

**BEYOND BORDERS:
HISTORICAL EVOLUTION OF DIPLOMATIC IMMUNITY
AND ITS CONTEMPORARY APPLICATION
IN SRI LANKA AND THE UNITED KINGDOM**

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ABSTRACT

The notion of diplomatic immunity places diplomats in a receiving state in safe hands, exempting them from prosecution under the domestic laws of that state. This concept has evolved through different eras with multifaceted state practices. Therefore, the primary objective of this paper is to analyze the concept of diplomatic immunity and privileges and their historical evolution. To this end, the evolution of diplomatic immunity and the rationale/theories behind it will be examined. Secondly, this research intends to analyze the notion of diplomatic immunity under the Vienna Convention on Diplomatic Relations. Thirdly, this paper aims to analyze the Sri Lankan state's practice of diplomatic immunity in light of recent developments in the United Kingdom. A library-based qualitative research method will be employed, gathering necessary information from relevant international treaties on diplomatic immunity and domestic legal standards of Sri Lanka and the United Kingdom. Journal articles, textbooks, research and working papers, government publications, electronic databases, and e-journals will be used to find information and substantiate arguments in the study. In conclusion, this research believes that the core objectives of diplomatic immunity should align with the function theory. Furthermore, a comparison of Sri Lankan and United Kingdom State practices reveals that both countries have taken different approaches to adopting international standards at the domestic level. Comparatively, the Sri Lankan system has areas that can be further subject to reforms.

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1. INTRODUCTION

Diplomatic immunity is a privilege that has emerged because of diplomatic relations between countries. Thus, diplomats who represent their State abroad are entitled to this privilege, which protects diplomats from being prosecuted within the jurisdiction of the receiving State.¹ In this regard, a receiving state should ensure that the immunity has not been violated because of their state action. This indeed creates a duty and a responsibility on the receiving State. However, diplomats who receive diplomatic immunity need to act in a *bona fide* manner by upholding the core values of diplomatic relations. The privilege evolved under the diplomatic immunity is a historically developed concept, and in 1961, this idea included in the Vienna Convention on Diplomatic Relations (VCDR).² Subsequently, countries became signatory parties to VCDR and introduced legislative initiatives to recognize the core of VCDR at their domestic level. Therefore, the primary objective of this paper is to analyze the concept of diplomatic immunity and privileges and their historical evolution. To this end, the evolution of diplomatic immunity and the rationale/ theories behind diplomatic immunity will be examined. Secondly, this research intends to analyze the notion of diplomatic immunity under the Vienna Convention on Diplomatic Relations. Thirdly, this paper intends to analyze the Sri Lankan State's practice of diplomatic immunity in light of recent developments in the United Kingdom. To this end, the legislative and judicial interventions of Sri Lanka and the United Kingdom will be subject to examination.

2. EVOLUTION OF DIPLOMATIC IMMUNITY

Diplomatic immunity is a concept that has developed in early human interactions and attempts to resolve conflicts in a nonviolent manner.³ The

¹ Government of the Netherland, "Diplomatic Immunity", (n.d) <<https://www.government.nl/topics/embassies-consulates-and-other-representation/s/diplomatic-immunity>> accessed 31 May 2021.

² J Brown, "Diplomatic Immunity: State Practice Under the Vienna Convention on Diplomatic Relations", *International & Comparative Law Quarterly*, Volume 37, Issue 1, (1988) 53.

