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Modern Slavery and the Commercial Activity Exception to Diplomatic Immunity From Civil Jurisdiction: The UK Supreme Court's Decision in *Basfar* v *Wong*

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In *Basfar* v *Wong* a majority of the UK Supreme Court decided that the exploitation of labour in circumstances of modern slavery constitutes 'exercising' a 'commercial activity' for the purposes of the exception to diplomatic immunity contained in Article 31(1)(c) of the Vienna Convention on Diplomatic Relations. The case is the first time a senior court anywhere in the world has adopted such an interpretation of this provision and potentially opens up a new avenue for holding foreign diplomats accountable for exploiting domestic workers. Yet, the Court's reasoning also leaves unanswered some important questions. This note reviews the Supreme Court decision and its implications for the content and scope of the 'commercial activity' exception to diplomatic immunity. It also considers what the case might reveal about the Supreme Court's current attitude(s) to adjudicating complex questions of international law that potentially warrant breaking new ground.

In *Basfar* v *Wong* a majority of the UK Supreme Court decided that the exploitation of labour in circumstances of modern slavery constitutes 'exercising' a 'commercial activity' for the purposes of the exception to diplomatic immunity provided for in Article 31(1)(c) of the Vienna Convention on Diplomatic Relations (VCDR).[1] The case will accordingly now go back to the Employment Tribunal for a hearing on the truth of the allegations for the purposes of the exception and then, perhaps, to a hearing on the merits,[2] although enforcement of any decision against Mr Basfar will be difficult as he has now finished his posting and seemingly left the UK.[3] Nonetheless, the Supreme Court's de-

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1 [2022] UKSC 20; [2023] AC 33 (*Basfar* v *Wong (SC)*).
2 *ibid* at [107].
3 See 'The London Diplomatic List' (Revised December 2022) at https://www.gov.uk/government/publications/foreign-embassies-in-the-uk (last visited 10 January 2022). As noted in the Supreme Court's decision, enforcement remains a challenge anyway due to the prohibition in the VCDR, Art 31(3) of measures of execution that would infringe the inviolability of the diplomat's person or residence: see *Basfar* v *Wong (SC) ibid* at [50].

cision in this case is the first time a senior court anywhere in the world has interpreted the 'commercial activity' exception to diplomatic immunity in the VCDR as including the exploitation of a domestic worker in conditions of modern slavery.[4] The decision in *Basfar* v *Wong* potentially opens up a new avenue for holding foreign diplomats accountable for exploitation of domestic workers in conditions of modern slavery. It is ground-breaking.

The case also raises, again, the now familiar 'tightrope' of principle and policy faced by domestic courts in cases that raise claims of international immunity in the context of alleged serious human rights abuses.[5] At least since *Jones* v *Saudi Arabia* (*Jones*) and *Jurisdictional Immunities of the State (Germany* v *Italy) (Judgment)* (*Jurisdictional Immunities*),[6] the conventional wisdom has been that, generally, this tightrope is balanced in favour of immunity – international immunities will not generally be displaced on the basis of the international wrongfulness of conduct (including violation of a peremptory norm), nor by the right of access to remedies, and no 'new' exception to (at least) State immunity has emerged for human rights cases.[7] *Basfar* v *Wong* casts some doubt on this conventional wisdom, but without revisiting the battlefield that is specific 'human rights exceptions' to international immunities. Indeed, Ms Wong's representatives made no submissions on the 'human rights arguments' litigated in previous cases and instead focused on the more modest question of the scope of an existing, codified exception to diplomatic immunity.[8] Although the international policy imperatives underlying diplomatic immunity make a broad interpretation of any exception

4 The Supremo Tribunal de Justiça (Portugal) found in *Fonseca* v *Larren* (30 January 1991) that '[h]iring a domestic servant for the private residence of a diplomat is an act outside of the diplomatic functions of the agent and therefore not included in the immunity from jurisdiction', however this was on the basis of a principle of statutory construction that is not applicable to a treaty in England: see *Al-Malki* v *Reyes* [2017] UKSC 61; [2019] AC 735 (*Reyes (SC)*) at [33]; *Basfar* v *Wong (SC) ibid* at [149].

5 See, for example, Andrew Dickinson, 'Germany v. Italy and the Territorial Tort Exception: Walking the Tightrope' (2013) 11 *Journal of International Criminal Justice* 147.

6 See for example *Al-Adsani* v *UK* (2001) 123 ILR 24; *Jones* v *Saudi Arabia* [2006] UKHL 26; [2007] 1 AC 270; *Jurisdictional Immunities of the State (Germany* v *Italy) (Judgment)* [2012] ICJ Rep 99 (*Jurisdictional Immunities*). Although, for some recent work challenging whether the assessments made of the state of customary international law in previous cases holds, see Vessela Terzieva, 'State Immunity and Victims' Access to Court, Reparation and the Truth' (2022) 22 *International Criminal Law Review* 780.

7 See generally François Larocque, 'Torture, jurisdiction and immunity: theories and practices in search of one another' in A. Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Cheltenham: Edward Elgar, 2015). Although see *Benkharbouche* v *Embassy of the Republic of Sudan* [2017] UKSC 62; [2019] AC 777 (*Benkharbouche*), where the Supreme Court held that the immunity of State employers of domestic embassy personnel provided under the State Immunity Act 1978 was not required by public international law and therefore contravened the European Convention on Human Rights, Art 6. On the preservation of diplomatic immunity 'in the face of these attacks' see Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (Oxford: OUP, 4th ed, 2016) 1.

