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COMMENT

Swarna and *Baoanan*: Unraveling the Diplomatic Immunity Defense to Domestic Worker Abuse

EMILY F. SIEDELL*

I. INTRODUCTION

Providing individuals with the opportunity to redress wrongs committed against them is arguably one of the core purposes of a justice system.¹ However, this principle necessarily relies on the assumption that the accused party can be brought to court. Historically, plaintiffs bringing suits against diplomats have been denied this opportunity to redress wrongs by virtue of the diplomatic immunity defense. One highly visible area where this is particularly true is in the context of human rights and, more specifically, domestic worker abuse cases. These cases involve suits brought by domestic workers against their diplomat employers seeking overdue compensation or damages for mistreatment. However, diplomatic privileges, as codified under the Vienna Convention on Diplomatic Relations, provide diplomats with immunity from civil and criminal liability and thus courts have consistently struck down domestic workers' cases for lack of jurisdiction.² Yet, two recent cases, *Swarna v. Al-Awadi* and *Baoanan v. Baja*, indicate that the tide may be turning. In dismissing the defendants' claims of residual diplomatic immunity, the court in these two cases takes the first,

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1. LINDA S. FREY & MARSHA L. FREY, *THE HISTORY OF DIPLOMATIC IMMUNITY* 496 (1999).

2. Vienna Convention on Diplomatic Relations art. 31, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf; see *infra* Part II.A.

albeit conservative, step toward improved access to justice for domestic workers.³

By parsing details and definitions, *Swarna* and *Baoanan* hopefully represent the beginning of a trend in which courts strike down diplomatic immunity as a defense to domestic worker claims. However, in rejecting the diplomatic immunity defense, the court in these two cases creates the unintended consequence that the condemned behavior of former diplomats is condoned when committed by active diplomats. Thus, while these cases may help advance the rights of domestic workers, the unintended dichotomy they create may also finally force the hand of signatory countries to the Vienna Convention on Diplomatic Relations to enact an amendment or otherwise come to an agreement in which they limit diplomatic immunity for both active and former diplomats. Such an amendment would correct the perverse dichotomy and reflect the judicial trend articulated in *Swarna* and *Baoanan* such that domestic workers will have a stronger foundation on which to depend in bringing their grievances.

This article will explore the development and application of diplomatic immunity as defined by the Vienna Convention on Diplomatic Relations (VCDR). It will then review prior case law regarding claims brought by abused domestic workers against their employers, whether active or former diplomats. Finally, the article will explore the court's reasoning in *Swarna* and *Baoanan* and analyze the way in which these two cases provide for more equitable judicial outcomes, question the underlying purpose of diplomatic immunity, and further highlight the need to limit diplomatic immunity.

3. *Swarna v. Al-Awadi*, 607 F. Supp. 2d 509 (S.D.N.Y. 2009), *reconsideration denied*, 2009 WL 1562811 (S.D.N.Y. May 29, 2009), *aff'd in part, vacated in part, and remanded*, 622 F.3d 123 (2d Cir. 2010); *Baoanan v. Baja*, 627 F. Supp. 2d 155 (S.D.N.Y. 2009). In *Swarna v. Al-Awadi*, the Court of Appeals for the Second Circuit vacated the default judgment entered for the plaintiff by the District Court on the grounds that the defendants' default "was not willful but instead based on mistaken belief." 622 F.3d at 142–43. However, the Second Circuit upheld the substantive merits of the District Court's findings, specifically that residual immunity did not operate as a defense to *Swarna's* claims. *Id.* at 140.

II. BACKGROUND

A. *Development of the Diplomatic Immunity Doctrine and Application of the VCDR*

Diplomatic immunity can be traced back as early as ancient Greece when envoys were protected from harm by the receiving state due to possible reprisal by the sending state and retaliation by the gods.⁴ Necessity formed the basis of diplomatic immunity in that immunity allowed for the interaction and development of “rules and understanding underlying the practice of international politics.”⁵ From the time of antiquity forward, what had previously been courtesies bestowed upon envoys evolved into rights and eventually into precedent or tradition.⁶ Defining when and to what degree these privileges applied to envoys sent from other nations was regarded as an issue for legal determination.⁷

Many nations chose to approach the issue of diplomatic immunity by codifying the privileges, as was the case with the Vienna Convention on Diplomatic Relations,⁸ which became one of the most successful and widely supported conventions.⁹ The Vienna Convention’s preamble identifies that the purpose of the diplomatic immunity privilege “is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States”¹⁰ The Convention provides for protection for both the premises of the mission (which agents of the receiving state may not enter without permission from the head of the mission)

4. FREY & FREY, *supra* note 1, at 5–6. “Receiving state” refers to the country that is receiving a diplomatic envoy from another country whereas the “sending state” is the country sending that envoy.

5. *Id.* at 3 (citation omitted).

6. *Id.* at 4.

7. *Id.*

8. *Id.*; Vienna Convention on Diplomatic Relations, *supra* note 2, pmbl., 23 U.S.T. at 3230, 500 U.N.T.S. at 96.

9. J. CRAIG BARKER, *THE PROTECTION OF DIPLOMATIC PERSONNEL* 62–63 (2006). The VCDR has received the endorsement of the International Court of Justice which “expressed the view that the privileges and immunities of diplomatic and consular personnel were part of general international law.” Jonathan Brown, *Diplomatic Immunity: State Practice Under the Vienna Convention on Diplomatic Relations*, 37 INT’L & COMP. L.Q. 53, 53–54 (1988) (citing United States Diplomatic Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 31 (May 24)).