³ J Kurbalija, Dietrich Kappeler & Christiaan Sys, "Evolution of Diplomatic Privileges, and Immunities", DiPLO, (2008) <<https://www.diplomacy.edu/resources/general/evolution-diplomatic-privileges-and-immunities>>

ideology of diplomatic immunity can be traced back from many ancient civilizations of China, Egypt, and India.⁴ According to the 'Institutes of Manu Hindu Code' (dating from 1500 BCE), when a guest arrives, he/she should receive a place to sit, water and properly seasoned food.⁵ The underpinning meaning of this idea is treating your guest in an honorable manner and not putting him in any difficulty. Later this idea was expanded when envoys service was used as a tool of communication between states. Equality between states is a fundamental doctrine that influenced diplomatic immunity because, from early periods, states required secure means of communication between government and its envoys to promote better relations between governments.⁶ The personal inviolability accorded to envoys became less vital with the emergence of Roman Empire and later of Byzantium because in both these instances focus was more on subjugation than co-existence.⁷ Later, the idea of diplomacy revived with the Renaissance and, especially during the sixteenth century, special protection and immunity from criminal jurisdiction even for ambassadors suspected of conspiracy, became an established practice among sovereign potentates.⁸ Subsequently, France established the first ministry of foreign affairs in 1626 and gradually, countries established more organized contact through diplomatic missions.⁹ Increasingly, diplomats became sacrosanct, and by the Congress of Westphalia in 1648, parties agreed on permanent legislation that were accepted as the normal way of conducting international affairs between sovereign states.¹⁰ Subsequently, rules relating to diplomats' immunity from criminal and civil proceedings and protection for the embassy premises have

accessed 31 May 2021.

⁴ CRS Report for Congress, "Diplomatic Immunity: History and Overview, Congressional Research Service," The Library of Congress, (2003) 1.

⁵ *Supra* 3.

⁶ *Supra* 4.

⁷ E Denza, *Vienna Convention on Diplomatic Relations*, United Nations Audio-visual Library of International Law, (2009) 1 <http://legal.un.org/avl/pdf/ha/vcdr/vcdr_e.pdf> accessed 31 May 2021.

⁸ *Supra* 7.

⁹ *Supra* 3.

¹⁰ K Thilakarathna, 'The Evolution of The Vienna Convention on Diplomatic Relations and Consular', *NAUJI Law Journal*, Volume 11 (1), (2020) 69.

emerged.¹¹

Later, this trend was furthered by the Congress of Vienna in 1815, which established a clear institutional framework for modern diplomacy.¹² According to Denza, this initiative “simplified the complex rules on the classes of heads of diplomatic missions and laid down that precedence among heads of missions should be determined by the date of arrival at post”.¹³ Then the codification of the Havana Convention on Diplomatic Officers of 1928 marks another milestone in the historical evolution of diplomatic immunity. However, Denza suggests that the *Havana Convention* did not well reflect the current practice of diplomatic immunity in either its terminology or its rules.¹⁴ Yet this initiative can be identified as a pivotal one since it tried to lay the path for a better Convention. Moreover, Jovan recognizes the Draft Convention drawn up in 1932 by Harvard Research in International Law as a more influential document in diplomatic immunity.¹⁵ Yet, both *the Havana Convention* and the Draft Harvard Convention were identified as valid instruments that influenced the Vienna Convention on Diplomatic Relations.¹⁶

The codification of an exclusive internationally recognized treaty to address diplomatic intercourse and immunities was accelerated with the establishment of the International Law Commission under the United Nations since the UN General Assembly requested the commission to take this as a priority task.¹⁷ Although the initial draft of articles was subject to revisions, it was adopted during the Vienna Conference, which was held in 1961 April.¹⁸ Subsequently, many scholars regard the Vienna Convention on Diplomatic Relations (VCDR) as having codified significant changes in diplomatic law.¹⁹ Indeed, this instrument has

¹¹ *Supra* 7.

¹² *Supra* 3.

¹³ *Supra* 7.

¹⁴ *ibid.*

¹⁵ *Supra* 3.

¹⁶ *ibid.*

¹⁷ Denza, *Supra*, n 7, 2.

¹⁸ *Supra* 2.

¹⁹ *Supra* 2.

become an important one today in diplomatic immunity and allied aspects.

