* note 6, at 39.

214. *Sabbithi*, 605 F. Supp. 2d at 123.

trine.²¹⁵ The defendants submitted various documents from the Bush Administration that confirmed the defendants were diplomats immune from suit pursuant to the Convention.²¹⁶

Nevertheless, the plaintiffs contended that the defendants should not be afforded diplomatic immunity because: (1) the defendants' conduct fell within the commercial activities exception to immunity under the Convention; (2) the Thirteenth Amendment overrides diplomatic protection under the Convention; (3) defendants' acts of trafficking were so "egregious" they violated *jus cogens* norms prohibiting slavery and slavery-like practices; and (4) the "subsequent-in-time" rule gave precedent to the TVPA over defendants' immunity pursuant to the Convention.²¹⁷ The *Sabbithi* court rejected the plaintiffs' commercial activity argument based on the Statement of Interest submitted by the Bush Administration.²¹⁸ The court failed to give credence to the plaintiffs' arguments pursuant to the subsequent-in-time rule because "[i]n the view of the United States, the TVPA does not override diplomatic immunity. First, the TVPA is silent as to whether it limits the immunity of diplomats, and courts should not read a statute to modify the United States' treaty obligations in the absence of a clear statement from Congress."²¹⁹ Further, the court rejected plaintiffs' constitutional claims that the Thirteenth Amendment, perhaps the most significant anti-slavery law in this country, must "give way to defendants' diplomatic immunity."²²⁰

The court also rejected the plaintiffs' argument that *jus cogens* norms precluded applicability of the Convention to shield the defendants' conduct. The *Sabbithi* court specifically indicated that the defendants' conduct did not constitute human trafficking, and thus no *jus cogens* norm was at issue.²²¹ The court went on to state, in addition, "[i]n the view of the . . . [Bush Administration], there is no *jus cogens* exception to diplomatic immunity" and "there is not evidence that the international community has come to recognize a *jus cogens* exception to diplomatic immuni-

215. *Id.* at 125. The State Department had previously closed its investigation into Sabbithi's criminal charges, because Kuwait declined to waive the defendants' immunity in response to the Department of Justice's request that diplomatic immunity be waived.

216. *Id.* at 126.

217. *Id.* at 127.

218. *Id.* at 128.

219. *Id.* at 130.

220. *Sabbithi*, 605 F. Supp. 2d at 129 (citing *Persinger v. Islamic Repub. of Iran*, 729 F.2d 835 (D.C. Cir.1984) (vacating earlier opinion and affirming the district court's dismissal of actions alleging violations of treaties and of international, constitutional, and common law)); *Weinstock v. Asian Dev. Bank*, 2005 WL 1902858 (D.D.C. July 13, 2005) (dismissing action seeking redress for constitutional violations based on defendants' immunity under the International Organizations Immunity Act of 1945); *Ahmed v. Hoque*, 2002 WL 1964806 (S.D.N.Y. August 23, 2002) (holding that plaintiff's Thirteenth Amendment claim did not trump defendants' diplomatic immunity).

221. *Sabbithi*, 605 F. Supp. 2d at 129; see also *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187 (enforcing diplomatic immunity over plaintiff's claim that defendants violated *jus cogens* norms).

ty.”²²² The court nevertheless recognized that limiting human-trafficking victims’ access to the courts may have harsh implications, including even the denial of legal or monetary relief.²²³ As the court noted, applying the doctrine of diplomatic immunity inevitably “deprives others of remedies for harm they have suffered.”²²⁴ Finally, the *Sabbithi* court stated:

Congress . . . is the appropriate body for plaintiffs to present their concerns that the effectiveness of enforcing fair labor practices in the United States is compromised by diplomatic immunity. This court will not create new exceptions to the longstanding policy of diplomatic immunity. . . . And the law that binds this Court states that “[a]ny action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Convention . . . shall be dismissed.”²²⁵

Since the *Sabbithi* decision there have not been any other decisions reflecting a court’s consideration of the *jus cogens* doctrine’s applicability to trafficking claims asserted against a current diplomat. Additionally, unlike the *Baoanan* court, the *Sabbithi* decision failed to distinguish between liability that might be imposed against former diplomats as opposed to the broader protection granted by the Convention to current diplomats.²²⁶ Therefore, without further intervention by the Obama Administration in such actions during the remainder of the President’s term in office, the law may not evolve to protect trafficking victims.

