ABUSE OF PRIVILEGE: EVALUATING THE APPLICATION OF THE LAWS ON DIPLOMATIC IMMUNITY IN CASES OF MIGRANT TRAFFICKING AND EXPLOITATION*

*Lorenz Fernand D. Dantes***

ABSTRACT

Human trafficking represents one of the most serious human rights violations in our world today. Unfortunately, recent cases in various jurisdictions have shown an increasing problem of diplomats becoming involved in human trafficking while using their diplomatic immunity to escape accountability for their actions. Can diplomatic immunity therefore, be limited to provide judicial recourse to human trafficking victims? In tackling this question, this Article seeks to explore various treaties and case law pronouncements on diplomatic immunity, including recent landmark jurisprudence from other jurisdictions. In so doing, it aims to contribute to the discussions on how migrants worldwide can be protected from the horrible scourge of trafficking, regardless of the status of the perpetrator.

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** Acting Director, Office of the Undersecretary for Migrant Workers' Affairs, Department of Foreign Affairs. J.D., Ateneo De Manila University School of Law (2016). B.S. Legal Management, Minor in Economics, Ateneo De Manila University (2012).

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I. INTRODUCTION

"Defeating human trafficking is a great moral calling of our time."
—Former US Secretary of State Condoleezza Rice[1]

The year 2022 heralded a significant milestone in the Philippine government's efforts to combat migrant trafficking and exploitation. In recognition of its relentless efforts and progress towards the elimination of human trafficking, the yearly Trafficking in Persons ("TIP") Report of the US Department of State awarded the Philippine government a Tier 1 status for the seventh consecutive year.[2] This makes the Philippines the only other country in Southeast Asia, aside from Singapore, to attain a Tier 1 status. This recognition, which the Philippines first achieved in 2016 after years of languishing in Tier 2, is the highest in the US State Department's four-tier placements, signifying that a country is complying with the minimum standards for the elimination of trafficking in persons under the US Trafficking Victims Protection Act of 2000 ("US TVPA") during the covered period. According to the 2022 TIP report:

> The Government of the Philippines fully meets the minimum standards for the elimination of trafficking. The government continued to demonstrate serious and sustained efforts during the reporting period, considering the impact of the COVID-19 pandemic on its anti-trafficking capacity; therefore[,] the Philippines remained on Tier 1. These efforts included identifying more victims than in 2020, drafting standard operating procedures (SOPs) on the identification and monitoring of trafficking-related corruption cases, sentencing nearly all traffickers to significant prison terms, and creating an executive-level Department of Migrant Workers. Victim-witness coordinators supported more victims participating in the criminal justice process than in the previous reporting period, and the government increased funding to the interagency anti-trafficking council.[3]

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[1] Condoleezza Rice, Speech delivered at the Independent Women's Forum, Washington DC (May 10, 2006) *cited in* United States Department of State, *Trafficking in Persons Report*, 44, *available at* https://2009-2017.state.gov/documents/organization/66086.pdf (last accessed May 24, 2023).

[2] Joyce Ann L. Rocamora, *PH Keeps Tier 1 Ranking in US Anti-human Trafficking Report,* PHIL. NEWS AGENCY, July 20, 2022, *at* https://www.pna.gov.ph/articles/1179378 (last accessed Aug. 2, 2022).

[3] US Department of State, *2022 Trafficking in Persons Report*, 447, *available at* https://www.state.gov/wp-content/uploads/2022/04/337308-2022-TIP-REPORT-inaccessible.pdf (last accessed Aug. 10, 2022).

Pertinently, the 2022 TIP report also provides important recommendations to ensure that the Philippines goes beyond the minimum standards. For instance, it recommends that the Philippine government should be more consistent in implementing the coordinated inter-agency response to provide services to returning Filipinos exploited in sex and labor trafficking overseas.[4] Likewise, it also points out that the lack of a centralized database to track illegal recruitment and human trafficking continued to hamper the government's efforts to prevent trafficking and hold traffickers accountable.[5] In conjunction with this, the TIP report remarks that:

> *Officials, including those in diplomatic missions, law enforcement and immigration agencies, and other government entities, allegedly have been complicit in trafficking or allowed traffickers to operate with impunity*. Some corrupt officials allegedly accept bribes to facilitate illegal departures for overseas workers, operate sex trafficking establishments, facilitate production of fraudulent identity documents, or overlook illegal labor recruiters. Reports in previous years asserted police conduct indiscriminate or fake raids on commercial sex establishments to extort money from managers, clients, and victims. *Some personnel working at Philippine embassies reportedly withhold back wages procured for their domestic workers, subject them to domestic servitude, or coerce sexual acts in exchange for government protection services*. There were anecdotal reports that police and local government units subjected individuals—who had voluntarily surrendered to officials in relation to the government's anti-drug campaign—to forced labor.[6]

The above observation on the alleged involvement of diplomatic personnel in trafficking cases as well as in the alleged abuses committed against migrant domestic workers is troublesome, albeit not a new phenomenon. In fact, the supposed involvement of a Filipino diplomat in migrant trafficking and exploitation became the subject of *Baoanan v. Baja*,[7] a landmark case ruling in the United States (US). It can also be recalled not too long ago that a Filipino labor attaché was accused by three Overseas Filipino Workers ("OFWs") of sexually molesting and "pimping" them in exchange for plane tickets going back to the Philippines.[8] More recently, it was reported that there were previous instances in which Filipino workers seeking refuge in

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[4] *Id.* at 448.

[5] *Id.*

[6] *Id.* at 450. (Emphasis supplied.)

[7] 62 F. Supp. 2d 155 (S.D.N.Y. 2009).

[8] Tina Santos, *Labor Execs in Sex-For-Flight Scandal Grounded,* PHIL. DAILY INQUIRER, Apr. 10, 2014, *available at* https://globalnation.inquirer.net/101903/labor-execs-in-sex-for-flight-scandal-grounded (last accessed Aug. 2, 2022).

a Philippine Embassy shelter ended up being "re-trafficked" to their employers, allegedly with the help of several embassy personnel in exchange for a sum of money.[9]

These problems are not confined to the Philippines, however. In one high-profile case in Switzerland, Filipino migrant workers accused several Pakistani diplomats assigned to Geneva of exploiting them. The Pakistani diplomats allegedly made them work for 20 years without pay despite earlier promises of providing them with "a decent life in Geneva, with a salary, a roof over their heads and payment of social insurance."[10] In another case, it was reported that a German diplomat assigned to the United Nations exploited a Filipina migrant domestic worker by making her work 100 hours a week, with "no breaks and less money than she was promised and no overtime."[11] Likewise, a Bangladeshi diplomat assigned in New York was accused of forcing a migrant to work more than 17 hours daily without pay, to sleep in a storage closet, and to serve as cook at Bangladesh Consulate events, while also forbidding them from leaving the residence of the diplomat.[12] This incident is very similar to another cause célèbre in which an Indian diplomat in New York was arrested for illegally underpaying and exploiting a migrant domestic worker, as well as presenting false information to US authorities to obtain a visa for the said migrant.[13] This incident even sparked a diplomatic row between Washington and New Delhi, featuring retaliatory measures against US diplomats assigned in India.[14] It also presented an odd situation: the Indian diplomat was reassigned from the Consulate General of India in New York to the Permanent Mission of India to the United Nations in New York, as an

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[9] Christia Marie Ramos, *New PH Envoy to Syria Bares 'Re-Trafficking' of OFWs in Embassy Shelter,* PHIL. DAILY INQUIRER, Apr. 25, 2021, *at* https://globalnation.inquirer.net/195527/new-ph-envoy-to-syria-bares-re-trafficking-of-ofws-in-embassyshelter#ixzz7aJzO8WZi (last accessed Aug. 2, 2022).

[10] Arshad Arbab, *Filipino Workers Accuse Pakistani Diplomats of Exploitation*, SWI Swissinfo.ch, June 12, 2021, *at* https://www.swissinfo.ch/eng/filipino-workers-accuse-pakistani-diplomats-of-exploitation-/46694794 (last accessed Aug. 10, 2022).

[11] Ariel Ramchandani, *Diplomats Are Getting Away with Abusing Their Children's Nannies*, ATLANTIC, May 21, 2018, *available at* https://www.theatlantic.com/business/archive/2018/05/diplomats-abuse-domestic-workers/559739/ (last accessed Aug. 10, 2022).

[12] Haroon Habib, *Now, Bangladeshi Diplomat in Soup*, THE HINDU, May 19, 2016, *at* https://www.thehindu.com/news/international/south-asia/now-bangladeshi-diplomat-in-soup/article5823067.ece?homepage=true (last accessed Aug. 10, 2022).

[13] *Devyani Khobragade Re-Indicted in Us Visa Fraud Case*, ECONOMIC TIMES, Mar. 15, 2014, *at* https://economictimes.indiatimes.com/news/politics-and-nation/devyanikhobragade re-indicted-in-usvisafraudcase/articleshow/32030815.cms?utm_source=contentofinterest&utm_mediu m=text&utm_campaign=cppst (last accessed Aug. 10, 2022).

[14] *Indian Consular Official's NY Arrest Sparks Diplomatic Row*, FRANCE 24, Dec. 18, 2023, *at* https://www.france24.com/en/20131218-india-usa-diplomat-arrest-new-york-diplomatic-row (last accessed Aug. 13, 2022).

attempt to retroactively upgrade the consular immunity of the Indian diplomat for official acts as guaranteed by the Vienna Convention on Consular Relations ("VCCR"), to the full diplomatic immunity guaranteed by the Vienna Convention on Diplomatic Relations ("VCDR").[15]

In most cases, the complainants are simply unable to oppose a motion to dismiss filed based on diplomatic immunity. In one of the cases discussed above, the trial judge observed that the diplomat did not even bother to challenge "the factual allegations of the complaint" in its motion to dismiss, prompting the judge to simply remark in the dismissal order that if "the allegations of the complaint are true, defendants' conduct was abhorrent and intolerable."[16] Other cases do not get dismissed outright, but with the trial judge urging the parties to simply reach out-of-court settlement or to resolve the matter through diplomatic channels.[17] This presents a risk to the complainants as they may be unable to enforce the settlement agreement in case of breach, especially if the diplomat leaves the country or once again invokes diplomatic immunity.

On the other hand, some cases do not even reach the courts, such as what occurred when the Philippine National Bureau of Investigation (NBI) arrested a Saudi attaché in 2014 for alleged involvement in human trafficking of aspiring OFWs.[18] The Secretary of Justice at that time, Leila De Lima, stated that the Saudi attaché cannot be prosecuted in the Philippines even for a heinous crime such as human trafficking, since the Department of Foreign Affairs (DFA) has already issued a certification confirming the diplomatic immunity of the Arabian national.[19] She confirmed that under ordinary protocols and processes, the Department of Justice (DOJ) would defer to the DFA on these matters as it is in the best position to certify whether a particular foreign national is covered by diplomatic immunity, including immunity from arrest and prosecution.[20]

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[15] Narayan Lakshman, *No Retroactive Immunity for Devyani, Says U.S.,* HINDU, Dec. 4, 2021, *available at* https://www.thehindu.com/news/international/world//article6035807 4.ece (last accessed Aug. 10, 2022).

[16] Ramchandani*, supra* note 11.

[17] Somini Sengupta, *U.S. Supports Bid to Dismiss Maid's Suit Against Envoy*, ATLANTIC, Apr. 4, 2000, *at* https://www.nytimes.com/2000/04/04/nyregion/us-supports-bid-to-dismiss-maid-s-suit-against-envoy.html (last accessed Aug. 10, 2022).

[18] Tetch Torres-Tupas, *Saudi Attaché Cleared of Human Trafficking Case,* INQUIRER.NET, May 21, 2024, *at* https://globalnation.inquirer.net/104818/saudi-attache-cleared-of-human-trafficking-case (last accessed May 24, 2023).

[19] *Id.*

[20] *Id.*

In all the cases mentioned above, as well as in a plethora of other cases in various jurisdictions, judicial recourse has been unavailable to the migrant worker, more often than not. Extrajudicial and diplomatic remedies such as the declaration of *persona non grata* against the offending diplomat, as well as the withholding of domestic worker visas from diplomatic missions that condone trafficking are usually beyond the grasp of the migrant worker. Bearing this in mind, it can be argued that diplomatic immunity has seemingly become a tool for manifest injustice and oppression of migrant workers. It can also be said that it has become a means for some diplomats to escape accountability for their actions.

It is therefore the purpose of this Article to analyze the question of whether diplomatic immunity can be limited to provide for more equitable judicial outcomes for victims of human trafficking and migrant exploitation. In this regard, it will also review relevant treaties and prior jurisprudence on diplomatic immunity, including recent case law in other jurisdictions on the interaction between diplomatic immunity and the commission of offenses involving human trafficking and migrant exploitation.

II. THE CONCEPT OF DIPLOMATIC IMMUNITY

A. Diplomatic Immunity Distinguished from Sovereign Immunity

The concept of diplomatic immunity has been described as a fundamental principle of international law and "one of the most important tenets of civilised and peaceable relations between nation-states."[21] In one famous case overseas, it has been described by a tribunal in New Zealand as an "important aspect of the international relations between sovereign [S]tates, and a fundamental element of the arrangements under which diplomats serve in countries which may have legal systems quite different from their own."[22] As a concept, it must be distinguished from State or sovereign immunity, which is based on the notion of sovereign equality—thereby preventing a State from being subjected to the jurisdiction of another state without its

[21] Basfar v. Wong [hereinafter "*Basfar*"], 2022 UKSC 20, 4, July 6, 2022, *available at* https://www.supremecourt.uk/cases/docs/uksc-2020-0155-judgment.pdf.

[22] Komla v. South African High Comm'r to New Zealand, NZERA Wellington 152, Dec. 14, 2016, *citing* MAGB v. GQC, NZHC 1595 (2015), *available at* https://www.employment.govt.nz/assets/elawpdf/2016/061f6c234f/2016_NZERA_Wellington_152.pdf.

consent.[23] Nonetheless, it is still possible for both to apply to the same facts. As observed by the Supreme Court of Israel in the case of *Her Majesty the Queen in Right of Canada v. Edelson*:

> There are various sorts of international immunity: We can distinguish, inter alia, between [S]tate immunity and diplomatic immunity. Both immunities find their origin in the sovereign's personal immunity.
>
> Despite their common historical origin, a distinction should be drawn between them. Thus, while state immunity refers to the immunity granted to a foreign state with respect to (civil) legal proceedings, diplomatic immunity signifies the immunity granted diplomatic representatives. The personal immunity of a head of [S]tate may be considered as belonging to either category. The dividing line between sovereign immunity and diplomatic immunity is often blurred. *Conceivably, both kinds of immunity may apply to the same set of facts. Thus, for example, if sovereign immunity regarding a specific case of "seizure" of an embassy's bank account, pursuant to a civil ruling against that country, is not recognized, the case could still fall under the category of diplomatic immunity.* It is possible that [S]tate immunity does not apply to the facts of the case, whereas diplomatic immunity may apply to the same facts.[24]

From another point of view, Lord Sumption of the UK Supreme Court, with whom Lord Neuberger agrees, stated in the landmark case of *Reyes v. Al-Malki* that:

> In some significant respects, the immunities of diplomatic agents are wider than those of the [S]tate. This is because their purpose is to remove from the jurisdiction of the receiving state persons who are within its territory and under its physical power. Human agents have a corporeal vulnerability not shared by the incorporeal state which sent them.[25]

In the landmark case of *Basfar v. Wong,* which will be discussed in more detail in the succeeding sections, this observation of Lord Sumption was

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[23] Arigo v. Swift [hereinafter "*Arigo*"], G.R. No. 206510, 735 SCRA 102, 130–33, Sept. 26, 2014.