3. RATIONALE / THEORIES BEHIND DIPLOMATIC IMMUNITY

Diplomatic immunity is a way of demonstrating a good relationship and respect towards another state. And this can be considered a vital pillar in any diplomatic negotiations and relations. Importantly, diplomats who are placed in a privileged position have a fundamental duty to perform their core duties rather than engaging with personal activities. Holroyd Pearce L.J in *Ghosh v. D'Rozario*²⁰ held that "...immunity is derived from the rules of international law and from the legal maxim *par in parem non habet imperium*".²¹ By emphasizing the value of diplomatic immunity and privileges, Harold Nicolson states that "It must soon have been realized that no negotiation could reach a satisfactory conclusion if the emissaries of either party were murdered on arrival. Thus, the first principle to become firmly established was that of diplomatic immunity".²² Additionally, Grotius identifies two maxims in the law of nations concerning ambassadors.²³ According to the first rule, ambassadors must be received by the receiving state accordingly, and secondly, they must suffer no harm.²⁴ Therefore, the principle of reciprocity can be identified as the main underpinning reasoning relating to diplomatic relations and immunity.²⁵ In that sense, both receiving and sending states must respect each other in good faith.

According to Leslie Shirin, three theories attempt to justify the rationale behind diplomatic immunity.²⁶ These three theories are as follows; first,

²⁰ [1962] 2 All E.R. 640.

²¹ *ibid* at p. 643.

²² H Nicolson, *The Evolution of Diplomatic Method*. University of Leicester Press, 1998 2.

²³ CRS Report for Congress, 'Diplomatic Immunity: History and Overview', Congressional Research Service, The Library of Congress, (2003) 2.

²⁴ *ibid*.

²⁵ K Thilakarathna, 'The Evolution of The Vienna Convention on Diplomatic Relations and Consular', *NAUJI Law Journal*, Volume 11 (1), (2020) 70.

²⁶ L S Farhangi, 'Insuring against Abuse of Diplomatic Immunity,' 38 *Stanford Law*

representative of sovereignty; secondly, extritoriality; thirdly, functional theory.²⁷ The first theory believes that diplomatic privileges are similar to those of a sovereign of state.²⁸ Therefore, a diplomat is entitled to the same respect and protection as the sovereign of the state. Further, extritoriality theory suggests that “an ambassador, wherever he or she might be, remains on the grounds of its sending state, and therefore is not subject to another country's laws”.²⁹ The third and most accepted theory is functional theory. This theory believes that diplomats cannot function well without the protection of such immunity.³⁰ Thus, this theory seeks immunity to perform their duties without any hindrances. Also, the preamble of the 1961 VCDR shows that the Convention is based on functional theory. Accordingly, the VCDR states that “the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states”.³¹ Many scholars have also recognized that the rationale for immunity should be based on functional theory and not for the individual benefit.³² Lord Phillimore, in *Engelke v. Musmann*,³³ elaborated, applied the functional approach, and held that problems arising from diplomatic relations and immunity can be best dealt with by looking at the functions of the diplomats. Thus, this paper holds that both the sending state's and the receiving state's diplomats must strictly adhere to their primary duties in order to rationalize the notion of diplomatic immunity, without pursuing any personal benefit from diplomatic relations.³⁴ Next, this paper would like to examine the concept of diplomatic immunity under the VCDR.

Review (1986) 1520.

²⁷ *Supra* 25.

²⁸ *ibid.*

²⁹ *Supra* 26.

³⁰ *ibid.*

³¹ Vienna Convention on Diplomatic Relations, (1961), preamble.

³² A Abass, *Complete International Law*, (2nd edn OUP 2014) 243.

³³ [1928] A.C. 433 at p. 454.

³⁴ See further, Holroyd Pearce L.J in *Ghosh v. D'Rozario* [1962] 2 All E.R. 640.