Another judicial obstacle to broader application of the *jus cogens* doctrine is set forth in *Princz v. Federal Republic of Germany*. In that case, Hugo Princz, a Holocaust survivor, brought suit in United States district court against Germany, alleging that sovereign immunity is negated when there is a violation of a *jus cogens* norm.²²⁷ The district court agreed with Princz, holding that a federal court had subject matter jurisdiction, notwithstanding the FSIA’s codification of the theory of sovereign immunity.²²⁸ The United States Court of Appeals, District of Columbia Circuit, reversed Judge Sporkin of the district court, holding that the FSIA precludes a United States national from suing a foreign sovereign.²²⁹ In fact, current Supreme Court Justice Ginsburg, then Judge Ginsburg, writing for the majority in *Princz*, stated that allowing a *jus cogens* violation to impli-

222. *Sabbithi*, 605 F. Supp. 2d at 129 (citing *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia*, [2006] UKHL 26, [2007] 1 A.C. 270, 271 (U.K.)).

223. *Id.* at 129.

224. *Id.* at 130 (quoting *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 980 (D.C. Cir. 1965)).

225. *Id.* at 126 (quoting *Gonzalez Paredes*, 479 F. Supp. 2d at 195).

226. *Id.* at 122.

227. *Princz*, 26 F.3d at 1168.

228. *Id.*

229. *Id.* at 1176 (Wald, J., dissenting).

citly waive a government's immunity would result in an abundance of lawsuits against multiple countries, thus placing a strain on United States diplomatic relations.²³⁰

Judge Patricia Wald's dissent in *Princz* has been frequently cited as the proper response to the limited view courts have given to the notion of extending the *jus cogens* doctrine.²³¹ Judge Wald stated that when a *jus cogens* violation is involved, the requirement of a clear intent to implicitly waive immunity does not apply.²³² Judge Wald argued that "international law is part of our law."²³³ Therefore, since international law would deny immunity to a country that has violated a *jus cogens* norm, the United States, in order to remain consistent with international law, should also deny immunity.

Finally, another argument against greater recognition of the *jus cogens* doctrine has been that the conduct that constitutes *jus cogens* norms and how violations are to be punished are ill-defined, and the consequences attached to the classification of certain human rights among *jus cogens* norms remain unsettled:

Reliance on the notion of *jus cogens* norms is made difficult, however, by two factors. First, the list of human rights included among norms of that nature remains ill defined. Norms which have the status of *jus cogens* are to be identified on the basis of the evolution of the understanding of the international community. . . . This list is therefore in constant evolution, and it would be both erroneous and counter-productive to seek to provide an authoritative classification. . . . A second obstacle to relying more systematically on *jus cogens* is that the consequences attached to the classification of certain human rights among *jus cogens* norms remain debated.²³⁴

Accordingly, the concern illustrated by the latter commentary, *Sabbithi*, and *Princz* is that the *jus cogens* doctrine has not achieved full or consistent recognition in United States or international courts. As noted by David Heffernan, "the Third Restatement, in clarifying the Vienna Convention's definition, emphasizes that a norm does not lose its preemptory character in the face of the dissent of a few nations, so long as a substantial

230. *Id.* at 1174 n.1 (majority opinion).

231. See, e.g., Jordan J. Paust, *Accountability for the Torture Memo Civil Liability of Bush, Cheney, Et Al. for Torture, Cruel, Inhuman, and Degrading Treatment and Forced Disappearance*, 42 CASE W. RES. J. INT'L. L. 359, 373 n.49 (2009) (referencing Wald's dissent as support for the argument that the doctrine of sovereignty of the state cannot be applied to acts which international law condemned as criminal.).

232. *Princz*, 26 F.3d at 1178.

233. *Id.* at 1183.

234. DE SCHUTTER, *supra* note 141, at 64, 68.

majority of nations recognize it.”²³⁵ Furthermore, what cannot be denied is that slavery has been denounced as a violation of human rights which no civilized society can condone.²³⁶ United States courts also have authorization to exercise jurisdiction over claims of slavery brought against diplomats because slavery is one of the few universal jurisdiction crimes.²³⁷ Indeed, the *Restatement (Third) of Foreign Relations Law for the United States* characterizes slavery as an international crime: “A state violates international law if, as a matter of state policy, it practices, encourages or condones slavery or the slave trade as well as other human rights violations.”²³⁸ Finally, according to the United States Supreme Court, “it is well established that ‘no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.’”²³⁹

Conflicting application of the *jus cogens* doctrine only serves to undermine its validity while shielding diplomats’ rogue conduct.²⁴⁰ Assuming that the FSIA does apply to government representatives such as diplomats, immunity would not attach to violations of *jus cogens* norms because such acts can never be within the lawful scope of an official’s authority. Following this line of reasoning, decisions such as *Baoanan* and its progeny could be applied to strip current and former diplomats of immunity for unofficial acts that violate rules of law such as the *jus cogens* doctrine. Moreover, to ensure that application of the *jus cogens* doctrine does not conflict with the Convention, its immunity components should only be ignored to the extent they permit a diplomat to violate universally-recognized and protected human rights:

[T]he logics under which each of these mechanisms operate are not systemically opposed to one another: where a treaty is not per se in violation of a *jus cogens* requirement but may lead to certain decisions being adopted which result in such a violation, only those decisions shall have to be considered invalid, while the treaty itself will remain in force. . . . As noted by the International Law Commission in the course of the discussion of the Draft Ar-

235. David Heffernan, Comment, *America the Cruel and Unusual? An Analysis of the Eighth Amendment Under International Law*, 45 CATH. U. L. REV. 481, 550-51 (1996) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, reporter’s note 6 (1987)).

