

## **The U.S.'s Recent Enhanced Efforts to Fight Corruption by Protected Individuals**

### **Introduction**

In March 2022, the U.S. took a small, but noticeable step in the fight against corruption by foreign officials when the former Sri Lankan Ambassador to the U.S. pleaded guilty to conspiracy to commit wire fraud in a U.S. District Court.<sup>1</sup> When the Sri Lankan Embassy was looking for a new location and real estate in 2012-13, then-current Ambassador Jaliya Wickramasuriya had devised a scheme in which he and his co-conspirators artificially inflated a purported purchase price to steal \$332,000 from Sri Lanka.<sup>2</sup> The U.S. investigated, refused to entertain diplomatic immunity as a defense, and eventually prosecuted after Sri Lanka did not take sufficient action. The case was noteworthy because it was brought against a Sri Lankan citizen for defrauding Sri Lanka, and the former Ambassador could not rely on diplomatic immunity for protection. While the case initially turned on whether a waiver for immunity could be withdrawn, the noteworthy aspect was the final legal application by the U.S. that officials can be retroactively prosecuted for corruption regardless of a waiver of immunity, if they return to the U.S. at a later time, because corruption and bribery are not official acts.<sup>3</sup> This *Insight* explores how the Wickramasuriya case navigated around the Vienna Convention on Diplomatic Relations and considers what the prosecution suggests about future U.S. efforts to combat foreign corruption.

### **The Vienna Convention Obstacle**

The Vienna Convention on Diplomatic Relations offers widespread protections and immunities to diplomatic agents representing a sovereign state, including preventing any form of detention or arrest, immunity from criminal jurisdiction, and immunity from certain

civil and administrative actions or even to give evidence as a witness.<sup>4</sup> The diplomatic protections are fully extended to family members of the diplomatic agents and also to certain members of the administrative or technical staff.<sup>5</sup> The only stated main exception to diplomatic immunity is when a “sending” state waives the immunity.<sup>6</sup> The implementation of the Vienna Convention has led to perceived unsatisfactory results, ranging from the vast accumulation of unpaid parking tickets and rent by United Nations officials, to a lack of criminal prosecution when the daughter of a diplomat stabbed a classmate at the British International School in Washington D.C.,<sup>7</sup> to the initial protection of the wife of a U.S. diplomat who struck and killed a British teen on a motorbike when she was driving on the wrong side of the road.<sup>8</sup>

Despite the questions of fairness and justice that these individual cases raise, the reciprocity of protection remains essential to ensuring the maintenance of diplomatic relations and the ability of foreign representatives to effectively carry out their duties. The main consequence of serious violations of national law by protected parties is typically revocation of visas or expulsion with no right of return. There have been incidents where the “sending” state unambiguously waives immunity, especially for serious crimes occurring outside the scope of official duty,<sup>9</sup> but a waiver of immunity is not common.

### **The Prosecution of Wickramasuriya**

Leading up to the filing of this case, there was disagreement about the former Ambassador’s immunity status and whether immunity had been waived. In 2017, the Sri Lankan government appeared to have the intent to waive his diplomatic immunity in an unsigned diplomatic *Note Verbale* that may or may not have been directed by the Sri Lankan President. In 2019, under leadership sympathetic to the former Ambassador, the government then attempted to revoke the waiver. The new President of Sri Lanka said immunity had not been properly waived during the interim period in an attempt to shield the country’s former diplomat. The U.S. State Department countered and said that there is a principle of international law that once immunity is waived, it cannot be revoked or reinstated, despite any internal Sri Lankan confusion.<sup>10</sup> The U.S. noted that, according to Article 32(2) of the Vienna Convention, waivers must be express, but there are no criteria established under the Convention as to what processes must be followed for a state to grant waiver or at what governmental level a waiver is considered operative.<sup>11</sup> On the basis of the *Note Verbale* and the status of the former Ambassador as a dual U.S. and Sri Lankan citizen, the Sri Lanka Supreme Court dismissed the former Ambassador’s claim that his immunity had been restored by the new Sri Lankan President.<sup>12</sup> This removed from the Sri Lankan side any contended final limitation on the U.S. prosecuting the former Ambassador.