4. DIPLOMATIC IMMUNITY UNDER THE VCDR

Today, VCDR provides a comprehensive framework relating to diplomatic relations. The provisions of VCDR set out the rules on privileges and immunities that enable members of the diplomatic mission to perform their functions without any fear of harassment through the enforcement of local laws of the receiving state.³⁵ The purpose of this Convention is to foster amicable relations between nations, regardless of the differences in their social and constitutional structures.³⁶ Notably, VCDR has acknowledged unequivocally that the goal of these privileges and immunities is to guarantee the effective execution of diplomatic missions' duties as agents of states, not to benefit specific persons.³⁷ This, hence, elucidates the fundamental goals and dispels uncertainties regarding the utilization of diplomatic immunity in intricate circumstances. The chief characteristics of diplomatic immunity can be further examined under the key Articles of the VCDR. Significantly, Article 2 of the VCDR has acknowledged that permanent diplomatic missions and diplomatic relations between states are established only with mutual consent. This is especially crucial since questions regarding consent invariably lead to confusion and uncertainty. Consequently, such diplomatic relations may cease to exist. Further, Article 3 of the Convention suggests that a diplomatic mission shall represent a sending state within a receiving state³⁸ and promote friendly relations between the sending states and the receiving states. However, friendly relations may also be in jeopardy if both states fail to commit to their goal, as this provision is based on the reciprocity principle and functional theory that were previously discussed.

Furthermore, “the sending state must make certain that the agreement of the receiving state has been given for the person it proposes to accredit as head of the mission to that state”.³⁹ Notably, the receiving state is not obliged to give any reasons if it refuses to accept the proposed one on

³⁵ *Supra* 7.

³⁶ *Supra* 31.

³⁷ *ibid*.

³⁸ Vienna Convention on Diplomatic Relations, (1961), art 3 para (a).

³⁹ *ibid*, art 4 para 1.

such occasions.⁴⁰ When the proposed head of the mission has a negative record or records on violations of human rights, receiving states, on most occasions, are hesitant to accept the proposal.

Article 31 of the Convention has delineated an additional crucial attribute of the topic under discussion. Accordingly, "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".⁴¹ In 1999, when the Japanese Counsel General in Vancouver, Canada, engaged in an act of domestic violence, the receiving state could not proceed with legal action, but he was later returned to his home country.⁴² While it makes sense to name this the chief privilege in diplomatic relations, there are three situations in which diplomatic agents will not be granted the aforementioned immunity. First, actions relating to private immovable properties held by the diplomatic agent in his private capacity, which is situated in the territory of the receiving state;⁴³ second, actions relating to succession in which the diplomatic agent involved but not on behalf of the sending State;⁴⁴ thirdly, actions relating to any professional or commercial activities exercised by the diplomatic agent in the receiving state outside his official functions.⁴⁵ The privileges of this concept are further extended by Article 31, paragraph 2 of the Vienna Convention on Diplomatic Relations (VCDR), which states that diplomatic agents are not obliged to give evidence as witnesses. Also, Articles 33 and 34 of the Convention exempt a diplomatic agent from the social security provisions and taxes of the receiving state. Furthermore, family members of administrative and technical officers as well as those of diplomatic agents, have been awarded diplomatic immunity under Article 37. Despite the fact that this clause is essential to the diplomat's duties, family members of the individual diplomat may abuse it.

⁴⁰ *ibid*, Article 4 para 2.

⁴¹ *ibid*, Article 31 para 1.

⁴² CBC News, Wife-beating diplomat ordered home (1999) < <https://www.cbc.ca/news/canada/wife-beating-diplomat-ordered-home-1.188071> > accessed on 25 March 2024.

⁴³ Vienna Convention on Diplomatic Relations, (1961), Article 31 para 1 (a).

⁴⁴ *ibid*, Article 31 para 1 (b).

⁴⁵ *ibid*, Article 31 para 1 (c).

The VCDR has extended diplomatic immunity not only to diplomats and their staff but also to the diplomatic premises. This comes under Article 22 of the Convention, which talks about the inviolability of diplomatic premises. The term inviolability refers to the receiving state's inability to enter the mission's premises materially or pursue legal action. Thus, agents of the receiving state shall not enter the diplomatic premises without the consent of the head of the mission. Although this is a primary condition, there are instances where receiving countries have attempted to enter diplomatic premises. An instance of this occurred in 1979 when demonstrators from Iran overran the US Embassy in Tehran, holding ninety-eight individuals as hostages.⁴⁶ As per Article 24, inviolability can be further extended to archives and documents of the mission as well. Finally, Article 27 is also vital yet debatable in modern days in terms of diplomatic immunity. This provision deals with the diplomatic bag and official correspondence of the mission.

