DIPLOMATIC LAW IN A NEW MILLENNIUM

Edited by Paul Behrens

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PAUL BEHRENS

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Preface

At few times within living memory has the importance of the diplomatic office been as pronounced as today.

The current state of international affairs carries a notion of uncertainty; and there are indications that storm lies ahead. The rise of violent non-State actors contributes to that, but equally significant is the inability of members of the international community to agree on a common position to counter that threat. In its place, political differences between States, even those that had traditionally been allies, reassert themselves with a force previously thought unimaginable. The ability to understand the concerns of the world is often given a lesser value than the power to please audiences at home; walls have become more important than bridges.

In situations of this kind, the role of the diplomatic agent carries a meaning which far exceeds the significance it enjoys in the popular mind. Diplomats are still the eyes and ears of their masters; they possess a more intimate understanding of the cultural and political conditions in the receiving State than that which can be expected of their superiors at home, and in times of crisis these characteristics are more important than ever. But they are also in a unique position to mediate between the worlds, to identify similarities and areas of common concern. Often enough, they are able to anticipate fields in which divergent views are a likely phenomenon and may help to prevent the kind of harsh disagreement that is otherwise bound to emerge. In this regard, diplomats not only serve interests of sending States, but fulfil the mandate which the Vienna Convention on Diplomatic Relations (VCDR), the leading instrument in the field, took as its guiding principle: they contribute to the 'development of friendly relations among nations, irrespective of their differing constitutional and social systems'.

But the current age has also put the rules underlying the diplomatic office into sharper focus. The increased criticism with which civil society approaches the representatives of established States and institutions does not halt before the doors of embassies, and the wide range and often absolute nature of diplomatic immunities is thus an ongoing topic of debate. It is joined by a growing discomfort about conduct which is perceived as diplomatic interference in the internal affairs of the host State and about reports of misconduct by diplomatic agents in their role as employers. At other times, it is the receiving State whose actions affect the diplomatic office: recent cases involving the breach of the inviolability of diplomatic communications bear witness to that. And modern diplomatic law continues to be plagued by challenges which the drafters of the VCDR and of related instruments had not been able to resolve: open questions still attach, for instance, to the nature of diplomatic asylum and to the circle of family members of the diplomatic agent to whom rules of immunity apply in equal measure.

In other areas again, actors have joined the field of diplomatic relations who in previous times played no role in it or whose remit had been considerably curtailed. International organizations must count among the most active forces in this regard—as do certain regional organizations (most prominently, the European Union (EU) with its very extensive network of diplomatic missions). They are joined by sub-State entities—regions of independent States which increasingly seek to make their voice heard on the diplomatic plane.

There is therefore need for a study which addresses the challenges to which contemporary diplomatic law is subjected, for a critical analysis of its characteristics, and an assessment of the question whether the codified rules in the field are adequate and sufficient for the demands which the law faces today.

Diplomatic Law in a New Millennium provides an in-depth analysis of many of the outstanding controversies in the field. It is a rare collaborative effort: its contributors are twenty scholars from diplomatic law and other areas of international law, active and retired diplomats and practitioners at international courts. It thus brings together a variety of perspectives by experts in the field which serve as a stimulus and, often, as a basis for the repositioning of the debate. Yet where the law is at its most controversial, there is also room for a wide range of views. The opinions expressed in the individual chapters (including introductory and concluding parts) are therefore the views of the respective authors; they are not necessarily shared by other contributors to the book or the institutions of which the authors may be members.

The principal objective of this study is a critical analysis of the rules that apply to the diplomatic office. It is, therefore, not a general conversation on diplomacy in the wider, and more political sense of the word, but an investigation of salient issues of modern diplomatic law. The VCDR plays an essential role in this regard—in view of its direct impact on the modern framework of the law, in view of its influence on subsequent instruments, and even in view of issues that were omitted from its scope. References to the 'Vienna Convention', the 'Convention', or the 'VCDR' throughout the text are therefore references to that treaty and Articles mentioned in the text are those of the Vienna Convention on Diplomatic Relations, unless a different instrument is indicated. Its full text is available in the Annex, and our thanks go to the United Nations who gave us permission to reprint it here.

We would also like to extend heartfelt thanks to Alba Brown and Dr Kai Bruns for their invaluable help with the translation and editing of Chapter 4. Thanks also go to Kaisa Mitt, who helped with the book proposal and with getting this project under way. At Oxford University Press, we are particularly grateful to John Louth, Emma Endean-Mills, and her predecessor, Nicole Leyland, for their assistance and encouragement throughout the production process, and for the warm welcome they extended to this study from its very beginnings.

The cut-off point for the consideration of law and factual developments was 1 December 2016.

Edinburgh, December 2016
Paul Behrens

Contents

List of Abbreviations

ABGB	Allgemeines Bürgerliches Gesetzbuch (Austria)
ACHR	American Convention on Human Rights
AFDI	Annuaire Française de Droit International
Afr J Int'l & Comp L	African Journal of International and Comparative Law
AJIL	American Journal of International Law
All ER	All England Reports
Am U J Int'l L & Pol'y	American University Journal of International Law & Policy
Ariz J Int'l & Comp L	Arizona Journal of International and Comparative Law
ARSIWA	Draft Articles on the Responsibility of States for Internationally Wrongful Acts (see also DARS)
ASEAN	Association of South East Asian Nations
ASIL	American Society of International Law
AU	African Union
Aust YBIL	Australian Yearbook of International Law
BAC	Bureau de l'Amiable Compositeur
Bgbl	Bundesgesetzblatt
BIOT	British Indian Ocean Territory
BISD	Basic Instruments and Selected Documents (GATT)
BYIL	British Yearbook of International Law
Can Y B Int'l L	Canadian Yearbook of International Law
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CFSP	Common Foreign and Security Policy
CJIL	Chinese Journal of International Law
CMLR	Common Market Law Reports
Cmnd	Command Paper
COE	Council of Europe
CRSIO	Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character
CSM	Convention on Special Missions
DARS	Draft Articles on the Responsibility of States for Internationally Wrongful Acts
DDC	US District Court, District of Columbia
Duke J Comp & Int'l L	Duke Journal of Comparative and International Law
ECHR	[European] Convention for the Protection of Human Rights and Fundamental Freedoms; Reports of Judgments and Decisions (of the European Court of Human Rights)
ECR	European Court Reports

ECtHR	European Court of Human Rights
EEAS	European External Action Service
EFTA	European Free Trade Association
EHRR	European Human Rights Reports
EJIL	European Journal of International Law
Env LR	Environment Law Reports
ESA	European Space Agency
EU	European Union
Eur J Int Law	European Journal of International Law (see also EJIL)
EWCA (Civ)	Court of Appeal of England and Wales (Civil Division)
EWHC	High Court of England and Wales
EWHC (QB)	High Court of England and Wales (Queen's Bench Division)
FCO	Foreign & Commonwealth Office
Fordham Int'l LJ	Fordham International Law Journal
FRUS	Foreign Relations of the United States
F. Supp.	Federal Supplement
GATT	General Agreement on Tariffs and Trade
Geo J Int'l L	Georgetown Journal of International Law
GPO	Government Publishing Office (USA)
HC	House of Commons
HMG	Her Majesty's Government
Hofstra L Rev	Hofstra Law Review
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
ICAO	International Civil Aviation Organization
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICCSt	Statute of the International Criminal Court
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICJ Rep	International Court of Justice, Reports of Judgments, Advisory Opinions and Orders
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICSID	International Center for Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IJRL	International Journal of Refugee Law
ILC	International Law Commission
ILDC	International Law in Domestic Courts
ILM	International Legal Materials
ILO	International Labour Organization
ILR	International Law Reports
IMF	International Monetary Fund
IOLR	International Organizations Law Review

JC&SL	Journal of Conflict and Security Law
J Church & St	Journal of Church and State
JICJ	Journal of International Criminal Justice
LEFÖ	Lateinamerikanische exilierte Frauen Österreich
LGBT	Lesbian, gay, bisexual and transgender
LNTS	League of Nations Treaty Series
Loy of L A Int'l and Comp L Rev	Loyola of Los Angeles International and Comparative Law Review
MFA	Ministry of Foreign Affairs
MoU	Memorandum of Understanding
MPA	Marine Protected Area
NATO	North Atlantic Treaty Organization
NGO	Nongovernmental organization
OAS	Organization of American States
OAU	Organization of African Unity
Ohio St J Disp Resol	Ohio State Journal on Dispute Resolution
OSCE	Organization for Security and Cooperation in Europe
PDS	Private Domestic Staff
RBDI	Revue belge de droit international
RGDIP	Revue générale de droit international public
SCSL	Special Court for Sierra Leone
S Ct	Supreme Court Reporter
SDI	Scottish Development International
SDNY	US District Court, Southern District of New York
StGB	Strafgesetzbuch
StPO	Strafprozeßordnung
Suffolk Univ LR	Suffolk University Law Review
TEU	Treaty on European Union
Tex Int'l LJ	Texas International Law Journal
TFEU	Treaty on the Functioning of the European Union
TIAS	Treaties and Other International Acts Series
Tul L Rev	Tulane Law Review
UDHR	Universal Declaration of Human Rights
UNCLOS	United Nations Convention on the Law of the Sea
UN Doc	United Nations Document
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNJY	United Nations Juridical Yearbook
UNSC	United Nations Security Council

UNTS	United Nations Treaty Series
UNYB	Yearbook of the United Nations
VCCR	Vienna Convention on Consular Relations
VCDR	Vienna Convention on Diplomatic Relations
VCLT	Vienna Convention on the Law of Treaties
Vienna Convention	Vienna Convention on Diplomatic Relations
W&L	Washington and Lee Law Review
WLR	Weekly Law Reports
WPC	Woman Police Constable
WTO	World Trade Organization
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

Notes on Contributors

Tamás Ádány, PhD, is Associate Professor at the Péter Pázmány Catholic University, Budapest, and has been teaching International Law, International Criminal Law, Human Rights, and the Law of Diplomatic Relations for more than a decade. He graduated as a lawyer at master's level in Budapest in 2000, holds a Master's Degree in International Relation from ASERI, Milan, and a PhD in International Law from the Péter Pázmány Catholic University. His PhD thesis examined the jurisdiction of the International Criminal Court from the perspective of general International Law of responsibility. In these fields, he has authored and edited three books and several academic articles. As a visiting lecturer, he has taught at the universities of Debrecen, San Francisco, and Nijmegen. He has also worked for the Ministry of Justice and for the Office of the Prime Minister on International Law-related issues.

Yinan Bao, PhD, LLM, did his studies in diplomatic law at the School of Law, Politics and Sociology, University of Sussex, and was awarded a PhD in November 2014 with a thesis entitled 'When An Old Principle Faces New Challenges: A Critical Analysis of the Principle of Diplomatic Inviolability'. He had previously studied Public International Law at the University of Leicester (2009–2010), and obtained the degree of LLM in Public International Law. Dr Bao's major research interest is in diplomatic law, especially around the issues related to the theory and practice of the principle of diplomatic inviolability. His academic work includes among other things a study 'On the Historical Evolution of the Principle of Diplomatic Inviolability' (*Social Sciences Academic Press*, China). He also has a strong interest in legal issues relating to the law of the sea, settlement of international territorial disputes and the recognition of States. He is currently doing post-doctoral research at the Centre for Rule of Law Strategy Studies, East China University of Political Science and Law.

Sir Brian Barder, KCMG, BA (Cantab), is a former British Ambassador to Ethiopia, Poland, and the Republic of Bénin, and former British High Commissioner to Nigeria and Australia. He worked on decolonization in the Colonial Office in London for seven years before transferring to the UK Diplomatic Service, serving at the UK Mission to the UN in New York and in Moscow and Canberra, as Assistant Head of West African Department and later Head of Southern African Department in the Foreign & Commonwealth Office, before his head of mission appointments. After retirement from the diplomatic service he was a founding member of the Special Immigration Appeals Commission, a chair of the Civil Service Selection Boards and a Governor of the Royal Hospital for Neuro-disability. He is a contributor of many published articles, blog posts (<http://www.barder.com/ephems > and elsewhere), and letters. He is an honorary visiting fellow at the University of Leicester's Department of Politics and International Relations. His book, *What Diplomats Do—The Life and Work of Diplomats*, was published in July 2014 (paperback edn, Rowman & Littlefield 2015).

J Craig Barker, PhD, LLB, is Professor of International Law and Dean of the School of Law and Social Sciences at London South Bank University. His primary research interest is in the field of Public International Law and he is co-author of *The Encyclopaedic Dictionary of International Law*. His interest in diplomatic law and the Vienna Convention dates back

to his PhD thesis which he completed at the University of Glasgow in 1991 on the topic of 'The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?', a modified version of which was published by Ashgate in 1996. He has subsequently written on various aspects of diplomatic law including a further monograph entitled *The Protection of Diplomatic Personnel* and a number of articles in leading journals including, most recently, an article celebrating the life of Raoul Wallenberg entitled 'The Function of Diplomatic Missions in Times of Armed Conflict or Foreign Armed Intervention' in the *Nordic Journal of International Law*. He has also written on other examples of immunity from jurisdiction, including State and Head of State immunity. He has recently been researching the alleged conflict between the law of international immunities and human rights, as well as issues of responsibility in International Law.

Paul Behrens, PhD, LLM, is a Reader (Associate Professor) in Law at the University of Edinburgh, where he has established the LLM course on Diplomatic Law and is also responsible for an LLM course on International Criminal Law. He has taught in the past at the University of Leicester and has been a Visiting Lecturer/Visiting Researcher at Uppsala (Sweden), Stockholm (Sweden), Kiel (Germany), and other universities. Dr Behrens is author of the monograph *Diplomatic Interference and the Law* (Hart Publishing 2016) and has written articles and papers on various aspects of diplomatic law. His recent publications include ' "None of their Business?" Diplomatic Involvement in Human Rights' in *Melbourne Journal of International Law* (2014). He has also published in the field of international criminal law and is co-editor of the books *The Criminal Law of Genocide* (Ashgate, 2007) and *Elements of Genocide* (Routledge, 2012). Dr Behrens also contributes regularly to newspapers (including *The Guardian, The Scotsman, Süddeutsche Zeitung*) on issues of international law and constitutional law and has given media interviews on these topics.

Kai Bruns, PhD, MA, is Assistant Professor of Political Science at the School of Arts & Sciences at the American University of Ras Al Khaimah (United Arab Emirates). He received his PhD in the field of Diplomatic Studies from Keele University (UK). In his research, he analysed Britain's influence on the negotiations of the 1961 Vienna Convention on Diplomatic Relations. His primary research interests include the codification of diplomatic law including the work of the International Law Commission and the negotiation process at United Nations diplomatic conferences of plenipotentiaries. In 2014, he published *A Cornerstone of Modern Diplomacy—Britain and the Negotiation of the 1961 Vienna Convention on Diplomatic Relations* within Bloomsbury's *Key Studies in Diplomacy* series (now Manchester University Press). Further research interests include the legal dimensions of the peaceful coexistence debate during the 1960s and the negotiations of the 1973 Protection of Diplomats Convention.

Naomi Burke, PhD, LLM, is an Associate Legal Officer at the International Tribunal for the Law of the Sea. Prior to taking up this position, she was the Arthur Watts Research Fellow in Law of the Sea at the British Institute of International and Comparative Law. Dr Burke holds an LLB from Trinity College Dublin, a Masters from IEP Paris (Sciences Po) specializing in conflict and security studies, an LLM from NYU School of Law, and a PhD from the University of Cambridge. Dr Burke has previously worked in private practice at a boutique law firm specializing in public international law. She has also worked at the Legal Department of the Irish Ministry of Foreign Affairs, as a clerk at the International Court of Justice, and as a research assistant at the International Law Commission.

Graham Butler, PhD, LLM, BA, is Assistant Professor of Law at Aarhus University, Denmark. He has been a member of Centre for Comparative and European Constitutional

Studies at the Faculty of Law, University of Copenhagen, and affiliated to the Faculty of Law, University of Iceland in Reykjavík. He wrote his doctorate on the constitutional limits of the European Union's Common Foreign and Security Policy (CFSP). In Aarhus, Copenhagen, and Reykjavík, he has taught several courses on European Union law, EU external relations law, international law, European integration, and diplomatic law, and has published a number of articles in the fields, primarily centring on CFSP and its various legal challenges from national, European, and international perspectives. Dr Butler previously worked in Dáil Éireann (Chamber of Deputies) at the Houses of the Oireachtas (Irish Parliament) in Dublin, Ireland.

Francesca Dickson, BSc Econ, MSc Econ, is a PhD candidate and President's Scholar with Cardiff University's Wales Governance Centre. Her research currently focuses on the diplomacy of sub-State governments in Wales, Bavaria, and Scotland. She has a broader interest in the diplomatic practices of non-State actors, and recently co-convened an ESRC sponsored international workshop on this theme at Cardiff University entitled 'the Diplomacy of Monsters'. She is also involved in an on-going project with Edinburgh University's Department of Politics and International Relations, considering the security and foreign policy implications of increasing Scottish autonomy. Some of her most recent work has examined the relationship between sub-State diplomacy and multi-level governance and was published in *Geography Compass* (2014), 'The Internationalisation of Regions: Paradiplomacy or Multi-Level Governance'. She is a regular commentator on the UK's devolved and constitutional politics, and teaches on political science and Welsh politics.

Sanderijn Duquet, LLM, has studied Law and International Legal Studies at Ghent University and at American University Washington College of Law and is currently a doctoral research fellow at the Leuven Centre for Global Governance Studies and the Institute for International Law, University of Leuven, Belgium. As a fellow of the Research Foundation Flanders (FWO), she is preparing a PhD on the contribution of the European Union to international diplomatic and consular law. She has published on topics such as diplomatic and consular law, EU external relations, foreign direct investment, and informal international law-making. Ms Duquet has (co-)authored journal articles on the EU's diplomatic and consular relations in *The Hague Journal of Diplomacy* (2012, 2018), the *European Foreign Affairs Review* (2014), and the *European Law Review* (2015). She has also examined the Vienna Conventions on Diplomatic and Consular Relations in a book chapter for *The Oxford Handbook of Modern Diplomacy* (OUP, 2013).

Alison Duxbury, PhD, LLM, is a Professor at Melbourne Law School, University of Melbourne. She is also a member of the International Advisory Commission of the Commonwealth Human Rights Initiative and the Board of Directors of the International Society for Military Law and the Law of War. Professor Duxbury's major research interests are in the fields of International Institutional Law, Human Rights Law, and International Humanitarian Law. Her publications include *The Participation of States in International Organisations: The Role of Human Rights and Democracy* (CUP, 2011) and the *Oxford Bibliographies in International Law* entry, 'International Organisations' (OUP, 2012). She is also co-editor of *Military Justice in the Modern Age* (CUP, 2016). Professor Duxbury has been a visiting fellow at the Institute of Commonwealth Studies at the University of London, the Lauterpacht Centre for International Law at the University of Cambridge, the Centre for Comparative and Public Law at the University of Hong Kong and the Oxford Institute for Ethics, Law and Armed Conflict.

Juan E Falconi Puig, PhD, is Ambassador of the Republic of Ecuador to the World Trade Organization. He was the Ecuadorian Ambassador to the Court of St James from 2013 to 2015. He is also one of the leading jurists in Ecuador, having been Judge *pro tempore* at the Ecuadorian Supreme Court (1999) and the Superior Court of Justice of Guayaquil (1985). He has been Professor of Civil Procedure at the Catholic University of Guayaquil since 1975, where he was appointed Dean of the Law Faculty in 1984. Professor Falconi is also Senior Partner and Owner of the Law Firm Falconi Puig Associates, in Guayaquil. Prior to his appointment to London, he held several positions in Ecuador, including that of Chairman of the International Chambers of Commerce of Ecuador (1992) and Secretary of Industry and Trade (1991). He was Chairman of the Cartagena Agreement Commission (1991); Arbitrator at the Board of Arbitration of the Guayaquil Chamber of Commerce (1985); Minister-Secretary of Production in October 1999 and Bank Superintendent in 2000. He is the author of numerous publications, including *Compañías: Su formación, costos e índice alfabético de la Ley; Código de Procedineinto Civil, comentado y concordado; Immunidad Parlamentaria; y, Estudios Procesales.* In November 2016 he was appointed Honorary Professor of The Catholic University of Guayaquil, Ecuador.

Patricio Grané Labat, LLM, is a Partner in the London Office of Arnold & Porter Kaye Scholer LLP. He is both civil and common law-trained. He studied International Law at Georgetown University Law Center. Grané has extensive experience representing sovereign States and private parties in international dispute resolution proceedings (eg under ICSID and WTO), as well as in non-contentious matters under public international law. He has acted as counsel in institutional and ad hoc arbitrations, including under ICSID, UNCITRAL, LCIA, SCC, and ICC rules. He has advised sovereign States in contentious and non-contentious proceedings on several areas of international law, including sovereign immunities. Prior to entering private practice in 2001, Grané served as a trade diplomat and negotiator for the Republic of Costa Rica in Geneva, Switzerland, in the areas of WTO dispute settlement, agriculture, trade in goods, market access, and other rules-related issues. Grané has been Adjunct Professor at the Georgetown University, Edmund A Walsh School of Foreign Service, and Adjunct Professor of Law at Georgetown University Law Center, where he lectured on dispute resolution under international trade and investment agreements.

Nelson Iriñiz Casás, PhD, participated as a diplomat in various international conferences and was *inter alia* the Uruguayan delegate at the Vienna Conference on Diplomatic Relations in 1961, where he was elected Vice President of the Plenary Commission that was responsible for redacting the text of the VCDR. He began his studies in Uruguay and finished them at the University of Vienna, where he was awarded his PhD in Philosophy. He was also lecturing at the University of Vienna on social and economic issues in Latin America. He started his political career at the age of seventeen, joining the National Party of Uruguay, and was soon awarded a prize for his excellent oratorical skills. Dr Iriñiz Casás began his career as a diplomat in 1954, working in Austria (1954–1958 and 1961–1962), Czechoslovakia (1959), Hong Kong (1962–1965), Denmark (1965–1967), and Sweden (1966–1967). He is also the author of numerous books and articles (including *Korruption in der UNO*, Econ Verlag 1970). In addition to his diplomatic career, he has been active in Uruguayan politics and in the fight against corruption.

Péter Kovács, PhD, LLM, is a Judge at the International Criminal Court. He is also Professor of Public International Law at the Péter Pázmány Catholic University and has worked as a professor of Public International Law at Miskolc University. He gained his academic expertise at the University Attila József, Centre Européen Universitaire, Institut

International des Droits de l'Homme and Miskolc Law Faculty in various fields such as Community Law, International Law, Comparative Law, and Humanitarian Law. He has been Invited Professor at Montpellier University, Paris IX, Paris II, Nantes University, Universität Regensburg (Summer University of the Law Faculty), and as Visiting Professor with Fulbright scholarship at Denver University, College of Law. Professor Kovács has also worked at the Hungarian Ministry for Foreign Affairs, where he was first secretary at the Embassy in Paris and Head of the Department of Human Rights and Minority Law. From 2005 to 2014, he was a judge of the Constitutional Court, where he was the President of the First Chamber from 2013. Professor Kovács' main research interests are in the areas of Minority Protection, Human Rights, Humanitarian Law, International Jurisprudence, History of International Law, and Schengen cooperation.

Lisa Rodgers, PhD, PG Cert, BA (Hons), is a Lecturer in Law at the University of Leicester. Her main research interest is labour law, and in particular the European and international dimensions of this subject. Her most recent research concentrates on the interaction between diplomatic law and State immunity, and access to justice for employment litigants. Dr Rodgers has written various academic articles, including 'Immunity and the Public/Private Boundary in EU Employment Law' (*European Labour Law Journal*), and is author of the book *Labour Law, Vulnerability and the Regulation of Precarious Work* (Edward Elgar, 2016). In 2014, Dr Rodgers was awarded a grant from the Association of Commonwealth Universities to present her research to an international audience at HEC Montreal, Canada. Dr Rodgers also conducts peer reviews for the E-Journal of *International and Comparative Labour Studies* and the *Industrial Law Journal*.

Wolfgang Spadinger, PhD, is the Austrian Consul General in Milan. Before this posting, he was Director of Privileges and Immunities of the Austrian Federal Ministry for Europe, Integration and Foreign Affairs. Dr Spadinger has studied in Innsbruck and Tübingen and holds a Doctorate in Law. His thesis focussed on European Union competition law. During his diplomatic career, he has held various positions such as Head of Unit of International Cooperation in Drug Control, Crime Prevention and Counter-Terrorism, and positions as Deputy Head of Mission at the Austrian Embassies in Madrid, Ottawa, and Sofia. He was the Austrian negotiator for the United Nations Convention against Corruption and represented his country in the 2005 UN Crime Congress in Bangkok. In addition to his diplomatic position he teaches diplomatic law and protocol at the Diplomatic Academy in Vienna.

Simonetta Stirling-Zanda, LLM, PhD, worked as a researcher and lecturer on Public International Law at the University of Edinburgh from 1992 to 2014. She completed all her studies at Geneva University. She did her LLM in Company Law and International Law. Based on her doctoral research she published a monograph examining and comparing the application of customary law in the domestic courts of fifteen European countries, *L'application judiciaire du droit international coutumier: étude comparée de la pratique européenne*. Dr Stirling-Zanda has also been a reporter for the *Oxford International Law Reports*. She has taught human rights at the Wallenberg Institute in Lund (2000–2007), as a visiting lecturer within the framework of the Socrates teaching exchange. Dr Stirling-Zanda's teaching and research have been essentially directed to analysing how individuals are allowed to benefit in their own State from the protection of international law and in particular from customary law. She is particularly interested in analysing relations of legal systems and the relationship between human rights and general norms of international law.

Sana Sud, BA, LLB, earned her Bachelor's in law and arts from Symbiosis Law School, India. She has a keen interest in Human Rights and International Law. She has authored various papers, such as 'Cybercrime and Women' (presented at a conference on Empowerment of Women) and an essay titled 'International Humanitarian Law Implementation in Non-International Armed Conflict in South Asia' for the International Committee of the Red Cross. Miss Sud has also been named the best contributor to the human rights cell, a student organization of Symbiosis Law School working for human rights. She has interned with various organizations a few of which are the United Nations High Commissioner for Refugees, National Human Rights Commission, Commonwealth Human Rights Initiative, and Lawyers' Collective. Sana holds a certificate for European legal studies and a diploma in International Law and Human Rights.