Ultimately, the continuing validity of the prior waiver became irrelevant, because the U.S. took the position that diplomatic immunity did not apply to Wickramasuriya's conduct once he was no longer an ambassador. The U.S. Attorney's Office, in evaluating Wickramasuriya's eligibility for immunity, distinguished between crimes committed as part of an official act, for which residual immunity would still be available, and crimes committed as an individual, such as corruption for self-enrichment. According to Article 39 of the Vienna Convention, "such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time. . . . However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist."<sup>13</sup> In conformity with the Vienna Convention, Wickramasuriya was eligible for prosecution upon ceasing his diplomatic position and departing the country since theft of Sri Lankan money cannot be considered an official act. The U.S. position regarding the legality of prosecuting unofficial acts at a later date is not in and of itself controversial, as the cessation of immunity is made explicit in the Vienna Convention. However, countries, including the U.S., have often not taken this action either due to the desire to maintain orderly diplomatic relations or the lack of the ability to actually arrest the culprit.

### **Past and Future Prosecutions of Foreign Corruption**

The Sri Lanka case is not the first attempt by the U.S. to crack down on corruption and the hiding of stolen money in the U.S. by family members of foreign government officials. Most notably, the U.S. seized and then forced the sale of millions of dollars in assets purchased by the son of Equatorial Guinea's President that were a result of corruption and money laundering.<sup>14</sup> However, Teodorin Obiang Nguemathere was not in the U.S. as a posted diplomatic representative of his country, and the assets were not purchased while he claimed a diplomatic role. Separately, the U.S. successfully prosecuted Francis Lorenzo, the deputy United Nations Ambassador from the Dominican Republic, for a vast bribery scheme. The distinguishing facts were that Lorenzo was a naturalized U.S. citizen, which provided a carve-out for prosecution because of the lack of a foreign relations impact, and there was no nexus to an official act.<sup>15</sup> Moreover, Lorenzo provided significant cooperation in assisting the prosecution of other individuals involved in the bribery.<sup>16</sup>

The U.S. has increasingly sought to identify and seize stolen financial assets traceable to foreign corruption under the Kleptocracy Asset Recovery Rewards Program. More importantly, in 2021, under the Foreign Corrupt Practices Act, the U.S. not only recovered

\$27 million from a related party, but unsealed indictments for the Republic of Chad's former Ambassador and Deputy Chief of Mission, Mahamoud Adam Bechir and Youssouf Hamid Takane, for soliciting and accepting bribes and conspiring to launder the bribes while in the U.S. as diplomats.<sup>17</sup> The indictments were a result of a 2019 plea deal by a non-diplomatic co-conspirator who bribed them.<sup>18</sup> Unlike Wickramasuriya, the Chadian diplomats have moved on to other Posts without intention to ever to return to the U.S., and therefore are unlikely to ever be prosecuted. Wickramasuriya represents one of the first cases of prosecution of former diplomats once they have returned to the U.S., using the exception to Article 39 immunity.

The combination of the Wickramasuriya prosecution and other recent cases, along with other policy initiatives, indicates that the U.S. may be taking a more aggressive approach towards corruption committed by diplomatic officials. The U.S. has already indicated an overall stronger desire to tackle corruption through the release of a new Strategy on Countering Corruption, which includes a specific pillar on "Holding Corrupt Actors Accountable" and the expressed intent to use existing tools for enforcement.<sup>19</sup> This followed a June 2021 National Security Study Memorandum that "Establish[ed] the Fight Against Corruption as a Core United States National Security Interest," which noted that corruption and bribery are a widespread problem that impacts democracy and financial growth.<sup>20</sup>

As illustrated by the Wickramasuriya case, the U.S. can gather evidence, issue a sealed indictment, and wait for a return visit to the U.S., which is not uncommon due to the number of former diplomats who retain property in the U.S. or whose children continue attending U.S. schools or universities. Because of Article 39, a waiver of immunity will not necessarily be required, as long as the foreign national later returns to the U.S. Admittedly, the consequences in the Wickramasuriya case, and even the Lorenzo case, were relatively minor, resulting in no prison time. Despite this, and even if few diplomats are prosecuted, the notice that corruption committed while in the U.S. in an official capacity may be prosecuted later will have at least some deterrent effect. That will be an important part of the U.S.'s larger efforts to counter corruption.

**About the Author:** Scott Lyons is Supervisory Senior Lecturer and Principal for the Defense Security Cooperation Agency's Institute for Security Governance, based at the Naval Postgraduate School. The views in this article are solely of the author in his personal capacity and do not represent the views of the U.S. Department of Defense, of any other agency, or of the United States Government.