8 The Court explicitly 'commended' the 'decision of Ms Wong's representatives not to renew' these arguments: *Basfar* v *Wong (SC)* n 1 above at [24]. On the strategy, see Philippa Webb, 'Not Reinventing the Wheel: Using Existing Exceptions to Sovereign Immunity to Enhance Accountability' (Thomas Franck Lecture, 8 September 2022) at https://www.kfg-intlaw.de/News%20and%20Events/news_einzel.php?ID=233 [https://perma.cc/55AE-6RM7].

an uphill task,[9] it is also 'difficult for [a] court to forsake what it perceives to be a legally respectable solution and instead to favour a conclusion that its system cannot provide redress for an apparently serious case of domestic servitude'.[10] Put to this test in *Basfar* v *Wong*, a majority of the Supreme Court (consisting of Lord Briggs, Lord Leggatt, and Lord Stephens) adopted a broad interpretation of Article 31(1)(c) that has the effect of restricting diplomatic immunity, potentially significantly.

This note reviews the decision and argues that, although the result is to be welcomed from an accountability perspective,[11] the Court's reasoning leaves some important questions unanswered. First, the reasoning adopted by the majority in support of its interpretation of Article 31(1)(c) leaves the precise limits of the exception uncertain, and reveals a shaky understanding of some fundamental principles of treaty interpretation. Second, the majority's approach in dismissing 'reciprocity' and the 'invasiveness' concerns is defensible in principle, but also risks understating the relevance of these concerns in the context of diplomatic immunities. Finally, the note examines what appear to be conflicting views within the Court as to its proper judicial function when faced with difficult questions of international law that potentially warrant breaking new ground. On this front, the note argues that the majority's decision in *Basfar* v *Wong* should be seen as a daring but defensible departure from previous hesitance in UK courts towards an embrace (again) of the role of domestic courts as important contributors to the development of international law. Whether courts in other jurisdictions will follow the bold approach taken by the Supreme Court in this case remains, however, to be seen.

BACKGROUND

Under the VCDR, enacted into UK domestic law by the Diplomatic Privileges Act 1964, diplomatic agents enjoy complete immunity from the criminal jurisdiction of UK courts, and, generally, the civil jurisdiction of such courts except where one of three enumerated exceptions applies.[12] Article 31(1)(c) of the VCDR provides for such an exception 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'.[13]

9 See for example *Reyes (SC)* n 4 above at [68]; *Basfar* v *Wong* [2020] ICR 1185 (*Basfar* v *Wong (EAT)*) at [78].

10 *Basfar* v *Wong (EAT) ibid* at [78]. Judge Brown, in the Employment Tribunal decision striking out Mr Basfar's claim to diplomatic immunity, adopted Lord Wilson's remarks herein: see *Wong* v *Basfar* Case No 2206477/2018, Judgment and Reasons of 13 June 2019 (*Basfar* v *Wong (ET)*) at [85].

11 See also Rosana Garciandia, 'Domestic Servitude and Diplomatic Immunity: The Decision of the UK Supreme Court in *Basfar* v *Wong*' (2023) 52 *Industrial Law Journal* 451; Annachiara Sarto, 'The Interconnection of Human Rights and Diplomatic Immunity as Seen by the United Kingdom Supreme Court' (2023) 9 *International Labor Rights Case Law* 110.

12 VCDR, Art 31.

13 The other exceptions are for '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

In this case, Ms Josephine Wong brought a number of complaints against Mr Khalid Basfar, who at the time of proceedings was a member of the diplomatic staff of the mission of the Kingdom of Saudi Arabia in the United Kingdom, for wages and breaches of employment rights.[14] Ms Wong is a migrant domestic worker and alleges that she is a victim of human trafficking who was exploited by Mr Basfar and his family in conditions of modern slavery.[15]

According to the facts alleged, Ms Wong was employed by the diplomatic household of Mr Basfar in Saudi Arabia from November 2015. She was brought to the UK in 2016 to continue working for him and, in order to obtain a visa, was provided with a contract detailing agreed hours of work, holidays, and remuneration.[16] Allegedly, Ms Wong was then subjected to egregious mistreatment, including being 'confined at all times to Mr Basfar's house except to take out the rubbish', 'held virtually incommunicado', 'made to work from 7am to around 11.30pm each day, with no days off or rest breaks, and was required to wear a door-bell at all times so that she was at the family's beck and call 24 hours a day'.[17] She claims to have been 'shouted at incessantly', 'regularly called offensive names', and when the family was home, 'only allowed to eat their left-over food'.[18] She was allegedly paid nothing for seven months, then 9,000 Saudi Riyals (approximately £1,800) for six months in one sum, and not again.[19] According to Ms Wong's pleaded case, this mistreatment amounts to 'trafficking in persons' as defined in international law and the 'exercise' of a 'commercial activity' such that Mr Basfar is not immune from the civil jurisdiction of UK courts. The Employment Tribunal (ET) decided in Ms Wong's favour.[20] The Employment Appeal Tribunal (EAT) then reversed that decision.[21] Given the general importance of the issue, the EAT issued a certificate that the case was suitable for a 'leapfrog appeal' to the Supreme Court, for which the Court granted permission.[22]

Interestingly, Ms Wong's pleaded case focused on the trafficking dimension of the facts more than 'modern slavery' more broadly. 'Modern slavery' is an umbrella phrase, commonly used for the discrete concepts of slavery, servitude, forced labour, and human trafficking, and its application on the alleged facts was not substantively considered, nor argued, in the courts below the Supreme

of the mission' and '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': see VCDR, Arts 31(1)(a), 31(1)(b).

14 More specifically, Ms Wong has made complaints of 'wrongful dismissal, failure to pay the National Minimum Wage, unlawful deductions from wages (failure to pay the National Minimum Wage and holiday pay), claims under the Working Time Regulations 1998, failure to provide written wage slips and failure to provide written employment particulars': *Wong* v *Basfar (ET)* n 10 above at [13].

15 *Basfar* v *Wong (SC)* n 1 above at [1].

16 *ibid* at [7].

17 *ibid* at [8].

18 *ibid*.

19 *ibid* at [9].

20 *Wong* v *Basfar (ET)* n 10 above (Judge Brown sitting alone).