Jan Wouters, PhD, LLM, is Full Professor of International Law and International Organizations, Jean Monnet Chair *ad personam* EU and Global Governance, and founding Director of the Institute for International Law and of the Leuven Centre for Global Governance Studies, an interdisciplinary research centre with the status of Jean Monnet Centre of Excellence, at the University of Leuven (KU Leuven). He is a Visiting Professor at the College of Europe, SciencesPo, LUISS, and an Adjunct Professor at Columbia University. He is a Member of the Royal Academy of Belgium for Sciences and Arts, is President of the United Nations Association Flanders Belgium, and practises law as *Of Counsel* at Linklaters, Brussels. He is Editor of the *International Encyclopedia of Intergovernmental Organizations*, Deputy Director of the *Revue belge de droit international*, and an editorial board member in ten other international journals. He has published widely on international and EU law, international organizations, global governance, and financial law.

Part I

Introduction

1

Diplomatic Law in a New Millennium

Paul Behrens

A new millennium carries the promise of change. That applies to the domestic area as well as to relations among States. At least in terms of technological advances—and their recognition by actors on the international stage—the twenty-first century does not disappoint. In the few years of its existence, it has already revealed itself as the age of videoconferencing and Skype; of smartphones and Whatsapp. Messages are sent within fractions of a second around the globe; answers received in as little time as if the correspondent were standing in the same room.

And yet, for all the progress achieved in the field of communication, the significance of the diplomatic office has not diminished, and there appears to be little appetite to replace diplomatic agents with IT technicians. The United States maintains more than 300 diplomatic missions and consulates around the world;[1] the British Foreign and Commonwealth Office notes that it employs 'over 14,000 people in nearly 270 diplomatic offices'.[2] In light of that, Denza's view that certain provisions of the Vienna Convention on Diplomatic Relations (VCDR)—the 'basic law' of diplomatic relations today—have 'drastically cut the armies' of those entitled to diplomatic privileges,[3] requires qualification. It is a position that may have validity with regard to certain restrictions applying to diplomats at permanent missions;[4] but it does not consider other factors: the existence of diplomats assigned to international organizations, for instance, the continued use of ad hoc diplomats and even the increasing attempts of sub-State entities to engage in international diplomatic relations.

It should not come as a surprise: the maintenance of a permanent mission in other States does, after all, carry substantial advantages which have not disappeared with the advent of videoconferences—most of all the possibility of gaining an insight into the inner workings of the receiving State which only those agents of a State can hope to provide who have gathered substantive expertise of the cultural and political framework

[1] Amy Roberts, 'By the Numbers: U.S. Diplomatic Presence' *CNN Online* (10 May 2013) <http://edition.cnn.com/2013/05/09/politics/btn-diplomatic-presence/>.

[2] Foreign and Commonwealth Office (UK), 'About Us' <https://www.gov.uk/government/organisations/foreign-commonwealth-office/about>.

[3] Eileen Denza, *Diplomatic Law* (4th edn, OUP, Oxford 2016) 4.

[4] As, for example, in the context of the more restrictive concept of the Ambassador's 'suite' (VCDR art 37), which Denza (n 3) 4 highlights.

within which their hosts operate. To sub-State entities and entities which are not universally recognized as States, the exchange of official representatives also sends out a message of considerable importance: it lends strong support to their position that they are serious players in the international field and deserving of recognition by members of the international community. For a range of reasons, therefore, the institution of the diplomatic mission enjoys undiminished popularity in the twenty-first century.

Yet with popularity come problems. The proliferation in the number of diplomatic personnel and diplomatic activities also increases the potential for tension, and more and more situations arise in which the debate about the contours of diplomatic privileges and immunities and about the duties which they owe to the receiving State becomes relevant. In the last few years, questions concerning the inviolability of diplomatic communications have likewise come to the fore—following the revelations of activities of intelligence services monitoring the computer networks of diplomatic missions,[5] and following also the publication of embassy cables by WikiLeaks—a matter which received judicial consideration in the United Kingdom.[6] The very character of the diplomatic office can still be in doubt, as the *Juffali* incident has shown: a 2016 case in which the Court of Appeal of England and Wales had to decide whether a person who had been appointed as Permanent Representative to an international organization but had not carried out any functions of his office was entitled to immunity.[7] The institution of diplomatic asylum continues to cause uncertainty: at the time of writing, the activist Julian Assange is still resident in the embassy of the Republic of Ecuador in London, where he had been granted asylum more than four years ago, and the dispute with the receiving State on this matter is unresolved.[8]

Developments of this kind highlight the fact that the difficulties which arise in modern diplomatic relations are not limited to problems on a factual or political level. They are challenges which concern matters of legal interpretation—and at times, even the identification of applicable legal norms to begin with.

In this area of international law, this may seem surprising: diplomatic law, after all, can lay claim to being one of the oldest branches of international law, and one may have expected that the difficulties in its path would have been addressed at some stage in its development. And it is certainly true that the history of diplomatic law reaches far beyond the days of the adoption of the VCDR in 1961, and that centuries of diplomatic relations gave opportunity to debate at least some of the problems which are of relevance today.

The roots of the diplomatic office have indeed been traced to the practice of Greek city States and to ancient India,[9] although permanent diplomatic missions

[5] Laura Poitras, Marcel Rosenbach, Holger Stark, 'Codename "Apalachee": How America Spies on Europe and the UN' *Der Spiegel* (26 August 2013).

[6] *Bancoult v Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 708.

[7] *Al-Juffali v Estrada and Another* [2016] EWCA Civ 176.

[8] On the Assange case, see Paul Behrens, 'The Law of Diplomatic Asylum – A Contextual Approach' (2014) 35 Michigan Journal of International Law 319–67; Maarten den Heijer, 'Diplomatic Asylum and the Assange Case' (2013) 26 Leiden Journal of International Law 399–425.

[9] Eileen Young, 'The Law of Diplomatic Relations' (1964) 40 BYIL 141, 142.

appear to have become common only in the Early Modern Age.[10] In the absence of codification on an international scale (and indeed of international institutions capable of promoting this process), it fell to scholars to advance the rules in the field. Some of the leading authorities on the law of nations contributed to that effort—including Alberico Gentili, who advised the English government in the famous Throkmorton incident of the 1580s (a situation arising from a plot to overthrow the rule of Elizabeth I—the Spanish Ambassador to England, Don Bernardino de Mendoza, played a role in that affair).[11] Grotius, one of the fathers of international law, wrote in his seminal work *De Iure Belli ac Pacis* extensively about the 'Right of Legation'.[12] In the eighteenth century, the works of Cornelius Bynkershoek, President of the Supreme Court of the Netherlands,[13] and of Emmerich de Vattel[14] made significant contributions to the development of the law in this field.

To the development, but also to the identification of the law: for at that stage, a principal task of scholars of the discipline was still the establishment of the rules as they appeared from the practice of States. 'In Vattel', writes Young, 'customary law [on diplomatic relations] … developed as far as it was ever to do unaided'.[15]

These efforts, and the sheer wealth of material on the subject area that existed even at the end of the eighteenth century, lend support to the view that the rules of diplomatic law were fairly well settled even then and certainly by the time the drafting of the VCDR was undertaken.

With regard to particular aspects of the law, this might even be an accurate assessment.

It is, for instance, true that the foundations of diplomatic immunities had been the object of debate for a long time. Over the years, three principal theories emerged which provided a rationale for the existence of immunities:[16] The theory of exterritoriality (the view that the beneficiaries of diplomatic privileges and immunities are considered to be 'outside' the territory of the receiving State) is frequently traced back to Grotius,[17] who had indeed spoken of a 'fiction' under which ambassadors 'were held to be outside of the limits of the country to which they were accredited'.[18]

Yet Grotius had also referred to another consideration to characterize the diplomatic office. Ambassadors, in his view, were also 'as if by a kind of fiction […]

[10] Young refers in this regard to Florence and other Italian cities which, from the fifteenth century onwards, adopted a system of permanent diplomatic missions, ibid 145 and see Ivor Roberts (ed), *Satow's Diplomatic Practice* (OUP, Oxford 2009) 9.

[11] See Paul Behrens, 'Diplomatic Interference and Competing Interests in International Law' (2012) 82 BYIL 181.

[12] Hugo Grotius, *De Iure Belli ac Pacis* (1625). For a translation, see Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (Francis Kelsey tr, Clarendon Press, Oxford 1925).

[13] Cornelius van Bynkershoek, *De Foro Legatorum* (1721). For a translation, see Cornelius van Bynkershoek, *De Foro Legatorum Liber Singularis* (Gordon Laing tr, Clarendon Press, Oxford, 1946).

[14] Emer de Vattel, *Le Droit de Gens* (1758). For a translation, see Emmerich de Vattel, *The Law of Nations or the Principles of National Law* (Charles Fenwick tr, Carnegie Institution, Washington 1916).

[15] Young (n 9) 164.

[16] See on the whole matter ILC Secretariat, *ILC Yearbook* 1956 vol II, 157–61.

[17] ibid 157, para 209; Roberts (n 10) 98.

[18] Grotius (Francis Kelsey tr) (n 12) 443.

considered to represent those who sent them'.[19] This is an early reference to what would become known as the theory of the 'representative character':[20] diplomats are representatives of independent States, and their immunities derive from the fact that the sovereignty of their masters has to be respected.[21]

Exterritoriality and representative character are joined by a third theory: the theory of 'functional necessity', which considers the basis of immunity to lie in the fact that diplomatic agents must be enabled to fulfil the functions of their office abroad.[22] That, too, is a position which can look back on a long history: Vattel is referred to as one of its strongest supporters,[23] but its roots have been traced even to the sixteenth and seventeenth centuries.[24]

Yet it is not only the formulation of the theories, but also the identification of their respective strengths and weaknesses that had taken place at a comparably early stage: Vattel's contemporary Bynkershoek, for instance, had already voiced his criticism of both the theory of functional necessity and that of the representative character.[25]

The International Law Commission (ILC) was therefore able to rely on a wide range of materials and to reflect on centuries of debate when it had to consider the theoretical underpinnings of a significant part of its articles on diplomatic law (the Vienna Convention itself was informed both by the theory of functional necessity and the theory of the representative character,[26] very much at the expense of exterritoriality[27]).

And this is not the only issue which had been a matter of discussion for a long time. The diplomatic functions, for instance, to which Article 3 VCDR today makes reference, had, to a significant degree, already been recognized in existing State practice.[28] The diplomatic duty not to interfere in the internal affairs of the receiving State (and its violation) had given rise to scholarly debate almost from the beginning of the establishment of permanent diplomatic missions.[29] Vattel's *Droit de Gens* takes up issues as detailed as the question of immunities to be accorded to diplomats who were nationals of the receiving State and exemption from taxation (including the question of indirect taxes).[30]

[19] ibid. [20] See ILC Secretariat (n 16) 158–60, paras 218–27.

[21] ibid and see Clifton E Wilson, *Diplomatic Privileges and Immunities* (University of Arizona Press, Tucson 1967) 1.

[22] See on this ibid 17, 18. [23] Young (n 9) 164. [24] Wilson (n 21) 17.

[25] Young (n 9) 161.

[26] *ILC Yearbook* 1958 vol II, 95, Section II, General Comments, para 3; United Nations Conference on Diplomatic Intercourse and Immunities, Vienna 2 March–14 April 1961, *Official Records, Vol I: Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole*, UN Doc A/CONF 20/14 (hereinafter 'Vienna Conference Records Vol 1'), 131, para 18 (Tunkin), and see VCDR, preamble, para 4.

[27] *ILC Yearbook* 1958 vol II, 95, Section II. General Comments, para 3 and see Vienna Conference Records Vol 1, 155, para 32 (Krishnan Rao).

[28] Denza (n 3) 29.

[29] See text to n 11 above on the Throkmorton incident. The *locus classicus* of diplomatic interference is, even today, frequently considered to be the Sackville incident of 1888. Paul Behrens, *Diplomatic Interference and the Law* (Hart Publishing, Oxford 2016) 27, 28.

[30] Young (n 9) 164–66.

Debate, however, is not the same as recognition, and the realization by some scholars that a problem exists, does not by itself mean that consensus within the international community on its solution can be established. Codification, in fact, proved to be a surprisingly stony path for the matter of diplomatic law.

Its beginnings on an international level can be traced to the conclusion of the Congress of Vienna in 1815, which saw the adoption of an instrument regulating aspects of diplomatic law for a multitude of States.[31] But the topical area which the Vienna Regulations—along with a second instrument, concluded three years later[32]—addressed remained narrow: they were limited to questions of rank and precedence among diplomatic representatives.

The first attempts to achieve a comprehensive codification of diplomatic law were, again, scholarly undertakings: draft codes written by experts on international law. As such, they had no binding authority, but several of their rules can be held to reflect customary law as it existed at that time. From the earliest of these codes (Bluntschli, 1868) to the last major private project—the Harvard Law School Draft Convention on Diplomatic Privileges and Immunities (1932)[33]—they were initiatives whose considerations of various aspects of diplomatic law were to exert influence on the thinking of scholars in the field, and often enough to have an impact on the later drafting of the VCDR itself.[34]

Codification through treaty law, however, proved to be a more sluggish procedure. In 1927, the League of Nations had drawn up a list of seven subjects which it considered 'ripe' for codification—among them, the topic of diplomatic privileges and immunities.[35] But the project was not successful: later in the same year, the Assembly decided that the subject should not be retained for codification, as it seemed difficult to reach universal agreement and as it was not considered a matter of priority.[36]

The inter-war period, however, also saw the signing of the Havana Convention on Diplomatic Officers (1928), which later entered into force with the participation of several American States. While being a relatively short instrument (the Convention has only twenty-seven articles), it included provisions on a wide range

[31] Congress of Vienna, *Règlement sur le rang entre les agents diplomatiques* (19 March 1815), Annex XVII of the Acts of the Congress, 2 (1814–1815) *British and Foreign State Papers* 179.

[32] Protocole de la Conférence, tenue à Aix-la-Chapelle (21 November 1818) 5 (1817–1818) *British and Foreign State Papers* 1090.

[33] For a reproduction of the draft codes, see (1932) 26 AJIL Supp 19–187.

[34] See, in particular, Young (n 9) 176.

[35] ILC Secretariat (n 16) 136.

[36] League of Nations, Report of the First Committee to the Assembly, *Progressive Codification of International Law*, League of Nations Doc A.105.1927.V (23 September 1927) 2. In 1928, the League of Nations also abandoned an initiative to engage in a 'revision of the classification of diplomatic agents' when it was found that international codification of this topic would not be realizable. League of Nations, Committee of Experts for the Progressive Codification of International Law, *Second Report to the Council of the League of Nations on the Questions Which Appear Ripe for International Regulation*, League of Nations Doc A.15.1928.V (27 June 1928) 6. See also ILC Secretariat (n 16) 136 et seq for an examination of the work done by the Committee of Experts and its Sub-Committee. For more details on the work of the League of Nations in that regard, see Chapter 5.

of topics, including immunity from civil and criminal jurisdiction, termination of the mission, and obligations of diplomatic agents.[37]

After the Second World War, the United Nations returned to the question of the codification of diplomatic law. The ILC began its debates on a code on diplomatic intercourse and immunities in 1957, based on a draft which its Special Rapporteur, the Swedish Judge Sandström, had prepared.[38] In the same year, a first set of draft articles was issued and States were given the opportunity to provide comments on it. The ILC took these statements into account when it revisited the topic in 1958, and a second set of articles was produced in that year and published, together with the ILC's own commentaries.[39] It was to form the basis of the debates at the Vienna Conference—the meeting of State delegates which, from 2 March to 14 April 1961, negotiated the text of the Vienna Convention on Diplomatic Relations.[40]

In spite of its difficult beginnings, it is tempting to consider the eventual codification of diplomatic law a remarkably successful undertaking. Agreement within the international community, which seemed so hard to establish in the days of the League of Nations, now appeared to be overwhelming. Not only did the drafting work proceed in record time (it took the ILC merely two years, and the conference forty-four days to deliberate the relevant texts), but the Convention itself was able to enter into force barely three years after its adoption. Today, it has no less than 190 parties, which allows the VCDR to join the ranks of those rare instruments that can lay claim to nearly universal acceptance. This wide-ranging appeal of the subject matter, which transcends political and cultural barriers, had been apparent even at Vienna, when delegates, for a brief span of time, were able to set aside the divisions of the Cold War to cooperate on the construction of a text whose influence would be felt around the world.[41]

Following the adoption of the final text at Vienna, the influence of the VCDR was soon felt in related areas of the law. The solutions found by the drafters of the treaty were, in a range of instances, also accepted by the 1963 Vienna Convention on Consular Relations (VCCR),[42] the 1969 Convention on Special Missions (CSM),[43] and the 1975 Convention on the Representation of States in their Relations with International Organizations of a Universal

[37] Convention on Diplomatic Officers (adopted 20 February 1928, entry into force 21 May 1929) 155 LNTS 259.

[38] *ILC Yearbook* 1955 vol II, 9–12.

[39] *ILC Yearbook* 1958 vol II, 89. For more details on the ILC's work and procedure, see Chapter 5.

[40] For details on the proceedings at Vienna, see Chapters 4 and 5.

[41] The conference brought together delegates from States whose political systems ranged from those of Communist States to Franco's Spain; but even between delegates from those States, agreement was possible and indeed actively sought. See, for instance, Vienna Conference Records Vol 1, 136, paras 31 (Zabigailo, Ukraine) and 32 (De Erice y O'Shea, Spain).

[42] Vienna Convention on Consular Relations (adopted 24 April 1963, entry into force 19 March 1967) 596 UNTS 261.

[43] Convention on Special Missions (adopted 16 December 1969, entry into force 21 June 1985) 1400 UNTS 231.

Character (CRSIO).[44] Some rules enshrined in the later instruments even employed the same wording that the VCDR had provided,[45] lending further support to the view that the 1961 treaty had been a remarkably successful undertaking.[46]

Diplomatic law has also gained the reputation of being a branch of international law that 'works' in practice. That may be true at least of some of its core aspects: State measures (as opposed to private actions) which breach diplomatic inviolability, for instance, have become a comparably rare phenomenon in contemporary international relations.[47]

Reciprocity—and the fear of reciprocal treatment—carries a good part of the responsibility for this. Receiving States are typically sending States as well, and there is a perceived danger that the treatment which diplomats from another State receive in their territory will be taken as a basis for measures against their own diplomats abroad. The original concept of reciprocity embraced a distinct positive component as well: prior to the conclusion of the VCDR, the granting of privileges and immunities to one's own diplomats was seen by certain States as justification for affording the same rights to diplomats from the relevant sending States.[48] In modern diplomatic relations, however, the principle of reciprocity tends to enter public awareness in particular in its negative form: most prominently, when expulsions of diplomatic agents lead to tit-for-tat measures by the sending State.

Yet in spite of the considerable progress made since the inception of diplomatic law and since codification efforts had begun, it would be wrong to think of this part of international law as a well-settled system that has found answers for all questions which the practice of diplomatic relations encounters.

Large areas which are of decisive importance for the conduct of modern diplomatic relations were outside the remit of the VCDR from the beginning. That includes relations with international organizations which are an indispensable element of diplomacy in the twenty-first century. Even the CRSIO, concluded fourteen years after the VCDR, addresses only a limited aspect of this part of the law;[49] and the fact that that instrument, more than forty years after its adoption, has not

[44] Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (adopted 13 March 1975; not yet in force) UN Doc A/CONF 67/16.

[45] See Chapter 20, section 1.

[46] See, however, for a critical view of that point, Chapter 20, in particular section 2.

[47] But not unheard of. Uganda, for instance, asserted in the *Armed Activities* case that the right to personal diplomatic inviolability had been breached by the Democratic Republic of Congo, referring to an incident in 1998 in which Congolese soldiers had stormed her embassy in Kinshasa, threatened the Ambassador and mistreated Ugandan diplomats at N'djili International Airport. The International Court of Justice (ICJ) agreed that the evidence for the allegations was sufficient and found that the DR Congo had indeed breached her obligations in that regard. *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda*) [2005] ICJ Rep 168, paras 307, 308, 338, 340. See also *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v Iran)* [1980] ICJ Rep 3, paras 17, 73–74. For cases of State action arising during the Cold War, see Wilson (n 21) 62–72.

[48] Wilson (n 21) 32, 33.

[49] See, in particular, CRSIO art 2.

yet entered into force, is reflective of the prevailing controversies in the field.[50] The years following the conclusion of the VCDR saw an increasing involvement in diplomatic activities by other actors for which the traditional system had not been designed. That includes the External Action Service of the European Union and the system of (at the time of writing) 139 delegations maintained by the EU.[51] But it also includes sub-State entities which have emerged as an important force in modern diplomatic relations and which at times operate a significant network of missions in various parts of the world.[52]

Even within the system which the VCDR expressly addresses—that of inter-State diplomatic relations, carried out through permanent diplomatic missions—there are significant fields which are marked by uncertainty and controversy. Some areas were deliberately omitted from codification: most prominently, the field of diplomatic asylum, whose status under international law continues to raise questions in contemporary international law.[53] A suggestion to allow the drafting work of the ILC to embrace this question, had been made in the Sixth Committee of the General Assembly,[54] but the majority of Committee members felt that it was a topic that should more appropriately be considered under the 'general question of asylum'.[55] Up to the present day, the international community has not been able to agree on a binding instrument on diplomatic asylum.[56]

In other fields, the wording of the VCDR remained vague, even though the resulting uncertainty—and in some cases, even the potential for conflict—had been foreseeable to the drafters. The question of immunity to be granted to the family of the diplomatic agent, for instance, had been a matter of concern to sending and receiving States for a long time—and certainly from the seventeenth century onwards.[57] At the 1961 Vienna Conference, several proposals had been made to clarify the concept of 'family'.[58] Yet the text which found approval in the Conference, merely referred to 'members of the family of a diplomatic agent forming part of his household',[59] thus retaining the uncertainty of the term and the potential for considerable disagreement on its interpretation.[60]

[50] The CRSIO requires the deposit of thirty-five instruments of ratification to enter into force, CRSIO art 89(1). At the time of writing, thirty-four instruments had been deposited. United Nations Treaty Collection, 'Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character' (30 November 2016) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-11&chapter=3&clang=_en>.

[51] European Union External Action, 'About the European External Action Service' (1 March 2016) <https://eeas.europa.eu/headquarters/headquarters-homepage/82/about-the-european-external-action-service-eeas_en>.

[52] See Ministère des Relations Internationales et de la Francophonie (Québec), 'Offices abroad' (24 November 2016) <http://www.mrif.gouv.qc.ca/en/ministere/representation-etranger>.

[53] For the ongoing relevance of diplomatic asylum, see above n 8 and text to n 8.

[54] See ILC Secretariat (n 16) 131, para 10.

[55] *ILC Yearbook* 1957 vol I, 2, para 7 (paraphrasing by Sandström).

[56] For the discussion of asylum in the ILC and subsequent developments, see Behrens (n 8) 322–23.

[57] See eg the 1654 case of Don Pantaleo de Sa, Young 154. According to Young, spouses and children began to accompany Ambassadors only from the second half of the seventeenth century, ibid 163.

[58] For details, see Chapter 7, section 1 and Chapter 20, section 2.1.

[59] VCDR art 37(1). [60] See on this, in particular, Chapter 7.

Uncertainty also manifests itself through a phenomenon which diplomatic law shares with other branches of international law: the fact that rules emanating from various parts of the law of nations may have an impact on the same situation. The application of the duty of diplomatic agents not to interfere in the internal affairs of the receiving State—today enshrined in Article 41(1) VCDR—frequently results in situations of this kind: host governments will often claim that the duty of non-interference had been violated even in instances in which diplomatic agents feel that they had the right, under international law, to make the relevant representations—based, for instance, on the interest which every State can claim to have in the realization of a people's right to self-determination.[61] Yet here, and in other cases, the Vienna Convention does not resolve the situation: with regard to this particular duty, it merely states that beneficiaries of privileges and immunities 'also have a duty not to interfere in the internal affairs of that State'.[62]

The image that emerges from these considerations, differs in significant regards from that which the reputation of the VCDR suggests. Neither the brevity of the text nor the undeniable accessibility of its style nor its very extensive and very speedy acceptance, mean that the 1961 instrument has served to resolve the principal controversies in the field. Diplomatic law, instead, is marked by uncertainty, by omissions (deliberate and otherwise) and by continuing disagreement regarding some of its most important aspects.[63]

There is, therefore, room for a critical examination of the chief challenges that contemporary diplomatic law encounters—an examination which avails itself of the instruments and the discourse which had not been available to writers of the classical age of international law. Given the continued importance of the problems in the field, the rise of new problems caused by societal and technological changes and the emergence of new players in the field, such an analysis is not only a useful, but a highly necessary initiative.

Diplomatic Law in a New Millennium is a study which explores some of the most important issues in the field and seeks to provide solutions to the leading controversies within the respective areas.

A first part offers introductory remarks on diplomatic law in general and the VCDR in particular, both from the point of view of a practitioner (Chapter 2) and of an academic expert on diplomatic law (Chapter 3). The second part is dedicated to the historical development of diplomatic law, with a particular emphasis on the codification history of the VCDR. It thus includes a chapter written by a former delegate to the Vienna Conference (Chapter 4) and a chapter which focuses in particular on the role of the ILC in the drafting of the blueprint for the Vienna Convention (Chapter 5).

Parts III to V deal with specific aspects of contemporary diplomatic law which, in general, fall within the remit of the VCDR, but which have given rise to controversy ever since the adoption of the treaty. That includes the topic of personal

[61] See on this Chapter 16. [62] VCDR art 41(1).
[63] See on these points Chapter 20.

immunities (Part III); and it is in this context that exceptions to the personal inviolability of diplomatic agents (Chapter 6), but also the elusive concept of the family of members of the diplomatic mission (Chapter 7) are being discussed. The last two chapters of Part III consider diplomatic law in the context of employment and thus discuss the inviolability of diplomatic agents in this field (Chapter 8), but also the situation of private domestic staff in modern diplomatic law (Chapter 9).

The discussion of personal immunity is followed, in Part IV, by an examination of property immunities—an area which has given rise to much discussion in recent instances—not least, where the granting of asylum on mission premises was concerned. The first chapter of this part deals with certain exceptions to premises immunity which have been discussed in the past (Chapter 10). This is followed by a chapter on current developments relating to premises inviolability (Chapter 11) and by a chapter on developments within the field of diplomatic asylum (Chapter 12). But immunity in this field also attaches to certain matters outside mission premises—most prominently, to diplomatic correspondence and the diplomatic bag—issues which have gained particular relevance through recent instances of infringements of the relevant inviolability and through court cases in which these matters were examined. These aspects are investigated in the last two chapters of that part (Chapters 13 and 14).