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<sup>1</sup> U.S. v. Jaliya Chitran Wickramasuriya, Case 1:18-cr-00120-TSC (U.S. District Court for the District of Columbia)

<sup>2</sup> Press Release, Department of Justice, Former Sri Lankan Ambassador Pleads Guilty to Defrauding Sri Lankan Government, (Apr. 1, 2022), <https://www.justice.gov/usao-dc/pr/former-sri-lankan-ambassador-pleads-guilty-defrauding-sri-lankan-government>.

<sup>3</sup> *The Ambassador, His Swanky New Embassy and the Limits of Diplomatic Immunity*, POLITICO (July 22, 2022), <https://www.politico.com/news/magazine/2022/07/22/sri-lanka-ambassador-jaliya-wickramasuriya-conviction-00047017>.

<sup>4</sup> Vienna Convention on Diplomatic Relations, arts. 29, 31, 500 U.N.T.S. 95, 23 U.S.T. 3227, 55 AJIL 1064 (1961) [hereinafter Vienna Convention].

<sup>5</sup> Vienna Convention, art. 37.

<sup>6</sup> *Id.*, art. 32

<sup>7</sup> Daughter of Diplomat Stabs Boy at British International School of Washington: Police (Sept. 5, 2017) <https://www.nbcwashington.com/news/local/child-stabbed-at-school-in-georgetown/26635/>.

<sup>8</sup> U.K. Cuts Immunity for Some U.S. Diplomats' Families After Fatal Crash, NY TIMES (July 22, 2022), <https://www.nytimes.com/2020/07/22/world/europe/diplomatic-immunity-harry-dunn.html>.

<sup>9</sup> For example, in 1997, the Deputy Ambassador to the U.S. from the Republic of Georgia killed a 16-year-old while driving drunk in Maryland and Georgia waved immunity leading to successfully bringing charges and a prison sentence. See *Diplomat Sentenced in Teen's Death*, WASHINGTON POST (Dec. 20, 1997), <https://www.washingtonpost.com/archive/politics/1997/12/20/diplomat-sentenced-in-teens-death/2de70f74-e021-4e73-b262-6e6f3f683e45/>.

<sup>10</sup> Wickramasuriya v. Marapana, SC Appeal 26/2011, SC SPL LA 117/2018, [https://www.colombotelegraph.com/wp-content/uploads/2021/10/sc\\_appeal\\_26\\_2021.pdf](https://www.colombotelegraph.com/wp-content/uploads/2021/10/sc_appeal_26_2021.pdf); *Jaliya's confession and Gota's failed attempts to protect him*, Daily Mirror (July 14, 2022), <https://www.dailymirror.lk/audio/expose/Jaliyas-confession-and-Gotas-failed-attempts-to-protect-him/333-241038>. See XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW, 316-342 (2012) (suggesting that the principle of “waiver of immunity may not be withdrawn except by consent of all the parties concerned”). In the Wickramasuriya case, the U.S. did not consent to the withdrawing of immunity.

<sup>11</sup> Vienna Convention, art. 32(2).

<sup>12</sup> See Wickramasuriya v. Marapana, SC Appeal 26/2011, SC SPL LA 117/2018.

<sup>13</sup> Vienna Convention, art. 39.

<sup>14</sup> US Seizes More Than \$30M From Guinean Official, VOA (Oct. 12, 2014), <https://www.voanews.com/a/us-seizes-property-from-guinea-vice-president-in-corruption-case/2481179.html>.

<sup>15</sup> *Suspended U.N. diplomat lacks immunity from U.S. bribe case: judge*, REUTERS (Feb. 4, 2022), <https://www.reuters.com/article/us-usa-crime-un/suspended-u-n-diplomat-lacks-immunity-from-u-s-bribe-case-judge-idUSKCN0VE04O>.

<sup>16</sup> *Ex-Dominican Republic ambassador faces no prison in UN Case*, AP NEWS (Nov. 8, 2019), <https://apnews.com/article/c95590afb0d149939785017a24c57913>.

<sup>17</sup> See Press Release, Department of Justice, Charges Unsealed Against Former Chadian Diplomats to the U.S. Charged in Connection with International Bribery and Money Laundering Scheme (May 24, 2021), <https://www.justice.gov/opa/pr/charges-unsealed-against-former-chadian-diplomats-us-charged-connection-international-bribery>.

<sup>18</sup> U.S. v. Tyab, Bechir and Niam, Case 1:19-cr-00038-RJL (U.S. District Court for the District of Columbia), document 1; Guilty plea, document 30.

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<sup>19</sup> United States Strategy on Countering Corruption (Dec. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>.

<sup>20</sup> Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest (June 3, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/>.