[24] Her Majesty v. Edelson, PLA 7029/94, Jun. 3, 1997, *available at* https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts/94/920/070/A01&fileName=94070920.A01.txt&type=4. (Emphasis supplied.)

[25] Reyes v. Al-Malki [hereinafter "*Reyes*"], 2017 UKSC 61, 17, Oct. 18, 2017, *available at* https://www.supremecourt.uk/cases/docs/uksc-2016-0023-judgment.pdf.

further expounded in the judgment of Lord Briggs and Lord Leggatt, and with which Lord Stephens agrees:

> Diplomatic immunity includes immunity for acts done for or on behalf of the sending [S]tate, and in that respect coincides with [S]tate immunity. But diplomatic immunity also extends more widely to provide personal protection to diplomatic agents (and their families) while they are present in the receiving [S]tate. […] To fulfill the purpose identified in the fourth recital to the Diplomatic Convention of ensuring the efficient performance of the functions of diplomatic missions, it is necessary to protect the freedom of individuals sent to perform those functions to live and go about their ordinary daily lives in the receiving [S]tate without hindrance. This explains why diplomatic agents enjoy privileges and immunities that apply even when they are not performing their official functions. It also explains why such privileges and immunities for acts performed outside their official functions only subsist while they are in post in the receiving [S]tate.[26]

In the case of *Benkharbouche v. Secretary of State for Foreign and Commonwealth Affairs*, Lord Sumption of the UK Supreme Court highlighted the comparison further by stating the difference in purposes. Thus, "[u]nlike diplomatic immunity, which the modern law treats as serving an essentially functional purpose, [S]tate immunity does not derive from the need to protect the integrity of a foreign state's governmental functions or the proper conduct of inter-state relations. It derives from the sovereign equality of [S]tates."[27]

In addition, it has also been recognized in the case of *Basfar* that diplomatic immunity is merely an aspect of State immunity:

> Manifestly, diplomatic and [S]tate immunity have a number of points in common. Both are immunities of the [S]tate, which can be waived only by the [S]tate. Both may extend to individual agents of the [S]tate, acting as such. Both are creatures of international law. And, although only diplomatic immunity has been codified by treaty, the embryonic United Nations Convention on Jurisdictional Immunities of States is generally regarded as an authoritative statement of customary international law on the major points which it covers. *These factors led Laws J, in Propend Finance Pty Ltd v Sing (1997)* [ ] *to suggest that "the law relating to diplomatic immunity is not free-standing from the law of sovereign or state immunity, but is an aspect of it",*

[26] *Basfar*, 2022 UKSC 20, 12.

[27] Benkharbouche v. Sec. of State for Foreign and Commonwealth Affairs, 2017 UKSC 62, 10, Oct. 18, 2017, *available at* https://www.supremecourt.uk/cases/docs/uksc-2015-0063-judgment.pdf.

> *and to cite with apparent approval a dictum of Jenkins LJ in Baccus SRL v Servicio National Del Trigo [1957]* [ ] *to the effect that the protection accorded to a diplomat under the Diplomatic Privileges Act 1708 (then in force) could not be greater than that accorded to a foreign sovereign*.[28]

B. Historical Roots of Diplomatic Immunity

The legal concept of diplomatic immunity reaches back to the earliest civilizations. In both ancient Greece and Rome, as well as in medieval times, it has been observed that:

> Diplomats enjoyed personal inviolability that included immunity from the receiving nation's civil and criminal jurisdiction, and the receiving sovereign owed a special duty to protect the diplomat's person. Even a crime as severe as plotting to overthrow the receiving sovereign could not be punished; the only permissible response was to declare the diplomat *persona non grata* and oust him from the territory. A violation of a diplomat's inviolability required immediate reparation by the offending sovereign, and "[m]ore than one war began because an envoy was detained or punished by the receiving sovereign without reparation.
>
> As political and economic contact between nations grew, so too did the need for regular diplomatic contact between nations. By the end of the Middle Ages, diplomacy was being practiced in a manner closely resembling modern practice, and the recognition of diplomatic immunity by receiving States had become a customary norm.[29]

Further to the East, the ancient Indian Sanskrit epic *Ramayana* confirmed that the concept of diplomatic immunity was already part of customary ancient laws as early as the 5th century B.C.E. when one of its main characters uttered that:

> [S]ages have declared that an ambassador's person is inviolate at all times and in all circumstances and an ambassador can never be put to death. […] There is no doubt that this ambassador is guilty of crimes without parallel. Nevertheless, the sages have laid down that

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[28] *Basfar*, 2022 UKSC 20, 17. (Emphasis supplied, citations omitted.)

[29] The Congressional Research Service, *Diplomatic Immunity: History and Overview*, 2, Nov. 19, 2003, *available at* https://www.everycrsreport.com/files/2003111_RS21672_076b3ccdf9ee6f191dd08f7a1612d555a236b5be.pdf (last accessed on Aug. 12, 2022).

> the execution of an ambassador is not permitted because there are other diverse forms of punishment prescribed for an ambassador.[30]

In Islamic law, the recognition of the concept of diplomatic immunity has been recognized as well, deriving its legal authority from the two sources of Islamic law, the Quran and Sunnah.[31] One of the most influential scholars of Islamic law, the renowned Persian Hanafi jurist Al-Sarakhsi, was quoted saying that "if somebody claims to be an envoy and has in his possession the necessary credentials, he shall be granted immunity till the completion of his ambassadorial duty and till he returns."[32]

The famous Dutch statesman and scholar Hugo Grotius who is also referred to as the father of international law, described diplomatic immunity by stating that "[t]here are two maxims in the law of nations relating to ambassadors which are generally accepted as established rules: the first is that ambassadors must be received and the second that they must suffer no harm."[33] Supplementarily, Grotius stated that it is a rule accepted by nations that the "common custom which makes a person who lives in foreign territory subject to that country, admits of an exception in the case of ambassadors."[34]

In the succeeding centuries after Grotius, numerous attempts were made to create a uniform set of rules on the immunity of diplomatic agents and to codify laws on diplomatic relations. These include the establishment by the League of Nations of a committee of experts for the progressive codification of international law in 1924, as well as a general instrument dealing with diplomatic privileges and immunities, which was adopted in Havana by the Sixth International American Conference in 1928.[35] Other attempts were also made by the famous Swiss jurist Johann Kaspar Bluntschli in 1868, the Italian jurist Pasquale Fiore in 1890, and the pre-eminent draft

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[30] Sri R. K. Dave, *International Law in Ancient India*, HIGH COURT OF JUDICATURE AT ALLAHABAD WEBSITE, *at* https://www.allahabadhighcourt.in/event/InternationalLawinAncientIndiaRKDave.pdf (last accessed Aug. 12, 2022), *citing* the Sanskrit Slokas.

[31] Sadiq Safiyanun, *The Principle of Diplomatic Immunity Under Islamic Law*, 5 INTL J. OF SOC. SCI. 42, 45 (2021).

[32] *Id.*

[33] The Congressional Research Service, *Diplomatic Immunity: History and Overview*, Nov. 19, 2003, *available at* https://www.everycrsreport.com/files/20031119_RS21672_076b3ccdf9ee6f191dd08f7a1612d555a236b5be.pdf (last accessed on Aug. 12, 2022) *citing* GROTIUS, DE JURE BELLI AC PACIS, BOOK II, CHAPTER XVIII.

[34] URSULA VOLLERTHUN & JAMES L. RICHARDSON, THE IDEA OF INTERNATIONAL SOCIETY: ERASMUS, VITORIA, GENTILI AND GROTIUS 188 (2017).

[35] *United Nations Documents on the Development and Codification of International Law*, 68, 124-125 (Oct. 1947), *available at* https://legal.un.org/ilc/documentation/english/ASIL_1947_study.pdf.

published in 1932 by the Harvard Research in International Law.[36] Relatedly, the Convention on the Privileges and Immunities of the United Nations[37] was adopted in 1946, in order to provide diplomatic immunities for representatives of United Nations (UN) Member States, UN officials, and experts who are serving on missions for the UN likewise served as an important legal precedent.

C. Creation of the Vienna Convention on Diplomatic Relations

Throughout post-modern and contemporary history, there have been three main legal theories that have been put forward to provide the basis and justification of diplomatic immunity. They are the theory of representative character, the theory of extraterritoriality and the theory of functional necessity.[38]

Under the theory of representative character, diplomats are deemed as the representative and embodiment of the ruler of their sending State.[39] Hence, the diplomat should be granted the same privileges and immunities which ordinarily would be granted to the sovereign, had the sovereign been physically present.[40] In addition, as the personification of the represented sovereign, the diplomat cannot be deemed as subject to the laws and jurisdiction of the receiving State, as it would be violative of sovereign equality of States.[41]

The theory of extraterritoriality, however, adjudges diplomats as still residing in the sending State, despite their physical presence in the receiving State.[42] For this reason, diplomats are considered to be within the jurisdiction of the sending State and outside the jurisdiction of the receiving State.[43] It is based on the notion that the premises of the diplomatic mission are

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[36] Jesse Reeves, *Diplomatic Privileges and Immunities*, 26 AM. J. INT'L. L. 15, 144–62; James Kenny, *Manley O. Hudson and the Harvard Research in International Law 1927-1940*, 11 INT'L LAWYER 319, 319–20 (1977).

[37] Feb. 13, 1946. 1 U.N.T.S. 15.

[38] Bokwujiri Cynthia O. Wogu, *Theoretical Basis for Diplomatic Privileges and Immunities: The Need for States to Exercise their Power of Waiver*, 9 INT'L. J. INNOVATIVE LEGAL & POL. STUDIES 34, 37 (2021), *available at* https://seahipaj.org/journals-ci/dec-2021/IJILPS/full/IJILPS-D-4-2021.pdf.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

considered the territory of the sending State, rather than of the receiving State.[44]

The theory of functional necessity, meanwhile, provides that the diplomat should be outside the jurisdiction of the courts of the receiving State because the performance of functions by diplomats could be unduly hampered if held otherwise. [45] This, in turn, could lead to the breakdown of relations between the receiving and the sending States.[46] Accordingly, it can be said that this theory aims to prevent legal and political interference in the normal functioning of international affairs.[47]

The functional necessity theory appears to be the most accepted theory in legal circles when in 1961, a major breakthrough occurred in the creation of a universally accepted code for diplomatic immunity. In that year, the VCDR was adopted in a conference convened by the United Nations on diplomatic intercourse and immunities.[48] The success of this feat would later be replicated in a subsequent treaty, the VCCR, which came to be in 1963, to provide for a more limited immunity to consular officials in respect of acts that they have performed in the exercise of consular function.[49]

One of the first countries to accede to the VCDR was the Philippines, which signed the VCDR on October 20, 1961, and then ratified it four years later in 1965.[50] Even before the VCDR however, the Philippine legal framework has already recognized the concept of diplomatic immunities through the incorporation clause of generally accepted principles of international law in Article II, Section 3 of the 1935 Philippine Constitution.[51] This provision was later retained under Article II, Section 3 of the 1973 Constitution and Article II, Section 2 of the 1987 Constitution. In the case of *Minucher v. Court of Appeals*, the Philippine Supreme Court described the VCDR as merely the codification of customary international law, stating:

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[44] *Id.*

[45] *Id.* at 38.

[46] *Id.*

[47] *Id.*

[48] Vienna Convention on Diplomatic Relations [hereinafter "VCDR"], Apr. 18, 1961, 500 U.N.T.S. 243.

[49] Vienna Convention on Consular Relations [hereinafter "VCCR"], Apr. 22, 1963, 596 U.N.T.S. 261.

[50] *Vienna Convention on Diplomatic Relations, Depositary,* UNITED NATIONS TREATY COLLECTION, *at* https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-3&chapter=3&clang=_en (last accessed May 24, 2023).

[51] CONST. (1935), art. II, § 3.

> The Vienna Convention on Diplomatic Relations was *a codification of centuries-old customary law and, by the time of its ratification on 18 April 1961, its rules of law had long become stable*. Among the city states of ancient Greece, among the peoples of the Mediterranean before the establishment of the Roman Empire, and among the states of India, the person of the herald in time of war and the person of the diplomatic envoy in time of peace were universally held sacrosanct. *By the end of the 16th century, when the earliest treatises on diplomatic law were published, the inviolability of ambassadors was firmly established as a rule of customary international law*. Traditionally, the exercise of diplomatic intercourse among states was undertaken by the head of state himself, as being the preeminent embodiment of the [S]tate he represented, and the foreign secretary, the official usually entrusted with the external affairs of the state. Where a state would wish to have a more prominent diplomatic presence in the receiving state, it would then send to the latter a diplomatic mission. Conformably with the Vienna Convention, the functions of the diplomatic mission involve, by and large, the representation of the interests of the sending state and promoting friendly relations with the receiving state.[52]

Since its inception, the VCDR has been adopted by almost all UN member and observer States, with Palau and South Sudan being the only countries which have not yet acceded to the VCDR as of writing. In its recital, the VCDR echoes the legal theory of functional necessity when it states that the purpose of diplomatic immunity is "not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States."[53] Correspondingly, the VCDR abolishes the theory of absolute diplomatic immunity for all types of cases, qualifying it in certain instances such as in administrative and civil cases.[54] The scope of diplomatic immunities under the VCDR specifies that diplomatic immunity carries with it other privileges, such as personal inviolability, inviolability of the official's properties, exemption from local jurisdiction, and exemption from taxation and customs duties.[55] As succinctly stated by one legal author, "the protection of diplomatic envoys is not restricted to their own persons, but must be extended to the members of their family and to their official residence, their

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[52] Minucher v. Ct. of Appeals [hereinafter "*Minucher*"], G.R. No. 142396, 397 SCRA 244, 254–55, Feb. 11, 2003. (Emphasis supplied.)

[53] VCDR, pmbl., Apr. 18, 1961, 500 U.N.T.S. 243.

[54] Jean-Gabrie Castel, *Exemption from the Jurisdiction of Canadian Courts,* 9 CAN. Y.B. INT'L L. 159, 173 (1971), *available at* https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2342&context=scholarly_works.

[55] World Health Org. v. Aquino [hereinafter "*World Health Organization*"], G.R. No. 35131, 48 SCRA 242, 244, Nov. 29, 1972.

furniture, carriages, papers, and likewise to their intercourse with their home states, by letters, telegrams and special messengers."[56]

D. Diplomatic Immunity under the VCDR

The VCDR provisions which deal particularly with immunities and privileges of diplomats are Articles 22 and 29 to 40.[57] Among these provisions. the most important perhaps is Article 31(1), which provides:

> Article 31
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> 1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
>
> (a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
> (b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
> (c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.[58]

Under Article 31 of the VCDR, it is clear that diplomatic agents are given immunity from the criminal jurisdiction of the receiving State. It is also evident that a diplomatic agent will have immunity in civil and administrative cases, subject to the exceptions provided. According to one recognized commentator on diplomatic law, the term civil and administrative covers a wide-ranging variety of cases, including those involving the application of family law and insolvency laws:

> Immunity from civil and administrative jurisdiction covers not only direct claims against a diplomatic agent or his property but also family matters such as divorce or other matrimonial proceedings, proceedings to protect a member of the family of a diplomat by a

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[56] Jorge R. Coquia, *Annotation: Diplomatic Privileges and Immunities of International Officials*, 48 SCRA 254, 258 (1972).