The last part which takes the VCDR as the basis of its discussions (Part V) deals with a topic that frequently tends to be ignored in the analysis of diplomatic law, but which carries considerable importance for diplomatic agents around the world: the subject of diplomatic duties. It thus comprises a chapter dealing in general with obligations incumbent on diplomatic agents in the receiving State (Chapter 15) and a chapter exploring the particular duty of non-interference (Chapter 16).

Part VI goes beyond the framework of the VCDR and explores the rules that apply to actors on the diplomatic stage which move outside the traditional system of inter-State diplomatic relations. It thus investigates the position of international organizations and their agents (Chapter 17), but also the increasing importance of the European Union as an active player in the field, the position of its External Action Service and of the missions it maintains around the world (Chapter 18). The last chapter of this part is dedicated to sub-State diplomacy: to the engagement of entities that are non-independent parts of sovereign States (such as Scotland and Wales) in contemporary diplomatic relations (Chapter 19).

The final part (Part VII, Chapter 20) offers concluding reflections on the current state of diplomatic law and on the position of the VCDR in particular. It thus takes up the questions which the present chapter touched upon: is the Vienna Convention, more than fifty years after its entry into force, capable of dealing with the challenges of diplomatic relations today? Are the difficulties which diplomatic law encounters today rooted in inherent shortcomings of the VCDR or are they due to an ever changing global situation which informs contemporary diplomatic relations? And are there solutions to the salient problems which mark the current field of diplomatic law?

The current study thus brings together a wide range of topics, and it is not surprising that they embrace different forms of discourse and, at times, even different bases for the discussions to which they give rise. It is the more remarkable that, in spite of this variety, common themes emerge—at least on a fundamental level of debate.

One of them is the continued importance of customary international law in the field. In light of the proliferation of instruments on diplomatic law, this might not have been an expected result: the significant efforts at codification may well lead to the assumption that space for customary law is considerably restricted. Yet the VCDR itself made reference to that source and affirmed that it 'should continue to govern questions not expressly regulated by the provisions of the present Convention'.[64] That is not to say that this is the only way of filling the gaps of the Convention: in some situations, the international community appears to resolve difficulties on the basis of specific understandings between the respective sending and receiving States. Yet it is only custom which can preserve a united position under international law: allowing bilateral solutions to take its place is tantamount to giving up the consensus which instruments like the VCDR sought to identify.

A second theme which recurs with some regularity in the current study, refers to the need for a holistic legal assessment of the relevant situations under discussion: an assessment which does not restrict itself to the rules of the VCDR (or other relevant instruments of diplomatic law), but takes into account all norms of international law which may exercise an impact in this field. Reference has in that regard already been made to the meeting of the provision on non-interference with other rules of international law,[65] but this situation is joined by numerous other examples in areas as diverse as the employment of domestic staff by diplomatic agents, personal diplomatic inviolability and its exceptions, and the inviolability of diplomatic premises in emergency situations.[66] The 'other norms' are often provisions whose direction appears to diverge from those found in the system of diplomatic law. But not always: at times, they reinforce a point which had already received support through the text of the VCDR.

A third theme relates to the procedural level, rather than the field of substantive law, and while it primarily refers to future developments, it is rooted in concerns which derive from diplomatic law in its current state. It is a consideration which concerns institutional progress: namely, the establishment of bodies tasked with the interpretation of the rules in this field and the supervision of their application. It is a point which has gained increasing traction in the literature,[67] and which is

[64] VCDR, preamble, 5th operative para.

[65] See text to nn 61–62 above.

[66] For a more detailed discussion of some of these aspects, see Chapter 20, section 2.2.

[67] See on this eg Joshua Groff, 'A Proposal for Diplomatic Accountability Using the Jurisdiction of the International Criminal Court: The Decline of an Absolute Sovereign Right' (2000) 14 Temple International and Comparative Law Review 209 at 227 et seq; Veronica Maginnis, 'Limiting Diplomatic Immunity: Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations' (2002–2003) 28 Brooklyn Journal of International Law 989 at 990; Stephen Wright, 'Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts' (1987) 5 Boston University International Law Journal 177 at 185–88. Ben-Asher advocates the establishment of a 'forum for arbitration', which would deal with human rights violations

discussed in various chapters of this study as well.[68] Solutions of this kind cannot be expected to be without their difficulties: they require the construction of consensus among a sufficient number of State parties to be feasible, and there are indications that, at present, the appetite of the international community for new international institutions, in particular international courts, is somewhat subdued.[69]

Yet inaction, too, comes at a price.

Diplomatic law, as it stands, is a system whose general principles are well supported—perhaps even grounded in universal approval. But agreement on principles is not the leading challenge to the contemporary law on diplomatic relations. It is not the general consensus that is in question, it is the definition of the rules in practice and their detailed application in everyday diplomatic life.

In the absence of an institutional solution, the system remains characterized by its gaps and omissions, by vague language on the one hand and absolute terms on the other. In the absence of a body that can, from a seat of authority, provide clarification to States and diplomats alike, academic scholars and diplomatic commentators find themselves in a position that, in spite of all the efforts at codification, does not differ much from that of their forebears in the classical age of the law of nations: like them, they are called upon to discern the contours of the law, to establish its meaning, and to identify solutions for the many fields in which the wisdom of the treaties has reached its limits.

by persons enjoying diplomatic privileges. Dror Ben-Asher, 'Human Rights Meet Diplomatic Immunities: Problems and Possible Solutions' Harvard Law School (November 2000) <http://www.law.harvard.edu/academics/graduate/publications/papers/benasher.pdf>.

A critical stance to international adjudication in this field is taken by Lori Shapiro, 'Foreign Relations Law: Modern Developments in Diplomatic Immunity' (1989) Annual Survey of American Law 281 at 297.

[68] See, in particular, Chapters 11 and 20.

[69] Recent developments in the field of international criminal law underline that point. In October 2016, three African States declared their withdrawal from the Rome Statute of the International Criminal Court. Somini Sengupta, Marlise Simons, 'African Exits Threaten a Court' *New York Times* (27 October 2016). The International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia had both come under criticism for the large budgets the courts were running. See Jonathan Mann, Aneesh Raman, Robin Oakley, 'Saddam Hussein Trial Update; Other World Leaders' Trials' *CNN International* (13 February 2006); Paul Behrens, 'Don't Expect Swift Justice for Flight 17' *The Scotsman* (4 July 2015).

2

A Former Diplomat's Reflections on the Vienna Convention

Brian Barder

I write as a former working diplomat who learned his curious trade on the job, not in the lecture room. Consequently I lack an academic's knowledge of the history of the VCDR and I am not qualified to judge whether it has lived up to expectations. All I can offer is some reflections on a few of the ways in which the VCDR affects diplomats as they go about their business. I shall also argue that while many diplomats would benefit from more familiarity with the history and underlying principles of the Convention, some academic commentators on it might also benefit from greater knowledge of how the Convention affects the life and work of diplomats in practical ways.

Reflecting on the VCDR, I draw on my experience as a British diplomat who served in four of the five continents, in two capitals of countries then ruled by more or less hostile communist governments—Moscow and Warsaw—and in two capitals of developing countries with whom our relations at the time were distinctly edgy—Addis Ababa and Lagos. It is in countries like these, where democracy and the rule of law cannot always be relied on, that diplomats rely most on the protections offered by the Convention. But it would be a mistake to suppose that diplomats need no such protection or immunities in advanced, democratic countries and cities such as New York and Canberra, where I was also lucky enough to serve.

In countries with totalitarian governments, and in developing countries where democracy has not yet fully taken root, neither diplomats nor anyone else can generally rely on an independent judiciary to uphold their civil rights or to observe due process and the rule of law. Without the protection of the Convention, diplomats could and would come under pressure to behave in ways convenient to the local government and security authorities but not necessarily compatible with their proper functions or with their obligations towards the governments at home (which they are paid to represent). A diplomat whose duty it is periodically to irritate and embarrass his hosts by the regular delivery of protests and complaints, or by his revelations of injustices, corruption, and other misdeeds in the country where he serves, could probably be brought to heel, or at any rate restrained, if the host government were free to subject him to exorbitant or indeed any other taxes, or to prosecutions and perhaps prison

sentences on trumped-up charges. Without the Convention, other kinds of lesser harassment and intimidation would be available as pressure on the uncooperative diplomat: constant searches by the police of his car and home, the threat of prosecution or civil court action against his wife or children, the levying of heavy import duties on tools of his trade which are not available in the local shops and therefore have to be imported—and I am not thinking only of alcohol. (That too, though.)

As anyone who worked in Moscow or other Warsaw Pact countries in Cold War days can testify, there are plenty of means of harassment that can be applied to foreigners, including diplomats regardless of their Vienna Convention immunities, as a way of influencing their behaviour and making them more amenable. Abolishing the protections given to diplomats by the Convention would greatly expand the coercive armouries of hostile governments around the world and make the practice of diplomacy even more difficult: even, eventually, impossible. (For the purposes of these reflections I am assuming, not perhaps unduly controversially, a general consensus that as between peaceful diplomacy constituting the principal means of communication between national governments on the one hand, and the use or threat of force in the conduct of countries' international relations on the other, diplomacy is generally to be preferred. Apart from anything else, diplomacy is less expensive.)

Even in the luxury capitals of the democratic West, some of the Convention's protections are absolutely indispensable. Chief among these is the ability of diplomats to communicate securely with their home governments. Ordinary diplomatic activity would be impossible if host governments, however benign, were able to open diplomatic bags and read their contents, listen to their telephone calls, hack into diplomats' e-mails and telegrams, and inspect the highly classified cipher machines which their diplomats import from home. The protection afforded by the Convention to diplomatic communications is vital. As to whether governments of sophisticated countries—other than my own—ever use their technological skills to abuse the sanctity of the communications of foreign diplomats serving in their countries, I couldn't possibly comment. At least the Convention acts as a deterrent to any such regrettable malpractices.

I should perhaps offer a few concrete examples of ways in which the Convention actually impinges on the legitimate (or at any rate defensible) work of diplomats. I am thinking of a walk-in to the British Embassy in Moscow in 1972, the case of Mr Julian Assange holed up in the Embassy of Ecuador in London, and the shooting of Woman Police Constable Yvonne Fletcher from the Libyan Embassy in London in 1984.

In 1972, when I was a humble—or at any rate junior—first secretary in the British Embassy in Moscow, four teenage members of a pop music group, two boys and two girls, from Armenia, then of course part of the Soviet Union, travelled to Moscow and managed to burst into the British Embassy past the patrolling Soviet militia outside the gates. They appealed to us for asylum and for visas to enable them to emigrate to Britain, the land of the Beatles. They were carrying not only their guitars but also razor blades, threatening to slit their own throats if we expelled them from the Embassy and delivered them into the hands of the waiting KGB, who rapidly augmented their patrols around the embassy building. It was several days before they calmed down, and several weeks before we could convince

them that there was no way for them to leave the embassy and go to England without being intercepted and taken away by Soviet security. The Soviet Foreign Ministry called in the British Ambassador and demanded that we hand over the four 'refugees', claiming that we had no right under international law to help them escape Soviet justice by abusing the immunity of the embassy's premises. After consulting the entire embassy staff, including spouses, and with the agreement of our masters in London, the Ambassador refused to hand them over and promised them (rather riskily) that we would not expel them against their own wishes.

After several weeks the parents of two of the teenagers arrived at the embassy in official Soviet government cars. With the explicit agreement of all four teenagers we allowed the parents to talk to them in complete privacy in a room in the embassy. After much audible emotion, all four agreed to leave with the two pairs of parents on the basis of a promise by the Soviet authorities that they would be allowed to go home, and that they would not be prosecuted or otherwise penalized—a promise which we were later able to satisfy ourselves was fully honoured. A happy ending, perhaps unusual for a diplomatic contretemps of this kind.

So although the Soviet authorities regarded our action in giving sanctuary to four Soviet citizens as an abuse of our diplomatic immunities under the Convention, they scrupulously observed it themselves and never attempted to force their way into the embassy to seize the four Soviet citizens inside. I express no view on whether it is consistent with the terms and spirit of the Vienna Convention to grant sanctuary in the inviolable precincts of an embassy to citizens of the host country, who may or may not be fugitives from justice or just from a repressive régime. Different countries adopt different positions on this issue, some having undertaken treaty obligations relating to it. It may be an issue on which international uniformity would be unhelpful and traditional British pragmatism, dealing with each such problem on its humanitarian and equitable merits case by case, is best.

This leads me to the interesting case of Mr Assange, the Australian publisher of WikiLeaks wanted in Sweden for questioning in connection with accusations of certain sexual offences, including rape. Mr Assange has taken refuge—some would say 'been granted asylum'—in the embassy of Ecuador in London in order to avoid extradition to Sweden, from which he claims to fear that he might be further extradited to the United States.

There is no need for me to dwell on the basic facts of the case of Julian Assange: they are well known. I shall focus on two aspects that have received little attention and which bear directly on the Vienna Convention. First, as far as I know there has never been a satisfactory explanation of the action of my former UK government Department, the Foreign & Commonwealth Office (FCO), in sending an official message[1] to the government of Ecuador asserting

[1] Aide Memoire by the British government to Ecuador (2012), Brian Barder, 'Julian Assange, Ecuador and the Law: A Compendium', Ephems Blog (6 December 2012) <http://www.barder.com/politics/julian-assange-ecuador-and-the-law-a-compendium/> accessed 3 April 2017.

a legal right on the part of Her Majesty's Government (HMG) to enter the Ecuadorian Embassy, if necessary without the permission of the Ambassador, and to remove Mr Assange, unless the Ambassador voluntarily handed him over to the London police first. The message claimed that harbouring Assange was an improper, even illegal, use of diplomatic premises and that the British government had powers *under UK law* to declare that the embassy no longer enjoyed diplomatic status and could therefore be entered by the British authorities without the need for Ecuadorian permission. The implied claim that UK domestic law overrode an international treaty obligation was extraordinary: I wonder whether the terms of the FCO ultimatum were approved by the FCO legal advisers. What would the consequences have been if the FCO and the police had carried out their questionably legal threat? My second comment on the Assange case concerns a scenario in which I suggest that the Ecuadorians could get their inconvenient visitor out of their embassy and onto a flight to Ecuador without breaching the Vienna Convention. I am no more a lawyer than I am a historian of the Convention, but on a lay reading of that wonderful document it seems that the Ecuadorians could notify the FCO of the appointment of Assange as a member of their embassy's diplomatic staff, drive him immediately to the airport and put him on a plane, claiming his immunity from arrest as a diplomatic agent under Article 29 of the Convention before the FCO has time to expel him—and even if he were to be expelled almost instantly, Assange would still enjoy immunity from arrest for a reasonable time needed for him to leave the country. It's true that the FCO could forestall any such cunning plan under the Convention by declaring Assange *persona non grata* before he could be appointed to the diplomatic staff, or by notifying the Ecuadorians in advance that HMG would not accept any non-Ecuadorian citizen as a member of the embassy diplomatic staff (although the Ecuadorians might get round that by granting him Ecuadorian citizenship), or by formally ruling out in advance any diplomatic appointment to the embassy of Ecuador in a defined category that would include Assange—such as Australians, or persons suspected of rape, or publishers of classified government documents, or whatever. To the best of my knowledge, the FCO has never taken any of these pre-emptive actions with the Ecuadorians, and if that is correct, the Ecuadorians could still rescue their voluntary prisoner from his confinement in their embassy and spirit him away to Quito, all within the terms of the Vienna Convention. Of course whether the Ecuadorians actually want to welcome Mr Assange to Quito on an extended visit, and whether Mr Assange is attracted by the idea of being confined to Ecuador for the next several years, far away from Harrods, are both open questions. But I suspect that their Ambassador in London would be very happy to have the use once again of the quarters now occupied by Mr Assange.

I recognize that there is more than one view among lawyers and diplomats on whether the device I have suggested would be viable. If it is, the only explanation for the failure of the Ecuadorians to use it must be that neither they nor the FCO have taken the trouble to read an extensive exchange of views about it freely

available on the internet. On the face of it, this seems a good example of the flexibility offered by the Convention to those who read its small print.

My third case study, the shocking murder in 1984 of WPC Yvonne Fletcher, shot dead from a window in the Libyan Embassy in St James's Square in London, also raises some interesting, if more sombre, questions. The staff of the embassy at the time were not professional diplomats: they were students, members of so-called Revolutionary Committees loyal to Colonel Gaddafi. The embassy was officially called the Libyan People's Bureau, tacitly (but only tacitly) accepted by the Libyan government as the office of the representatives of Libya in London. So did they enjoy full diplomatic immunity from arrest and trial? Had they all been formally notified to the FCO as diplomatic staff? Presumably they did, and had, for after the shooting HMG demanded that the Libyans should waive the diplomatic immunity, if any, of whoever had shot WPC Fletcher and should hand him or her over to face justice. Predictably, the Libyans refused.

The police thereupon surrounded the Libyan Embassy building in a siege that lasted eleven days. The deadlock was resolved only when the British government allowed the entire staff of the embassy to leave the building and immediately expelled them all, so that they were all, presumably including the murderer, allowed to return to Libya, since the Convention guarantees the continuation of immunities for diplomats expelled by the host government for long enough to enable them to leave the country.

It is perhaps interesting to speculate about whether the British government had the option of declaring, immediately after the shooting, that the embassy was being used for activities incompatible with its diplomatic status—ie murder—and was therefore no longer immune from forcible entry by the British police without the Ambassador's permission. Instead Britain waited for eleven days before reaching a compromise agreement that allowed the guilty party or parties to return home to Libya unscathed. Probably the reason for this apparent restraint and patience on the part of the British government was the fear of almost certain violent retaliation against the staff of the British embassy in Tripoli, who were eventually also allowed to leave the country when Britain understandably broke off diplomatic relations with Libya altogether over the Fletcher shooting.

This raises an interesting point about *reciprocity*, one of the key concepts in diplomatic affairs. Most countries, most of the time, choose to respect the provisions of the Vienna Convention, and the privileges and immunities that it confers on diplomats accredited in their capitals, for fear that failure to do so will expose their own diplomats serving abroad to the risk of retaliation in the name of reciprocity—quite a powerful sanction, fortunately for diplomats. In a sense, the whole Convention is based on general acceptance of the principle of reciprocity: 'I won't lay a finger on your Ambassador so long as you don't lay a finger on ours.'

There are other provisions of the Convention besides those that confer widely misunderstood and much envied privileges and immunities on diplomats. Among the other provisions most actively relevant to diplomats' everyday life and work is the requirement under Article 41 of the Convention that all persons enjoying diplomatic privileges and immunities have a duty 'to respect the laws and regulations

of the receiving State', and 'not to interfere in the internal affairs of that State'. This raises many difficulties of interpretation in situations where the relationship between the diplomat's government and the host government is hostile or adversarial. In the days of the Cold War, how far was it legitimate under the Convention for Western diplomats serving in, say, Poland to maintain relations with the (then technically illegal) Solidarity movement of Lech Wałęsa, knowing that the mere act of keeping in touch with Solidarity leaders provided them with a measure of respectability, legitimacy, and even some limited protection against harassment by their own government?

When I was British Ambassador in Warsaw, we enjoyed the friendship of the then official spokesman of Solidarity and his wife, whom we saw on many social occasions in our official residence and elsewhere. When Janusz Onyszkiewicz was sent to prison once again for a few weeks on the usual trumped-up charges, part of the routine harassment of Solidarity leaders, my wife used to go round to his small nearby flat to collect the dirty washing generated by their numerous small children and take it back to go into the washing machine at our residence, returning it clean and neatly ironed to his feisty wife. Did that constitute interference in the internal affairs of Poland? The Polish government at the time would certainly have said that it did, although they never protested, no doubt having other and weightier matters on their minds than who was washing the Solidarity nappies.

More seriously, I used to pay periodic visits to the Solidarity leader, Lech Wałęsa, in Gdansk, not only to discuss Polish affairs with him (always a fascinating experience), but also indirectly to demonstrate my government's implicit solidarity with Solidarity (to coin a phrase). After every such visit I would be routinely summoned to the Foreign Ministry in Warsaw to be reprimanded for trying to give undeserved importance to a former Polish political figure who was now of no political significance, with the clear implication that this constituted interference in Poland's internal affairs. Like other Western Ambassadors who kept in touch with Wałęsa—and indeed many other Solidarity leaders—I invariably replied that it was legitimate for diplomats serving in Poland to keep in touch with opposition figures on the political scene, just as Polish diplomats in London would be expected to maintain contact with members of Her Majesty's Official Loyal Opposition (admittedly a somewhat inexact parallel). As for the alleged political insignificance of Lech Wałęsa, barely two years after I left Poland for another posting, Lech Wałęsa was elected President of Poland, although when I saw him to say goodbye in 1988, neither he nor I had any inkling that such a thing was possible, still less imminent.

Sometimes diplomats in hostile or totalitarian countries—not always the same thing—do get involved in encouraging or even supporting opposition movements, sometimes actually illegal ones, like Solidarity. They often do this under the banner of promoting human rights throughout the world. It may be argued that promoting human rights in other people's countries is encouraged and legitimated by various international treaties and covenants that enjoy equal international legal status with the Vienna Convention. Who is to say which is to prevail in the event of conflict? In practice, however, the question is largely academic, if I might use such a negative term in this predominantly academic context. Whatever Article 41

might say, diplomats will go as far in interfering in their host country's internal affairs, when it suits them to do so, as they think they can get away with. In Cold War Poland, there was a clear limit on the Polish communist government's scope for taking action against Western diplomats who gave tacit support and even some protection to the anti-Communist Solidarity movement and its leaders. Any attempt to stop this would have provoked an international outcry that would have additionally benefited Solidarity. Moreover, there is safety in numbers: they would have had to think twice before expelling half or more of the Ambassadors of Western countries who were behaving in much the same way, and always with the evident approval of their own governments.

Here I must stress the important distinction between on the one hand diplomatic activity which, though arguably legal, could be construed as interference in a country's internal affairs, and on the other hand straightforward espionage. Most espionage, as practised of course by other less enlightened countries than mine, involves breaking the law of the host country in order to obtain information by clandestine means, and under Article 41 of the Convention all diplomats with immunity have a duty 'to respect the laws and regulations of the receiving State', even though they enjoy immunity from arrest and trial if they fail in that duty. When I drove from Warsaw in my official car, flying the Union flag with the royal coat of arms at the centre, to visit Lech Wałęsa in Gdansk, routinely followed every kilometre of the way by a team from Polish security in their own official car, I was not knowingly breaking any Polish law, nor indeed acting in any way clandestinely. Whether I was acting within the letter or the spirit of Article 41(1) of the Convention is a question for others to ponder.

I have enjoyed many discussions over the years with academic experts on the history and theory of diplomacy, aspects of my old trade of which, as I say, I am largely ignorant. In those discussions I have sometimes been struck by the apparent lack of understanding on the part of some eminent academics of what working diplomats actually *do*, from the time when they get up in the morning until they go to bed in the early hours of the following morning, somewhat the worse for duty-free drink consumed at some unconscionably tedious embassy reception. Conscientiously researched articles in learned journals and even more punctilious books are written about the doctrines underlying the Vienna Convention and their effect on the evolution of both diplomacy and diplomatic theory. Yet few of them seem to recognize the practical ways in which international law, including in particular the Convention, affects the day-to-day work of real-life diplomats. I was eventually persuaded to attempt to fill this apparent gap in the literature by writing a book describing '*what diplomats do*' in real life as distinct from theory. The resulting book, *What Diplomats Do: The Life and Work of Diplomats*, was published by Rowman & Littlefield in July of 2014. In describing a fictitious diplomat's day-to-day work in many different circumstances I have ruthlessly excluded theory in favour of actual practice, illustrating each chapter with anecdotes drawn from my own experience in the field. There is hardly a page in the book that has no bearing, however indirect, on the many practical, as distinct from theoretical, questions raised by the Vienna

Convention. That document is a central part of international law with real-life practical consequences for working diplomats.

I started with a warning that I am not qualified to write about the history of the Vienna Convention or about how far it has lived up to expectations. Instead, I have tried to quote some examples of the ways in which the provisions of the Convention affect the daily lives and work of diplomats around the world—from dignified Ambassadors and High Commissioners to scruffy Second Secretaries learning their funny old trade on the hoof. I readily acknowledge that working diplomats like them, and like me, would probably do better if they knew more about the background, development, and underlying doctrines of the Vienna Convention. By the same token, academic historians and legal analysts of the Convention might perhaps benefit from a better understanding of the practical ways in which it impinges, or fails to impinge, on the everyday lives and work of practising diplomats.

3

In Praise of a Self-Contained Regime

Why the Vienna Convention on Diplomatic Relations Remains Important Today

J Craig Barker

1. Introduction

The VCDR stands as one of the most successful ever international treaties. There are currently 190 States Parties to the Convention, meaning that only five or so States worldwide are not States party. According to the ICJ, the Convention is 'accepted through the world by nations of all creeds, cultures and political complexions'.[1] The success of the Convention can be put down, in large part, to the fact that a significant proportion of it constitutes a codification of well-established practice dating back in many cases some hundreds of years.

Nevertheless, the last fifty years have seen seismic change in the context in which contemporary diplomacy now operates. The Cold War that served as the geopolitical backdrop for the negotiation of the Vienna Convention ended some twenty-five years ago. The emergence of the globalized economy and the rapid development of technology have undermined the traditional role of diplomats. New diplomatic processes have emerged though the creation of governmental and non-governmental institutions. Notions such as collaborative, public, and cultural diplomacy are challenging accepted understandings of the role and function of traditional diplomacy. Additionally, international law is itself changing from a system intended to regulate co-existing and, at times, cooperating sovereignties, into a diverse and possibly fragmented discourse of complex and, at times, competing normative frameworks which themselves challenge the sovereignty paradigm. Such competition is perhaps most apparent in the alleged conflict between international immunities (including diplomatic immunity) and human rights.

This chapter will examine the success of the Vienna Convention as an international instrument. It will focus on the reciprocal nature of the Convention and

[1] *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* 1980 ICJ Rep 3, 25 (hereinafter *Tehran Hostages Case*).

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will highlight some of the elements of diplomatic law that are essential to its continued success even in a time of change and challenge. Remembering the origins of diplomatic law among ancient tribes and civilizations up to the modern day, it will be argued that the fundamental principles of diplomacy and the law that governs these principles should be maintained as they are and not opened up to possible deconstruction.

