



# Domestic Workers in Diplomats' Households

Rights Violations and Access to Justice  
in the Context of Diplomatic Immunity

Angelika Kartusch

## Imprint

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## The Institute

The **German Institute for Human Rights** is the independent National Human Rights Institution in Germany. It is accredited according to the Paris Principles of the United Nations (A-Status). The Institute's activities include the provision of advice on policy issues, human rights education, applied research on human rights issues and cooperation with international organizations. It is supported by the German Federal Ministry of Justice, the Federal Foreign Office, the Federal Ministry for Economic Cooperation and Development and the Federal Ministry of Labour and Social Affairs. The National Monitoring Body for the UN Convention on the Rights of Persons with Disabilities was established at the Institute in May 2009.

The project "Forced Labor Today - Empowering Trafficked Persons" is carried out by the Institute since 2009 in cooperation with the Foundation "Remembrance, Responsibility and Future" (EVZ). The research for this study has been undertaken as part of the project, funded through the Foundation EVZ. The study was printed at the expense of the Institute.





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# Domestic Workers in Diplomats' Households

Rights Violations and Access to Justice  
in the Context of Diplomatic Immunity.  
Analysis of Practice in Six European Countries

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# Preface by the German Institute for Human Rights

Rights violations experienced by migrant domestic workers in diplomats' households may seem, at first glance, to be a side issue only of the broader discourse on human trafficking and exploitation of labor migrants. Upon further inspection, however, its relevance as a human rights issue becomes clear in two respects: First, even if the number of victims constitutes only a small portion of labor exploitation and forced labor worldwide, labor rights violations and exploitation in diplomats' households are a global phenomenon rooted in structural shortcomings in the protection of diplomats' domestic workers, both in sending states and in host states. Second, the employers' diplomatic immunity aggravates rights violations and restrictions of freedom experienced by domestic workers as it severely limits, if not entirely bars, victims' access to justice.

## Spectrum of cases

Reported cases range from less severe labor law infringements (e.g. no remuneration for overtime work, less wages than agreed beforehand) over severe forms of labor exploitation (wages far below the minimum wage, overlong working hours, no days off or holidays) to working and living conditions that amount to forced labor and slavery-like practices (low or literally no payment of wages, having to work around the clock, restrictions of liberty, inhuman accommodation and food, physical and sexual violence). While the overwhelming majority of victims are women, mostly employed as domestic helpers, nannies or cooks, there are also cases of male victims, employed as cooks, gardeners or chauffeurs.

## Rights violations

Victims may experience violations of their human rights in manifold ways: Their right to just and favorable working conditions enshrined in Art. 7 of the International Covenant on Social, Economic and Cultural

Rights (ICESCR) is violated when they receive less than minimum wages, are forced to work overlong periods without adequate rest and without periodic holidays with pay. The prohibition of slavery, servitude and forced labor, enshrined in Art. 8 of the International Covenant on Civil and Political Rights (ICCPR) and Art. 4 of the European Convention on Human Rights (ECHR), is at stake in the most severe cases. The right to health may be violated by unhealthy working conditions without rest periods and insufficient nutrition, as well as the right to an adequate standard of living, including adequate food (Art. 11, 12 ICESCR). The right to physical integrity and the prohibition of torture are violated by physical and sexual attacks and degrading treatment (Art. 7 ICCPR, Art. 3 ECHR). The right to privacy is affected when the domestic worker is not provided with a room for herself or himself (Art. 17 ICCPR, Art. 8 ECHR). Freedom of movement is infringed upon when the worker is not allowed to leave the house on her or his own (Art. 9, 12 ICCPR). The restriction of liberty entails violations of other rights, such as the freedom of religion when the worker cannot go to a place of worship, or the right to family life, when he or she is not allowed to go out to visit or make a phone call to family members (Art. 18, Art. 17 ICCPR). International human rights treaties furthermore impose the duty on states to guarantee access to justice for such rights violations to victims (Art. 2 Para 3 ICCPR, Art. 13 ECHR).

## The relation between human rights and diplomatic immunity

When victims are seeking justice, their employers' diplomatic immunity, acknowledged in the 1961 Vienna Convention on Diplomatic Relations, comes into play, barring as well criminal, civil and administrative jurisdiction as the enforcement of judgments in the host state. Insofar, employers' diplomatic immunity in practice overrules the human rights of the victim and leads to a situation of de facto-unaccountability and -impu-

nity for exploitative employers. For the most severe cases amounting to slavery, general international law offers a resolution of this situation: The prohibition of slavery is generally acknowledged to have the status of a peremptory norm ("ius cogens") in international law. Thus, it cannot be overridden by any state through international treaties or general customary rules not endowed with the same normative force. In situations when the exploitation of domestic workers amounts to slavery, the victims' human rights thus precedes over diplomatic immunity. But even in those cases of human rights violations listed above which do not amount to slavery or torture, host states of diplomatic missions cannot confine themselves to referring to diplomatic immunity and remain inactive. Human rights impose on states the obligation to offer alternative ways to justice and redress for victims – be it by making available alternative complaint mechanisms or by providing compensation to the victims as a case of State liability (as the French Conseil d'État determined in a recent judgment).

#### **The study and the expert roundtable**

The German Institute for Human Rights carried out the present study to provide an expanded and comprehensive insight into the practice of several European states, to identify examples of promising practice and to develop a comprehensive set of human rights based recommendations to all actors, especially the Protocol departments of Foreign Ministries and non-governmental organizations. The study was conducted as part of the three-year project "Forced Labor Today: Empowering Trafficked Persons", carried out in cooperation with the Foundation "Remembrance, Responsibility, Future".

On 2nd and 3rd of May 2011, the German Institute for Human Rights, in cooperation with the Special Representative and Co-ordinator for Combating Trafficking in Human Beings of the Organization for Security and Co-operation in Europe (OSCE), organized a roundtable on the issue of "Rights Violations and Access to Justice of Domestic Workers in the Context of Diplomatic Immunity" in Berlin. The roundtable was attended by thirty selected experts from nine countries and brought together representatives from Foreign Ministries, non-governmental organizations, lawyers, the academia and International Organizations. The research findings and the recommendations were presented to participants and discussed in depth. All participants welcomed the study as the most comprehensive research of its kind and committed themselves to continue and reinforce their work to protect victims' human rights. We hope that the study provides other actors both the incentive and the ideas for taking up this human rights issue, too.

Berlin, June 2011

German Institute for Human Rights

Prof. Dr. Beate Rudolf  
Director

Dr. Petra Follmar-Otto  
Head of Department Human Rights Policy Germany/  
Europe



# Preface by the Foundation "Remembrance, Responsibility and Future" (EVZ)

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The Foundation "Remembrance, Responsibility and Future" (EVZ) was the first attempt to pay compensation to victims of National Socialist slavery and, through that gesture, to recognize that they had suffered a grave injustice. Since the payment's ending in 2007, the Foundation EVZ funds projects to promote international understanding and human rights in remembrance of the victims of National Socialist regime's injustice.

Human rights are aimed at empowering individuals to assert their own rights. Human trafficking is not only a serious crime but also a human rights violation. Victims of human trafficking and other extreme forms of labor exploitation today have a right to assert claims for remuneration and compensation for violations, but very few victims are currently able to assert these claims. The formulation of victims' rights in Germany primarily focuses on their status as witnesses in criminal proceedings against perpetrators. And in cases in which victims successfully assert their rights, the received compensation and wage often falls short of what they are entitled to.

The Foundation EVZ and the German Institute for Human Rights therefore cooperate in a three-year project "Forced Labor Today – Empowering Trafficked Persons". The project is aimed at increasing the ability of persons who have been trafficked into extreme forms of labor exploitation in Germany to assert claims for wages and compensation against perpetrators and exercise their rights under the German Crime Victims' Compensation Act. The project supports victims to bring their case before the authorities or courts to assert claims for remuneration and/or compensation. Victims may apply for legal aid to cover extrajudicial and legal costs. To support victims by successfully asserting court claims the project offers financial support for test cases by means of a legal aid fund.

The project is also aimed at governmental and non-governmental organizations that come into contact with trafficked persons. This year the project presents the study "Rights Violations and Access to Justice of Domestic Workers in the Context of Diplomatic Immunity". The study addresses the employment of domestic workers in private households of diplomats with a focus on their access to justice following rights violations committed by diplomat employers. Persons concerned are faced with complete withholding of wages, are forced to work excessive hours without days off and without any or with inadequate compensation, accommodation or food or with restrictions of the workers' freedom of movement by prohibiting them to have social contacts and to leave the house unaccompanied or by withholding their passports and special ID cards. Some of them even suffered physical, psychological and/or sexual violence, although such slavery-like conditions were regarded as an exception.

The persons concerned are faced with the diplomatic immunity of their employees as an additional difficulty in accessing justice. In this conflict of Human Rights vs. diplomatic immunity the Foundation stresses that Human Rights and Human Dignity are a higher commodity than diplomatic immunity, even in diplomatic households there cannot be illegal areas.

By providing an overview of recent developments in Europe and identifying examples of promising practice, the study aims to offer a basis for discussion and to support the efforts of governments and NGOs to improve the access to justice for the concerned persons. The study focuses on practices in Austria, Belgium, France, Germany, Switzerland and the United Kingdom, Ireland and the Netherlands in their capacity as host states for foreign diplomatic missions and international organizations. The Author interviewed Foreign Ministry Protocol departments, NGOs and lawyers.

Although the common project "Forced Labor Today – Empowering Trafficked Persons" combats extreme forms of labor exploitation in Germany we hope this approach will have an international impact.

The results of this study have been presented and discussed by experts from foreign ministries, non-governmental organizations as well as international and European institutions at the International Roundtable in May 2011 in Berlin. The discussion underlined the results of the study, that e.g. Protocol departments in some countries have personal meetings with domestic workers or invite NGOs to come to the Ministry to meet the domestic worker in an atmosphere of trust to enable them to report rights violations and to find strategies for support. The event carried out by the EVZ-funded project "Forced Labor Today – Empowering Trafficked Persons" was hosted by the German Institute for Human Rights in cooperation with the Organization for Security and Co-operation in Europe (OSCE).

We also very highly appreciate that the rights of migrant domestic workers have been put on the agenda of the International Labour Organization (ILO). This study also comprises references the UN Committee on Migrant Workers first General Comment on "Migrant Domestic Workers", published in 2011, which analyzes human rights violations experienced by migrant domestic workers as well as protection gaps of both a legal and practical nature.

Berlin, June 2011  
Foundation "Remembrance, Responsibility and Future"

Dr. Martin Salm  
Chairman of the Board of Directors





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# 1 Rights Violations of Domestic Workers in the Context of Diplomatic Immunity – an Issue on the International Agenda

The German Institute for Human Rights (Deutsches Institut für Menschenrechte, DIMR) has commissioned the present study as part of the three-year project "Forced Labour Today – Empowering Trafficked Persons"<sup>1</sup> implemented by DIMR in cooperation with the Foundation "Remembrance, Responsibility and Future" (Stiftung "Erinnerung, Verantwortung und Zukunft", EVZ).

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

Regional and international documents shed light on the rights violations experienced by domestic workers working for diplomats from different perspectives – labor rights, migrants' rights, women's rights, the rights of victims of crime/trafficked persons –, thereby illustrating the complexity of the phenomenon. They also demonstrate how a number of factors add up to a risk of dependency and abuse faced by private domestic workers employed by diplomats: First, the hidden and informal nature of domestic work relegates the working conditions of employees to the so-called "private sphere", exempting it from state control and exacerbating the unequal power relationship between employees and employers. Even where domestic work is regulated by law, protection standards are often weaker compared to general labor laws. Furthermore, the privileged status of diplomats to whom international law awards immunity from the host country's jurisdiction and the execution of judgments creates an additional barrier for domestic workers seeking to

access justice and compensation from their employers, leading to a situation of de facto impunity for rights violations.

## 1.1 European Level

At the regional level, the Parliamentary Assembly of the Council of Europe (PACE) adopted a recommendation on "Domestic Slavery"<sup>2</sup> in 2001, in which it called for a number of measures to prosecute and prevent domestic slavery and to protect the rights of the victims thereof, as well as an amendment of the Vienna Convention on Diplomatic Relations so as to exclude diplomatic immunity for all offences committed by diplomats in private life. In a 2004 follow-up resolution,<sup>3</sup> PACE recommended the adoption of a charter of rights of domestic workers, which should, among others, recognize domestic work as labor.

Member States of the Organization for Security and Cooperation in Europe (OSCE) have addressed trafficking into domestic servitude more broadly in a number of policy commitments.<sup>4</sup> More specifically, violations of the rights of domestic workers employed in diplomats' households have been put on the agenda of a conference of the Alliance against Trafficking in Persons titled "Unprotected Work, Invisible Exploitation. Trafficking for the Purpose of Domestic Servitude", organized by the OSCE in Vienna in June 2010. The issue was also addressed in a research paper with the same title published by the Office of the OSCE Special Representative on Trafficking in Human Beings. The study concludes with a number of recommendations addressed to the organization and its Participating States, including measures to prevent rights violations

1 See <http://www.institut-fuer-menschenrechte.de/de/projekt-zwangsarbeit-heute.html>.

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

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

4 Including OSCE Action Plan to Combat Trafficking in Human Beings, adopted by Permanent Council Decision No. 557 of 24 July 2003; Ministerial Council Decision on Combating Trafficking in Human Beings for Labor Exploitation, 29 and 30 November 2007.

committed by diplomats and staff members of international organizations to enhance the access of private domestic workers to assistance and redress.<sup>5</sup>

## 1.2 International Level

At the level of the United Nations (UN), the Committee on the Elimination of Discrimination against Women (CEDAW Committee) in its General Recommendation No. 26 on Women Migrant Workers issued in 2008 has raised abuse, violence and other forms of discrimination against women migrant domestic workers perpetrated by diplomats while enjoying diplomatic immunity as an obstacle to ensure women's access to justice. The Committee recommended States Parties to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) to train and supervise their diplomatic and consular staff to ensure that they protect the rights of women migrant workers abroad, including through providing interpreters, medical care, counseling, legal aid and shelter.<sup>6</sup>

More recently, the UN Special Rapporteur on Contemporary Forms of Slavery in her latest report to the Human Rights Council explored how the specificities of domestic work as an industry put domestic workers at risk of economic exploitation, abuse and domestic servitude. The report identifies a "net of dependency factors" that prevent domestic workers from leaving situations of exploitation, including payment in kind, prohibitions to freely change employers, forcing workers to live with their employers, withholding food, water or essential medical care, and physical and psychological abuse. For migrant domestic workers employed by diplomats or international civil servants with diplomatic status, the report points to a "specific protection gap", due to the dependency of the workers' visa status on the ongoing employment relationship and diplomatic immunity which shields abusive employers from enforcement of national legislation. The Special Rapporteur criticizes the fact that host countries often lacked the courage to request waivers of immunities and declare abusive diplomats *personae non gratae*. Her recommendations to governments include the abolishment of visa regimes that tie a visa

to a single employer, including for domestic workers employed by diplomats, and the diligent investigation and prosecution of alleged abuse or exploitation committed by diplomats. Where sending states of diplomats do not take criminal action, host states should demand that immunity be waived or declare diplomats *personae non gratae*, while granting independent residence rights to victims.<sup>7</sup>

Furthermore, the UN Committee on Migrant Workers in January 2011 published its first General Comment on "Migrant Domestic Workers", in which it analyzes human rights violations experienced by migrant domestic workers as well as protection gaps of both a legal and practical nature. The Committee recommends States parties to the Migrants Rights Convention, among others, to "ensure that migrant domestic workers can obtain legal redress and remedies for violations of their rights by employers who enjoy diplomatic immunity under the Vienna Convention on Diplomatic Relations."<sup>8</sup> Recently, the rights of migrant domestic workers have also been put on the agenda of the International Labour Organization (ILO) where currently a legally binding Convention, supplemented by a Recommendation, concerning decent work for domestic workers is being drafted. However, the draft documents<sup>9</sup> which will be further discussed at the next session of the International Labour Conference in June 2011 contain no specific references to domestic workers employed in diplomats' households.

## 1.3 Non-Governmental Organizations

The issue of rights violations experienced by domestic workers employed by diplomats has also been addressed by several non-governmental organizations (NGOs). These organizations have contributed to raising awareness of the issue and bringing it to the agenda of governments and international bodies. To give a recent example, a group of seven European NGOs has recently come up with a comprehensive catalog of joint recommendations directed at governments, focusing in particular on domestic workers' access to justice and their immigration status in the host countries.<sup>10</sup>

<sup>5</sup> Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings 2010: p. 66.

<sup>6</sup> UN, Committee on the Elimination of Discrimination against Women 2008: General Recommendation No. 26 on Women Migrant Workers, CEDAW/C/2009/WP.1/R, 5 December 2008, paragraph 21.

<sup>7</sup> Special Rapporteur on Contemporary Forms of Slavery, Including its Causes and Consequences 2010: paragraphs 33, 57, 58, 96.

<sup>8</sup> UN, Committee on Migrant Workers 2011: General Comment on Migrant Domestic Workers: CMW/C/GC/1, 23 February 2011, paragraph 49.

<sup>9</sup> International Labour Office 2011.

<sup>10</sup> Ban Ying (Berlin), BLinN (Amsterdam), CCEM (Paris), Kalayaan (London), LEFÖ (Vienna), Migrants Rights Centre Ireland (Dublin) and PAG-ASA (Brussels) 2011.

## 2 Research Aim, Scope and Methodology

### 2.1 Aim of the Study

The study seeks to document examples of breaches of law experienced by domestic workers working in private households of diplomats in select host countries and to analyze legal and institutional responses and their application vis-à-vis bearers of diplomatic immunity in select European countries, with a focus on the exploitation of domestic workers in diplomatic households. By providing an overview of recent developments in Europe and identifying examples of promising practice, the paper aims to offer a basis for discussion and support the efforts of governments and NGOs to improve the access to justice for trafficked persons.

### 2.2 Scope of the Study

The study focuses on practices in six European countries in their capacity as host states for foreign diplomatic missions and international organizations: Austria, Belgium, France, Germany, Switzerland, and the United Kingdom. In addition, select developments from Ireland and the Netherlands are also reflected. Unless explicitly stated otherwise, the overview of mechanisms, procedures and legislation (chapters 4.2. and 4.4.1.) and their assessment by interview partners refer exclusively to the six focus countries.

The question of how these states, as sending states, deal with alleged misconduct of their own diplomatic staff abroad in terms of prevention and holding staff accountable has not been covered by the present research project.

The study addresses the employment of domestic workers in private households of diplomats with a focus on their access to justice following rights violations committed by diplomat employers:

- While the term “diplomat”, in line with the Vienna Convention on Diplomatic Relations (hereinafter: Vienna Convention), refers to persons with diplomatic rank working in a state's diplomatic mission abroad (including bilateral embassies and permanent representations with international organizations), the study also covers international civil servants with diplomatic status employed by international organizations. In so far as the latter possess diplomatic privileges and immunities, the procedures governing the employment of private domestic workers are identical to those applicable to diplomat employers in the narrow sense, as are the obstacles faced by domestic workers in seeking justice and compensation from their employers.
- “Private domestic workers” – or “private servants”, as they are called in the Vienna Convention – are employed by individual diplomats in their private homes to perform household-related chores. Strictly speaking, they need to be distinguished from domestic workers employed by a diplomatic mission (“members of the service staff”, according to the Vienna Convention). While this distinction is easily blurred in practice, especially when a service staff member de facto works in the private household of the ambassador, it is important, in particular because service staff members are employed by the sending state and not by an individual diplomat. Therefore, their employer is, in labor-law related disputes, covered by the regime of state immunity, which international law defines more narrowly than diplomatic immunity (see chapter 3.3. below).

### 2.3 Methodology

Six countries have been selected as main focus countries: Austria, Belgium, France, Germany, Switzerland and the United Kingdom. The following selection criteria have been applied: existing practice in regard to legal proceedings and/or negotiations involving domestic workers seeking redress from diplomat employers; existing formal or informal mechanisms to enable domestic workers to report rights violations; active and experienced NGOs; large international community because of presence of international organizations. These criteria have been used flexibly, so not all countries fulfill all criteria.

In these countries, interviews with Foreign Ministries (mainly Protocol departments), NGOs, lawyers as well as the Geneva-based Office of the Amiable Compositeur<sup>11</sup> were conducted. In addition, information obtained from NGOs from Ireland and the Netherlands as well as the Dutch Protocol department was also taken into account. Interview partners were selected through snowball-sampling. They deserve particular thanks for their time and for their willingness to share their knowledge. Please refer to the annex for a list of all interview partners.

