

## Applying the Functional Necessity Test to the Immunity of Diplomats' Family Members: *Dunn-Sacoolas* Incident between the UK and USA

**Ahmed Ragib Chowdhury**

Student at the Faculty of Law, University of Dhaka

### Abstract

*Diplomatic immunity highlights bilateral bonds between states. It extends to family members of the concerned diplomatic staff as well. The extent of diplomatic immunity enjoyed by a diplomatic staff's family came into the issue when the wife of a US diplomatic staff, Anne Sacoolas killed a 19-year-old UK citizen Harry Dunn giving rise to an international incident between the countries. The England and Wales High Court denied a judicial review application by the Dunn family holding that Mrs. Sacoolas enjoyed diplomatic immunity at the time of the accident. This essay will focus on the scope and extent of diplomatic immunity enjoyed by Mrs. Sacoolas at the time of the accident based on the functionality and dual criminality theory in tandem with the provisions of the Extradition Treaty between the UK and the USA.*

*"Legal immunity of diplomatic agents is one of the oldest principles of customary international law"*

- Lord Sumption in *Al-Malki*.<sup>1</sup>

### 1. Introduction

The law of diplomatic immunity is codified in Vienna Convention on Diplomatic Relations ("VCDR"), a convention to which 190 states are a party.<sup>2</sup> A diplomatic representative is a symbol of the bilateral relationship between two states. They enjoy immunities and have been granted privileges. In addition to such immunity and privileges, diplomatic officers also enjoy a principle of inviolability, which means that they are inviolable by the state functionaries of the receiving state.<sup>3</sup> Diplomatic immunity derives from state immunity. The rights, duties, and privileges of diplomatic envoys have continued to develop over the centuries.<sup>4</sup> The concept of diplomatic agents residing in another country dates back to the 15th century, but the role of diplomats has evolved with time, where two friendly states exchange diplomats (i.e., it is the right of a state to receive and send diplomatic envoys to another state).<sup>5</sup> While diplomatic immunities and privileges serve as a base for better inter-state relationships, they can also be the base for an inter-state international incident as well. The situation concerning Harry Dunn and Anne Sacoolas is no different from the latter type.

On 27 August 2019, 19-year-old British teenager Harry Dunn is involved in a motor vehicle accident where his motorbike is struck by the 42-year-old US citizen Anne Sacoolas near the Royal Air Force (RAF) base in Croughton, Northamptonshire. Dunn later dies in the hospital.

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<sup>1</sup> *Al-Malki v Reyes* [2017] UKSC 61 [5].

<sup>2</sup> *R (Dunn) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWHC 3185 (Admin) [11].

<sup>3</sup> Nehaluddin Ahmad, 'The Obligation of Diplomats to Respect the Laws and Regulations of the Hosting State: A Critical Overview of the International Practices' (2020) 9 (18) MDPI 1-14.

<sup>4</sup> Ibid.

<sup>5</sup> Nehaluddin Ahmad, 'The Obligation of Diplomats to Respect the Laws and Regulations of the Hosting State: A Critical Overview of the International Practices' (2020) 9 (18) MDPI 1-14; David Ott, *Public International Law in the Modern World* (Pitman Publishing 1987) 161–62.

Anne Sacoolas is the wife of Jonathan Sacoolas, a member of the US Government's Administrative and Technical ("A&T") Staff at RAF Croughton.<sup>6</sup> On 15 September, Mrs. Sacoolas leaves the UK on a US Air Force plane, multiple requests of extradition and diplomatic immunity waiver by the UK Foreign and Commonwealth Office ("FCO") is denied by the US government despite reports of an Interpol Red Notice being issued against her on account of her being charged with causing death by dangerous driving.<sup>7</sup> This essay will focus on the extent and scope of diplomatic immunity under the VCDR, whether functional theory of diplomatic immunity can be used to prosecute Mrs. Anne Sacoolas.

## 2. Situational Overview of the Harry Dunn Incident

US State department specifically stated in a diplomatic note on 30 August 2019 that there had been no waiver of immunity concerning Anne Sacoolas and that she enjoyed complete criminal immunity.<sup>8</sup> On 5 September 2019, the Protocol Directorate officials formally delivered a diplomatic note to the US Embassy requesting a waiver of immunity of Anne Sacoolas and one of her children, the waiver request was declined by the US. Rather, the Protocol Directorate officials were subsequently informed that the Sacoolas family would be leaving the UK the next day unless the UK had strong objections. The UK did have strong objections and it was emphasized by the government officials present in the meeting on that day that the Sacoolas family cooperate with the UK authorities. Despite their requests, the Sacoolas family left the UK.<sup>9</sup>

On 22 December 2019, the NP ("Northamptonshire Police") was authorized to charge Mrs. Sacoolas with causing death by dangerous driving, and it began extradition proceedings, which was condemned by the US State Department, on the premise that "that would establish a troubling precedent".<sup>10</sup> On 10 January 2020, the Home Office submitted an extradition request to the US. The State Department responded by saying that the request was "highly inappropriate" and insisted that Mrs. Sacoolas' status at the time of the crash meant she had diplomatic immunity. A spokesperson said, "it is the position of the United States government that a request to extradite an individual under these circumstances would be an abuse."<sup>11</sup>

Legal avenues sought after by Mr. Dunn's family were also closed shut by the EWHC ("England & Wales High Court") which ruled that at the time of the accident, Mrs. Anne Sacoolas did indeed have diplomatic immunity and therefore she was protected from criminal jurisdiction.<sup>12</sup> The lawyers for the Dunn family argued that the treaties signed between the US and the UK in 1995 were not intended to give family members of diplomats greater immunity than themselves and that the immunity enjoyed from criminal proceedings by diplomats only concerning activities carried out in the course of their duties rather than non-work-related

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<sup>6</sup> *R (Dunn) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWHC 3185 (Admin) [2].