236. Heffernan, *supra* note 235, at Section II (b).

237. Winston P. Nagan & Alvaro de Medeiros, *Old Poison In New Bottles: Trafficking And The Extinction Of Respect*, 14 TUL. J. INT’L & COMP. L. 255, 258 (2006) (“Notwithstanding the fact that since the nineteenth century slavery has been a universal crime in international law, the ubiquity and variability of its practices have required a specific and consistent prescription of both international and domestic norms seeking to control both slavery and slave-like practices, including trafficking.”).

238. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

239. *Boos*, 485 U.S. at 324 (citing *Reid v. Covert*, 354 U.S. 1, 16 (1957)).

240. *Jus cogens* norms “enjoy the highest status within international law.” Comm. of U.S. Citizens Living in Nicar. (CUSCLIN) v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988).

ticles on State Responsibility: ‘one might envisage a conflict arising on a subsequent occasion between a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. If such a case were to arise it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen.’²⁴¹

In condemning trafficking in persons, Congress emphasized that “the right to be free from slavery and involuntary servitude is among [the] inalienable rights” of all human beings.²⁴² Indeed, then-Senator Obama referred to human trafficking as “a debasement of our common humanity” that we have to eradicate in all countries.²⁴³ Recognition of these principles should guide United States courts to clarifying broader application of the *jus cogens* doctrine to limit diplomatic immunity when ruling on claims of human trafficking in this country.

V. CONCLUSION

A. Predicting Obama’s Legacy

At a time when our nation’s current president must deal with an economic recession, repair intergovernmental relations strained during the Bush presidency,²⁴⁴ and fight the war against terrorism on multiple fronts, it is difficult to fathom how much he will be able to focus on the daunting

241. DE SCHUTTER, *supra* note 141, at 61 (comparing J. Combacau, *Logique de la validité contre logique d’opposabilité dans la Convention de Vienne sur le droit des traités in Mélanges M. Virally 195-203* (Paris: Pedone, 1991) and *Official Records of the General Assembly, Fifty-sixth Session, Supplement 10 (A/56/10)*, commentary to Art. 40 of the Draft Articles on State Responsibility, para. (3)).

242. TVPA, *supra* note 5, § 7102 (23) (“The international community has repeatedly condemned slavery and involuntary servitude.”).

243. *See, generally*, TIP Report, *supra* note 23. As noted in the 2010 TIP Report, the Obama Administration has ramped up efforts to combat abuses of diplomatic immunity to escape liability under the TVPA and similar anti-slavery statutes. While attempting to navigate international relations, Obama must also overcome judicial hurdles to establishing the *jus cogens* doctrine as fully applicable to limit the ability of current diplomats to skirt responsibility for violating the TVPA and any similar anti-trafficking rule of law.

244. Oxford Analytica, *Anti-American Sentiment Grows Worldwide*, FORBES, Aug. 23, 2007, available at http://www.forbes.com/2007/08/22/bush-anti-americanism-cx_0823oxfordanalytica.html. The article notes:

In a March 2007 survey of 28,000 people in 27 countries conducted for the BBC World Service by GlobeScan and the University of Maryland’s Program on International Policy Attitudes, only Israel, Iran and North Korea were perceived as having a more negative influence than the United States on world affairs. During 2002-06, European views of the desirability of U.S. leadership in world affairs has declined from 64% to 37%, while its undesirability has risen from 31% to 57%. Former U.S. National Security Adviser Zbigniew Brzezinski gives Bush an ‘F’ for his ‘catastrophic leadership’ in world affairs in his new book, *Second Chance*.

task of balancing the rights of the privileged few with the millions who have been marginalized by a literal and rigid adherence to the doctrine of diplomatic immunity.²⁴⁵ To overcome this struggle Obama should heed the words of Martin Luther King Jr. in his Letter from Birmingham Jail: “An Unjust Law Is No Law at All.”²⁴⁶ Just as the Black Codes and Jim Crow Laws were unjust laws advanced to benefit a privileged few despite their undeniable conflict with the Emancipation Proclamation and the Thirteenth Amendment, Obama should lead the dialogue to denounce abuses of diplomatic immunity particularly when used to violate *jus cogens* norms. In essence, his Administration has already taken up this gauntlet by rating for the first time the United States’ efforts to combat human trafficking.²⁴⁷

Yet, there are other steps President Obama can take to ensure more accountability for diplomats who flaunt the law and access or their victims to protection. The President’s administration must inspect those responsible for harming others through use of their corrupted authority, and invest his executive powers into more public discourse about the scourge of human trafficking.