In July and August 2010, semi-structured telephone interviews with ten NGOs in the eight countries mentioned above were conducted, which served to obtain basic information on the status quo in the respective countries and to identify potential interview partners for in-depth interviews. Subsequently, interview partners in the six focus countries have been identified and were contacted for in-person interviews and interview guides have been developed. While contents of these interview guides varied according to four target groups (Foreign Ministries, NGOs, lawyers and the Office of the Amiable Compositeur), they were semi-structured and broadly focused on the following topics: qualitative and quantitative aspects of identified cases of rights violations experienced by domestic workers through diplomat employers; admission and monitoring procedures governing the entry and employment of domestic workers and their practical application;

diplomatic measures to respond to alleged rights violations and their practical application by Protocol departments; experiences with legal proceedings and/or out-of-court negotiations and the role of different actors, in particular Protocol departments and NGOs.

Between September and November 2010, in-depth interviews with representatives of six Foreign Ministries, seven NGOs, three lawyers and the Office of the Amiable Compositeur were conducted. With three exceptions,<sup>12</sup> these interviews were conducted in-person in the capitals of the six focus countries as well as in Geneva. Besides the six focus countries, an in-person interview was also held with the Irish NGO Migrant Rights Centre Ireland (MRCI). NGO interview partners covered a broad thematic spectrum ranging from trafficking in human beings/women to migrants, migrant domestic workers, domestic slavery and violence against women.

Most interviews were recorded, with the consent of the interview partners, and transcribed. Some interviews were summarized on the basis of notes taken during the interview. Interview findings were analyzed based on the main focus areas reflected in the interview guides. Besides findings from the exploratory and in-depth interviews, this paper is also based on a review of documents that have been provided by interview partners and, to a limited extent, have been identified through desk research.

In April 2011, interview partners had the opportunity to comment on the results and to add recent key developments, which are reflected in the final version of this report.

<sup>11</sup> The Geneva-based Office of the Amiable Compositeur (OAC) is facilitating the settlement of work conflicts that involve persons who enjoy diplomatic and consular privileges and immunities. For further information, see chapter 4.5.2.

<sup>12</sup> The Protocol department of the German Foreign Ministry and the British NGO Kalayaan sent written responses to the interview guide. The interview with the Swiss lawyer interview partner was done via telephone.

# 3

## Excursus: Diplomatic Immunity – the International Legal Framework

### 3.1 Diplomatic Immunity

The **Vienna Convention on Diplomatic Relations of 1961** is the key international document codifying the standards regulating diplomatic immunity. As of 30<sup>th</sup> November 2010, the Convention has been ratified by 187 out of 192 UN Member States, thus coming close to universal ratification.

The Convention awards different levels of privileges and immunities to the members of the diplomatic mission depending on their professional status. Its preamble underlines that “the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States”.

“Diplomatic agents” who comprise the head of mission and the members of the mission with diplomatic rank (Art. 1 (d)), enjoy inviolability of their person, which prohibits their arrest and detention by the host state's authorities (Art. 29) and inviolability of their residence which implies immunity from search, requisition, attachment or execution (Art. 30, Art. 22). Furthermore, they enjoy absolute immunity from the host state's criminal jurisdiction. Immunity also exists in regard to administrative and civil proceedings, with three exceptions, including for professional or commercial activities exercised outside their official function (Art. 31 (1)). While this exception covers for instance paid employment of a diplomat outside the mission or the provision of professional services for remuneration by a diplomat, the contract between a diplomat and a private domestic worker is generally considered not a

“commercial activity”.<sup>13</sup> Therefore, employment relationships between private domestic workers and diplomats are not exempted from a diplomat's immunity. Diplomats are not obliged to give evidence as witnesses (Art. 31 (2)). Immunity also comprises immunity from execution, except for the three exceptions in regard to administrative and civil proceedings mentioned above and provided that the inviolability of the diplomat's residence is respected (Art. 31 (3)). The Convention also specifies that immunity from the host state's jurisdiction does not exempt diplomats from the jurisdiction of their sending state (Art. 31 (4)).

Family members of diplomats who live in the same household, unless they are nationals of the host country, enjoy the same inviolabilities and immunities as diplomats (Art. 37 (1)). For other persons the scope of immunity is more narrowly defined: Diplomats who are nationals or permanent residents of the host state enjoy immunity from jurisdiction and inviolability only in respect of official acts performed in the exercise of their function (Art. 38 (1)). Members of administrative and technical staff and service staff of the mission have no diplomatic status but also enjoy immunity, albeit also to a limited extent.<sup>14</sup> Private domestic workers do not enjoy immunity, unless this is admitted by the host state (Art. 37 (4)). They are exempted from the host state's social security provisions, provided that they are not nationals of the host state and possess social security coverage in the sending or a third state. If this exemption does not apply, diplomat employers need to provide for the workers' social insurance, in line with the host state's regulations. Even if the exemption applies, private domestic workers may vol-

<sup>13</sup> Denza 2008: p. 305.

<sup>14</sup> Administrative and technical staff, unless they are nationals or permanent residents of the host state, and their family members, enjoy the same inviolabilities and immunities as diplomats, which includes full immunity from criminal jurisdiction. Immunity from administrative and civil proceedings, however, extends only to acts performed in the course of their duties (Art. 37 (2)). Members of service staff who are not nationals or permanent residents of the host state do not enjoy inviolability of their person and residence, and immunity from criminal, civil and administrative jurisdiction is limited to acts performed in the course of their duties (Art. 37 (3)). If these staff members are nationals or permanent residents of the host state, they enjoy privileges and immunities only to the extent admitted by that state.



untarily participate in the host state's social security system, provided that such participation is permitted by the host state (Art. 33 (2)-(4)).

A diplomat's immunity starts when s/he enters the host state's territory in order to take up her/his post, or if s/he is already there, with the notification of her/his appointment to the host state's Foreign Ministry (Art. 39 (1)). As regards the end of immunity, the Convention distinguishes as follows: For acts performed "in the exercise of [the diplomat's] function as a member of the mission", immunity is indefinite and continues even after the diplomat has left the host country. In regard to acts performed in her/his private capacity, immunity ceases to exist when the diplomat's functions have come to an end, normally at the moment when s/he leaves the country or on expiry of a reasonable period of time to do so (Art. 39 (2)). This includes employment contracts concluded between diplomats and private domestic workers. In addition, the Convention foresees two other possibilities for immunity to come to an end: waiving immunity or declaring a diplomat *persona non grata*. A waiver of a diplomat's immunity may be declared only by the sending state, not the diplomat her/himself (Art. 32 (1)), because the immunity aims to protect the interests of states, not to benefit individual diplomats. A waiver always needs to be explicit ("express" – Art. 32 (2)). If immunity from jurisdiction is waived, this does not automatically encompass immunity from execution of a judgment, for which a separate waiver is needed (Art. 32 (4)). Furthermore, the host state can declare a diplomat *persona non grata* at any time and without having to explain its decision. In that case, the sending state shall either recall or terminate the diplomat's functions (Art. 9 (1)). If it refuses to do, the host state may refuse to recognize the diplomat as member of the mission, in which case her/his function as diplomatic agent comes to an end (Art. 9 (2), Art. 43 (b)).

It is generally recognized that immunity is a procedural bar and does not affect any underlying substantive liability.<sup>15</sup> Thus, while diplomats enjoying immunity cannot be sued or prosecuted for breaches of law in the host country, they still remain under the obligation to respect the latter's laws and regulations (Art. 41 (1)). The procedural nature of immunity implies that as long as immunity persists any procedural steps against a diplomat are precluded, while her/his liabil-

ity for any committed violations of law remains unaffected. As soon as immunity ceases to exist, however, for example in case of a waiver of immunity or the departure of the diplomat, the court may start or continue to proceed with the case. When assessing whether a diplomat possesses immunity, courts have to take into account the time when they examine the case, not the time when the conduct in question took place.<sup>16</sup> Thus, even if a diplomat possessed immunity at the time when committing the alleged rights violations legal proceedings against her/him are possible if s/he is not protected by immunity anymore at the time the matter is examined by the court.

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### 3.2 Immunity of Staff Members of International Organizations

According to the **Convention on the Privileges and Immunities of the United Nations (1946)**, officials of the United Nations (UN) enjoy immunity from legal process, but only in respect of all acts performed in their official capacity (functional immunity). Countries that are seats of international organizations in addition have concluded **bilateral agreements** with the respective organization, which often contain further reaching regulations, providing high-ranking international civil servants with the same privileges and immunities as diplomats.

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### 3.3 State Immunity

Under the doctrine of relative state immunity which has been widely, albeit not universally, recognized by states, foreign states are immune from the host country's jurisdiction only in regard to *acta iure imperii* (acts undertaken by a state in exercising its sovereign authority), but not for *acta iure gestionis* (acts of a private law nature). Consequently, state immunity is only granted in respect to acts which are exclusively expression of the sovereignty of a state. Whether an act is to be considered as sovereign or private depends on its character and aim. Therefore, specific disputes pertaining to employment contracts, which belong to the latter category, are not covered by state immunity and therefore may be taken to court. This distinction is a principle of international customary law recognized by many states.

<sup>15</sup> Denza 2008: p. 311.

<sup>16</sup> *Ibid.*

The distinction becomes relevant where a domestic worker is a member of the embassy's service staff but de facto works in the private household of the ambassador. Because the worker is employed by the sending state and not by an individual diplomat, her/his employer is, in labor-law related disputes, covered by the regime of state immunity, which international law defines more narrowly than diplomatic immunity.

Two international treaties deal with the issue of state immunity: the **Council of Europe's 1972 European Convention on State Immunity**, which has to date been only ratified by eight countries, and the **2004 UN Convention on Jurisdictional Immunities of States and their Property**, which is not yet in force. Both Conventions exempt employment contracts from the scope of state immunity, albeit with certain limitations.<sup>17</sup>

<sup>17</sup> Article 5 of the European Convention on State Immunity, Article 11 of the United Nations Convention on Jurisdictional Immunities of States and their Property.

## 4 Research Findings

### 4.1 Rights Violations Experienced by Domestic Workers Working in Diplomats' Households

The following chapter highlights some quantitative and qualitative data collected through interviews with representatives of Ministries of Foreign Affairs (MFA), the Office of the Amiable Compositeur (OAC),<sup>18</sup> NGOs and lawyers as well as background materials provided by interview partners.

#### 4.1.1 Quantitative Dimension

The present research project did not pursue a quantitative approach. Therefore and because of differences in regard to the nature (estimations, statistics) and reference periods of data provided by interview partners, the collected data does not allow for substantive conclusions on the real extent or the predominance of certain types of violations over others. Figures tend to point to a relatively small number of rights violations in relation to the numbers of diplomats accredited and of private domestic workers registered in the host countries. However, it is not known how many cases remain unreported.

Nevertheless, some figures shared by interview partners are showcased in the following in order to give the reader an impression of the extent to which institutions participating in this study are occupied with the phenomenon.

The following box compiles numbers of domestic workers registered with Protocol departments to work in

the private households of employers enjoying diplomatic, consular or international privileges and immunities. It should be noted that these figures do not necessarily encompass all persons who work for diplomats in the countries covered, but only those who are migrant workers and possess a special ID card<sup>19</sup> issued by the Protocol department to work in the host country. Workers that might have been recruited at the local labor market who possess the nationality of the host country, a different residence status or no regular status or workers who are declared as family members are not included.

#### Numbers of private domestic workers registered with Protocol departments<sup>20</sup>:

- **Austria:** 237 private domestic workers have been registered as of August 2010.<sup>21</sup>
- **Belgium:** Approximately 200 new permits for private domestic workers are issued per year. As of October 2010, around 500 private domestic workers and 200 members of service staff employed by diplomatic missions but de facto working in a private household of a diplomat have been registered.
- **France:** Approximately 80 new permits are issued per year for private domestic workers. As of October 2010, an estimated 400-500 private domestic workers have been registered.

<sup>18</sup> For further information on OAC, a Geneva-based institution to facilitate settlements between diplomats and their employees, refer to chapter 4.5.2.

<sup>19</sup> Private domestic workers employed by diplomats are provided with special ID cards from Protocol departments which serve as confirmation of their residence status in the host country.

<sup>20</sup> Source: Interviews with Protocol representatives, unless indicated otherwise.

<sup>21</sup> Statistics provided by Ministry of Foreign Affairs, Protocol department, September 2010, on file with the author. Data included in this document is disaggregated by country of origin, age and gender of the domestic workers as well as by country of origin or the employers.

- **Germany:** 249 private domestic workers have been registered as of August 2010.
- **Netherlands:** 208 of which 74 are employed by staff of international organizations (as of May 2011).
- **Switzerland:** 533 private domestic workers have been registered (as of October 2010) in both Geneva and Berne.
- **United Kingdom:** approximately 200–300 permits for private domestic workers are issued per year.

As regards cases of alleged rights violations experienced by domestic workers, representatives of Foreign Ministries and the Office of the Amiable Compositeur in Switzerland shared the following figures of cases brought to their attention (including a mix of statistics and estimates).<sup>22</sup> Information on the nature of legal cases (labor law, criminal law) was provided only on an anecdotal basis.

**Alleged rights violations by diplomat employers experienced by private domestic workers notified to Foreign Ministries and the Office of the Amiable Compositeur:<sup>23</sup>**

- **Austria:** approximately 6–7 cases in the past 1 ½ years (March 2009 – September 2010).
- **Belgium:** approximately 50 complaints received in 2009 (ranging from “tiny to bigger” cases). Per year, the Protocol department learns of an estimated 4 alleged cases under criminal law.

- **Germany:** 11 alleged violations of labor law from January 2008 to mid 2010. No information was provided on criminal law cases.
- **France:** 1 case in 2010.
- **Netherlands:** 5 alleged rights violations over the last 4 years from 2007 to May 2011.
- **Switzerland:** 62 cases, including 46 new cases have been handled in 2009 by the Geneva-based Office of the Amiable Compositeur (OAC).<sup>24</sup> No figures were provided by the Foreign Ministry in Berne.
- **United Kingdom:** so far, 3 cases of trafficking in persons under investigation. No other cases under criminal law and no cases under labor law have ever been reported.<sup>25</sup>

As regards NGO data, most organizations interviewed for this study provided estimates, as clients employed by diplomats have not been captured separately in their statistics. Some NGOs have however compiled detailed statistics on this group and strategically used this data for evidence-based policy advocacy. For instance, Kalayaan (United Kingdom) has collected and analyzed client statistics<sup>26</sup> and used this information in their submission<sup>27</sup> to the UN Special Rapporteur on the Human Rights of Migrants for his latest United Kingdom country report.<sup>28</sup> Other examples are the German NGO Ban Ying, which fed data resulting from its own client statistics and a survey among NGOs into a request to the UN CEDAW Committee to initiate an inquiry procedure against Germany in 2003.<sup>29</sup> The Migrant Rights Centre Ireland (MRCI) is currently working with a sample of qualitative case studies in their

<sup>22</sup> The figures provided do not explicitly distinguish between private domestic workers and embassy service staff working in a diplomat's household.

<sup>23</sup> Source: Interviews with Protocol representatives, unless indicated otherwise.

<sup>24</sup> Source: Statistics provided by OAC, October 2010 (on file with the author). These cases include both private domestic workers as well as service staff members (no breakdown of both categories available). The total of 62 includes preventative consultations (14) and cases that were not within OAC's mandate and therefore rejected (7). For further information on OAC refer to chapter 4.5.2.

<sup>25</sup> Alleged breaches of labor law suffered by overseas domestic workers would be notified to the United Kingdom Border Agency, not the Protocol.

<sup>26</sup> Kalayaan, Client statistics 2008–2009. These figures illustrate the kinds of rights violations experienced by the organization's clients and their nationalities, based on a total sample of 51 cases (27 in 2008 and 24 in 2009).

<sup>27</sup> Kalayaan and Anti-Slavery International 2009.

<sup>28</sup> Special Rapporteur on the Human Rights of Migrants 2010.

<sup>29</sup> Ban Ying 2003: annex 4. These figures illustrate the gender, working and living conditions and countries of origin of private domestic workers working for diplomats and list the nationalities of the employers, based on a total sample of 10 cases.

advocacy for legal and policy changes in Ireland's immigration regime as it affects private domestic workers employed by diplomats.<sup>30</sup>

The following box compiles statistics and estimates of private domestic workers working for diplomatic employers supported by NGOs, covering a broad range of cases from labor rights violations to trafficking in human beings.

#### Private domestic workers employed by persons with diplomatic or consular status and international civil servants supported by NGOs:<sup>31</sup>

- **Austria:** LEFÖ-IBF<sup>32</sup> – overall, an estimated 2-3 cases by year.
- **Belgium:** Pag-Asa<sup>33</sup> – an estimated 5 cases by year. OR.CA – an estimated 4-5 cases per year.
- **France:** CCEM<sup>34</sup> – 15 cases in 2009, including diplomats but also other privileged persons, such as members of royal families of government members of foreign states.
- **Germany:** Ban Ying<sup>35</sup> – an estimated 5-10 new cases per year.
- **Ireland:** MRCI<sup>36</sup> – as of September 2009, legal proceedings had been ongoing in 7 cases assisted by MRCI, including 4 labor law cases and 3 presumed cases of trafficking for forced labor, which were referred to the police.
- **Netherlands:** BLinN<sup>37</sup> – so far, an estimated 3-4 cases (as of August 2010).

- **Switzerland:** No figures provided.
- **United Kingdom:** Kalayaan<sup>38</sup> – 24 cases in 2009. Not all of them reported abuse and exploitation – some workers e.g. came to participate in English classes.<sup>39</sup> Between April 2009 and March 2010, Kalayaan referred 9 private domestic workers employed by diplomats to the National Referral Mechanism (NRM) as presumed trafficked persons. Additionally, they referred four others under a Government pilot project for presumed trafficked persons.

#### 4.1.2 Qualitative Dimension

Interviews have revealed a broad spectrum of alleged rights violations reported by private domestic workers working in diplomats' households on the part of their employers.

Interviewees pointed at a large share of labor rights violations in various degrees among the cases they had come across. When asked about typical cases, examples provided range from milder and/or fewer forms of rights violations to graver breaches that may have accumulated and/or extended over a longer period of time. On one end of the spectrum, interview partners listed breaches of labor law such as failure on part of the employer to pay the full wage or fully compensate the worker for extra hours or for unconsumed annual leave, or, in case of termination of the work contract, failure to respect legal notice periods or to pay indemnity. On the other end of the spectrum, examples of

30 Migrant Rights Centre Ireland 2010. This document provides a qualitative analysis of a sample of six case studies with a focus on the worker's working and living conditions, escape routes and efforts to access justice as well as key trends emerging.

31 Source: Interviews with NGO representatives.

32 LEFÖ Intervention Centre for Trafficked Women (IBF) is based in Vienna and provides counseling and support to trafficked women. For further information, see <http://www.lefoe.at/index.php/ibf.html>.

33 Pag-Asa is based in Brussels and provides counseling and support to trafficked persons. For further information, see <http://www.pagasa.be/>.

34 The Committee against Modern Slavery (CCEM) is based in Paris and provides counseling and support to victims of domestic slavery. For further information, see <http://www.esclavagemoderne.org/>.

35 Ban Ying is based in Berlin and provides counseling and support to trafficked women and other migrant women who experienced violence. For further information, see <http://www.ban-ying.de/pageeng/start.htm>.

36 The Migrant Rights Centre Ireland (MRCI) is a community-based organization in Dublin, which promotes migrant workers' rights, among others through advocacy, information and referral services and supporting workers' action groups. For more information, see <http://www.mrci.ie/>.

37 Bonded Labor in the Netherlands (BLinN), a joint program of the NGOs Humanitas and Oxfam Novib, is based in Amsterdam and provides counseling and support to trafficked persons. For further information, see [www.blinn.nl](http://www.blinn.nl).

38 Kalayaan is based in London and provides advice, advocacy and support services for migrant domestic workers. For more information, see <http://www.kalayaan.org.uk/>.

39 According to a survey conducted by Kalayaan, which was answered by at least 19 out of these 24 workers (response rates differed for the different questions), over 70 percent of respondents had not been allowed out, had no day off during the week, had to be on call 24 hours, were paid £50 or less per week and/or had their passports withheld.

more severe violations include complete withholding of wages, forcing workers to work excessive hours without days off and without any or with inadequate compensation or failure to provide them with adequate accommodation and food. A number of interviewees mentioned restrictions of the workers' freedom of movement – by prohibiting them to have social contacts and to leave the house unaccompanied or by withholding their passports and special ID cards.