21 *Basfar* v *Wong (EAT)* n 9 above (Justice Soole sitting alone).

22 See *Basfar* v *Wong (SC)* n 1 above at [4].

Court.[23] It was only when pressed in questioning that the hearing turned substantively to questions of 'modern slavery'.[24] The Court then invited written submissions on 'whether, on the facts alleged, the claim can properly be characterised as relating to forced labour and/or domestic servitude'.[25]

Ms Wong's case builds upon the *Al-Malki* v *Reyes* (*Reyes*) case previously brought before UK courts, which involved very similar facts and in which submissions on the scope of the Article 31(1)(c) exception were made to the Supreme Court.[26] There, however, 'the diplomat's posting ended during the litigation' such that the question of immunity from jurisdiction became one that could be resolved by determining the scope of the diplomat's residual immunities after leaving office.[27] The Court held that the employment of domestic workers is not part of a diplomatic agent's 'official functions' such that immunity for employment-related claims does not persist once the diplomat leaves office.[28] Therefore, the Court did not need to decide the point of whether the diplomat would have had immunity if still in post at the time of the hearing, as was the case in *Basfar* v *Wong*.[29] A minority of the Court nonetheless expressed a clear view that the diplomat would have immunity,[30] while the majority expressed doubts.[31]

In *Basfar* v *Wong*, the Supreme Court was faced with the question of whether the Article 31(1)(c) exception applies where the diplomat remains in post. The Court accepted that *Reyes* had answered the 'outside his official functions' aspect of this question, and there was no suggestion on the facts that Mr Basfar's alleged conduct constituted 'professional activity' enlivening the exception. Therefore, the only question for the Court in *Basfar* v *Wong* was whether Ms Wong's claim 'related' to a 'commercial activity exercised' by Mr Basfar.

23 Ms Wong's claim form asserted that she 'is a victim of *trafficking*' (emphasis added). For the purposes of the strike out application, the parties then agreed that the question for the tribunal was 'whether the respondent's employment of the claimant as a domestic servant (*in assumed circumstances of modern slavery*) was a commercial activity exercised by the respondent outside his official functions' (emphasis added). Yet, even then, neither the ET nor the EAT judgment substantively considered the various forms of modern slavery, nor the application of these concepts to the alleged facts. Ms Wong's case as argued in the Supreme Court hearing also focused on the allegation of *trafficking*, submitting that keeping Ms Wong in domestic servitude constituted 'harbouring' her within the definition of trafficking as contained in the Palermo Protocol. Mr Basfar's case was similarly focused on trafficking. See *Wong* v *Basfar (ET)* n 10 above at [14]-[15]; *Basfar* v *Wong (SC) ibid* at [84]-[85]. See also the recordings of argument heard on 13 October 2021 (morning and afternoon) and 14 October 2021 (morning) at https://www.supremecourt.uk/cases/uksc-2020-0155.html [https://perma.cc/NJC5-MNYR].
24 See, for example, the recording for 14 October 2021 from 2:40:00, *ibid*.
25 *Basfar* v *Wong (SC)* n 1 above at [91].
26 *Reyes (SC)* n 4 above.
27 VCDR, Art 39(2).
28 *Reyes (SC)* n 4 above at [4], [21] per Lord Sumption, with whom Lord Neuberger agreed; at [54], [55] per Lord Wilson; at [69] per Baroness Hale and Lord Clarke.
29 *ibid* at [51], [56], [69].
30 *ibid* at [51] per Lord Sumption and Lord Neuberger.
31 *ibid* at [57]-[68] per Lord Wilson; at [69] per Baroness Hale and Lord Clarke, agreeing with Lord Wilson.

INTERPRETATION OF THE 'COMMERCIAL ACTIVITY' EXCEPTION

According to Article 31(1) of the VCLT, a treaty is to be 'interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Article 31(3) provides that 'together with the context' there 'shall be taken into account', inter alia, 'any relevant rules of international law applicable in the relations between the parties'. Pursuant to Article 32, only once this approach to interpretation yields a meaning can one resort to supplementary means of interpretation, including recourse to the *travaux préparatoires*, to either 'confirm' that meaning, or 'determine' it when the Article 31 approach to interpretation 'leaves the meaning ambiguous or obscure' or 'leads to a result which is manifestly absurd or unreasonable'. In *Basfar* v *Wong*, the members of the Court were in agreement that these are the applicable interpretative rules for determining the scope of Article 31(1)(c) of the VCDR.[32] They diverged, however, in their application.

General approach to interpretation

The starting point for the majority's analysis was interpretation of the ordinary meaning of the words 'commercial activity'. For Lord Briggs and Lord Leggatt (with whom Lord Stephens agreed), as a matter of ordinary language these terms plainly include the concepts of 'carrying on a business' or 'setting up shop' but are 'not *limited* to them' – 'buying goods and services' could also be considered a commercial activity, regardless of the purpose of purchase, as could 'entering into a contract of employment as an employer (or employee) and receiving (or supplying) personal services under such a contract'.[33] This conclusion directly parts ways with the view expressed by Lord Sumption in *Reyes* that the ordinary meaning of 'exercising' a 'commercial activity' is *confined* to 'carrying on a business' or 'setting up shop'.[34] There are indications in Lord Hamblen and Lady Rose's judgment that this was their view of the ordinary meaning of the terms also.[35] However, on a broad approach to 'commerce' as, generally, simply meaning the exchange of goods and services, the majority's view here seems justified.[36]

The more difficult question, however, is whether this is (or remains) the meaning of 'commercial activity' when considered in the context of the VCDR and having regard to *this* treaty's object and purpose, as required by Article 31(1) of the VCLT. On this point, the majority were in agreement with Lord Hamblen and Lady Rose that the normal employment of a domestic