10. Vienna Convention on Diplomatic Relations, *supra* note 2, pmbl., 23 U.S.T. at 3230, 500 U.N.T.S. at 96.

and for individual diplomatic agents for which the Convention provides, “. . . 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.”¹¹ The Convention goes further to note, in Article 31, that diplomatic agents are immune from criminal, civil, and administrative jurisdiction with three narrow exceptions: a real action involving private property, an action regarding succession in which the diplomatic agent acts as a private person, and “an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.”¹² The VCDR also establishes the scope of immunity, and therefore liability, in other international agreements including the Headquarters Agreement governing the relationship between the United States and the United Nations.¹³

Diplomatic immunity has been asserted in a number of cases to prevent liability from attaching to a diplomat’s crime or otherwise illegal behavior. Examples range from a diplomat being immune to charges of speeding¹⁴ to preventing a court from having jurisdiction to undertake child protective proceedings in the case of children abused by their diplomat parents.¹⁵ Domestic worker cases are particularly vulnerable to claims of diplomatic immunity.¹⁶ Often the cases involve domestic workers hired and brought from their home countries to work for diplomats assigned to a particular country based on previously agreed upon terms and conditions of employment such as salary and vacation time.¹⁷ Unfortunately, there are instances in

11. *Id.* arts. 22, 29, 23 U.S.T. at 3259, 3262, 500 U.N.T.S. at 101, 103.

12. *Id.* art. 31, 23 U.S.T. at 3240–41, 500 U.N.T.S. at 103.

13. *Ahmed v. Hoque*, No. 01 Civ. 7224(DLC), 2002 WL 1964806, at *5 (S.D.N.Y. Aug. 23, 2002).

14. *Burkhardt v. Page-Sharp*, 91 N.Y.S.2d 290, 292 (New Rochelle City Ct. 1949).

15. *In re Terrence K.*, 524 N.Y.S.2d 996, 1000 (N.Y. Fam. Ct. 1988).

16. *See, e.g.*, Emily Dugan, *Diplomat’s Nanny Lifts Lid on Modern Slavery*, INDEP., Aug. 9, 2009; Sarah Fitzpatrick, *Diplomatic Immunity Leaves Abused Workers in the Shadows*, WASH. POST, Sept. 20, 2009, at A4; Petra Follmar, Daniela Hödl & Ulrike Mentz-Eickhoff, *Female Domestic Workers in the Private Households of Diplomats in the Federal Republic of Germany* (Sept. 2003), <http://www.ban-ying.de/downloads/cedaw%20engl.pdf>.

17. *E.g.*, *Paredes v. Vila*, 479 F. Supp. 2d 187, 189–90 (D.D.C. 2007); *Ahmed*, 2002 WL 1964806, at *1; *Tabion v. Mufti*, 877 F. Supp. 285, 286 (E.D. Va. 1995), *aff’d*, 73 F.3d 535 (4th Cir. 1996).

which the employers not only fail to live up to their promises, but also engage in behavior that extends into abuse.¹⁸

Like many other cases involving diplomats, cases brought by abused domestic workers have often been dismissed for lack of jurisdiction on account of diplomatic immunity asserted by the diplomat being charged, or otherwise have been unsuccessful for the domestic worker plaintiffs.¹⁹ In some cases, the use of the diplomatic immunity defense has been justified on policy grounds.²⁰ For example, the court in *Ahmed v. Hoque* accepted diplomatic immunity as a shield against liability in a case brought by a domestic worker noting that: “[t]his result is compelled for the reason that ‘by upsetting existing treaty relationships American diplomats abroad may well be denied lawful protection of their lives and property to which they would otherwise be entitled.’”²¹ This argument stems from the fact that diplomats are often stationed in areas where due process is not recognized, where legal procedures are prejudiced against diplomats, or where diplomats are frequently harassed.²²

In addition to jurisdictional issues and policy concerns, some cases have focused on whether the diplomats’ actions fit within the “commercial activity” exception of Article 31.²³ This exception

18. *E.g.*, *Tabion*, 877 F. Supp. at 286 (discussing a domestic worker, originally from the Philippines, who agreed to work in the United States for diplomats based on her understanding that she would receive minimum wage, overtime, and a reasonable work schedule. However, during her time working for the diplomats she was required to work sixteen hours a day at \$0.50 an hour with no overtime. Moreover, her passport was confiscated, and she was threatened with deportation, arrest, or dismissal if she attempted to leave the house); *Swarna v. Al-Awadi*, 607 F. Supp. 2d 509, 512–13 (S.D.N.Y. 2009), *reconsideration denied*, 2009 WL 1562811 (S.D.N.Y. May 29, 2009), *aff’d in part, vacated in part, and remanded*, 622 F.3d 123 (2d Cir. 2010) (discussing a domestic worker, originally from India, who agreed to come to the United States to work in the home of diplomats based upon an agreed salary of \$2,000 per month with vacation time. The domestic worker was only paid \$200 to \$300 per month, had her passport confiscated, was forbidden to leave the apartment or use the telephone to make calls, was called names, and was physically abused and raped).

19. *E.g.*, *Paredes*, 479 F. Supp. 2d at 195; *Tabion*, 877 F. Supp. at 292.