[57] *Reyes*, 2017 UKSC 61, 5.

[58] VCDR, art. 31(1), Apr. 18, 1961, 500 U.N.T.S. 243.

> care order or make him or her a ward of court and[—]unless they are within the specific exceptions provided set out in Article 31.1[—]such matters as bankruptcy, company law or administration of estates.[59]

In the same manner, Lord Sumption of the UK Supreme Court, with whom Lord Neuberger agrees, explains that Article 31 does not, as a general rule, distinguish between private and official acts of the diplomatic agent in its provision of immunity against civil cases. For as long as the matter at hand does not fall within the three exceptions provided under Article 31, then the immunity of the diplomatic agent remains:

> The Vienna Convention distinguishes between diplomatic agents (i.e.[,] ambassadors and members of their diplomatic staff), the administrative and technical staff of the mission, their respective families, and service staff of the mission. The highest degree of protection is conferred on diplomatic agents. *In their case, the Convention substantially reproduces the previous rules of customary international law, by which a diplomatic agent was immune from the jurisdiction of the receiving state (i) in respect of things done in the course of his official functions for an unlimited period, and (ii) in respect of things done outside his official functions for the duration of his mission only. Thus [A]rticle 31(1) confers immunity on diplomatic agents currently in post in respect of both private and official acts, subject to specific exceptions for the three designated categories of private act.*[60]

As an exception to the general rule however, Article 31(1)(c) distinguishes between private and official acts of the diplomatic agent before they can be deprived of immunity in civil and administrative cases. This is due to the fact that in these types of cases, a diplomatic agent can only be stripped of the grant of immunity upon satisfaction of two conditions. First, the exercise of the activity must be outside the official functions of the diplomatic agent.[61] Second, the action of the diplomatic agent must relate to the exercise of a professional or commercial activity.[62] As to the first requirement, the US case of *Swarna v. Al-Awadi* states that "a diplomatic agent performs acts 'in the exercise of his functions' when the acts are taken in the regular course of implementing an official program or policy of the mission."[63] In this regard,

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[59] Eileen Denza, Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations 235 (2016 ed.).

[60] *Reyes*, 2017 UKSC 61, 12. (Emphasis supplied.)

[61] *Id.*

[62] *Id.*

[63] Swarna v. Al-Awadi [hereinafter "*Swarna*"], 607 F. Supp. 2d 509 (S.D.N.Y. 2009).

Article 3 of the VCDR enumerates the functions of a diplomatic mission, namely:

> (a) Representing the sending State in the receiving State;
> (b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
> (c) Negotiating with the Government of the receiving State;
> (d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State; and
> (e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.[64]

Consequently, all activities of the diplomatic agent related to the above must be deemed to be activities within their official functions.[65] Still, as aptly noted by Lord Sumption, activities undertaken by the diplomatic agent, even if not related to those enumerated under Article 3 of the VCDR, may still be considered as part of their official functions, provided that they conducted for or on behalf of the sending State:

> If the relevant acts were within the scope of the diplomat's official functions, the enquiry ends there. He is immune. Moreover, he will retain the residual immunity in respect of them even after his posting comes to an end. But if he is still in post and the relevant activity is outside his official functions, the operation of the exception will depend on whether it amounts to a professional or commercial activity exercised by him.
>
> Accordingly, the first question is what are a diplomatic agent's official functions. The starting point is the functions of the mission to which he is attached. *They are defined in* [*A*]*rticle 3 of the Convention, and comprise all the classic representational and reporting functions of a diplomatic mission. It is, however, clear that the official functions of an individual diplomatic agent are not necessarily limited to participating in the activities defined by* [*A*]*rticle 3. They must in the nature of things extend to a wide variety of incidental functions which are necessary for the performance of the general functions of the mission. But whether incidental or direct, a diplomatic agent's official functions are those which he performs for or on behalf of the sending state. The test is whether the relevant activity was part of those functions.*[66]

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[64] VCDR, art. 3, Apr. 18, 1961, 500 U.N.T.S. 243.
[65] *Id.*
[66] *Reyes*, 2017 UKSC 61, 13. (Emphasis supplied.)

One example of official functions not listed under Article 3 of the VCDR is the act of hiring and employing locally employed staff for the mission, as stated in the case of *Swarna*:

> Courts have also held that a diplomatic agent's act of hiring and employing an individual to work at the diplomatic mission is an official act…The rationale underlying these decisions appears to be that diplomatic missions cannot function without having a certain set of employees to carry out various roles. Thus, it may be part of a diplomatic agent's official duties to enter into employment relationships with others who will work at the mission.[67]

Once it has been determined that an act falls outside the functions of the diplomatic agent, the next query towards applying the exception under Article 31(1)(c) will then be whether the activity exercised by the diplomatic agent amounts to a professional or commercial activity. In this regard, the Lord Sumption of the UK Supreme Court, with whom Lord Neuberger agrees, has noted that an activity is not synonymous with a singular or isolated act.[68] Consequently, Article 31(1)(c) "is concerned with the carrying on of a professional or commercial activity having some continuity and duration."[69] This coincides with the earlier ruling of the Philippine Supreme Court in *Republic of Indonesia v. Vinzon* wherein it was held that the singular act of the Indonesian Ambassador and Minister Counsellor in terminating a maintenance agreement was considered as not falling within the scope of "professional or commercial activity."[70]

Correlating this then with Article 42 of the VCDR, which provides that a diplomatic agent shall not in the receiving state practice for personal profit any professional or commercial activity,[71] Lord Sumption postulates that Article 31(1)(c) should be understood as applying only to an accredited diplomat who engages in professional or commercial business in the receiving state:

> The difference between the language of the exception in [A]rticle 31(1)(c) and that of the prohibition in [A]rticle 42 is simply the use in the latter of the expression "for personal profit" in place of "outside his official functions[.]" *The essential point, however, is that in*

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[67] *Swarna*, 607 F. Supp. 2d 509 (S.D.N.Y. 2009) (U.S.).
[68] *Reyes*, 2017 UKSC 61, 13–14.
[69] *Id.*
[70] Republic of Indonesia v. Vinzon, G.R. No. 154705, 405 SCRA 126, June 26, 2003.
[71] VCDR, art. 42, Apr. 18, 1961, 500 U.N.T.S. 243.

> *both* [*A*]*rticles, the reference is to the diplomat carrying on or participating in a professional or commercial business*.[72]

In the subsequent case of *Basfar* however, Lord Briggs and Lord Leggatt disagreed with this limiting interpretation made by Lord Sumption, stating that the understanding of commercial activity in Article 31(1)(c) should not be limited to cover only the act of a diplomat in carrying on a business:

> We do not accept that this conclusion can be reached just by considering the ordinary meaning of the words used in [A]rticle 31(1)(c) of the Diplomatic Convention. *In particular, we cannot agree with the view expressed by Lord Sumption in Reyes, at para*[.] *21(2), that the ordinary meaning of "exercising" a "commercial activity" is restricted to "carrying on a business" or "setting up shop". Certainly, the ordinary meaning of the words includes those concepts. But it is not limited to them.* For example, it would be perfectly consistent with ordinary usage to describe a person who is employed as a shop assistant as "exercising a commercial activity" even though he or she is working in someone else's shop and is not carrying on a business.[73]

Germanely, Lord Briggs and Lord Leggatt likewise elucidated on the complementary relationship between Article 31(1)(c) and Article 42 of the VCDR, ruling that the prohibition in Article 42 was not meant to cover non-remunerated activities. This notwithstanding, diplomats are still not at liberty to pursue unpaid professional and commercial activities in the host country with reckless abandon for Article 31(1)(c) ensures that they will not be protected by diplomatic immunity should they choose to proceed:

> We agree that there is a clear link between the two provisions and that, where a diplomatic agent practices an activity incompatible with his diplomatic status in breach of [A]rticle 42, [A]rticle 31(1)(c) ensures that the diplomat will not enjoy immunity from civil actions relating to that activity. *To that extent,* [*A*]*rticle 31(1)(c) is clearly intended to complement* [*A*]*rticle 42. We are not persuaded, on the other hand, that article 31(1)(c) goes no wider than* [*A*]*rticle 42. In one respect at least, the scope of* [*A*]*rticle 31(1)(c) is undoubtedly wider, as the exception from immunity in article 31(1)(c) applies (by* [*A*]*rticle 37) to members of the family of a diplomatic agent forming part of his household, whereas the* [*A*]*rticle 42 prohibition does not.* Thus, [A]rticle 42 does not prevent, for example, the spouse of a diplomatic agent from working in paid employment or carrying on a business in the receiving state; yet there is no doubt that the spouse does not have immunity from suit in respect of such

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[72] *Reyes*, 2017 UKSC 61, 14. (Emphasis supplied.)
[73] *Basfar*, 2022 UKSC 20, 11. (Emphasis supplied.)

> activities. *The inclusion in* [*A*]*rticle 42 of the words "for personal profit" also indicates that* [*A*]*rticle 42 was not intended to prohibit a diplomat from carrying on a professional or commercial activity on a voluntary basis, for example teaching or helping out in a charity shop for no remuneration; whereas the absence of those words in* [*A*]*rticle 31(1)(c) suggests that a civil claim relating to such conduct would nevertheless fall within the exception from immunity.*[74]

Just the same, Article 39 of the VCDR states that the immunity from criminal, civil and administrative jurisdiction provided under Article 31 begins "the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs."[75] Correlating this with Article 43 of the VCDR, this diplomatic immunity will last until the functions of the diplomatic agent has come to an end, through the following:

> (a) On notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end;
> (b) On notification by the receiving State to the sending State that, it refuses to recognize the diplomatic agent as a member of the mission.[76]

Apart from this, Article 39 of the VCDR expressly states that "when the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so."[77] Pending the occurrence of such, the immunity shall subsist even in cases of armed conflict.

Complementarily, it is also recognized that the diplomatic agent retains some form of residual immunity, but only for actions performed in the exercise of his functions as a member of the diplomatic mission.[78] In the US case of *Swarna*, it was stated that residual diplomatic immunity applies only to official acts since these acts may be attributed to the sending State, "but do[ ] not apply to private acts[,] because the purpose of immunizing a diplomatic agent's private acts is to ensure the efficient functioning of a diplomatic mission, not to benefit the private individual, and this purpose terminates when the individual ceases to be a diplomatic agent."[79] Therefore, residual

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[74] *Id.* (Emphasis supplied.)
[75] VCDR, art. 39, Apr. 18, 1961, 500 U.N.T.S. 243.
[76] Art. 43.
[77] Art. 39.
[78] *Reyes*, 2017 UKSC 61, 12.
[79] *Swarna*, 607 F. Supp. 2d 509 (S.D.N.Y. 2009).

diplomatic immunity does not extend to "lawsuits based on actions that were entirely peripheral to the diplomatic agent's official duties," such as distributing cocaine.[80]

Be that as it may, Lord Sumption states in *Reyes* that residual immunity is one of the four instances in which diplomatic immunity is limited by the VCDR to a protected person's official acts.[81] The other instances are found in the following provisions of the VCDR:

> a. Immunity conferred on a diplomatic agent who is a national of or permanently resident in the receiving state, which is limited to "official acts performed in the exercise of his functions;"[82]
> b. Immunity conferred on administrative and technical staff of a mission, which "shall not extend to acts performed outside the course of their duties;"[83] and
> c. Immunity conferred on the domestic staff of the mission, which is limited to "acts performed in the course of their duties."[84]

As observed in the above enumeration, the privilege of diplomatic immunity has not been limited by the VCDR to cover only the diplomatic agents. Article 37 of the VCDR extends the same to members of the family of the diplomatic agent and members of the administrative and technical staff of the diplomatic mission, if not a citizen or permanent resident of the receiving State. All the same, the immunity of the service staff of the diplomatic mission who are not citizens or permanent residents of the receiving State are limited only for acts performed in the course of their duties, while private servants of members of the mission only have immunities to the extent admitted by the receiving state.

The limitation imposed by the VCDR on the extension of diplomatic immunity to certain members of the diplomatic mission was further explained by the Philippine Supreme Court in the previously mentioned case of *Minucher*, in which it was said that:

> The Convention lists the classes of heads of diplomatic missions to include (a) ambassadors or nuncios accredited to the heads of state, (b) envoys, ministers or internuncios accredited to the heads of

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[80] *Id.*
[81] *Reyes*, 2017 UKSC 61, 12.
[82] VCDR, art. 38(1), Apr. 18, 1961, 500 U.N.T.S. 243.
[83] Art. 37(2).
[84] Art. 37(3).

> states; and (c) charges d'affair[e]s accredited to the ministers of foreign affairs. *Comprising the "staff of the (diplomatic) mission" are the diplomatic staff, the administrative staff and the technical and service staff. Only the heads of missions, as well as members of the diplomatic staff, excluding the members of the administrative, technical and service staff of the mission, are accorded diplomatic rank. Even while the Vienna Convention on Diplomatic Relations provides for immunity to the members of diplomatic missions, it does so, nevertheless, with an understanding that the same be restrictively applied. Only "diplomatic agents," under the terms of the Convention, are vested with blanket diplomatic immunity from civil and criminal suits. The Convention defines "diplomatic agents" as the heads of missions or members of the diplomatic staff, thus impliedly withholding the same privileges from all others.*[85]

In construing who is to be considered as a member of the staff of the diplomatic mission, it should be kept in mind that consular officials and consular employees fall more properly within the coverage of Article 43 of the VCCR rather than of Article 37 of VCDR. It will also be recalled that the VCCR grants consular officers and consular employees a more limited immunity from the civil, criminal, and administrative jurisdiction of the receiving state only for acts performed in the exercise of consular functions. In this regard, the Philippine Supreme Court explains the reason for the variance in treatment as to consular officials by stating thus:

> It might bear stressing that even consuls, who represent their respective states in concerns of commerce and navigation and perform certain administrative and notarial duties, such as the issuance of passports and visas, authentication of documents, and administration of oaths, *do not ordinarily enjoy the traditional diplomatic immunities and privileges accorded diplomats, mainly for the reason that they are not charged with the duty of representing their states in political matters*. Indeed, the main yardstick in ascertaining whether a person is a diplomat entitled to immunity is the determination of whether or not he performs duties of diplomatic nature.[86]

In addition, the Philippine Supreme Court explained that an attaché, though assigned to a diplomatic mission, is not usually conferred diplomatic immunity due to absence of diplomatic rank, hence:

> An attaché belongs to a category of officers in the diplomatic establishment who may be in charge of its cultural, press, administrative or financial affairs. There could also be a class of attaches belonging to certain ministries or departments of the

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[85] *Minucher*, 397 SCRA 244, 255–56. (Emphasis supplied.)
[86] *Id.* at 256–57. (Emphasis supplied.)