<sup>7</sup> Yaron Steinbuch, 'US diplomat's wife faces virtual trial in Harry Dunn's fatal car crash' (*New York Post*, 14 June, 2021) available at <https://nypost.com/2021/06/14/anne-sacoolas-faces-virtual-trial-in-harry-dunns-death/> accessed 11 July 2021; Timeline: Events after Harry Dunn crash death (*BBC*, 22 July 2020) available at <<https://www.bbc.com/news/uk-england-northamptonshire-53505239>> accessed 12 July 2021.

<sup>8</sup> *R (Dunn) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWHC 3185 (Admin) [54], [53], [65].

<sup>9</sup> Ibid [64], [66], [69].

<sup>10</sup> Ibid [77].

<sup>11</sup> Ibid [78].

<sup>12</sup> Ibid [20].

circumstances such as driving outside the base.<sup>13</sup> The Court insisted that they did not arrive at the ruling at any enthusiasm and left the scope open for an application of judicial review.<sup>14</sup>

### 3. Diplomatic Immunity under the VCDR

This section will focus on the legal regime of diplomatic immunity under the VCDR. Diplomatic privileges and immunities under various provisions of VCDR comprise inviolability and protection of the person (Article 29) as well as inviolability and protection of their private residence, papers, correspondence, and property (Article 30), immunity from criminal, civil, and administrative jurisdiction (Articles 31 and 32), immunity from social security (Article 33), fiscal immunity (Article 34), immunity from personal services, public services, and military obligations (Article 35) and immunity from custom duties (Article 36).<sup>15</sup>

The concept of diplomatic immunity can be attributed to the following 3 theories<sup>16</sup>:

**Theory of Extraterritoriality:** This theory centers on the notion that the area or territory of the receiving state used by the diplomatic mission of the sending state shall be considered to be part of the territory of the sending state.

**Theory of Representative Character:** This theory is partially reflected in the Preamble and Article 3 of the VCDR which states that the diplomatic agent represents the sending state. This signifies that the diplomatic missions, diplomats exhibit the sending state and are thus accorded immunities and privileges as are granted to the sending state.

**Theory of Functional Necessity:** This theory provides that immunities are granted to diplomatic agents to enable them to perform diplomatic functions. This also finds support from the preamble of the VCDR, which states that the purpose of the privileges and immunities is for the efficient performance of diplomatic functions and not for the benefit of individuals. It is also further supported by *Empson v Smith*<sup>17</sup>, wherein it was stated that diplomatic immunity is not immunity from legal liability rather immunity from suit, and diplomatic agents are not above the law and are obligated to respect the laws and regulations of the receiving state.

Under VCDR, a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He/she shall also enjoy immunity from its civil and administrative jurisdiction except under certain circumstances as mentioned in article 31.<sup>18</sup> According to the VCDR, the “members of the administrative and technical staff” are the members of the staff of the mission employed in the administrative and technical service of the mission.<sup>19</sup> The family members of diplomatic agents, administrative and technical staff of a mission shall enjoy the privileges and immunities specified in articles 29 to 36. Members of the service staff of the mission who are

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<sup>13</sup> Patrick Wintour, ‘Harry Dunn’s Parents Lose High Court Immunity Case’ (*The Guardian*, 24 November 2020) <<http://www.theguardian.com/uk-news/2020/nov/24/harry-dunn-parents-lose-high-court-immunity-case>> accessed 6 July 2021.

<sup>14</sup> *R (Dunn) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWHC 3185 (Admin) [120].

<sup>15</sup> Simonetta Stirling-Zanda, ‘The Privileges and Immunities of the Family of the Diplomatic Agent: The Current Scope of Article 37(1)’ in Paul Behrens (ed) *Diplomatic Law In A New Millennium* (1st edn, OUP 2017) 98.

<sup>16</sup> Rene Vark, ‘Personal Inviolability and Diplomatic Immunity in Respect of Serious Crimes’ (2003) VIII Juridica International 112.

<sup>17</sup> *Empson v Smith* [1966] 1 QB 426.

<sup>18</sup> Vienna Convention on Diplomatic Relations 1961 500 UNTS 95, art 31 (1).

<sup>19</sup> Ibid, art 1(f).

not nationals of or permanently resident in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties.<sup>20</sup>

Except insofar as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanent resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.<sup>21</sup> Every person entitled to privileges and immunities shall enjoy them from 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 or such other ministry as may be agreed.<sup>22</sup>

Article 29 encapsulates ‘the positive duty to treat the diplomatic agent with due respect and to protect him from physical interference by others with his person, freedom or dignity. This is because the requirement of the physical protection of diplomats and diplomatic premises is a fundamental requisite for the conduct of diplomatic relations.<sup>23</sup> The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.<sup>24</sup> Waiver of immunity of diplomatic agents enjoying immunity under article 37 is required to be expressly made by the sending state.<sup>25</sup> Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State.<sup>26</sup> The textual provisions of both the VCDR and the VCCR broadly mandate that not only foreign officials but also ‘all persons enjoying such privileges and immunities’ must respect the laws and regulations of the receiving State.<sup>27</sup>

Immunity *ratione materiae* protects a state official from foreign court proceedings for official acts performed on behalf of the state even though this immunity is traditionally regarded as an extension of state immunity, which primarily serves the purpose of ensuring that a state is not indirectly impleaded by a proceeding against its officials.<sup>28</sup> However, the gradual separation of the two immunities in recent domestic jurisprudence<sup>29</sup> has featured the argument that immunity *ratione materiae* represents not only a procedural bar to the jurisdiction of the forum court but also a substantive exemption of individual liability.<sup>30</sup> As a result, immunity *ratione materiae*

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<sup>20</sup> Ibid, art 37.

<sup>21</sup> Ibid, art 38.

<sup>22</sup> Ibid, art 39.

<sup>23</sup> *Aziz v Aziz* [2007] EWCA Civ 712.

<sup>24</sup> Ibid, art 31 (4).

<sup>25</sup> Ibid, art 32.

<sup>26</sup> Ibid, art 41(1).

<sup>27</sup> S R Subramanian, ‘Abuse of Diplomatic Privileges and the Balance between Immunities and the Duty to Respect the Local Laws and Regulations under the Vienna Conventions: The Recent Indian Experience’ (2017) 3 CJGG 228.