20. *See, e.g.*, *Ahmed*, 2002 WL 1964806, at *5 (citing 767 Third Ave. Assoc. v. Permanent Mission of Republic of Zaire to United Nations, 988 F.2d 295, 296 (2d Cir. 1993)).

21. *Id.*

22. FREY & FREY, *supra* note 1.

23. *See, e.g.*, *Paredes*, 479 F. Supp. 2d at 192–93; *Tabion*, 877 F. Supp. at 288. The commercial activity exception states that a diplomatic agent shall “enjoy

reflects a general prohibition on diplomats engaging in trade or having a second occupation while simultaneously serving as a representative of the sending state.²⁴ However, attempts to apply this exception in the context of domestic worker abuse cases have been largely unsuccessful.²⁵ For example, in *Paredes v. Vila*, one of the arguments advanced by the plaintiff, a domestic worker who brought suit against her former employers for breach of contract and unjust enrichment, was that the plaintiff's employment contract constituted a commercial and/or professional activity outside the diplomat's official functions.²⁶ Citing both to a Fourth Circuit opinion in the case of *Tabion v. Mufti* and to the Statement of Interest filed by the United States, the court found that "a contract for domestic services such as the one at issue in this case is not itself a 'commercial activity' within the meaning of Article 31(1)(c) of the Vienna Convention on Diplomatic Relations."²⁷

Ahmed and *Paredes* are just two illustrations of the type of reception diplomatic immunity-related cases receive in court. However, as will be explained below, these types of cases receive closer scrutiny and a more fact-intensive analysis when the diplomat being charged with the offense is a former rather than an active diplomat.²⁸

immunity from . . . civil and administrative jurisdiction, except in the case of . . . [a]n action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions." Vienna Convention on Diplomatic Relations, *supra* note 2.

24. EILEEN DENZA, *DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS* 473 (3d ed. 2008).

25. *See, e.g., Paredes*, 479 F. Supp. 2d at 193.

26. *Id.*

27. *Id.* at 193 (citing *Tabion v. Mufti*, 73 F.3d 535, 537 (4th Cir. 1996)). In deciding to give weight to the Statement of Interest filed by the United States government, the court noted that "the Supreme Court has held that 'although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.'" *Id.* (citing *United States v. Stuart*, 489 U.S. 353, 369 (1989)); *see also Sabbithi v. Al Saleh*, 605 F. Supp. 2d 122, 130 (D.D.C. 2009) (holding that employing plaintiff as a domestic worker did not constitute a commercial activity outside the official functions of the defendants).

28. *See Baoanan v. Baja*, 627 F. Supp. 2d 155, 161 (S.D.N.Y. 2009) (noting that Article 39 of the VCDR provides for a more restrictive form of immunity than that afforded under Article 31).

B. *Former Diplomats: Residual Immunity*

The Vienna Convention on Diplomatic Relations provides different guidelines for assessing domestic worker claims against former diplomats as compared to claims against current or active diplomats.²⁹ Article 39 of the VCDR provides that

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 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.³⁰

This continued, albeit diminished, immunity is justified, for as Eileen Denza, a diplomatic law expert, explains,

The acts of a diplomatic agent in the exercise of his official functions are in law the acts of the sending State. It has therefore always been the case that the diplomat cannot at any time be sued in respect of such acts since this would be indirectly to implead the sending State.³¹

The determinative question for deciding whether a diplomat is entitled to residual immunity is whether a particular act committed against a plaintiff was performed by the diplomat in the exercise of his official functions.³² Some cases reflect a broad, policy-based approach to this question. For example, in *Sabbithi v. Al Saleh*, in which a domestic worker brought claims against her former employers, Kuwaiti diplomats, the court simply concluded that because the plaintiff's claims did not fit within the commercial activity exception, the defendant's immunity remained intact under a residual immunity analysis.³³ However, other case law reflects a more nuanced analysis of residual immunity. In assessing when diplomatic immunity is applicable, courts have often adhered to the

29. *Id.*

30. Vienna Convention on Diplomatic Relations, *supra* note 2, art. 39, 23 U.S.T. at 3245–46, 500 U.N.T.S. at 107–08.

31. DENZA, *supra* note 24, at 439.

32. *Swarna v. Al-Awadi*, 607 F. Supp. 2d 509, 516 (S.D.N.Y. 2009), *reconsideration denied*, 2009 WL 1562811 (S.D.N.Y. May 29, 2009), *aff'd in part, vacated in part, and remanded*, 622 F.3d 123 (2d Cir. 2010).

33. 605 F. Supp. 2d 122, 130 (D.D.C. 2009).

principle that immunity applies to a former diplomat's official but not private acts.³⁴ As illustrated in *De Luca v. United Nations Org.*, an "official act" is one directly related to duties listed under Article 3 of the VCDR.³⁵ Specifically, the court in *De Luca* held that former UN officials were entitled to residual diplomatic immunity against the plaintiff's claims that they had instigated an unlawful tax audit, forged pay statements, and had failed to investigate these claims.³⁶ The court reasoned that the former UN officials' actions were based on their official duties to implement financial and employment-related policies and thus were covered by residual immunity.³⁷

Courts have also found "official act" to include a diplomat's hiring of an employee to work at the diplomatic mission and, by extension, any disputes that arise as a result of that employment.³⁸ In *Brzak v. United Nations*, UN employees brought claims including emotional distress and indecent battery against the United Nations and UN officials.³⁹ As in the case of *De Luca*, the *Brzak* court was concerned with whether a particular act fell within a diplomat's official functions, noting that UN officers are granted immunity from claims "relating to acts performed by them in their official capacity and falling within their functions."⁴⁰ In determining whether a claim "related to" acts performed in an officer's official capacity, the court looked to whether the alleged acts were the result of the exercise of official functions rather than being concerned with the nature of the acts themselves.⁴¹ On this basis, the court held that because the acts alleged by the plaintiffs occurred in the workplace, they were acts

34. *Swarna*, 607 F. Supp. 2d at 517.