> government, other than the foreign ministry or department, who are detailed by their respective ministries or departments with the embassies such as the military, naval, air, commercial, agricultural, labor, science, and customs attaches, or the like. Attaches assist a chief of mission in his duties and are administratively under him, but their main function is to observe, analyze and interpret trends and developments in their respective fields in the host country and submit reports to their own ministries or departments in the home government. *These officials are not generally regarded as members of the diplomatic mission, nor are they normally designated as having diplomatic rank*.[87]

Adding to the limitations specified under Article 31 of the VCDR, Article 32 provides that the jurisdictional immunity of diplomatic agents in the receiving state can likewise be limited by the express waiver of the sending State:

> Article 32
>
> 1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under [A]rticle 37 *may be waived by the sending State.*
>
> 2. Waiver must always be *express.*
>
> 3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under [A]rticle 37 shall *preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim.*
>
> 4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.[88]

Interpreting the first and second paragraph of the above provision, we can see that only the sending State can waive the immunity of the diplomatic agent. As observed by one legal commentator, the "immunity, being the right of the sending State, its waiver is said to require the consent of the Government of that State or of the diplomatic person's official superior."[89] This contention is supported by the US case of *Logan v. Dupuis*. In this case, it was alleged by the plaintiff that a Canadian diplomat has waived

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[87] *Id.* at 257. (Emphasis supplied.)
[88] VCDR, art. 32, Apr. 18, 1961, 500 U.N.T.S. 243.
[89] Coquia, *supra* note 56, at 257.

his immunity from civil jurisdiction by entering a contract containing a clause for adjudication of disputes in the local and federal courts. However, this argument was denied as the Canadian diplomat "has no authority to waive his immunity from civil jurisdiction; that is the prerogative of the government of Canada, which, to date, has declined to do so."[90] Although it is exceedingly rare for a State to forsake the immunity of its own diplomatic agent and leave them exposed to legal actions, such a situation is not without precedent, like when Columbia waived the immunity of one of its diplomats who committed manslaughter in the UK.[91] Similarly, Belgium previously acceded to the request of the US to waive the immunity of a Belgian diplomat who has admitted to committing two homicides in Florida.[92]

In any case, Article 32(3) provides an exception to the requirement of the sending State's consent before a diplomatic agent can waive his or her own immunity. For cases in which the diplomatic agent initiates legal proceedings, the diplomatic agent will be precluded from raising immunity, but only with respect to counterclaims directly connected to the initiated case. Corollarily, jurisprudence in the US before the adoption of the VCDR has held that in an action for damages arising out of a motor car accident, a diplomat will be deemed to have had waived their immunity by appearing and interposing an answer on the merits of the case, notwithstanding the fact that diplomatic immunity was raised as an affirmative defense.[93]

All told, it is important to note that diplomatic immunity is an exemption from jurisdiction, but not from liability.[94] As observed by one legal commentator:

> The exterritoriality granted to diplomatic envoys by the Municipal Laws of all the members of the international community is not based on the principle par in parem non habet imperium, but on the necessity that *envoys must, for fulfilling other duties, be independent of the jurisdiction, control, and the like, of the receiving States.* Exterritoriality, in this case, is a fiction only, for diplomatic representatives are in reality not without but within the territories of the receiving States. *They are exempt not from legal liability, but from the jurisdiction of the courts*

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[90] Logan v. Dupuis, 990 F. Supp. 26, 31 (1997).

[91] *Diplomat Charged with UK Murder*, CNN, Sept. 27, 2002, *available at* http://edition.cnn.com/2002/WORLD/europe/09/27/uk.colombia/index.html (last accessed Aug. 13, 2022).

[92] David Jones & Jonathan Fried, *Diplomatic Immunity: Recent Developments in Law and Practice, Proceedings of the Annual Meeting*, 85 AMERICAN SOC'Y INT'L L. 261, 270 (1991).

[93] Friedberg v. Santa Cruz, 193 Misc. 599 (N.Y. Misc. 1948).

[94] *Arigo*, 735, SCRA 102, 224, *citing* JUSMAG-Philippines v. Nat'l Lab. Rel. Comm'n (NLRC), G.R. No. 108813, 239 SCRA 224, Dec. 15, 1994.

> *of the country to which they are accredited* [ ]. *The term "exterritoriality" is nevertheless valuable because it demonstrates clearly the fact that envoys must, in most respects, be treated as though they were not within the territory of the receiving States.*[95]

In *Reyes,* Lord Sumption cited the ruling of the International Court of Justice (ICJ) in the case of *Democratic Republic of the Congo v. Belgium*, in which the ICJ stated that diplomatic immunity is not the same as being immune from liability.[96] Lord Sumption further commented that this was because diplomatic immunity is merely a procedural immunity from the jurisdiction of the courts of the receiving State.[97] Hence, as stated in the ICJ ruling:

> Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offenses; it cannot exonerate the person to whom it applies from all criminal responsibility.[98]

Similarly, in the case of *Democratic Alliance v. Minister of International Relations and Co-operation*, a high-profile case decided by the High Court of South Africa, it was declared that: "[t]he law of immunity is procedural in nature. *It is* [*focused*] *on and regulates the question of jurisdiction of the court but does not deal with the question of the lawfulness or otherwise of the action,* for that is an issue of substantive law."[99]

As observed by the Lord Sumption, this ruling of the ICJ means that the "receiving [S]tate cannot at one and the same time receive a diplomatic agent of a foreign [S]tate and subject him to the authority of its own courts in the same way as other persons within its territorial jurisdiction."[100] This statement also conforms with the Philippine Supreme Court's earlier jurisprudential ruling, in which it held that diplomatic privilege is "not an

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[95] Annotation: Diplomatic Privileges and Immunities of International Officials by Jorge R. Coquia, 48 SCRA 254, 260, 261 (1972). (Emphasis supplied, citations omitted.)

[96] *Reyes*, 2017 UKSC 61, 4.

[97] *Id.*

[98] Arrest Warrant of Apr. 11, 2000 (Democratic Republic of the Congo v. Belgium), Merits, 2002 I.C.J., GL No. 121, 22, (Feb. 14) *available at* https://www.refworld.org/cases,ICJ,3c6cd39b4.html.

[99] Democratic All. v. Minister of Intl Rel. and Co-operation; Engels v. Minister of Intl Rel. and Co-operation, (58755/17) [2018] ZAGPPHC 534; [2018] 4 All SA 131 (GP); 2018 (6) SA 109 (GP); 2018 (2) SACR 654 (GP) (2018), *available at* http://www.saflii.org/za/cases/ZAGPPHC/2018/534.html. (Emphasis supplied.)

[100] *Reyes*, 2017 UKSC 61, 4.

immunity from the observance of the law of the territorial sovereign or from ensuing legal liability; it is, rather, an immunity from the exercise of territorial jurisdiction."[101] This observation is supported by the language of Article 41(1) of the VCDR, which states that without prejudice to the privileges and immunities enjoyed under the VCDR, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State, and not interfere in its internal affairs.[102] Ultimately, the diplomatic agent will still be subject to the "jurisdiction of his own country's courts, and in important respects to the jurisdiction of the courts of the receiving state after his posting has ended."[103]

In the Philippines, one of the first occasions in which the Supreme Court had to rule on the concept of diplomatic immunity occurred in the case of *World Health Organization v. Aquino*. In this case, the Philippine Supreme Court described diplomatic immunity as a political question, and Philippine courts could not go beyond the determination set forth by the Executive branch, thus:

> It is a recognized principle of international law and under our system of separation of powers that *diplomatic immunity is essentially a political question and courts should refuse to look beyond a determination by the executive branch of the government*, and where the plea of diplomatic immunity is recognized and affirmed by the executive branch of the government as in the case at bar, *it is then the duty of the courts to accept the claim of immunity upon appropriate suggestion by the principal law officer of the government, the Solicitor General in this case, or other officer acting under his direction*.[104]

The Philippine Supreme Court would later expound on the above passage by stating that the question of vesting diplomatic immunity is a prerogative granted to the Executive branch, thereby binding the hands of the judiciary. The Court explained, "[c]oncededly, vesting a person with diplomatic immunity is a prerogative of the executive branch of the government. In *World Health Organization*, the Court has recognized that, in such matters, the hands of the courts are virtually tied."[105]

Philippine case law has also recognized that under our system of government, the responsibility for making this executive determination falls

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[101] *Minucher*, 397 SCRA 244, 259.
[102] VCDR, art. 41, Apr. 18, 1961, 500 U.N.T.S. 243.
[103] *Reyes*, 2017 UKSC 61, 4.
[104] *World Health Organization*, 48 SCRA 242, 248. (Emphasis supplied.)
[105] *Minucher*, 397 SCRA at 258.

under the mandate of the DFA, as such is part and parcel of its task to maintain and manage the country's foreign affairs. In the case of *Department of Foreign Affairs v. National Labor Relations Commission*, it was stated that:

> *The DFA's function includes, among its other mandates, the determination of persons and institutions covered by diplomatic immunities, a determination which, when challenged, entitles it to seek relief from the court so as not to seriously impair the conduct of the country's foreign relations. The DFA must be allowed to plead its case whenever necessary or advisable to enable it to help keep the credibility of the Philippine government before the international community*. When international agreements are concluded, the parties thereto are deemed to have likewise accepted the responsibility of seeing to it that their agreements are duly regarded. In our country, this task falls principally of the DFA as being the highest executive department with the competence and authority to so act in this aspect of the international arena.[106]

In the case of *China National Machinery & Equipment Corp. v. Santamaria*, the Philippine Supreme Court described such authority to make an executive determination as exclusive to DFA.[107] In that case, the Philippine Supreme Court stated that endorsements provided by other government agencies, without the DFA's participation or at the very least, soliciting the views of the DFA on the matter, will not elicit the same confidence as a DFA endorsement of immunity, whether it be sovereign or diplomatic. According to the Court:

> Further, [the China National Machinery & Equipment Corp. (Group)] also claims that its immunity from suit has the executive endorsement of both the OSG and the Office of the Government Corporate Counsel (OGCC), which must be respected by the courts. However, as expressly enunciated in Deutsche Gesellschaft, this determination by the OSG, or by the OGCC for that matter, does not inspire the same degree of confidence as a DFA certification.[108]

Owing to the crucial role that a DFA endorsement for immunity plays in the dismissal of actions, the Philippine Supreme Court cautioned that the issuance of such endorsements must undergo careful scrutiny in order to prevent abuse. Thus, the Court said in another case that:

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[106] Dep't of Foreign Aff. v. NLRC, G.R. No. 113191, 262 SCRA 39, 48, Sept. 18, 1996. (Emphasis supplied.)

[107] China Nat'l Mach. & Equip. Corp. (Group) v. Santamaria [hereinafter "*China National Machinery*"], G.R. No. 185572, 665 SCRA 189, 210, Feb. 7, 2012.

[108] *Id.* at 211.

> Amidst apprehensions of indiscriminate and incautious grant of immunity, designed to gain exemption from the jurisdiction of courts, *it should behoove the Philippine government, specifically its Department of Foreign Affairs, to be most circumspect, that should particularly be no less than compelling, in its post litem motam issuances.*[109]

However, the Philippine Supreme Court has also stated in another case that this would not mean that courts are completely helpless in the face of executive determination. Seemingly contradicting its pronouncement in other cases that courts should refuse from looking beyond the executive determination, the Philippine Supreme Court ruled in *Liang v. People* that such executive determination is only preliminary and not binding on the courts. According to the Court:

> [C]*ourts cannot blindly adhere and take on its face the communication from the DFA that petitioner is covered by any immunity. The DFA's determination that a certain person is covered by immunity is only preliminary which has no binding effect in courts*. In receiving ex-parte the DFA's advice and in motu propio dismissing the two criminal cases without notice to the prosecution, the latter's right to due process was violated. It should be noted that due process is a right of the accused as much as it is of the prosecution. The needed inquiry in what capacity petitioner was acting at the time of the alleged utterances requires for its resolution evidentiary basis that has yet to be presented at the proper time. At any rate, it has been ruled that the mere invocation of the immunity clause does not ipso facto result in the dropping of the charges.[110]

This ruling has been reiterated in the aforementioned case of *China National Machinery,* in which it was stated that "[e]ven with a DFA certification, however, it must be remembered that this Court is not precluded from making an inquiry into the intrinsic correctness of such certification."[111]

In the US, jurisprudential rulings concur with the views expressed in *World Health Organization* and *Minucher*, that the executive determination of diplomatic immunity is conclusive on the courts. In the case of *Kline v. Kaneko*, it was stated that:

> Courts are bound by suggestions of immunity submitted by the executive branch because they are a "conclusive determination by

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[109] *Minucher*, 397 SCRA 244, 258–59. (Emphasis supplied.)

[110] Liang v. People [hereinafter "*Liang*"], G.R. No. 125865, 323 SCRA 692, 695, Jan. 28, 2000. (Emphasis supplied.)

[111] *China National Machinery*, 665 SCRA at 211–12.

> the political arm of the Government.["] […] Since the judiciary "must be sensitive to the overriding necessity that courts not interfere with the executive's proper handling of foreign affairs" […] logic mandates that courts be bound by the State Department's recommendation. Thus, upon a filing of a suggestion of immunity, it becomes the "court's duty" to surrender jurisdiction.[112]

Additionally, in the case of *Guaranty Trust Co. v. United States*, the US Supreme Court declared that:

> What government is to be regarded here as representative of a foreign sovereign state is a political, rather than a judicial, question, and is to be determined by the political department of the government. *The action of that department in recognizing a foreign government and in receiving its diplomatic representatives is conclusive on all domestic courts, which are bound to accept that determination, although they are free to decide for themselves its legal consequences in litigations pending before them.*[113]

Similarly, the Federal Court of Australia has stated in one case that "[r]ecognition of the status of diplomatic personages is the prerogative of the Government of Australia, and a person who is so recognized as having a particular status has that status for the purpose of a court of law."[114]

Apropos to this discussion, the Philippine Supreme Court has nevertheless recognized that the lack of executive endorsement from the DFA will not always be fatal to the claim of diplomatic immunity, such as when it is invoked directly through counsel without waiting for executive endorsement. In the absence of any executive determination, the court may still give credence to the claim of immunity through its own judicial determination:

> In some cases, *the defense of sovereign immunity was submitted directly to the local courts by the respondents through their private counsels* (Raquiza v. Bradford, 75 Phil. 50 [1945]; Miquiabas v. Philippine-Ryukyus Command, 80 Phil. 262 [1948]; United States of America v. Guinto, 182 SCRA 644 [1990] and companion cases). *In cases where the foreign states bypass the Foreign Office, the courts can inquire into the facts and make their own determination as to the nature of the acts and transactions involved.*[115]

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[112] Kline v. Kaneko, 141 Misc. 2d 787, 788 (N.Y. Sup. Ct. 1988) *available at* https://casetext.com/case/kline-v-kaneko-1.

[113] Guaranty Trust Co. v. U.S., 304 U.S. 126 (1938). (Emphasis supplied.)

[114] Duff v. The Queen, 39 FLR 315 (1979).

[115] Holy See v. Rosario [hereinafter "*Holy See*"], G.R. No. 101949, 238 SCRA 524, 532–33, Dec. 1, 1994. (Emphasis supplied.)