32 *Basfar* v *Wong (SC)* n 1 above at [16]-[18], [109].
33 *ibid* at [28]-[29].
34 *Reyes (SC)* n 4 above at [21(2)].
35 See *Basfar* v *Wong (SC)* at [111]-[112].
36 cf *Tabion* v *Mufti* (1996) 73 F 3d 535, quoted in *Reyes (SC)* n 4 above at [23] (the plaintiff arguing that 'because "commerce" is simply the exchange of goods and services … "commercial activity" necessarily encompasses contracts for goods and services, including employment contracts').

worker by a diplomatic agent cannot be considered an 'exercise' of 'commercial activity' for the purposes of Article 31(1)(c) of the VCDR. For Lord Hamblen and Lady Rose, the exclusion of such acts from the exception was due to the ordinary meaning of the phrase (and reinforced by the context of the phrase, its object and purpose, the *travaux préparatoires*, and, seemingly, policy concerns).[37] For the majority, in contrast, the reason lay in large part in the difference between State and diplomatic immunity.[38] While the majority accepted that the concept of 'commercial activity' in the foreign sovereign immunity context (at least in the US, Canadian, and UK enactments) 'includes the employment of a domestic worker (and purchasing goods or other services)',[39] the same interpretation could not be 'transposed' to the diplomatic immunity context due to the difference in rationale underpinning it – 'diplomatic immunity extends more widely to provide personal protection to diplomatic agents (and their families) while they are present in the receiving state' due to their 'corporeal vulnerability' as human agents.[40] Ensuring the effective performance of the functions of diplomatic missions therefore renders it 'necessary to protect the freedom of individuals sent to perform those functions to live and go about their ordinary daily lives in the receiving state without hindrance'.[41]

The conclusion followed that 'it would be contrary to the purpose of conferring immunity on diplomatic agents to interpret the words 'any … commercial activity' in Article 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'.[42] For these activities, immunity from civil jurisdiction is justified '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'.[43]

This analysis seems reasonable enough, and is broadly consistent with understandings of the rationale of diplomatic immunity in other courts and the literature.[44] Where the majority significantly departed from the well-worn path to forge a new one was, however, in its next step: that 'keeping a person in circumstances of modern slavery [cannot] reasonably be equated with the ordinary hiring of a domestic employee' and that the 'material and qualitative difference between these activities' renders the former a 'commercial activity'.[45] The crucial difference was located in the elements of coercion and control by which

37 *Basfar* v *Wong (SC)* n 1 above at [111], [114]-[118].
38 *ibid* at [33].
39 *ibid* at [32]. Notably, the UK State Immunity Act 1978, s 4 contains a specific exception to State immunity for employment contracts made or to be performed in the UK, as well as an exception in s 3 for proceedings relating to a 'commercial activity'. This was discussed by the majority alongside the US and Canadian legislation before concluding that the concept of 'commercial activity' in the sovereign immunity context must include employment of a domestic worker: see *ibid* at [30]-[31].
40 *ibid*.
41 *ibid*.
42 *ibid* at [34].
43 *ibid*.
44 See for example Denza, n 7 above. See also the discussion in *Reyes (SC)* n 4 above at [22]-[38].
45 *Basfar* v *Wong (SC)* n 1 above at [38], [42]-[43].

work is extracted in conditions of modern slavery, whereas in ordinary employment the relationship is 'voluntary', 'freely entered into and governed by the terms of a contract'.[46] From here, Lords Briggs and Leggatt went on to consider the vulnerable characteristics of migrant domestic workers and exploitation of control over them for personal profit to conclude that 'Mr Basfar has on the assumed facts made a substantial financial gain from his exploitation of Ms Wong's labour, 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 practised for personal profit'.[47]

That there are ample grounds for distinguishing modern slavery from ordinary domestic work, and that modern slavery has a distinctly 'commercial' aspect, is, it is submitted, clear, at least according to widely accepted views (reflected in international instruments).[48] However, the question remains: does this make the exploitation of a domestic worker in such circumstances a 'commercial activity' caught by Article 31(1)(c) of the VCDR?

It is on this point that the majority's reasoning could, respectfully, be more robust. Lord Briggs and Lord Leggatt return to 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' and state that

> [t]hat 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 labour 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 ordinary contracts incidental to the daily life of the diplomat and family members which the immunity serves to protect.[49]

As forcefully observed in Lord Hamblen and Lady Rose's dissent, there is something uncomfortable in the logic underlying this step of the majority's reasoning. It requires one to accept 'that the *conditions* under which a person is employed or how they came to be employed can convert employment which is not of itself a "commercial activity" exercised by her employer into such an activity falling within the exception'.[50] Put another way, it introduces a normative

46 *ibid* at [43].
47 *ibid* at [44]-[55]. Whether the activity must be 'for personal profit' to fall within Art 31(1)(c) was ultimately left open, as here the majority was satisfied that Ms Wong, on the assumed facts, was exploited for Mr Basfar's personal profit: *ibid* at [40].
48 See, for example, Manisuli Ssenyonjo, 'Human Trafficking in the Context of Global Migration: Modern Manifestations of De Facto Slavery, Servitude and Forced or Compulsory Labour' (2021) 10 IHRLR 191; Stefan Machura and others, 'Recognizing Modern Slavery' (2019) 5 *Journal of Human Trafficking* 201; 'Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences' UN Doc A/HRC/15/20 (18 June 2010).
49 *Basfar* v *Wong (SC)* n 1 above at [57] (emphasis added).
50 *ibid* at [113] (emphasis added).

element to an otherwise functional approach to the scope of diplomatic immunities. This does not necessarily make the approach undesirable. Yet, it does raise some important questions: *How* does distinguishing domestic labour in circumstances of modern slavery from ordinary domestic employment remove it from the realm of activities 'incidental' to daily life (accepted by the majority as justifiably not 'commercial activity') and elevate it to the realm of 'commercial activity' (excepted from the scope of diplomatic immunity)? And precisely *when* will conditions of employment (or other activities outside a diplomat's official functions) turn it into a commercial activity? Unfortunately, the majority judgment devotes remarkably little attention to these questions.[51]