35. *Id.* (citing *De Luca v. United Nations Org.*, 841 F. Supp. 531, 534–35 (S.D.N.Y. 1994)). Article 3 duties under the VCDR include, *inter alia*, negotiating with the government of the receiving state, reporting on developments in the receiving state to the sending state, and promoting friendly relations between the sending and receiving states. Vienna Convention on Diplomatic Relations, *supra* note 2, art. 3, 23 U.S.T. at 3231–32, 500 U.N.T.S. at 98.

36. *Swarna*, 607 F. Supp. 2d at 517 (citing *De Luca*, 841 F. Supp. at 534–35).

37. *Id.*

38. *Id.* at 518.

39. *Brzak v. United Nations*, 551 F. Supp. 2d 313, 315 (S.D.N.Y. 2008). While the *Brzak* case involves the United Nations and its officials rather than diplomatic agents, it is still concerned with the application of Article 39 of the VCDR. *Id.* at 317.

40. *Id.* at 319.

41. *Id.*

against which the officers were immunized despite the fact that such conduct was wrongful and inappropriate.⁴²

Finally, case law demonstrates that official acts do not include “acts that were completely peripheral to the official’s diplomatic duties.”⁴³ In the case of *In re Application of Noboa*, the court faced the issue of whether a former diplomatic agent was immune from complying with a subpoena requiring her to produce documents and give a deposition.⁴⁴ The court held residual diplomatic immunity to be inapplicable because at the time the defendant was served with the subpoena she was on a trip not related to her diplomatic duties.⁴⁵

While the facts and context of these cases differ, they demonstrate a common theme that runs throughout residual diplomatic immunity case law, namely that courts have a tendency to uphold diplomatic immunity for defendants except in the most egregious of situations.

C. *Swarna and Baoanan: A Turning Point in Residual Immunity Analysis*

1. *Swarna v. Al-Awadi*

Swarna v. Al-Awadi was the first indication that courts might begin reigning in the scope of diplomatic immunity. This section explores the court’s reasoning in this case and the way in which it came to the conclusion that diplomatic immunity was an insufficient defense to a domestic worker’s claims of abuse.

In 1995, Vishranthamma Swarna agreed to relocate to the United States to work as a domestic worker for Mr. Al-Awadi, who was serving as Third Secretary at the Kuwait Mission in New York City, and his wife, Ms. Al-Shaitan.⁴⁶ Swarna was promised \$2,000 per month, Sundays off, and one month of paid vacation per year to visit

42. *Id.* at 320; *see also* D’Cruz v. Annan, No. 05 Civ. 8918(DC), 2005 WL 3527153, at *2 (S.D.N.Y. Dec. 22, 2005) (holding that plaintiff’s claims including harassment and suspension arose from his employment at the United Nations and relate only to acts performed within the official capacity of the defendants as UN officials and employees, and thus the defendants were immune from liability).

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

44. *Id.* at 518 (citing *In re Application of Noboa*, M18-302, M19-111(JSM), 1995 WL 581713, at *1, *3 (S.D.N.Y. Oct. 4, 1995)).

45. *Id.* (citing *In re Application of Noboa*, 1995 WL 581713, at *4).

46. *Id.* at 512–13.

her family in India.⁴⁷ However, when Swarna arrived in the United States, Mr. Al-Awadi confiscated her passport, forced her to work approximately seventeen hours a day, seven days a week, and paid her only \$200-\$300 per month.⁴⁸ Moreover, Swarna was forbidden to leave the apartment unless she was supervised (even with supervision, Swarna only left the apartment a total of ten to fifteen times in four years), was forbidden to use the telephone to make calls, and was called derogatory names.⁴⁹ Swarna was also repeatedly raped by Mr. Al-Awadi and physically abused by Mr. Al-Awadi and his wife on numerous occasions.⁵⁰

Swarna initially filed the lawsuit while Mr. Al-Awadi was still serving as a Kuwaiti diplomat.⁵¹ Like many of the domestic worker cases previously cited, the district court dismissed the case for lack of jurisdiction, citing the fact that Mr. Al-Awadi was entitled to diplomatic immunity.⁵² However, the court dismissed the case without prejudice because the court noted that Swarna could re-file her action against Mr. Al-Awadi when he was no longer serving as a Kuwaiti diplomat.⁵³ Swarna accepted the court's implicit suggestion and once again filed a claim against Mr. Al-Awadi when he had completed his diplomatic service.⁵⁴ The court then assessed Swarna's labor law and Alien Tort Claims Act claims under the residual immunity language of Article 39 of the VCDR.⁵⁵

i. Labor Law Claims

Swarna alleged labor law claims in the form of failure to pay required wages, unjust enrichment, fraud, and breach of contract.⁵⁶ Applying the principles set forth in prior cases and parsing the language of Article 39, the court noted that the protection afforded by residual immunity was inapplicable if the acts alleged by Swarna could be considered private acts, separate from Mr. Al-Awadi's

47. *Id.*

48. *Id.* at 513.