At any rate, whether the determination by the executive branch on diplomatic immunity is conclusive on the courts as the cases of *World Health Organization* and *Minucher* seem to suggest, or merely preliminary as ruled upon in *Liang* and *China National Machinery,* the invocation of diplomatic immunity in Philippine courts normally follows a similar procedure that is being implemented in other jurisdictions like the US. This procedure recognizes that as a general rule, the claim of diplomatic immunity should first be validated by foreign affairs office of the receiving state before it is given due recognition by the courts. Thus, in the case of *Holy See v. Rosario*, the Philippine Supreme Court explained that:

> *In Public International Law, when a state or international agency wishes to plead sovereign or diplomatic immunity in a foreign court, it requests the Foreign Office of the state where it is sued to convey to the court that said defendant is entitled to immunity.*
>
> In the United States, the procedure followed is the process of "suggestion," where the foreign state or the international organization sued in an American court requests the Secretary of State to make a determination as to whether it is entitled to immunity. If the Secretary of State finds that the defendant is immune from suit, he, in turn, asks the Attorney General to submit to the court a "suggestion" that the defendant is entitled to immunity. In England, a similar procedure is followed, only the Foreign Office issues a certification to that effect instead of submitting a "suggestion".
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> *In the Philippines, the practice is for the foreign government or the international organization to first secure an executive endorsement of its claim of sovereign or diplomatic immunity.*[116]

Later jurisprudence has ruled that the foreign office referred to under the above-quoted paragraphs refer only to the DFA and does not include certifications issued by foreign embassies and missions in the Philippines.[117] In this regard, it is worth mentioning that the Philippine judiciary has been very flexible when it comes to the means by which the DFA endorsement of diplomatic immunity can be conveyed to Philippine courts. In the words of the Philippine Supreme Court ruling in *Holy See*:

> But how the Philippine Foreign Office conveys its endorsement to the courts varies. In *International Catholic Migration Commission v. Calleja*, 190 SCRA 130 (1990), *the Secretary of Foreign Affairs just sent a letter directly to the Secretary of Labor and Employment, informing the latter*

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[116] *Id.* at 532. (Emphasis supplied, citations omitted.)

[117] Dep't of Foreign Aff. v. NLRC, G.R. No. 113191, 262 SCRA 39, 49, Sept. 18, 1996, *citing* Holy See v. Rosario, G.R. No. 101949, 238 SCRA 254, Dec. 1, 1994.

> *that the respondent-employer could not be sued because it enjoyed diplomatic immunity*. In *World Health Organization v. Aquino*, 48 SCRA 242 (1972), *the Secretary of Foreign Affairs sent the trial court a telegram to that effect*. In *Baer v. Tizon*, 57 SCRA 1 (1974), *the U.S. Embassy asked the Secretary of Foreign Affairs to request the Solicitor General to make, in behalf of the Commander of the United States Naval Base at Olongapo City, Zambales, a "suggestion" to respondent Judge. The Solicitor General embodied the "suggestion" in a Manifestation and Memorandum as amicus curiae*.
>
> In the case at bench, the *Department of Foreign Affairs, through the Office of Legal Affairs moved with this Court to be allowed to intervene on the side of petitioner. The Court allowed the said Department to file its memorandum in support of petitioner's claim of sovereign immunity*.[118]

As properly observed above by the Philippine Supreme Court from its own jurisprudence, such conveyance has been allowed in various forms, ranging from a proactive petition for intervention made by the DFA itself, a legal manifestation coursed through the Office of the Solicitor General, and even a simple telegram sent by the DFA Secretary to the trial court. It also bears mentioning that according to the American case of *Abdulaziz v. Metropolitan Dade County*, it is not necessary that the issuance of the executive endorsement to diplomatic immunity come before an action is initiated, as it can equally serve as a defense to suits already commenced.[119] Moreover, in *United States v. Khobragade*, it was observed that "diplomatic immunity acquired during the pendency of proceedings destroys jurisdiction even if the suit was validly commenced before immunity applied."[120] The reverse is also true as a subsequent loss of immunity arising from the departure of the diplomat from the host country, such as what is stated under Article 39(2) of the VCDR, will not bar the dismissal of suits already commenced. Hence, it was also observed in *Khobragade* that courts have "dismissed claims against individuals who had diplomatic immunity at an earlier stage of proceedings, even if they no longer possessed immunity at the time dismissal was sought."[121]

III. LAWS PROTECTING MIGRANTS FROM TRAFFICKING AND EXPLOITATION

In the Philippines, the main domestic legal framework for the protection of migrants is found in the Republic Act ("R.A.") No. 8042, otherwise known as the Migrant Workers' Act of 1995. In its declaration of

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[118] *Holy See*, 238 SCRA at 532. (Emphasis supplied.)
[119] Abdulaziz v. Metropolitan Dade County, 741 F.2d 1328 (11th Cir. 1984).
[120] United States v. Khobragade, 15 F. Supp. 3d 383 (S.D.N.Y. 2014).
[121] *Id.*

policies, the law declares that "existence of the overseas employment program rests solely on the assurance that the dignity and fundamental human rights and freedoms of the Filipino citizens shall not, at any time, be compromised or violated."[122]

This reflects the constitutional policy in Section 3, Article XIII of the 1987 Philippine Constitution, which mandates full protection for labor, including those which are overseas, thus: "[t]he State shall afford full protection to labor, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all."[123]

In the case of *Aldovino v. Gold and Green Manpower Management and Development Services, Inc.,* the Philippine Supreme Court stated that the legal mantle providing full protection to labor is not removed just because the Filipino laborers are working in another jurisdiction.[124] In the case of the case of *Philippine Association of Service Exporters, Inc. v. Drilon*, the Philippine Supreme Court further expounds on this by stating that the mandate to provide protection to labor does not imply that the State should focus solely on promoting employment since the 1987 Constitution is more concerned that Filipino laborers are given decent, just, and humane employment, whether locally or overseas.[125] Hence, according to the pronouncement of the Philippine Supreme Court in this case, the government is "duty-bound to insure that our toiling expatriates have adequate protection, personally and economically, while away from home."[126]

As part of its directive to the state for the protection of Filipino migrant workers, R.A. No. 8042 commands the Department of Foreign Affairs: "to undertake the necessary initiative such as promotions, acceptance or adherence of countries receiving Filipino workers to multilateral convention, declaration or resolutions pertaining to the protection of migrant workers' rights;"[127] "to make an assessment of rights and avenues of redress under international and regional human rights systems that are available to

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[122] Rep. Act No. 8042 (1995), § 1(c). Migrant Workers and Overseas Filipinos Act of 1995.

[123] CONST. art. XIII, § 3.

[124] Aldovino v. Gold and Green Manpower Mgmt. & Dev. Serv., Inc., G.R. No. 200811, 904 SCRA 573, 593, June 19, 2019.

[125] Phil. Ass'n of Serv. Exp., Inc. v. Drilon, G.R. No. 81958, 163 SCRA 386, 397, June 30, 1988.

[126] *Id.*

[127] Migrant Workers and Overseas Filipinos Act of 1995, § 22.

Filipino migrant workers who are victims of abuse and violation;"[128] and to "take priority action or make representation with the foreign authority concerned to protect the rights of migrant workers and other overseas Filipinos and extend immediate assistance including the repatriation of distressed or beleaguered migrant workers and other overseas Filipinos."[129]

In R.A. No. 10022, which amended R.A. No. 8042, the State is further commanded to "uphold the dignity of its citizens whether in country or overseas, in general, and Filipino migrant workers, in particular, continuously monitor international conventions, adopt/be signatory to and ratify those that guarantee protection to our migrant workers"[130] as well as to "endeavor to enter into bilateral agreements with countries hosting overseas Filipino workers."[131]

Fittingly, the Philippines became a State party to the Palermo Protocols, which include the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime ("UN TIP Protocol") and the Protocol against the Smuggling of Migrants by Land, Sea and Air. The Philippines signed the two agreements on December 14, 2000, and ratified them both on May 28, 2002. As part of its obligations under these watershed treaties, the Philippine is required to adopt such legislative and other measures as may be necessary to establish as criminal offenses the commission of "trafficking in persons," which has been defined under the Palermo Protocols as:

> Recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.[132]

As referred to in the Palermo Protocols, exploitation shall include at a minimum, the "exploitation of the prostitution of others or other forms of

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[128] § 22.

[129] § 23(a).

[130] Rep. Act No. 10022 (2010), § 1. An Act Amending Republic Act No. 8042, Otherwise Known as the Migrant Workers and Overseas Filipinos Act of 1995, As Amended, Further Improving the Standard of Protection and Promotion of the Welfare of Migrant Workers, their Families and Overseas Filipinos in Distress, and for Other Purposes.

[131] § 1.

[132] United Nations General Assembly, 55/25 United Nations Convention Against Transnational Organized Crime, at 32, U.N. Doc. A/RES/55/25 (2001).

sexual exploitation, forced [labor] or services, slavery or practices similar to slavery, servitude or the removal of organs."[133]

Suitably, the Philippines enacted into law R.A. No. 9208, otherwise known as the Anti-Trafficking in Persons Act, as a way to institute policies for combatting human trafficking, and facilitates government efforts to protect and support victims-survivors of human trafficking. On that account, R.A. No. 9208, as amended by R.A. No. 10364 and R.A. No. 11862, states in its declaration of policies that:

> [T]he State values the dignity of every human person and guarantees the respect of individual rights. In pursuit of this policy, the State shall give highest priority to the enactment of measures and development of programs that will promote human dignity, protect the people from any threat of violence and exploitation, eliminate trafficking in persons, and mitigate pressures for involuntary migration and servitude of persons, not only to support trafficked persons but more importantly, to ensure their recovery, rehabilitation, and reintegration into the mainstream of society in a manner that is culturally-responsive, gender- and age-appropriate, and disability-inclusive.[134]

In parallel with the Palermo protocols, the crime of trafficking in persons has been defined under the law as the:

> [R]ecruitment, obtaining, hiring, providing, offering, transportation, transfer, maintaining, harboring, or receipt of persons with or without the victim's consent or knowledge, within or across national borders by means of threat, or use of force, or other forms of coercion, abduction, fraud, deception, abuse of power or of position, taking advantage of the vulnerability of the person, or, the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation which includes at a minimum, the exploitation or the prostitution of others, or the engagement of others for the production or distribution, or both, of materials that depict child sexual abuse or exploitation, or other forms of sexual exploitation, forced labor or services, slavery, servitude, or the removal or sale of organs.[135]

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[133] *Id.*

[134] Rep. Act No. 11862 (2022), § 2. Expanded Anti-Trafficking in Persons Act of 2022.

[135] § 3.

It is noteworthy that just like Article 3(b) of the UN TIP Protocol, this definition considers the consent of the victim as irrelevant in determining liability for the offense. Congruently, Section 7 of R.A. No. 11862 and Section 11 of R.A. No. 10364, which both amended Section 8 of R.A. No. 9208, similarly state that: "[c]ases involving trafficking in persons should not be dismissed based on the affidavit of desistance executed by the victims or their parents or legal guardians. Public and private prosecutors are directed to oppose and manifest objections to motions for dismissal."[136] Simultaneously, Section 17-B of the law, as amended, further states that:

> The past sexual behavior or the sexual predisposition of a trafficked person shall be considered inadmissible in evidence for the purpose of proving consent of the victim to engage in sexual behavior, or to prove the predisposition, sexual or otherwise, of a trafficked person. Furthermore, the consent of a victim of trafficking to the intended exploitation shall be irrelevant where any of the means set forth in Section 3(a) of this Act has been used.[137]

In addition to the foregoing, Section 17(c) as amended, states that "[t]he prosecution of retaliatory suits against victims of trafficking shall be held in abeyance pending final resolution and decision of the criminal complaint for trafficking."[138] Under this section, it is also prohibited for "the DFA, the DOLE, and the POEA officials, law enforcement officers, prosecutors and judges to urge complainants to abandon their criminal, civil and administrative complaints for trafficking."[139]

Corollary, R.A. No. 9208 as amended, also follows the UN TIP Protocol in stating that the recruitment, transportation, transfer, harboring, adoption, or receipt of a child for the purpose of exploitation shall also be considered as trafficking in persons even if it does not involve any of the means which mentioned above.[140] In addition, R.A. No. 11862 likewise introduces the amendment wherein the act of recruiting, transporting, harboring, maintaining, obtaining, hiring, offering, providing, transferring, receiving, or adopting a child for deployment as a migrant worker is already considered as an act of trafficking.[141] In doing so, it defines a child to include any person below 24 years of age.[142] This supplements the earlier amendment introduced by R.A.

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[136] Rep. Act No. 10364 (2012), § 11. Expanded Anti-Trafficking in Persons Act of 2012; Expanded Trafficking in Persons Act of 2022, § 7.

[137] Expanded Anti-Trafficking in Persons Act of 2012, § 19.

[138] § 20.

[139] § 20.

[140] §§ 4, 6.

[141] Expanded Anti-Trafficking in Persons Act of 2022, § 4.

[142] § 4.

No. 10364 wherein the facilitation of the travel of a child who "travels alone to a foreign country or territory without valid reason therefor and without the required clearance or permit from the Department of Social Welfare and Development, or a written permit or justification from the child's parent or legal guardian"[143] is to be considered as attempted trafficking of persons.

Notably, R.A. No. 11862 introduced an important amendment, such that the act of facilitating, assisting, and helping in the exit and entry of persons from and to the country, at international and local airports, territorial boundaries and seaports, for the purposes of promoting trafficking in persons, is to be considered as an unlawful act if done by the offender despite knowing that the persons are not in possession of required travel documents or are in possession of fake, tampered, or fraudulently acquired travel documents.[144]

To provide for greater protection to trafficking victims, R.A. No. 9208 likewise adheres to the so-called "Non-Punishment Principle."[145] This principle states that trafficked persons are considered as victims of the act or acts of trafficking. Hence, they should be provided with immunity from any unlawful acts they may have committed as a "direct result of, or as an incident or in relation to, being trafficked based on the acts of trafficking"[146] or as a result of merely obeying an "order made by the trafficker in relation thereto."[147] Although not found in the Palermo protocols, this principle is consistent with the Recommended Principles and Guidelines on Human Rights and Human Trafficking published by the United Nations High Commissioner for Human Rights in 2002, which states that "[t]rafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons."[148]

Even though the Philippine Supreme Court has not yet had the occasion to apply the Non-Punishment Principle in its rulings, the Supreme Court of the state of Wisconsin and the California Court of Appeal in the US were recently able to do so in cases that garnered huge attention. In the case

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[143] § 5.
[144] § 5.
[145] §§ 17–20.
[146] Expanded Anti-Trafficking in Persons Act of 2012, § 17.
[147] § 17.
[148] Office of the High Commissioner for Human Rights, Recommended Principles and Guidelines on Human Rights and Human Trafficking, at 1, (E/2002/68/Add.), *available at* https://www.ohchr.org/sites/default/files/Documents/Publications/Traffickingen.pdf.

of the *State of Wisconsin v. Kizer*, the Supreme Court of Wisconsin interpreted the phrase "direct result" to mean that there must be logical, causal connection between the unlawful act committed by the trafficking victim and the crime of trafficking itself—such that the unlawful act committed by the trafficking victim is not the result in significant part, of other events, circumstances, or considerations, apart from the trafficking offense.[149] The Supreme Court of Wisconsin likewise emphasized that the offense need not be a foreseeable result of the trafficking violation and need not proceed "relatively immediately" from the trafficking violation.[150] The main reasoning for this lies in the fact that:

> Unlike many crimes, which occur at discrete points in time, human trafficking can trap victims in a cycle of seemingly inescapable abuse that can continue for months or even years. […] For that reason, even an offense that is unforeseeable or that does not occur immediately after a trafficking offense is committed can be a direct result of the trafficking offense, so long as there is still the necessary logical connection between the offense and the trafficking.[151]

Hence, following this dictum, the Supreme Court of Wisconsin stated that a trafficking victim who went to the house of the trafficker in order to shoot him and set him on fire can still invoke this principle provided that she can prove logical and causal connection to the fact that she was trafficked.[152] Meanwhile, the California Court of Appeals stated in its ruling in the case of *People v. DC,* that it is not required for the trafficker to have direct involvement in, or even knowledge of the crime committed by the trafficking victim for a defense founded on the Non-Punishment Principle to apply.[153] Hence, the trafficking victim who was charged with carrying a concealed illegal weapon can similarly invoke the defense as against any attempt to prosecute him for committing an unlawful act.[154]

Significantly, Article 14(7) of the 2015 ASEAN Convention Against Trafficking In Persons, Especially Women And Children adheres to the same principle by stating that ASEAN States shall "subject to its domestic laws, rules, regulations and policies, and in appropriate cases, consider not holding victims of trafficking in persons criminally or administratively liable, for

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[149] State of Wisconsin v. Kizer, WI 58, 12 (Wis. 2022).
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] Super. Ct. No. J280153, Cal. Ct. App (2021).
[154] *Id.*

unlawful acts committed by them, if such acts are directly related to the acts of trafficking."[155]

Another important feature of R.A. No. 9208, as amended, is the provision for extraterritorial jurisdiction for prosecuting trafficking crimes. Under Section 26-A, it is provided that the State can exercise jurisdiction even if the criminal act is "committed outside the Philippines and whether or not such act or acts constitute an offense at the place of commission, if the offense being a continuing offense, was either commenced in the Philippines; or committed in another country."[156] In the case of the latter, it is necessary that the suspect or accused is a:

- Filipino citizen;
- Permanent resident of the Philippines; or
- Has committed the act against a citizen of the Philippines.[157]

In the same vein, Section 26-A states that unless there was an approval from the Secretary of Justice, no prosecution may be commenced against a person if a foreign government, in accordance with jurisdiction recognized by the Philippines, has prosecuted or is prosecuting such person for the conduct constituting the offense.