As set forth in the 2010 TIP Report “[t]here are cases of domestic workers, foreigners on A3 and G5 visas, being subjected to trafficking-related abuse by diplomats posted to the United States.”²⁴⁸ In light of this documented fact, the Obama Administration should create more stringent measures to oversee the State Department’s annual issuance of approximately 3,500 A3 and G5 visas.²⁴⁹ In the ACLU’s statement before the House Foreign Affairs Committee the organization noted:

245. Kouame’ Adou, *The Impact of Barack Obama’s Election on the Transatlantic Slavery Debate* 6-7, *Revue Ivoirienne de Langues Etrangères* 1 (2010) (“It seems clear that he will take action to correct racial inequalities so that America moves towards a more just society. However, it is necessary to emphasize that for most Americans, this issue, as worrying as it is, is not a priority for the new American president. In fact, the economic recession, the relations of the United States with countries such as Iraq and Afghanistan and the U.S. budget deficit appear to be the essential points of his mandate. We cannot say that the new president will plead for a new world order but he will likely seek to establish peaceful and friendly relations with the rest of the world unlike his predecessor George W. Bush, who was conspicuous for his unilateralism as a result of the attacks of September 11, 2001. However, these priorities cannot sidestep the embarrassing issue of race and compensation claimed by the black community. Indeed, it is worth noting that the arrival of Barack Obama in the White House is a breakthrough in the interracial relations even if this does not mean that racism has completely disappeared in the United States.”).

246. Letter from a Birmingham Jail, Martin Luther King, Jr. (Apr. 16, 1963), *republished by African Studies Center – University of Pennsylvania, available at* http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

247. 2010 TIP REPORT, *supra* note 23, at 338 (“The United States is a source, transit, and destination country for men, women, and children subjected to trafficking in persons, specifically forced labor, debt bondage, and forced prostitution.”). Recommendations that the State Department made in the Report to address diplomatic abuses included briefing domestic workers in the United States assigned to foreign diplomats of their labor rights.

248. *Id.* at 339.

249. U.S. DEP’T OF STATE, 9 FOREIGN AFFAIRS MANUAL § 41.21 n.6 (2009), *available at* <http://www.state.gov/m/a/dir/regs/fam/09fam/index.htm>.

Currently, because of a lack of oversight and accountability, the visa program enables diplomats to traffic and exploit these workers.

Indeed, in recent years, foreign diplomats have perpetrated some of the worst trafficking abuses reported in the United States. Media reports of severe abuse and exploitation by diplomats of their domestic workers in the United States have become increasingly commonplace. Yet, without exception, none of these diplomat traffickers have been brought to justice through criminal prosecutions nor have their domestic workers succeeded in holding them civilly accountable. Diplomatic immunity shields them from criminal or civil jurisdiction in the United States. As a result, their victims are unprotected and unable to seek the restitution and redress provided by the TVPA. The effect of diplomatic immunity is that, under the cover of foreign relations, diplomat employers can enslave their workers with indifference to our constitutional and statutory prohibitions on slavery, without repercussion.²⁵⁰

The sheer number of visas issued and the laxity of enforcement affords diplomats and employees of international organizations the opportunity to traffic domestic workers into the United States with limited restrictions.²⁵¹ Thus, as highlighted by *Baoanan*, a more stringent review of the documentation diplomats submit to bring workers into this country might aid victims of trafficking in their fight against mistreatment and subjugation into slave-like conditions and deter diplomats from abusing their domestic workers with impunity.

Diplomats have abused their virtually unregulated ability to bring predominantly female domestic workers into the United States under an A3 or G5 visa, only to confiscate the workers' legal documents. Thereafter, the workers are subjected to horrific physical, verbal, and sexual abuse.²⁵² According to Bales and Soodalter, foreign diplomats and employees tied to the World Bank, United Nations, and the International Monetary Fund must be subject to increased scrutiny.²⁵³ In their informative book on human trafficking in the United States today, Bales and Soodalter note:

250. ACLU, *supra* note 98, at 3-4.

251. Friedrich, *supra* note 58, at 1142.

252. *Id.* at Section II (c); see also Human Rights Watch, *Hidden in the Home: Abuse of Domestic Workers with Special Visas in the United States* (2001), available at <http://www.hrw.org/reports/2001/usadom/usadom0501.pdf>.