When asked about extreme cases, interview partners told about workers who had been forced to sleep on the floor, deprived of food apart from leftovers, denied basic hygiene and suffered physical, psychological and/or sexual violence. Such cases involving slavery-like conditions were regarded as an exception rather than the norm by interviewees.

It emerged from interviews that the boundaries between "typical" and "extreme" cases were fluid. While some forms of rights violations might be part of either category, it was the combination of different forms of abuse and their duration that were relevant criteria.

The following example illustrates a "typical case" shared by the NGO Kalayaan. It is exemplary for the large number of cases that involve massive economic exploitation of a domestic worker's labor, some form of restrictions of the worker's freedom of movement, but no physical or sexual violence.

Maria<sup>40</sup> is a woman in her forties from Indonesia. She was brought to the United Kingdom by a diplomat to work as housekeeper/cleaner. The employer made her work extremely long hours – sometimes 18 hours a day, with no day off in the week. She had to sleep on the floor in the hallway. Whenever she wanted to leave the house, she had to tell her employer when she would be leaving and when she would be back. Maria received only half of the salary she was promised before coming to the United Kingdom. Leaving the employer would have meant that she had to return to Indonesia. Returning home was not an option for Maria as she had to support her three children back home and pay back debts that she had incurred to leave her country for work originally.

An example of a case involving extreme rights violations is the case of "Ms Hasniati"<sup>41</sup>, reported by the NGO Ban Ying.

Ms Hasniati, a woman from Indonesia, had worked for four years (including two and a half years in Germany) in the private residence of a diplomat. She had to work up to 19 hours a day and never received any pay for her services. She was provided with only very little food of poor quality, was not allowed to leave the house and was subjected to physical violence. The employer kept Ms Hasniati's special ID issued by the Protocol department and did not return her passport. Only after months of suffering from tuberculosis, Ms Hasniati was allowed to go to the hospital to seek medical care.

## 4.2 Legal and Procedural Frameworks in Host Countries Governing the Employment of Domestic Workers by Diplomats

The following chapter highlights key elements of legal frameworks and administrative procedures put in place by host state governments to prevent, monitor and respond to rights violations experienced by private domestic workers employed by diplomats. Rather than presenting an in-depth legal analysis of the author, which would have exceeded the scope of the present study, this chapter provides an overview of relevant frameworks and procedures and their application, based on information shared by interview partners, unless indicated otherwise in the footnotes.

### 4.2.1 Admission and Monitoring Procedures

As private domestic workers working for diplomats in the countries covered by this study are usually non-EU citizens, they need a permit to obtain residence and to work in the respective host country. Usually, these permits take the form of a special ID card issued by the Foreign Ministries' Protocol departments. The present chapter provides an overview of the procedures put in place by governments regulating the entry and employment of domestic workers and the monitoring of working conditions in the host country.

<sup>40</sup> The name was taken from the case study provided to the author by Kalayaan.

<sup>41</sup> Pseudonym used by the NGO Ban Ying who had supported the domestic worker.

#### 4.2.1.1 Admission Criteria

Governments have set a number of admission criteria for the employment of domestic workers in diplomats' homes, which differ among countries. Besides general factors such as majority age or the requirement that the worker must not be a family member of the employed, some of these criteria touch upon the domestic workers' private and family life, as illustrated by the following examples.

##### Marital status of the employee

In Switzerland, for example, in order to work with a diplomat, domestic workers must be single, divorced or widowed.<sup>42</sup> If, during employment, a worker gets married or if a female worker gives birth to a child in Switzerland, s/he ceases to fulfill the admission criteria and therefore loses the special ID card after the expiry of the current work contract.<sup>43</sup> Exceptionally, a married couple who has already worked for the same diplomat before may be authorized to accompany her/him to Switzerland, provided that they will both continue to work for the same employer and that, if they have children, child care is guaranteed for their entire stay.<sup>44</sup> Domestic workers employed by diplomats can only be joined by family members, if the latter fulfill the requirements under the general immigration and work permit system. Even in case this amendment will be adopted, it remains to be seen how feasible it will be for non-EU citizens to fulfill these requirements. The only countries covered by the present study where the possibility of a spouse to join a domestic worker of a diplomat in the host country exists, are France<sup>45</sup>, Belgium, the Netherlands and the United Kingdom.

##### Living conditions of the employee

Switzerland<sup>46</sup> and Germany require domestic workers to live in the same household with the employer, unless the latter is unable to provide accommodation complying with the required quality standards – in which

case s/he has to pay for her/his employee's separate accommodation. No legal requirement to live in the same household exists in Austria, France and the Netherlands but in practice it is almost always the case. In Austria, similarly to Switzerland, the employer has to pay for renting additional space if s/he cannot make adequate accommodation available to the domestic worker, plus a higher minimum wage.<sup>47</sup> A private domestic worker is in principle free to live separately, if s/he wishes, which however rarely happens in practice. In that case, s/he must cover the additional costs her/himself and confirm in writing that s/he voluntarily chose not to live with the employer.

#### 4.2.1.2 Application Procedure for Visas and Special Protocol ID Cards

As a general rule, it is not the individual diplomat, but the embassy, mission or international organization that applies for the visa of the prospective domestic worker prior to her/his arrival in the host country.

As regards the kind of **documentation required**, a variety of documents have to be submitted to the host country's embassy abroad or the Protocol department of the MFA in the capital. Here, the requirements differ among countries. The United Kingdom government requests only a certificate of sponsorship signed by the employer, thus pursuing a light touch approach. Other countries covered by the study require a work contract signed by both parties and in line with the host country's labor law standards, with Austria, Belgium and France providing obligatory templates, or a declaration signed by the employer and stamped by the embassy confirming that s/he respects national labor law and provides for the domestic worker's accommodation, health insurance and return flight after the contract ends. While Germany requests accommodation of the domestic worker in a separate room "if possible", in Austria and Switzerland, this is a mandatory requirement. The Protocol department in Vienna requests a copy of the employer's lease and a map of her/his

<sup>42</sup> This criterion will be removed by the new Ordinance.

<sup>43</sup> Département fédéral des affaires étrangères (DFAE), Directive sur l'engagement des domestiques privés par les membres du personnel des missions diplomatiques, des missions permanentes, des postes consulaires et des organisations internationales en Suisse, entrée en vigueur le 1<sup>er</sup> mai 2006, modifiée le 1<sup>er</sup> janvier 2010, paragraphes 3.22, 7.2.

<sup>44</sup> Ibid.

<sup>45</sup> Ministère des Affaires Étrangères (no date indicated). The spouse's visa application is submitted to the Protocol department by the employer's mission.

<sup>46</sup> Département fédéral des affaires étrangères (DFAE), Directive sur l'engagement des domestiques privés par les membres du personnel des missions diplomatiques, des missions permanentes, des postes consulaires et des organisations internationales en Suisse, entrée en vigueur le 1<sup>er</sup> mai 2006, modifiée le 1<sup>er</sup> janvier 2010, paragraphes 3.1, 8.2.

<sup>47</sup> For the government's minimum wage scheme for domestic workers applicable in Vienna, see Bundeseinigungsamt beim Bundesministerium für Wirtschaft und Arbeit, Mindestlohn tarif für im Haushalt Beschäftigte/Wien, § 2 paragraph A subparagraphs 1-2, paragraph B subparagraphs 1-2.



apartment/house clearly indicating a separate and adequate living space for the domestic worker that must comply with existing health, building security and fire prevention regulations.

Since autumn 2010, Austria also requires the establishment of a **bank account** of the domestic worker as a prerequisite for the registration of private domestic workers and has notified diplomatic missions and international organizations that wage payments in cash are no longer accepted. When the employer requests an extension of a Protocol ID for a domestic worker, the Protocol department may request proof of bank transfers of past salaries and, in case such evidence cannot be provided, will refuse the extension. While the setting up of bank accounts is not obligatory in France, Germany and the Netherlands, the respective Protocol departments were in practice recommending domestic workers to do so.<sup>48</sup>

Once the visa has been approved, the worker is allowed to enter the host country where the employer, through the mission or international organization, applies for a **special ID card** issued by the Protocol department. This is the case in all countries but the United Kingdom, where the worker's right to stay is confirmed solely by a vignette stamped into her/his passport without a separate ID. In some countries, domestic workers are required to pick up their special ID in person from the Protocol department (see chapter 4.2.1.3). As a rule, special ID cards are issued for a limited period of time, initially mostly for one year. When extending the card's validity, the French as well as the Dutch Protocol department choose a shorter period, if there are grounds to suspect problems in the employment relationship. In that case, the ID is issued only for a period of three to six months; after this period, the worker is requested to come to the Protocol department to pick up her/his renewed ID and given an opportunity to update the Protocol department on the employment situation, so that the latter can consider further steps. A similar approach exists in Belgium. In the United Kingdom, the overall duration of the vignette is limited to six years and in Germany the duration of the

special ID card is limited to five years, with the possibility to re-enter after one year.

In order to inform employers of the relevant procedures and applicable labor law standards in the host country, Foreign Ministries have issued **notes verbales** that are distributed to employers, diplomatic missions and international organizations. In most countries, Protocol departments also provide employers with model contracts, which, in varying degrees of detail, specify the cornerstones of the employment relationship. In some countries, **written information on their legal rights** is also provided to private domestic workers: Besides a comprehensive leaflet published by the Swiss Foreign Ministry in eight languages<sup>49</sup> and the Dutch Foreign Ministry in nine languages<sup>50</sup> information materials identified in the course of this study have mainly been produced by NGOs.<sup>51</sup>

#### 4.2.1.3 Monitoring of Ongoing Employment Relationships by Protocol Departments

The screening of documentation during the application and renewal process provides a possibility for MFAs to monitor the compliance with labor laws and employment contracts in work relationships between private domestic workers and diplomats.

In addition, Protocol departments in some countries have **personal meetings with domestic workers**. Upon arrival in the host country,<sup>52</sup> workers in Austria, Belgium, Switzerland and with some exceptions in France<sup>53</sup> have to come to the Protocol department unaccompanied to pick up their special ID card. During these meetings, they also receive information on the relevant administrative procedures, their rights and possibilities to obtain support. Further meetings are scheduled when the workers' IDs are due for renewal and at a later stage if needed, in order to give them an opportunity to seek further information and to bring any concerns relating to the employment relationship to the Protocol department's attention. In Switzerland, such follow-up meetings are currently held only on a case-by-case basis, but the government is planning to

<sup>48</sup> Circular Note 7/2003 of the Federal Foreign Office, published in Ban Ying 2008: p.12ff.

<sup>49</sup> Federal Department of Foreign Affairs 2010.

<sup>50</sup> Ministry of Foreign Affairs of the Netherlands 2011.

<sup>51</sup> Ban Ying 2008: Geneva Forum for Philippine Concerns 2000. Furthermore, the King Baudouin Foundation in Belgium in 2005 published a brochure titled "Working as a Homehelp at the Private Residence of a Diplomat".

<sup>52</sup> At least three countries foresee that, before entering the host country, domestic workers pick up their visa in person at the embassy abroad.

<sup>53</sup> In France, the Protocol department invites domestic workers living in Paris and surroundings to personal meetings. For workers living in other parts of France, ID cards are being sent to the mission of the diplomat's sending country or the international organization.



replace the current system by introducing regular follow-up meetings. In Germany, according to the Foreign Ministry, personal meetings between the Protocol department and domestic worker are not foreseen as standard practice, but may be held at the request of the domestic worker. The German MFA is currently discussing a new route for reporting rights violations: according to the Protocol department, the setting up of an emergency telephone number or special e-mail address to enable confidential reporting is being considered.

The United Kingdom is the only country among the six examples covered by this study where there is no personal contact between the MFA and the domestic worker.

In one of the countries, an NGO providing counseling and support to trafficked women is participating in the personal contact between the Protocol department and the domestic worker: When there are grounds to believe that rights violations occurred in the employment relationship, the Protocol department invites the NGO to come to the Ministry to meet the domestic worker. The aim is to enable the worker to report rights violations to a person specialized in psycho-social counseling and to identify strategies for support in an atmosphere of trust. This is the only example among the countries covered in this research of NGOs participating in meetings of Protocol department and private domestic workers.

As mentioned above,<sup>54</sup> some MFAs require or encourage the opening of a bank account of the domestic worker, in order to facilitate the proof of salary payments in case of a dispute. In some countries the MFA requests the employer to prove bank transfers of salaries when considering the extension of a Protocol ID card for private domestic workers, or in case of suspected rights violations.

#### 4.2.1.4 Assessment by Interview Partners

Overall MFA representatives seemed satisfied with existing regulations and procedures. Among the strengths or gaps pointed out, a few specific issues were raised, besides a number of comments of a rather general nature such as "the system could be improved" or "you could always do more". NGO interviewees, even where progress was noted, pointed to a

need for further improvements, as outlined in the following.

#### Monitoring of Ongoing Employment Relationships

**Personal contact between the Protocol department and domestic workers** was regarded as an important measure by Foreign Ministry representatives in countries where this is being practiced. The Belgian interviewee noted that this approach put in place by her MFA seven years ago had made an enormous difference as a lot more cases of rights violations were now being brought to the Protocol department's attention. This positive assessment was joined by the Belgian NGO representative, who also noted, however, that language barriers might sometimes prevent domestic workers to report problems as translators might not always be available.

Several NGO interviewees underlined the importance of personal meetings between Protocols and domestic workers. One NGO representative believed that in her country, where no such personal contact was currently taking place, the retaining of the workers' documents by their employers – an experience that most of their clients had made – could be prevented by having private domestic workers pick up their documents in person at the Protocol department. For such meetings to be effective, the creation of a climate of trust with the domestic worker was considered crucial, which would sometimes require a lot of time. In the country where a NGO was attending meetings of the Protocol department with the domestic workers in case of suspected rights violations, the Ministry and the NGO interviewee concurred in a positive assessment of this cooperation. The Protocol representative underlined the added value of the presence of an NGO who had expertise in dealing with victims of rights violations and was trusted by both the Ministry and the domestic worker.

Challenges brought up by NGO and government interviewees included **language barriers** and reluctance of domestic workers to speak openly to the Protocol official about abuses experienced, mainly due to intimidation by their employers. As regards the **skills and capacities** of Protocol staff in dealing with reports of rights violations, some Foreign Ministry interviewees tended to be of the opinion that no additional efforts in terms of sensitization were required as those staff members who were in contact with domestic workers

<sup>54</sup> See chapter 4.2.1.2.

had acquired the necessary skills over the years through training on the job. Sporadic criticism was voiced from the NGO side that Protocol staff lacked the necessary capacities and sensitivity to deal with human trafficking cases and expressed concern that the Protocol department leaned closer to the side of diplomats.

The requirement of setting up a bank account was considered by NGO and government interviewees a powerful tool to facilitate proof as to whether salaries had been paid – which was seen as protecting the interests of both workers and employers. At the same time, concerns were raised that some migrant domestic workers might not be familiar with the host country's banking system, and that, with regard to MFA's role and resources, the Protocol department would not be in a position to provide assistance in this regard.

#### Admission Criteria

Several interview partners expressed serious concern that the requirement for private domestic workers to live in the same household with the employer increased their risk of exposure to abuse and exploitation, compared to those who come to work and leave after work. In particular NGO representatives identified the requirement of living in the diplomat's household alongside the fact that the worker's immigration status was tied to the employer as a main factor contributing to the structural dependency of domestic workers on their employers.<sup>55</sup>

#### 4.2.2 Immigration Status – Characteristics and Possibilities to Switch

As a general rule, the special immigration status of domestic workers is accessory to the continuation of the employment relationship and their employer's stay in the host country and therefore does not allow them to switch their employer. That also implies that, once the work relationship has ended – be it due to expiry of the contract, the end of the diplomat's posting or the termination of the work relationship by either side – the domestic worker loses her/his right to stay and work in the host state's territory.

A few limited exceptions to this general principle have been identified by interviewees, as will be summarized in the following. While interviewees neither provided specific figures on residence permits awarded to

domestic workers employed by diplomats through other avenues nor elaborated on the respective legal prerequisites, it was understood that such permits would be awarded on a case-by-case basis and constituted the exception rather than the rule.

#### Switching within the Diplomatic Community

Most countries covered by the study provide for a limited exception by allowing switching employers within the diplomatic community within a certain period of time (usually one month) after the work contract has ended. In the Netherlands it is required that the two contracts are performed in a continuous sequence. The Foreign Ministry is currently reviewing this practice with regard to giving the domestic worker more time to find a new employer in cases of abuse or exploitation. That possibility does not exist at all in Germany and in the United Kingdom it is restricted to new employers who work in the same diplomatic mission. The British government has announced a review of its overall visa policy as regards domestic workers working in private and diplomat households for the beginning of 2011.

In case a private domestic worker has fled an abusive work relationship, some Foreign Ministry representatives said they would informally try to assist her/him finding a new job by linking her/him up with a potential new employer, should they be aware of someone within the diplomatic community looking for domestic personnel. At the same time it was underlined that, in light of its role and mandate, the Protocol department could only play a limited role in this regard. An institution explicitly mandated to provide such job exchange services exists in Switzerland: The Geneva Welcome Centre<sup>56</sup>, an institution founded in 1996 by the Swiss Federal Government and the Canton of Geneva, runs a database of diplomats offering employment and of domestic workers in possession of a special permit issued by the Protocol department. The aim is to assist both sides – the domestic workers in finding a job within 30 days following the end of the working relationship and the potential employer in quickly finding appropriate personnel. Services are provided free of charge.

Interview partners have identified examples of approaches to legalize the status of domestic workers for a limited time period that some Protocol depart-

<sup>55</sup> See also Kalayaan 2010a: 1 and Migrant Rights Centre Ireland 2010: p. 2.

<sup>56</sup> Website of the Geneva Welcome Centre <http://www.cagi.ch/en/vie-pratique/travail/bourse-emploi-personnel-maison.php> (visited 26 November 2010).

ments have either applied in the past and/or would consider in the future, within their margin of discretion. This included the exceptional renewal of the special ID card in cases of serious rights violations where no other option was available to the domestic worker to enable her/his stay in the host country for the duration of legal proceedings against the former employer, where such proceedings were legally possible (see chapters 4.3. and 4.4.). Another example mentioned was the provision of a confirmation letter to a worker having fled an abusive work relationship stating that, for the period specified in the letter, the person remains in the territory with the knowledge of the Protocol department, in order to enable her/him to engage in out-of-court negotiations. These examples were based on discretionary decisions on the part of Foreign Ministries, rather than on legal entitlements of domestic workers.

#### Switching to the Anti-Trafficking Framework

For rights violations amounting to trafficking in human beings, special assistance and protection, including temporary residence status, is in theory available to workers who have been identified by the authorities as presumed trafficked persons. While regulations differ among countries as regards the definition of trafficking and the duration of and/or prerequisites to obtain residence status, a common feature is that this status is limited to the duration of criminal proceedings and linked to the applicant's cooperation with law enforcement. In addition, trafficked persons may obtain long-term or indefinite residence status beyond the duration of proceedings, for example in Belgium (provided that the prosecutor brings a charge against the trafficker)<sup>57</sup> or in France and the Netherlands (if a court judgment has been obtained).<sup>58</sup> In France and the Netherlands there also exists the possibility of obtaining residence status on humanitarian grounds where there has been no court case or the case has not resulted in a conviction (Netherlands), when proceedings end with

a judgment that is not in favor of the trafficked person, for example because of diplomatic immunity (France) or when proceedings are ongoing but do not require the presence of the trafficked person anymore (Switzerland).<sup>59</sup>

Interviewees mentioned a few cases in which private domestic workers employed by diplomats had been able to obtain such temporary or long-term residence permits under anti-trafficking legislation. In Austria for example, a few years back, some domestic workers employed by diplomats had obtained short-term residence permits under the anti-trafficking framework, including in cases where due to the diplomat's immunity no legal proceedings could be instituted.

In France, the legislation was not precise as to whether long-term residence permits for trafficked persons required a judgment by a criminal court or a labor court. In some cases, domestic workers had been awarded long-term residence status on the basis of convictions of former employers before labor courts (see chapter 4.4.2.1. for examples of cases in which courts have issued judgments against employers with diplomatic status). Belgium is the only country where an explicit regulation on assistance and protection of trafficked persons in the context of diplomatic immunity exists.

In Belgium, the residence status of trafficked persons is linked to criminal prosecution and their cooperation with law enforcement, as well. In the case of domestic workers employed by diplomats, however, criminal prosecution is usually not an option, given the diplomatic status of their employers. The government sought to address this gap by integrating a specific section on "victims of trafficking working for diplomatic personnel" into the Ministerial Circular of 26

57 European Commission, Fight against Trafficking in Human Beings, National Info Page Belgium, <http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Belgium> (visited 6 March 2011).