Relevance of the conditions of domestic work

On the 'how' question, it may be that an assumed step in the majority's analysis was that *there is simply a limit* to the notion of activities (or means for pursuing them) that can legitimately be considered incidental to the conduct of daily life that the parties to the VCDR can be taken to have intended to exclude from the concept of 'commercial activity'. The precise character of or reasoning behind any such limit is not clear on the majority's judgment, but the use of the language 'incidental to the *ordinary* conduct of daily life' when discussing activities that must fall outside of the concept might indicate something in the realm of a reasonableness standard.[52] Another potential justification for the majority's conclusion could be that the intention behind the 'commercial activity' exception was to exclude from the ambit of diplomatic immunity (to civil jurisdiction) only those generally commercial activities that are also 'inconsistent with the dignity of a diplomatic agent'.[53] There is some support in the majority's analysis of the context, object, and purpose of the VCDR in this regard, and also the relevant *travaux préparatoires*. For instance, they state that a major 'theme' of the preparatory work relating to Article 31(1)(c) relied on by the majority was 'that engaging in a commercial activity outside the diplomat's official duties would be inconsistent with the dignity of a diplomatic agent' and that this was the reason behind the 'commercial activity' exception to immunity (and Article 42).[54] It may have been that, at the time of drafting, this was understood to mean primarily 'setting up shop' in a trade or business.[55] The adoption of the broad and undefined language of 'commercial activity' could also support, however, inferring an intention to catch a broader range of activ-

51 Ingrid Wuerth Brunk has made a critique of the decision along similar lines: see 'No Immunity for Diplomats Who Hold Domestic Workers in Conditions of Modern Slavery' (Transnational Litigation Blog, 18 July 2022) at https://tlblog.org/no-immunity-for-diplomats-who-hold-domestic-workers-in-conditions-of-modern-slavery/ [https://perma.cc/GB3E-63EF].
52 See for example *Basfar* v *Wong (SC)* n 1 above at [34], [61], but cf [57], [72].
53 *ibid*. There is support for this in the majority's conclusion that 'exploiting the labour of a domestic worker for financial gain is a commercial activity exercised by the diplomatic agent outside his official functions' and '[m]anifestly … an activity wholly inconsistent with the position (and dignity) of a diplomatic agent': *ibid* at [20].
54 *Basfar* v *Wong (SC) ibid* at [60].
55 See *Reyes (SC)* n 4 above at [35]-[38].

ities – a range that might undergo changes over the life span of the treaty such that exploitation of labour in circumstances of modern slavery might now fall within the ambit of Article 31(1)(c).[56]

On either approach, however, it remains the case that the rationale underpinning diplomatic immunities, as acknowledged by the majority, is functional. Both the scope of and qualifications to these immunities have traditionally been articulated by reference to the function played by diplomatic missions in the relations between States and usually, without implicating (dis)approval of conduct.[57] Defining the scope of immunity in a case such as this by reference to the conditions of domestic work (allegedly, modern slavery) therefore introduces a normative element to analysis based on different legal and policy assumptions to those traditionally invoked in this area.[58] There are plausible grounds for justifying, as a matter of treaty interpretation, recourse to those normative considerations in the case of the 'commercial activity' exception specifically, as outlined above. Yet, the shift in teleology involved is significant; it requires justification.

As to the 'when' question, the majority acknowledged that the distinction between '(1) ordinary domestic employment arrangements which are incidental to the daily life of a diplomat in the receiving state and do not fall within article 31(1)(c)' and '(2) exploitation of a domestic worker for profit which amounts to a "commercial activity" when practised by a diplomatic agent' is 'not always a clear one'.[59] To draw the distinction, they looked to 'rules of international law applicable in the relations between the parties'.[60] In this case, that consisted of the concepts and definitions of slavery, servitude, forced labour, and trafficking that together are commonly grouped under the description of 'modern slavery'.[61] Applying these concepts, the majority concluded that 'on the assumed facts, Mr Basfar was plainly involved in trafficking Ms Wong' but that 'more importantly', the 'conclusion that his exploitation of her was a commercial activity does not depend upon which particular manifestation of modern slavery may best describe his conduct, using the classification to be derived from international Conventions'.[62]

The basis for this recourse to the international law relating to modern slavery was Article 31(3)(c) of the VCLT, which, it will be recalled, requires consideration of 'any relevant rules of international law applicable in the relations between the parties'. It is accordingly legitimate to have recourse to developments in international law beyond the four corners of the VCDR when interpreting it. However, the VCLT also clearly requires that such rules of international law are

56 cf for example, *Dispute Concerning Filleting within the Gulf of St Lawrence (Canada/France)* Award, 17 July 1986 (1986) 82 ILR 591 (where the Tribunal was tasked with determining whether the expression 'fishery regulations' in the 1972 Agreement, Art (6)1 between the parties encompassed administrative measures that affected but did not concern fishing directly).

57 See Denza, n 7 above, 232-259.

58 The resulting conflict is not dissimilar to that illustrated, albeit in the different context of State immunity in criminal cases, by the well-known Draft Art 7 of the 2022 ILC Draft Articles on the immunity of State officials from foreign criminal jurisdiction: ILC, 'Report on the work of its seventy-third session' UN Doc A/77/10 (2022) ch VI at [68] (text of the draft articles).

59 *Basfar* v *Wong (SC)* n 1 above at [72].

60 *ibid*.

61 *ibid*.