253. BALES AND SOODALTER, *supra* note 7, at 38; see also Freeman Klopott, *World Bank Economist Paying \$41k Back to Servant*, WASH. EXAM'R, June 18, 2010, <http://washingtonexaminer.com/local/crime-and-punishment/world-bank-economist-paying-41k-back-servant>; see also U.N. Comm'n on Human Rights, Written Statement Jointly Submitted by Global Rights and the ACLU, Non-governmental Organizations in Special Consultative Status (Apr. 7, 2005), available at <http://>

It is estimated that some thirty thousand workers have come to the United States on these visas over the past ten years, but no one knows how much abuse occurs at the hands of diplomats, since no government agency tracks cases. In 2007 the State Department issued one thousand visas for personal servants of diplomats. Some diplomats brought in two or even three servants. While the diplomat has to show a contract for the worker in order to get the special visa, no one ever checks to see if the terms of these contracts are kept. Carol Pier of Human Rights Watch explained, 'The special visa program allowing international agencies and embassies to sponsor the workers is at the heart of the problem. It leaves migrants very vulnerable to serious abuse . . . Most workers do not speak English and do not know where to go or how to complain. But if they do complain, and they're still with their employers, they risk being fired, losing their legal status and being deported, which scares them more.' When a foreign diplomat is discovered to be enslaving his servant, he's protected by diplomatic immunity. Normally, in the event of a scandal, diplomats will simply be called home or reassigned outside the United States, with the care and support of the domestic slaves they have victimized falling on charities and the taxpayer. Occasionally, a freed slave is able to win a judgment for back wages in a U.S. court, but collecting that award usually proves impossible.²⁵⁴

Therefore, the most effective way that the Obama Administration can combat slavery at our doors is not to allow it in or to more heavily scrutinize diplomats when they bring domestic workers into this country.

The ACLU also made suggestions in its Statement before the House Foreign Affairs Committee that are consistent with those made herein and the observations of Bales and Soodalter:

The United States can prevent such rampant abuse, exploitation and trafficking by ensuring that (1) domestic workers are informed of their rights in the U.S. and of resources available to them, and (2) that diplomat employers are aware of their obligations under U.S. law as employers and as visa sponsors. In addi-

www.aclu.org/files/assets/aclu.statement.solitary.confinement.unhrc_19th.session.feb_2012.pdf ("Even after the Special Rapporteur on Migrant Workers reported to the UNCHR in 2004 cases of human rights abuses 'involving women working for diplomatic staff or staff in international organizations many migrant domestic workers employed by the United Nations' own staff and the staff of country missions to the UN are still suffering exploitation and being denied their human rights.'").
254. BALES & SOODALTER, *supra* note 7, at 38; *see also* Skinner, *supra* note 59 (quoting Mark Lagon, former trafficking ambassador for the United States: "Alleged strategic interests that some argue are the reason for downplaying the abuse of trafficking victims are generally a mirage.").

tion, the U.S. government can improve oversight over the visa program.

When prevention fails, and the diplomat employer violates the terms of the employment contract with the domestic worker, he or she must be held accountable. A narrowly tailored and limited remedy, premised on a voluntary waiver of immunity, is appropriate and necessary.²⁵⁵

As part of the ACLU's model legislation presented to the House Foreign Affairs Committee, recommendations were made that the TVPA be revised to require, *inter alia*, the State Department to develop a detailed model employment contract containing uniform provisions that provide the terms and conditions of the employment relationship between the employer and the A3 or G5 visa recipient as well as liability for violation of the terms of the contract; hold mandatory consular interviews with the domestic workers; and maintain information about the presence of A3 and G5 domestic workers in the United States, including a copy of the employment contract, and other contact information.²⁵⁶ If these types of steps are taken by the Obama Administration to oversee the employment relationship between the diplomat and domestic worker, the government should be able to ensure compliance with important immigration regulations,²⁵⁷ increase the ability of litigants like Baoanan to obtain evidence that their employment treated or conditions are outside the scope of the Convention, and provide them with contacts outside the walls of the diplomat's home or embassy.

The president has been regarded as having the "authority to speak as the sole organ of the government."²⁵⁸ President Obama must use all of the tools in the arsenal of the commander-in-chief to lead the fight against human trafficking in memory of generations of Americans affected by this original sin and the millions of victims presently in the world. Obama should speak out about the reality reflected in the 2010 TIP Report that as various nations' economies become global and integrated, more products and services make the United States a point of origin and destination for victims of trafficking. Free the Slaves and the Human Rights Center at

255. ACLU, *supra* note 98, at 6.

256. ACLU, *supra* note 98, at 6-7.

257. Chuang, *supra* note 18, at 1644.

258. *Id.*; see also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432-33 (1964), *superseded by statute as stated in Industrial Inv. Development Corp. v. Mitsui and Co. Ltd.*, 594 F.2d 48 (5th Cir. 1979). *Sabbatino* stated:

When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns.