<sup>28</sup> *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment) [2008] ICJ Rep 177, 242 [188]; Fox, *The Law of State Immunity* (2008) 708–9; Xinxian Shi, ‘Diplomatic immunity *ratione materiae*, immunity *ratione materiae* of state officials, and state immunity: A comparative analysis’ (2020) LJIL 1-21.

<sup>29</sup> *Samantar v Yousuf* 560 US 305 (Supreme Court 2010); *Regina v Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147; *Jones v Saudi Arabia* [2006] UKHL 26; Xinxian Shi, ‘Diplomatic immunity *ratione materiae*, immunity *ratione materiae* of state officials, and state immunity: A comparative analysis’ (2020) LJIL 1-21.

<sup>30</sup> *Prosecutor v Tihomir Blaskic* (Judgement) (1997) Case No IT-95-17/1-T AC [38]; Xinxian Shi, ‘Diplomatic immunity *ratione materiae*, immunity *ratione materiae* of state officials, and state immunity: A comparative analysis’ (2020) LJIL 1-21

cannot be upheld for crimes that attract individual responsibility in international law, even though these crimes may be regarded as official in nature.<sup>31</sup>

In the same line, it can be argued that a service staff member enjoys immunity only for acts performed in the course of diplomatic service. A "diplomatic agent" is the "head of the mission or a member of the diplomatic staff" which means "members of the staff of the mission having diplomatic rank."<sup>32</sup> On the other hand, members of the administrative and technical staff are members of the staff of the mission employed in the administrative and technical service of the mission meaning that both these categories are "members of the staff of the mission."<sup>33</sup>

Regardless of their categories per the VCDR, in certain situations, tasks may be required to be performed by subordinate members of a diplomatic mission not pertaining to their job description or functions. The objective of diplomatic immunity is to facilitate the smooth transition of diplomatic functions rather than ensuring the fulfillment of official duties by mission staff. Therefore, under the VCDR, there can be no meaningful differentiation between duties and functions of subordinate staff or diplomatic agents as the execution of diplomatic functions pertains to the internal administration of individual missions.<sup>34</sup> For example, if an ambassador directs the cook of a diplomatic mission to deliver a sensitive document or instructs a technician to perform certain tasks, the receiving state has to recognize their diplomatic immunity *ratione materiae*. This is simply because the process of execution of diplomatic functions and not the person performing them is given protections, irrespective of whether it pertains to their official functions or not.<sup>35</sup>

The post-VCDR practice of concluding bilateral agreements to extend full immunity to all mission members is strong evidence that states do not treat 'duties' of subordinate members and 'functions' of diplomatic agents differently, for if a mission member is only allowed to perform his or her specific duties, full immunity is hardly necessary from a functional perspective.<sup>36</sup>

#### **4. Does Diplomatic Immunity Cover Local Crimes in the Receiving State?**

This section will focus on to what extent and under what circumstances diplomatic immunity does not extend protection for the commission of local crimes. The receiving state is under a legal obligation not to interfere in the official functions and to respect the immunities and privileges of diplomatic agents for the purpose of non-interference, effective and independent exercise of their official functions.<sup>37</sup> Article 31(1) of the VCDR reflects customary international law providing a diplomatic agent with immunity from the criminal jurisdiction of the receiving state.<sup>38</sup> Per Article 41, persons on the receiving end of diplomatic immunities and privileges are required to respect the laws and regulations of the same; serious breaches of the

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<sup>31</sup> Xinxian Shi, 'Diplomatic immunity *ratione materiae*, immunity *ratione materiae* of state officials, and state immunity: A comparative analysis' (2020) LJIL 1-21.

<sup>32</sup> Patrick O'Keefe, 'Privileges and Immunities of the Diplomatic Family' (1976) 25 (2) ICLQ 329-350.

<sup>33</sup> Ibid.

<sup>34</sup> Xinxian Shi, 'Diplomatic immunity *ratione materiae*, immunity *ratione materiae* of state officials, and state immunity: A comparative analysis' (2020) LJIL 1-21.

<sup>35</sup> Ibid.

<sup>36</sup> Leich (ed), *Cumulative Digest of United States Practice in International Law (1981-1988)* (CUP 1993) 914; Xinxian Shi, 'Diplomatic immunity *ratione materiae*, immunity *ratione materiae* of state officials, and state immunity: A comparative analysis' (2020) LJIL 1-21.

<sup>37</sup> GV McClanahan, *Diplomatic Immunity: Principles, Practices, Problems* (Hurst & Company 1989).

<sup>38</sup> CJ Lewis, *State and Diplomatic Immunity* (3<sup>rd</sup> edn, Lloyd's of London 1990) 135.

law (specifically criminal law) will result in them being declared *persona non grata* by the receiving state under Article 9.<sup>39</sup>

In its traditional sense, sovereignty was absolute.<sup>40</sup> However, states nowadays are bound by various treaties and sovereignty is no longer absolute.<sup>41</sup> By default, foreign officials will be subject to the local rules and regulations, unless the rules of the Vienna Conventions expressly provide otherwise.<sup>42</sup> In *Equatorial Guinea v France*<sup>43</sup>, it was recognized that since premises of missions are placed in the receiving State's territory, legislation of the receiving State applies to the relevant building. As specified in Article 41 (1) of VCDR concerning diplomatic privileges and immunities, "laws and regulations of the receiving State" need to be respected which was reaffirmed in several cases.<sup>44</sup>