62 *ibid* at [96].

taken into account 'together with the context' in interpreting a treaty.[63] There is, accordingly, something very artificial about only turning to international law 'indirect[ly]' to provide 'criteria' for the application of an interpretation of 'commercial activity' already reached.[64] The first problem is that Article 31(3)(c) only permits recourse to external rules of international law at the level of *context* for the purposes of *interpretation*. Here, the majority appears to introduce such rules as parameters for the *application* of Article 31(1)(c) of the VCDR. The second difficulty is that only turning to Article 31(3)(c) after interpreting a treaty provision to calibrate the application of that provision cuts against the basic notion of treaty interpretation adopted in Article 31 as a *single* exercise of interpretation that involves regard to all admissible materials. On balance, it is therefore unclear (at best) how the majority's approach is compatible with Article 31 of the VCLT.

It is worth recalling at this juncture that foundational to the majority's interpretation was the 'material and qualitative difference' between ordinary domestic employment and exploitation amounting to 'commercial activity' and that that was apparently based on an understanding of 'modern slavery' informed by developments in international law (and related literature) relating to modern slavery.[65] Noting this, one cannot help but wonder whether it might have been more straightforward – and compatible with the VCLT – for the majority to embrace a more direct role for recourse to international developments relating to 'modern slavery' as informing the context of the concept of 'commercial activity' (and more precisely, any limits to activities considered justifiably incidental to a diplomat's conduct of daily life) as a matter of interpretation.[66]

As for the substantive content of the international law relating to modern slavery relied upon by the majority, Lord Hamblen and Lady Rose raised two main concerns in their dissent as to the breadth of the definition of 'trafficking' employed by the majority in the course of this exercise, and also the scope of the exception if it includes other forms of modern slavery (or exploitative employment more generally).[67] First, the broad scope of the Palermo Protocol definition for human trafficking raised concerns. Although Ms Wong's allegations are particularly egregious, if this definition is the test for trafficking, 'the immunity may be lifted whenever the test is satisfied, not simply when it is satisfied in a particularly egregious form' and its application may lead to long and complex hearings for the determination of trafficking as a preliminary issue of jurisdiction.[68] This concern can, however, only be taken so far. Long and arduous jurisdictional phases are, unfortunately, far from foreign to English courts.[69] English courts are also routinely called upon to apply broad concepts that are lacking in 'bright lines' to determine preliminary jurisdictional issues,

63 VCLT, Art 31(3)(c).
64 *Basfar* v *Wong (SC)* n 1 above at [72].
65 *ibid* at [44] and [54].
66 This seemed to be what was envisaged by Ms Wong's counsel: see the afternoon session of 13 October 2021, n 23 above.
67 *Basfar* v *Wong (SC)* n 1 above at [155]-[160], [163]-[166].
68 *ibid* at [156]-[160].
69 See, for example, *AK Investment* v *Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804 at [7]; *FS Cairo (Nile Plaza) LLC* v *Lady Brownlie* [2021] UKSC 45; [2022] AC 995.

including in relation to foreign States and their agents.[70] The 'breadth' of the definition of trafficking therefore does not, in itself, require a narrow interpretation of Article 31(1)(c) of the VCDR, although the rationale and context of the VCDR specifically might affect this conclusion.

Second, Lord Hamblen and Lady Rose also expressed concern that '[u]nderlying the majority's judgment is the assumption that there is a boundary with servitude and forced labour on one side of it and voluntary employment on the other side' whereas in reality, they suggested, there is 'a broad spectrum between those who are in the fortunate position of working in congenial conditions and being free to leave their jobs when they please on the one hand and victims of trafficking, servitude and forced labour on the other'.[71] This latter point may prove a difficult one to overcome, and may be a reason why Ms Wong's counsel was content to focus in argument on the trafficking dimensions of the case. Although on the one hand, the majority's situation of trafficking within its broader modern slavery context reflects the reality that these concepts are intertwined,[72] the blurry boundaries also raise questions of *what* exactly might now fall within the Article 31(1)(c) exception. And might other rules of international law also prove relevant, in other cases? The ground here seems fertile for further development.

'RETALIATION' CONCERNS AND 'INVASIVENESS' OF PROCEDURE

The Court was divided on some further points that are of relevance to the adjudication of immunities cases more broadly. First, Mr Basfar's counsel raised the concern that '[a] restrictive application of the immunity granted by article 31 … may well be met by a restriction on the immunity granted to UK diplomats in Saudi Arabia' or, indeed, other retaliatory measures.[73] In principle, it seems unlikely that reciprocity – that is, that English diplomats could be held to the same standards English courts hold foreign diplomats – is a legitimate reason in and of itself for restricting the scope of diplomatic immunity in the way proposed by the majority.[74] The majority made similar observations with

70 In cases concerning forum selection or the enforcement of foreign judgments judges can be called upon to determine whether substantial justice is available in another State's courts. See, for example, *AK Investment* v *Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804; *Cherney* v *Deripaska* [2008] EWHC 1530 (Comm); [2009] 1 All ER (Comm) 333.

71 *Basfar* v *Wong (SC)* n 1 above at [163].

72 See for example *Queen* v *Tang* [2008] HCA 39 at [29], quoted by the majority in *Basfar* v *Wong (SC) ibid* at [96]: 'It is unnecessary and unhelpful, for the resolution of the issues in the present case, to seek to draw boundaries between slavery and cognate concepts such as servitude, peonage, forced labour, or debt bondage … [These] concepts are not all mutually exclusive. Those who engage in the traffic in human beings are unlikely to be so obliging as to arrange their practices to conform to some convenient taxonomy'.

73 *Basfar* v *Wong (SC) ibid* at [169] (quoting the statement in *Barnet* that 'many of the 192 States Parties to the VCDR are not equipped with fair, effective and independent judicial systems and law enforcement agencies' such that diplomatic staff may face 'politically motivated charges' and that 'an exception to inviolability or immunity made unilaterally on one basis … could easily be extended to encompass other factual situations').