Id.

the University of California, Berkeley concluded on the issue of the scope of slavery that forced labor prevailed in five sectors of the American economy: prostitution and sex services (46%), domestic service (27%), agriculture (10%), sweatshop factory work (5%), and restaurant/hotel work (4%).²⁵⁹ Bales has also noted that slavery pervades every day American life in ways that may not be realized: "Slavery in the product chains of the food we eat, the clothes we wear, and the cars we drive is an ugly blot on our lives."²⁶⁰

In addition to engaging in more public dialogues about the proximity of victims of human trafficking to everyday American life, Obama must help increase funding for combating human trafficking, even at this time of economic uncertainty: "In the US only a tiny fraction of law enforcement resources are directed at slavery and trafficking, in spite of the fact that as many people are newly enslaved each year in the US, according to US government estimates, as are murdered."²⁶¹ More manifestations of slavery are understood today as constituting human trafficking and, as a result, the United States legislature must logistically and financially reassess the criteria it uses to support anti-trafficking efforts. Human trafficking and slavery must be given proper deference as untenable acts by anyone, irrespective of their superior political or economic clout. Thus, a higher law of human conduct must override recognition of diplomatic immunity in light of allegations of involuntary servitude. In most countries, non-governmental organizations (NGOs) lead the fight against human trafficking, but it is time that leadership was turned around or more greatly supported. Obama may help strengthen NGOs by linking their efforts to local, faith-based organizations dedicated to helping individuals often victimized by traffickers.²⁶²

Finally, equal justice demands equal enforcement of anti-trafficking laws. According to Dr. Lois Lee, founder and president of Children of the Night, the federal government still focuses more on prostitution than other forms of modern slavery.²⁶³ The 2010 TIP Report notes in its intro-

259. Panjabi, *supra* note 6, at 14-15 (citing Free the Slaves & Human Rights Ctr., *Hidden Slaves: Forced Labor in the United States*, at 2, CORNELL UNIV. ILR SCHOOL (2004)); see also Elissa Steglich, Address at Princeton University's Woodrow Wilson School Conference: Defining Trafficking Concepts from the States (Dec. 1, 2006), available at http://uc.princeton.edu/main/index.php?option=com_content&task=view&id=1341; BALES, *supra* note 9, at 201; Off. to Monitor and Combat Trafficking in Persons, *How Can I Recognize Trafficking Victims?*, U.S. DEP'T. OF STATE (July 28, 2004), <http://www.state.gov/g/tip/rls/fs/34563.htm>.

260. Panjabi, *supra* note 6, at 15

261. Free the Slaves, *supra* note 6.

262. *Obama Vows to Expand Bush's Faith-Based Programs*, HUFFINGTON POST, July 7, 2008, available at http://www.huffingtonpost.com/2008/07/01/obama-plans-to-expand-bus_n_110140.html.

263. E-Mail from Dr. Lois Lee, Founder & President, Children of the Night, to Assistant Professor of Law Derrick Howard, Appalachian School of Law (June 11, 2010) (on file with the Appalachian School of Law Library).

duction that “no country has yet attained a truly comprehensive response to this massive, ever increasing, ever changing crime,” and that includes the United States.²⁶⁴ To ensure continuity in national and state efforts to combat human trafficking the Obama Administration should invest some of the resources of his office into stressing the need for uniform laws throughout the states and international community against the practice. Forty-two states have enacted specific anti-trafficking statutes using varying definitions and a range of penalties.²⁶⁵ A more concerted effort to coordinate state and local law enforcement to recognize and prosecute all forms of human trafficking in the remaining states should have a positive impact on reducing the problem. In addition, President Obama should invest his cabinet’s time into ratifying treaties that improve the courts’ ability to broaden the reach of the *jus cogens* doctrine.²⁶⁶

B. *Striving For Human Progress*

The international effort to eradicate human trafficking in all its manifestations has only become more prominent in this country during the past decade.²⁶⁷ This process is one that must be continually advanced even if its completion does not come to fruition during Obama’s presidency. However, a failure to do anything opens the door for violations of other *jus cogens* norms, even in light of modern society’s collective recognition that slavery is an unacceptable practice in which no nation, ruler or diplomat may engage. The Obama Administration has already made a mark on the fight against human trafficking, but the dialogue and outcome can be more greatly influenced if Obama focuses on further influencing the courts to reconcile diplomatic immunity and the rule of law.²⁶⁸

264. 2010 TIP Report, *supra* note 23, at 5 (“Ten years of focused efforts is the mere infancy of this modern movement; many countries are still learning about human trafficking and the best responses to it.”).

265. *Id.* at 339.