58 Sources: Information provided by the French NGO interviewee; European Commission, Fight against Trafficking in Human Beings, National Info Page The Netherlands, <http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Netherlands> (visited 6 March 2011).

59 Sources: Information provided by the French NGO interviewee; European Commission, Fight against Trafficking in Human Beings, National Info Page The Netherlands, <http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Netherlands> (visited 6 March 2011); Verordnung über Zulassung, Aufenthalt und Erwerbstätigkeit, adopted on 24 October 2007, as of 24 January 2011, Article 36 paragraph 6 (available at <http://www.admin.ch/ch/d/sr/1/142.201.de.pdf>, visited 25 May 2011).

September 2009 dealing with multidisciplinary cooperation in the field of assistance to trafficked persons.<sup>60</sup> This circular states that, in cases where the employer's diplomatic status renders criminal proceedings impossible, an opinion issued by the prosecutor (Magistrate de Ministère Public)<sup>61</sup> confirming the situation of trafficking and exploitation shall be sufficient for an official recognition as a victim of trafficking and subsequently the issuance of a residence permit. When establishing the relevant facts, the magistrate shall consider the statement of the worker and other specific elements of the file. The prosecutor may undertake all appropriate measures, in cooperation with the Protocol department, to prove the existence of the crime, while respecting the rules governing diplomatic immunity. On the basis of this provision, private domestic workers in practice receive permanent residence permits, once there has been a positive advice from the prosecutor. During the inquiry and as long as there is no such advice, they are awarded a temporary residence permit of six months.

#### Switch to Regular Residence Permit System

Foreign Ministry sources also mentioned instances of domestic workers working for diplomats who had been able to switch to the regular residence and work permit system. In Austria, a small number of domestic workers have in the past been able to switch from the Protocol ID to a residence permit for employed persons, issued by the immigration authorities. While that permit was again limited to domestic work for diplomats, it allows the worker, after seven years, to apply for unlimited residence status. Even though this channel is apparently not well known, it has been successfully used in a number of cases according to the Protocol department. In the United Kingdom, migrant domestic workers can apply for settlement (i.e. indefinite leave

to remain) after a period of five years, if they have resided legally as a full-time domestic worker in the country during that period.<sup>62</sup> According to the Protocol department, in 2009 settlement was granted to a total of 795 persons employed in households of both private persons and diplomats (no figures were available as to the share of domestic workers employed by diplomats in that group).

Another – exceptional – possibility for domestic workers to change their residence status are broader regularization campaigns by the government. From Belgium it has been reported that a very small number of domestic workers have been able to switch to regular residence permits as part of such a campaign in 2000. A second round of regularization is currently pending – it remains to be seen how many domestic workers will be able to benefit from it.

#### 4.2.2.1 Assessment by Interview Partners

In particular for non-state interview partners, the immigration status of private domestic workers – both during the ongoing employment relationship as well as after the worker left the diplomat's household – constituted a key concern. It was criticized that the dependency of the domestic worker's status on the stay of the employer and the continuity of the work relationship created and perpetuated dependencies and unequal power relationships.<sup>63</sup> Combined with the employer's diplomatic status and the economic pressure faced by many migrant domestic workers as they have to pay back loans and are sending money back home to support their families, these factors were regarded as preventing the workers from accessing justice.

Several interviewees from Foreign Ministries regarded the system of awarding residence permits as part of existing National Referral Mechanisms to assist and protect trafficked persons a viable option to enable private domestic workers who fled exploitative work

<sup>60</sup> Circulaire relative à la mise en œuvre d'une coopération multi-disciplinaire concernant les victimes de la traite des êtres humains et/ou de certaines formes aggravées de trafic des êtres humains, 26 September 2008 (available at [http://www.diversite.be/index.php?action=wetgeving\\_detail&tid=67&select\\_page=12](http://www.diversite.be/index.php?action=wetgeving_detail&tid=67&select_page=12), visited 25 May 2011). In line with general requirements of anti-trafficking legislation, the circular states that, in order to be eligible for recognition as a victim of trafficking, a domestic worker needs to be supported by a specialized victim support center, make a statement or file a lawsuit, renounce the work relationship and return the special ID to the Protocol.

<sup>61</sup> Magistrate within the Prosecutor's Office.

<sup>62</sup> For further information on the possibilities for migrant workers to apply for settlement, refer to the UKBA website: <http://www.ukba.homeoffice.gov.uk/workingintheuk/othercategories/domesticworkers/settlement/> (visited 10 December 2010).

<sup>63</sup> This gap has also been addressed by the UN Special Rapporteur on Contemporary Forms of Slavery in her most recent report dealing with domestic servitude, in which she identified the lacking possibility to switch employers as an element of "neo-bondage" and as a factor contributing to a "net of dependency factors from which the victim cannot extract herself". Special Rapporteur on Contemporary Forms of Slavery, including its Causes and Consequences 2010: paragraphs 33, 48, 57.

relationships that qualify as human trafficking to legally remain in the country for the duration of proceedings, after their special ID has lost its validity. However, non-state actors questioned the extent to which domestic workers employed by diplomats were in fact benefitting from this protection. The conditional link between residence status and criminal proceedings poses an obstacle because diplomatic privileges and immunities often render criminal proceedings virtually impossible. In this context, the Belgian Ministerial Circular of 2009 was considered a positive step, as it offers a way around the conditional link.

Some interviewees pointed to the ambiguity of national laws and practice as regards the nature of proceedings required and the resulting lack of clarity as to whether labor court proceedings or out-of-court negotiations would be a sufficient basis for the worker to receive a residence permit, or whether criminal proceedings needed to be instituted. Other gaps mentioned included the case-by-case approach used by authorities in handling applications, which made the outcomes difficult to predict, and long duration of proceedings, which creates a situation of limbo for the domestic worker after having left her/his work place.

### 4.3 Measures under International Diplomatic Law and their Application in Practice

A number of measures are at the disposal of Protocol departments in host countries in response to reports on alleged rights violations committed by foreign diplomats in the context of the employment of private domestic staff. While some measures have an explicit basis in the Vienna Convention on Diplomatic Relations such as declaring a diplomat persona non grata or requesting the waiver of her/his immunity, others are of a more informal and less far-reaching nature, for instance raising the matter with the ambassador of the diplomat's sending state.

Foreign Ministry interviewees noted that the selection of appropriate measures depended very much on the circumstances of the individual case and that it was therefore difficult to specify which measures would be considered, or in fact applied, under which circumstances. Overall, interviews revealed that the measures taken tended to lean rather towards the lenient spectrum, whereas the more severe measures foreseen in the Vienna Convention on Diplomatic Relations, such

as requesting waivers of immunity or declaring a diplomat persona non grata, are considered measures of last resort and are being rarely, if at all, applied.

#### 4.3.1 Informal Measures at the Diplomatic Level

MFA interview partners mentioned a number of examples of diplomatic measures at their disposal that are being applied in practice vis-à-vis the sending state or the international organization and/or the diplomat.

- **Raising the matter with the ambassador or director of the international organization** to request an explanation and facilitate the settlement of the case. Such exchange takes place behind closed doors, without involvement of the domestic worker or a representative of her/him.
- **Delay or refusal in issuing permits for domestic workers** if the diplomat or mission has a bad track record in employment matters. In some countries Protocol departments have occasionally resorted to this measure. While interviewees did not specify how often or under which circumstances this measure would be put into practice, some explained that when considering an application, they would take into account whether any cases of rights violations reported in the past have remained unsettled and insist that any persisting issues be solved before accepting the registration of a new domestic worker.
- **Threats to withdraw or actual withdrawal of unilateral privileges**, such as exemptions from value-added taxes (VAT), were mentioned by Protocol interview partners from at least two countries as reaction to breaches of host country laws by diplomats in general. In one country (Belgium) these measures have been applied to involving rights violations of domestic workers. It was underlined that such measures needed to be chosen in a way that they did not negatively influence the diplomat's ability to perform her/his official duties.
- **Informal exchange with Protocol counterparts in other countries** on employers with a negative track record in employing private domestic workers.

### 4.3.2 Diplomatic Measures Foreseen in the Vienna Convention

It emerged from the interviews that severe diplomatic measures are being very rarely applied, and if, mainly in cases of severe labor exploitation or trafficking in human beings.

As regards the more severe measures established by the Vienna Convention, interview partners from Foreign Ministries in at least four countries (Austria, Belgium, Switzerland, United Kingdom) referred to cases where they had requested the sending country or international organization to **waive the employer's immunity** in cases of rights violations reported by domestic workers. While no figures on the number of requests could be provided, interviews revealed a spectrum of responses, as demonstrated by the following examples. According to the representative from the Protocol department in the United Kingdom, if the MFA was being approached by the police with a request for a waiver of immunity, it was standard practice to pass on that request to the foreign mission. If the waiver was not accepted, the Protocol department would request the diplomat's withdrawal – that was done in at least one case involving trafficking in human beings brought to their attention in 2008. In France, the threshold for requesting waivers seems to be higher: According to the French Protocol interview partners, the government considered requesting waivers in general as a measure of last resort and would most likely do so only in very serious cases, such as if a diplomat was suspected of having killed somebody. In Germany, no waivers in cases involving rights violations of private domestic workers had so far been requested.

The following case of exploitation of a domestic worker, in which immunity had eventually been waived and the employer was consequently taken to court, has been documented by the French NGO Comité contre l'Esclavage Moderne (CCEM).

This case involved a criminal law suit against a high-level diplomat and former Prime Minister working with an international organization in Paris who, together with his wife, had allegedly exploited his wife's two nieces as domestic workers. The girls had been 13 and 9 years old, respec-

tively, when they fled the war in Burundi in 1994. C., the older girl, had to take care of the family's household seven days per week, 16 to 17 hours per day and look after six of the couple's seven children. She was not allowed to leave the house and had her passport taken away. Both girls were subjected to degrading living conditions.<sup>64</sup> After the Director of the international organization had waived immunity following a request from the host country's prosecutor, the employer was put to trial. Despite his efforts to challenge the court's jurisdiction by invoking immunity, the Supreme Court eventually confirmed that French courts were competent to deal with the case – among others, because the international organization had waived the employer's immunity.

At the upper end of the spectrum of diplomatic measures foreseen by the Vienna Convention on Diplomatic Relations is the **declaration of a diplomat as persona non grata**. Following such a declaration, the sending state shall either recall the diplomat or terminate her/his functions with the mission (Art. 9 Vienna Convention), which means that the diplomat can be held accountable for rights violations before the host state's courts like any other person. According to Foreign Ministry representatives, in none of the countries covered by the study, use had ever been made of the possibility of a non grata declaration. MFAs usually consider a declaration persona non grata as a measure of last resort and therefore first warn the mission or international organization that unless the case could be settled the diplomat would be asked to be withdrawn.

When asked if and under which circumstances Foreign Ministries would consider declaring a diplomat persona non grata – both in cases of abuse of a private domestic worker and more generally –, some MFA representatives stated that they might consider this measure in very serious cases, if all other measures had failed. Examples provided of other cases where a persona grata declaration had been made included very serious criminal offences such as murder, terrorism or espionage, but, according to Denza, the procedure has also been applied to large patterns of illegal parking by diplomats, as had been the case in the United Kingdom.<sup>65</sup>

<sup>64</sup> Website of CCEM, [www.esclavagemoderne.org](http://www.esclavagemoderne.org) (visited 15 July 2010).

<sup>65</sup> Denza 2008: p. 86.



In practice, it was considered difficult to distinguish whether a diplomat left as a result of a *persona non grata* declaration by the host state or because of a withdrawal by her/his sending state without such a declaration. The following case illustrates an example of a case that came close to a *persona non grata* declaration:

In Austria, in a case that involved allegations of labor rights violations (non-payment of wages and compensation for overtime) and physical violence committed against a domestic worker by her employer, the repeated interventions of the host country's Foreign Ministry with the diplomat's embassy failed to result in a successful settlement of the case. However, as a consequence, the diplomat was withdrawn by the sending country, one year before her posting ended. According to the Protocol department, this case *de facto* amounted to a declaration *persona non grata*, without the Ministry having had to declare it as such.

#### 4.3.3 Assessment by Interview Partners

Foreign Ministry representatives tended to regard lenient diplomatic measures an appropriate response to reported rights violations. Measures such as the refusal of or delayed issuing of permits for domestic workers or the withdrawal of unilateral tax privileges for employers with a bad track record had been found effective in a material sense in various occasions as they helped to substantially increase the motivation of employers to agree to a settlement and to make remuneration payments to the domestic worker.

While more severe measures were in principle deemed appropriate in the context of domestic work – at least in cases involving very serious rights violations – the scope of application of such measures was considered substantially restricted because of the hidden nature of domestic work and the inherent difficulties in proving rights violations alleged by private domestic workers. Whereas traffic violations could be proven more easily (e.g. through tickets stating the violation in writing), this was more difficult for rights violations committed in the hidden sphere of the home, where one person's word stood against the other's.

While Foreign Ministry interviewees tended to emphasize the *ultima ratio* character of diplomatic measures

foreseen under the Vienna Convention, non-state actors were of the opinion that Foreign Ministries should be more proactive in applying such measures, in particular the declaration *persona non grata*, in domestic servitude cases. NGO representatives and lawyers pointed to examples in which, in their opinion, the severity of the case would have justified the application of measures of last resort foreseen in the Vienna Convention on Diplomatic Relations. The case of "Ms Hasniati", who had been subjected by her employer to conditions amounting to *de facto* slavery, including massive violations of her labor rights and freedom of movement (see chapter 4.1.2), was mentioned as an example where a declaration *persona non grata* would have been appropriate.

A number of interviewees across all target groups pointed to the political dimension and the potential impact on country's bilateral relations as explanations for the rare application of severe diplomatic measures. As one NGO representative put it, while some individual Ministry officers might be open and sensitive to the need for applying more severe measures, their leeway was limited by their government's high-level diplomatic and political interests. Some interviewees pointed to the resistance of sending countries to waive immunity as a challenge, whereas one NGO representative suggested that this argument might be used as a pretext by host country Protocol departments to justify their own inaction. The important role of NGOs in lobbying their governments to exert pressure on other states to lift immunity was underlined.

Some interviewees suggested that it made a difference for the potential impact of diplomatic measures whether their counterpart was a bilateral mission or an international organization. International organizations were perceived more receptive than bilateral representations when it came to insisting on their own staff members' compliance to comply with their legal obligations under contractual arrangements and the host country's laws and to granting waivers of immunity. While bilateral missions usually withdrew their staff in case of problems, that was not the case for international civil servants so there was a better chance of exerting pressure, in particular with international organizations who were mandated to work on human rights and rule of law issues. Furthermore, governments often refused to accept the host state's jurisdiction over their diplomats by arguing that they should be sued back home in front of their own courts, while international organizations did not have that option.

## 4.4 Legal Proceedings

The very nature of diplomatic immunity implies that diplomats are exempted from the jurisdiction of the host country's authorities. That means a substantial restriction of the possibilities of private domestic workers to access justice against their employers. Nevertheless, given the fact that immunity primarily aims to protect the sending state's, and not the individual diplomat's, interests, it should be kept in mind that persons enjoying diplomatic privileges are not exempted from the duty to observe the host country's laws,<sup>66</sup> but that merely legal proceedings are barred for the time immunity exists. This implies that for instance when the diplomat's immunity has been waived by the sending country, legal proceedings may be undertaken against her/him like any other person. Similarly, after the diplomat's posting and consequently her/his immunity for acts committed in a private capacity has ended, s/he can be taken to court for these acts. Furthermore, the jurisdiction of the sending country over its diplomats remains untouched – thus maintaining the option of pursuing legal claims in that country. For an overview of the relevant standards set by the Vienna Convention on Diplomatic Relations, refer to chapter 3.1.

The following chapter addresses interview partners' experiences in using legal proceedings as an avenue for private domestic workers to seek redress against rights violations committed by diplomatic employers. While the analysis mainly focuses on the six core countries covered by the research (Austria, Germany, Belgium, France, Switzerland, United Kingdom), it also takes up experiences shared by NGO interview partners from Ireland and the Netherlands with relevant experiences concerning legal proceedings.

### 4.4.1 Applicable Labor Law Standards

According to information provided by interviewees, as a general rule, private domestic workers employed by diplomats are covered by national labor law standards in all countries investigated as part of the study, apart from specific admission criteria (see chapter 4.2.1.1).

In most countries, the employers and/or missions or international organizations need to confirm, through signing a declaration of commitment or note verbale, that they have taken note of the applicable legislation pertaining to the employment of the private domestic worker. In Austria<sup>67</sup> and France<sup>68</sup>, for example, that also includes an explicit obligation not to take the domestic worker's passport and Protocol ID away.

In most countries covered, private domestic workers employed by diplomats are theoretically covered by regulations establishing **minimum wages**. The amounts established by laws, directives or collective agreements often differ according to criteria such as the years of work experience and whether food, accommodation and social security are included or not. Therefore, and also because national minimum wages are based on different numbers of regular work hours, ranging from 35 hours per week in France to 238 hours per month in Austria, a cross-country comparison of amounts is difficult. The German Protocol department in its Circular Note 6/2004 reminds foreign diplomats that these amounts reflect minimum levels only and are not equivalent to distinctly higher wages commonly paid for this kind of work in Germany. Only some countries' model contracts provided by Foreign Ministries contain references to the legal minimum wage.

The Swiss government is currently preparing a new federal Ordinance regulating the working conditions for private domestic workers employed by diplomats, in order to overcome the current fragmentation at cantonal levels.<sup>69</sup> Among others, it is planned to introduce a federal minimum wage through the Ordinance.

As regards **health and/or social insurance**, in at least three countries (Austria, Belgium, Switzerland) private domestic workers are mandatorily covered by the state insurance system, unless they possess equivalent insurance in a third country (based on a bilateral agreement between the latter and the host country) or private insurance. In France, private domestic workers cannot be covered under the state health and social insurance system and therefore must get private health insurance to be paid by the employer. The range or risks covered by state social insurance differs by countries – for instance, whereas Switzerland covers health, acci-

<sup>66</sup> Art. 41 (1) Vienna Convention.

<sup>67</sup> Bundesministerium für europäische und internationale Angelegenheiten 2009: Zirkularnote BMeiA-AT.1.35.01/0018-I.1b/2009, 23 October 2009, p. 2 (on file with the author).

<sup>68</sup> Ministère des Affaires Étrangères et Européennes, Attestation (à joindre au contrat d'engagement d'un personnel privé) (on file with the author).

<sup>69</sup> The Ordinance is expected to enter into force at the beginning of July 2011. It will be available under [www.eda.admin.ch](http://www.eda.admin.ch)



dent, invalidity and pension insurance, in Austria, only health insurance is comprised. The Austrian Protocol interviewee considered accident insurance for private domestic workers to be covered by the employer's obligation to bear all costs of assistance and medical care which might arise to Austrian public entities due to the domestic worker's entry and sojourn in Austria, as undertaken in the employer's declaration of commitment.

#### 4.4.2 Legal Proceedings: Procedures, Claims and Outcomes

Due to the very nature of diplomatic immunity which exempts diplomats from the jurisdiction of the host countries' courts, interviews have overall revealed limited experiences with legal proceedings against diplomat employers.

##### 4.4.2.1 The Role of Diplomatic Immunity in Legal Proceedings

Interview partners shared examples of cases where courts considered themselves competent to deal with claims raised by private domestic workers against diplomat employers. Overall, interviews revealed that legal proceedings fail to provide private domestic workers with legal certainty as regards the relationship between violations of individual rights and diplomatic immunity.

- **Immunity had never existed** – for example where the presumed diplomat turned out to be a lower rank staff member of a diplomatic mission or international organization whose immunity was therefore limited to acts undertaken in her/his official capacity, or a family member of a diplomat who possessed the nationality of the host state and therefore did not enjoy immunity. In practice, it may be difficult to distinguish between the status of these employers and those enjoying immunity.
- **Immunity had ceased to exist** – for example after an international organization had agreed to waive immunity of its employee, or after the diplomat's functions had come to an end, at which point s/he no longer possessed immunity for acts performed in her/his private capacity.

- **The worker was employed not by an individual diplomat, but by the government of the sending state.** Even though the employee had worked in the ambassador's private residence, her/his employment contract had been signed by the diplomatic mission of the ambassador's sending state, not the ambassador her/himself. Therefore, the matter was to be addressed under the doctrine of state immunity, rather than diplomatic immunity. Under that doctrine, foreign states are immune from the host country's jurisdiction only in regard to *acta iure imperii* (acts undertaken by a state in exercising its sovereign authority) and therefore may be taken to court in regard to disputes pertaining to employment contracts, which qualify as *acta iure gestionis* (acts of a private law nature) – a principle of international customary law recognized by many states.