74 The minority seemed to accept this: *ibid*.

regard to retaliatory measures that go beyond 'tit for tat' to harsher reprisals: 'it is difficult to see how such a risk, even if genuine, can affect the meaning of the phrase "commercial activity" in article 31(1)(c)'.[75] It could be added to this that there is probably some level of risk of retaliation inherent in the very existence of a general, non-defined exception to immunity and appeasing that risk altogether would require the exception to be void of content.

The majority was also quick to dismiss the suggestion that the intrusive nature of determining immunity issues was a reason, in itself, to restrict the scope of the Article 31(1)(c) exception to immunity.[76] The concern is that the potential need to undertake 'a difficult fact-finding exercise' for the purpose of determining the truth of the allegations must militate against a case relating to a 'commercial activity' because the signatories to the VCDR surely could not have 'envisaged that such an exercise was an appropriate one for courts and tribunals to undertake in order to decide whether the exception in article 31(1)(c) applies'.[77] This concern is bolstered by the framing of immunities in international law as requiring cessation of procedure *in limine litis* – they are preliminary issues which must be expeditiously decided at the beginning of proceedings.[78]

However, as the majority pointed out, inherent in the creation of an exception to immunity must also be acceptance of some fact-finding exercise to determine its application in a particular case.[79] 'The possibility of such an inquiry is one which the parties to the Diplomatic Convention must be taken to have contemplated and accepted in establishing the commercial activity exception. It cannot be a reason for excluding an allegation from the scope of article 31(1)(c)'.[80] That the battle in determining whether immunity applies takes place on the premise of the allegations made, and that the truth of those allegations must subsequently be proved, is also conventional in immunities cases.[81] Of course, there may be some flexibility as to the best way to test allegations of truth as a matter of procedure,[82] but that there be *some* fact-finding exercise is inevitable.[83] Otherwise, the bare claim of immunity would always win out, and that cannot have been the intention behind an exception to immunity.[84]

75 *ibid* at [105].
76 *ibid* at [101]-[102], [161]-[162].
77 *ibid* at [161]; see also *Al-Malki* v *Reyes* [2015] EWCA Civ 32; [2016] 1 WLR 1785 (*Reyes (CA)*) at [34] per Lord Dyson MR.
78 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion)* [1999] ICJ Rep 62 at [63].
79 *Basfar* v *Wong (SC)* n 1 above at [102].
80 *ibid*.
81 See for example *Jones* n 6 above at [4].
82 For example, a trial on a preliminary issue may be possible if the defendant wishes to challenge the assumed facts for the purposes of the immunity claim: see further *Reyes (SC)* n 4 above at [54]-[55]. See also the judicial questioning and resulting discussion on this point in the morning session of argument heard on 13 October 2021, n 23 above. Lord Briggs there seemed to be of the opinion that it would be difficult to embrace one 'hard and fast' procedural approach in all cases.
83 This is clear from the earliest authorities on VCDR, Art 31: see for example *Empson* v *Smith* [1966] 1 QB 426, 438, 439-440.
84 This point was made forcefully by Timothy Otty KC for Ms Wong in oral argument: see the morning session of argument heard on 13 October 2021, n 23 above.

Further, other provisions of the VCDR provide protections ensuring that any fact-finding process can only be so 'invasive'.[85]

Are these concerns of retaliation and invasiveness of procedure therefore simply irrelevant to determining the scope of Article 31(1)(c) of the VCDR? The majority judgment raises strong points of principle applicable to immunity cases in general. However, the minority also raised some valid concerns that are particularly pertinent in the context of diplomatic immunities. In particular, arguably the practical difficulties with applying the commercial activity exception and concerns regarding potential retaliation by other States cannot be divorced from the friction that arises from interpreting the exception by reference to normative considerations. The majority's approach is based on a different teleology to that which has traditionally underpinned the scope and exceptions of diplomatic immunities in international law. This, of course, is not necessarily undesirable nor precluded in principle, and could reflect a broader shift in approaches to interpreting immunities.[86] Yet, it does raise qualitatively different considerations in determination and application than a strictly functional approach and is likely to raise particular controversies that are not easily resolved within the traditional framework of immunities. The consequence is a need for fine balance. In this context, the concerns raised by the minority seem to call for further scrutiny.

VIEWS ON THE COURT'S JUDICIAL FUNCTION

As a final consideration, it is worth reflecting on what the majority's broad reading of the 'commercial activity' exception to diplomatic immunity in the VCDR, and process in reaching it, might reveal about the Supreme Court's current attitude(s) towards adjudicating complex questions of international law. In this regard, *Basfar* v *Wong* seems to exemplify what Lord Lloyd-Jones recently observed to be a 'growing willingness on the part of courts in the United Kingdom to address and investigate the conduct of foreign States and issues of public international law when appropriate'.[87]

Endeavours by domestic courts to interpret the scope of international immunities, especially restrictively and where the path is not yet well-worn by other courts, have historically been highly controversial.[88] Indeed, until recent years, UK courts have been fairly deferential to foreign States and governments, even if they have not shied away from engaging deeply with the international

85 See for example VCDR, Arts 30, 31(1), 31(2).
86 See text accompanying nn 52-58 above.
87 Lord Lloyd-Jones, 'International Law Before United Kingdom Courts: A Quiet Revolution' (2022) 71 ICLQ 503, 519.
88 See for example Terzieva, n 6 above; Claire E. M. Jervis, 'Jurisdictional Immunities Revisited: An Analysis of the Procedure Substance Distinction in International Law' (2019) 30 EJIL 105; Andrea Bianchi, 'Overcoming the Hurdle of State Immunity in the Domestic Enforcement of International Human Rights' in Benedetto Conforti and Francesco Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (Leiden: Brill, 1997); Pasquale De Sena and Francesca De Vittor, 'State Immunity and Human Rights: The Italian Supreme Court Decision on the *Ferrini* Case' (2005) 16 EJIL 89.