266. Carter, *supra* note 44; see also United States Senate, *Executive Agreements, Treaty Termination, Status as Law* (Jan. 20, 2011), available at <http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm#4>. The article notes:

In addition to treaties, which may not enter into force and become binding on the United States without the advice and consent of the Senate, there are other types of international agreements concluded by the executive branch and not submitted to the Senate. These are classified in the United States as executive agreements, not as treaties, a distinction that has only domestic significance. International law regards each mode of international agreement as binding, whatever its designation under domestic law.

Id.

267. OSIATYŃSKI, *supra* note 47, at 34. OSIATYŃSKI states:

After the August 1, 1975, signing of the Final Act of the Helsinki Conference on Security and Cooperation in Europe, human rights became an accepted standard of international conduct. The signatory states could monitor the observance of human rights and appeal for enduring violations of rights by other governments that were party to the Agreement.

Id.

268. Larry Luxner, *Oppressed Nannies: State Department Orders Embassies to Clean Up Their*

During his presidential campaign, Obama linked his candidacy to President Abraham Lincoln, Obama's political inspiration.²⁶⁹ Obama spoke at Cooper Union in New York²⁷⁰ to call for major economic reforms in light of this nation's latest recession.²⁷¹ Obama stated, "Our free market was *never* meant to be a free license *to take what you can get, however you can get it.*"²⁷² Although his speech was presented to address a different dilemma, it implies how his legacy might mirror one of Lincoln's greatest civil rights achievements—issuance of the Emancipation Proclamation. Because of the growing number of individuals subjugated through modern-day slavery and trafficked throughout the world in 2010,²⁷³ the reality is that slavery's specter will never withdraw from this country or abroad unless the fragile rights of the oppressed are deemed more precious than those of their morally bankrupt oppressors.²⁷⁴

President Lincoln reflected on the need to protect this inherent right in his speech at Edwardsville, Illinois, on September 11, 1858: "Our reliance is in the love of liberty which God has planted in our bosoms. Our defense is in the preservation of the spirit which prizes liberty as the heritage of all men, in all lands, everywhere."²⁷⁵ This country's original sin may only be purged when no one, irrespective of their title, wealth or cloak of authority, is allowed to deprive another of inalienable human rights.²⁷⁶ Without such an unwavering stance protecting this universal heritage Lincoln recognized nearly 160 years ago, we will be helpless to prevent a

Act, WASH. DIPLOMAT, Feb. 2010, available at http://www.washdiplomat.com/index.php?option=com_content&view=article&id=6064:oppressed-nannies-state-department-orders-embassies-to-clean-up-their-act-&catid=203:february-2010&Itemid=241.

269. Mike Dorning, *Obama Team Emphasizing Lincoln Connection in Inauguration*, CHI. TRIB., Jan. 18, 2009, available at http://www.chicagotribune.com/news/nationworld/chi-obama-lincoln_5jan18,0,4506325.story.

270. Michael Tomaso, Cooper Union's Place in Presidential History: Obama Returns to the Great Hall Where Lincoln Made History, *NBC N.Y. (Apr. 25, 2010 10:46 AM)* <http://www.nbcnewyork.com/news/local-beat/Cooper-Union-91855249.html>. This was the same location for Lincoln's anti-slavery oratory in the nineteenth century.

271. According to the *National Bureau of Economic Research* the current recession began in December 2007 more than two years before President Obama took office on January 20, 2009.

272. Phil Hirschhorn, *The Obama-Lincoln Parallel: A Closer Look*, CBS NEWS Politics (Jan. 17, 2009) <http://www.cbsnews.com/stories/2009/01/17/politics/main4731552.shtml> (emphasis added).

273. Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN'S L.J. 1, 5 (2004) ("[H]uman trafficking is also called 'modern day slavery.'"); Working Group on Contemporary Forms of Slavery, U.N. Econ. & Soc. Council [ECOSOC], U.N. Doc. E/CN.4/Sub.2/2003/31 (June 27, 2003) ("Forced labour is a contemporary form of slavery.").

274. BALES & SOODALTER, *supra* note 7, at 3.

275. *Selected Quotations by Abraham Lincoln*, ABRAHAM LINCOLN ONLINE (Oct. 26, 2010 11:50), <http://showcase.netins.net/web/creative/lincoln/speeches/quotes.htm>.

276. John F. Kennedy, *We Face a Moral Crisis: Civil Rights Message to Congress*, BLACKPAST.ORG (June 11, 1963), available at <http://www.blackpast.org?q=1963-john-f-kennedy-civil-rights-message> ("This Nation was founded by men of many nations and backgrounds. It was founded on the principle that all men are created equal, and that the rights of every man are diminished when the rights of one man are threatened.").

modern-day *Scott v. Sanford*²⁷⁷ at a time when international laws and mores objectively denounce slavery as one of the greatest crimes against humanity.²⁷⁸ Further, a failure to act may negatively juxtapose the legacy of Obama, the “Anointed One,”²⁷⁹ against that of the “Great Emancipator.”²⁸⁰

In October 2009, Obama became the fourth president to be awarded the Nobel Peace Prize.²⁸¹ Unlike his predecessors who received the same honor, Obama was the first president acknowledged in that way who had not even engaged in any efforts to end an international conflict. Yet, Obama is the only president to accept the award while obligated as commander-in-chief to manage two wars in Iraq and Afghanistan.²⁸² While accepting the prize, Obama spoke about the controversy his selection presented:

I am at the beginning, and not the end, of my labors on the world stage. Compared to some of the giants of history who have received this prize—Schweitzer and King; Marshall and Mandela—my accomplishments are slight. . . .