Although the concept of diplomatic immunity creates profound privileges, the holders of immunity must respect the laws and regulations of the receiving state.⁴⁷ And they should not interfere with the internal matters of the receiving state.⁴⁸ At the same time, diplomatic agents are not allowed to use the diplomatic premises in any manner incompatible with the functions of the mission.⁴⁹ Functional theory well supports these provisions. Additionally, diplomatic agents are prohibited from practicing for personal profit any professional or commercial activity within the receiving state.

Further, Article 9 of the Convention deals with the *persona non grata* status. *Persona non grata* status can be declared against any head or member of the mission by the receiving state. With such a declaration, a receiving state can notify their unwillingness to accept the diplomatic member of the sending state. According to the same provision, the receiving State is not responsible for giving any reason for declaring anyone *persona non grata*. In 1984, a member of the Libyan embassy in London killed a British constable. Although Libya claimed diplomatic

⁴⁶ USDS, *The Iranian Hostage Crisis* (nd) < <https://history.state.gov/departmenthistory/short-history/iraniancrises>> accessed on 25 March 2024.

⁴⁷ Vienna Convention on Diplomatic Relations, (1961), Article 41 para 1.

⁴⁸ *ibid*, Article 41 para 1.

⁴⁹ *ibid*, Article 41 para 3.

immunity for all occupants in the embassy, the UK declared *persona non grata* status and expelled that person.⁵⁰ Moreover, in 1979, the American embassy in Tehran was captured by students (armed) and the staff of the American embassy was held hostage.⁵¹ Yet the Iranian government was very indolent in protecting and rescuing the captured. Then the US made a complaint to the International Court of Justice, and the court held that “the Government of the Islamic Republic of Iran shall afford to all the diplomatic and consular personnel of the United States the protection, privileges and immunities to which they are entitled under the treaties in force between the two states, and under general international law, including immunity from any form of criminal jurisdiction.....”.⁵² Likewise, there are instances where the provisions of diplomatic immunity have been violated. Most importantly, states take the VCDR as a guideline when practicing diplomatic immunity at the national level. In the next part, this paper will discuss Sri Lankan State practices related to this topic.

4. SRI LANKAN STATE PRACTICE RELATING TO DIPLOMATIC IMMUNITY

Despite ratifying the Vienna Convention on Diplomatic *Relations* in June 1978, Sri Lanka took eighteen years to pass the necessary enabling laws. Later, in 1996, Sri Lanka enacted the required enabling legislation, and the short title of the said legislation is the Diplomatic Privilege Act No. 9 of 1996. According to the preamble of this Act, this was enacted “to give effect to the Vienna Convention on Diplomatic Relations, and to provide for the grant of immunities and privileges to sub-officers, agents and property of certain international organizations.” This law relied on the reciprocity between the Sri Lankan government and other international entities relating to immunities and privileges.⁵³ Nevertheless, this legislation has failed to include core provisions of the VCDR at the domestic level. At the same time, this law does not contain any specific provision relating to the scope and limitations of diplomatic immunity.

⁵⁰ K Thilakarathna, “The Evolution of The Vienna Convention on Diplomatic Relations and Consular”, NAUJI Law Journal, Volume 11 (1) (2020) 72.

⁵¹ *U.S. v. Iran*, 1980 I.C.J. 3 (May 24).

⁵² *ibid* 45.

⁵³ Diplomatic Privileges Act, No. 9 of 1996, section 4.