- **Failure of diplomat to appear in court:** Interviewees reported instances where Labor Courts in Belgium, France, Ireland, Switzerland and the United Kingdom had considered themselves competent to hear the case because the diplomat had not participated in the proceedings and failed to raise the defense of diplomatic immunity. Therefore, it was found that the diplomat did not benefit from immunity, and in several cases, judgments were issued in favor of the domestic workers, as illustrated in the following examples.

In the case of "Alia", a domestic worker employed by a diplomat in the United Kingdom, a lawyer submitted a claim on behalf of her in the labor court for several violations of labor law, including sexual harassment, breaches of working time regulations and failure to pay the national minimum wage. The court considered itself competent to hear the case because the employer had not invoked diplomatic immunity<sup>70</sup> and awarded "Alia" compensation amounting to approximately £ 80,000. However, because of the diplomat's departure, "Alia" could not enforce this judgment.

A domestic worker from Sri Lanka came to France where he worked in the private household of a high-level diplomat. Over a period of about one year, he worked from 7AM to 10 PM every day,

<sup>70</sup> The Guardian 2010: Does immunity breach a victim's human rights? 30 August 2010.

without a day off and did not receive his full wage as agreed in the contract. He had no room on his own and had to sleep on a folding bed. His passport had been taken away and he was not allowed to leave the house unaccompanied. After he fled to the NGO CCEM, he sued his employer before the Labor Court. The employer had been summoned but did not participate in the proceedings. The court condemned the diplomat to pay his former employer an overall amount of approximately EUR 14,000, including compensation for unpaid wages, unconsumed annual leave and unlawful dismissal.<sup>71</sup> The employer did not appeal the judgment. However, the domestic worker could not enforce his entitlements because of the diplomat's immunity from execution.

However, the worker was not able to obtain any payments from the employer because of the latter's immunity from execution. The Administrative Supreme Court<sup>73</sup> found that, under the doctrine of state liability independent of negligence which exists in France, the French government was liable to pay compensation to the domestic worker. That doctrine provides for liability of the state in cases where an international convention signed by France (here: the Vienna Convention Diplomatic Relation, which applied through analogy) has an unintended significant negative effect upon a small group of people. The group was defined by the Court as those domestic workers employed by diplomats who had obtained a judgment by a French Court, but could not enforce it because of immunity from execution.

This argumentation points to efforts of individual judges to apply regulations on immunity creatively, but also to gaps in the knowledge on the concept of immunity, given the fact that in order to be valid, waivers of immunity need to be explicit and can only be granted by the sending state, not an individual diplomat. While providing a moral victory to domestic workers, such judgments are unlikely to enable domestic workers to access compensation and remuneration, given the fact that diplomat employers are unlikely to accept judgments that override international diplomatic law and also with a view to immunity from enforcement.

- **State liability for damages suffered:** A recent judgment by the French Administrative Supreme Court demonstrates an alternative channel for domestic workers to obtain compensation – namely from the host state.

The domestic worker who had worked for a deputy delegate of a member State's permanent representation to Unesco had been awarded compensation against her former employer amounting to around EUR 33,400, including for unpaid wages, by a Court of Appeal. The employer appealed but the second instance court upheld the judgment in favor of the domestic worker.<sup>72</sup>

#### 4.4.2.2 Procedures and Claims

The majority of cases that interview partners had been notified of and/or worked with concerned proceedings under labor law before labor courts or semi-judicial bodies and/or criminal law proceedings.

Examples of **labor law claims** include primarily payment of outstanding salaries, compensation for overtime work, unconsumed annual leave or dismissals in violation of legal notification periods, but also payment of outstanding social security premiums, compensation following sexual harassment or reinstatement after illegal dismissals. The amounts claimed covered a broad range, depending on the amount of the legal minimum wage in the respective country (which, according to several interviewees constituted a core component of the claims), the duration of the employment relationship and the extent to which the worker had or had not been paid in the past. Amounts can be quite substantial. To take an example shared by a lawyer from United Kingdom, recent claims included amounts of £ 30.000 (where the contract had lasted only for eight months, but the domestic worker had worked many extra hours) up to possibly £ 150.000 in a case where the employment relationship lasted for years. The following case also showcases how rights

<sup>71</sup> Conseil de Prud'hommes de Paris RG n° F 05/06486, 4 January 2006.

<sup>72</sup> The judgment of the Supreme Administrative Court did not address the issue of immunity from jurisdiction. According to the French NGO interviewee, the employer most likely could not rely on immunity because of his very appearance in court.

<sup>73</sup> Conseil d'État 2011: n° 325253, 11 February 2011.

violations continuing over longer periods of time can amount to quite substantial claims.

In a case taken on by the Irish NGO MRCI, the labor law claims of "Ali",<sup>74</sup> a driver and cook who was paid a US\$ 150 per month for 105 hours of work per week added up to approximately EUR 60,000, over an employment period of two years. "Ali" had to be on call throughout the night, without breaks or pay for work on Sundays, public holiday or annual leave. He had to sleep in the basement in a room without heating or natural light. He was not allowed to leave the house and had his passport returned only when he visited his home country on holidays. "Ali" left the employment and remained in Ireland in order to obtain remuneration based on his entitlements under Irish employment law.<sup>75</sup>

Only very rarely have domestic workers initiated proceedings before **civil courts**, even in cases involving physical violence and/or deprivation of the workers' freedom of movement.

As regards cases that had been referred to the **criminal justice system**, in a number of countries, including Austria, Belgium, Ireland and the United Kingdom, this was done under the criminal offence of trafficking in human beings. Other relevant offences identified by interview partners included bodily injury, rape, coercion, or wage usury.

In the majority of cases, domestic workers faced **difficulties to provide evidence** of the rights violations they had experienced. While embassy drivers could use their daily logbooks to document their work, such an option was not available to domestic workers. Therefore, in most cases, there would be the word of the domestic worker against the word of the employer. That gap was exacerbated in cases where the domestic workers had been deceived or coerced into signing blank receipts or receipts indicating higher amounts than those actually received, a practice experienced by interviewees in some countries.

Some NGOs, in their daily counseling work, have been recommending domestic workers the following ways

to document rights violations: taking notes to document key facts such as work hours, times of going to bed or the kind of work undertaken; writing down names of persons who might be able to confirm working hours, such as neighbors, guests served at receptions or parents met at the playground or at school; keeping record of discussions with the employer; keeping receipts of money transfers to their accounts back home; taking photos to document living conditions. MFA representatives mentioned bank statements proving the transfer of wages as a useful means of evidence – for both sides, the domestic worker and the employer.

#### 4.4.2.3 Outcomes of Legal Cases

The majority of interview partners said they had not been aware of any cases that resulted into convictions against diplomats before criminal, labor or civil courts and/or actual payments by diplomats. In Belgium, France, Switzerland and the United Kingdom, interview partners referred to a number of cases in which labor courts had found themselves competent to hear the case and awarded payments to private domestic workers through judgments that were issued in absence of the employer. In these cases the employer had failed to respond to the claims and to participate in the legal proceedings (see chapter 4.4.2.1.).

The only country in which interview partners recalled a few examples of labor court judgments that resulted in actual payments by employers to private domestic workers was Switzerland. While exact figures could not be provided, one interviewee had observed a tendency of international civil servants being most likely to comply with court judgments, followed by states (i.e. embassies or missions as employers of service personnel), while according to the interviewee's experience, individual diplomat employers would only rarely pay amounts ordered by courts.

When it came to criminal proceedings, interviewees observed a strong tendency on the part of criminal justice authorities to prematurely close cases and only in isolated cases had come across judgments. Diplomatic immunity of the employer, lack of evidence to indict and the departure of diplomats were among the reasons for closing cases listed by interview partners.

<sup>74</sup> Pseudonym used by MRCI.

<sup>75</sup> MRCI 2010: p. 5f.

#### 4.4.3 Assessment by Interview Partners

##### Overall Added Value of Legal Proceedings

Interview partners had different views on the overall value of legal proceedings in the context of the present study, in the light of the limitations inherent to diplomatic immunity.

At the level of enforcement of the rights of individual domestic workers, the impact of legal proceedings was considered rather limited. Against the background of diplomatic immunity, legal proceedings in the majority of cases were unlikely to result in enforceable results for domestic workers in the strict legal sense. Even though a few cases resulted into labor court judgments, this was far from providing private domestic workers with legal certainty and offering a systematic response to their inability to seek justice from diplomat employers.

- Interview partners across all categories pointed to the difficulty to prove rights violations committed in work relationships in diplomat's private households, especially as regards non-payment of wages and, even more, overtime work. The employer's right to privacy in general and diplomatic immunity and inviolability of the home in particular have been identified as obstacles preventing police and labor inspectors from entering the work place and collecting evidence (see below).
- A number of interviewees questioned the value of a judgment that might take a very long time to obtain but in the end could not be enforced: Even in those few cases where domestic worker had managed to overcome the hurdle of the employer's immunity from jurisdictional immunity and to obtain a conviction of the diplomat, diplomatic immunity from enforcement posed an additional obstacle. Apart from legal constraints – even if jurisdictional immunity were waived, a separate waiver would be required to enable the host country to enforce the judgment – the likelihood of successful enforcement was restricted by the fact that diplomats most often have left the host country's territory and moved their assets abroad. Knowing from the beginning that legal proceedings, once instituted, would most likely have to be closed and legal entitlements could not be awarded because of the employer's diplomatic status was often a great frustration for domestic workers.

- Interview partners expressed concern about the tendency of some labor courts to quickly override immunity, often without providing a well-reasoned justification in the judgment, which might put them at risk of being seen to break diplomatic law. While such judgments might provide domestic workers with a moral victory, they fail to provide a solid basis for enabling them to access their legal rights.

- Court judgments establishing the facts of the case, while not providing enforceable rights, could however be of pragmatic use. For example, on the basis of judgments, domestic workers might in individual cases be able to obtain residence permits or access state compensation funds. Furthermore, some interviewees found that the initiation of legal proceedings could increase pressure on individual diplomat employers to engage in out-of-court proceedings or to agree to settlements – this potential was however seen to depend on the duration and quality of legal proceedings.

A number of NGOs concluded that, with all the uncertainties involved (long duration of court proceedings and police investigations; lack of adequate support and protection infrastructure and unclear residence status, in particular in cases of labor rights violations not amounting to human trafficking; risk of having to bear procedural costs; little chance of obtaining a judgment and if so, of being awarded more than the minimum wage) a lot was at stake for their clients when considering whether or not to initiate legal proceedings, while having very little chance of a satisfactory outcome. Therefore, explaining to the clients the options and implications was key for NGOs and lawyers. One lawyer explained that advice to the clients would basically come down to the following: "If you want moral recognition – go to court. If you want money, it's better to negotiate." The lawyer also criticized that given the de facto impossibility to obtain and/or enforce judgment, legal proceedings completely missed the purpose of prevention – rather than having a deterrent effect, law suits would reinforce the idea that "you can get away with it".

Overall, interview partners tended to attribute added value to legal proceedings rather at the structural level.

- Several Foreign Ministry representatives underlined the importance of using the judicial path and that there was no alternative for a country with certain rule of law standards to stick to those. Interviewees agreed that obtaining a judgment gave the domestic worker a sense of justice and official recognition of the injustice experienced.
- Strategic litigation has been identified by non-state interviewees as a useful entry point in order to challenge the large patterns of unsuccessful cases in European countries which reveal systemic gaps in the implementation of state obligations under international human rights law, in particular to protect domestic workers employed by diplomats from slavery and servitude and to guarantee them access to justice. Moreover, the importance of using international human rights law in national litigation was flagged by a lawyer who hoped that, once a claim of a domestic worker against a diplomatic employer would be successfully litigated in her country, diplomats and embassies might be more willing to engage in proceedings.
- From an NGO perspective, cases taken to court and their outcomes have also proven a useful basis for lobbying the government to tackle structural shortcomings and for awareness raising and campaigning purposes.

#### The Role of Preliminary Proceedings in Criminal Law

The potential of criminal proceedings was underlined by interviewees in particular in regard to cases of rights violations qualifying as trafficking in human beings. Some interviewees have observed progress in the responses of criminal justice actors. Anecdotal evidence indicates that increased sensitivity of police and prosecutors on issues around diplomatic immunity has had a positive impact on the outcome of individual cases. Where criminal justice authorities thoroughly investigate and prosecute rights violations reported by private domestic workers within the legal boundaries of immunity, domestic workers have been able to obtain the status of victims of trafficking (see chapter 4.2.2.) and subsequently to obtain residence permits and access state-funded support facilities.

Besides such examples of progress, many NGO interview partners and some Foreign Ministry representatives expressed concern about gaps in the response of police and prosecutors to cases involving alleged rights

violations committed by diplomats against private domestic workers. A key point was the overall reluctance on part of criminal justice actors to take action against diplomats, which manifested itself in the failure to record reports made by domestic workers, the tendency to drop cases quickly without fully exploring the options for investigating cases allowed by international diplomatic law and the failure to follow existing procedures. Some interview partners also found that the authorities might not be sufficiently familiar with how far they were allowed to go in investigating cases against diplomats within the boundaries of international diplomatic law. Another bottleneck identified concerned the resistance of the criminal justice system towards recognizing the exploitation of domestic workers and trafficking for forced labor as a matter of criminal law – an issue that was found to concern proceedings against diplomatic and private employers alike.

#### Impact of diplomatic measures for the enforcement of civil claims

A number of NGO representatives were of the opinion that Protocol departments should do more to push for waivers of immunity and, in case a judgment was delivered, for compliance with the court's ruling.

Interviews also revealed that the application of diplomatic measures in practice may have a negative impact on the enforcement of domestic workers' labor rights: Even if immunity were waived, it was likely that the diplomat would immediately depart, thus rendering legal steps in the host country and the enforcement of a judgment very difficult. As one of the lawyers put it: "Obtaining a waiver might be a diplomatic victory for the host country, but in practice it brings no advantage for the victim."

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#### 4.5 Out-of-Court Negotiations

Given the protection of diplomats under international law and the fact that diplomatic immunity from jurisdiction and execution is rarely waived by sending states, out-of-court negotiations have in practice provided often the only and so far most effective option for domestic workers to obtain compensation and remuneration from employers with diplomatic status.

Most interview partners have reported experiences with extra-judicial negotiations as an avenue to settle claims of private domestic workers against diplomatic employers.

#### 4.5.1 Nature and Amount of Claims

Interviews have revealed that claims negotiated have almost exclusively been based on labor law. Similar to what was said for legal proceedings, claims included payment of wages, remuneration for overtime work or unconsumed annual leave, payments of social security premiums, as well as compensation or reinstatement following illegal dismissal during sickness or pregnancy. In a number of cases, the ticket for the return flight for the domestic worker was also part of the negotiation package.

Civil law claims, such as for reimbursement of medical expenses or compensation for pain and suffering were hardly ever pursued, and if at all, as part of a lump sum. Explanations provided by interviewees included that they either had not come across a lot of cases involving violence, or that they were less familiar with that area of law and so far had not thought about raising civil claims. Obviously, the mandate of the complaint mechanism put in place also played a role: while for example the Geneva-based Office of the Amiable Compositeur is specialized on settling labor law, civil law claims are not a major focus of its work.

As for legal proceedings, the amounts of claims raised by domestic workers in negotiations may range from smaller to larger scales, depending on the duration of the employment relationship and the extent to which due payments have or have not been made in the past. It appears from the interviews that the wage component is usually based on the respective country's legal minimum wage. This allows for the conclusion that in practice, employment contracts do not go beyond this amount, thus stipulating it as rule, rather than a minimum standard that may be exceeded by the parties. Examples of figures shared by interview partners ranged from one month's wage up to EUR 200,000. For instance, in a case reported by an interviewee from Austria that had involved severe exploitation and violence, the claims as calculated by the lawyer who had represented the worker in the negotiations amounted to around EUR 30,000 for unpaid wages, overtime, additional allowances provided by labor law and damages for harm and suffering.

#### 4.5.2 Settings of Negotiations and Actors Involved

In most countries **Protocol departments** played some role in facilitating negotiations between private domestic workers and their employers, with different degrees of involvement. Besides the transmission of information on alleged cases to the embassy or international organization concerned and the request for a statement, which seems a common feature of all Foreign Ministries' role, Protocol representatives from Austria explicitly and Belgium to a certain extent regarded their role as being a mediator and neutral convenor of private domestic workers and diplomats. A more cautious approach was reflected in interviews with Foreign Ministry officials from Germany and Switzerland who stated that their departments might be involved in negotiations in a mediating capacity, albeit only on an exceptional basis. For Switzerland it was explained that this role was mainly played by the Geneva-based Office of the Amiable Compositeur (OAC – see below), an institution specialized in mediating labor law related disputes. At the other end of the spectrum, the United Kingdom Protocol department, according to its representative, was not aware of any negotiations that might have taken place among parties and played no role in facilitating those.

In some countries **other state actors** get involved in facilitating settlements between domestic workers and their employers. The Geneva-based **Office of the Amiable Compositeur (OAC)** is facilitating the settlement of work conflicts that involve persons who enjoy diplomatic and consular privileges and immunities. Such a specialized body is unique among the countries covered by the present study.

The Office of the Amiable Compositeur (OAC) was established in 1995 by the cantonal government of Geneva in cooperation with the Swiss Mission to the United Nations (UN).<sup>76</sup> It is funded by the canton of Geneva and has its secretariat administratively attached to the latter. OAC has been set up as an independent and

<sup>76</sup> OAC was established at a time when widespread media coverage of cases of alleged abuse of domestic workers by diplomats and an increase in the international presence in Geneva caused concern on the part of the government about the city's international image as well as the rights of private domestic workers. Geographically, OAC covers the canton of Geneva, seat of a large number of international organizations and UN Member States' permanent missions to those, as well as neighboring canton of Vaud. An expansion to Berne where bilateral embassies are based is currently being discussed.



impartial body that is not bound by any governmental directives.<sup>77</sup> The Office has three members: a president who is also a Member of Parliament and a former Member of the cantonal government and her two deputies, former delegates of the International Committee of the Red Cross. OAC's mediation services primarily focus on labor law disputes. Domestic workers reporting potential breaches of criminal law are provided with basic information on their rights and referred to specialized organizations for further support and advice, such as the Geneva-based NGO *Cœur de Grottes*. The Office also has a small hardship fund to provide financial support or loans to domestic workers. Its services are confidential and provided free of charge. Overall, an estimated 80 percent of OAC's clients are employees, and the remaining 20 percent employers. The latter mostly contact OAC to request legal advice on issues such as the length of legal notification periods. Typically, disputes relate to payments of salaries, working conditions and illegal dismissals. When it comes to finding an agreement on the amount to be paid, OAC has separate conversations with both parties. In their work, they use two possibilities for coming up with a starting point in financial terms: either OAC makes a proposal to begin with that they regard appropriate or the mediation starts on the basis of the respective claims of the domestic worker and the employer.

Since its creation, OAC has been dealing with an average of 40–50 new cases per year.<sup>78</sup> 24 percent (10 cases) out of the 41 cases effectively handled in 2009 could be resolved in that year as a result of OAC mediation and concluded by an agreement signed by both parties. A further four cases were resolved among parties themselves – not directly as a result from OAC's mediation but with some involvement at an earlier stage. Overall, the rate of successful mediations since OAC's creation in 1995 is around 30–40 percent.

In Belgium, the position of a **Labor Mediator** exists. However, it differs from OAC as it is not a specialized and independent body – the Mediator's tasks are part of the portfolio of a Director General at the Federal Ministry of Labor. Furthermore, the Mediator's main role in negotiations between diplomatic employers and private domestic workers is the calculation of employee's claims. Upon request of the domestic workers or the Protocol department, the Labor Mediator provides exact calculations based on objective criteria, which are then used as basis for negotiations. Furthermore the body has the task to inform domestic workers on their rights. The Labor Mediator has so far played no direct role in negotiations facilitated by the Protocol department, but has done so in cases of mere labor law breaches (thus excluding those qualifying as trafficking in human beings) referred to him by the NGO interviewed.

As regards the role of NGOs providing support to private domestic workers, some of the organizations interviewed did participate in negotiations in order to safeguard the interests of their clients – either through joining negotiations facilitated by Protocol departments, if appropriate and apparently on an occasional rather than on a regular basis (as for example in Germany), or through directly approaching diplomat employers or embassies (as was reported from Ireland and the United Kingdom). The French NGO interviewee stated that her organization did not directly participate in negotiations but rather referred domestic worker to lawyers.