Besides the Palermo Protocols, the legal protections provided for under R.A. No. 9208 as amended have also been incorporated in various treaties. In the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ("ICRMW"), it has been recognized that "appropriate action should be encouraged in order to prevent and eliminate clandestine movements and trafficking in migrant workers."[158] In this regard, the ICRMW provides that migrants workers shall not be subjected slavery, servitude and forced labor.[159] Concurrently, the Geneva Convention to Suppress the Slave Trade and Slavery of September 25, 1926, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of April 30, 1956; and the Convention No. 29 of the International Labour Organisation ("ILO") of June

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[155] ASEAN Convention Against Trafficking in Persons, Especially Women and Children art. 14(7), Nov. 21, 2015, *available at* https://www.asean.org/wp-content/uploads/2015/12/ACTIP.pdf.

[156] Expanded Anti-Trafficking in Persons Act of 2022, § 17.

[157] Expanded Anti-Trafficking in Persons Act of 2012, § 23.

[158] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families [hereinafter "ICRMW"] pmbl., Dec. 18, 1980, 2220 U.N.T.S. 3.

[159] Art. 11.

28, 1930 provide for the abolition of all forms of debt bondage, slavery and forced labor.

Under the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), everyone including migrants, are guaranteed the right to just and favorable conditions of work, as well as the right to gain one's living by work which he or she freely chooses or accepts.[160] At the same time, Article 8 of the International Covenant on Civil and Political Rights ("ICCPR") states that no one shall be held in slavery or servitude, and that slavery in all its forms shall be prohibited.[161] It also states that no one shall be required to perform forced or compulsory labor.[162] The guarantees under the ICCPR and ICESCR are also embodied in the Universal Declaration of Human Rights ("UDHR"), which likewise prohibits slavery and servitude, and guarantees the right to free choice of employment and to just and favorable conditions of work.[163]

On the other hand, Article 6 of the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") provides that States must take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women. The legal protection is also emphasized in the case of children through ILO Convention No. 182, otherwise known as the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, which provides for the adoption of immediate and effective measures to secure the prohibition and elimination of the worst forms of child labor. This includes banning "all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory [labor]."[164]

Adding to the legal protections mentioned above, the Philippines was one of the leading countries that pushed for the adoption by the United Nations General Assembly ("UNGA") of the Global Compact for Migration ("GCM") through Resolution 73/195. Although the resolution expressly states that the GCM is a non-legally binding, cooperative framework, its progressive realization has now become part of the Philippines' domestic legal

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[160] International Covenant on Economic, Social and Cultural Rights arts. 6–7, Dec. 16, 1966, 993 U.N.T.S. 3.

[161] International Covenant on Civil and Political Rights art. 8, Dec. 16, 1966, 999 U.N.T.S. 171.

[162] Art. 8.

[163] Universal Declaration of Human Rights, G.A. Res 217A (III) arts. 4 & 23, U.N. GAOR, 3rd Sess., Supp. No 13, UN Doc A/810, (1948).

[164] Worst Forms of Child Labour Convention, 1999 (No. 182) art. 3, June 17, 1999, 2133 U.N.T.S. 161.

framework through R.A. No. 11641, otherwise known as the Department of Migrant Workers Act. This makes the Philippines as the first country in the world to do so, a feat which has been recognized by the UN Migration Network.[165]

Under Section 2 of R.A. No. 11641, it is provided that "[t]he State commits to progressively align its programs and policies towards the fulfillment of the twenty-three (23) objectives of the Global Compact for Sale, Orderly and Regular Migration (GCM)."[166] Among these objectives, Objective 10 provides for the prevention, combatting and eradication of trafficking in persons in the context of international migration, stating that:

> We commit to take legislative or other measures to prevent, combat and eradicate trafficking in persons in the context of international migration by strengthening capacities and international cooperation to investigate, prosecute and penalize trafficking in persons, discouraging demand that fosters exploitation leading to trafficking, and ending impunity of trafficking networks. We further commit to enhance the identification and protection of, and assistance to, migrants who have become victims of trafficking, paying particular attention to women and children.[167]

IV. APPLICATION OF DIPLOMATIC IMMUNITY IN CASES OF MIGRANT TRAFFICKING AND EXPLOITATION

The crime of human trafficking has increasingly been recognized as *delicta juris gentium*, or a crime against the law of nations.[168] In the case of *Rantsev v. Cyprus and Russia*, the European Court of Human Rights described the crime of trafficking by stating that:

> [T]rafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the

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[165] United Nations Network on Migration, *Creation of the Department of Migrant Workers created under Republic Act No. 11641,* Feb. 18, 2022, *available at* https://migrationnetwork.un.org/practice/creation-department-migrant-workers-created-under-republic-act-no-11641.

[166] Rep. Act No. 11641 (2021), § 2. An Act Creating the Department of Migrant Workers, Defining its Powers and Functions, Rationalizing the Organization and Functions of Government Agencies Related to Overseas Employment and Labor Migration, Appropriating Funds Therefor, and for Other Purposes.

[167] Global Compact for Safe, Orderly and Regular Migration, G.A. Res. 73/195 U.N. GAOR, 73rd Session, U.N. Doc. A/RES/73/195, ¶ 26 (Dec. 19, 2018).

[168] Tom Obokata, *Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System,* 54 INT'L & COMP. L.Q. 445, 445 (2005).

> right of ownership. It treats human beings as commodities to be bought and sold and put to forced labor, often for little or no payment, usually in the sex industry but also elsewhere […] It implies close surveillance of the activities of the victims, whose movement are often circumscribed. […] It involves the use of violence and threats against victims, who live and work under poor conditions.
>
> There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society.[169]

Accordingly, the European Court of Human Rights observed that trafficking in persons is the modern day form of slavery and slave trade, involving the same exploitative practices like servitude, prostitution, debt bondage, forced labor and sexual abuse.[170] In this regard, the categorization on the prohibition of slavery as *jus cogens* or a peremptory norm of general international law should be recognized as applying to the crime of trafficking as well. Consonantly, in the case of *Belgium v. Spain (Case Concerning Barcelona Traction, Light, and Power Company, Ltd.)*, the International Court of Justice gave the pronouncement that "principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination" can give rise to obligations owed to the international community as a whole, otherwise known as *obligations erga omnes*.[171] Along this line, it cannot be gainsaid that trafficking in persons affects the basic rights of human beings, as recognized in various international and regional human rights instruments. Relevant to this, Article 4 of the ICCPR states that no derogation should be permitted in the prohibition of slavery, forced labor and servitude even in times of public emergency.[172]

In this light, shouldn't diplomatic immunity then give way to such peremptory norms of international law? To answer this question, in the case of *Reyes*, Lord Sumption began his analysis by once again emphasizing the concept of immunity as a question of jurisdiction, rather than liability:

> *Diplomatic immunity, like state immunity, is an immunity from jurisdiction and not from liability. Its practical effect is to require the diplomatic agent to be sued in his own country, or in respect of non-official acts in the receiving state,*

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[169] Rantsev v. Cyprus & Russia, application no. 25965/04, Council of Europe: European Court of Human Rights, Jan. 7, 2010.

[170] *Id.*

[171] Barcelona Traction, Light & Power Co. Ltd. (Belgium v. Spain), 1970 I.C.J. 1 (Feb. 5).

[172] ICCPR art. 4, Dec. 16, 1966, 999 U.N.T.S. 171.

> *once his posting has ended. There is therefore no conflict between a rule categorising specified conduct as wrongful, and a rule controlling the jurisdictions in which or the time at which it may properly be enforced*. It was for this reason that in Jones v[.] Saudi Arabia [2007] 1 AC 270, Lord Bingham (para[.] 24) and Lord Hoffmann (para[.] 44) both adopted the observation of Hazel Fox in the then current edition of The Law of State Immunity (2002), at p[.] 525, that state immunity "does not contradict a prohibition contained in a jus cogens norm but merely diverts any breach of it to a different method of settlement."[173]

In pronouncing this judgment, Lord Sumption invokes the ruling of the International Court of Justice in the case *Germany v. Italy: Greece Intervening (Jurisdictional Immunities of the State)*, where the ICJ stated that adherence to peremptory norms of international law does not negate the application of the rules of immunity, to wit:

> *This argument therefore depends upon the existence of a conflict between a rule, or rules, of jus cogens, and the rule of customary law which requires one State to accord immunity to another. In the opinion of the Court, however, no such conflict exists*. Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave [labor] and the deportation of prisoners of war to slave [labor] are rules of jus cogens, there is no conflict between those rules and the rules on state immunity. *The two sets of rules address different matters*. The rules of state immunity are procedural in character and are confined to determining whether or not the courts of one state may exercise jurisdiction in respect of another state. *They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful* […] The application of rules of state immunity to determine whether or not the Italian courts have jurisdiction to hear claims arising out of those violations cannot involve any conflict with the rules which were violated.
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> To the extent that it is argued that no rule which is not of the status of jus cogens may be applied if to do so would hinder the enforcement of a *jus cogens* rule, even in the absence of a direct conflict, the Court sees no basis for such a proposition. *A jus cogens rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess jus cogens status, nor*

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[173] *Reyes*, 2017 UKSC 61, 24. (Emphasis supplied.)

> *is there anything inherent in the concept of jus cogens which would require their modification or would displace their application.* The Court has taken that approach in two cases, notwithstanding that the effect was that a means by which *a jus cogens* rule might be enforced was rendered unavailable. *In Armed Activities, it held that the fact that a rule has the status of jus cogens does not confer upon the Court a jurisdiction which it would not otherwise possess* (Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 32, para. 64, and p. 52, para. 125). In *Arrest Warrant*, the Court held, albeit without express reference to the concept of jus cogens, that the fact that a Minister for Foreign Affairs was accused of criminal violations of rules which undoubtedly possess the character of *jus cogens* did not deprive the Democratic Republic of the Congo of the entitlement which it possessed as a matter of customary international law to demand immunity on his behalf (*Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*), *Judgment, I.C.J. Reports 2002*, p. 24, para. 58, and p. 33, para. 78).[174]

In the same vein, Lord Sumption further states that diplomatic immunity is not *ipso facto* removed just because trafficking is committed, no matter how unlawful or abhorrent it can be:

> [T]he international obligations of states in relation to human trafficking are embodied in treaties, primarily in the Palermo Protocol […]. *The Protocol is not in any way concerned with jurisdictional immunity. Its sole relevance is as a source of international policy against human trafficking. But it does not follow from that policy that diplomatic immunity cannot be available in cases of trafficking.* The intention of the parties to the Protocol that trafficking should be unlawful is entirely consistent with the subsistence of rules determining where and when civil claims or criminal charges may properly be determined. For the same reason, international law immunities have been held to be available in cases involving torture (*Jones v*[.] *Saudi Arabia*), breach of the laws of armed conflict (*Jurisdictional Immunities of the State*) or crimes against humanity (*Democratic Republic of the Congo v*[.] *Belgium* (*Arrest Warrant of 11 April 2000*).[175]

Even under domestic constitutional law, the same jurisdictional consequences brought about by diplomatic immunity have been held to apply as well. In the case of *Ahmed v. Hoque*, a migrant worker who was trafficked

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[174] Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening). 2012 I.C.J. 434 (Feb. 3). (Emphasis supplied.)

[175] *Reyes*, 2017 UKSC 61, 27. (Emphasis supplied.)

into the US by a Bangladeshi diplomat claims that his right against involuntary servitude was infringed, in violation of the guarantees of the thirteenth amendment of the US Constitution. Notably, this is a guarantee which is similar to Article III, Section 18(2) of the 1987 Philippine Constitution. The US District Court held however, that even if a claim is founded on constitutional rights, the courts will still have no jurisdiction if the defendant has diplomatic immunity.[176] Moreover, it was likewise held that this jurisdictional limitation caused by diplomatic immunity does not mean that the courts are deprived of their judicial power as laid down under the Constitution, since the judiciary itself recognizes the doctrine of immunity as a limitation to its jurisdiction.[177] This conclusion was reiterated in the case of *Sabbithi v. Al Saleh*, wherein it was stated that case law has been consistent in stating that diplomatic immunity can shield a diplomat from liability for alleged constitutional violations.[178]

Having examined the foregoing, we can then continue our inquiry by looking at the limits of diplomatic immunity, as stated in the VCDR itself. Should the commission of migrant trafficking and exploitation then be a ground for loss of immunity under the exception provided in Article 31(1)(c) of the VCDR? If so, can trafficking then be considered as an inherently commercial activity outside the functions of the diplomatic agent?

In the case of *Reyes*, Lord Sumption approaches these questions by stating that the growing concern of international law with human trafficking does not mean that the concept of a "professional or commercial activity" has now been modified.[179] Hence, the employment of a domestic servant to provide purely personal services is not a professional or commercial activity exercised by the diplomatic agent even if trafficking is involved.[180] Lord Sumption supports this argument by stating that no such intention can be discerned in Article 31(1)(c) of the VCDR and the Palermo Protocols:

> The concept of a "professional or commercial activity" exercised by a diplomatic agent is not ambulatory. The expression does not express a general value whose content may vary over time. It is a fixed criterion for categorizing the facts, whose meaning and effect was extensively discussed during the drafting and negotiation of the text. *There is no reason to suppose that it refers today to anything other than what it referred to in 1961*.