49. *Id.* at 513-14.

50. *Id.* at 514.

51. *Id.* (citing *Vishranthamma v. Al-Awadi*, No. 02 Civ. 3710(PKL)(MHD) (S.D.N.Y. Jan. 26, 2005)).

52. *Id.*

53. *Id.*

54. *Id.* at 514, 516.

55. *Id.* at 512, 516.

56. *Id.* at 512.

official duties.⁵⁷ The court agreed with the defendants that Swarna's labor law claims could be described as "employment-related" as they were based on an employment relationship, similar to the claims in *Brzak*.⁵⁸ However, the court hedged its agreement by noting, "[i]t does not follow that *all* employment-related acts by a diplomat are official acts to which residual immunity attaches once the diplomat's duties end."⁵⁹ In this particular case, the court held that residual immunity was unavailable as a defense because Mr. Al-Awadi's employment of Swarna was a private rather than an official act.⁶⁰ In so holding, the court reasoned that Swarna's employment "bore no relationship to the 'functions of a diplomatic mission'" as listed under Article 3 of the VCDR, that Swarna was not employed as part of implementing an official policy of the Kuwait Mission, and that Swarna was not hired to work at the Kuwait Mission as a subordinate of Mr. Al-Awadi.⁶¹ The court went on to note that, even though on occasion Swarna had served members of the Kuwait mission when Mr. Al-Awadi and his wife entertained at home, "[t]his tangential benefit to the Kuwait Mission did not make her an employee of the mission, and did not make Mr. Al-Awadi's act of employing her 'in law the act[] of the sending State.'"⁶²

ii. Alien Tort Claims Act Claims (ATCA)

Under ATCA, Swarna brought claims of "trafficking, involuntary servitude, forced labor, assault and sexual abuse."⁶³ In response to these claims, the court noted that if residual immunity were held to extend to rape and the other acts cited by Swarna it would be "tantamount to holding that Art. 39 extends to *all* acts taken by a diplomatic agent . . ."⁶⁴ Moreover, the court found that the acts alleged by Swarna were peripheral to Mr. Al-Awadi's duties and responsibilities as a diplomat in much the same way as the *In re Application of Noboa* case.⁶⁵ Finally, the court cited the fact that "diplomatic agents were only intended to receive residual immunity

57. *Id.* at 519.

58. *Id.*

59. *Id.*

60. *Id.* at 520.

61. *Id.* (citations omitted).

62. *Id.* (citing *DENZA*, *supra* note 24, at 439).

63. *Id.* at 512.

64. *Id.* at 521.

65. *Id.*

with respect to official acts, and that not *all* acts of a diplomatic agent were understood to be official.”⁶⁶ As with the labor law claims, the court held Mr. Al-Awadi’s actions to have been private, thus once again making residual immunity inapplicable.⁶⁷

2. *Baoanan v. Baja*

While *Swarna v. Al-Awadi* laid the groundwork for abused domestic workers to have greater access to justice, *Baoanan v. Baja* confirmed and furthered the precedent of striking down diplomatic immunity as an absolute defense. This section highlights the key facts of the *Baoanan* case and explores the relationship between *Baoanan* and its predecessor, *Swarna*.

As plaintiff Marichu Baoanan relays the story, Mr. and Mrs. Baja asked her to travel to the United States from the Philippines by making false promises of finding her employment as a nurse upon her arrival.⁶⁸ However, when Baoanan arrived, Mr. Baja, who was serving as the Permanent Representative of the Philippines to the United Nations at the time, forced her to work as a domestic servant in their house at the Philippine Mission.⁶⁹ During her time working for Mr. Baja, Baoanan worked approximately 126 hours per week, was forced to sleep in the basement, was prevented from leaving the household unaccompanied or from using the telephone, and was verbally abused.⁷⁰

Like *Swarna*, the court here determined that Mr. Baja’s claim of diplomatic immunity was to be assessed under Article 39 of the VCDR regarding residual immunity as opposed to the broader Article 31.⁷¹ In assessing Baoanan’s claims, the court first rejected Mr. and Mrs. Baja’s blanket argument that they were entitled to diplomatic immunity because the act of hiring and bringing domestic help into the country was a “long engrained practice.”⁷² Rather, like *Swarna*, the court here focused on determining whether Baoanan’s employment could be considered an official or private act.⁷³

66. *Id.* at 522.

67. *Id.*

68. *Baoanan v. Baja*, 627 F. Supp. 2d 155, 157 (S.D.N.Y. 2009).

69. *Id.*

70. *Id.* at 159.

71. *Id.* at 161.

72. *Id.* at 165.