In the *Devyanı Khobragade* case, Khobragade was arrested upon allegations of labor exploitation and visa fraud. While the Indian government claimed that the incident amounted to a serious breach of her immunity, the US government relied on the 'grave crimes' exception under article 43 of the VCCR. In the Italian Marines case, two Italian marines attached with a merchant's vessel to prevent piracy shot and killed two Indian fishermen mistaking their vessel to be a pirate one. They were subsequently arrested and charged under the Indian Penal Code amongst other laws. The proceeding was sought to be quashed but the Supreme Court of India held that there existed jurisdiction and directed the creation of a special bench to conduct the trial. The marines were later allowed to return to Italy for voting in their national election upon their conditional return for the trial that was guaranteed by Italian Ambassador Daniele Mancini. When they did not, Mancini was arrested and the claim of diplomatic immunity under VCDR was negated for his voluntary appearance before the Court.<sup>45</sup> In the case of *US v Al-Hamdi*,<sup>46</sup> a court in Virginia, considering the possible immunity of the adult son of a Yemeni diplomat charged with a firearms offense, accepted the certification by the State Department, per the above practice, as conclusive and concluded that the defendant was not entitled to immunity. On appeal, it was confirmed that a US court would give 'substantial deference' to the interpretation of a treaty by the State Department, if it was reasonable.<sup>47</sup>

According to the International Law Commission ("ILC"), the varied state practice regarding exemption from personal inviolability had many forms including disentitlement from claiming immunity premised on the quantum of the sentence (5 years or so), specific crimes for which immunity could not be claimed, the sole focus on the penalty applicable, in certain others, it

<sup>39</sup> Nehaluddin Ahmad, 'The Obligation of Diplomats to Respect the Laws and Regulations of the Hosting State: A Critical Overview of the International Practices' (2020) 9 (18) MDPI 1-14.

<sup>40</sup> S K Kapoor, *International Law & Human Rights* (19<sup>th</sup> edn, Central Law Agency 2017) 127.

<sup>41</sup> Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 330; Michel Rosenfeld and András Sajó (ed), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 480; *Union of India v Sukumar Sengupta* [1990] AIR (SC) 1701.

<sup>42</sup> Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4<sup>th</sup> edn, OUP 2016) 374.

<sup>43</sup> *Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Merits) General List No 163 [2020] ICJ [9] (Declaration of Gaja J).

<sup>44</sup> *United States v Devyanı Khobragade* [2013] 14 Cr008 (SAS); *Republic of Italy v Union of India* (2013) 4 SCC 721; S R Subramanian, 'Abuse of Diplomatic Privileges and the Balance between Immunities and the Duty to Respect the Local Laws and Regulations under the Vienna Conventions: The Recent Indian Experience' (2017) 3 CJGG 206.

<sup>45</sup> *Massimilano Latorre v Union of India* (2012) 252 KLR 794.

<sup>46</sup> *US v Al-Hamdi* 356 F 3d 564 (4th Cir 2004).

<sup>47</sup> Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (14<sup>th</sup> edn, OUP 2016) 323.

was confined to only felony-type crimes. Nevertheless, the non-availability of personal immunity for serious criminal offenses was generally accepted. Two approaches were proposed by the ILC, a) diplomatic immunity to be withheld when the offense concerned is punishable by a maximum term of imprisonment not less than 5 years, and b) when matters of grave crimes were involved.<sup>48</sup>

According to the UK Consular Relations Act, 1968<sup>49</sup> which graciously provides that a reference to a grave crime shall be construed as a reference to any offense punishable with imprisonment for a term that may extend to 5 years or with a more severe sentence'. However, the major problem with this attribution is that there are wide variations in sentencing across the major criminal justice systems and hence it is very difficult to find the common threshold.<sup>50</sup> Regardless, while considering these implications in terms of the Dunn-Sacoolas incident, only the laws of the UK and USA are relevant for consideration as per the mentioned criterion.

Even under the Convention on the Privileges and Immunities of the United Nations, 1946, which guarantees the representatives of UN Members immunity from personal arrest or detention or legal process of every kind, such immunity is subject to certain qualifications. *Firstly*, the privileges and immunities accorded under the Convention are solely for the autonomous exercise of their functions and not for their personal or individual benefits. *Secondly*, there exists a duty for the persons enjoying immunities and privileges under the Convention to waive the same where it impedes the course of justice and can be waived without any prejudice to the purpose of immunity attribution.<sup>51</sup>

It is pertinent to refer to the observation of the ILC that in the case of criminal proceedings, the waiver must be expressed, though, in the case of civil or administrative proceedings, the waiver may be express or implied.<sup>52</sup> In this connection, it may be noted that in the areas of extradition, which is dominated by bilateral treaties, the variations between the legal systems in terms of quantum of sentences or imprisonment are resolved through a 'double criminality' rule. This rule requires that the alleged crime for which extradition is sought should be punishable in both the requesting and requested countries.<sup>53</sup>

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<sup>48</sup> Arthur Watts, *The International Law Commission 1949–1998: Volume One: The Treaties*, (art 42 Commentary) (1st edn, Clarendon 1999) 282; S R Subramanian, 'Abuse of Diplomatic Privileges and the Balance between Immunities and the Duty to Respect the Local Laws and Regulations under the Vienna Conventions: The Recent Indian Experience' (2017) 3 CJGG 208; ILC, 'Documents of the Thirteenth Session, Including the Report of The Commission to the General Assembly' (26 January 1961) UN Doc. A/CN4/134 & ADDI 115; Dapo Akande, '*Immunity of Consular Officials: The Arrest by the US of an Indian Deputy Consul-General*' (*EJIL: Talk!*, 20 December 2013) available at <<https://www.ejiltalk.org/immunity-of-consular-officials-the-arrest-by-the-us-of-an-indian-deputy-consul-general/>> accessed on 13th July 2021.

<sup>49</sup> The Consular Relations Act 1968, s 1(2).

<sup>50</sup> S R Subramanian, 'Abuse of Diplomatic Privileges and the Balance between Immunities and the Duty to Respect the Local Laws and Regulations under the Vienna Conventions: The Recent Indian Experience' (2017) 3 CJGG 208; The Foreign Missions and International Organizations Act 1991, s 2(4); The Diplomatic and Consular Relations Act 2005, s 4(2) (b).

<sup>51</sup> Convention on the Privileges and Immunities of the United Nations 1946 1 UNTS 15, arts 14, 20, 23, 18, 11; S R Subramanian, 'Abuse of Diplomatic Privileges and the Balance between Immunities and the Duty to Respect the Local Laws and Regulations under the Vienna Conventions: The Recent Indian Experience' (2017) 3 CJGG 212-213.