2. Analysing the Success of the Vienna Convention: In Praise of a Self-Contained Regime

In this section, it will be argued that one of the primary reasons for the success of the Vienna Convention lies in its self-contained nature. According to the ICJ:

> The rules of diplomatic law … constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other hand, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse.[2]

The privileges and immunities of diplomatic missions, and of specified diplomatic personnel,[3] are significant and include the inviolability of person[4] and property;[5] freedom of movement in the receiving State subject to limited exceptions;[6] as well as immunity from civil and criminal jurisdiction;[7] and certain privileges and exemptions in relation to duties otherwise owed to the receiving State.[8] The provisions that provide the counterbalance to the privileges and immunities, and thereby facilitate the self-contained nature of the Convention, are framed by Article 41 of the Vienna Convention which places a duty on all persons enjoying privileges and immunities to respect the laws and regulations of the receiving State. This duty is underpinned by what this author has previously referred to as 'administrative measures' contained in Articles 4–11 of the Convention, and 'punitive/deterrent measures' comprising Articles 9, 31(4), 32, and 39(2).[9] It is these counterbalancing provisions of the Convention that will form the basis of the discussion in the remainder of this section.

Article 41 of the Vienna Convention may be seen as a rather pointless provision insofar as the obligation placed on persons enjoying privileges and immunities to respect the laws and regulations of the receiving State, and indeed not to interfere with the internal affairs of the receiving State, is offset by the phrase 'without prejudice to their privileges and immunities'. It is quite clear from the *travaux préparatoires* of the Vienna Convention,[10] and from State

[2] ibid 40. [3] See VCDR art 37. [4] VCDR art 29.
[5] VCDR arts 22, 24, 27, 30. [6] VCDR art 26. [7] VCDR art 31.
[8] VCDR arts 20, 23, 28, 33–36.
[9] See further J Craig Barker, *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* (Ashgate, Aldershot 1996) Chapter 5.
[10] See eg *ILC Yearbook* 1958 vol I, 148.

practice,[11] that the principle of diplomatic inviolability was intended to have overriding force. To some extent therefore, it may be argued that the obligation to comply with local law and regulations is little more than a moral interdiction.[12] However that assertion would misunderstand the interweaving of rights with administrative and punitive/deterrent measures throughout the Convention. As the ICJ has made clear, 'diplomatic law itself provides the necessary means of defence against, and sanctions for, illicit activities by members of diplomatic or consular missions'.[13]

2.1 Administrative measures

The administrative measures available to States in Articles 4–11 of the Convention are not specific to the control of abuse of diplomatic privileges and immunities. They constitute a range of mechanisms available to every receiving State to limit the size of missions and control the number and, to some extent, the identity of personnel entitled to diplomatic privileges and immunities in their territory. If used properly, these provisions can be very effective.[14]

Article 4 requires the sending State to secure the *agrément* of the receiving State for the appointment of a Head of Mission.[15] This allows the receiving State to block the appointment of a particular Head of Mission without having to give reasons for that decision.[16] According to Article 7 of the Convention, other members of diplomatic missions, including diplomatic agents, can be freely appointed by the sending State. Only in the case of military, naval, and air attachés can the receiving State request that names be provided in advance.[17]

Nevertheless, Article 7 should be read in conjunction with Article 9. Article 9 provides that the receiving State may declare a diplomat *persona non grata* and is one of the principal provisions of the Convention dealing with limiting the problem of abuse. The relevance of Article 9 as a sanctioning mechanism will be

[11] According to the United Kingdom's House of Commons Foreign Affairs Committee, which undertook a significant investigation of the rules of the Vienna Convention in the aftermath of the shooting of WPC Yvonne Fletcher from the Libyan Embassy in April 1984, 'it is not correct that when a diplomat violates this duty he loses his immunity. Such a reading is inconsistent with the immunities given, which operate precisely in respect of such alleged violations … An argument can be made that when diplomats act in fact as terrorists, they are not diplomats at all, and thus must lose the benefits of those immunities that diplomats are entitled to. But the right view seems to be that a diplomat remains an accredited diplomat until the receiving State requires him to be withdrawn. This view would seem to accord with the general ethos of the Convention that there should be no exception to its terms'. Foreign Affairs Committee (UK), 'The Abuse of Diplomatic Immunities and Privileges' HC Paper 127 (1984–85) para 42 (hereinafter Foreign Affairs Committee).

[12] The moral and/or professional interdiction on diplomats not to abuse their privileges and immunities is strong insofar as diplomatic personnel who otherwise retain their privileges and immunities commit serious offences far less frequently than their civilian counterparts. See House of Commons: Written Statement (HCWS128) Foreign and Commonwealth Office made by The Secretary for State for Foreign and Commonwealth Affairs (Mr Philip Hammond, 16 July 2015) <http://www.parliament.uk/documents/commons-vote-office/July%202015/16%20July/9-FCO-AllegedSerious.pdf> accessed 27 May 2016.

[13] *Tehran Hostages Case* (n 1) 38. [14] Foreign Affairs Committee (n 11).

[15] VCDR art 4(1). [16] VCDR art 4(2). [17] VCDR art 7.

considered in due course. However, insofar as the receiving State is entitled to invoke Article 9 'at any time and without having to explain its decision', it is clear that the mechanism can be used to limit the granting of diplomatic privileges and immunities to individuals deemed unacceptable to the receiving State. The addition of a final sentence to Article 9(1) at the Vienna Conference to the effect that 'A person may be declared *persona non grata* or not acceptable before arriving in the territory of the receiving State' emphasizes the availability of this administrative power as a mechanism to limit the granting of diplomatic privileges and immunities to specific individuals. It might be argued that this undermines the explicit power of the sending State in Article 7 freely to appoint members of their mission, but in this case, the balance has been struck in favour of the receiving State. That having been said, if a receiving State chooses not to undertake the necessary due diligence inquiries to identify and vet those individuals who are being accredited to it, their right to call foul when privileges and immunities are abused is significantly undermined. The limitation in Article 7 that allows sending States not to provide names can be overcome either by prior agreement between the two States or during the accreditation process itself. Bearing in mind the significant advances in technology that have occurred since 1961, it would not seem to be a difficult task to identify and check on the specific identity of any person who is working in or associated with a diplomatic mission in any country and exclude any 'undesirables'.

Further restrictions on the right freely to appoint diplomatic personnel are to be found in Articles 10 and 11 of the Convention. Article 10 of the Convention requires that the Ministry of Foreign Affairs of the receiving State be notified of the arrival and final departure of members of a diplomatic mission as well as family members of such individuals, the arrival and departure of private servants of members of the mission as well as dates of ending of employment as such, and finally of appointment of permanent residents of the receiving State as persons entitled to diplomatic privileges and immunities, although in relation to this final category, it can be noted that the privileges and immunities of private residents of the receiving State are significantly limited by other provisions of the Convention.[18] Article 11 provides that '[i]n the absence of specific agreement as to the size of the mission, the receiving State may require that the size of a mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission'.[19] It is clear that without agreement, the question of the size of mission is left entirely at the discretion of the receiving State.

None of these administrative measures provide direct sanctions for abuse of diplomatic privileges and immunities (except where Article 9 is specifically so used, as explained below). Nevertheless, a close examination of the *travaux préparatoires* of the Draft Convention and of the Conference proceedings reveals that where existing customary law was unclear as to the precise balance of power between the sending and receiving States, the ultimate right to determine who is and is not

[18] See, in particular, VCDR art 38. [19] VCDR art 11.

entitled to accreditation and, as a consequence, entitled to diplomatic privileges and immunities, was left with the receiving State.[20] Once again it is worth highlighting that where a State chooses not to apply Articles 4–11 as strictly as they are otherwise entitled, as happened in the Yvonne Fletcher case, then the right of the receiving State to complain about abuse is limited.

In order fully to understand the importance of the administrative measures provided for in the Vienna Convention, it is worth dwelling on the Fletcher case and its aftermath. Without going into significant detail it will be recalled that WPC Fletcher was killed by a bullet that was fired from inside the premises of the Libyan People's Bureau located in St James's Square, London.[21] WPC Fletcher had been policing a peaceful demonstration directed against the Gaddafi regime in Libya. After the incident, the 'embassy' was held in lock down for eleven days while the Government considered what their response should be. Ultimately, all occupants of the building were permitted to leave London and return to Tripoli. The matter was referred to the Parliamentary Foreign Affairs Committee, whose 1984 Report[22] was responded to by the Government in 1985.[23]

2.2 Punitive/deterrent measures

The 'sanctions for illicit activities' referred to by the ICJ in the *Hostages Case* may not at first appear to be sanctions and, in fact, have led one leading barrister to suggest that the Convention is little more than a 'charter for impunity' that should, be abandoned immediately.[24] However, this is little more than a rather trite sound bite that indicates a disregard for the moral integrity of the vast majority of diplomatic personnel and, more importantly, of the deterrent values of these provisions.

The measures that a State can take after an allegation of abuse of immunities by a diplomat are contained in Articles 9, 31(4), 32, and 39(2) of the Vienna Convention. The power to declare an individual *persona non grata*, by virtue of Article 9 of the Convention, and to require his or her removal from the receiving State, is the most immediately available response for a State facing abuse. The remedy is apparently unlimited and States are not required to give reasons for declaring an individual *persona non grata*, though they often do. On the other hand, State practice suggests that States are unwilling to use this remedy except in the case of the most serious abuse.[25] It is difficult fully to explain such an approach.

[20] For a full analysis of the *travaux préparatoires* and the Conference proceedings in relation to VCDR arts 4–11, see Barker (n 9) 91–102.

[21] For full details of the circumstances and aftermath of the case see Foreign Affairs Committee (n 11), and Barker (n 9) Chapter 1.

[22] See Foreign Affairs Committee (n 11).

[23] Secretary of State for Foreign and Commonwealth Affairs (UK), 'Government Report on Review of the Vienna Convention on Diplomatic Relations and Reply to "The Abuse of Diplomatic Immunities and Privileges"' (Cmnd 9497, 1985), 6, para 8 (hereinafter 'Cmnd 9497').

[24] See Geoffrey Robertson QC on *Exposed: Inside the Diplomatic Bag* (ITV, first broadcast, 26 March 2014).

[25] For an alternative view of *persona non grata* see Paul Behrens, *Diplomatic Interference and the Law* (Hart Publishing, Oxford 2016) 2, with extensive references at 277–386.

It can partly be explained by the fear of reciprocal action.[26] Additionally, the fear of offending the sending State may limit use of the process.[27] Nevertheless and whatever the reason might be for the limited use of *persona non grata*, as far as the person endowed with privileges and immunities is concerned, it is likely that the fear of being declared *persona non grata* is a significant deterrent against abuse. It would be a mistake by such an individual to assume that any State will follow 'normal' practice in every case.

Article 31(4) of the Convention provides that 'the immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State'. The question of jurisdiction, particularly criminal jurisdiction is a complex one. The mere fact that jurisdiction is available to the sending State does not necessarily mean that the sending State, or indeed anyone else for that matter, will be able to exercise that jurisdiction. Attempts at the ILC[28] and again at the Vienna Conference[29] to require States to designate a competent court to hear cases relating, in particular, to debts incurred by diplomats, were rejected. Ultimately, the barriers to pursuing a successful civil claim or criminal prosecution in the sending State are remote. As this author has previously noted, problems such as securing the attendance of witnesses, production of evidence, and the problems of a fair trial, as well as the costs involved in bringing a claim or mounting a prosecution in the sending State, even if that were possible, mitigate strongly against the success of Article 31(4) as a deterrent.[30] Nevertheless, the mere fact that the provision exists alongside the statement of immunity contained earlier in Article 31(1) should at the very least give diplomatic personnel some pause for thought in terms of avoiding abuse of their privileged status.

Article 39(2) of the Vienna Convention is similarly limited as a sanction not by its terms but by the opportunities that exist for it to be fully applied. Article 39(2) provides that the immunity of a diplomatic agent ceases when he or she leaves the receiving State, except in relation to acts performed in the exercise of official functions for which immunity remains. Article 39(2) was used 'by analogy' in the determination of the immunity to be ascribed to General Augusto Pinochet, the former Chilean Head of State, in relation to his requested extradition from the UK to Spain in 1998. One of the key questions in that case concerned whether the crimes of which Pinochet was accused could be considered

[26] Tit-for-tat expulsions of diplomatic agents was common during the Cold War but persists today. Recent examples include the expulsion of several Russian and Polish diplomats in November 2014: see 'Russian and Poland Expel Diplomats in Tit-for-Tat Measures' *The Guardian* (17 November 2014) <https://www.theguardian.com/world/2014/nov/17/russia-poland-expel-diplomats>. On the day that this chapter was being finalized by the author it was reported that the US had expelled three Venezuelan diplomats in response to the expulsion of three US diplomats: see 'U.S. expels three diplomats in tit-for-tat measure with Venezuela', *North America Inter-Press Service* (2 October 2013) <http://www.ipsnews.net/2013/10/u-s-expels-three-diplomats-in-tit-for-tat-measure-with-venezuela/> accessed 27 May 2016.

[27] This is mitigated somewhat by the use of less offensive language such as 'request the recall'. See Ivor Roberts, *Satow's Diplomatic Practice* (6th edn, OUP, Oxford 2009) 206.

[28] *ILC Yearbook* 1959 vol II, 99.

[29] UN Doc A/CONF 20/C 1/L 186/Rev 1.

[30] Barker (n 9) 105–11.

acts performed by Pinochet in the exercise of his functions as Head of State. Similar issues might arise if a diplomat were accused of comparable crimes in a receiving State. However, the application of Article 39(2) is severely limited by the fact that the individual is required to be given a 'reasonable period in which to leave the receiving State'. It is unlikely that the sending State will choose to extradite an accused back to the receiving State, particularly where it will have previously taken the decision not to waive the immunity of that same individual. What is required is that the individual accused voluntarily decides to return to the receiving State, something that would seem to be unusual. Nevertheless, it is worth noting the recent application of Article 39(2) on 19 November 2015 in relation to the arrest of an individual accused of the shooting of WPC Fletcher.[31] It appears that in this case, the individual may have voluntarily returned to the UK, although whether he expected to be arrested in relation to that crime is unclear.

Arguably the single most important deterrent of abuse is to be found in Article 32 of the Convention which deals with the issue of waiver of immunity. Theoretically this provision should provide the solution to the problem of the abuse of diplomatic privileges and immunities by providing the ultimate deterrent. However, it would appear that States are generally unwilling to waive immunity, particularly in relation to serious offences. The wording of Article 32 makes it clear that there is no obligation on States to waive diplomatic immunity in any circumstances. It enunciates a right which a State is entitled to exercise according to its own determination. Thus, even the earliest drafts of the article in question refer to the fact that a State 'may' waive immunity.[32] It is worth noting that an attempt was made at the Vienna Conference to hold States responsible for damage caused by diplomatic personnel by including a requirement that States make fair compensation for such damage. The proposal, which was put forward by the Holy See, was intended to ensure the accountability of States for the action of their representatives in cases where the immunity of those representatives was not waived.[33] However, the proposal was soundly rejected by the vast majority of States, who made clear their opposition to there being any sense of obligation to waive immunity or to pay damages in lieu.[34]

[31] See Ewan Palmer, 'PC Yvonne Fletcher: Was Britain Right to "allow murderer to walk free" under Diplomatic Immunity?' *International Business Times* (20 November 2015) <http://www.ibtimes.co.uk/pc-yvonne-fletcher-was-britain-right-allow-murderer-walk-free-under-diplomatic-immunity-1529723> accessed 27 May 2016.

[32] Report of the International Law Commission on its Draft Articles concerning Diplomatic Intercourse and Immunities A/2623, *ILC Yearbook* 1957 vol II, 139.

[33] The proposal was to include a further paragraph in art 32(1) of the Convention to read as follows: '[The sending State] shall, in any case be under an obligation to take appropriate steps to provide fair compensation for damages caused by its diplomatic agents in consequence of liabilities incurred by them in criminal or civil matters in the receiving State.' UN Doc A/CONF 20/C 1/L 292. The proposal was not adopted.

[34] See eg the view of the US delegate who noted that the proposal imposed an obligation on the sending State without establishing its liability or its responsibility for the compensating of individuals suffering damage. ibid.

It would seem that the general attitude of States against there being an obligation to waive immunity is reflected in the current practice of States generally to refuse to waive diplomatic immunity. The UK Government noted in 1985 that:

> [t]he main abuse lies not so much in the comparative number of alleged offences (which is small) or in their relative gravity, but in the reliance on immunity to protect individuals for offences without any obvious connection to the efficient performance of the functions of a diplomatic mission.[35]

As the decision whether or not to waive diplomatic immunity lies with the sending State and not the individual, it would appear that the UK Government was of the view that the primary abuse of diplomatic privileges and immunities lay in the refusal of States to waive diplomatic immunity in appropriate cases. On the other hand, the UK Government was unwilling to pursue any mechanism by which the waiving of diplomatic immunity could be more easily achieved. It concluded that, even if it was objectively justifiable to impose an obligation to waive immunity, in appropriate circumstances, there was no support for such a move, not even on a limited basis amongst close allies:

> We have found … no support within the European Community or elsewhere for the idea of bilateral or limited mutual agreements to waive immunity either generally or in specific cases. There would, in any case, be a risk that a restriction on immunity could in certain countries be exploited for political or retaliatory purposes against British diplomats and communities overseas.[36]

Whether such a position would be maintained in the European Union (EU) today is moot, particularly in the context of the development of the notion of EU citizenship and the more recent consolidation of the Common Foreign and Security Pillar of the EU into the EU Treaty, as well as the development of the European External Action Service (EEAS), which, since 2010, effectively functions as the diplomatic service of the EU.[37] On the other hand, neither the various agreements giving rise to the EEAS, nor any other published agreements of member States of the EU since 2010 make explicit reference to the question of there being a mutual duty to waive immunity and it would seem that in spite of ever closer union of States in the EU and the nature of European citizenship, the waiver of immunity will continue to be the exception rather than the rule.

Ultimately, the decision as to whether or not to waive immunity is not a legal one. Rather, it is a political decision based upon a number of factors which take account of the possibility of retaliatory measures being taken against diplomatic personnel, most obviously in the form of trumped up or fabricated charges, but which also take account of the wider general interests of the State in question. The political nature of the decision as to whether or not to waive diplomatic immunity

[35] Cmnd 9497 (n 23) para 62. [36] ibid.

[37] Article 13a-III of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01 (Article 27 TEU). See further the official website of the EEAS <http://www.eeas.europa.eu/index_en.htm> accessed 27 May 2016.

in any particular instance is most apparent in the US Department of State's 1986 Guidance to the Foreign Service. The Guidance noted that:

> [T]he individual, who ultimately benefits from the immunity, has no power to waive immunity even in cases where he or she believes that it would be in his or her personal or commercial interest to do so. Rather, the sending State must waive immunity when it judges that to do so is in the national interest.[38]

In the same note, the Department of State made clear it policy against the waiving of immunity:

> While the power to waive immunity is always available, it is the usual practice of the Department of State to waive only in benign circumstances.[39]

It would seem, accordingly, that matters of justice in the receiving State are very much of secondary consideration to the national interests of the US in making such a determination.

This attitude apparently prevails throughout the world driven by a sense that waiver is the exception and, to some extent believing, rightly or wrongly, that waiver of immunity in one case would open the door to future requests for waiver that would be increasingly difficult to resist. This was apparently the view of the Government of St Lucia when it refused to waive the immunity of Dr Walid Juffali, its permanent representative to the International Maritime Organisation in London, who was facing a civil claim in the British courts in relation to a divorce settlement. It is difficult to question the assertion by the Government in this case that 'based on the legal advice it received and diplomatic practice in such matters, the case does not warrant the lifting of … immunity'.[40]

2.3 The Vienna Convention as a self-contained regime—some concluding thoughts

This overview of sanctions available to prevent and punish breaches of diplomatic privileges and immunities illustrates that there are significant measures available to receiving States to deal with the problem of abuse of diplomatic privileges and immunities, but highlights that preventive measures may be limited either by practical and legal difficulties or through political choice. The deterrent effect of these measures cannot but influence the conduct of diplomatic personnel, particularly those serving States who are willing to punish breaches of diplomatic personnel abroad when those individuals return to their home State, either through criminal or civil process, or, more likely, through employment measures such as demotion

[38] 'Privileges and Immunities' *What Do I Do Now?* Overseas Briefing Centre Supplement, February 1986, quoted in Grant V McClanahan, *Diplomatic Immunity: Principles, Practices, Problems* (C Hurst & Co, New York 1989) 138.

[39] ibid.

[40] Government of St Lucia Press Release 008/16, 18 January 2016. Full text reproduced in *St Lucia Times* (18 January 2016) <http://stluciatimes.com/2016/01/18/government-will-not-waive-juffalis-immunity> accessed 27 May 2016.

or restrictions on promotion. The significant problems arise where diplomats are accused of offences that are not taken seriously, or are even condoned by the sending State.

The commission of parking offences is one such example. The UK Government's review of diplomatic privileges and immunities undertaken in the aftermath of the Fletcher incident recognized not only the problem of serious abuse of diplomatic privileges and immunities but also of the 'proliferation of driving and parking offences for which immunity is claimed' giving rise to significant public concern in capital cities around the world.[41] The UK Government made clear its desire to deal with this problem and indicated that it had both the right and the inclination to deal with repeat offenders, primarily through engagement with the relevant Head of Mission and ultimately through the *persona non grata* process.[42] Nevertheless, since 1995, as is apparent from the annual survey of serious offences committed by persons entitled to diplomatic privileges and immunities in the United Kingdom, it is clear that the number of parking offences committed by individuals entitled to diplomatic immunity has not reduced substantially and there is little apparent effort to deal with repeat offenders despite the clear information as to which States those offenders represent.[43]

Ultimately, it is asserted that the Vienna Convention provides sufficient tools to ensure the balancing of the interests of both sending and receiving States. It is strengthened by the bilateralism that is at the core of every diplomatic relationship insofar as every sending State is also a receiving State and, in most cases, engage in the exchange of diplomatic personnel. To that extent, the self-contained nature of the Convention allows States to avoid disputes by training and advising their representatives fully and, where disputes occasionally occur, to sort them out by recognizing the mutually beneficial impact of observing the Convention in its fullest respects.

3. The Future of the Vienna Convention in a Changing World

It cannot be denied that the nature of intercourse between States is changing. Some would argue that the nation State is a dying concept, others that it is already dead. Reference has already been made to the development of the EEAS which might, one day, replace the individual diplomatic services of the member States of the EU. As far-fetched as this process seems, it will not lead to a radical transformation of the diplomatic process as we know it today insofar as representatives of the EU (EU diplomats) will continue to engage with non-EU powers in much the same way as State representatives do today.

The concept of public diplomacy suggests a significant role for individuals and groups in influencing the conduct of foreign relations. It would seem, however, that

[41] Cmnd 9497 (n 23), para 8. [42] ibid 27.
[43] See the Statement of Mr Philip Hammond, UK Foreign Secretary on 16 July 2015 (n 12).

public diplomacy is directed more at influencing both domestic and foreign public opinion than it is in listening to it.[44] In this context, public diplomacy might be regarded as simply an updated form of traditional diplomacy. Nevertheless, at its best, public diplomacy is a process of global engagement and dialogue that can positively influence international relations.

One of the most significant developments in international relations since the 1960s has been the progress of globalization. Globalization has effected diplomacy in at least two significant ways. First, the need for diplomatic and consular interaction between States has arguably increased rather than diminished, in order to ensure that the interests of nationals living abroad are fully protected. Secondly, the engagement of individuals, societies, and diaspora has required States to consider the impact of their foreign relations on individuals living abroad. The intermingling and, at times, interdependence of populations has shifted the focus of diplomacy to more specifically commercial and, increasingly, to cultural matters, and has forced politicians to consider the position of their own nationals in foreign States when considering attacks of whatever form on those States in which their nationals are resident.

The impact of globalization on the Vienna Convention is difficult to assess in its entirety. However, some recent cases in the United Kingdom point to a need potentially to reassess the Convention to deal with issues such as human rights abuses by diplomatic personnel as well as the development of a trend towards the appointment of what might be called 'resident diplomats'. Each of these will be considered in turn in the following sub-sections, which will ultimately assert that amendment of the Convention is neither necessary nor possible in response to either of these emerging difficulties but that receiving States, in particular, should begin more rigorously to use the existing Convention provisions to crack down on abuse and to minimize the scope for abuse.

3.1 Balancing immunities and human rights and the prioritization of the Vienna Convention

The balancing of the granting of international immunities with human rights concerns more generally has been the focus of a considerable degree of attention in recent years. It has given rise to significant challenges to the broad range of immunities from jurisdiction, especially State and Head of State immunity in the face of mass human rights atrocities.[45] The debate is on-going and is one to which the

[44] See eg the US Department of State website which states that '[T]he mission of American public diplomacy is to support the achievement of U.S. foreign policy goals and objectives, advance national interests, and enhance national security by informing and influencing foreign publics and by expanding and strengthening the relationship between the people and Government of the United States and citizens of the rest of the world', <http://www.state.gov/r/> accessed 27 May 2015.

[45] For an analysis of some of the key challenges see J Craig Barker 'The Pinochet Judgment Fifteen Years On' in James Green and Chris Waters (eds), *New Perspectives on Adjudicating International Human Rights* (Martinus Nijhoff, The Hague 2014).

present author has contributed.[46] The primary concern for the purposes of this chapter, relates to the potential impact of this debate on the specific question of the immunity of diplomatic agents and, consequently, on the future of the Vienna Convention.

The framework of analysis of the relationship between immunities from jurisdiction and human rights draws heavily on the so-called fragmentation of international law described by the ILC in its 2006 Report of the same name.[47] The Report argued that international law was becoming fragmented into a number of different subsystems, few of which related to one another and some of which called into question the validity of one another.[48] The response to such fragmentation can be found in technical legal analysis drawing upon principles such as *lex specialis, lex posterior*, normative hierarchy, and self-contained regimes.[49] Having established that diplomatic law is a self-contained regime, one might be content to accept that diplomatic law exists away from other subsystems of international law and can therefore function independently thereof. However, no subsystem can exist in such a vacuum. The relationship between immunity from jurisdiction and human rights law is one that has created a great deal of controversy in recent years. While mostly applicable in the context of State and Head of State immunity, the problem of the relationship between human rights and diplomatic law is steadily increasing.

The dominant narrative of the relationship between international immunities and human rights has been focused around the concept of normative hierarchy with many asserting that particular human rights, dealing in particular with international crimes and gross violations of human rights, have a superior status in international law and constitute *jus cogens*.[50] This discourse is problematic for diplomatic law insofar as it has no higher status than any other subsystems of international law. Diplomatic law is certainly not a system of *jus cogens* norms, yet its importance to the proper and efficient functioning of the international diplomatic process cannot be ignored.