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[176] Ahmed v. Hoque, 01 CIV. 7224 (DLC) (S.D.N.Y. Aug. 14, 2002) (U.S.).
[177] *Id.*
[178] Sabbithi v. Al Saleh [hereinafter "*Sabbithi*"], 605 F. Supp. 2d 122 (D.D.C. 2009)..
[179] *Reyes*, 2017 UKSC 61, 25.
[180] *Id.* at 3.

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> [N]*othing in the Palermo Protocol requires that human trafficking must be classified as a "commercial activity" when it would not otherwise be, whether for the purpose of diplomatic immunity or for any other purpose. The commerciality or otherwise of the activities defined as trafficking are irrelevant to the definition*. As defined in [A]rticle 3 of the Protocol, trafficking may consist in a number of different operations, including the recruitment, transportation, transfer, harbouring and receipt of persons. It may also consist in fraud, deception or the abuse of power or vulnerability. Commonly, a chain of intermediaries will be involved, each participant doing some of these things but not necessarily all of them. It is not inherent in any of these acts that they will necessarily be done in the exercise of a commercial activity. That will depend on the precise circumstances. In particular, it will depend on the nature of each participant's involvement. Thus[,] one would expect an intermediary who recruits or transports a trafficked person for money to be exercising a commercial activity. The same is likely to be true of someone who receives a trafficked person for, say, prostitution. These are business operations. *But the mere employment of a domestic servant on exploitative terms is not a commercial activity, and the fact that it is unlawful, contrary to international policy and morally repugnant cannot make it into one.*[181]

The above analysis of Lord Sumption however, while comprehensive, was countered by other members of the UK Supreme Court. Lord Wilson, who was joined by Lady Hale and Lord Clarke, expressed his doubts by stating that:

> I am, with respect to Lord Sumption's contrary opinion expressed in para[.] 42 above, less persuaded that, even if (which is debatable) [A]rticle 31 of the 1961 Convention does not by its terms contemplate any future development of its meaning, the latter would have been unable to develop over 56 years. Article 31(3)(c) of the Vienna Convention requires the interpretation of an [A]rticle to take account of any relevant rules of international law applicable in the relations between the parties; and the requirement is not further qualified.[182]

In any event and despite disagreement between Lord Sumption and Lord Wilson on the above points, the UK Supreme Court concluded in the case of *Reyes* that a Saudi diplomat who trafficked a Philippine national into

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[181] *Reyes*, 2017 UKSC 61, 26–27. (Emphasis supplied.)
[182] *Id.* at 35.

the United Kingdom to employ her for domestic services, cannot be deemed to be exercising his official functions. This is all the more true if the diplomat's posting has already ended and he is left only with residual diplomatic immunity. Lord Sumption argued that it cannot even be considered as incidental to official functions since "a diplomat's acts in obtaining day to day living services are remote from the performance of his official functions and are not done on behalf of the sending state."[183] Furthermore, Lord Sumption observed that:

> But on any view Mr[.] Al-Malki's official functions cannot have extended to the employment of domestic staff to do the cleaning, help in the kitchen and look after his children. These things were not done for or on behalf of Saudi Arabia. The Court of Appeal (para[.] 19) thought that such activities were "conducive" to the performance of his official functions. No doubt they were. But that could be said of almost anything that made the personal life of a diplomatic agent easier. It does not make the employment of Ms[.] Reyes part of Mr[.] Al-Malki's official functions as a diplomatic agent. […] Since Mr[.] Al-Malki's functions as a diplomatic agent have now come to an end, he is no longer entitled to any immunity under [A]rticle 31. The only immunity available to him is the residual immunity under [A]rticle 39(2). It follows from the fact that the relevant acts were not done in the course of his official functions that that immunity cannot apply.[184]

This interpretation is in agreement with the US case of *Swarna*, which arrived at the same conclusion by distinguishing the act of a diplomat in employing a subordinate at the diplomatic mission, from the act of a diplomat in employing an individual who performed no function whatsoever at the diplomatic mission.[185] In other words, the act of a diplomat in employing a domestic servant bears no relationship to the "functions of a diplomatic mission" listed under Article 3 of the VCDR, unlike the act of hiring individuals to work for the diplomatic mission.[186] Further, the employment of a domestic servant is not needed in order to represent the sending State, even if the domestic servant was made to serve members of the diplomatic mission and entertain them at the diplomat's home.[187] Any tangential benefit to the diplomatic mission therefore, did not transform the diplomatic agent's act of hiring a domestic servant as the act of the sending State, and did not make the domestic servant an employee of the diplomatic mission, despite the fact that

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[183] *Id.*
[184] *Id.* at 28–29.
[185] *Swarna*, 607 F. Supp. 2d 509 (S.D.N.Y. 2009).
[186] *Id.*
[187] *Id.*

the sending State subsequently reimbursed the diplomatic agent for the medical and travel expenses of the domestic servant.[188] Correspondingly, "acts of physical and psychological assault and abuse, like acts of cocaine distribution, are not related to one's duties as a diplomatic agent."[189]

In *Baoanan*, the pronouncement in *Swarna* was further expounded to state that even if the domestic servants were working within the premises of the diplomatic mission, the diplomatic agent is still considered as employing them in a private capacity rather than in an official one if the domestic servant caters solely to the private needs of the diplomatic agent:

> Functionally, not all domestic workers hired by diplomats are necessarily alike. While undoubtedly many are routinely employed and assigned to provide services related solely to the official functions of the mission, it does not follow that all such workers are always hired only for such purposes. A diplomat could also employ and pay staff to perform personal or private tasks for the diplomat or the diplomat's family that the sending State would not recognize as ordinary or necessary to the official functioning of the mission and for which it would not provide compensation.
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> [*T*]*o hold categorically that it is always an official act to employ an individual who works within the four walls of a diplomatic mission*[—]*even when, at the time it was contracted for and during the course of the performance of its duties, the nature of that employment is entirely unrelated to the diplomatic agent's functions as a member of the mission*[—]*would improperly reward form over substance. Physical location should be considered in determining whether an act is official or private, but certainly it is not by itself dispositive. In this case, Baoanan's employment was personal to Baja, pertaining predominantly to the private needs of the Baja family and their domestic affairs, inuring to the Bajas' personal comfort and only tangentially to the benefit of the Philippine Mission itself.* To deem these activities as having occurred in the course of Baja's official functions would result in a perverse outcome: a diplomatic agent whose official residence happens to be located within the same building as the mission would be immune from jurisdiction for acts stemming from his employment of a domestic worker, while a diplomatic agent who resides in a separate building adjoining or nearby his mission and employs a domestic worker to perform identical duties in an identical fashion, would not qualify for such immunity.[190]

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[188] *Id.*

[189] *Id.*

[190] Baoanan v. Baja, 627 F. Supp. 2d 155 (S.D.N.Y. 2009). (Emphasis supplied.)

In contrast, there is a series of American court rulings in which regardless of whether migrant trafficking and exploitation was involved, the employment of domestic servants was considered incidental to official functions. Accordingly, it was observed that the "hiring domestic employees is an activity incidental to the daily life of a diplomat and his or her family, and does not constitute commercial activity outside a diplomat's official function."[191] Stated differently, daily contractual transactions for personal goods and services are not contemplated as commercial activities outside of official functions that can cause exceptions to the application of diplomatic immunity.

In the leading case of *Tabion v. Mufti,* the District Court declared that the drafting history of the VCDR shows that Article 31(1)(c) was not intended to divest diplomats and their family of immunity for "for everyday commercial transactions, such as shopping and having shoes repaired" as well as in "disputes arising out of personal contracts for goods and services that are incidental to daily life in the receiving State"[192] Hence, even if a diplomat exploits a migrant worker who was employed as a domestic servant by not paying her what she was supposed to earn, the diplomat should still not be deemed as carrying on a commercial activity outside official functions since Article 31(1)(c) was not intended to cover such transactions which are merely incidental to day-to-day life of the diplomat. Thus:

> At all stages, the treaty's drafting and negotiating history points *persuasively to the conclusion that Article 31(1)(c) was not intended to carve out a broad exception to diplomatic immunity for a diplomat's daily contractual transactions for personal goods and services. Activities such as purchasing a car, sending clothing to a tailor, and hiring a domestic servant certainly are not "wholly inconsistent" with a diplomat's functions. Nor are such activities particularly "unusual" or prohibited by Article 42*. Yet those involved in the drafting process consistently questioned the need to provide an immunity exemption for commercial activities when diplomats were already barred from those activities. *Thus, it is evident that the phrase "commercial activity" in the Vienna Convention means a business or trade activity for profit, and that Article 31(1) (c) was intended to reach those rare instances where a diplomatic agent ignores the restraints of his office and, contrary to Article 42, engages in such activity in the receiving State*. Accordingly, a diplomat who strays from his diplomatic functions and runs a car business or becomes a tailor in the receiving State cannot then shelter himself behind diplomatic immunity when disputes arise out of that activity. Not only is this broader

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[191] *Sabbithi*, 605 F. Supp. 2d 122 (D.D.C. 2009).

[192] Tabion v. Mufti [hereinafter "*Tabion*"], 877 F. Supp. 285 (E.D. Va. 1995).

> construction of immunity clearly consistent with the drafters' intent, but it also follows the fundamental principle that treaties should be liberally construed so as to enlarge, rather than restrict, rights that signatory nations may claim under them.
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> Scholars and practitioners who have subsequently written articles and treatises on the Vienna Convention uniformly agree that Article 31(1) (c) was meant to complement Article 42 and, as such, does not encompass ordinary contracts for personal goods and services.[193]

On appeal, the US Court of Appeals Fourth Circuit affirmed the interpretation of the District Court, stating that:

> The Vienna Convention provides diplomats with absolute immunity from criminal prosecution and protection from most civil and administrative actions brought in the "receiving State," i.e., the state where they are stationed. Article 31 lists three exceptions to a diplomat's civil immunity. Chief among them, and at issue here, is the elimination in Article 31(1)(c) of immunity from actions "relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions." Also relevant to the present matter is Article 42's pronouncement that "[a] diplomatic agent shall not in the receiving State practice for personal profit any professional or commercial activity."
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> Nowhere in the Vienna Convention is the term "commercial activity" defined. Yet we must determine the meaning of the phrase in order to resolve the present dispute. Tabion contends that the language is plain. Because "commerce" is simply the exchange of goods and services, she argues, "commercial activity" necessarily encompasses contracts for goods and services, including employment contracts.
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> But such a literal manner of interpretation is superficial and incomplete, and, we believe, yields an incorrect rendering of the meaning of *"commercial activity" as used in the Vienna Convention. When examined in context, the term "commercial activity" does not have so broad a meaning as to include occasional service contracts as Tabion contends, but rather*

[193] *Id.* (Emphasis supplied.)

> *relates only to trade or business activity engaged in for personal profit.* Accepting the broader meaning fails to take into account the treaty's background and negotiating history, as well as its subsequent interpretation. It also ignores the relevance of the remainder of the phrase [ ] "outside his official functions."
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> *Legal commentators similarly characterize the exception as covering only a diplomat's participation in trade or business, and not his everyday transactions. One scholar has concluded that, while Article 31(1)(c)'s exception is broadly drawn, "it is not intended to cover commercial contracts incidental to the ordinary conduct of life in the receiving State."*
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> *It is evident from the foregoing authorities that the phrase "commercial activity," as it appears in the Article 31(1)(c) exception, was intended by the signatories to mean "commercial activity exercised by the diplomatic agent in the receiving State outside his official functions." Day-to-day living services such as dry cleaning or domestic help were not meant to be treated as outside a diplomat's official functions. Because these services are incidental to daily life, diplomats are to be immune from disputes arising out of them.*[194]

This ruling in *Tabion,* was later invoked and reiterated in other cases such as *Fun v. Pulgar*, *Montuya v. Chedid*, and *Sabbithi*.[195] In the case of *Gonzalez Paredes v. Vila and Nielsen*, the ruling was still the same even though the plaintiff in that case, the trafficked migrant worker, made a unique argument—because the wife of the Argentinian diplomat was able to advance her professional career and pursue her academic legal studies in the US as a result of the migrant worker's provision of domestic help, the case has become an action relating professional activity exercised outside of official functions under Article 31(1)(c) of the VCDR.[196] In response, the US District Court stated that:

> This argument, while creative, also is without merit. Even if the Court were to conclude[—]which it does not[—]that the pursuit of academic studies is a professional activity under the Convention, plaintiff's argument would fail. To conclude that the pursuit of academic study by a diplomat's wife is "related to" the provision of domestic services within the meaning of the exception to immunity is to read the treaty too broadly. […] ("Related" means "connected

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[194] *Tabion*, 73 F.3d 535 (4th Cir. 1996). (Emphasis supplied.)

[195] Fun v. Pulgar, 993 F. Supp. 2d 470 (D.N.J. 2014); Montuya v. Chedid, 779 F. Supp. 2d 60 (D.D.C. 2011); *Sabbithi,* 605 F. Supp. 2d 122 (D.D.C. 2009).

[196] Gonzalez Paredes v. Vila, 479 F. Supp. 2d 187 (D.D.C. 2007).

> by reason of an established or discoverable relation"). The Court cannot conclude that this lawsuit is "an action related to" a professional activity within the meaning of the convention simply because having domestic services would be helpful while one is pursuing an L.L.M.
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> No doubt domestic services are helpful in pursuing many activities but that does not lead to the result that plaintiff desires[—]a lack of diplomatic immunity[—]because there is "no connection by reason of an established relation" between the two activities. Nor does the Court believe that academic studies are a "professional activity." Academic studies are, by definition, academic rather than related to a profession, commerce, trade, or other profitable activity.[197]

In looking at the above cases, it is important to note that *Swarna* and *Baoanan* dealt with a diplomat whose posting had already ended, unlike in *Tabion* and its related cases. Hence, this means that *Swarna* and *Baoanan* had to settle only the question of whether the diplomat is acting in the exercise of official duties as required in any inquiry involving residual immunities under Article 39 of the VCDR, but not with the question of whether the diplomatic agent is also pursuing a commercial activity as required by Article 31(1)(c).

The distinction was highlighted even further after the UK Supreme Court crafted its own dictum on the legal interaction between diplomatic immunity, migrant trafficking and migrant exploitation through the landmark case of *Basfar*. This case arose from a complaint by Ms. Josephine Wong, a Philippine national who claims that she was trafficked and subjected to abusive and slavery-like conditions while working at the diplomatic household of Mr. Khalid Basfar, a Saudi diplomat assigned to the UK. Unlike in the case of *Reyes* however, the diplomat's posting in the case of *Basfar* had not yet ended at the time that it was litigated. This means that it is not enough to show that Mr. Basfar was acting outside his official functions—it is also necessary to demonstrate that Mr. Basfar was engaged in the pursuit of a commercial or professional activity.