This lacuna has been addressed on the Ministry of Foreign Affairs website. Accordingly, as per the Vienna Convention, diplomats and diplomatic organizations are exempted from the Civil and Criminal Jurisdiction of Sri Lanka.⁵⁴ However, as per the Ministry web page, this immunity will not apply to diplomats under two situations. Firstly, for violations of motor traffic rules and secondly, for disputes relating to locally recruited staff members.⁵⁵

Next, it is required to see how far the above principles have been used in domestic cases/ diplomatic issues in Sri Lanka. First, in *Appuhamy v. Gregory*, which came to discourse prior to the enactment of Diplomatic Privileges Act, No. 9 of 1996, the court held that “under the rules of international law, diplomatic immunity from the judicial process is extended not only to a Minister or Ambassador but also to his family, suite and servants”.⁵⁶ Although this judicial pronouncement demarcates the application of diplomatic immunity, scholars believe that the judgement has unnecessarily broadened the concept of diplomatic immunity.⁵⁷ Additionally, in *Ranasinghe v. Minister of Foreign Affairs*, the court held that once a member in a diplomatic mission terminates her duties and returns to the country as a non-diplomatic member, she will no longer entitled to any diplomatic immunity.⁵⁸ *International Water Management Institute v. Kithsiri Jayakod*⁵⁹ is another Sri Lankan case that dealt with the concept of diplomatic immunity. In this case, the Appellant incorporated an institute under the International Irrigation Management Act No.6 of 1985 (amended by the amending Act No. 50 of 2000), and the question was whether he was entitled to diplomatic immunity under the provisions of the Diplomatic Privileges Act. In the judgment, the court held that when dealing with matters relating to diplomatic immunity, the court should examine the Diplomatic Privileges Act and International

⁵⁴ Ministry of Foreign Affairs, DPL Act, (n.d), <<https://mfa.gov.lk/dpl-act/>> accessed 4 June 2021.

⁵⁵ *ibid.*

⁵⁶ 1953 55 New Law Reports 235.

⁵⁷ K A A N Thilakarathna, ‘The Evolution of The Vienna Convention on Diplomatic Relations and Consular’, *NAUJI Law Journal*, Volume 11 (1), (2020) 81

⁵⁸ 2010 (1) Sri L R 178.

⁵⁹ SC Appeal No. 11/2011.

Irrigation Management Act together with the CVDR.⁶⁰ However, scholars are of the view that, as for Sri Lanka, given its weakness in global politics and its judiciary's inability to provide clarity in comparison to other nations, it may be more vulnerable to the abuse of the principle of diplomatic immunity.⁶¹ These case laws show that the Sri Lankan judiciary has interpreted the concept of diplomatic immunity by aligning with the VCDR. Therefore, this paper apprises the Sri Lankan commitment in terms of integrating the notion of diplomatic immunity to the domestic spheres, yet the main legislation needs certain reforms to fill the gaps in it.

5. RECENT DEVELOPMENTS IN THE UNITED KINGDOM

The UK enacted enabling legislation in 1964, the same year that it ratified the VCDR. The Diplomatic Privileges Act 1964, which has incorporated several important provisions from the VCDR, is, therefore, the primary piece of legislation in the United Kingdom governing matters pertaining to diplomatic relations. In contrast to other nations, the United Kingdom's diplomatic privilege law has embraced the VCDR through a schedule. However, Section 3 of the Diplomatic Privileges Act 1964 governs how the VCDR's provisions are applied. Accordingly, Section 3 (1) suggests that Her Majesty may, by an Order in Council, withdraw from the mission of that state or from the persons connected to it, as appropriate, if it appears to Her Majesty that the privileges and immunities granted to a mission of Her Majesty in the territory of any state, or to persons connected with that mission, are less than those conferred by this Act on the mission of that state or on persons connected with that mission. This provision has attempted to promote friendly and equal relations between the United Kingdom and any states that are having diplomatic relations. As VCDR is fully accepted within the United Kingdom, all the immunities and other privileges are applied accordingly.⁶²

⁶⁰ *ibid.*

⁶¹ K A A N Thilakarathna, "The Paradox of Diplomatic Immunity: A Comparative Approach with Practices from Sri Lanka, South Africa, and India", 5 KAZAN U. L. REV. 70 (2020) 89.