The lawyers interviewed had different levels of experience in representing private domestic workers employed by diplomats in negotiations – ranging from an exclusive focus on taking cases to court without any engagement in negotiations over some involvement in negotiations, depending on the individual case either in addition to or instead of legal proceedings to a main focus on negotiations, after a few litigations at an earlier stage. According to NGOs and lawyers interviewed, the contact between domestic workers and lawyers is often facilitated by NGOs, many of them having established longstanding working relationships with lawyers from other areas of their work, such as

77 See also Bureau de l'Amiable Compositeur 2008: Note à l'intention des Mesdames et Messieurs les députés membres de la Commission de droits de l'Homme du Grand Conseil genevois, 28 May 2008 (not published, on file with the author).

78 In 2009, OAC received a total of 62 requests, including 46 new cases. Out of these 62, 41 cases were effectively handled, besides 14 that concerned preventive consultations and 5 requests that were not within the Office's mandate. Out of the 41, 8 cases were closed without result and 19 were still ongoing by the end of 2009. These figures include both private domestic workers as well as service staff members (no breakdown of both categories available).

supporting trafficked persons or domestic workers working with private employers. As state legal aid is either not available for extra-judicial negotiations or, if it exists (for example in Germany), fails to cover the entire costs incurred, the services of lawyers are mostly either paid by NGOs or provided by the lawyers on a pro bono basis.

Apart from Switzerland, where two unions based in Geneva were mentioned that are involved in advising and representing private domestic workers or referring them to lawyers, interview partners so far showed limited experience in working with trade unions in representing private domestic workers in court cases of negotiations against diplomatic employers. For example the Irish NGO interview partner had referred to a case in which an Irish union had helped a driver employed at an embassy to realize his employment rights on the basis of a written agreement concluded with the embassy that had been facilitated by a union in the sending country. Apart from cooperation on individual cases, NGO interviewees from Ireland and the United Kingdom had engaged with unions in the field of joint policy work and campaigning.

#### 4.5.3 Outcomes of Negotiations

As regards the outcomes of negotiations between domestic workers and diplomats, in those cases that lead to a settlement, interviewees mainly pointed to financial settlements, but there was no indication of cases where the actual dispute was settled and an employment relationship reflecting legal rights and obligations continued.

In financial terms, a number of exemplary cases shared by interview partners from Germany and Austria for instance had resulted in settlements ranging from EUR 1,200 up to around EUR 23,300. According to statistics provided by the representative of OAC in Switzerland,<sup>79</sup> the organization had facilitated settlements amounting to CHF 89,874.45 (around EUR 69,200)<sup>80</sup> in 2009. For the period of 1995–2009, the total amount of settlements achieved was CHF 2,233,610.33 (around EUR 1,719,500),<sup>81</sup> with an annual average of CHF 148,907.36 (or around EUR 114,600).<sup>82</sup>

The information obtained through interviews does not allow for representative conclusions on the extent to

which the amounts agreed through negotiations reflect the amounts originally claimed. Interviews however reflected an overall tendency of monetary outcomes far below the original claim, often with discrepancies of about 50 percent. For example, in one case from Germany, the domestic worker had claimed EUR 31,000 for unpaid wages, including overtime, over an employment period of 3 ½ years. Eventually, the settlement resulted in an award of EUR 16,000, based on the legal minimum wage, but without taking into consideration the overtime work performed, for which it was not possible to provide evidence. In one case reported by the Austrian Protocol department that involved physical violence, the employee claimed EUR 30,000, whereas the employer was willing to pay EUR 1,900 covering one month's salary and the worker's return ticket – in that case, no settlement could be achieved.

#### 4.5.4 Assessment by Interview Partners

Interview findings reveal that the extra-judicial path has in several instances proven an – at least partly – effective route for domestic workers to obtain compensatory payments owed to them under labor law. Indeed, a number of interview partners across all target groups found that out-of-court settlements implied a greater likelihood for domestic workers to obtain at least some remuneration compared to legal proceedings, which would usually either be closed at some point because of the employer's immunity from jurisdiction, or produce judgments that – even if they might in some cases award high amounts to the worker – could not be enforced, due to the diplomat's immunity from enforcement or because s/he had left the country. At the same time, a number of problems have been identified, as will be outlined in the present chapter.

#### Outcomes of Negotiations

While the negotiation strategies of NGOs and lawyers rather aimed at obtaining payments that fully amounted to the labor entitlements of domestic workers' claims, state actors tended to pursue a rather pragmatic approach. Accordingly, the assessment of the outcomes of out-of-court negotiations differed substantially among different groups of interview partners.

<sup>79</sup> Office of the Amiable Compositeur, Tableau comparatif 1995–2009, (not published, on file with the author).

<sup>80</sup> Calculation of the author, on the basis of ECB exchange rate as of 30 November 2010.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.



NGO representatives and lawyers expressed concern about the low amounts negotiated by or on behalf of domestic workers, which were regarded as failing to reflect the workers' entitlements under national law and the severity of rights violations experienced. Furthermore, it was criticized that key elements of the workers' entitlements, such as remuneration for overtime work and unconsumed annual leave, or damages for harm and suffering, had been mostly absent from the negotiation table. As one NGO interviewee put it, "the outcome is usually a compromise which is obviously not in the interest of the victim".

State representatives, on the other hand, tended to be rather satisfied with the outcomes of negotiations. Their objective seemed to be the achievement of a pragmatic compromise that was acceptable to both parties, even if it was far below the claims presented by domestic workers. In one country, concern was expressed about the amounts of claims presented by some domestic workers which were considered excessive and therefore counterproductive. For example, as was explained by one interviewee, when a domestic worker demanded around EUR 92,000 for work performed over a period of two or three years, such an amount was problematic because it was clearly not affordable to the employer and therefore reduced the chance for a successful settlement. As a thumb rule, the interviewee regarded reasonable an amount that was between the legal minimum wage and what was acceptable to each party - which would usually be around two-thirds of the minimum wage. Overall it was argued that it was important that in the end the employer or embassy was able to pay the amount negotiated, even if it was less than the original claim - only then the domestic worker could be certain to receive the money.

#### Difficulties in Providing Evidence to Substantiate Claims

As a general rule, due to the absence of witnesses, it is difficult for domestic workers to prove labor rights violations committed in the hidden sphere of the home, in particular unpaid wages and excessive work hours, which often constitute the biggest part of their claims. Furthermore, cases have been reported where domestic workers were coerced or deceived to provide blank signatures or had to sign papers which they did not understand, which were then used by employers to wrongly claim that payments had been made. Only in isolated instances have domestic workers been able to prove overtime with the help of witnesses, usually as result of contacts to the outside world, for example

when neighbors could confirm that they had seen the domestic worker looking after the diplomat's children at the playground every weekend. Overall, the situation of proof in practice works in favor of the more powerful party.

#### Settings of Negotiations and Actors Involved

While the participation of **Ministries of Foreign Affairs** in facilitating negotiations was overall assessed positively, non-state actors pointed to cases where the role of the Ministries as custodian of diplomatic relations had conflicted with their function as complaint mechanism or facilitator of settlements. The Ministries' neutrality was sometimes questioned.

Some NGOs underlined the important role that Protocol departments have played in setting the stage for negotiations between domestic workers and their representatives on the one hand and the diplomats and/or embassies on the other and pointed to the importance of developing good working contacts with Protocol officers. As stated by one NGO, "the diplomats wouldn't be willing to talk to us or to the lawyer if the Foreign Ministry was not involved in the discussion." Furthermore, negotiations facilitated through the Ministry rather than the NGO getting in direct contact with the employer was regarded useful as it allowed for official confirmation or regularization of the domestic worker's residence status.

NGOs attached great importance to the background and commitment of the head of Protocol department and the level of sensitivity and competency of Protocol staff to address cases of rights violations reported by domestic workers. Understanding of issues around victimization was regarded crucial, given the fact that domestic workers sometimes feared repercussions from their employers and that it therefore might take quite some time for them to speak out on the rights violations and trauma experienced. The point on sensitivity was also linked to staff turnover as new officials might be less aware of the issue and therefore at first be hesitant to take a strong stand vis-à-vis abusive employers so that good work relationships have to be built again.

Non-state interviewees considered problematic that the impact of the role of Foreign Ministries as guardian of diplomatic relations depended on a number of factors, including the sending country of the employer, the host country's economic interests, or the status of the employer: if s/he was the ambassador, the process might take longer as the Foreign Ministry might

be more keen to avoid diplomatic problems, whereas in case of a diplomat, the Ministry could seek to exert pressure on the ambassador in order for her/him to insist that the diplomat settled the case.

NGOs tended to regard their own participation in negotiations important in order to ensure that their clients' interests were appropriately represented vis-à-vis the Protocol department and the employer. Furthermore, it was considered to contribute to increased transparency of the process – also because the Foreign Ministry in its role as neutral convenor was not seen in an appropriate position to exert pressure on diplomats and to take sides.

Among Foreign Ministry interviewees, there were different views on the role of NGOs in negotiations facilitated by the Ministries. One Ministry interviewee regarded the psycho-social skills of specialized NGOs as valuable to support the domestic worker, as Protocol staff lacked specific expertise in this area. It was suggested that NGOs participating in negotiations might benefit from increased legal expertise, either through own staff capacities or external support from a lawyer. Another Foreign Ministry interviewee from a country where regular contact between the Protocol department and an NGO was established explained that while in principle nothing spoke against the presence of NGOs in negotiations, they had no specific role in the negotiations facilitated by the Ministry. In another country, where no contact in regard to individual cases or policy consultations was in place between the Foreign Ministry and NGOs, the Ministry interviewee tended to perceive the role of NGOs rather as service providers than as relevant actors in the negotiation process.

In Switzerland, where an **external mechanism** specifically devoted to mediating disputes between diplomats and private domestic workers – the Office of the Amiable Compositeur (OAC) – exists, interview partners overall appreciated the establishment of this institution. Positive attributes included the external nature of the Office and that its establishment demonstrated political will on part of the government to tackle the issue. All interview partners underlined the importance of impartiality and independence of such a mechanism. While representatives from the Foreign Ministry and OAC regarded the Office sufficiently independent and underlined its equidistance to both parties, concern

was voiced among non-state interview partners that because of its staffing,<sup>83</sup> OAC was positioned too close to the government which gave reason to doubt its independence. Furthermore, the Office was perceived as leaning rather towards the employers' side, which was found to have a negative impact on the outcomes of negotiations.

The participation of **lawyers** representing domestic workers in negotiations was deemed useful by several interviewees because of their legal expertise supplementing the psycho-social skills of NGOs, for instance when it came to calculating claims. Furthermore, support by a lawyer could help to give stronger weight to a case vis-à-vis the Protocol department, compared for instance to a letter merely signed by a NGO. A major challenge identified was funding. Even if state-funded legal aid existed, it was available only for court proceedings. NGOs in countries without pro-bono tradition could not always afford to pay for a lawyer to represent their clients in negotiations.

When it comes to the role of **trade unions**, NGOs tended to see an added value of partnerships rather in joint policy work and campaigning, than in the field of individual case work. That was explained by the fact that domestic workers in general, and those employed by diplomats in particular, have traditionally not been among the core target groups of unions. Also it was explained that unions usually provided services only to those workers who have been paying members for a certain period of time, which was often not the case for private domestics working for diplomats.

As regards the role of **domestic workers** in negotiations, several interviewees regarded their participation at the negotiation table important, as it enabled them to voice their views and interests. At the same time, it was stated that the workers were sometimes too modest and too readily accepting offers that were far below their entitlements – possibly because of fear of the employer, but also because an amount of for instance EUR 400 that was below the legal minimum wage was often still a lot of money compared to earnings back home. This was a challenge for NGOs whose work was guided by their clients' interests: if the worker accepted an offer that the NGO regarded not sufficient, there was no way to prevent the client from doing so. Sometimes negotiations were attended by NGOs without presence of their clients, in order to be able to negoti-

<sup>83</sup> The President of OAC is a former government minister and current member of Parliament. Her two deputies are former delegates of the International Committee of the Red Cross.

ate a settlement that reflected the worker's legal entitlements. According to a Foreign Ministry representative, domestic workers needed to be convinced to insist on their rights – that was where well-experienced NGOs would bring an added value.

### Factors Influencing the Outcomes of Negotiations

A number of ingredients for successful negotiations were identified by interviewees. Some of these factors were regarded useful to achieve a better balance in the unequal power relationship between employers and employees. Others could help to increase the understanding on the part of actors involved in facilitating negotiations as well as the willingness of parties to come to a settlement.

According to some representatives of Foreign Ministries, the **withdrawal of privileges** such as unilateral tax exemptions or the refusal or delay of the registration of new domestic workers had in some cases had the positive effect of increasing the willingness of diplomats to engage in negotiations and pay the amounts agreed.

Several interview partners among state and non-state actors pointed to the importance of **reputation** to the employer and her/his embassy. It was underlined that facilitators needed to understand the needs of the parties and what would be the worst case scenario for either side: As a rule, the strongest interest of employers and their embassies was to avoid damage to their reputation, while employees were greatly interested in obtaining financial compensation for and moral recognition of their entitlements by their (former) employer. Mainly non-state actors have identified **media coverage and public campaigning** to make abusive behaviour of diplomat employers widely visible (“naming and shaming”) as a useful tool to enable their clients to obtain remuneration. The fear of loss of reputation was seen as major factor to motivate diplomats to engage in negotiations and to pay an appropriate amount to domestic workers, as well as embassies to put pressure on and take responsibility for their staff members who employ domestic workers under exploitative conditions. As one NGO interviewee put it: “The only pressure we have is to go public.” Recent examples taken

to the public by NGOs and accompanied by widespread media coverage include the cases of “Ms Hasniati”, a client of the German NGO Ban Ying; and of Valentyna Khristonsen, a domestic worker supported by the Irish NGO MRCI. Both organizations found that the public naming and shaming of abusive employers had proven useful to obtain settlements for their clients and said that they would be using this strategy also in other cases.

In November 2009, MRCI's Domestic Workers Action Group organized a public protest of over 40 of its members in front of the private residence of the former employer of Valentyna Khristonsen, a domestic worker from Ukraine.<sup>84</sup> That was at a time when Ms Khristonsen's complaint was pending before the Labor Rights Commission because of multiple breaches of her labor rights, whereas the employer, an Ambassador, had claimed exemption from jurisdiction because of diplomatic immunity. Eventually, the Commission accepted the employer's claim and refused to deal with the case. Subsequently, MRCI supported its client in appealing this decision before the Labor Court. While the case was still pending in court, it was eventually settled through out-of-court negotiations in November 2010. Due to a confidentiality agreement, no further details were available from the NGO on the outcome of the negotiations, except that “the case has been satisfactorily concluded and Valentyna is happy.”

In the case of “Ms Hasniati”, negotiations between the NGO Ban Ying and the embassy of the diplomat's sending state had been going on for one year. At some point, when no agreement could be achieved, Ban Ying set a deadline, and after it had passed decided to make the case public.<sup>85</sup> As a result of media coverage and public pressure, the embassy – not the employer himself – eventually paid “Ms Hasniati” compensation in the amount of EUR 23,250 – as

<sup>84</sup> For examples of media coverage, see The Irish Times 2009: Protest over ambassador's immunity claim in employments rights dispute. 5 November 2009; Irish Examiner 2009: Protest over ambassador's immunity claim in worker case. 5 November 2009; Evening Herald: Diplomat claims immunity in row with housekeeper. 5 November 2009.

<sup>85</sup> For examples of media coverage, see Der Spiegel 2008: Mitten in Berlin: Diplomat hält Angestellte wie Sklavin 26 January 2008. <http://www.spiegel.de/politik/deutschland/0,1518,530836,00.html> (visited 25 May 2011); die tageszeitung 2008: Ausbeutung bei Diplomaten in Berlin: Botschaft entschädigt Sklavin. 30 January 2008. <http://www.taz.de/1/politik/deutschland/artikel/1/botschaft-entschaedigt-sklavin/> (visited 25 May 2011).

opposed to the embassy's original offer of EUR 5,000. The case was closed with a press declaration publicizing the settlement achieved.

When using public pressure, interviewees also identified a number of limitations: Journalists were often interested only in covering cases that involved extreme rights violations, and wanted to name the embassy and/or the diplomat concerned – the latter was not possible for domestic workers who feared the diplomat's power and repercussions for their families back home. Furthermore, settlements that came along with confidentiality agreements between the embassy and the NGO could be problematic. On the one hand, signing such an agreement was often necessary to achieve the consent of the diplomat or embassy to pay. On the other, NGOs faced a dilemma as they did have an interest in supporting their clients to obtain a settlement, but also in exposing human rights violations experienced by domestic workers. As one NGO representative put it, "they basically buy our silence".

Another important element identified was to **understand the differences between legal systems of sending countries and host countries**, which required for example to explain employers coming from countries with lower levels of labor law protection the rationale behind legal minimum wages or limited work hours as established by the host country's laws.

Some Foreign Ministry interviewees underlined the importance of understanding the **"human element"**: a lot depended on the chemistry between the persons involved in negotiations and the willingness of both parties to come together and find an agreement. That was considered particularly true for domestic work relationships, which were based on much closer interpersonal relations than other areas of work. In some cases, the working conditions had been so severe that the parties were not willing to talk to each other anymore – a situation posing challenges for Protocol staff when seeking to facilitate a settlement, as they were not specialized in psycho-social matters and not used to handle such emotional situations.

As another important factor, the **mediator's credibility and neutrality** was underlined. Especially when dealing with ambassadors who are used to operate in

hierarchies it was considered crucial that the negotiations were facilitated by a "respectable" person and trustworthy organization.

The following example summarizes some of the key challenges inherent to out-of-court negotiations identified by the interview partners. It demonstrates the divergent objectives of the different parties involved in negotiations – finding a solution that contributes to a good diplomatic atmosphere versus fully satisfying the domestic worker's legal entitlements. It also underlines the importance of institutionalized and transparent procedures and the need to inform domestic workers about her/his legal entitlements and to empower them with a view to encouraging them to claim their rights.

The host country's Protocol department had received information from the police about a private domestic worker who had, while staying abroad with her employer, left a note in a hotel in which she called for help. After the Protocol department invited the worker for a meeting for which she did not show up, they contacted the ambassador of the diplomat's embassy to raise the matter. A few months later it turned out that the worker had left her employer and turned to her country's embassy where she received accommodation. The negotiations, in which three ambassadors – from the Protocol department and the embassies of the employer's sending state and the domestic worker's country of origin, respectively – got engaged, resulted in compensation to the domestic worker for unpaid wages for a period of 2-3 months and a flight ticket back home. The Protocol interviewee regarded this case as success, because everybody involved – the domestic worker as well as the ambassadors – was happy with the outcome. The direct and good communication among the three ambassadors, who demonstrated commitment and awareness of the problem, had played a key role. From the perspective of the NGO, which had not been present in the negotiations, the final amount paid – EUR 2,000, while the minimum wage alone would have amounted to at least EUR 5,000 – did not correspond to the worker's entitlements under labor law and failed to include damages for pain and suffering.

## 4.6 The Role of the International Human Rights Framework

Addressing rights violations experienced by private domestic workers at the level of international human rights mechanisms has been identified by non-state interview partners as a significant strategy, given the limitations in obtaining access to justice at the level of national legal systems set by the parameters of diplomatic immunity.

This chapter maps efforts of NGO interview partners to use the international human rights framework in their efforts to strengthen the access of private domestic workers to justice, at both the level of individual cases and the policy level.

### 4.6.1 Individual Complaints to the European Court of Human Rights and United Nations Human Rights Treaty Bodies

The European Court of Human Rights and several UN Human Rights Treaty Bodies enable individuals to submit individual claims against states for violations of rights guaranteed by human rights conventions.

So far, none of the NGO interview partners has submitted an individual complaint to international human rights bodies in order to challenge the specific gaps and obstacles faced by private domestic workers working in diplomats' households in seeking access to justice for rights violations.

In 2001, the Committee against Modern Slavery (CCEM) submitted a complaint involving a case of domestic servitude to the European Court of Human Rights that resulted in a condemnation of France by the Court for a violation of Article 4 ECHR prohibiting forced labor and servitude (judgment *Siliadin versus France*).<sup>86</sup> While that case did not involve a diplomatic employer, it exemplifies, according to the French NGO interviewee, the failure of the criminal justice system to recognize forced labor in domestic work as a serious offence and to provide the complainants with effective protection under criminal law – one of the systematic obstacles that also affect the access to justice of private domestic workers employed by diplomats.