73. *Id.*

The court first looked to the documents used to obtain Baoanan's visa to enter and work in the United States.⁷⁴ Specifically, the court took note of an affidavit which indicated that should a diplomat employ private staff, it would be for personal household needs.⁷⁵ From this stipulation the court concluded that "the employment of a domestic worker by a diplomatic agent predominately for the purpose of meeting his own and his family's personal needs is not an act performed 'in the exercise of his functions as a member of the mission.'" ⁷⁶ Again, as in *Swarna*, the court emphasized that Baoanan's work at official Philippine Mission events did not "transform her employment into an official act."⁷⁷ The court also struck down the Bajas' assertion that because the family actually resided in the Philippine Mission and Baoanan was hired to work in the Bajas' residence that her employment was for official purposes and that any disputes arising from the employment would likewise be considered official and subject to diplomatic immunity, as was the case in *Brzak*.⁷⁸ In rejecting this argument, the court noted that "to hold categorically that it is always an official act to employ an individual who works within the four walls of a diplomatic mission . . . would improperly reward form over substance."⁷⁹ The court went on to note that "[p]hysical location should be considered in determining whether an act is official or private, but certainly it is not by itself dispositive."⁸⁰ The court reasoned that to hold otherwise would:

[R]esult in a perverse outcome: a diplomatic agent whose official residence happens to be located within the same building as the mission would be immune from jurisdiction for acts stemming from his employment of a domestic worker, while a diplomatic agent who resides in a separate building adjoining or nearby his mission and employs a domestic worker to perform identical duties in an identical fashion, would not qualify for immunity.⁸¹

74. *Id.* at 167–68.

75. *Id.*

76. *Id.* at 168.

77. *Id.*

78. *Id.* at 168–69.

79. *Id.* at 169.

80. *Id.*

81. *Id.*

The court found that Mr. Baja could not benefit from residual immunity and ordered that the Bajas' motion to dismiss be denied.⁸²

III. ANALYSIS

A. *A Shift in Judicial Thinking: Departing From Prior Precedent With an Eye on Equity*

Prior case law reflects a broad definition and application of diplomatic immunity. Cases such as *De Luca* and *Brzak* illustrate courts' tendencies to side with diplomat defendants even in cases involving residual diplomatic immunity. In contrast, *Swarna* and *Baoanan* represent a shift in judicial thinking that focuses more on achieving a fair and equitable result rather than accepting the diplomatic immunity defense as a foregone conclusion. The two cases represent an approach where the court appears more willing to undertake a critical look at the VCDR language and prior precedent. As such, the court provided the plaintiffs with a rare, invaluable chance to present the merits of their claims against their diplomatic employers to the court.

One of the first ways in which we see the court in *Swarna* and *Baoanan* departing from precedent is in answering the pivotal question of whether *Swarna* and *Baoanan*'s employment could be termed a private or official act. In answering, the court avoided relying on prior precedent holding that employment-related conflicts are within the scope of official acts or that location of employment, such as inside the mission, invokes a diplomat's official functions and thus protects him from liability.⁸³ The court further avoided an opportunity to ground the holding in prior case law by refusing to conclude that even if *Baoanan* and *Swarna*'s employment as domestic workers was private, their involvement in official diplomatic events, such as entertaining guests of the mission, transformed their employment into an official act for which the diplomats could be held immune from liability.⁸⁴

82. *Id.* at 170–71.

83. *See id.* at 168–69; *cf.* *Brzak v. United Nations*, 551 F. Supp. 2d 313, 319 (S.D.N.Y. 2008) (noting that “courts have consistently held that employment-related issues lie at the core of an international organization’s immunity”).

84. *Baoanan*, 627 F. Supp. 2d at 168; *Swarna v. Al-Awadi*, 607 F. Supp. 2d 509, 520 (S.D.N.Y. 2009), *reconsideration denied*, 2009 WL 1562811 (S.D.N.Y. May 29, 2009), *aff'd in part, vacated in part, and remanded*, 622 F.3d 123 (2d Cir.

A second way we see the court departing from precedent and more closely focusing on equitable ramifications is in its failure to mention or even consider the policy ramifications of its decisions. While in prior cases courts have struck down suits against diplomats by highlighting the importance of diplomatic immunity in providing safety and security for citizens sent abroad as diplomats, the court in *Swarna* and *Baoanan* focused more closely on assessing the individual facts of the cases at hand rather than assessing whether its decisions further diplomacy and international relationships.⁸⁵

B. *Swarna and Baoanan Highlight the Tension Between the VCDR and the Purpose of the Justice System and Question the Underlying Rationale of Diplomatic Immunity*

In choosing an equitable approach over adherence to prior case law, the court in *Swarna* and *Baoanan* confronted competing principles which ultimately forced the court to choose between judicial ideals and international political realities. Moreover, the results of *Swarna* and *Baoanan* currently support a perverse reading of case law where diplomats are immune from claims of domestic worker abuse when they are employed as active diplomats but may be held accountable for those same claims when they are classified as former diplomats. While this reading is supported by the VCDR, specifically the limited language regarding immunity for former diplomats (Article 39) compared to active diplomats (Article 31), there arguably does not appear to be any logical connection between diplomatic immunity and a diplomat's ability to effectively carry out his or her duties.⁸⁶

One of the first dilemmas which the court in *Swarna* and *Baoanan* faced was how to achieve an equitable outcome while adhering to the VCDR framework. The *Swarna* court solved this conflict by framing its decision to allow the plaintiff to take

2010) (citing *Brzak*, 551 F. Supp. 2d at 319; *De Luca v. United Nations Org.*, 841 F. Supp. 531, 534–35 (S.D.N.Y. 1994)).

85. *Baoanan*, 627 F. Supp. 2d at 165–70; *Swarna*, 607 F. Supp. 2d at 520; accord *Tabion v. Mufti*, 877 F. Supp. 285, 292–93 (E.D. Va. 1995), *aff'd*, 73 F.3d 535 (4th Cir. 1996); *Ahmed v. Hoque*, No. 01 Civ. 7224(DLC), 2002 WL 1964806, at *5 (S.D.N.Y. Aug. 23, 2002).