A better framework of analysis would be that of *lex specialis* insofar as is the special importance of the Vienna Convention regime lies both in its facilitation of international diplomacy, but also in its provision of a framework for the protection of diplomatic personnel, who are often living in hostile countries, facing hostile day-to-day living conditions and require special protection in order to do their work.[51] In many ways, it is the special nature of diplomatic law in facilitating the diplomatic process and providing protection that allows it to take priority over local, civil, and criminal law. Where that law is abused, the Convention provides the necessary remedies. This should surely be the same when the rules

[46] See n 45 and J Craig Barker, 'Negotiating the Complex Interface between State Immunity and Human Rights: An Analysis of the International Court of Justice Decision in Germany v Italy', (2013) 15 International Community Law Review 415.

[47] UN Doc A/CN 4/L 682. [48] ibid paras 7–8. [49] ibid paras 46–222.

[50] See eg Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP, Oxford 2008).

[51] On the necessity of protecting diplomats, see further J Craig Barker, *The Protection of Diplomatic Personnel* (Ashgate, Aldershot 2006).

of diplomatic privileges and immunities come into conflict with human rights law that has not reached the level of *jus cogens* norms, that is, the vast majority of human rights norms.

Recent allegations of abuse of diplomatic privileges and immunities have focussed on the alleged abuse of domestic staff in the employ of an individual diplomat or of a mission. Given the potential sanctions against abuse outlined previously, and the greater difficulty of condoning such abuse by failing to take action on political grounds, it would seem that the Vienna Convention does not prevent a receiving State from acting against an individual diplomat or against a sending State in such cases. The problem in such cases concerns the gathering of evidence given that the premises of a diplomatic mission and of the private residence of a diplomatic agent are inviolable and immune from search. On the other hand, it should be remembered that the Vienna Convention is not a mechanism of impunity and does not prohibit a receiving State from investigating an alleged offence, particularly in light of Article 38(2) discussed above.

The innovative and imaginative process recently introduced in Vienna, Austria, which invites domestic staff of missions and diplomatic households to attend regular interviews to ascertain whether there is any cause for concern in relation to domestic abuse, is compliant with the Vienna Convention. Insofar as States are required to register the entry and departure of domestic staff in compliance with the Vienna Convention, it should be possible to ensure that the vast majority of domestic staff are interviewed where necessary.[52] This can be enforced by 'imposing' a requirement on embassies to ensure compliance. While such a requirement is unenforceable, it can be the focus of local oversight. Examples of serious abuse or non-cooperation with local authorities can result in declarations of *persona non grata* and the breaking off of diplomatic relations with a State where the abuse is considered sufficiently serious. The Vienna Convention should not be seen as a block to engagement with embassies and diplomatic agents. Insofar as it provides for remedies for abuse, it clearly provides opportunities to minimize abuse, depending on the exercise of political will, the lack of which is itself possibly the greatest threat to the future of the Vienna Convention.

In relation to allegations of human rights abuses that meet the threshold of *jus cogens* breaches, one would hope in the first place that receiving States would complete the due diligence and block the accreditation of an individual who is the subject of such accusations in the first place.[53] However, if that were not the case or where allegations of gross human rights abuses were to arise during the course of an appointment, the mechanism of declaring an individual *persona non grata* and expelling them from the receiving State, perhaps with a referral to the prosecuting authorities of the sending State, or of an international tribunal, such as the International Criminal Court, would lead to prosecution and ensure compliance with the Vienna Convention. This might seem inadequate to some, and it certainly

[52] See Chapter 11, section 4.

[53] On the right to block accreditation, see further below n 64.

does not sit lightly with the present author. On the other hand it is important to recognize the impact that arresting such an individual might have on the protection of diplomatic personnel around the world.

3.2 Expanding jurisdictions and globalized living

When the Vienna Convention was drafted in 1961 the growth and impact of globalization was unimagined. The diplomatic relations that the Convention was designed to regulate involved the traditional exchange of diplomats who were expected primarily to be nationals of sending States working solely to develop the interests of that State. Some provision was made in the Vienna Convention to regulate the privileges and immunities of nationals of third States and indeed nationals of the receiving State,[54] as well as to remove immunity from the commercial activities of diplomats where that activity was unconnected with the interests of the sending State.[55] However these exceptions to the traditional, rather staid, norms of diplomatic relations were rare.

Developments in the function and style of some aspects of diplomacy, particularly high-level diplomacy, and issues related to representation at international organisations and the privileges and immunities of international organizations themselves merited the development of special regimes.[56] However, these regimes were based essentially on the established rules of diplomatic law in the Vienna Convention. The same applied to the regulation of consular intercourse.[57]

The situation today is considerably more complex. Diplomats come and go much more regularly; 'special representatives' are sent by smaller States to embassies and organizations; individuals are accorded diplomatic privileges and immunities in countries in which they have extensive private interests, some of which overlap with the interests of the sending State. One of the most significant developments since 1961 concerns the enormous expansion of both civil and criminal jurisdiction of States.[58] In terms of international criminal law, crimes that were previously prosecutable only domestically can now be prosecuted internationally. For serving diplomats, the precedents are quite clear in that immunity overrides criminal jurisdiction, regardless of how local or international that jurisdiction is.[59] However, that straightforward position is increasingly being challenged on the grounds that developments in international criminal jurisdiction must be matched by changes to the law of immunity.[60] In terms of civil law, the exterritoriality of

[54] VCDR arts 3 and 38. [55] VCDR art 31(1)(c).

[56] See the Convention on the Representation of States in their Relations with Organizations of a Universal Character of 14 March 1975, UN Doc A/CONF 67/16 and the Convention on Special Missions of 8 December 1969, 1400 UNTS 231.

[57] Vienna Convention on Consular Relations of 24 April 1963, 596 UNTS 261.

[58] See for a full discussion of jurisdiction and immunities Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar, Cheltenham 2015).

[59] The VCDR simply immunizes diplomatic agents from criminal jurisdiction regardless of the source of that jurisdiction, VCDR art 31.

[60] See further Barker (n 51).

jurisdiction is giving rise to a situation where claims unrelated to the diplomatic intercourse between the two States involved are being challenged in the domestic courts of sending States.[61]

The matter is complicated slightly by the emergence of a category of diplomats or other representatives who are not permanently resident in the territory of the receiving State but who have business interests there and, perhaps, own property there.[62] The Vienna Convention does except from immunity civil cases concerning a real action relating to private immovable property and actions relating to professional and commercial activities by a diplomatic agent outside his official functions. Nevertheless, it would appear that these exceptions are rather limited as highlighted by two recent cases in the British courts.

The first concerned Dr Wahid Juffali, a Saudi Arabian national appointed as the representative of St Lucia to the International Maritime Organisation based in London.[63] Juffali asserted diplomatic immunity in response to court proceedings brought by his ex-wife Christina Estrada, a former supermodel. The British government, perhaps unusually for such a private case, requested St Lucia to waive Juffali's immunity. The St Lucian Government opted not to, asserting their rights as a sovereign State 'in order to uphold the principle' of diplomatic immunity. Given the analysis of the right of waiver set out above, this was neither unusual nor was it out of line with State practice. Crucially for this case, there are no restrictions in international law concerning the appointment of non-nationals to such positions, and it is common practice in the Caribbean for States to do so. At the time of appointment, the IMO did not raise any questions relating to Juffali's credentials. More importantly, the UK did not raise any concerns and immediately added Juffali to the Diplomatic List, thereby confirming his diplomatic status and entitlement to full diplomatic immunity.

The UK Government, and more specifically the Foreign and Commonwealth Office (FCO) is the gatekeeper for determining who is entitled to diplomatic immunity in the UK. As analysed above, the Vienna Convention allows sending States a free choice of whom to appoint to specific diplomatic roles. However, it also allows a receiving State to decline the nomination, by declaring the individual *persona non grata* prior to his or her attaining full diplomatic status.[64] This would have been the time to question the appointment of Juffali, if indeed there had been any concerns.

[61] ibid for a discussion of relevant cases.

[62] Permanent residents of the receiving State are given immunity only in respect of their official acts in the case of diplomatic agents (VCDR art 38(1)) and only to the extent where such privileges and immunities are admitted in the case of other members of the mission and private servants (VCDR art 38(2)).

[63] The position of State representative to the IMO in London carries full diplomatic privileges and immunities for the incumbent as provided for in the International Maritime Organisation (Immunities and Privileges) Order 2002.

[64] Article 9 of the Vienna Convention allows a State to declare an individual *persona non grata* 'at any time and without having to explain its decision'. The effect of this wording, when read with arts 5, 8, 10, and 11 of the Convention allows the receiving State to declare an individual *persona non grata* prior to his or her arrival.

One of the most obvious concerns in the context of the present discussion should have been the considerable immovable assets held by Juffali in the United Kingdom. It is likely that Juffali's ex-wife, who is not herself a British national, brought the case in the UK because of that fact. The assets themselves provided the jurisdictional link sufficient to allow her to bring the case in the UK Courts. Insofar as Juffali's immunity had not been waived and he had not been declared *persona non grata* his immunity remained and Juffali's assets were immunized. This has the potential to create significant difficulties in major capital cities around the world if the trend of appointing such individuals continues. However, the remedy already exists. Given the above analysis, it is open to a receiving State simply to refuse to accredit a State representative if to do so would immunize significant assets. For that reason, it is important that the authorities of receiving States should undertake the necessary due diligence when deciding whether or not to accredit a State representative to a position that brings with it diplomatic privileges and immunities

An alternative reading of such appointments has been suggested; that the majority of such appointments are shams. Furthermore, it has been asserted that in the case of 'sham' appointments, diplomatic immunity could simply be removed. This was the view taken by Mr Justice Hayden at first instance in the case of *Estrada v Al-Juffali*.[65] While superficially attractive, such an option is replete with problems. First, it would require complete renegotiation of the Vienna Convention. Secondly, it would generate conflict between sending States and receiving States about when an appointment is sham and when it is not. If the UK were unilaterally to adopt such an approach, not only would it be in direct contravention of international law, it would also open up British diplomats serving abroad to claims that they were not doing their job (according to officials of the receiving State) and expose them to the removal of immunity by the receiving State without recourse to their home country. Ultimately such an approach would render diplomatic immunity useless and would wholly undermine international relations. Although Al-Juffali's appeal failed, the question of his appointment as a diplomat was declared not to be reviewable by the British courts.[66]

A second on-going civil claim in the British courts that has been met with a claim of immunity is that of the former Prime Minister of Qatar, Sheikh Hamad bin Jassim bin Jaber al-Thani, who is facing a civil claim for compensation for torture allegedly carried out against a British citizen under his authority. Al-Thani was appointed as Minister Counsellor in the Qatari Embassy in London and that appointment was accepted by the Foreign and Commonwealth Office. The circumstances of this case are considerably more problematic insofar as they involve allegations of torture and possibly invocation of an argument for removal of immunity based on a breach of a *jus cogens*. The current jurisprudence of the English courts would mitigate against that but courts appear to become increasingly frustrated

[65] *Estrada v Juffali* [2016] EWHC 213 (Fam) (08 February 2016).

[66] *Al-Juffali v Estrada* [2016] EWCA Civ 176 (22 March 2016), Al-Juffali's diplomatic immunity was not upheld on appeal because of his permanent residence in the United Kingdom.

with the assertion of immunity in such cases. Once again, however, it is asserted that the problem lies with a failure of due diligence by the United Kingdom government. It is likely that the FCO was aware of allegations of torture being made against Al-Thani prior to acceptance of his appointment as Minister Counsellor. Furthermore, Al-Thani appears to own a string of luxury hotels in the UK. The jurisdictional issue in this case was not dependent on the ownership of property in the UK given the fact that the claimant was a British national. Nevertheless, the effect of accepting Al-Thani's appointment was to immunize him and his property from a claim of this nature in the UK. His immunity was upheld by the High Court in February 2016 in the case of *Al Attiya v Bin-Jassim Bin-Jaber Al Thani*.[67] Mr Justice Blake in that case refused to entertain assertions that Al-Thani's appointment was a sham.

The response of many to the changes to diplomatic process brought about by globalization since 1961 and their impact on the Vienna Convention has been to call for a renegotiation of the Convention itself. Such calls came as early as 1984 as an obvious response to the murder of WPC Fletcher. Indeed this author undertook his own PhD with that exact solution in mind. However, the review of the Vienna Convention conducted by the Foreign Affairs Committee and the British Government in response to the murder of Yvonne Fletcher was to the effect that 'the difficulties in the way of achieving any restrictive amendment to the Convention and the doubtful net benefit to the UK of so doing, it would be wrong to regard amendment of the Vienna Convention as a solution to the problem of the abuse of diplomatic privileges and immunities'.[68] The Government agreed with this assessment at the time and would be right to do so again today.

The Vienna Convention, as a self-contained regime, provides both the rights and the remedies for abuse of those rights. Those remedies are not perfect but they are the best that the parties could agree. To think that more restrictive remedies could be agreed today is fanciful. That having been said, more political will to enforce the existing provisions of the Vienna Convention, would go a considerable way to clamp down on and deter further abuse of the Convention from the basic but often highlighted parking offences, to abuse of domestic staff, to sham appointments and ultimately to murder. Crucially, as highlighted by the analysis above, a greater willingness of States to refuse to accept appointed representatives who raise concerns, as permitted by Article 9 of the Vienna Convention, would go a long way to reducing the potential for abuse.

4. Conclusions

The Vienna Convention's success is ongoing. It is dependent on a number of key factors. First, the Convention is bilateral and, to a large extent, symmetric.

[67] *Al Attiya v Bin-Jassim Bin-Jaber Al Thani* [2016] EWHC 212 (QB) (15 February 2016).
[68] Foreign Affairs Committee (n 11) para 11.

Although a State may be larger or smaller, powerful or weaker, popular or hated, the Vienna Convention underscores the importance of sovereign equality that is enshrined in the United Nations Charter. States do not have to have diplomatic relations with one another and some choose not to but the vast majority do and they rely on the Vienna Convention to facilitate the performance of diplomatic functions and to ensure the protection of their representatives. Those representatives are essentially responsible. They take seriously their duties to their home States and to the maintenance of good relations between the sending and receiving State. Occasionally persons entitled to diplomatic privileges and immunities will take advantage of their position and abuse those rights. This is undoubtedly the exception rather than the rule. When that happens, the self-contained nature of the Vienna Convention has already set out the remedies that should be adopted.

Some may argue that the 'punishments' contained in the Convention are not enough and where States do not investigate and, where appropriate, punish a diplomatic agent who is expelled from a State after an accusation of abuse then that argument appears well founded. However prevention is better than cure. The UK review of diplomatic privileges and immunities after the shooting of Yvonne Fletcher identified a number of ways in which the application of the Convention could be strengthened, particularly though the administrative measures. Recent history of FCO oversight of the accreditation of diplomats and State representatives on the face of it, does not suggest that sufficient lessons have been learned from that process.

Ultimately, it is asserted that the Vienna Convention remains today, and for the foreseeable future, the best and most widely accepted legal regime for the regulation of diplomatic relations. It remains only for States to take a more considered and less political approach to its implementation even if to do that might risk some short-term difficulties.

Part II

History

4

Views of a Delegate to the 1961 Vienna Conference

Nelson Iriñiz Casás

1. From Uruguay to Vienna

After the International Law Commission (ILC) had submitted its final set of 'Draft Articles on Diplomatic Intercourse and Immunities' in 1958, the UN General Assembly decided to convene a conference of States, which was to take place no later than spring 1961 in Vienna. Its task would be to work out, on the basis of the draft articles, a binding convention on the topic. The instrument which resulted from this stands today as one of the most important and most widely ratified treaties in the world—a treaty which was given the title of the 'Vienna Convention on Diplomatic Relations' (VCDR).

I was, at that time, head of the mission of the Republic of Uruguay to Austria. That I would be chosen to represent my country at the conference, may not seem surprising—it is not uncommon that diplomats who are already at the seat of the conference, become delegates to it. (At Vienna, Monsignor Casaroli, effectively the Vatican's Deputy Foreign Minister, nicknamed us locally accredited diplomats 'The Viennese'). And yet, my presence in Vienna was no accident.

In fact, it had been my second posting to Austria. I had taken up position as First Secretary of our mission in Vienna as early as 1954. Two months after my arrival, the Minister of the Uruguayan Embassy (Colonel Blanco) went back home, and I became Chargé d'Affaires ad interim with overall responsibility for the mission. I remained in charge of the mission in Vienna until 1959, when I was made head of our mission in Czechoslovakia.

In the twenty-first century, it may be difficult to imagine what life was like behind the Iron Curtain. But it is worth reflecting on the circumstances of the time—they had a significant impact on our work as diplomats and were to influence the negotiations at Vienna as well. In Czechoslovakia and in other countries of the Soviet bloc, people in general were kept in the dark about what was going on in the free world. Officials blocked Western news or at least adapted the contents to the taste of the respective secret services. Foreign diplomats, too, faced numerous restrictions, and building a work environment in which one could deal

Views of a Delegate to the 1961 Vienna Conference. Nelson Iriñiz Casás.
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with confidential information became a particular challenge. As Chargé d'Affaires of a small mission in Prague, for instance, I did not find it easy to carry out my work when the secretaries, service staff, gardener, and chauffeur were all nominated by the Czechoslovakian government. Travel restrictions further limited the reach of diplomatic activity. To gain some liberty, I established a Committee on Trade Exchange between Uruguay and Czechoslovakia. As its President, I had the freedom to move in the country far beyond the boundaries that were set to my Western colleagues. But the Cold War had repercussions that were felt in countries outside the Soviet bloc as well, and at the Vienna Conference, we were well aware of the climate it created.

In 1959, my government appointed me to the delegation of the Republic of Uruguay to the 14th session of the UN General Assembly, where I mainly worked in the Sixth Committee (Legal). It was the Sixth Committee that had, in 1952, discussed the proposed codification of diplomatic law and had in the same year submitted the resolution calling on the ILC to deal with the matter as a 'priority topic'. In 1957, it was the same Committee that discussed the first set of draft articles on diplomatic law which the ILC had submitted to the General Assembly. It was therefore the ideal place for me to meet some of those who had been involved in the codification of diplomatic law, and some friendships resulted from these contacts. The delegate who was sitting next to me in the Sixth Committee was Ernest Kerley, who would later be Legal Adviser to the US delegation at the Vienna Conference.

When the 1959 session of the General Assembly came to an end, I did not return to Prague but was sent to Vienna in the official capacity as head of the mission of Uruguay. It was a strategic move. By then, it was known that the Vienna Conference would take place in early 1961, and the importance of the event was appreciated by members of the international community, including my own State (in the end, no less than eighty-one States participated in the conference). By sending me to Vienna at this early point, I had about one year to revive old contacts and to prepare for the Conference, during which I had the honour to serve as one of the two Vice Presidents of the Committee of the Whole.

2. The Cold War and the Latin American Delegations

At the time of the Vienna Conference, Austria was a neutral country. But it, too, was shaped by the conditions of the Cold War, and this was the environment in which our negotiations took place. It was estimated that Austria and its bordering region was, in the 1950s, home and target of nearly 3,000 spies of the Great Powers from both sides of the Iron Curtain. Not all of the implications of the Cold War were known at the time. For instance, I learnt only in 1990, after the fall of the Berlin wall, that Sergey Kondrashev, a member of the Soviet delegation at the Vienna Conference, had been affiliated with the KGB.

But in other areas, the influence of the Cold War was quite clear, especially to delegations from Latin American States like Uruguay. In the early years of the Cold

War, Latin American Foreign Ministries had ordered their delegations to vote at conferences in the manner indicated by the delegation of the United States. After this decision had caused criticism in the parliaments of the few Latin American democracies, it was changed to a policy of voting in line with most other Latin American countries. In fact, this policy was much like the old one, because the majority of States took the line of the United States.

At the same time, it would have been difficult to speak of a coherent political system in Latin America. Several Latin American States were dictatorships, others were democracies; Cuba, which had recently adopted a communist system, was not considered a member of our bloc, as she followed the USSR line.

There were also considerable differences between the political positions of individual delegates. Many of the Latin American delegates had a personal track record of supporting political movements opposed to Soviet communism. Others opposed what they considered as US imperialism, and were joined in this by the head of the Spanish delegation, Ambassador José Sebastián de Erice y O'Shea, who represented a dictatorial government that had remained neutral during the Second World War. My own position, which was one of anti-communism, was not exceptional either. I had been part of the UN Special Committee that studied the Soviet invasion in Hungary in 1956—an experience that had not changed my views of the Soviet regime.

Given this considerable divide between political views, backgrounds, and personalities, one may wonder how it was possible to carry out constructive work on a complex matter of international law and achieve effective results. To a degree, this was made possible through the efforts of the Austrian Foreign Ministry, through the skills of the conference leadership and of individual delegates. But it also helped that many of the delegates had met before. I would estimate that, at the cocktail reception before the opening of the conference, about a quarter of the attending delegates had the chance to talk to colleagues whom they knew from other contexts: from previous conferences at the UN or their postings to Vienna.

The Austrian Foreign Ministry (which was represented with a dozen diplomats at the event) and the locally accredited diplomats (the 'Viennese' group) were accustomed to the mentality of Eastern European countries and keen to bridge the gap between East and West. Our attempts were mirrored by delegates from Hungary, Czechoslovakia, and especially the Romanians who were the most curious ones and most open to the idea of conversing with Western representatives. This mutual interest contributed to an unusually positive atmosphere which lasted throughout the entire conference.

It was at those informal meetings at the very beginning of the conference when the value of the participation of the Viennese as a link between East and West became apparent. However, group cohesion was not really established with those who, before the conference, had no opportunity of putting aside their fear of delegates of communist countries. Contacts between communist delegates and those from Mexico, Ghana, the Philippines, or Lebanon in particular remained limited. Additionally, despite the overall positive atmosphere, some delegates still had

questions about the need for a convention and about realistic prospects of reaching consensus on the most controversial points.

At later stages of the conference, some delegates were particularly helpful in overcoming the differences between participating States. The Guatemalan delegate—Dr Linares Aranda (who was also his country's Ambassador to Germany)—joined a group of other diplomats in Café Hawelka and was able to make a particularly important contribution, as he had influence over various delegates from Latin American States whose peoples lived under authoritarian regimes and were therefore not closely aligned to the government I represented. His legal knowledge and distinguished diplomatic career (he had previously been Ambassador to Washington and the Guatemalan Minister of Foreign Affairs) suggested from the outset that he would be a trusted colleague and confidante; and he studied each of the amendments, which we wanted to present, with great care.

Linares Aranda was also helpful in facilitating contact with the Cuban delegate, who was one of his friends. At that time, dealing with Cuban delegates in international fora had not been an easy matter. At the UN in New York, for instance, conversations among members of the Latin American bloc would immediately turn to trivial matters as soon as a Cuban delegate was within earshot. (Some Cuban delegates exploited that: they would stand in the room for a few minutes, then leave it, then suddenly reappear, in order to obstruct the work of their Latin American colleagues.) No such difficulties arose in Vienna; in fact, at some point, the Cuban delegate accompanied us to Café Demel, where some of our discussions took place; and our talks did not suddenly stop on his account.

3. Leadership of the Conference

An important reason for the fact that we were able to bridge the political divide and to reach consensus even on controversial questions must be seen in the extraordinary leadership from which the conference benefitted.

The appointment of Professor Alfred Verdross as President of the Conference was particularly helpful. That he was envisaged for this position was a decision which had not been publicly discussed—it had been made even at the time when Vienna had been chosen as conference venue. The diplomatic missions at Vienna received confidential notes about this, and it was brought to the attention of those delegates who were not accredited in Austria. The United States, initially, had some hesitation on the matter. But Verdross had already done brilliant work in the ILC, and his outstanding performance during the pre-negotiations guaranteed his election as President of the Conference. His vast expertise was of invaluable help in clarifying the meaning of the individual provisions, and he provided insightful guidance throughout the conference.

The other major role in the organization of the conference fell to the Chairman of the Committee of the Whole. The decision had been made to entrust that position

to the delegate of a Commonwealth State who would be able to attract support among many of the participating States. In the end, the choice fell to Shri Arthur S Lall, who was then accredited to India's mission in Austria. We 'Viennese' were very pleased with the appointment—Ambassador Lall was highly respected and well-known for his diplomatic skills. He led his session with prudence and discretion and showed these qualities outside the conference halls as well. Although he, too, was locally accredited, he never came to our meetings at Café Hawelka. Instead, he preferred to meet with the British, Asian, and Commonwealth delegations.

From a Latin American perspective, there was a third delegate whose contribution to the success of the conference was of particular importance: the aforementioned Ambassador Erice y O'Shea, head of the Spanish delegation and an invaluable facilitator among the Latin American group. He was in more than one regard an unlikely choice for that position. For one, Spain was, in 1961, still under the Franco dictatorship that maintained close diplomatic relations with only a handful of States. As a result, the Spanish delegation was usually isolated at international conferences, not least because some, like the Mexican delegation, would not work with representatives of dictators. However, I had known Erice y O'Shea since my early days in Vienna, when he headed the Spanish mission. During that time, he demonstrated indisputable legal expertise which he owed to his time as a law professor and internationally acclaimed legal authority having authored several books on public international law.

During the conference, I took advantage of my position as Vice Chairman to make the best use of the qualities of my friend. Officially, I could not intervene in the work of delegations. However, I managed to convince some of the most diligent Latin American colleagues, in particular those of Colombia, Brazil, and Guatemala, to accept Ambassador Erice y O'Shea within the Latin American group. Just for the purposes of the Vienna Conference, he thus effectively became Latin American—a procedure that had never been adopted at the UN before 1961.

As the facilitator of our amendments and proposals, his legal standing gave more weight to the voice of the Latin American delegations. He was happy to fulfil this role because he missed his classes at university, and having centre stage at the committee meetings gave him the opportunity to discuss detailed legal issues in front of an audience that did not stop listening with interest. As a result, Professor Erice y O'Shea became the most active delegate at Vienna. He regularly took part in the sessions of the Committee of the Whole to which he submitted numerous Spanish amendments and sponsored many of the Latin American ones.

On 6 March 1961, the Vice Chairmen of the Committee of the Whole were to be elected. Before the session began (which was to be chaired by Lall), the delegates formed several groups in the cafeteria. On that occasion, Sergey Kondrashev, First Secretary at the Soviet Embassy to Vienna (and member of the Soviet delegation chaired by Grigory Tunkin, the international legal scholar) had a talk with the Colombian delegate. Kondrashev told him that the Soviet bloc proposed having two Vice Chairmen so that the weight of drafting the Convention could be better shared. He suggested that the Latin American bloc should vote for the delegate of

Uruguay (myself) for one of the posts and should in turn accept the Polish delegate, Professor Henry Birecki, for the other one.