<sup>52</sup> S R Subramanian, 'Abuse of Diplomatic Privileges and the Balance between Immunities and the Duty to Respect the Local Laws and Regulations under the Vienna Conventions: The Recent Indian Experience' (2017) 3 CJGG 221.

<sup>53</sup> S R Subramanian, 'Role of Extradition in Human Rights: The Imperatives of Reforming the Indian Extradition Law' (2014) 40 Commonwealth Law Bulletin 245; S R Subramanian, 'Abuse of Diplomatic Privileges and the

Causing death by dangerous driving is punishable by imprisonment of up to five years in the UK.<sup>54</sup> According to the UK Road Traffic Act 1991, a person who drives a mechanically propelled vehicle dangerously on a road or other public place is guilty of such an offense. In this context, "dangerous" refers to danger either of injury to any person or of serious property damage; and in determining what would be expected of, or obvious to, a competent and careful driver in a particular case, regard shall be had not only to the circumstances of which he or she could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.<sup>55</sup> Woolf CJ said that there is no essential requirement that there be any specific intent to drive dangerously. The concept of what is obvious to a careful driver places the question of what constitutes dangerous driving within the province of the jury.<sup>56</sup> Dangerous driving is regarded as reckless driving under United States law (varies from state to state as in respect of penalty clauses) as a major traffic violation; punishable by various methods such as suspension or revocation of license, fines, or imprisonment.

Therefore, it can be concluded that there are circumstances under which as opined by the ILC diplomatic immunity will not afford protection to the person enjoying it. Regarding complete loss of immunity instead of partial loss, this author is of the opinion that the immunities and privileges accorded to diplomats under the VCDR are accorded for the smooth functioning of diplomatic objectives and therefore any contravention of such purpose for which these immunities and privileges have been accorded consequentially results in the forfeiture of the same.

## 5. The Extradition Treaty between the USA and UK

This segment will focus on whether the extradition of Mrs. Sacoolas was possible under the terms of the treaty. An extradition treaty signed between the USA and the UK focuses on specific procedures, which are to be followed regarding extradition between the two states. According to that treaty, an offense that is punishable by the laws of both the states by deprivation of liberty for one year or more or by a more severe penalty shall be extraditable.<sup>57</sup> It shall be extraditable irrespective of whether the offense is categorized similarly by the requesting and the requested states or not.<sup>58</sup> Extradition shall not be refused based on the nationality of the person sought to be extradited.<sup>59</sup> No extradition is available for political offenses but murder, manslaughter, malicious wounding, or infliction of grievous bodily harm are excluded from the category of political offenses.<sup>60</sup> Extradition is also barred for offenses under military law and not under ordinary criminal law.<sup>61</sup>

The US Embassy on 15 September 1994 stated that State department personnel would be running the Croughton facility and therefore their status shall be governed by VCDR by virtue

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Balance between Immunities and the Duty to Respect the Local Laws and Regulations under the Vienna Conventions: The Recent Indian Experience' (2017) 3 CJGG 209.

<sup>54</sup> Metropolitan Police, '*Sentencing For Causing Death By Driving*' <<https://www.sentencingcouncil.org.uk/wp-content/uploads/FINAL-Death-by-driving-sentencing-leaflet-for-web1.pdf>> accessed 10 July 2021.

<sup>55</sup> The Road Traffic Act 1991, s 1.

<sup>56</sup> *R v Boswell* [1984] 1 WLR 1047; Attorney General's Reference (No 4 of 2000) (2001) 2 Cr App R 417, 422.

<sup>57</sup> Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America 2007 UKTS No 13, art 2 (1).

<sup>58</sup> *Ibid*, art 2 (3) (a).

<sup>59</sup> *Ibid*, art 3.

<sup>60</sup> *Ibid*, arts 4(1), 4(2) (c).

<sup>61</sup> *Ibid*, arts 4(4).

of attributing them the rank of communications attaché.<sup>62</sup> Which was accepted by the FCO on 12 June 1995 on condition of waiver of immunity of the concerned staff.<sup>63</sup> On numerous occasions, statements and exchange of notes between persons deemed to signify or represent a state under the Vienna Convention on the Law of Treaties<sup>64</sup>, 1969 have been regarded to have been as binding as a treaty (such as statements by foreign ministers, prime ministers, attorney generals and even minister of justice).<sup>65</sup> Therefore, the exchange of notes can be arguably as effective and binding as a treaty between these two nations.

The EWHC observed several broad points based on the diplomatic correspondence focused on the exchange of notes between the USA and UK in the Dunn families judicial review application which included there was an express waiver of immunity from UK criminal jurisdiction of “employees” and “staff members” in the A&T category at RAF Croughton and there was no express reference to the position of family members of A&T staff in the terms amongst others.<sup>66</sup>

Therefore, within the provisions of the Extradition Treaty, the refusal of extradition on the ground of Anne Sacoolas having diplomatic immunity is not tenable for manifold grounds. *Firstly*, the offense with which she has been charged is not a political one neither is it punishable by military law, rather under the ordinary criminal law of the UK. *Secondly*, the treaty precludes for extradition whether or not the offense for which the extradition of a person is requested has been categorized dissimilarly under the laws of the requesting and the requesting states. *Thirdly*, offenses that are punishable by imprisonment for a year or more shall be extraditable. The offense of dangerous driving thereby meeting the threshold according to the UK Road Traffic Act 1991. Therefore, the offense with which Anne was charged was an extraditable offense making the refusal of extradition by the USA a violation of the Treaty itself alongside the exchange of notes.

## 6. Applicability of Functional Theory of Diplomatic Immunity

The ‘inviolability’ of domestic agents has traditionally been founded on the following bases, a) diplomatic agents are representatives of their State thereby entitled to privileges granted to the state; b) for functionality, diplomatic agents are granted immunity to perform their diplomatic mission works effectively.<sup>67</sup> Both of these understandings of the nature of diplomatic immunity are reflected in the VCDR.<sup>68</sup>

Diplomatic immunity *ratione materiae* differs from state immunity regarding both nature and extent as it is only granted in all practicality for official acts including personal acts connected with the performance of official duties solely based on the ground of functional necessity.