86. Francisco Orrego Vicuna, *Diplomatic and Consular Immunities and Human Rights*, 40 INT'L & COMP. L.Q. 34, 47 (1991); see also René Värk, *Personal Inviolability and Diplomatic Immunity in Respect of Serious Crimes*, 8 JURIDICA INT'L 110, 114 (2003).

advantage of the system.⁸⁷ Specifically, the court dismissed the plaintiff's original complaint against Mr. Al-Awadi, who at the time was actively serving as a diplomat, without prejudice because the plaintiff could simply wait until Mr. Al-Awadi and his wife were no longer actively employed as diplomats to re-file the claim.⁸⁸ In doing so, the *Swarna* court implicitly suggested that by waiting until Mr. Al-Awadi had left his diplomatic post, the plaintiff would have a better chance of succeeding on her claim because of the diminished scope of residual immunity.⁸⁹ However, in so implying, the court upheld the very concept it later criticized in *Baoanan*, namely, rewarding form (differences between immunity under Article 31 as compared to Article 39) over substance.⁹⁰ While *Swarna* and *Baoanan* provided access to justice for domestic workers for whom access had previously been nonexistent, the cases arguably undermine the legitimacy and purpose of the justice system by only allowing domestic workers to present their claims to the court when particular circumstances are met rather than when a violation occurs.

A second tension the *Swarna* and *Baoanan* court confronted was choosing between undermining the VCDR, which could put their country's own diplomats at risk, or undermining the judicial principles of equity and the right to redress wrongs. When faced with the choice, courts have largely chosen to liberally interpret and adhere to the VCDR in order to protect American diplomats while knowingly turning a blind eye to abuses committed by diplomats.⁹¹ Fear for one's own diplomats stems from the concept of reciprocity and the idea that a country's "representatives abroad are in some

87. See *Swarna*, 607 F. Supp. 2d at 514.

88. *Id.*

89. See *id.*

90. See *Baoanan*, 627 F. Supp. 2d at 169.

91. See, e.g., *Ahmed v. Hoque*, No. 01 Civ. 7224(DLC), 2002 WL 1964806, at *5 (S.D.N.Y. Aug. 23, 2002); see also FREY & FREY, *supra* note 1; see, e.g., *Tabion v. Mufti*, 877 F. Supp. 285, 292–93 (E.D. Va. 1995), *aff'd*, 73 F.3d 535 (4th Cir. 1996) (noting that diplomatic immunity is valuable and necessary “[t]o protect United States diplomats from criminal and civil prosecution in foreign lands with differing cultural and legal norms as well as fluctuating political climates . . .”); *Värk*, *supra* note 86, at 111 (noting that “regardless of the severity of offences, states have so far refrained from serious retaliatory actions due to several factors. Firstly, states maintain a substantial number of diplomatic agents abroad and they do not want to endanger the situation of their diplomats in different and not always particularly safe countries”).

sense always hostages.”⁹² It is this fear that “guarantees efficient application of diplomatic law and also general obedience” but at the same time prevents states from prosecuting diplomats even for acts that are arguably not connected to a diplomat’s efficient performance of their job.⁹³ Unlike prior cases, the court in *Swarna* and *Baoanan* was willing to put the fear aside in favor of allowing for a more equitable outcome. While prior case law would lead one to believe that the *Swarna* and *Baoanan* decisions endanger American diplomats abroad, arguably the court’s approach creates a stronger incentive for American diplomats to more closely adhere to Cordell Hull’s supposition that, “the privilege of diplomatic immunity does not presuppose the right to violate any laws or regulations . . . of the countries to which they are accredited; that on the contrary, the privilege of such immunity imposes upon them [diplomats] the obligation of observing meticulously such laws and regulations.”⁹⁴

While the *Swarna* and *Baoanan* opinions highlight the importance of achieving equitable outcomes, the decisions also provide support for the contention that there is no functional connection between immunity from civil and criminal liability and a diplomatic agent’s ability to effectively carry out his or her duties.⁹⁵ This is especially true when immunity is provided for human rights violations, as in the case of domestic worker abuse.⁹⁶ For as Francisco Orrego Vicuna advocates, “[b]y no standard can such acts [human rights violations committed by diplomats] be considered as a part of the diplomatic or consular function, and thus neither can be considered an official act.”⁹⁷ Vicuna goes on to argue that “[i]f one aspect has been perfectly established in the contemporary law of human rights, it is that no State can stand above the requirements of protection of such fundamental rights.”⁹⁸ While prior case law has not necessarily embraced this view, *Swarna* and *Baoanan* are the first indications that courts may be stepping up to accept their role in what

92. DENZA, *supra* note 24, at 2.

93. Värk, *supra* note 86, at 111.

94. FREY & FREY, *supra* note 1, at 497.

95. Vicuna, *supra* note 86.

96. *Id.*

97. *Id.*; see also Värk, *supra* note 86, at 114 (noting in the context of grave crimes, “the theory of functional necessity or, in other words, the very same link between diplomatic immunity and necessity to perform diplomatic functions effectively renders questionable the necessity or legitimacy of diplomatic immunity in such cases”).