To resolve this case, Lord Briggs and Lord Leggatt of the UK Supreme Court, with whom Lord Stephens agrees, acknowledged first and foremost that migrant workers, especially those who are exploited and coerced to perform domestic services, are placed in an especially vulnerable position:

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[197] *Id.*

> A major source of vulnerability is physical and social isolation. Someone who works alone and is cut off from family, friends and other social support is inherently vulnerable to exploitation. A domestic worker living in her employer's home in a foreign country may find herself in this position, exacerbated by language and cultural barriers.
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> The other side of isolation is invisibility to the outside world. A domestic worker who is effectively incarcerated in the household of her employer is in practice beyond the reach of public authorities or private charities who might be able to help if they were aware of her situation.
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> All the factors which make migrant domestic workers who live in their employers' homes vulnerable to exploitation are compounded where the employer has diplomatic status.[198]

Yet, at the same time, Lord Briggs and Lord Leggatt recognized that the question of restricting diplomatic immunity is neither determined by the vulnerable position of trafficked migrant workers nor by the presence of grave human rights violations. Instead, following the VCDR, it is determined by whether the acts can be covered by the exception of Article 31(1)(c):

> There is in any case a further, and in our view fatal, objection to the attempt to rely on human rights law to interpret [A]rticle 31(1)(c) of the Diplomatic Convention, noted by Lord Sumption in Reyes at para[.] 45. This is that the exception to diplomatic immunity created by [A]rticle 31(1)(c) is not based on whether the relevant activity is contrary to international law or violates human rights. The sole question is whether the activity is "professional or commercial[."] Certainly, some commercial activities are contrary to rules of international law, for example dealing in illicit drugs. But the fact that an activity is unlawful has no direct bearing on whether or not it is commercial.[199]

Having settled this, Lord Briggs and Lord Leggatt then proceeded to follow legal precedents such as *Reyes* in stating that activities incidental to daily life of a diplomat in the receiving state, like engaging the services of a household help, cannot be considered as falling within the scope of a diplomat's official functions. Again, this is because these acts are not considered as being done for or on behalf of the sending State. Nonetheless,

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[198] *Basfar*, 2022 UKSC 20, at 16–17.

[199] *Id.* at 10.

the exception under Article 31(1)(c) providing for the withdrawal of the conferment of immunity, will still not apply since the other requisite of carrying on a commercial activity has not been satisfied, hence:

> [I]t would be contrary to the purpose of conferring immunity on diplomatic agents to interpret the words "any […] commercial activity" in [A]rticle 31(1)(c) as including activities incidental to the ordinary conduct of daily life in the receiving state, such as purchasing goods for personal consumption or purchasing medical, legal, educational or domestic services privately. Immunity from the civil jurisdiction of the local courts is justified in relation to such activities to ensure that diplomatic agents and their families can live in the receiving state without the impediment arising from having to deal with civil claims against them.
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> Acts of purchasing services of the kind described are manifestly done in a private capacity and not for or on behalf of the sending state. *We therefore do not agree that they can properly be treated as falling within the scope of a diplomat's official functions. But we do agree that, because services such as dry cleaning and domestic help are incidental to ordinary daily life, they fall within the rationale for immunity from the civil jurisdiction of the receiving state, so that the* [*A*]*rticle 31(1)(c) exception should not be construed as applying to actions relating to them. We would rest that conclusion on the ground that ordinary contracts incidental to daily life in the receiving state do not constitute "commercial activities" within the meaning of* [*A*]*rticle 31(1)(c).*[200]

Will the answer be the same then if the engagement of the services of a household help is tainted with trafficking and exploitation? In responding to this question, Lord Briggs and Lord Leggatt noted in their ruling that exploiting trafficked migrant workers by making them work in slavery-like conditions is not "comparable to an ordinary employment relationship of a kind that is incidental to the daily life of a diplomat (and his family) in the receiving state."[201]

According to the judgment of Lord Briggs and Lord Leggatt, there are material and qualitative differences between these activities. Ordinarily, employment of a domestic worker falls outside the scope of Article 31(1)(c) because "it is an activity that is incidental to the ordinary conduct of daily life, which is not itself a 'commercial activity' and for which personal immunity is

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[200] *Id.* at 13–14. (Emphasis supplied.)
[201] *Id.* at 15.

needed to ensure the efficient performance of the functions of diplomatic missions."[202] However, the same does not hold true about the "activity of profiting from the forced labor of a domestic worker who is held in a state of servitude."[203] Resultantly, this means that "exploiting the [labor] of a domestic worker for financial gain is a commercial activity exercised by the diplomatic agent outside his official functions."[204] As explained by Lord Briggs and Lord Leggatt:

> Employment is a voluntary relationship, freely entered into and governed by the terms of a contract. Subject to contractual provisions about notice, employees are free to leave when they please, and cannot be compelled to stay by injunction even if they leave in breach of contract. *By contrast, the essence of modern slavery is that it is not freely undertaken. Rather, the work is extracted by coercion and the exercise of control over the victim. This usually involves exploiting circumstances of the victim which make her specially vulnerable to abuse.* Those constraints generally make it impossible or very difficult for the worker to leave.
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> On any fair view of the matter, *Mr*[.] *Basfar has on the assumed facts made a substantial financial gain from his exploitation of Ms*[.] *Wong's labor, albeit not in cash but in money's worth. The exploitation has been a systematic activity carried on over a significant period. It is accurately described as a commercial activity practiced for personal profit.*
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> That conclusion is confirmed by recalling the rationale for construing the words "commercial activity exercised" by the diplomatic agent as excluding a contract for ordinary domestic services, in contrast to the meaning given to similar words in the context of state immunity. That rationale is the need to protect diplomats and their families from hindrance in going about their daily lives in the receiving state. It would be not merely wrong but offensive to suggest that conduct of the kind disclosed by the assumed facts of this case is incidental to daily life, let alone the daily life of an accredited diplomat. *Compelling a migrant domestic worker to provide her labor in circumstances of modern slavery cannot reasonably be likened to paying for dry cleaning or ordinary domestic help. Unlike such day-to-day living services, such exploitation is an abuse of the diplomat's presence in the receiving state and falls far outside the sphere of*

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[202] *Id.* at 21.
[203] *Id.*
[204] *Id.* at 22.

> *ordinary contracts incidental to the daily life of the diplomat and family members which the immunity serves to protect.*[205]

Withal, following the above analysis, it is clear that the requisites of Article 31(1)(c) are deemed to have been complied with in cases of human trafficking. The exploitation of Ms. Wong's labor is viewed not in terms of actual money received, but from the financial savings that Mr. Basfar gained as a result. Moreover, according to Lord Briggs and Lord Leggatt, exploiting another human being cannot in any manner be deemed as merely incidental to the daily life of any diplomat. Therefore, in making this expansive interpretation of the term "commercial activity," Lord Briggs and Lord Leggatt's judgment diverges significantly from a contrasting albeit restrictive interpretation that it should only cover activities that involve carrying on a business or setting up shop, as seen in *Reyes* and the series of US court rulings that started with *Tabion*.

Perforce, Lord Briggs and Lord Leggatt attempted to reconcile their position to these US court rulings by stating that none of them "address the question whether keeping a person in circumstances of modern slavery can reasonably be equated with the ordinary hiring of a domestic employee."[206]

However, in making this contention, the judgment of Lord Briggs and Lord Leggatt in *Basfar*, ignores the fact that the circumstances in these US cases also constitute modern slavery. As quoted by Lord Briggs and Lord Leggatt themselves, the ILO defines modern slavery as "situations of exploitation that a person cannot refuse or leave because of threats, violence, coercion, deception, and/or abuse of power"[207] This is precisely the situation in *Tabion*, wherein the migrant worker was falsely imprisoned and threatened with arrest if she attempted to leave. Similarly, in *Montuya v. Chedid*, the trafficked migrant worker complained therein that she was exploited, subjected to abuse and illegally confined without being allowed to leave, yet it was still ruled that the exploitative acts were not commercial activities.[208] The minority view of Lord Hamblen and Lady Rose pointed this out as well and argued that the appalling nature of a diplomat's actions does not mean that the diplomat is already engaged in a commercial activity.[209] Even so, Lord Briggs and Lord Leggatt stated it accurately when they countered that

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[205] *Id.* at 15–19. (Emphasis supplied.)

[206] *Id.* at 14.

[207] International Labour Organization, *Global estimates of Modern Slavery: Forced Labour and Forced Marriage,* 9 (2017) *available at* https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf.

[208] Montuya v. Chedid, 779 F. Supp. 2d 60 (D.D.C. 2011).

[209] *Basfar*, 2022 UKSC 20, 57.

"[m]anifestly, such an activity is wholly inconsistent with the position (and dignity) of a diplomatic agent."[210]

V. INHERENT LIMITATIONS OF *BASFAR V. WONG* RULING

Looking at the historic judgment in *Basfar*, one must not lose sight of the fact that there are still a lot of factors that must be taken into consideration to achieve complete justice for trafficked and exploited migrants *vis-à-vis* erring diplomats.

To start, diplomats are still very much immune from the criminal jurisdiction of the receiving State. In addition, a court ruling providing for liability to diplomats in civil and administrative may be very difficult to enforce, especially if diplomatic pressure is applied by the sending country on the receiving country. As observed by Lord Briggs and Lord Leggatt in their judgment:

> But on any view a diplomat who exploits a migrant domestic worker enjoys immunity from the criminal jurisdiction of the receiving state. And even if the diplomat can in principle be sued in a civil action, a money judgment against the diplomat may be difficult if not practically impossible to enforce. While the diplomat remains in post, [A]rticle 31(3) of the Convention precludes taking any measures of execution which would infringe the inviolability of the diplomat's person or residence. And once the diplomat's posting ends and he leaves the country, there may be no realistic prospect of enforcing a judgment against him in his home state.[211]

Veritably, the above observation of Lord Briggs and Lord Leggatt reinforces the earlier statement of the District Court in *Tabion*, that "a certain amount of unfairness is inherent in the concept of diplomatic immunity."[212] To offset this, the District Court in *Tabion* tried to point out that migrant victims can avail of extrajudicial remedies such as by asking the Ministry of Foreign Affairs of the receiving state to investigate and mediate the dispute through the offending diplomats' embassy, as "simply bringing the matter to the attention of the embassy may sufficiently embarrass a delinquent diplomat into voluntary compliance."[213] In case this is unsuccessful, the District Court likewise suggested that other remedies maybe resorted to, such as a

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[210] *Id.* at 21.
[211] *Id.* at 17.
[212] *Tabion*, 877 F. Supp. 285 (E.D. Va. 1995).
[213] *Id.*

declaration of *persona non grata* under Article 9(1) of the VCDR and reduction of foreign aid to the sending country, as well as refusal to accept additional diplomats from the sending country.[214] Last but not the least, the District Court also suggested that the migrants themselves can take measures to gain protection against such crimes, such as "requiring cash payments in advance and charging higher prices in exchange for the risk of non-payment."[215]

However, despite these suggestions, simply having a diplomat declared as *persona non grata* would certainly not bring justice in the truest sense of the world for trafficked and exploited migrants. In addition, the suggestion that the receiving state can just simply reduce foreign aid to the sending State as a way of holding their diplomats accountable for trafficking would be to downplay other important considerations of foreign policy and ignores the fact that not all sending states are receiving aid from the receiving state. As discussed previously, even waivers of immunity by the sending state are rarely granted.

Suffice to say, these extrajudicial remedies cannot hide the fact that judicial mechanisms for holding diplomats accountable still leaves much to be desired. However, this is not attributable to the courts itself as their hands are very much tied by the text of the VCDR. The American case of *Gonzales Paredes v. Vila and Nielsen* said it best when it stated "conduct of foreign relations is not entrusted to the judiciary, and in the cases that come before it the Court may only apply the treaties (and related statutes) that the President has signed and that Congress has ratified."[216] Moreover, as observed in *Sabbithi*, the proper forum for seeking further redress against the harsh implications of applying diplomatic immunity, such as foreclosure of certain judicial remedies, lies not with the courts but with other branches of government such as Congress.[217] This is because such unfairness is outweighed by other policy considerations, as noted by US Court of Appeals Fourth Circuit's in its decision on *Tabion*:

> Here, as in most cases invoking sovereign immunity, there may appear to be some unfairness to the person against whom the invocation occurs. But it must be remembered that the outcome merely reflects policy choices already made. Policymakers in Congress and the Executive Branch clearly have believed that diplomatic immunity not only ensures the efficient functioning of diplomatic mission in foreign [S]tates, but fosters goodwill and

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[214] *Id.*
[215] *Id.*
[216] Gonzalez Paredes v. Vila, 479 F. Supp. 2d 187 (D.D.C. 2007).
[217] *Sabbithi*, 605 F. Supp. 2d 122 (D.D.C. 2009).

> enhances relations among nations. Thus, they have determined that apparent inequity to a private individual is outweighed by the great injury to the public that would arise from permitting suit against the entity or its agents calling for application of immunity.[218]

VI. CONCLUSION

Despite its limitations, *Basfar* still represents a great starting point in breaking down the great wall of impunity erected by diplomatic privilege. Its innovative use of Article 31(1)(c) in the VCDR to provide more equitable judicial outcomes for human trafficking victims serves as a tiny crack that can open the floodgates of legal accountability for diplomats who resort to these sinister practices. This is true not just in the UK, but also in the Philippines and other jurisdictions. In fact, in *Liang*, the Philippine Supreme Court has already expounded on Article 31(1)(c) of the VCDR by stating that the commission of a crime certainly does not form part of the official functions of a diplomatic agent.[219] This would most definitely include trafficking crimes.

Necessarily, in the Philippine jurisdiction, the only question remaining is if we would also consider trafficking as a commercial activity for purposes of applying the exceptions to immunity under the VCDR. In this regard, *Basfar* can serve as an important guidepost, especially as Philippine jurisprudence has not yet had the occasion to define or set more concrete parameters on what constitutes commercial or professional activity in the context of Article 31(1)(c) in the VCDR.

Of course, it is acknowledged that the Philippine Supreme Court has already cautioned in *Pangilinan v. Cayetano* that we should not be "beguiled by foreign jurisprudence" for they are not binding within our jurisdiction and merely hold persuasive value.[220] Yet, it is also noteworthy to remember that Philippine jurisprudence is likewise replete with examples where foreign case law served as a useful framework in the Philippine Supreme Court's examination of the scope and application of certain legal provisions.[221]

This is all the more so considering that *Basfar* is not inconsistent with previous rulings of the Philippine Supreme Court on diplomatic immunity, and is very much in consonance with Philippine public policy to promote

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[218] *Tabion*, 73 F.3d 535 (4th Cir. 1996).

[219] *Liang*, 323 SCRA 692, 696, Jan. 28, 2000.

[220] Pangilinan v. Cayetano, G.R. No. 238875, Mar. 16, 2021.

[221] *See, e.g.*, Ient v. Tullet Prebon (Phil.), G.R. No. 189158, 814 SCRA 184, Jan. 11, 2017, Phil. Nat'l Bank v. CA, G.R. No. 128661, 337 SCRA 381, Aug. 8, 2000.

human dignity, protect people from exploitation and eliminate trafficking in persons.[222] Lest we forget that both here and abroad, many of our fellow Filipinos have already fallen victim to acts of human trafficking committed by foreign accredited diplomats, as evidenced by the plethora of cases cited in this Article. Hence, adopting the sound doctrine introduced by *Basfar* in this jurisdiction can go a long way towards combatting and eliminating impunity in the human trafficking crimes. After all, as observed by the Philippine Supreme Court in the case of *Continental Micronesia Inc. v. Basso*, to give justice is the most important function of the law.[223]

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[222] Expanded Anti-Trafficking in Persons Act of 2022, § 2.

[223] Continental Micronesia, Inc. v. Basso, G.R. No. 178382, 771 SCRA 329, Sept. 23, 2015.