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<sup>62</sup> *R (Dunn) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWHC 3185 (Admin) [26].

<sup>63</sup> *Ibid* [29].

<sup>64</sup> Vienna Convention on the Law of Treaties 1969 1155 UNTS 331, art 7.

<sup>65</sup> *Land and Maritime Boundary (Cameroon v Nigeria)* (2002) ICJ Rep 303; *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (1994) ICJ Rep 112; *Nuclear Test Cases (Australia v France and New Zealand v France)* (Merits) (1974) ICJ Rep 253; *Frontier Dispute Case (Burkina Faso v Mali)* (1986) ICJ Rep 554; *Questions Relating to the Seizure and Detention of Certain Documents (East Timor v Australia)* (Order) (2014) ICJ Rep 147; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic Of The Congo v Rwanda)* (New Application 2002) (2006) ICJ Rep 6.

<sup>66</sup> *R (Dunn) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWHC 3185 (Admin) [36].

<sup>67</sup> *The Queen v Turnbull ex parte Petroff* (1979) 52 ILR 303-309.

<sup>68</sup> Lisa Rodgers, ‘The Inviolability of Diplomatic Agents in the Context of Employment’ in Paul Behrens (ed) *Diplomatic Law In A New Millennium* (1st edn, OUP 2017) 129.

Nevertheless, the fact that VCDR is silent on the application of this principle gives domestic courts expansive discretion for immunity determination especially when serious offenses are concerned or involved.<sup>69</sup> Even if it is argued that the functional necessity principle exposes diplomats to court proceedings in the receiving state thereby disrupting a diplomat's performance of official acts, the lack of VCDR guidance allows courts to assess whether a private individual act is indeed covered by immunity. In general, courts examine to determine diplomatic immunity whether a private incidental act is connected to the official function performed with emphasis on the circumstantial distinct natures of the connection.<sup>70</sup>

The transition from traditional absolute immunity theory to restrictive immunity theory means that state immunity in current international law is to a large extent dependent on the nature of an act. The principle *par in parem non habet imperium* has been interpreted as granting immunity for acts of sovereign nature (*acta jure imperii*) but not acts of private nature (*acta jure gestionis*).<sup>71</sup> The distinction between official and private acts lies on the premise of whether the alleged illegality stems from the official function or private activity of the concerned diplomat. For example, a diplomat cannot be sued for rejecting a visa as the act falls within the ambit of official functions. However, if the applicant is verbally attacked or abused by the diplomat during the assessment of the visa application, the question that would remain is whether the attack is inclusive of the performance of the official functions being essentially a private act of the diplomat. If yes, then the private act would be protected by diplomatic immunity, and if no, then the act shall fall under the unprotected private act category.<sup>72</sup>

In the 1977 case of *Ministère Public and Republic of Mali v Keita*,<sup>73</sup> the Court had to decide whether the murder of the Ambassador of Mali by a chauffeur came within the ambit of official duties or acts or functions. The Court observed that even though the act was performed during work hours on Embassy grounds, the act was done in connection with a personal dispute between the Ambassador and the chauffeur. The Court, therefore, held that murder by the chauffeur was not a natural consequence of or connected to the performance of or exercise of official duties as diplomatic immunity is granted extends only to the abovementioned instances.

Article 41(1) imposes an obligation to respect local laws and regulations on foreign mission members, but this obligation is without prejudice to their privileges and immunities. Therefore, in the case of private incidental acts, domestic courts, while applying their discretion, may balance the benefit to the performance of diplomatic functions accrued through the granting of immunity against the damage done to the victim or the society as a whole. This does not mean, of course, that a mere allegation by the plaintiff is sufficient for the court to reject diplomatic immunity *ratione materiae*, but it does suggest that, when an allegation is corroborated by credible evidence, minor offenses are much more likely to be covered by immunity than serious offenses.<sup>74</sup> It is to be noted that under Article 41(1), not all acts of a diplomatic mission are intended to be subject to the laws of the receiving state through the use of the words 'respect' in the 1957 draft instead of 'comply'. ILC's commentary on the 1958 draft specifies that the duty to respect the laws of the receiving state is not applicable when precluded by the privileges

<sup>69</sup> Xinxian Shi, 'Diplomatic immunity *ratione materiae*, immunity *ratione materiae* of state officials, and state immunity: A comparative analysis' (2020) LJIL 1-21.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> *Ministère Public and Republic of Mali v Keita* (1977) Journal des Tribunaux 678; 77 ILR 410.

<sup>74</sup> Xinxian Shi, 'Diplomatic immunity *ratione materiae*, immunity *ratione materiae* of state officials, and state immunity: A comparative analysis' (2020) LJIL 1-21.

and immunities of the diplomatic agent/s adding support to the standing that certain acts of mission members are not subject to the laws of the receiving state.<sup>75</sup>

Diplomatic immunity does not absolve the personal liability of a mission official as those disputes arise predominantly from the personal acts of the person concerned rather than from official acts or acts done in the performance of diplomatic functions.<sup>76</sup> What this means is that an act of speeding for the emergency diplomatic functionalities will fall within the purview of ‘official acts/duties’, but in the absence of any such exigent circumstances, it will be nothing but a private act.<sup>77</sup> On a similar note, diplomatic immunity does not mean a mission member bears no accountability for violation of traffic regulations that are neither in official acts of the state nor are they anything except personal acts. What diplomatic immunity does in this sense is that it ascertains the integrity of official functions to not get it compromised by a mission member being involved in court proceedings without exempting the member from individual responsibility under the domestic law.<sup>78</sup>