Several NGO representatives and one of the lawyers interviewed underlined the potential of the Court's recent judgment in the case of *Cudak against Lithuania*.<sup>87</sup>

The Court dealt with a complaint involving unfair dismissal of an employee of the Polish embassy in Lithuania who had been sexually harassed by a colleague. It found that Lithuania, by having accepted the Polish government's argument that state immunity applied and exempted it from Lithuania's jurisdiction had violated the applicant's right to access to court (Article 6 ECHR). While this case concerned state immunity and not diplomatic immunity, some interviewees underlined the importance of the Court's argument in which it referred to the evolving nature of international law and differentiated between acts of a public-law nature (*acta iure imperii*) and of a private law nature (*acta iure gestionis*), exempting the latter from state immunity.

Another channel for seeking redress in individual cases of human rights violations is the UN system, through its system of human rights treaty bodies and their power to receive individual complaints. Possible avenues include the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW – Article 6: elimination of trafficking in women; Article 11: elimination of discrimination against women in the field of employment), the UN International Covenant on Civil and Political Rights (ICCPR – Article 2 paragraph 3 b: access to justice; Article 8: prohibition of slavery, servitude and forced labor) and the UN International Covenant on Economic and Social Rights (ICESCR – Article 7: right to just and fair working conditions; Article 6: right to work). While CEDAW and ICCPR foresee the right to submit individual complaints to the respective Committees in charge of monitoring of the treaties' implementation,<sup>88</sup> that procedure is not yet available under the ICESCR as the Optional Protocol establishing the individual complaint procedure adopted in 2008 has not yet entered into force. So far, no individual complaint has been brought by interviewees to a UN human rights treaty body.

<sup>86</sup> European Court of Human Rights 2005: Case of *Siliadin v. France*, Application no. 73316/01, judgment of 26 July 2005.

<sup>87</sup> European Court of Human Rights 2010: Case of *Cudak v. Lithuania*, Application no. 15869/02, judgment of 23 March 2010.

<sup>88</sup> An individual complaint can be brought against those states that have ratified both the treaty and the respective Optional Protocols accompanying the treaty.

#### 4.6.2 Inquiry Procedures before United Nations Human Rights Treaty Bodies

Several UN human rights foresee inquiry procedures undertaken by the respective expert committees responsible for monitoring the treaties' implementation, in order to investigate systematic or grave human rights violations.

One NGO interviewed for this study, Ban Ying, in 2003 turned to the UN CEDAW Committee and requested the initiation of an inquiry into the exploitation of private domestic workers employed by diplomats in Germany, in order to challenge the German government's response to rights violations experienced by the workers at the hands of their employers. The input to the Committee<sup>89</sup> has built on experiences from ten cases occurred over a period of three years that have been compiled by Ban Ying through a survey among German NGOs providing support to trafficked women.

While the request did not result in an opening of an inquiry by the CEDAW Committee, according to Ban Ying, the publicity created by this step alerted the government and led to a number of structural changes to the existing policy framework governing the employment of private domestic workers employed by diplomats. In particular, in 2004 the German Foreign Ministry introduced a minimum wage for this group of workers at the amount of 750 EUR per month, plus accommodation, food and health insurance.

#### 4.6.3 Inputs to State Reporting to United Nations Human Rights Treaty Bodies and other Human Rights Monitoring Processes

Among the existing international human rights mechanisms, NGO interview partners had gained the most experience with human rights monitoring procedures, such as state reporting to UN human rights treaty bodies or the work of UN Special Rapporteurs procedures. Several NGOs have used these procedures as a forum to present their concerns and recommendations.

For example, the exploitation of private domestic workers employed by diplomats was brought up in NGO shadow reports under CESCR (Germany<sup>90</sup> and Belgium<sup>91</sup>) or in submissions to the Committee on Migrant Workers.<sup>92</sup> In the United Kingdom, NGOs submitted inputs to the UN Special Rapporteurs on the Human Rights of Migrants<sup>93</sup> and on Contemporary Forms of Slavery,<sup>94</sup> respectively. Indeed, the report of the Special Rapporteur on the Human Rights of Migrants to the Human Rights Council on his country visit to the United Kingdom published in March 2010 reflected some of the concerns and recommendations stated by the NGO in its submission. That included a point on the specific vulnerability to abuse of private domestic workers coming to the United Kingdom to accompany diplomats, as opposed to those working for private persons, accompanied by a recommendation to ensure that the first group enjoys the same level of protection as the latter, in particular the right to switch employers.<sup>95</sup>

Another channel identified was submitting NGO shadow reports to the Group of Experts on Action against Trafficking in Human Beings (GRETA), the expert body tasked with the monitoring of the implementation of the CoE Convention against Trafficking in Human Beings, given the fact that it was still relatively new and in the process of shaping its thematic priorities.

While inputs to international human rights monitoring processes were regarded as a strategic opportunity to voice concerns and influence policy directions, concern was also raised about limited resources available to NGOs on top of high loads of case work and about the difficulties to see how such policy recommendations would translate into real impact on the rights of domestic workers.

<sup>89</sup> Ban Ying 2003.

<sup>90</sup> Alliance for Economic, Social and Cultural Rights in Germany (WSK Allianz) 2010: p. 55.

<sup>91</sup> Coalition of Belgian Civil Society for Economic, Social and Cultural Rights 2005.

<sup>92</sup> Monitoring body of the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

<sup>93</sup> Kalayaan and Anti-Slavery International 2009.

<sup>94</sup> Kalayaan 2010b.

<sup>95</sup> Special Rapporteur on the Human Rights of Migrants 2010: paragraphs 62 and 76 (a).



## 5 Conclusions and Recommendations

The present study documents examples of rights violations experienced by domestic workers working in private households of diplomats in select host countries. It analyses legal and institutional responses and their application vis-à-vis bearers of diplomatic immunity in select European countries. In order to be able to develop recommendations that aim to achieve a balance between the maintenance of diplomatic relations and the enforcement of individual rights state and non-state actors have been interviewed.

The following recommendations, unless stated otherwise, are addressed to state and non-state actors in host countries. While the proposed measures are based on the experiences and practices in the countries covered by the present research, they aim to provide a framework for reform in other countries as well.

### 5.1 General Observations

The issue of severe rights violations experienced by private domestic workers employed by diplomats as well as the gaps and challenges these workers face in accessing justice has increasingly emerged on the international agenda – not least due to sustained and concerted advocacy and awareness raising efforts by NGOs.

On a positive note, a number of current developments in the countries covered by this study indicate growing awareness on the part of governments of the issue and provide opportunities to strengthen the protection of private domestic workers' rights. This includes the new requirement of opening a bank account for salary payments to domestic workers in Austria or an upcoming review of the visa scheme for migrant domestic workers, including those working in diplo-

mats' households, in the United Kingdom. Another example is the pending adoption of a new Ordinance harmonizing the working conditions for private domestic workers employed by diplomats in Switzerland at the federal level, which will, among others, introduce a federal minimum wage and more regular meetings with domestic workers to follow up on reported rights violations. At the same time, severe systemic shortcomings persist. While some cases have been documented where domestic workers working for diplomats have been able to realize their entitlements vis-à-vis their former employers, these examples are based on case-by-case or informal approaches rather than on a systematic approach or even legal certainty.

On the one hand, it is generally recognized that diplomatic immunity serves the legitimate purpose to protect individual diplomats from arbitrary interference with their work, so as to ensure the effective functioning of their sending state's diplomatic relations. On the other hand, it has become apparent that individual diplomats have been abusing their immunity to shield themselves from being held accountable for serious rights violations committed. From the perspective of private domestic workers, this de facto impunity enjoyed by their employers, together with the hidden nature of domestic work and their marginalization as migrant workers puts them at risk of exploitation and abuse, while preventing their access to justice and compensation as well as remuneration.

Official figures of private domestic workers registered with Foreign Ministries do not necessarily encompass all persons who work for diplomats in the countries covered, but only those who are migrant workers and possess a special ID card<sup>96</sup> issued by Protocol departments to work in the host country. Workers that might have been recruited at the local labor market who pos-

<sup>96</sup> Private domestic workers employed by diplomats are provided with special ID cards from Protocol departments which serve as confirmation of their residence status in the host country.



sess the nationality of the host country, a different residence status or no regular status or workers who are declared as family members of the diplomat are not included. Consequently, figures on rights violations provided by Foreign Ministries also include only those workers who have been officially registered with Protocol departments.

Research undertaken for this study revealed that precise and comparable figures on cases of alleged rights violations committed by diplomats vis-à-vis their domestic staff and the number and nature of legal proceedings are not available because they are not compiled systematically by Protocol departments and most NGOs; information can be provided only on an anecdotal basis. Figures provided by Foreign Ministries and the Geneva-based Office of the Amiable Compositeur ranged from one case in one year up to 62 cases in one year. Based on the findings of the interviews, it can be assumed that in countries where a formalized way for domestic worker to report rights violations to Protocol departments exists, the number of reports of alleged rights violations is higher than in other countries.

As regards the qualitative dimension, interviewees pointed at a large share of labor rights violations in various degrees among the cases they had come across. On one end of the spectrum, they listed breaches of labor law such as failure on the part of the employer to pay the full wage or fully compensate the worker for extra hours. Examples of more severe violations include complete withholding of wages, forcing workers to work excessive 16–18 hours without days off and without any or with inadequate compensation, or failure to provide them with adequate accommodation and food. On the other end of the spectrum, some of the cases amounted to slavery-like conditions when additionally the workers' freedom of movement was restricted, notably by prohibiting them to have social contacts and to leave the house unaccompanied. The main focus of the examples given was on cases of severe breaches of labor law.

## 5.2 Cooperation and Support Services

In supporting the access of private domestic workers to justice, cooperation between Protocol departments and NGOs constitutes an added value. This fact has been underlined in those countries where such cooperation is in place. It seems that in countries where institutionalized multi-stakeholder cooperation as part of anti-trafficking National Referral Mechanisms

exists, more established cooperation and support structures tend to be in place in the context of domestic workers exploited by diplomats. At the same time, the circle of relevant NGOs is not limited to those working on anti-trafficking, but also includes migrants' rights or domestic workers' rights organizations. Due to their specific thematic focus, these organizations not only possess valuable expertise but also are able to reach out to private domestic workers who might not be clients of anti-trafficking NGOs.

Existing anti-trafficking support infrastructure can offer private domestic workers access to specialized support, protection and residence status. While this is an important starting point, it is not sufficient, given the fact that not all cases of exploitation of domestic workers amount to or are identified as human trafficking. Furthermore, the identification as presumed trafficked persons and the obtaining of a residence status often requires the cooperation of trafficked persons in legal proceedings against the trafficker, which is usually not an option for private domestic workers employed by diplomats, given the latter's immunity from jurisdiction. Therefore, a more comprehensive approach is needed to ensure that all domestic workers who have experienced rights violations by employers with diplomatic status can access support services – whether or not they have been trafficked or have been identified as presumed trafficked persons.

### Recommendations:

- Governments, in consultation and cooperation with relevant NGOs, should ensure that domestic workers who experienced rights violations by diplomat employers have access to support and counseling services, irrespective of whether they have been trafficked or identified as presumed trafficked persons.
- Protocol departments, in engaging in dialog and cooperation with NGOs, for example around policy dialog or referrals of private domestic workers to support services, should include a broad range of relevant NGOs, including those working on anti-trafficking, migrants' rights and domestic workers' rights.
- Protocol departments and NGOs dealing with domestic workers employed by diplomats should jointly review the implementation of existing procedures to regulate the admission of domestic workers and the monitoring of employment relationships. This could be done through annual

meetings. In order to be able to maintain and improve the results continuously, meetings should be institutionalized. In doing so, Protocol departments and NGOs should build on and integrate lessons learned from existing cooperation structures within National Referral Mechanisms to assist and protect trafficked persons.

### 5.3 Admission and Monitoring Procedures – Regulating the Entry and Employment of Domestic Workers

Foreign Ministries in host countries have put a number of legal and institutional measures in place to regulate the entering and registration of private domestic workers employed by diplomats and, to varying extents, to monitor ongoing employment relationships. Registration procedures, including the provision of special Protocol ID cards, enable Protocol officials to check whether employment contracts reflect certain standards, such as minimum wages, working hours or suitable accommodation. Model contracts that are in line with national labor law and international labor rights standards and that are to be used by diplomat employers on a mandatory basis are useful in this respect. However, the privacy of the home in general and the inviolability of the diplomat's residence in particular impede the monitoring of whether these standards are met in practice.

Admission criteria, such as the requirement for domestic workers to be unmarried, to live in the same household with the employer and the lack of possibilities to bring their family members to their host country are problematic with a view to the workers' right to privacy and family life as well as the principle of non-discrimination. They also increase their exposure to isolation, exploitation and abuse. Positive examples in this regard are Belgium and France, where domestic workers may bring their family members. Even where domestic workers are theoretically not obliged to live in their employer's house, such as in Austria, Belgium and France, their chances to rent external accommodation are limited by the fact that this would involve additional costs which domestic workers are often not able to cover when they earn salaries not exceeding the level of national minimum wages.

Innovative measures include the requirement of domestic workers to pick up their ID card in person from the Protocol department, which not only enables them to keep control over their personal documents but also to seek information on their legal rights and

report problems with their employers. Encouraging experiences in this regard have been shared by interview partners from several countries, including Austria and Belgium. In the latter country, the personal contact of the Protocol department with domestic workers was reported to have resulted in an increase in reports of rights violations. In one country, the possibility of domestic workers to meet with NGO staff specialized in psycho-social support in the Ministry has been positively assessed by both Protocol department and NGO representatives involved. Furthermore, the mandatory opening of bank accounts for the payment of salaries to domestic workers, as has been introduced recently in Austria, can help domestic workers to increase control over their earnings and makes money flows transparent, thereby helping both parties when it comes to proving the payment or non-payment of wages.

Access of domestic workers to comprehensible information about their legal rights and possibilities to seek support in a language they understand is a key prerequisite for their access to justice. In this respect, the comprehensive brochure for domestic workers published by the Swiss Foreign Ministry in eight languages and the compilation of Protocol verbal notes and circulars published and distributed by the German NGO Ban Ying are examples worth mentioning. The study has also revealed the need to inform foreign diplomats of their rights and, in particular, obligations under the host country's labor laws, in particular for those coming from countries with lower levels of labor law protection than the respective host country.

#### Recommendations:

- Protocol departments should require domestic workers to pick up their Protocol IDs in person at the stages of first registration and renewal to enable them to access information and report problems with their employers. At these meetings that should be held in the absence of the employer, Protocol departments should provide domestic workers with information on their rights and contact details of specialized NGOs who can provide advice and support. Such information has to be in writing and in a language the domestic worker understands.
- Protocol departments and NGOs should jointly develop objective indicators to determine the circumstances under which follow-up meetings with domestic workers have to be set up (for example, when a domestic worker reports problems

at the occasion of picking up a renewed Protocol ID or when the Protocol department receives such information from a NGO).

- Protocol departments should create an enabling environment to encourage domestic workers to report problems with their employers, including through sensitizing Protocol staff in contact with domestic workers, referring workers claiming abuse to support services including specialized NGOs and helping domestic workers to get in touch with such organizations if they wish, for example through inviting NGOs to meet with domestic workers at the Ministry.
- Protocol departments should systematically document severe rights violations, in order to prevent the hiring of further domestic workers by diplomats with negative track records as long as compensation and remuneration has not been paid.
- Protocol departments should inform both employers and domestic workers on their rights and obligations under the host country's laws through appropriate means, including through publishing and distributing written materials.
- Protocol departments should require the opening and use of bank accounts for payment of wages to domestic workers, and, upon reports of alleged labor rights violations, require employers to provide account statements to prove payments.
- Protocol departments should review existing admission criteria for the employment of private domestic workers and remove those unduly interfering with the workers' right to privacy, family life and the principle of equal treatment, in particular through allowing workers to bring close family members and removing the obligations of the employee to live in their employer's household.
- Governments should develop a model to enable domestic workers to access separate accommodation in a way that is affordable for both parties, diplomat employers and domestic workers.

## 5.4 Immigration Status of the Domestic Worker

The residence status of domestic workers is accessory to the continuation of the employment relationship and the diplomat's stay in the host country. That implies that, once employment has ended, the domestic worker loses her/his right to stay and work on the host state's territory. Furthermore, domestic workers are, apart from limited exceptions, not allowed to switch their employers. These restrictions prevent workers from leaving abusive work conditions, thereby perpetuating situations of dependency and rights violations and impeding their access to redress.

In some countries private domestic workers are allowed to switch within the diplomatic community. While this option certainly offers an exit route from abuse and alternative income opportunities, it fails to address the problem of continuous dependency on the employers, resulting from the latter's diplomatic status which shields them from state monitoring of their employees' working conditions and from being held accountable for rights violations committed.

As a general rule, holders of special Protocol IDs are not eligible to apply for residence permits under the host countries' immigration laws. In some countries, domestic workers are in theory able to switch from Protocol IDs to regular residence permits, but only if they fulfill the general requirements under national immigration legislation, such as appropriate accommodation, health insurance or educational qualifications. Furthermore, exceptional instances have been reported where domestic workers could regularize their status in the course of regularization and naturalization campaigns or in the framework of specific residence permits for trafficked persons. In general, there was little information available as to exact modalities and requirements and numbers of domestic workers who had been able to change their status.

Residence permits under anti-trafficking regulations were considered especially by Foreign Ministry representatives as a viable option for domestic workers exploited by diplomats to obtain support and regularize their residence status. However, it emerged from interviews that the potential of such permits to benefit domestic workers employed by diplomats is lim-

ited: Only a small number of domestic workers experiencing rights violations qualify or are identified as trafficked persons. Furthermore, the nexus of these residence permits with criminal proceedings and/or with the cooperation of trafficked persons with law enforcement poses particular challenges for employees of diplomats as the immunity enjoyed by the latter implies that investigations are discontinued or not even started. In this regard, the Belgian regulation provides a noteworthy example. It enables trafficked persons to obtain residence permits on the basis of a favorable opinion of the prosecutor, in cases where diplomatic immunity of the accused prevents the case from being taken to court.

#### Recommendations:

- Protocol departments should review, in light of the judgment of the European Court of Human Rights in the case of *Rantsev against Cyprus and Russia* and the positive obligations under Art. 4 of the European Convention of Human Rights, the tying of a residence status of domestic workers to their diplomatic employers, especially in combination with the requirement to live in the employers' household and the informal character of domestic work.
- Protocol departments should, as a minimum standard, allow domestic workers to switch employers within the diplomatic community and provide them with an appropriate time period to find a new employer.
- Governments should provide domestic workers employed by diplomats with the same possibilities to switch to other residence and work permits as domestic workers employed by non-diplomats.
- In case of prima facie evidence of rights violations, Governments should enable a domestic worker to stay in the host country as long as necessary to settle their claims under labor law through judicial proceedings or extra-judicial negotiations and to obtain medical treatment, if needed.
- Protocol departments and all other actors in the host countries in contact with domestic workers should refer workers who are identified as presumed trafficked persons to National Referral Mechanisms to enable them to obtain special residence status in the host country.
- Protocol departments and Ministries of Interior should review and Governments should adapt, if needed, existing anti-trafficking regulations so as to enable domestic workers working for diplomats who are identified as presumed trafficked persons to benefit from the reflection period, short-term and long-term residence permits, including in cases where the diplomatic status of the employer does not allow for court proceedings.

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### 5.5 Applicable Labor Law

In all six countries reviewed, national labor laws, including regulations establishing mandatory minimum wages, are in principle applicable to private domestic workers employed by diplomats. In practice, however, working conditions often differ substantially from these standards. In addition to the barriers to labor inspection and judicial recourse resulting from the employers' diplomatic status, the hidden nature of domestic work in general makes it difficult for employees to prove breaches of labor law, in particular as regards payment of wages and working hours.

Model contracts provided by Protocol departments can help to ensure that the modalities governing employment relationships between diplomats and domestic workers are defined in line with national legal standards. It has emerged as good practice to make the use of such templates mandatory in the registration process and to ensure that they are comprehensive and include, in particular, references to national minimum wages.

In countries like Switzerland, where labor law provisions are regulated below the federal level, federal harmonization of basic labor standards such as minimum wages is important in creating legal certainty for both, employees and employers, on their rights and obligations. In this regard, ongoing efforts by the Swiss government to adopt an Ordinance at the federal level regulating the working conditions of private domestic workers employed by diplomats constitute a positive development.

The extent to which private domestic workers are covered by social security schemes differs from country to country. The most comprehensive approach among the six countries covered by this study can be found in Switzerland, where domestic workers are mandatorily covered by health, accident, invalidity and pension insurances.