. . . .

277. *Scott v. Sanford*, 60 U.S. 393, 400–02 (1856), *superseded by statute*, U.S. CONST. amend. XIV, as stated in United States v. Summers, 2007 U.S. Dist. LEXIS 28797 (E.D. Mich. 2007).

278. Patricia M. Muhammad, *The Trans-Atlantic Slave Trade: a Forgotten Crime Against Humanity as Defined by International Law*, 19 AM. U. INT’L L. REV. 883, 915–47 (2004).

279. Kate Phillips, *McCain Ad Mocks Obama as ‘The One’*, N.Y. TIMES (Aug. 1, 2008), available at <http://thecaucus.blogs.nytimes.com/2008/08/01/mccain-ad-mocks-obama-as-the-one/>.

280. Robert Morgan, *The ‘Great Emancipator’ and the Issue of Race*, INSTITUTE FOR HISTORICAL REVIEW (Oct. 26, 2010, 12:04 PM), http://www.ihr.org/jhr/v13/v13n5p-4_Morgan.html. The article states:

Many Americans think of Abraham Lincoln, above all, as the president who freed the slaves. Immortalized as the “Great Emancipator,” he is widely regarded as a champion of black freedom who supported social equality of the races, and who fought the American Civil War (1861–1865) to free the slaves.

While it is true that Lincoln regarded slavery as an evil and harmful institution, it is also true . . . that he shared the conviction of most Americans of his time, and of many prominent statesmen before and after him, that blacks could not be assimilated into white society. He rejected the notion of social equality of the races, and held to the view that blacks should be resettled abroad.

Id.

281. *Factbox-U.S. Presidents Who Won Nobel Peace Prize*, REUTERS, <http://uk.reuters.com/article/2009/10/09/uk-nobel-peace-presidents-sb-idUKTRE5981WP20091009> (last visited Sept. 19, 2011). Presidents Theodore Roosevelt (1906), Woodrow Wilson (1919), and Jimmy Carter (2002) were also awarded the same honor.

282. Dan Balz, *Analysis: Obama is Wartime President Accepting Nobel Peace Prize*, WASH. POST (Dec. 11, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/10/AR2009121003991.html?nav=emailpage>; see also Michael Eisenstadt, *Why the Next President Will Be a Wartime Leader*, WASH. INST. FOR NEAR EAST POLICY (Nov. 3, 2008), <http://www.washingtoninstitute.org/print.php?template=C05&CID=2953>.

. . . Concretely, we must direct our effort to the task that President Kennedy called for long ago. “Let us focus, he said, “on more practical, more attainable peace, based not on a sudden revolution in human nature but on a gradual evolution in human institutions.” . . .

. . . .

. . . For peace is not merely the absence of visible conflict. Only a just peace based upon the inherent rights and dignity of every individual can truly be lasting.

It was this insight that drove drafters of the Universal Declaration of Human Rights after the Second World War. In the wake of devastation, they recognized that if human rights are not protected, peace is a hollow promise.

. . . .

. . . No matter how callously defined neither America’s interests—nor the world’s—are served by the denial of human aspirations.²⁸³

During his inauguration speech, President Obama stated,

[I]n the words of Scripture, the time has come to set aside childish things. The time has come to reaffirm our enduring spirit; to choose our better history; to carry forward that precious gift, that noble idea, passed on from generation to generation: the God-given promise that all are equal, all are free, and all deserve a chance to pursue their full measure of happiness.²⁸⁴

If he is to positively affect this nation’s and his legacy on the issue of human trafficking, he must live his words by championing the human right to be free from forced servitude irrespective of the perversion of diplomatic authority and the rule of law that currently exists.

283. Barack Obama, President of the U. S., Remarks by the President at the Acceptance of the Nobel Peace Prize, (Dec. 10, 2009), *available at* [http:// www.whitehouse.gov/ the-press-office/ remarks-president-acceptance-nobel-peace-prize](http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize).

284. Barack Obama, President of the U. S., President Barack Obama’s Inaugural Address (Jan. 20, 2009), *available at* [http:// www.whitehouse.gov/ blog/ inaugural-address/](http://www.whitehouse.gov/blog/inaugural-address/).