## 7. Can Anne Sacoolas be Prosecuted?

The textual provisions of both the VCDR and the VCCR broadly mandate that not only foreign officials but also ‘all persons enjoying such privileges and immunities’ must respect the laws and regulations of the receiving state.<sup>79</sup> Because of the language of the provision, it is generally viewed as the ‘moral duty’ or ‘a duty of courtesy’ rather than as a legal duty to respect the local laws.<sup>80</sup> This would apply equally to families enjoying diplomatic immunity under the mandate of VCDR. It is the practice of the UK, New Zealand, Canada, and Australia that the determination of family member status in a legal proceeding is a question of fact rather than of law in terms of interpretation of Article 37(1).<sup>81</sup> The administrative and technical staff of a diplomatic mission enjoy diplomatic immunity for the performance of acts that are reasonably incidental to their official functions during working hours. They may, however, be sued subject to varying personal obligations.<sup>82</sup>

In the case of *Empson v Smith*,<sup>83</sup> the Court of Appeal said that it was arguable that acts done by the defendant concerning a tenancy of a private residence were performed ‘outside the course of his duties’ and this issue was remitted to the lower court for a determination on the evidence. In *Holland v Lampen-Wolfe*,<sup>84</sup> the claimant (employed in a US military base in the UK at education capacity) faced disparaging remarks made by the defendant (also an employee of US Defense Forces) about the claimant’s teaching. The claimant sued for libel. The House of Lords held that where the immunity applies, covers an official of the state in respect of acts performed by him or her in an official capacity and that at all material times the defendant acted

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Barnhoorn (ed), ‘Netherlands Judicial Decisions Involving Questions of Public International Law, 1974 – 1975’ (1976) 7 NYIL 303; Xinxian Shi, ‘Diplomatic immunity *ratione materiae*, immunity *ratione materiae* of state officials, and state immunity: A comparative analysis’ (2020) LJIL 1-21.

<sup>79</sup> S R Subramanian, ‘Abuse of Diplomatic Privileges and the Balance between Immunities and the Duty to Respect the Local Laws and Regulations under the Vienna Conventions: The Recent Indian Experience’ (2017) 3 CJGG 228.

<sup>80</sup> Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4<sup>th</sup> edn, OUP 2016) 374.

<sup>81</sup> Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (14<sup>th</sup> edn, OUP 2016) 322.

<sup>82</sup> Ibid, 333.

<sup>83</sup> *Empson v Smith* [1966] 1 QB 426.

<sup>84</sup> *Holland v Lampen-Wolfe* [2001] 1 WLR 1573.

in his or her capacity as an official of the United States Department of Defense, being the department responsible for the armed forces of the United States present in the United Kingdom.<sup>85</sup>

The Court in *R (Dunn) v FCO* observed that the Sacoolas family enjoyed immunities and privileges under the VCDR (per Article 37 and 39). That there was no express waiver of their immunity under Article 32 of VCDR even though the legally binding Exchange of Notes was a formal expression of waiver of immunity for the AT&T staff not amounting to a waiver of the same for their families.<sup>86</sup> The FCO conceded however that the effect of granting immunity to Mrs. Sacoolas is “anomalous” when there was a waiver of her husband’s immunity. Why such an anomaly arose is, it says, a matter of speculation.<sup>87</sup>

Interpretation according to the VCDR’s language has been regarded as central to the effective operation of the system of diplomatic immunity for certainty and consistency of application.<sup>88</sup> The Court observed that A&T Staff and their families enjoy inviolability and immunity from criminal jurisdiction automatically (i) as a matter of international law, by operation of Articles 29, 31(1) and 37(2) VCDR; and (ii) as a matter of primary domestic legislation, by operation of s2(1) of the 1964 Act.<sup>89</sup> It also observed that although in one sense, the family of a diplomatic agent or member of A&T staff enjoy what can loosely be called a “derivative” set of privileges and immunities under Articles 37(1) and 37(2), it is clear in their judgment that the VCDR confers separate entitlements to inviolability and immunity on (i) the diplomatic agent or member of A&T Staff; and (ii) his/her family members. These are distinct and independent entitlements.<sup>90</sup> However, keeping in mind that diplomatic immunity does not extend to acts that are personal and not connected to official functions, there has to be a reasonable nexus or proximate connection between the act and the employment of the person concerned doing the act.<sup>91</sup> It has to be shown that the act or work being done at the time was not in furtherance of the own interest of the person concerned rather by the nature of his employment or official duties.<sup>92</sup> In multiple cases it has been held that there has to be a proximate cause between the act and the official duty, unless there is the existence of the same, every incident will not be regarded as done per the course of official functions.<sup>93</sup>

Because according to the Extradition treaty between the USA and the UK, an offense will be extraditable irrespective of whether it is or is not regarded as such under the laws of the receiving and requesting state. Moreover, accepting the fact that Mrs. Sacoolas enjoyed diplomatic immunity derived from the immunity of her spouse that is extended to acts performed in connection with his official acts. At the time of the incident, it has been accepted

<sup>85</sup> Martin Dixon, Sarah Williams and Robert McCorquodale, *Cases and Materials on International Law* (6th edn, OUP 2016) 316; *Trendtex Trading Corp v Central Bank of Nigeria* [1977] 2 WLR 356.

<sup>86</sup> *R (Dunn) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWHC 3185 (Admin) [98], [111], [112], [113].

<sup>87</sup> *Ibid* [94].

<sup>88</sup> *Ibid* [14].

<sup>89</sup> *Ibid* [18].

<sup>90</sup> *Ibid*.

<sup>91</sup> *General Manager, BEST Undertaking Bombay v Mrs Agnes* [1964] AIR (SC) 193; *Weaver v Tredagar Iron and Co* (1940) 3 All ER 157.

<sup>92</sup> *Lancashire and Yorkshire Railway Co v Highley* (1971) AC 352; *Mackinnon Mackenzie & Co Pvt Ltd v Ibrahim Mohd Issak* (1970) 1 SCR 869 (Per Ramaswami J); *RM Pandey v API Ltd* (1956) Bom 115; *National Iron & Steel Co v Manorama* (1953) Cl 143; *Mrs Saton v National Coal Board* (1957) 2 All ER 667.