Given my well-known political stance, the Soviet proposal may, at first glance, have seemed surprising. At a closer look, it made perfect sense. My anti-communist reputation justified Birecki's candidacy, which initially had triggered the resistance of the USA, whose tendency to seek the rejection of Soviet candidates for critical conference positions was well known. And given my close relationship to Ernest Kerley, the US could be convinced to agree to Birecki and to make an exception to her policy.

The Colombian delegate conveyed that message to Erice y O'Shea, who quickly embarked on the necessary consultations with Stavropoulos as the Representative of the UN Secretary General and delegations from other blocs, which accepted the proposal. When the moment arrived at the session, Erice y O'Shea proposed my candidature, which was approved by acclaim.

This trade-off also secured the appointment of a European candidate for the post of Rapporteur of the Committee of the Whole. It had been known to us since the very beginning of the Conference that the European delegations would push for the nomination of the Dutch legal adviser, Willem Riphagen. It was also an open secret that the conference would seek to form a committee to deal with the topic of ad hoc diplomacy, which was to recommend further research to pursue separate codification of the subject at a later stage.

4. Café Diplomacy

I have mentioned meetings in Café Hawelka and Café Demel. That, in fact, was an aspect of our work that should not be underestimated. As those familiar with diplomatic conferences know, important parts of negotiations often take place in (seemingly) social settings—over lunch or coffee, but also through 'private' invitations at the fringes of the conference.

In Vienna, 'café diplomacy' nearly became an art form. At lunchtime, for instance, if I did not have any official functions to attend, I would usually go to Hotel Sacher, where a table had been reserved for me in the Blue Bar since before Austria had become independent. It became my venue of choice for all kinds of meetings. My guests, both international and local, appreciated the opportunity to visit this historic place where *Tafelspitz* (a Viennese specialty) was on the menu and a pianist was softly playing Mozart and Stolz. I also hosted my Austrian friends—academics, students, journalists, artists, scientists, and members of the nobility—at the Palais Pallavicini and at my own home in Mahlerstraße, opposite the International Atomic Energy Agency (IAEA). Others came, too—friends and colleagues from Western States, Eastern Europeans, and Africans. Among them was Monsignor König who, years later, would present Cardinal Wojtyła to the Vatican conclave as a candidate for the papacy.

I was not the only one who engaged in café diplomacy. Pâtisserie Demel, which had been a favourite of the Austrian Emperor Franz Joseph because of its famous chocolate cake, was also popular with the 'Viennese' group. We would invite our colleagues from smaller States to this café to enlist their help in drafting certain articles—such as Articles 11, 12, and 41—when it was particularly important to protect the interests of small States while still allowing a version to emerge which could meet with the approval of the Great Powers and the support of the negotiating States in general.

But the Viennese group also met with non-aligned and more independent delegates as well as others who tended to lengthen the debates during the conference by repeatedly adding articles for consideration. The delegate of the Philippines, for instance, had, early on, raised the position of the heads of some international organizations in the host country and suggested their inclusion in the draft. But there was reason to consider amendments of this kind with some suspicion. Those of us who had experience of international organizations knew that the members of short term missions were, often enough, friends of the relevant governments, who were rewarded with trips to attractive and exotic countries but had no desire to do any strenuous work. This often happens in places where the UN maintains headquarters or holds conferences. It was for that reason that a decision was made in the end to postpone the issue and to call attention to the government officials who were favouring their friends and other freeloaders in this way.

The Vatican diplomats were among those whom we were not able to persuade to join us at Demel (or at Café Hawelka). They preferred to go, together with other delegates, to the events organized by the Austrian Foreign Ministry or one of the embassies: visits to a Heuriger (tavern) in the mountains around Vienna, to the Staatsoper or the Volksoper, Schönbrunn, and Belvedere, followed by lunches, dinners, and receptions which were offered throughout the conference.

5. Personalities at Vienna

There are several delegates whose position and performance at the Conference were, to my mind, memorable. Constantin Stavropoulos, for instance, Representative of the Secretary-General at the conference, was an old acquaintance. We had met before in France, at the Château Saint Jean Cap Ferrat, the house of our mutual friend, Ernie Kanzler, which was perched over the Mediterranean. Kanzler was the uncle of Henry Ford II and adviser to several US Presidents. During July and August of each year, he would host daily lunches, attended by around thirty academics, diplomats, and politicians, sometimes including Prince Rainier and Grace Kelly. At the end of the Vienna Conference, it was a great pleasure to be invited to Stavropoulos' table and to be seated next to Rosemarie Kanzler, Ernie's wife, who had arrived especially from Detroit to attend the end of conference reception dinner.

Stavropoulos had arrived in Vienna with a delegation of UN officials specializing in international law. Together with his team, he visited Café Hawelka on two occasions and cast a watchful eye on the behaviour of each delegation. Stavropoulos also served as Acting President of the Conference before Verdross was elected President.

Verdross himself was a jurist and legal academic expert *sui generis*. He was an international personality whose expertise was recognized by the universities of the States represented at the Vienna Conference. His book *Public International Law*, which had been published shortly before the Vienna Conference began, became obligatory reading in law schools all over Latin America and Spain.

I remember Sir Francis Vallat, chairman of the European bloc of democratic States, as one of the most active and capable members of the Conference. He was distinguished, remarkable, and performed outstandingly throughout. Close to his Commonwealth colleagues, he possessed wit, intelligence, authority and was able to rely on the considerable legal assistance of the British delegates.

6. Topics at Vienna

What were the issues which were of particular importance to us during the conference?

There are four matters which I would like to highlight in view of their significance and the fact that they offer good illustrations for the negotiating procedure at Vienna. They were the debates on (today's) Articles 11, 27, and 41 and the matter of diplomatic asylum.

Article 11 deals with the fact that the receiving State may require the size of the mission to be kept within limits which it considers 'reasonable and normal'. On reading it, one may get the impression that a ten year old could have written it. In fact, the article took an entire week of cordial meetings at Pâtisserie Demel, with the Polish and Czechoslovakian delegates, and at one point with Sergei Kondrashev of the Soviet delegation and the Guatemalan delegate. I also had a meeting just with Ernest Kerley of the US delegation in Demel, in which I managed to get him to agree that he would present a compromise amendment which would not prejudice the position of the smaller States.

Article 11 and Article 12 (requiring the consent of the receiving State if offices of the mission are to be established in localities other than those of the mission itself) are rules which, like few other provisions in the convention, illustrate the different positions of smaller and greater actors in the international community. It was not uncommon for some of the Great Powers to use diplomacy as a means of espionage, and there was thus an advantage to having armies of diplomatic officials and premises outside the capital. That did not apply to the same degree to other States. The Great Powers, however, did not want to accept wording that would deprive them of the option to freely manage the number of officials in their diplomatic missions and to deploy them in their cultural or other centres in the receiving State. Smaller States, on the other hand, had a considerable interest in

retaining control over the number of members that could be assigned to a diplomatic mission.

During the conference and at Café Demel, several drafts were thus confidentially prepared in an effort to reach a conclusion that would neither adversely affect small countries nor unduly favour larger States as the greatest beneficiaries.

But the drafting of Article 11 also showed that very specific, contemporary concerns at times had an impact on the shape which the VCDR eventually assumed. In Demel, the US delegate Kerley and I reached a deal under which we agreed that he would present a compromise amendment and I accepted that my government would decrease the number of staff of the Soviet Embassy in Montevideo, and that its officials would not visit districts bordering Brazil and Argentina before advising the Foreign Ministry of their plans. These were matters which had been of concern to the United States (and we did indeed follow up on this point in Uruguay).

Article 27 enshrines the principle of freedom of communication of diplomatic missions, but it also lays down the rule that the mission may install and operate a wireless transmitter only with the consent of the receiving State. The point was of some relevance to the Soviet Union: the USSR had not forgotten the activities of Radio Free Europe in Germany during the Hungarian uprising, encouraging the people of Hungary to resist the invasion of Soviet troops. The result, at Vienna, was a protracted discussion—it needed the skilful intervention of the British delegate to overcome this difficulty and reach consensus on the drafting of this paragraph.

A further topic of debate—also in Article 27—was the inviolability of the diplomatic bag. Today, fifty years after the drafting of the VCDR, it is my duty to state that none of those present at the conference, in the General Assembly, or even in the ILC had spoken about the issue that amazes us now: the use of the diplomatic bag to traffic cocaine. It took the international press to raise that issue and bring it to the attention of the general public.

Article 41(1) VCDR contains the rule that diplomatic agents are not allowed to interfere in the internal affairs of the receiving State.

The official conference records make it appear as if this had been a provision that caused no controversy and whose adoption had been a straightforward matter. The reality was somewhat different. It took time to draft this norm which has great importance in light of the tendency of Great Powers to interfere in political affairs of the host State, and it gave rise to interesting discussions which took place outside the conference hall. Neither the USA nor the USSR wanted to accept the draft which had been adopted following strong pressure by the smaller countries. And yet, today it is not only the Great Powers that violate this rule, but also smaller States. Instances of that are currently happening in Latin America, as I had the opportunity to point out in Uruguay, when the rule was violated both by the Ambassador of Venezuela and the Ambassador of the United States.

The topic of diplomatic asylum was of importance to Latin American States. In Latin America and in Haiti, diplomatic asylum has roots not only in politics and diplomatic practice, but also in law—customary law as well as treaties that apply in our region.

However, as a general rule, diplomatic asylum is not accepted in the rest of the world, and the so-called active asylum seeker is rejected, except in very rare and exceptional circumstances. Only Portugal and Spain have tolerated passive asylum seekers, and only then in times of great revolutions.

At the time of the Vienna conference, one of the most famous asylum seekers—Cardinal József Mindszenty—was still in the US Embassy in Hungary, following the defeat of the 1956 revolution. He was to stay there for many years after our deliberations had come to a close, until laborious and complicated negotiations permitted his departure after fifteen years. In light of that, the Soviet bloc was not interested in dealing in detail with the right of asylum.

The solution which was adopted in the VCDR, satisfied all sides: protection was given to the asylum seeker only as a result of the inviolability of the mission. That only prevented arrest on mission grounds, without generating further consequences. This simple protection was based on a fundamental prerogative of diplomatic missions which had already existed under customary law and was enshrined into treaty law in the form of Article 22 VCDR.

7. Reflections

More than fifty years have passed since we agreed on the text of the Vienna Convention. In light of that, the time may be ripe for an assessment of the treaty and a reflection on its ability to meet the challenges which it has encountered since 1961. There are three observations which I would like to offer in that regard.

The first concerns a particular provision which I have mentioned before: Article 27 VCDR and the inviolability of the diplomatic bag.

Violations of that rule abound. And these are not minor misdeeds. Items smuggled in diplomatic bags can cause great danger to the receiving State and indeed to mankind. The fact must be recalled that attempts have been made in the past to smuggle considerable amounts of cocaine and other drugs through diplomatic bags. Conduct of that kind inflicts serious damage on States in all parts of the world. There can be no doubt that Article 27 VCDR requires reform. We ignore the difficulties to which it has given rise at our own peril.

Secondly, any attempt to reform the Vienna Convention must take into account current political conditions, for every treaty will be negotiated by representatives of governments which, be they good or bad, honest or corrupt, make up the family of the UN. The VCDR is a widely ratified and, to that extent, successful instrument: it is the ABC of modern diplomatic law. But the fact remains that its text has moved away from the political realities on the ground.

That is not a matter which is confined to the Vienna Convention. It is a problem that is reflected, on an even wider scale, at the UN, which is still dominated by the dictatorship of the five permanent members of the Security Council. In both cases, reform is, at times, proposed: during the US presidential campaign of 1968, the Democratic candidate stressed the importance of reform of the UN Charter. We are still waiting for that reform.

There are lessons to be learned for the future of the VCDR. Reform is essential: it is, in particular, important that the modern regime of diplomatic law provides members of the international community with effective sanctions to deal with the abuse of diplomatic immunity. The absence of such sanctions has led to the situation with which we are faced today: a situation in which breaches of the Vienna system have become commonplace. Yet any attempt at revision of the 1961 Convention must take into account the current political environment and contemporary political needs if it wants to achieve results which are respected, observed, and widely accepted.

My third and final point concerns those who should be involved in reform of the Vienna Convention. It is increasingly clear that effective reform cannot be achieved in the old ways and through the usual suspects. One must not be surprised if civil society has lost faith in a system which is dominated by grandstanding declarations by international personalities of the 'old school'—representatives who engage in old-fashioned forms of conference diplomacy (I compliment you, you compliment someone else, who in turn compliments me). What is required, is a fresh and objective look at diplomatic law and international law in general. What we need, is the jurists' surgical intervention—the involvement of impartial minds, motivated by an interest in the law itself and capable of devising solutions to the problems it encounters, to work towards the establishment of a new and effective international order. Academics therefore must appreciate the importance of diplomatic law and can no longer afford to hide in ivory towers. Those who are suffering under oppression and abuse will appreciate their voice. Solutions are possible. But they can only be achieved if scholars and diplomats are willing to listen to one another, to share their expertise, to accept constructive criticism and to work together towards the creation of a new system of diplomatic law which truly serves as a foundation of friendly relations around the world.

5

On the Road to Vienna

The Role of the International Law Commission in the Codification of Diplomatic Privileges and Immunities, 1949–1958

Kai Bruns

The VCDR is looking back on more than fifty extraordinary successful years since its coming into force in 1964. It has become *the* reference for the regulation of diplomatic relations between States, and the privileges and immunities granted to their representatives. By 2016, the VCDR had been accepted by 190 parties which literally turned its provisions into general international law. As a matter of fact, be it for micro island States such as the Republic of Seychelles or for United Nations non-Member Observer States such as Palestine (the VCDR's most recent party since April 2014), acceding to the VCDR has become a natural thing to do. The high degree of acceptance is an expression of its recognition and makes the VCDR, to say it with the words of Eileen Denza, 'a cornerstone of the modern international legal order'.[1] With the wisdom of hindsight, the codification of diplomatic law has been an event of exceptional political and legal significance, coming as it did, shortly after the end of the Second World War, at the height of the Cold War, and amid the on-going process of decolonization.

When explaining the success of the VCDR regarding States' adherence, authors have put forward a number of different arguments. Both Philippe Cahier and Eileen Young (later Denza) stressed that the subject matter lent itself towards codification since diplomatic relations were based on long-established diplomatic practice.[2] Auto-regulated by reciprocity, diplomatic law disposes of permanent and effective sanctions which have enhanced States' observance of the codified rules. Ernest Kerley, official advisor of the US delegation at the Vienna Conference, in

[1] Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, (OUP, Oxford 2008) 1.

[2] Philippe Cahier, 'The Vienna Convention on Diplomatic Relations' (1969) 37 International Conciliation 5 and Eileen Young, 'The Development of the Law of Diplomatic Relations' (1964) 40 British Yearbook of International Law 180.

On the Road to Vienna: The Role of the International Law Commission in the Codification of Diplomatic Privileges and Immunities, 1949–1958. Kai Bruns.

a later article also observed that the subject matter was 'less contentious'.[3] Shortly before the Vienna Conference, the first and second Law of the Sea Conferences were held in 1958 and 1960, respectively. Their extensive agendas and particularly the territorial aspects involved made them a bone of contention in contrast to which the codification of diplomatic privileges and immunities seemed an easy topic to reach agreement on. Also, in comparison to the first codification of diplomatic precedence at the 1815 Congress of Vienna, Richard Langhorne and Modesto Vázquez stressed that the Vienna Conference included many smaller States in the negotiations which made a later, universal acceptance of the convention much more likely.[4]

One factor, however, equally stressed by most of the aforementioned authors is the admiration for the preparatory work rendered by conference officials and the ILC. The 'admirable' work of the ILC is reflected in the quality of the forty-five draft articles on the basis of which delegates at the Vienna Conference started its discussions. The 1958 ILC draft was already a well-balanced and realistic compromise text on a number of Cold War issues.[5] Protecting these compromises, the Soviet Union and UK delegation in particular never became tired of calling on 'the wisdom of the International Law Commission' to make sure that as few as possible of the roughly 350 amendments would alter the content of the draft articles.[6] In her epic commentary on the VCDR, Eileen Denza confirms that both members of the ILC and conference delegates never lost sight to find solutions acceptable to governments and national parliaments. This included the fine balance that members of the ILC struck between the scope of topics, form of codification, and elements of progressive development of diplomatic law.[7]

This chapter analyses the role of the ILC in the codification process of diplomatic privileges and immunities.[8] It gives insight into the nature and composition of the ILC and shows how these aspects affected the drafting process. In so doing it seeks to clarify the influence of the preparatory process on the final 1958 ILC draft articles. Additionally, light is shed on discussions that took place in the ILC between 1949 and 1958. Some of these discussions form a substantial basis for a profound understanding of why the Vienna Convention takes the form it does today, and of the topics that have been subject to intense debate at the United Nations Conference on Diplomatic Intercourse and Immunities, better known today as the 1961 Vienna Conference.

[3] Ernest Kerley, 'Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities' (1962) 56:1 AJIL 128.

[4] Richard Langhorne, 'The Regulation of Diplomatic Practice: The Beginnings to the Vienna Convention on Diplomatic Relations, 1961' (1992) 18 Review of International Studies 17.

[5] *ILC Yearbook* 1958 vol II, 89–105.

[6] Karl Zemanek, 'Die Wiener Diplomatische Konferenz 1961' (1961) 9 Archiv des Völkerrechts 398.

[7] Denza (n 1) 2.

[8] This chapter is partly an adapted version of a chapter on the codification of international law in Kai Bruns, *A Cornerstone of Modern Diplomacy—Britain and the Negotiation of the 1961 Vienna Convention on Diplomatic Relations* (Bloomsbury, London 2014).

1. Evolution of the Institutionalized Codification Process

Before looking at the negotiations directly relevant to the drafting of the Vienna Convention, it is beneficial to understand the historical evolution of the institutionalized codification process that has shaped the codification of international law under the auspices of the UN. After the First World War codification of international law became institutionalized by the League of Nations.[9] However, its efforts were not altogether successful and, eventually, halted. One reason was that the preparatory process under the League of Nations had failed to produce a balanced draft convention for the first codification conference, The Hague Codification Conference in 1930.[10] Until the First World War codification was mostly in the hands of international jurists or private international organizations such as Johann Caspar Bluntschli or the *Institute of International Law*.[11] With the end of the First World War and the establishment of the League of Nations the codification of international law became organized on an intergovernmental level. In so doing, the League of Nations instructed a Committee of Experts to prepare a provisional list of the subjects on international law of which codification, by international agreement, would seem to be most desirable and realizable. The basis for this evaluation was a detailed questionnaire on matters drawn from a provisional list of subjects which were determined in sub-committees, typically staffed with one rapporteur and assisted by another international jurist. However, there was little communication between the Committee members and governments and the feedback on the questionnaires was of limited value for a balanced codification since the responses were kept general and did not include specific information on detailed practices.[12] The reason for this absence of 'diplomatic spadework'[13] was partly that, at that time, international law did not occupy 'any significant place in the normal diplomatic exchange between states'.[14] But also because governments were not particularly motivated to reveal their diplomatic practices. As a result, the 1930 Hague Codification Conference negotiated three selected subjects (nationality, territorial waters, and the responsibility of States for damage caused in their territory to the person or property of foreigners), resulting in a set of drafts which only reflected the views of individual experts, but did not constitute a politically and systematic draft. The basis for discussion lacked the precision necessary to reach a satisfactory agreement and eventually the 'remoteness of the preparatory work from the realities of the international situations'[15] led to the practical failure of the first international conference convened for the codification of international law.

[9] Shabtai Rosenne (ed), *League of Nations Committee of Experts for the Progressive Codification of International Law (1925–1928)* (Oceana Publications, New York 1972).

[10] Hunter Miller, 'The Hague Codification Conference' (1930) 4 AJIL 674.

[11] Langhorne (n 4) 3f. See also Young (n 2) 171.

[12] Shabtai Rosenne, 'Relations between Governments and the International Law Commission' *The Year Book of World Affairs* (1965) 188–98, 190.

[13] ibid 189. [14] ibid 184. [15] ibid 185.

After the Second World War, the successor organization of the League of Nations, the United Nations, included the initiation of studies on the codification and progressive development of international law in Article 13 of its Charter. This made the study of international law an integral part of the work of the United Nations which delegated this task to the newly founded ILC. However, in the early years of the ILC many questions regarding its work and working procedure still stood open. The experience of the failure of the 1930 The Hague Codification Conference led to divergent interpretations of what the future work of codification should look like. And so, in the late 1940s, it was not yet clear how the UN should comply with its obligations under Article 13 of the Charter. In 1947, the *Institut de Droit International*, one of the most influential private institutions on the study of international law, estimated that the most significant contribution to the codification of international law was to perform systematic research, on the national and international level, to correctly calculate the current state of affairs.[16] This view was supported by British international jurists and particularly by the then president of the renowned *Grotius Society*, Sir Cecil Hurst, who pleaded for the codification of international law on new lines.

Through his work as former Foreign Office legal adviser as well as judge and president of the Permanent Court of International Justice, Sir Cecil had become an expert in legal inter-war issues and realized that there were still many points in international law on which no universal acceptance existed or where no international practices had yet developed.[17] The strict sense of codification was to ascertain and define the limitations of international law, declaring the existing rules of international law but not formulating how rules of international law ought to be (as it had been the practice in the past under the guidance of the League of Nations). However, the latter was, according to Hurst, the automatic consequence of codification by international conferences in which national needs were too often neglected. This was, for Hurst, the misfortune that contributed to the failure of the 1930 The Hague Conference. Regarding the practice under the League of Nations, Hurst pointed out that the work was too vast for one man and that the task could not be done on an individualistic basis.[18] Moreover, some States criticized rather the remoteness of the preparatory documents in relation to diplomatic practice than the opposing national interests during the final diplomatic stage of the 1930 codification attempt. Powerful political support for a greater influence of governments on the codification process came, *inter alia,* from the Soviet Union

[16] Furthermore, the resolution of the Institute of International Law, adopted at the 1947 Lausanne meeting, warned against codifying international law as intended by the 1930 Hague Codification Conference, but recommended gathering systematic information on the current state of accepted rules of international law, creating a doctrinal base from which gaps in international law could be filled. Institut de Droit International, *La codification du droit international* (12 August 1947) <http://www.idi-iil.org/idiF/resolutionsF/1947_lau_02_fr.pdf> accessed 28 September 2016. See also Cecil Hurst, 'A Plea for the Codification of International Law on New Lines: Transactions of the Grotius Society', Problems of Public and Private International Law, Transactions for the Year 1946 (1946) 32 British Institute of International and Comparative Law 135.

[17] Hurst (n 16) 135. [18] ibid 148.

which had a justified interest in avoiding the production of drafts at the preparatory stage which would have been too theoretical. As a result, preparations were to be conducted within an institutional framework which would allow for in-depth involvement of governments.[19]

It was in this light that the Statute of the ILC was drawn up in 1947 providing for a preparatory codification process in which calm scientific research and governmental involvement went hand in hand.[20] The United Nations General Assembly adopted at its 123 plenary meeting Resolution 174 (II), establishing the ILC on 21 November 1947.[21] The idea behind the UN effort was to refashion the traditional notion of international custom through codification which sought to make the law more efficient to support the very conceptive idea of the UN itself; the maintenance of international peace and security.[22] As a result, the ILC was instructed to discover the real needs of the international community in the field of 'codification and progressive development of international law'.[23] In doing so, the Statute of the ILC drew on past experience and included some provisions which strengthened mutual relations between the ILC and governments. The Statute gives a precise role to each of these actors, providing for a routine procedure in the codification process. Consequently, it became usual procedure that during a first preparatory phase research is organized by the ILC as an independent group of experts which prepares a set of non-binding draft articles. The preparatory phase concludes with a recommendation of the ILC to the United Nations General Assembly (UNGA) for the appropriate form of codification. During the second, diplomatic, phase every member State has the possibility to participate directly in the negotiations, often (but not exclusively) taking the form of an international conference of plenipotentiaries.

2. Diplomatic Intercourse and Immunities: A Priority Topic

When the ILC took up its work in 1949, the topic of diplomatic immunities was shortlisted in a survey of the Secretariat of the UN. However, unlike the topics on the law of treaties, arbitral procedure, and the regime of the high sea, no priority status was initially accorded to diplomatic immunities.[24] In preparation

[19] Shabtai Rosenne, 'The International Law Commission, 1949–1959' (1961) 37 British Yearbook of International Law 186.

[20] Shabtai Rosenne, 'Codification Revisited after 50 Years' (1961) 2 Max Planck United Nations Yearbook 1.

[21] Jeffrey Morton, *The International Law Commission of the United Nations* (Columbia: University of South Carolina Press 2000) 6.

[22] Shabtai Rosenne, 'The Role of the International Law Commission' (1970) 64 AJIL 26.

[23] 'Codification and progressive development' of international law is the quantum leap by which it is intended to strike a balance between the need for improvement of international law (progressive development) and the need for stability (codification).

[24] For an excellent account on the priority-status debate see Richard Langhorne (n 4) 13–15, and Yuen-Li Liang, 'Diplomatic Intercourse and Immunities as a Subject for Codification' (1953) 47 AJIL 439.

for the first session of the ILC in June 1949, a number of studies were published by the Secretariat, *inter alia*, for a draft declaration of the rights and duties of States, a survey of the question of international criminal jurisdiction, and a survey on international law in relation to the codification work of the ILC. The latter study included twenty-five topics in the field of 'international law of peace' of which the members selected, within only six meetings, a preliminary list of fourteen topics becoming the Commission's first long-term working plan.[25] While the Commission had only needed six meetings to agree on the topics included in this working plan, identifying the ones which should enjoy priority status became more difficult. One suggestion favoured the regime of the high seas, statelessness, and consular intercourse and immunities.[26] Another strategy aimed to prioritize the law of treaties and arbitral procedure. A third one focused on the question of nationality and statelessness. A further one stressed the importance of the codification of the right of asylum. While the last two proposals did not find the necessary support to be pushed forward, the ILC, eventually, decided to prioritize the three topics of law of treaties, arbitral procedure, and the regime of the high seas.[27]

The increasing Cold War confrontations during the 1950s, however, deterred enhanced relations between States. The international pressure particularly burdened relations between States of East and West, and violations of diplomatic immunities became more frequent and increasingly serious. It was often in these situations that less powerful States sought the protection of international law and, in this particular case, it was the former Republic of Yugoslavia, which had fallen out with the Soviet Union, and had placed a draft resolution on the agenda of the seventh UNGA session in 1952, requesting priority be given to the codification of 'diplomatic intercourse and immunities'.[28] In the meetings of the Sixth Committee of the UN, Yugoslavia accused the governments of the Soviet Union, Poland, Czechoslovakia, Hungary, Bulgaria, Romania, and Albania of diplomatic discrimination. Yugoslavian agents had been the subject of physical attacks as well as restriction of fundamental diplomatic rights such as the freedom of movement, the inviolability of mission premises, and the freedom of communication.[29]

[25] The twenty-five topics shortlisted in the survey can be found in the ILC report to the General Assembly. With the preliminary list of fourteen topics the ILC decided, from the outset, against the establishment of a general and systematic codification plan for the entire field of international law, as originally envisaged in the preamble and article 1 of the Charter of the United Nations. *ILC Yearbook* 1949, 280–81.