⁶² In *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62, the Court discussed the possibility of applying European Human Rights Laws in matters

After the killing of Women Police Constable Fletcher in London by shots fired from the windows of the Libyan People's Bureau on 1984 April 17, the governmental authorities in the United Kingdom instituted a full review of the VCDR, its operation and enforceability.⁶³ The Foreign Affairs Committee was established for this purpose, and following a study of all pertinent materials, the report titled "The Abuse of Diplomatic Immunity and Privileges" was released. In a statement to the aforementioned committee, the Foreign Secretary emphasized that diplomatic immunity does not grant the authority to break UK law or endanger the lives of British nationals or visitors.⁶⁴ A strict examination of diplomatic immunity and privileges was suggested as one of the committee report's recommendations. The committee also suggested a thorough examination of the VCDR's operations in the UK.⁶⁵ This drew attention to a number of uncertainties that might occur when interpreting specific VCDR rules domestically. It is conceivable to claim, based on an analysis of the Foreign Affairs Committee report, that the Committee thinks functional theory could assist in resolving any ambiguities about diplomatic immunity. Following that, in *R v. Lambeth, justices, ex p. Yusufu*⁶⁶ court, declined to acknowledge diplomatic immunity status in the absence of a Foreign Office certificate, which gives the Foreign Office control over foreign missions. Moreover, the court in *ex p. Yusufu* held that for a person to be entitled to diplomatic immunity, his position must be included in Schedule 1 of the Diplomatic Privileges Act 1964 and comply with the receiving states' requirements.

In the landmark decision of *Basfar v Wong*,⁶⁷ the Supreme Court of the United Kingdom established a novel and progressive path for the prosecution of foreign diplomats who engage in the modern-day enslavement of domestic workers. Article 31 (1) (c) of the VCDR has

pertaining to diplomatic immunity.

⁶³ R Higgins, "UK Foreign Affairs Committee Report on the Abuse of Diplomatic Immunities and Privileges: Government Response and Report", *American Journal of International Law*, Vol. 80, No. 1(1986) 135.

⁶⁴ S Davidson and others, "Treaties, Extradition and Diplomatic Immunity: Some Recent Developments", *The International and Comparative Law Quarterly*, Vol.35, No. 2 (1986) 433.

⁶⁵ *Supra* 63.

⁶⁶ [1985] Crim LR 510.

⁶⁷ [2022] UKSC 20.

been subjected to the question in this incident. The said Article notes that “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... an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions.” In this case, Ms. Josephine Wong, a migrant domestic worker from the Philippines, was employed in the home of Mr. Khalid Basfar, a diplomat assigned to the Saudi Arabian mission in the United Kingdom. Ms. Wong contends that she was coerced into working under conditions akin to modern slavery by Mr. Basfar and his family as a victim of human trafficking.⁶⁸ Ryan argues that *Basfar v. Wong* marks a significant advancement in the United Kingdom Supreme Court's expansive and audacious interpretation of Article 31(1)(c) of the VCDR, both practically and philosophically, for those seeking redress for grave breaches of fundamental rights.⁶⁹

Further, in *Al-Malki v Reyes*⁷⁰ the Supreme Court of the United Kingdom held that the objective of VCDR is “not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states. If a person’s duties under a contract of employment made between her and a foreign diplomat relate to the latter’s official functions, the immunity is appropriately provided, in accordance with its purpose, by the last four words of article 31(1)(c)”.⁷¹

In addition, *Brigadier Andige Priyankara Indunil Fernando v. Majuran Sathanathan*⁷² a recent case held in the United Kingdom, dealt with the concern of granting diplomatic immunity to the Minister Counsellor for Defence at the Sri Lankan High Commission to the United Kingdom. The primary issue came up at a demonstration outside the Sri Lankan High Commission on February 4, 2018. Safeguarding the High Commission and keeping an eye on people demonstrating against the Sri Lankan

⁶⁸ *ibid* at para 1.