98. Vicuna, *supra* note 86, at 47–48.

Vicuna considers a new, emerging form of jurisdiction, namely the “humanitarian jurisdiction.”⁹⁹

C. *The Need For Change in the Realm of Diplomatic Immunity*

The *Swarna* and *Baoanan* opinions provide support for amending the scope and nature of diplomatic immunity under the Vienna Convention. One logical possibility that would allow domestic workers to seek compensation for harms perpetrated against them by diplomats would be to enact domestic laws that would impose conditions on countries wishing to send diplomats to that country.¹⁰⁰ As the ACLU advocated in their testimony to Congress regarding the reauthorization of the Trafficking Victims Protection Act, Congress should require states, “as a condition for their diplomats to obtain special visas for their domestic workers, to waive their diplomats’ immunity for civil claims arising from a breach of the employment contract.”¹⁰¹ However, it is necessary to remember in this context that any diplomatic protection that is denied diplomats of one nation is likely to be reciprocated in that “failure to accord privileges or immunities to diplomatic missions or to their members is immediately apparent and is likely to be met by appropriate countermeasures.”¹⁰² Thus, adopting ACLU’s position would require countries to make the same difficult choice faced by the court in *Swarna* and *Baoanan*, namely choosing between allowing victims of crimes committed by diplomats to bring claims against the diplomats and protecting diplomats from being held responsible for the foreign laws of the country in which they are stationed.

Other suggestions for change include requiring diplomatic missions to carry insurance¹⁰³ and establishing a fund which can be used to compensate individuals who suffer abuse at the hands of

99. *Id.* at 45.

100. *Eradicating Slavery: Preventing the Abuse, Exploitation and Trafficking of Domestic Workers by Foreign Diplomats and Ensuring Diplomat Accountability: Hearing on International Trafficking in Persons: Taking Action to Eliminate Modern Day Slavery Before H. Comm. on Foreign Affairs, 110th Cong. 2 (2007)* (statement of Caroline Frederickson, Director, Washington Legislative Office, American Civil Liberties Union).

101. *Id.*

102. DENZA, *supra* note 24, at 2.

103. Leslie Shirin Farhangi, *Insuring Against Abuse of Diplomatic Immunity*, 38 STAN. L. REV. 1517, 1517–18 (1986).

diplomats.¹⁰⁴ The insurance solution would operate by requiring countries sending diplomats abroad to purchase insurance for their diplomats from a group of private insurers.¹⁰⁵ This solution would provide a fallback option where abuse victims would be able to pursue a claim against the insurer if the claim against the diplomat was unsuccessful.¹⁰⁶ While both the fund and insurance option would allow for more equitable outcomes and thus prevent abuse victims from being left empty-handed, neither option has been successfully implemented.¹⁰⁷ This is arguably a result of cost and reciprocity concerns in that if a country, such as the United States, required insurance of other nations sending their diplomats to the United States, it would likely be required of the United States when it sends diplomats abroad.¹⁰⁸

Another possibility is for countries party to the Vienna Convention to construct a list of agreed upon crimes for which diplomatic immunity is waived and the diplomat may be prosecuted.¹⁰⁹ In his article, René Värk advocates this solution and suggests using the Rome Statute of the International Criminal Court as a starting place for constructing a list of universally recognized crimes for which signatory countries to the Vienna Convention could agree diplomatic immunity would not apply.¹¹⁰

While it is unclear which of the many proposed solutions would be the most successful in providing abused domestic workers access to justice, it is clear that action of some sort needs to be taken as reports of abused domestic workers do not appear to be diminishing.¹¹¹

IV. CONCLUSION

The decisions in *Swarna* and *Baoanan* are early indications of success in prosecuting diplomats who abuse their domestic workers. While their holdings are arguably narrow, *Swarna* and *Baoanan*

104. Michael B. McDonough, *Privileged Outlaws: Diplomats, Crime and Immunity*, 20 SUFFOLK TRANSNAT'L L. REV. 475, 491 (1997).

105. *Id.* at 492.

106. *Id.* at 492–93.

107. *Id.* at 493; Farhangi, *supra* note 103, at 1517.

108. McDonough, *supra* note 104, at 493.

109. Värk, *supra* note 86, at 114.

110. *Id.*

111. *See* sources cited *supra* note 16.

represent a shift from prior decisions adhering strictly to the language of and the policy purposes behind the Vienna Convention to a judicial framework with a more equitable focus. However, the decisions also create a contradictory result in which diplomats are shielded from immunity for cases of domestic worker abuse when acting as active diplomats but can be held accountable for the same behavior when the diplomats are only protected under residual immunity. There are no coherent justifications for this disparity or plausible arguments to support the assertion that being shielded from such liability allows a diplomat to more efficiently carry out his or her functions.

While the dichotomy created by the *Swarna* and *Baoanan* decisions does at least provide for a real possibility that an abused domestic worker may recover from a diplomat, where prior precedent largely did not provide for such an opportunity, plaintiffs are still denied forthright access to justice. This is due to the fact that an abused domestic worker, in order to have any chance for recovery in court, must wait until the diplomat is no longer working in his or her diplomatic capacity. Thus, while *Swarna* and *Baoanan* represent a crucial first step, they are just the beginning of what will hopefully be a legal overhaul of diplomatic law. In the meantime, *Swarna* and *Baoanan* further support current criticisms of the broad diplomatic protections afforded by the Vienna Convention. More specifically, these cases present new justification for the need for an amendment or other change that would hold diplomats accountable for their abusive behavior. In this way, these two cases have the potential to enact widespread change in the realm of international law.