[26] The last topic was raised by ILC member Vladimir Koretsky of the Soviet Union. He stressed that questions on consular relations arose very often in current State practice and that this field was 'strewn with obstacles, as practice differed in various countries, thus leading to frequent misunderstandings between the states'. However, other topics seemed more urgent, which explains why consular intercourse received only three out of nine votes in the final vote. ibid 58.

[27] ibid 283.

[28] See Richard Langhorne for an explanation on how the Cold War situation had positive effects on the codification process of diplomatic relations and that it was particularly the USA that gave the codification process additional momentum. Langhorne (n 4) 3–17.

[29] The alleged flagrant violations of privileges and immunities included: discourtesy, maltreatment and physical attacks, arrest, restriction of travel, denial of medical aid and various services, refusal of exit visas, illegal entry into the embassies and legations, censorship, and refusal of permission to receive mail, and newspapers. UNGA, 'Legal Questions' (1952) UNYB 801.

Therefore, Yugoslavia argued that an early codification of 'diplomatic intercourse and immunities' would have a positive effect on the application of respect for traditional rules of diplomacy. It would mobilize world public opinion against 'aggressive machinations' and, as a consequence would relieve world tension.[30] The US representative supported the idea stressing the importance of codification as US citizens and diplomats, too, were suffering discrimination by *Cominform* regimes.[31] The Soviet representative, of course, denied these charges of violation of diplomatic immunities and was opposed to the Yugoslavian draft resolution. He was supported by the Polish delegate who interpreted the claims as being not of a legal character, explaining that the issue had been 'artificially created' by the United States and Yugoslavia as a 'propaganda manoeuvre'.[32]

Meanwhile, discussions on the codification of 'diplomatic intercourse and immunities' had already borne strong results in the Sixth Committee of UNGA. In the light of recent violations of diplomatic custom, most members of the Committee regarded the topic as sufficiently important to be considered by the ILC. It was proposed to include matters such as personal privileges and immunities, diplomatic asylum, protection of premises and archives as well as the start and ending of the appointment of diplomatic staff in the codification project.[33] Indeed, the Yugoslavian and the US representative had made an impression, warning that such violations of diplomatic immunities infringed the UN Charter and threatened the maintenance of peace. However, there was another practical reason to treat the question of diplomatic privileges with priority. It was in the early 1950s that international organizations increasingly sought immunities and privileges for their members of staff, and there was a widespread desire to circumscribe this process.[34] Representatives in the Sixth Committee feared that the elasticity of customary law could be challenged and it was argued that certain privileges, such as juridical immunity, should be reserved only to diplomatic agents.[35]

Despite the overall agreement to lift diplomatic 'intercourse and immunities' to the status of a priority topic, some representatives wanted to further broaden the Yugoslavian draft resolution. The Lebanese and Columbian representatives suggested including the question of consular relations in the resolution as well.[36] Another proposal, made by Colombia and supported by many other Latin American States, wanted to add diplomatic asylum to the topic of diplomatic

[30] Liang (n 24) 442.

[31] He referred to a Soviet decree that converted 80% of the country into a forbidden zone, including capital cities such as Kiev and Minsk. Additionally, there was a Secrets Act in 1947 that had restricted all forms of communication between Soviet citizens and foreign diplomats. ibid.

[32] UNGA 'Question of the Codification of Diplomatic Intercourse and Immunities' (1952) UNYB 802.

[33] Memorandum of the Secretariat on the Codification of Diplomatic Intercourse and Immunities, ibid 131.

[34] Liang (n 24) 443. State relations with international organizations were later regulated separately by the CRSIO which, however, is still missing the necessary number of ratifications in order to come into force.

[35] Diplomatic agents understood in the traditional sense as representatives of States.

[36] UNGA (n 29) 802.

intercourse and immunities, as these themes would be closely related.[37] But none of these suggestions gathered the necessary majority. Under the precondition that the work of the ILC would not be disturbed, and that it was granted the necessary freedom to decide when to start to work on the subject, the representatives of, *inter alia*, Australia, Bolivia, Brazil, Taiwan, France, Greece, the UK, and the US, agreed to support an amended version of the Yugoslavian draft resolution.[38] Finally, the revised draft resolution was adopted in the Sixth Committee by forty-two votes to five, with four abstentions and passed the Assembly without discussion.[39] As a result, resolution 685 (VII) urged the ILC to treat the codification of diplomatic intercourse as a priority topic, starting with its research 'as soon as it considered it possible'.[40]

Half a year later when the ILC held its 1953 annual session, it was not feasible to deal with the subject of diplomatic intercourse and immunities due to an overloaded working schedule, unfortunate timing, and some procedural problems. Because of the absence, caused by illness, of one of the special rapporteurs and other procedural problems with the preparations for the meetings, members of the ILC had difficulties deciding on a suitable working order.[41] Furthermore, the ILC was overburdened with work, having scheduled seven different topics, including 'diplomatic intercourse and immunities', for this session.[42] This heavy agenda, to be realized within such a short time, required its members to concentrate on a few topics rather than giving superficial attention to all of them. Thus, the ILC was at pains not to load even more work onto their annual agenda. Furthermore, members' terms were due to end the following year, and they felt the need to complete at least some of their work. The upcoming ILC elections left its members uncertain of re-election which would enable them to continue their work. This uncertainty led the Commission to conclude that it would be inappropriate for the then present members, in their last year of term, to elect a special rapporteur as no-one could be sure if he would be re-elected for another term.[43] Therefore, the appointment of a special rapporteur on 'diplomatic intercourse and immunities' was postponed until the next session, in 1954.

After some difficulties finding a suitable candidate, the Commission appointed Emil Sandström of Sweden Special Rapporteur on the topic of diplomatic intercourse and immunities during its 1954 annual session. The sixth session of the ILC was held at the headquarters of UNESCO in Paris from 3 June to 28 July

[37] ibid.

[38] Despite the fact that not all delegations were satisfied with such a loose formula; Argentina, shortly before its adoption, introduced an amendment to delete this phrase. See ibid et seq.

[39] ibid 802–03. [40] See UNGA Res 685 (VII) (5 December 1952).

[41] The Secretariat had failed to produce crucial French translations and, furthermore, had not supplied ILC members with some other important preparatory documents. *ILC Yearbook* 1953 vol I, 4.

[42] These topics were: nationality/statelessness, arbitral procedure, regime of the high seas, law of treaties, draft code of offences against the peace and security of mankind, regime of the territorial sea and, finally, the question of diplomatic intercourse referred to the Commission by virtue of UNGA Resolution 685 (VII) of 1952.

[43] *ILC Yearbook* 1953 vol I, 366.

1954. For two out of the nine members, it was their first session after their election into the ILC in late 1953.[44] Although diplomatic intercourse and immunities was only the fifth topic on the provisional list for this session, ILC member Hersch Lauterpacht of Great Britain suggested placing that topic together with the study on state responsibility on the Commission's priority list for the next, seventh session of the ILC in 1955. Furthermore, Lauterpacht initially proposed Jaroslav Zourek of Czechoslovakia to be appointed Special Rapporteur. However, when, ten days later, it came to the election of the Special Rapporteur for the topic of 'diplomatic intercourse and immunities' Zourek declined the proposal, owing to a lack of time.[45] The Commission had then to appoint another rapporteur. Lauterpacht now suggested the chair of the current ILC session, Emil Sandström of Sweden, to be Special Rapporteur on that topic. Lauterpacht was seconded by other members and, as a result, his proposal was adopted unanimously.[46]

Sandström was one of the original members of the ILC and had previously functioned as Special Rapporteur on the question of international criminal jurisdiction. From 1950 onwards he was a member of the *Institut de Droit International* and reflected the ideals of the first hour: international legal expertise of highest rank but not directly affiliated with any government. Being responsible for the setting up of the first report on diplomatic intercourse, Sandström's initial draft was important for the scope of the future convention as it bore an apolitical signature. His report on the original twenty-eight draft articles concentrated on legal aspects but did not draw on Cold War topics. As will be seen, these were only later added thanks to discussions during the ILC sessions in 1957 and 1958. Additionally, Sandström kept the focus on diplomatic intercourse and immunities, excluding deliberately consular relations and immunities of agents of international organizations, both of which he considered a separate topic. Finally, in his report, he started the tradition of keeping discussions on doctrines of diplomatic immunity in a commentary, separate from the articles themselves. Doing so met particularly with Soviet agreement, and helped to focus on practical problems, however, sometimes at the cost of coherence of applied doctrines.[47]

Although Sandström was able to draft a first report on the subject of 'diplomatic intercourse and immunities' within a year's time, the Commission neither in 1955 nor in 1956 found time to discuss the issue as it was busy preparing the drafts for the Law of the Sea conventions.[48] However, members were provided with background information via the report of the Special Rapporteur and a memorandum prepared by the Secretariat which outlined current principles and

[44] Fluctuation of membership, though, was not too high. While Jesús Yepes of Colombia, Ricardo Alfaro of Panama, Feodor Kozhevnikov of the Soviet Union, and Manley Hudson of the USA left the ILC, Francisco García Amador of Cuba and Carlos Salamanca Figueroa of Bolivia joined the Commission. Another vacancy was caused by the resignation of John Parker of the USA shortly after his election in 1955; he was later replaced by Douglas Edmonds of the USA.

[45] *ILC Yearbook* 1954 vol I, 193. [46] ibid.

[47] See Tunkin's comment on the Commission's main purpose being the achievement of practical results. *ILC Yearbook* 1957 vol I, 5.

[48] ibid vol II, 132.

practices followed by States.[49] The memorandum was not only a restatement of the status quo of prevailing rules but also observed divergences in practice, such as those regarding the limits of immunity in private law, categories of diplomatic staff entitled to full diplomatic immunity, immunities of subordinate staff, the extent of immunity from taxation, and conditions for the waiver of immunity. Furthermore, the memorandum reviewed various attempts which were made in the past to codify the subject. These included the first international convention on diplomatic relations, namely the 1815 *Règlement de Vienne* (Congress of Vienna); a regional codification of diplomatic relations, namely the 1928 *Havana Convention on Diplomatic Officers*,[50] and an in-depth piece of research conducted by the prestigious Harvard University on diplomatic privileges and immunities, the *1932 Harvard Research Draft*.[51]

3. The Ninth Session of the International Law Commission in 1957

Diplomatic intercourse and immunities was point 6 of the agenda for the 1957 session of the ILC and the subject of discussion during thirty-nine meetings between the 383rd to 413th as well as the 423rd to 429th meeting.[52] The twenty-one ILC members considered, under the guidance of Chairman Zourek, the topic on the basis of the report and draft articles supplied by Special Rapporteur Sandström and the memorandum prepared by the UN Secretariat. Sandström's draft report on diplomatic intercourse and immunities originally contained only twenty-eight articles but expanded during the ILC discussions to thirty-seven draft articles.[53]

Cold War issues influenced the discussions and sometimes gave reason for the inclusion of some particular articles in the draft. It was noticeable that although ILC member Grigory Tunkin of the Soviet Union, as well as his British colleague Fitzmaurice, sat in the Commission in their personal capacity they were well aware of national diplomatic practices and peculiarities of Cold War diplomacy between

[49] ibid vol I, 272.

[50] The Havana Convention was limited in its scope, although, unlike the European efforts under the auspices of the League of Nations, the draft articles made it to codification stage, resulting in a regional convention in 1928. Nevertheless, the convention came into force only between four Latin American States. Obviously, the authors of the Havana Convention had foreseen the limited impact of the convention as they admitted that 'it was intended as a provisional instrument until something more complete could be achieved'. Grant McClanahan, *Diplomatic Immunity: Principles, Practices, Problems* (St Martin's Press, New York 1989) 41.

[51] The Harvard Research Draft Convention on Diplomatic Privileges and Immunities was published in 1932. Regarding its content, the Harvard draft was 'a big step forward' and had 'great persuasive authority'. However, although coming from an American university of highest prestige, the text did not lead to legislation because it lacked authority to influence changes in State practice where the provisions of the draft code differed.

[52] See also Bruns (n 8) 28–33.

[53] For an overview on how the draft had changed, see Bruns (n 8), Appendix.

East and West.[54] As a result, provisions such as that on the facilitation of accommodation and particularly that regarding the freedom of movement, made their way into the first set of provisional draft articles in a form which would not have been necessary before the start of the Cold War. Not least because of the technical nature and reciprocity of diplomatic relations, members were able to go beyond these arguments until they reached a common principle on which a compromise text could be adopted which was acceptable for both sides. However, there were also many points on which Tunkin and Fitzmaurice agreed and on which they, together, convinced other members of their position. This was the case, for example, during the debate on the inviolability of the diplomatic mission in respect of the regionally practiced custom of conceding diplomatic asylum on mission premises. While Tunkin and Fitzmaurice had led the Commission to reject the inclusion of such a provision, the issue was diplomatic reality particularly in Latin American countries which could not be ignored. The Commission as a whole became aware that an endless debate on diplomatic asylum could only be avoided if diplomatic missions were granted absolute inviolability. This way, the final conventional text offered a loophole which would help to avoid future discussions on the inclusion of diplomatic asylum. Hence, the fear of opening up Pandora's box was greater than the wish to eliminate any form of misuse of this principle and eventually led to the absolute principle of the inviolability of mission premises.

During the 400th meeting, after more than three weeks' work, the Commission discussed a point raised by Jean Spiropoulos of Greece; namely the final form of the draft articles. Such a decision was not unimportant and affected the method of work, particularly for the discussion of diplomatic privileges and immunities. It was rather unlikely once the Commission had decided to formulate a model code, it being not much more than a restatement of the current law that the Commission would go beyond recognized international law in force. However, should it be decided to envisage a codification by convention, which had binding power on the UN member States, the Commission might also attempt to 'codify a practice which had not yet become law, but which was general enough to warrant the reasonable expectation that the text proposed […] would be accepted by Governments'.[55]

In general, most members had aimed from the beginning for codification by convention. Special Rapporteur Sandström acknowledged that he had assumed the final drafts would form the basis of a draft convention.[56] By the 400th meeting half of the set of draft articles had already been discussed with the understanding that they would be recommended for codification in a convention and, de facto, the Commission had no choice but to continue as it had begun. The Greek ILC Member Spiropoulos pointed out that the Commission remained positive about the suitability of the topic for codification, and 'could not change horses in mid-stream'.[57] Furthermore, ILC member Zourek noticed that uniformity of

[54] Fitzmaurice was the legal adviser of the British Foreign Office. Tunkin headed the Legal Department of the Foreign Ministry of the Soviet Union.
[55] *ILC Yearbook* 1957 vol I, 88. [56] ibid. [57] ibid.

State practice could only be achieved by a convention, while others stressed that diplomatic intercourse displayed 'a fair measure of agreement' and expressed high hopes by suggesting that it had the best chance of all topics of achieving a successful codification.[58]

By contrast, Fitzmaurice was not so optimistic and doubted whether a draft convention was the most desirable form. Having in mind the two options open to the UNGA to proceed with codification by convention (ie either through the General Assembly or through the convening of a diplomatic conference) Fitzmaurice was sceptical. He did not expect UNGA to convene a special conference on diplomatic intercourse alone, as it had done with the Law of the Sea, and pointed to the dangers that codification within the scope of the General Assembly would imply. He expected the General Assembly to open up discussions on the drafts again, but with far less time for careful study, increasing the likelihood that any change introduced 'might not be for the better'.[59] On top of this, there was also the problem of ratification and reservations. One could not know yet how many States would ratify a possible convention, nor the extent of reservations these States would introduce to it. Therefore, Fitzmaurice was not sure if a convention would necessarily be more advantageous than a model code. He suggested the deferment of a final decision until the next ILC session, awaiting the nature of governmental comments. However, despite his warnings the Commission as a whole could not agree entirely. Having in mind both that half of the draft articles would need reconsideration[60] if they were to fit the form of a restatement to a model code only, and also the real chances of a successful codification in form of a convention, the Commission felt urged to show its preferential attitude towards codification. In order to indicate to governments which final form the Commission was aiming for, it provisionally decided in favour of codification by convention and it was on that basis that it proceeded with its considerations of the remaining articles.

4. The Tenth Session of the International Law Commission in 1958

For several reasons the tenth session of the ILC in 1958 was an important stepping stone for the codification process of diplomatic privileges and immunities. First, the ILC had received comments by nineteen States,[61] and subsequently was to review the articles in the light of these commentaries. Second, the ILC had to take a final decision on its recommendation to the General Assembly regarding the

[58] ibid. [59] ibid.

[60] The recommendation for a model code would have impeded the formulation of provisions that differed from recognized rules of international law or which introduced a means of implementation such as the new draft article on the settlement of disputes.

[61] Argentina, Australia, Belgium, Cambodia, Chile, Czechoslovakia, Denmark, Japan, Jordan, Luxembourg, the Netherlands, Pakistan, Sweden, Switzerland, Taiwan, Union of Soviet Socialist Republics, United Kingdom, United States of America, and Yugoslavia.

form and eventual purpose of the draft articles. The feedback received on the draft articles as a whole was generally favourable. Many governments agreed to the scope of the presented draft and the UK Government even expressed its appreciation for the 'painstaking study'[62] rendered by the Commission. Particularly interesting were the comments of the USA and Chile. The latter noted that the 1957 ILC draft fundamentally met with the provisions of the Havana Convention of 1928.[63] This comment was important for the Commission as it stood in contrast to the criticism received in the Sixth Committee where it had been said that the draft did not sufficiently take into account the provisions of the Havana Convention and, hence, the regional practices of Latin American countries.[64] In fact, the only important principle that was not covered by the ILC draft but practiced in South America was that of diplomatic asylum. This practice was related to the fiercely debated principle of absolute inviolability of mission premises and was dropped for tactical reasons.[65]

In terms of the final form of the draft convention, it is worth noting that neither the USA nor Britain in 1958 supported codification through a legally binding convention. In its observations on the first set of provisional drafts the USA supported codification in form of a restatement of existing principles of international law. In contrast to the other twenty government comments, the US government was the only one that plainly excluded a possible codification by convention. The reason was that it felt that friction could arise between States due to a number of vague and ambiguous provisions whose language was 'obscure in meaning and susceptible of different interpretations'.[66] This is particularly interesting bearing in mind the initial debates in the Sixth Committee in 1952 about diplomatic intercourse and immunities becoming a priority topic for codification, in which the USA actively supported the Yugoslavian representative in its endeavour to press for codification. But Britain also had its doubts. ILC member Fitzmaurice was convinced that a non-binding form of codification was the most advisable and practical solution. Thus, he lobbied for the recommendation of a resolution on the drafts of diplomatic intercourse and immunities. He feared that time restraints, potential changes suggested at such a conference, and subsequent reservations could complicate codification. Therefore, he favoured a model code which would remain as the ILC had negotiated it—although non-binding in its legal character.[67]

At the end of the tenth session, at its 467th meeting, the Committee resumed discussions on the final form of the ILC drafts. Although some time had passed, the general attitude of members regarding their inclination towards codification by convention had not changed. Special Rapporteur Sandström suggested inviting the General Assembly either to recommend the drafts to Member States with the

[62] *ILC Yearbook* 1958 vol II, 132.

[63] The 1928 Havana Convention codified regional diplomatic practices as they were found primarily in Latin American States. Its regional focus was one of its major shortcomings and impeded a more wide-reaching application.

[64] *ILC Yearbook* 1958 vol II, 114–15, and 132. [65] ibid vol I, 84.

[66] ibid vol II, 133. [67] *ILC Yearbook* 1957 vol I, 88.

view of concluding a convention or to convoke a conference to conclude a convention.[68] Such a procedure would be in accordance with Article 23(c) or (d) of the Statute of the ILC.[69] However, Fitzmaurice, still trying to avoid codification by convention, criticized the idea that all ILC drafts should be recommended to the General Assembly as codification in form of a convention. Comparing diplomatic intercourse and immunities with consular affairs, he stressed that there was not much customary international law on the latter which might make codification by an international conference desirable.[70] However, the draft articles, according to Fitzmaurice, had broken no new ground, nor was there 'any obscurity'[71] (as was the case with the Law of the Sea) which would justify the convocation of a conference. Therefore, Fitzmaurice suggested that instead of recommending the form of an internationally binding convention, members of the Commission should be guided by Article 23(b) of the Statute of the International Law Commission to recommend that the General Assembly take note of the Commission's report and adopt it as a resolution.[72]

Nevertheless, for the majority of members of the ILC, only recommendations along the lines of Article 23(c) or (d) (to recommend the draft to Member States with a view to the conclusion of a convention either through the Sixth Committee or through a conference of plenipotentiaries), were ever in the running. Zourek supported the convocation of a separate conference which, in any case, did not need to be as big as the UN Conference on the Law of the Sea. In contrast, there was also a need to reduce the number of conferences to a minimum, and, because the subject of diplomatic intercourse was 'straightforward', the General Assembly could deal with it.[73] However, an article by article discussion within the Sixth Committee was the exception rather than the rule and lately had only been applied in the codification of Genocide in 1948, as Liang, the Secretary to the Commission, pointed out.[74] In 1958, however, such an endeavour seemed unrealistic since the General Assembly would not have the necessary time to examine the draft in order to recommend it to Member States. Consequently, Ahmed Matine-Daftary of Iran took up Fitzmaurice's suggestion that it was not necessary to recommend the convocation of a conference but that the draft convention could be simply opened for signature by Member States after the General Assembly had adopted it.[75] Despite some debate, this suggestion still did not convince the majority of ILC members by the end of the day. Although the final vote was postponed until the next morning, it did not change the predominant view that the draft articles would be best formulated in conformity with Article 23(c) of the ILC Statute. Eventually, the proposal was adopted by vote, and the ILC officially recommended to the General Assembly that the draft articles on diplomatic intercourse and immunities

[68] *ILC Yearbook* 1958 vol I, 199.
[69] Statute of the International Law Commission, UNGA Res 174 (II) (21 November 1947) art 23(c) and (d), and ibid.
[70] *ILC Yearbook* 1958 vol I, 199.
[71] See Fitzmaurice's intervention during the 467th meeting of the tenth ILC session, ibid.
[72] *ILC Yearbook* 1958 vol I, 199. [73] ibid. [74] ibid. [75] ibid 200.

'were to be recommended to Member States with a view to the conclusion of a convention'.[76]

A third important aspect of the 1958 session was the decision to abandon the idea of a simultaneous codification of diplomatic and consular relations. During the 1957 UNGA session this idea was aired first and was taken up in the following ILC session by Jean-Pierre François of the Netherlands who wondered if the ILC should submit those two drafts simultaneously to UNGA.[77] The main reason for doing so was the close relationship between the two topics as diplomats often also performed consular tasks. One option discussed was, therefore, that ILC members could deal with the most important aspects of consular intercourse and immunities in the current 1958 session in order to adopt a provisional draft in 1959 together with the ILC's draft on *special missions*.[78] Despite a certain proximity of the topic organizational aspects weighted heavy on such an endeavour. As a matter of fact, the agenda of the ILC was set according to the maturity of topics and not according to the close relationship between two subjects. No set of draft articles had yet been prepared on consular intercourse and the ILC preferred to press on with the subjects of arbitral procedure and diplomatic intercourse, whose preparation was most advanced.[79] Consequently, after the start of the 1958 it had become clear that a simultaneous codification of diplomatic and consular intercourse and immunities could not be achieved without accepting considerable delays in the codification of the former.

Regarding the content of the drafts on diplomatic intercourse and immunities, the 1958 ILC session had not brought much change in structure but led to a considerable increase in the total sum of draft articles. While the 1957 draft contained thirty-seven articles, the adopted and final set of draft articles in 1958 comprised forty-five draft articles. Thus, a new article on the notification of arrival and departure was added due to the suggestions of the Netherlands and Italy and another one on non-discrimination and reciprocity of diplomatic privileges and immunities emerged out of the discussions. Debates during this session tended to concern points on which State practice differed. Therefore, a rather controversial debate arose on the ILC draft article on the settlement of disputes by the ICJ, because the jurisdiction of the Court was not accepted by many States.[80] Although it was not clear if an article on the settlement of disputes was indispensable for the codification of diplomatic intercourse, and despite the danger that the Article could deter States from acceding to the Convention, it remained in the ILC draft—most likely, thanks to its idealistic value. However, ILC members saw little prospect that the Article would be adopted by a necessary two-thirds majority in the Plenary of the Vienna Conference.[81] On the other hand, issues which were debated but not included in the draft convention included an article on the right of legation and a provision stating that the establishment of diplomatic relations implied the establishment of consular functions, both of which were alluded to by

[76] *ILC Yearbook* 1958 vol II, 89. [77] ibid vol I, 3. [78] ibid 4. [79] ibid 4.
[80] ibid 184–87. [81] ibid vol II, commentary on art 45.

the Czechoslovakian Government in their comments on the provisional set of draft articles.[82] An additional article on the diplomatic corps, as suggested by the Italian government, failed because ILC members could not agree on a concrete definition of it—as did another article on diplomatic bank accounts, a topic which remained disputed.[83]

5. Conclusion

The quality of the draft articles prepared by the ILC was an essential stepping stone towards a successful codification of diplomatic privileges and immunities. The draft articles drew part of their authority from a realistic codification of diplomatic practice and the feedback received from governments. The codification process under the UN has learnt its lessons from past codification attempts. In contrast to the prescriptive codification effort pursued under the League of Nations, which relied mainly on the individual expertise of a few experts, the codification process under the UN had been institutionalized, allowing for input from both governments and a variety of legal experts. This way, the ILC managed to balance views early in the drafting process and successfully downsized the potential for complex and time-consuming discussions during conference negotiations. The depths of discussions that took place during the rather intimate ILC meetings produced a balanced draft that enhanced the likelihood to secure the needed two-thirds majority among the eighty-one delegations in the Plenary sessions of the Vienna Conference.