### Recommendations:

- Protocol departments should ensure that private domestic workers employed by foreign diplomats are covered by national labor laws and/or any specific legislation in place covering domestic work.
- Protocol departments should ensure that adequate national minimum wages established by law or collective agreements apply to private domestic workers.
- Protocol departments should require written work contracts signed by both parties according to templates in line with national labor law and specifying key elements of the employment relationship, including salary, working hours and days off. Such templates should be made mandatory in the registration process. Contracts have to be written in a language the domestic worker understands.
- Governments should ensure that domestic workers are covered by comprehensive social security, including at a minimum health and accident insurance. This aim should be achieved either through requiring employers to provide proof of social security coverage and of payments of premiums, or alternatively through including domestic workers in the host countries' social security schemes.

## 5.6 Diplomatic Measures

In addressing reported cases of rights violations, Protocol departments in host countries have a number of diplomatic measures at their disposal, covering a wide range from rather informal, lenient measures such as raising the matter with the diplomat's embassy, delaying or refusing the registration of future domestic workers or withdrawing unilateral tax privileges, to grave measures explicitly foreseen in the Vienna Convention, such as requesting a waiver of the diplomat's immunity or declaring her/him *persona non grata*.

In practice, measures tend to lean rather towards the lenient side of the spectrum, whereas more severe responses are considered measures of last resort and are hardly, if ever, applied in cases of exploitation of domestic workers.

Practices as regards requesting waivers of immunity differ substantially across the countries covered in the present study. The spectrum ranges from requesting waivers as standard practice in all cases presumably amounting to trafficking in human beings (United Kingdom) to a very restrictive approach where waivers are regarded appropriate in extreme cases only, such as murder (France).

The example of waivers illustrates that in enabling domestic workers to access justice not only host states but also sending states and international organizations have an important role to play, because it is within the power of the latter two to accept or refuse a waiver. Indeed, it has been commonly experienced across all countries covered that sending states basically never agreed to lift the immunity of their diplomats. Interestingly, in some countries, international organizations have been found more open to lifting the immunity of their staff members.

In none of the countries have abusive diplomat employers ever been declared *persona non grata*. In general, this measure is very rarely applied, and if so, in case of serious criminal offences such as espionage or terrorism. Interestingly, the United Kingdom has also made use of *persona non grata* declarations in response to large patterns of illegal parking by diplomats, which proved effective as it led to a sharp drop in the number of parking tickets.

When it comes to the application of severe diplomatic measures against abusive employers, domestic workers often face a dilemma. On the one hand, such measures are desirable as they reflect the grave nature of the rights violations experienced and, once the obstacle of diplomatic immunity has ceased to exist, enable domestic workers to seek legal redress against abusive employers – at least in theory. On the other hand, in practice, a common consequence of requests for waivers or threats to request the withdrawal of a diplomat is the latter's prompt departure. This fact is not in the interest of the domestic workers, as it diminishes their chances of obtaining compensation and remuneration from their employers. Initiating legal proceedings in the diplomat's sending country is a theoretical, but for various practical and legal reasons not very realistic option for domestic workers. Furthermore, it is not clear whether diplomats who committed rights violations abroad have to face any consequences of a legal or disciplinary nature on the part of their sending state or international organization. Therefore, the question

remains whether any diplomatic measures undertaken do in fact have a preventive or punitive effect, or rather reinforce the message that in the end the diplomat does not face any legal consequences.

#### Recommendations:

- Protocol departments should make use of the entire range of diplomatic measures at their disposal, as appropriate, from lenient measures to far-reaching measures under the Vienna Convention, while ensuring that any measures taken reflect the nature and gravity of the rights violations in question. This should include, for host states, systematic requests for waivers of immunity and applying political pressure on sending states and international organizations to accept such requests; and for sending states and international organizations, accepting such requests. In cases of grave and/or repeated rights violations, Foreign Ministries should not shy away from declaring diplomats *persona non grata*, based on successful experiences with using this procedure to large patterns of illegal parking by diplomats in the United Kingdom. Any measures should be guided by the best interest of the domestic workers concerned, including in particular the realization of their labor law claims against their employers.
- Protocol departments should devise and apply criteria for the application of each diplomatic measure in response to rights violations of domestic workers. Among others, decisions which measure to apply should be guided by both the gravity of the criminal offence concerned (such as trafficking in human beings, rape, bodily injury, deprivation of liberty, etc.), as well as the degree of economic exploitation.
- When facilitating negotiations between private domestic workers and abusive diplomat employers, Protocol departments should, in case of *prima facie* evidence of rights violations, consider the application of diplomatic measures, where this is necessary to increase the diplomat's willingness to agree to a fair settlement. The choice of measures should reflect the gravity of the rights violations involved.
- Authorities in host and sending countries should ensure that the application of diplomatic measures does not impede domestic workers' access to justice. Following a host state's request for a waiver, sending states should refrain from immediately withdrawing diplomats so that domestic workers can assert their claims for compensation and remuneration before the courts in the host country. In case the diplomat has left the host country, authorities in the latter should cooperate with their counterparts in the sending country or a third country, as appropriate, to enable domestic workers to seek redress from former employers, including the enforcement of any civil law judgments obtained.
- Sending states should, where immunity does not allow for legal proceedings in the host country, exercise jurisdiction over their diplomats for rights violations committed abroad.

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### 5.7 Out-of-Court Negotiations between Domestic Workers and Diplomat Employers

Given the protection of diplomats under international law and the fact that diplomatic immunity from jurisdiction and execution is rarely waived by sending states, out-of-court negotiations provide in practice often the only and so far the most effective option for domestic workers to obtain compensation and remuneration from employers with diplomatic status.

At the same time, the informal setting of negotiations, while it can help to avoid some of the legal obstacles attached to the employer's diplomatic status, also has some drawbacks: Employers are not obliged to participate in negotiations. Furthermore, in most countries no formal platform exists for domestic workers to negotiate their claims. There are no guidelines in place to set the process of negotiations, and progress often depends on the commitment and attitudes of the individuals involved.

As a rule, the final amounts negotiated are far below the workers' legal entitlements. Mostly, state-funded legal aid is limited to legal proceedings and therefore not available for negotiations. Therefore the access to legal representation in practice often depends on funds raised by NGOs and on the availability of lawyers who work *pro bono* or for reduced fees. Another gap lies in the residence status of domestic workers following the end of the employment relationship: even in cases identified as presumed cases of human trafficking, special residence permits are usually linked to legal proceedings, thus not applying to extra-judicial negotiations. As in the case of legal proceedings, proving rights



violations occurred in domestic work, in particular unpaid wages and uncompensated overtime, is difficult. Another important factor which has not been addressed systematically is the power imbalance between the domestic worker on the one hand and the diplomat on the other hand. The participation of lawyers, NGOs or trade unions besides or on behalf of the domestic worker can help to adjust this imbalance.

As regards the involvement of Protocol departments in negotiations, the scope of their role as facilitator varies according to the perceptions of Foreign Ministry interviewees in the countries covered by the present study, ranging from no involvement in negotiations to a self-perception as mediator. The understanding of their roles is not formalized and seems to be influenced by factors such as the commitment of individual officials as well as by political and economic interests.

In some cases, actors involved as facilitators have seemed to play a rather strong role in setting terms for negotiations, through accepting or refusing the scope of claims negotiated or determining what is an appropriate amount for compensation. Such an approach tends to come closer to a court or arbitrating body, rather than a mediator.

In Switzerland, the Office of the Amiable Compositeur has been set up to facilitate employment-related disputes between diplomats and their private employee – the only specialized body of its kind. Impartiality, independence and transparency are key attributes for an effective facilitator recognized by both sides, domestic workers and diplomats. The extent to which Foreign Ministries are able to fulfill this standard has been questioned, pointing to the Ministries' role of maintaining well-functioning diplomatic relations with other states.

#### Recommendations:

- Governments should set up a mechanism for domestic workers to turn to with complaints of rights violations afflicted by diplomat employers. This mechanism should be tasked to facilitate the extra-judicial settlement of employment-related disputes, based on the principles of impartiality, independence, transparency and acceptance by both parties. Procedural guidelines should be established laying down the steps of the proceedings and the roles and responsibilities of the actors involved, as well as guidance for the calculation of claims. The procedure should ensure a balance of the unequal power relationship between

domestic workers and diplomat employers, in particular through allowing domestic workers to be accompanied or represented by a lawyer, NGO or trade union representative in negotiations.

- For negotiations between domestic workers and diplomat employers facilitated by Protocol departments, guidelines with the same requirements should be put into place.
- Domestic workers should have access to free legal advice and representation in negotiations. This could be achieved through governments providing state-funded legal aid, at least in cases involving severe rights violations. Where state-funded legal aid is not available, NGOs should approach law firms to further explore possibilities of pro bono legal representation as well as establish or deepen partnerships with trade unions, with a view to obtaining their support in representing domestic workers in negotiations.

### 5.8 Legal Proceedings against Diplomat Employers

Interview partners shared examples of legal proceedings that have been instituted in their countries to hold diplomatic employers accountable for alleged rights violations. While the majority of known cases concerned proceedings before labor courts or quasi-judicial bodies, some cases had also been investigated and prosecuted by criminal justice authorities, often under the offence of human trafficking.

It has emerged from the interviews that legal proceedings have so far had rather limited impact on the individual rights of domestic workers, but have brought added value at the structural level. As a rule, legal cases are being closed at some point because of the procedural obstacle of diplomatic immunity. In some instances, proceedings were continued, sometimes resulting in judgments in favor of domestic workers. In only a few cases, this was possible following a waiver of immunity of the employer – concerning mainly international civil servants, rather than diplomats sent by states. In other cases, immunity was not an obstacle, for example because it had ceased to exist following the diplomat's retirement or departure or because the employer assumed to be a "diplomat" turned out not to possess diplomatic status, for instance because s/he was a lower rank staff member of an embassy or a family member of a diplomat who possessed the nationality of the host country. In some countries, labor



courts have issued judgments against diplomats based on an interpretation of diplomatic immunity which raises doubts as to their compatibility with the requirements of the Vienna Convention for issuing waivers, as was also pointed out by some interview partners. While these judgments might offer symbolic recognition to domestic workers of the injustice experienced, they fail to provide legal certainty. Interestingly, the recent judgment by the French Administrative Supreme Court<sup>97</sup> presents an innovative alternative route for private domestic workers to obtain redress from the host state, where this is otherwise not possible under international diplomatic law.

In those few cases where a court judgment could be obtained, the departure of diplomats and immunity from execution have been major obstacles for domestic workers seeking to enforce their legal rights. Indeed, there is little evidence of domestic workers who have actually received payments from their employers as a result of legal proceedings. Unless sending states also waive diplomats' immunity from execution, court judgments may on the paper provide satisfaction to domestic workers, but fail to offer them a realistic chance to enforce their legal entitlements.

A major problem for domestic workers when seeking legal recourse is the lack of evidence, in particular for unpaid wages and uncompensated overtime. This fact reflects the general difficulty of proving rights violations that took place in the private sphere of the home, hidden away from the public and often without witnesses.

In criminal proceedings, the familiarity of criminal justice authorities with existing procedures on how to deal with cases presumably involving diplomatic immunity and their capacities to approach forced labor taking place in private homes as a matter of criminal law are key prerequisites to enable private domestic workers to access justice. While some improvements in this field have been noted by interview partners, it became apparent that more needs to be done to ensure appropriate responses. In particular, the question how far police and prosecutors may go in investigating and prosecuting cases against diplomats without transgressing the boundaries of international diplomatic law has in some countries emerged as a grey area requiring clarification – for criminal justice authorities as well as some interview partners.

#### Recommendations:

- Foreign Ministries, Ministries of the Interior and Ministries of Justice should sensitize and inform police, prosecutors and judges on the scope of diplomatic immunity and its implications for legal proceedings as well as on existing procedures to confirm the immunity status of a presumed diplomat and to request waivers of immunity. This should also include the preparation of guidelines laying down the powers of police and prosecutors to investigate and prosecute alleged breaches of criminal law within the boundaries of international diplomatic law, also with a view to enable domestic workers to benefit from reflection periods and a residence permit for trafficked persons.
- Foreign Ministries, Ministries of the Interior and Ministries of Justice should sensitize criminal justice authorities on rights violations involved in the context of forced labor in domestic work in order to ensure that these are understood and treated as matters of criminal law.
- Protocol departments, criminal justice actors and NGOs should improve information sharing on legal proceedings against diplomat employers.
- Domestic workers should have access to free legal advice and representation in legal proceedings. That could be achieved through governments providing state-funded legal aid, at least in cases involving severe rights violations. Where state-funded legal aid is not available, NGOs should approach law firms to further explore possibilities of pro bono legal representation as well as establish or deepen partnerships with trade unions, with a view to obtaining their support in representing domestic workers in proceedings.

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### 5.9 Strategic Litigation

Strategic litigation before national and international courts as well as regional and international human rights bodies can offer advocates for domestic workers' rights a useful tool for challenging traditional legal concepts around the compatibility of international diplomatic law with international human rights law, in particular regarding the right of access to justice.

<sup>97</sup> See chapter 4.4.2.1.

### Recommendations:

- Lawyers and NGOs should prepare test cases on behalf of private domestic workers before the European Court for Human Rights, challenging diplomatic immunity and its compatibility with human rights. Possible entry points for the argumentation include recent developments in international law to reduce the scope of state immunity for civil proceedings, as well as the international legal principles of the forfeiture of immunity in cases of severe human rights violations and the assumption of compatibility between the fields of international diplomatic law and international human rights law. Lawyers and NGOs who have prepared legal argumentations should share them with counterparts in other European countries. NGOs should raise funds so that potential plaintiffs can afford to decline insufficient offers in out-of-court negotiations **and are encouraged to engage in strategic litigation cases.**
- Lawyers and NGOs should bring test cases to national courts of last instance and the European Court of Human Rights to address gaps in the investigation and prosecution of cases of trafficking for forced labor in domestic work.
- Lawyers and NGOs should explore the potential of bringing claims on behalf of private domestic workers under the doctrine of state liability, based on the argumentation of the French Supreme Administrative Court in its recent judgment of February 2011.<sup>98</sup>
- Lawyers and NGOs should bring complaints against host states on behalf of private domestic workers or initiate inquiries before UN human rights treaty bodies, for example under the Convention on the Elimination on All Forms of Discrimination against Women (CEDAW)<sup>99</sup> or the International Covenant on Civil and Political Rights (ICCPR)<sup>100</sup> to challenge cases where domestic workers have become victims of trafficking and/or have been unable to access justice against diplomat employers at the national level. Past experiences with these procedures, for example an NGO's efforts in 2003 to initiate an inquiry procedure before the CEDAW

Committee to address exploitation and abuse of private domestic workers by diplomat employers, should be evaluated and shared so as to allow for lessons learned to be taken up and adapted to other countries' contexts.

- Lawyers and NGOs should engage in mutual exchange and information sharing at the European level on experiences with strategic litigation, for example through translating and circulating key national Supreme Court judgments or important legislative developments.

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### 5.10 Promoting the Issue on the International Agenda

The issue of rights violations experienced by domestic workers employed by diplomats and the gaps and challenges these workers face in accessing justice as a result from diplomatic immunity, has increasingly emerged on the international agenda over the past decade. The increasing recognition of the issue as a matter of concern by governments, NGOs and regional and international organizations provides a strategic opportunity to keep the momentum and to further push for developments strengthening the access to justice for private domestic workers.

### Recommendations:

- NGOs should continue to provide information on the situation of migrant domestic workers employed by foreign diplomats in their respective country to international human rights mechanisms, including in parallel reporting to UN treaty bodies established under instruments such as CEDAW, the Convention on the Elimination of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MWC) as well as in information notes and urgent appeals to UN special procedures, including the Special Rapporteurs on Trafficking in Persons, on the Human Rights of Migrants, Contemporary Forms of Slavery, Violence against Women and on Torture.

<sup>98</sup> Conseil d'Etat N°325253.

<sup>99</sup> For example based on Article 6 or Article 11 of CEDAW and the CEDAW Committee's General Recommendation no. 26 on Women Migrant Workers (see chapter 1.2.).

<sup>100</sup> For example based on Article 8 and Article 2 paragraph 3 b of the ICCPR.

- NGOs should provide inputs to the evaluation procedure by the Group of Experts on Action against Trafficking in Human Beings (GRETA) under the Council of Europe Convention on Action against Trafficking in Human Beings, in particular under Article 15 (access to compensation and legal redress).
- Foreign Ministries should put the issue of exploitation of domestic workers by diplomat employers high on the agenda of the regular meetings of Heads of Protocol departments from EU Member States.
- A permanent working group should be set up at UN level, with balanced geographical representation. This group should serve as a forum for exchange among governments on best practices as well as on gaps in enabling domestic workers to access justice against diplomat employers, and come up with proposals to address these gaps. More specifically, possible tasks of the working group include the elaboration of guidelines and codes of conduct for UN Member States to improve the access of private domestic workers employed by diplomats to redress. The working group should closely consult with relevant NGOs.

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## List of Abbreviations

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BlinN	Bonded Labour in the Netherlands
CEDAW	UN Convention on the Elimination of All Forms of Discrimination against Women (1979)
CCEM	Committee against Modern Slavery (Comité Contre L'Esclavage Moderne)
ICCPR	International Covenant on Civil and Political Rights
CESCR	International Covenant on Economic, Social and Cultural Rights
CoE	Council of Europe
DFAE	Ministry of Foreign Affairs, Switzerland (Département Fédéral des Affaires Étrangères)
DIMR	German Institute for Human Rights (Deutsches Institut für Menschenrechte)
ECHR	European Convention on Human Rights
ECtHR	European Court for Human Rights
EU	European Union
EUR	Euro
LEFÖ-IBF	Association of Latin American Women Emigrated to Austria - Intervention Centre for Trafficked Women (Latein-Amerikanische Emigrierte Frauen in Österreich - Interventionsstelle für Betroffene des Frauenhandels)
ILO	International Labour Organization
MFA	Ministry/Department of Foreign Affairs
MRCI	Migrants Rights Centre Ireland
NGO	Non-Governmental Organization
NRM	National Referral Mechanism
OAC	Office of the Amiable Compositeur
OSCE	Organization for Security and Co-operation in Europe
UN	United Nations
VCDR	Vienna Convention on Diplomatic Relations



# Annex: List of Interview Partners

Interview partners deserve particular thanks for their time and for their willingness to share their knowledge.

## Ministries of Foreign Affairs

**Austria:** Ministry for Foreign and European Affairs, Protocol - Unit Diplomatic Privileges and Immunities: Alexander Ehrlich-Adam, Head of Unit; Office for International Law - Department for Public International Law: Gerhard Thallinger, Legation Secretary.

**Belgium:** Federal Public Service Foreign Affairs, Protocol: Gerrigje Veldhuis, Deputy Counselor.

**France:** Ministry for Foreign and European Affairs, Protocol - Sub-directorate of Consular Privileges and Immunities: Jean Wiet, Deputy Director of Consular Privileges and Immunities; Nicole Roubenne, Assistant to the Deputy Director; Agnès Thiroit, Responsible for Private Domestic Workers.

**Germany:** Federal Foreign Office, Protocol - Unit Diplomatic Missions and Consular Posts, International Organizations: Personnel Status Issues, Visas, Protocol ID Cards.

**Switzerland:** Federal Department of Foreign Affairs, Directorate for Public International Law - Unit for Diplomatic and Consular Law: Caroline Kraege, Deputy Head of Unit.

**United Kingdom:** Foreign and Commonwealth Office, Protocol - Diplomatic Missions and International Organizations Unit: Barry Nicholas, Head of Unit.

## Office of the Amiable Compositeur

Office of the Amiable Compositeur, Geneva, Switzerland: Martine Brunschwig Graf, President.

## Non-Governmental Organizations

Au Cœur des Grottes, Geneva, Switzerland: Anne Marie Von Arx Vernon, Psychologist.

Ban Ying, Berlin, Germany: Nivedita Prasad, Project Coordinator.

Bonded Labour in the Netherlands (BLinN), Amsterdam, The Netherlands: Eline Willemsen, Project Manager.

Fachstelle Frauenhandel und Frauenmigration (FIZ), Zurich, Switzerland: Susanne Seytter, Staff member Advocacy, Public Relations and Finances.

Geneva Forum of Philippine Concerns, Geneva, Switzerland: Joseph Sycip, President.

Kalayaan, London, United Kingdom: Jenny Moss, Community Advocate.

LEFÖ Intervention Center for Trafficked Women, Vienna, Austria: Evelyn Probst, Coordinator.

Migrant Rights Centre Ireland (MRCI), Dublin, Ireland: Aoife Smith, Coordinator of the Domestic Workers Action Group.

Organisatie voor Clandestiene Arbeidsmigranten (OR.C.A), Brussels, Belgium: Elke Gutiérrez, Domestic Workers Project Officer.

Pag-Asa, Brussels, Belgium: Sally Beeckman, Head of Legal Unit.

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