<sup>93</sup> *Regional Director ESI Corp v Francis De Costa* (1996) SCC (L&S) 1361; *Saurashtra Salt Mfg Co v Bai Valu Raja* [1958] AIR (SC) 881; *General Manager Easter Railway v RR Verma* (1979) Lab IC 1099; *St Helens Colliery Company Ltd v Hewitson* (1924) AC 59.

by parties and by the Court that the Sacoolas family was on their way to a particular location not in connection with the employment or official functions of Mr. Sacoolas<sup>94</sup>, and from a functionality perspective the Sacoolas family only enjoys diplomatic immunity in respect of acts of official nature or connected thereto and not purely personal acts, it can be said that at the time of the incident Mrs. Sacoolas did not have diplomatic immunity because the act itself being an act of personal nature disconnected with the official functions concerned.

*Furthermore, Mrs. Sacoolas has been claimed to have been in the employment of the US State Department at the time of the crash<sup>95</sup> meaning that as a family member of an AT&T, she would not be entitled to full immunity as observed by the EWHC, rather she would not have immunity at all from criminal prosecution under the RAF Croughton bylaws (exchange of notes previously mentioned). This, therefore, amounts to a contravention of the Extradition Treaty between the USA and UK alongside the Croughton bylaws. A question may also be raised here regarding the act being done in good faith by Mrs. Sacoolas as it has been claimed that she was mistakenly driving on the wrong side of the road.<sup>96</sup> Even then, taking into account the fact that post-dinner on the date of the incident she started her vehicle on the wrong side of the road<sup>97</sup>; any claim of good faith exercised by Mrs. Sacoolas stands negated exhibiting an absence of due care and consideration.*

## **8. Where Does This Leave Diplomatic Immunity?**

It has been discouraged to consider each application of diplomatic immunity in terms of whether or not it impedes the performance of diplomatic functions. The reason is that the more loosely a multilateral treaty is interpreted, the greater the scope for damaging divergences between different states in its application. Therefore, a domestic court should not, therefore, depart from the natural meaning of the Convention unless the departure reflects the intentions of the other participating states so that it can be assumed to be equally acceptable to them.<sup>98</sup>

However, considering the functionality theory regarding diplomatic immunity, the dual criminality rule in tandem with the derivative nature of diplomatic immunity enjoyed by the Sacoolas family including the Extradition Treaty between the UK and the USA, it can reasonably be concluded that there was ample scope for cooperation with the UK authorities alongside avenues to consider (or reconsider) the scope or status of diplomatic immunity enjoyed by Mrs. Sacoolas at the moment of the accident. The EWHC ruling has focused on the point that she had diplomatic immunity at the time of the accident and that there was no express waiver of her immunity by the US, therefore, she had immunity from criminal jurisdiction. Recourse could have been made to the connection or nexus of the act during the incident with the diplomatic functions in the interests of justice as the Lordships themselves said that they do not arrive at this conclusion with enthusiasm.<sup>99</sup>

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<sup>94</sup> *R (Dunn) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWHC 3185 (Admin) [42].

<sup>95</sup> Johnny Diaz, ‘Woman Charged in Fatal U.K. Collision Was Employed by State Department, Lawyer Says’ (*The New York Times*, 4 February 2021) available at <https://www.nytimes.com/2021/02/04/us/anne-sacoolas-harry-dunn-uk.html> accessed 23 October 2021.

<sup>96</sup> ‘Harry Dunn death: Anne Sacoolas lawyers say she 'drove on wrong side of road' (BBC, 11 September 2020) available at <<https://www.bbc.com/news/uk-england-northamptonshire-54112841>> accessed 23 October 2021.

<sup>97</sup> *R (Dunn) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWHC 3185 (Admin) [42].

<sup>98</sup> *Al-Malki v Reyes* [2017] UKSC 61 [11]-[12] (Per Lord Sumption); *R (Dunn) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWHC 3185 (Admin) [12]-[13].

<sup>99</sup> *R (Dunn) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWHC 3185 (Admin) [119].

Given the fact that the accident cost young Harry his life robbing him of his right to life and that right to life is understood to be *jus cogens* or *erga omnes*,<sup>100</sup> and it obligates States Parties to uphold both positive and negative duties. An obligation *erga omnes* is owed to the international community as a whole.<sup>101</sup> *Erga omnes* obligations may be defined as obligations of such nature that each state party has a common interest in compliance with these obligations. Common interest implies that any State party owes the obligations in question to all the other States Parties. All the States parties “have a legal interest” in the protection of the rights involved.<sup>102</sup> Such obligations include outlawing acts of aggression and genocide, protection from slavery, racial discrimination and torture, and the right to self-determination.<sup>103</sup> This could have (if not should have) put more pressure on the UK to follow through with the traditional course of the justice system.

## 9. Conclusion

Diplomatic immunities and privileges do indeed exhibit bilateral inter-state relationships effectively. Nevertheless, it has to be considered whether it will continue to be a bar to meet the ends of justice for families shaken and bereaved by tragedies like the Dunn. Though diplomatic immunity is considered to be an extension of state immunity, it should not by the same impede accountability as state immunity and sovereignty itself has become restricted and redefined, and with the development of international law, the concept of diplomatic immunity though an essential limb of international law should not stay stagnant.

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<sup>100</sup> UNHRC, ‘General Comment 36: Right to Life’ (2019) UN Doc CCPR/C/GC/36.

<sup>101</sup> Craig Eggett ‘Clarification and Conflation: Obligations *Erga Omnes* in the Chagos Opinion’ (EJIL: Talk!, 21 May 2019) < <https://www.ejiltalk.org/clarification-and-conflation-obligations-erga-omnes-in-the-chagos-opinion/>> accessed 12 July 2021.

<sup>102</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Second Phase) (Judgment) [1970] ICJ Rep 32 [33]; *Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422 [68].

<sup>103</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Second Phase) (Judgment) [1970] ICJ Rep 32 [34]; *Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422 [69]; *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 102 [29]; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95 [180].