⁶⁹ S Ryan, *Modern Slavery, and the Commercial Activity Exception to Diplomatic Immunity from Civil Jurisdiction: The UK Supreme Court’s Decision in Basfar v Wong* (2023) *Modern Law Review* 16.

⁷⁰ [2017] UKSC 611961.

⁷¹ *ibid* at para 66.

⁷² [2021] EWHC 652 (ADMIN).

government were the Brigadiers' responsibilities. On three separate instances, he was observed making a "cut-throat" gesture with his fingers running across his neck. Majuran Sathanathan, who saw this occurrence, filed a complaint against the Brigadier for acting in a way that violated local regulations in the United Kingdom and using threatening or abusive language. Sir Julain Flaux, Chancellor of the High Court, and Mc Gowen J, hearing the appeal, noted that "we consider that the acts in question in the present case were ones which were performed by the appellant in the exercise of his functions as a member of the mission and thus *qua diplomat*... They remained acts performed by the appellant [Brigadier] in the exercise of his function as a member of the mission despite their criminality".⁷³ These judgments and state practices of the United Kingdom in terms of diplomatic immunity showcase a higher level of coherence, clarity and consistency. Moreover, examination of these court rulings shows that the UK has prioritized the functional theory more than other theories, and as a result, immunity has not been extended to activities that are not related to diplomatic duties. As such, it is evident that the United Kingdom has embraced the VCDR in its domestic domains and has maintained adherence to functional theory with regard to matters of diplomatic immunity.

6. CONCLUSION

The concept of diplomatic immunity is applicable across national boundaries and is contingent upon the degree of collaboration amongst the world's civilized nations. Diplomatic immunity is a vital concept that assists in advancing friendly relations between sovereign states. It has been frequently observed that the law of diplomatic immunity usually has high compliance rates because, more than any other area of international law, there are obvious and conspicuous reciprocal benefits associated with compliance.⁷⁴ In the contemporary world, the VCDR is a globally recognized convention that was adopted as a result of the concept's historical evolution. The concept of diplomatic immunity is well-established today and aids state parties in conducting their diplomatic relations in accordance with international norms without jeopardizing

⁷³ *ibid.*

⁷⁴ *Supra* 63 at 641.

their diplomatic relations.

While there are four⁷⁵ theories that support the reasoning behind diplomatic immunity, this paper argues that the functional theory should serve as its cornerstone. Given that diplomats who stray from their primary role may raise questions about the legitimacy of their actions. In this case, observing all requirements pertaining to diplomatic immunity is the responsibility of both the sending and receiving states.

Although Sri Lanka, a state party to the VCDR, has passed its own domestic legislation, it also has certain lacuna within it. Although the Sri Lankan judiciary has attempted to apply international standards when interpreting domestic cases, Sri Lanka's position in geopolitics has limited its energy. As a result, there are still certain points that are up for interpretation, which may cause some ambiguities. When comparing the Sri Lankan practices with the contemporary trends in the United Kingdom, it is evident that the Diplomatic Privileges Act of the United Kingdom has been able to welcome the VCDR in a progressive manner. In particular, the United Kingdom's pertinent court rulings have consistently upheld the fundamental principles of the VCDR. In comparison, a discernible uniformity exists between governmental policies and judicial rulings of the United Kingdom. In conclusion, this paper argues that maintaining the essence and requirements of diplomatic immunity could be aided by prioritizing the core values and objectives of the Vienna Convention on Diplomatic Relations (VCDR) and applying functional theory to the interpretation of the convention's core values. This can be further resolved by realizing that diplomatic immunity serves as a tool to advance diplomatic relations rather than as a cover for transgressions. In order to demonstrate their commitment to preserving the fundamental principles of this idea, state parties must act in good faith and accept accountability for their own actions.

⁷⁵ Functional theory, representative theory, reciprocity theory and extraterritoriality Theory.