law on the subject.[89] In the immunity context, this is evident as recently as in the House of Lord's 2006 decision on State immunity in *Jones* and the views expressed therein relating to the Court's role vis-à-vis the interpretation of international law.[90] Lord Hoffmann, for instance, stated emphatically that '[i]t is not for a national court to "develop" international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states'.[91]

Of course, the immunity context also highlights some of the reasons why domestic courts may be reticent in their treatment of international law questions. If wrong in their application of international law, domestic courts can incur the State's international responsibility (and so put the State in the awkward domestic and international position of being obliged to cease the wrongful conduct while also needing to maintain judicial independence under domestic law).[92] Domestic courts are also generally not the ideal fora for evaluating the legal balance struck in the international legal process – which often takes place simultaneously across various bilateral, regional, and universal fora, and not always publicly – and whether it is the right moment to push forward a particular rule in a certain setting.[93]

Yet, this does not mean that domestic courts cannot play an important role in shaping the content of international law. Domestic court decisions can form relevant State practice and/or *opinio juris* for identifying customary international law or informing the scope and content of treaties.[94] They are explicitly provided for in Article 38(1)(d) of the ICJ Statute as a potential 'subsidiary means' for determining international law. Franck goes as far as stating that domestic courts are 'the principal progenitors of third-party international law' and are 'profoundly and quite properly involved in the process of international law-making, for international law is part of the law of all civilized states, just as, reciprocally, the 'general principles of law recognized by civilized States' have been incorporated, by Article 38 of the Statute of the World Court, in the inter-

89 See further Lloyd-Jones, n 87 above, 518-519; Rosalyn Higgins, 'International Law' in Louis Blom-Cooper (ed), *The Judicial House of Lords 1876-2009* (Oxford: OUP, 2009) 464-469.

90 *Jones* n 6 above.

91 *ibid* at [63].

92 See the Articles on the Responsibility of States for Internationally Wrongful Acts (2001), Article 4, Annex to UN General Assembly Res 56/83, UN Doc A/RES/83 (12 December 2001) and Commentary (2001) II(2) YBILC. The *Jurisdictional Immunities* saga is illustrative: see n 6 above. After the ICJ's decision, the Italian Constitutional Court held that implementing the ICJ judgment would be incompatible with the Italian Constitution, Art 24. That judgment and those of several Italian courts following it that disregarded Germany's sovereign immunity and awarded damages to victims led to Germany bringing the matter to the ICJ again in 2022. See Serena Forlati and Pietro Franzina (eds), *Jurisdictional Immunities Again* (2022) 94 *Questions of International Law, Zoom In* 1.

93 See further Roger O'Keefe, 'Domestic Courts as Agents of Development of the International Law of Jurisdiction' (2013) 26 LJIL 541.

94 Generally, see ILA, 'Mapping the Engagement of Domestic Courts with International Law' (Final Report, Johannesburg, 2016). Regarding custom specifically, see ILC, *Draft conclusions on identification of customary international law, with commentaries* GAOR 73rd sess, supp 10, UN Doc A/73/10 (2018) Conclusions 5, 6, 10, 13 and Commentary thereto. Regarding treaties, see VCLT, Art 31 (3)(b); ILC, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties ibid* Conclusions 4 and 5 Commentary thereto.

national *corpus juris*'.[95] In the immunity context, this profound role – and of UK courts in particular – is evident in the incremental development of the doctrine of restrictive immunity.[96] As Lord Bingham stated in the *Jones* case, English decisions such as *The Philippine Admiral* and *Trendtex Trading Corpn* v *Central Bank of Nigeria* played an important role in the 'relaxation' of the previously 'well established' absolutist principle of immunity.[97]

Accordingly, that the majority in *Basfar* v *Wong* felt able to reach the conclusion it did regarding the 'commercial activity' exception to immunity, especially where it was the first court to do so, is in and of itself significant. Alongside the bold decision to restrict immunity in *Benkharbouche*,[98] the decision is emblematic of an openness of the Court to address difficult questions of international law, including in ways that warrant breaking ranks with the jurisprudence of other jurisdictions. More broadly, it may be that this decision of the Court will prompt the emergence of similar (or, perhaps, contrary) practice from domestic courts in other jurisdictions.

CONCLUSION

Basfar v *Wong* represents a substantial development, both practically for those seeking accountability for serious violations of fundamental rights and also as a matter of principle, in the Court's broad and bold approach to Article 31(1)(c) of the VCDR. Strategically, the decision suggests that there is more space for civil litigation for international human rights abuses involving States or State agents than the 'conventional wisdom' might suggest. Yet, the majority's approach to interpreting Article 31(1)(c) also leaves many questions unanswered. How, exactly, does distinguishing domestic labour in circumstances of modern slavery from ordinary domestic employment remove it from the realm of activities 'incidental' to daily life and elevate it to that of excepted 'commercial activity'? When will conditions of employment turn such activity into a 'commercial' activity? And in related cases, just how far can the concept of 'modern slavery' in the context of activity outside a diplomat's official functions be stretched? These are the interpretative questions that will likely prove fertile ground for further developments in future litigation.

95 Thomas M. Franck, *The Structure of Impartiality: Examining the Riddle of One Law in a Fragmented World* (New York, NY: Macmillan, 1968) 233, quoted in François Larocque, 'Recent Developments in Transnational Human Rights Litigation: A Postscript to Torture as Tort' (2008) 46 *Osgoode Hall Law Journal* 605, 651.

96 See Larocque, *ibid*, 651-652.

97 *The Philippine Admiral* [1977] AC 373; *Trendtex Trading Corpn* v *Central Bank of Nigeria* [1977] QB 529; see *Jones* n 6 above at [8]. See also Higgins, n 89 above, 464-466.

98 n 7 above. *Benkharbouche* could also be seen as bringing UK law into line with other jurisdictions: see Andrew Sanger, 'The Limits of State and Diplomatic Immunity in Employment Disputes' (2018) 77 CLJ 1, 2.