Additionally, the ILC functioned as a platform for debates on the final form and scope of the codification project. Since the first version of Special Rapporteur Sandström's draft, the theory of diplomatic immunities was sidelined, and only topics on which diplomatic practice was universally established and clear were included. *Per definitionem*, this excluded issues such as diplomatic asylum, diplomatic bank accounts, or the role of the diplomatic corps. For a short period of time, the simultaneous codification of diplomatic and consular relations was an option, however, for procedural reasons this did not prove possible in the end. There was too little time for the drafts on consular diplomacy to be thoroughly discussed and commented on by governments. In retrospect, had the ILC rushed the consular draft through, it is very well possible that the articles would have encountered a similar fate as those on *ad hoc* diplomacy which later were returned by the Vienna Conference for further comments by governments.

Although it was not until 1958 that the ILC took a final decision as to which form of codification it would recommend to the General Assembly, most ILC members were convinced from an early stage that a legally binding convention, as opposed to a model code or resolution as a restatement of current law, was the

[82] Comments by Governments on Draft Articles Concerning Diplomatic Intercourse and Immunities, Czechoslovakia, ibid 117.

[83] ibid vol I, 145 and 120 respectively (contributions by Sandström).

appropriate form of codification. Such a decision had at least two consequences. First, despite the ILC's mission to introduce in its work an element of progressive development of international law, ILC members stuck to the mandate of UNGA Resolution 685 of 1952 which required the ILC to restrict its work to the codification of diplomatic intercourse and immunities. Second, the decision to recommend codification as a convention collided with the interests of the USA, one of the original supporters of the Yugoslavian initiative. Similarly, Gerald Fitzmaurice of Britain intended until late in the 1958 ILC session to dissuade the Commission to recommend a codification by convention. He was not convinced that a binding convention was necessary. At best it would involve some form of national legislation and, most certainly, a bothersome, renewed discussion in parliament about the merits and dangers of extended diplomatic privileges and immunities.

At the time the drafts on diplomatic immunity were discussed in front of the ILC, its membership composition had not yet adapted to the influx of African and Asian UN Member States. ILC members from African and Asian States were few in comparison to their Western or Latin American counterparts. As a consequence, during the drafting and the debates of the articles on diplomatic intercourse and immunities the focus was set on a number of Cold War issues. It might be questioned whether the provisions on the freedom of movement and the facilitation of accommodation would have entered the set of draft articles if they had been discussed at a different point of time and with a different composition of the ILC. A positive effect, however, was that ILC members found compromise formulas on Cold War topics on which discussions did not need to be reopened at Vienna. This created vital support for the ILC draft articles on both sides of the Iron Curtain which instilled general confidence in the ILC draft.

Another positive side effect was the collaboration between the Soviet member Grigory Tunkin and Gerald Fitzmaurice of Britain. Both stressed and stood up for the importance of the absolute inviolability of mission premises. In view of Cold War-related incidents that had occurred in diplomatic practice not long before the ILC debates, this might at first appear surprising. However, for the time being, and because it seemed the only way to reduce pressure from Latin American governments to introduce a debate on diplomatic asylum, both cooperated to convince the ILC to formulate nothing less than a draft article that stipulated the absolute inviolability of mission premises. The basic idea behind this was that, if the inviolability of mission premises were to remain absolute, this would cover any incident including those in which people sought diplomatic asylum on mission premises. This way, the Latin American practice could continue while other delegations did not have to agree (or discuss) the codification of diplomatic asylum which was a controversial topic and highly unlikely to pass national legislation, for instance, in Britain.

The focus on Cold War issues led also to the neglect of matters which were at the heart of smaller, poorer, and mainly newly independent African and Asian States. For these States, the codification of diplomatic privileges and immunities meant a chance to ensure that the balance of reciprocity was maintained and that rights of the receiving State were strengthened. While the concentration on Cold War

issues was certainly a reflection of their political importance and the bi-polarity of the international system in the late 1950s and early 1960s, it was also a reflection of the fact that African and Asian legal systems were under-represented in the ILC. Together these two factors led to biased pre-negotiations during which topics such as the diplomatic wireless transmitter or the extent of diplomatic privileges and immunities of administrative staff were not discussed with the necessary foresight. Despite this point of criticism, the ILC addressed most foreseeable problems before they could reach a magnitude that could not be handled by delegates during the scheduled six conference weeks. Eventually, the general quality of the draft articles laid the foundation for the often cited well-natured, friendly atmosphere in which negotiations prospered during the 1961 Vienna Conference.

Part III

Personal Immunity

6

The Personal Inviolability of Diplomatic Agents in Emergency Situations

Paul Behrens

1. Introduction

Personal diplomatic inviolability, as enshrined in Article 29 of the Vienna Convention, imposes obligations on the receiving State, which can best be considered under two categories. The first of them—which is at the centre of this chapter—relates to the conduct of authorities of the receiving State themselves: it comprises the negative duty to refrain from arresting or detaining diplomatic agents, but also the obligation to treat them with respect. The second category concerns the conduct of third parties. In this regard, the receiving State has the positive duty of taking measures to prevent attacks on the person, freedom, or dignity of diplomats by such parties.

There is a general perception that obligations under the first category do not, in fact, experience many violations in contemporary diplomatic relations.[1] On the other hand, situations have arisen in which acts of diplomatic agents made it particularly difficult for their hosts not to resort to enforcement measures which would impact on liberty or physical integrity of the relevant persons. This is certainly the case when a danger to certain interests in the receiving State had been created by diplomatic personnel.

One of the most famous situations in this context arose in April 1984, in an incident involving the Libyan 'People's Bureau' in London. Reference has already been made to the events: when a demonstration had been held outside the Libyan mission, shots were fired from the Bureau, killing a young Police Constable (Yvonne Fletcher).[2]

A similar incident had occurred in Paris in July 1978, when, after a hostage situation had been resolved at the Iraqi Embassy, gunfire was discharged from that

[1] René Värk, 'Personal Inviolability and Diplomatic Immunity in Respect of Serious Crimes' 8 (2003) Juridica International 110, 111. But see Clifton Wilson, *Diplomatic Privileges and Immunities* (University of Arizona Press, Arizona 1967) 62–77 for a more discerning picture.

[2] See Chapter 3 above. On the incident, see also Rosalyn Higgins, 'The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience' (1985) 79 AJIL 641, 643.

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mission, apparently in an attempt to execute the hostage taker. The shots resulted in the death of one police officer and the wounding of two others.[3]

Cases which reach such extreme dimensions are, thankfully, not a common occurrence. But diplomatic history also knows of incidents below that level which still—at least in the eyes of the receiving State—constituted good reason for coercive action. In 1947, for instance, a Secretary at the Brazilian Embassy in Moscow was restrained 'to prevent him from damaging the property of a hotel'.[4] And in October 2013, Dmitri Borodin, a Russian diplomat in The Hague, was arrested[5] and, according to the Russian Foreign Ministry, beaten in front of his children.[6] At the time, it was reported that Borodin's neighbours had called the police 'over concerns children were being maltreated in his flat'—a claim which the diplomat denied.[7]

The reactions of receiving States to dangerous conduct by diplomatic agents can differ considerably. The French authorities in the 1978 embassy shooting did not indulge in much hesitation: they returned fire, and a police statement later confirmed that a member of the embassy security service was killed '[d]uring the riposte which the French police were obliged to make'.[8] The British government, after the killing of Fletcher in 1984, contacted the Libyan authorities in an attempt to find a solution and, when the British proposals were rejected, terminated diplomatic relations, giving the diplomats several days to leave the country.[9] In the Borodin case, the police did at least arrest and detain the diplomat; but soon after the incident, the Dutch Foreign Minister apologized to the Russian Ambassador to the Netherlands and admitted that Dutch police had violated the rules of diplomatic immunity.[10]

These variations reflect the existing uncertainty on the evaluation of diplomatic inviolability in emergency situations. The VCDR itself offers little guidance on this point, and even the codification history does not clearly reveal a suitable approach that should be followed.[11]

The problem is based on the fact that the VCDR, in spite of the absolute terms in which inviolability is couched, is not the only instrument of international law

[3] Paul Treuthardt, '[A lone terrorist …]', *The Associated Press* (31 July 1978); Värk (n 1) 117. There is some uncertainty about the status of the shooters: Värk states that 'the diplomats started to fire', ibid. At the time, it was reported that the shots came from members of the security staff, Treuthardt. If that had been the case, the shooters would, as service staff, enjoy subject matter immunity only (VCDR art 37(2)). At the same time, the protection of mission premises clearly falls within the assigned duties of members of a mission's security service.

[4] Geraldo Eulálio Do Nascimento e Silva, *Diplomacy in International Law* (AW Sijthoff, Leiden 1972) 93.

[5] 'Dutch Foreign Ministry Prepared to Apologize on Arrest of Russian Diplomat if Necessary', *Xinhua General News Service* (8 October 2013).

[6] 'Dutch Sorry on Russia Diplomat Case', *BBC Online* (9 October 2013) <http://www.bbc.co.uk/news/world-europe-24463515>.

[7] ibid. [8] Treuthardt (n 3).

[9] Foreign Affairs Committee (UK), 'The Abuse of Diplomatic Immunities and Privileges' HC Paper 127 (1984–85) paras 74–76.

[10] BBC Online (n 6). [11] See text to nn 14–22 below.

which has an impact on situations of this kind. Such incidents regularly involve other interests which find a basis in international law rivalling that of the VCDR, and they require the identification of a mechanism which is capable of establishing a relationship between the competing norms.

This chapter deals with the options at the disposal of receiving States faced with emergencies caused by diplomatic agents. Following general considerations on enforcement measures in this context (section 2.1), it investigates possible legal mechanisms for such measures where interest of the receiving State are affected (2.2) and where interests of individuals are at stake (2.3). A concluding section (3) reflects on the justifications which appear as the most effective grounds for enforcement measures and highlights their respective advantages and challenges for States faced with emergency situations of this kind.

2. Inroads into Inviolability? Emergencies and Responses

2.1 Of need and suitability: Enforcement measures in emergency situations

Where dangerous situations created by diplomatic agents are discussed in the literature, there is a tendency to limit the debate to a general prioritization of one interest over the other, without always providing the legal reason that would allow for such an understanding. Denza thus speaks of a 'very limited exception' to the prohibition on the arrest of diplomatic agents on the basis of an 'overriding duty to protect human life'.[12] Sen writes that an envoy who committed an assault on a person and was himself assaulted in return, could be said to have 'brought about the attack on himself by his own conduct and he should not be heard to complain about violation of his immunity'.[13]

And yet, the very question whether any inroads into inviolability are permitted, requires determination.

The codification history appears to suggest that personal inviolability was not understood as an absolute concept. In its commentary on the relevant draft article, the ILC noted that the rule of inviolability would not exclude, 'in exceptional circumstances', measures to prevent a diplomatic agent 'from committing crimes or offences',[14] and it specifically mentioned the possibility of resorting to measures of self-defence.[15] At the Vienna Conference, China even suggested bringing this statement into the substantial text of the Convention, with her delegate asserting that the principle to which it referred was 'universally accepted in international

[12] Eileen Denza, *Diplomatic Law* (4th edn, OUP, Oxford 2016) 223.

[13] Biswanath Sen, *A Diplomat's Handbook of International Law and Practice* (Martinus Nijhoff, Dordrecht, London 1988) 109.

[14] *ILC Yearbook* 1958 vol II, 97.

[15] ibid 97, art 27, commentary, para 1.

law'.[16] The amendment was rejected,[17] but the Conference did not engage in a discussion on the proposal either.

It is illuminating to compare this development with the debates on the inviolability of mission premises (today enshrined in Article 22 VCDR). There, too, an attempt had been made to limit inviolability: Special Rapporteur Sandström's draft would have allowed the receiving State to enter premises under certain circumstances in situations of 'extreme emergency',[18] and at the Vienna Conference, there had been a proposal to allow that State to take certain measures 'in exceptional circumstances of public emergency or danger'.[19] But in these instances, express opposition arose to the suggestions, with some drafters referring to inviolability as an 'absolute principle',[20] and others considering the establishment of any limitations as 'contrary to international law'.[21] The relevant proposals were withdrawn.[22]

That does not necessarily mean that the critics were right in their position. But it does underline that the acceptance of limitations for personal inviolability was seen as a much less controversial topic at drafting stage: the strong objections which dominated the debate on restrictions to premises inviolability were completely absent where personal inviolability was concerned.

The understanding of personal inviolability as an absolute concept would indeed encounter significant challenges. The fact that it appears without limitations in the text of the VCDR does not make competing interests disappear; and in some situations, that may mean that the concept of inviolability even meets with logical limitations. If, for instance, a diplomat holds a gun to the head of a fellow diplomat and police officers of the receiving State had a chance to effectively intervene by taking enforcement action, the borders of inviolability would be quite apparent. In a situation of that kind, the diplomatic hosts would violate either their negative duty towards the potential shooter (by adopting coercive measures) or their positive duty towards the threatened diplomat (by doing nothing). International law cannot be presumed to force the receiving State to act against international law: it is clear that, under such circumstances, at the very least the invocation of *force majeure* must be at the disposal of the receiving State.[23]

[16] United Nations Conference on Diplomatic Intercourse and Immunities, Vienna 2 March–14 April 1961, *Official Records, Vol I: Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole*, UN Doc A/CONF 20/14 (hereinafter 'Vienna Conference Records Vol 1') 160, para 79.

[17] ibid at 160. The amendment was rejected by twenty-seven votes to six, with thirty-four abstentions.

[18] *ILC Yearbook* 1955 vol II, 11, art 12, and see *Diplomatic Intercourse and Immunities, Report submitted by AEF Sandström, Special Rapporteur*, UN Doc A/CN 4/91 (21 April 1955) 2, art 12 [English translation] (hereinafter 'Sandström Draft').

[19] United Nations Conference on Diplomatic Intercourse and Immunities, Vienna 2 March–14 April 1961, *Official Records, Vol II: Annexes, Final Act, Vienna Convention on Diplomatic Relations, Optional Protocols, Resolutions*, UN Doc A/CONF 20/14/Add 1 (hereinafter 'Vienna Conference Records Vol 2'), 24, UN Doc A/CONF 20/C 1/L 163.

[20] *ILC Yearbook* 1957 vol I, 56, para 64 (Amado). See also ibid 54, para 38 (Tunkin).

[21] Vienna Conference Records vol 1, 136, para 34 (Daskalov). See also ibid 137, para 37 (Tunkin).

[22] *ILC Yearbook* 1957 vol I, 57, para 2 (Sandström); Vienna Conference Records vol 1, 138, para 9 (Waldron).

[23] *Force majeure* applies when an act not in conformity with an international obligation is the result of an 'irresistible force or of an unforeseen event, beyond the control of the State', which makes it

The assessment of the conditions under which measures against diplomats can be taken, and of the shape they have to assume, causes greater difficulties.

Such measures would certainly include sanctions which the VCDR itself puts at the disposal of the receiving State. That includes the declaration *persona non grata*,[24] but also sanctions below that level—such as warnings issued to the diplomatic agent, to his superiors at the mission, and the Foreign Ministry of the sending State. The receiving State is also entitled to sever diplomatic relations with the sending State altogether.[25]

In some cases, however, the urgency of the situation created by diplomatic acts suggests that measures are indicated whose effects are seen immediately. In such circumstances, the receiving State may well feel that a declaration *persona non grata* is an insufficient tool.[26]

The question, however, whether measures outside those envisaged by the VCDR can be adopted to deal with emergencies of this kind, is subject to some controversy. In the *Tehran Hostages Case*, the ICJ expressed a restrictive view in this regard, suggesting that the rules of diplomatic law constituted a 'self-contained régime' which already foresaw the possible abuse of privileges and immunities by the receiving State and specified the methods 'to counter such abuse'.[27]

A literal interpretation of that statement may suggest that measures outside the system of diplomatic law proper are not at the disposal of the receiving State. It is a position that appears to be reinforced by some of the limitations which international law places on sanctions that would usually be available when a State is faced by unlawful acts of organs of another State. With regard to countermeasures, for instance,[28] the ILC's Draft Articles on State Responsibility make clear that a State resorting to such sanctions would not be relieved from its duties to respect diplomatic inviolability.[29]

And yet, there is evidence that the reference to a 'self-contained régime' does not mean a return to the theory of the absolute nature of inviolability.

The drafters themselves had certainly envisaged a more generous approach towards the position of the receiving State. Even Sandström's original articles on 'Diplomatic Intercourse and Immunities' had made reference to the exercise of the

impossible to perform its obligation. *ILC Yearbook* 2001 vol II Pt 2, 27, art 23(1). It has been accepted that the cause of *force majeure* can be human intervention, ibid 76, art 23(1), commentary, para 3.

[24] VCDR art 9, and see *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v Iran)* (Judgment) [1980] ICJ Rep 3, para 85 (hereinafter '*Tehran Hostages Case*').

[25] *Tehran Hostages Case*, para 85. The receiving State would also be able to resort to interpretive methods to resolve the meeting of competing interests, where this is indicated by the text. The specific terms and the absolute language employed in VCDR art 29, however, considerably reduces the space for the application of mechanisms of harmonization (which are discussed in Chapter 16, section 3 below). On the other hand, it is suggested that harmonization plays a certain role where the second limb of inviolability is concerned: there, the fact that the VCDR refers to 'appropriate' steps which the receiving State has to take to prevent attacks on diplomats, does invite an interpretive effort which by necessity has to take the value of the affected interests and the threat arising to them into account.

[26] See also text to n 35 below.

[27] *Tehran Hostages Case*, para 86.

[28] *ILC Yearbook* 2001 vol II Pt 2, 27, art 22.

[29] *ILC Yearbook* 2001 vol II Pt 2, 30, art 50(2)(b).

right of self-defence which personal inviolability was not supposed to impede.[30] In the ILC itself, some members went considerably further. Verdross found this reference 'insufficient' and would have allowed a right to coercive action if, for instance, diplomats were 'entering prohibited areas or photographing fortifications'.[31] Nor can the fact that the Sandström phrase did not appear in the final version of the draft articles be seen as supporting the view that only sanctions of diplomatic law would be at the disposal of the receiving State: the relevant paragraph was deleted because the ILC agreed that the matter could be dealt with in its commentary.[32]

The ICJ itself had not been consistent in its approach towards sanctions at the disposal of the diplomatic hosts either. Only a few lines after it had called the measures envisaged by diplomatic law 'by their nature, entirely efficacious', the Court stated that observance of inviolability did 'not mean that diplomats 'caught in the act of committing an assault or other offence' could not at times be 'briefly arrested by the police of the receiving State in order to prevent the commission of the particular crime'.[33]

It is indeed questionable whether the restriction of State options to measures provided in the VCDR would find consensus within the international community. If that were the case, the receiving State would be barred from enforcement measures even if, for instance, a diplomat of a hostile power[34] were to trigger a powerful explosive in a military facility—all it could do would be to declare the perpetrator *persona non grata* and give him a 'reasonable period' to leave the country;[35] and during such period, not even coercive measures to prevent further attacks by the same person would be possible. There is hardly evidence that State practice is willing to go to such extremes in the defence of personal inviolability.

There is, on the other hand, evidence that international law recognizes a distinction between certain emergency situations and other incidents and that it supports measures which are limited to the conditions of the former scenario. Punitive measures, which do not respond to an ongoing danger, but seek retribution or the prevention of a recurrence of the situation in the future, are outside this area. It is for that reason that countermeasures are a poor basis for restrictions on diplomatic inviolability. They presuppose a deliberative effort: the injured State must make sure that it has fulfilled its obligations under dispute settlement procedures which exist between the responsible State and itself,[36] that the adopted measures

[30] Sandström draft (n 18), art 17(2).

[31] ILC Yearbook 1957 vol I, 90, para 20 (Verdross).

[32] See, in particular, ibid 90, para 22 (Sandström).

[33] *Tehran Hostages Case*, para 86; and see Yinan Bao, *When Old Principles Face New Challenges: A Critical Analysis of the Principle of Diplomatic Inviolability* (PhD Thesis, University of Sussex, Sussex 2014) 213, and Matthias Herdegen, 'The Abuse of Diplomatic Privileges and Countermeasures not covered by the Vienna Convention on Diplomatic Relations' (1986) 46 ZaöRV 734, 746.

[34] On the possible maintenance of diplomatic relations between States involved in an armed conflict, see Denza (n 12) 396.

[35] VCDR art 39(2).

[36] *ILC Yearbook* 2001 vol II Pt 2, 30, art 50(2)(a).

are 'commensurate with the injury suffered',[37] and they must call on the responsible State to fulfil its obligations.[38] They are, as it were, taken in cold blood.

Emergency measures are a different species altogether. Their acceptance in principle is an expression of the recognition that an exceptional situation has arisen in which the receiving State cannot be expected to fulfil its obligations while the incident lasts.

And mechanisms have been identified which allow States under these circumstances to deviate from duties incumbent on them. It is this concept to which the ILC made reference when it formulated the 'circumstances precluding wrongfulness' in its Draft Articles on State Responsibility.[39] The invocation of these circumstances, which include the situations of self-defence, necessity, and distress, does not constitute a permanent reduction of the scope of inviolability. They are rather, in the ILC's own words, 'a justification or excuse for non-performance while the circumstance in question subsists'.[40]

With regard to the type of danger which can emanate from the acts of diplomatic agents, it is possible to distinguish two particular fields. The first category is formed by danger caused to interests of the receiving State itself. The second category encompasses danger to private interests—the interests of individuals under the jurisdiction of the receiving State. Each category provides its own grounds for the limitation of diplomatic inviolability and thus deserves consideration in its own right.

Overlaps do of course exist: necessity in particular is equally well suited to benefit the interests of individuals as well as those of the State; and it thus appears preferable to discuss this particular ground in its entirety when it first makes its appearance.[41]

2.2 Emergency situations threatening interests of the State

2.2.1 State jurisdiction as a basis for enforcement measures

The view expressed by the ICJ that the arrest of diplomatic agents to prevent the commission of a crime should be possible,[42] appears to indicate that in certain situations the exercise of jurisdiction—even enforcement jurisdiction—on the side of the receiving State would, in spite of the rule of inviolability, still be an option. It is a view that, in similar form, had already appeared in the ILC debates.[43]

[37] ibid 30, art 51.

[38] ibid 30, art 52(1)(a). Depending on the urgency of the situation, the injured State might even have to notify the responsible State of its decision to take countermeasures, ibid 30, art 52(1)(b) in conjunction with ibid 30, art 52(2).

[39] ibid 27–28, arts 20–27.

[40] ibid 71, Chapter V, para 2.

[41] Similar overlaps relate to some factual aspects: the shooting from the Libyan People's Bureau in 1984, for instance, affected interests of individuals and interests of the State alike (especially since the shooting had resulted in the death of a policewoman). See text to n 2 above. This incident in particular will therefore be discussed at appropriate points of the subsequent analysis without insisting on a strict separation of the affected interests, where this is not required.

[42] See text at n 33 above.

[43] *ILC Yearbook* 1957 vol I, 90, para 20 (Verdross).

Yet the acceptance of State jurisdiction as a basis for measures of this kind, is not free from criticism. In the literature, restrictions on inviolability are usually proposed in a far more limited way.[44] State practice, too, presents a more complex picture.

The area of traffic offences supplies an example for a context in which enforcement action against diplomats does occur from time to time; but it also highlights the diversity of State practice in this field. Where driving under the influence of drink was concerned, the US State Department noted in 1985 that drivers entitled to personal inviolability should, if they were stopped by law enforcement officers, 'cooperate if asked to take a sobriety test' and pointed out that the object of such a test was 'not punitive, but preventative'.[45] Canada, in the following year, stated that the police were entitled to stop cars with diplomatic or consular licence plates on 'reasonable suspicion that the driver has consumed alcohol', that they may request the driver, 'on reasonable suspicion of impaired driving' to undergo a breathalyser test and may '[o]n evidence of insobriety […] escort the offender to the local police station'.[46]

On the other hand, in a case occurring in September 2004, German police stopped the driver of a car on suspicion of dangerous driving, but released him when it was established that he was the Bulgarian Ambassador to that State.[47] And on a more general level, the Foreign Affairs Committee of the House of Commons, in its report on the abuse of diplomatic privileges and immunities, was quite clear in its view that even diplomats who violated their duty to respect the laws and regulations of the receiving State,[48] did not thereby lose their immunities.[49]

In light of this, it is difficult to establish consistency of State practice to the effect that State jurisdiction alone would constitute an acceptable basis for the limitation of diplomatic inviolability. Even if Canada and the United States could be seen as examples of States whose domestic policy permits the adoption of enforcement measures,[50] it must be borne in mind that they were both concerned with very specific situations in which ongoing danger to life and physical integrity to members of the public will usually exist.[51] That distinguishes their position from the wider

[44] Denza, for instance, speaks about a 'very limited exception to the prohibition on arrest or detention […] on a basis of self-defence or of an overriding duty to protect human life', Denza (n 12) 223. See also Michael Hardy, *Modern Diplomatic Law* (Manchester University Press; Manchester; Oceana Publications, New York 1968) 51.

[45] State Department (USA), Circular Note (3 July 1985), quoted in Jonathan Brown, 'Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations' (1988) 37 ICLQ 53, 82.

[46] Department of External Affairs (Canada), Circular Note No. X DC-2070 (22 April 1986), quoted in Brown (n 45) 84, at n 153.

[47] 'Im Zickzack durch Berlin', *Focus Online* (30 September 2004) <http://www.focus.de/politik/diverses/bulgarischer-botschafter_aid_87065.html>; Denza (n 12) 223.

[48] On this see Chapter 15.

[49] Foreign Affairs Committee (n 9), para 42.

[50] At least in the case of the United States, some doubts attach to that reading of the Circular Note, since the Department was at pains to stress the voluntary element of the measure: text to n 45 above. Canada likewise, would allow police forces to request the driver to submit 'voluntarily' to roadside screening: Department of External Affairs (n 46). On the other hand, the very act of stopping the relevant vehicle did not seem to require an element of voluntariness in either case.

[51] See on situations of that kind the discussion in the subsequent sections.

view adopted by the ICJ which, by its reference to any 'offence', could be seen as supporting State jurisdiction as a true, autonomous basis for State action in any case of violations of domestic criminal law.

A position along such extensive lines would defeat the very purpose of diplomatic immunity, of which inviolability forms part—in the words of the Foreign Affairs Committee, immunity operates 'precisely in respect of' alleged diplomatic violations of the laws of the receiving State.[52] The opposing view would leave the doors wide open to abuse by the State in which the diplomatic agent resides. Freedom from enforcement measures which only applies while the diplomat, in the eyes of his hosts, behaves himself, is a freedom not worth having.

If a basis for enforcement measures is required, it cannot lie in the general application of State jurisdiction. Allowing every State to subordinate inviolability to its own, subjective, considerations, is a retrograde step which would not find acceptance within the international community. If consensus on limitations is to be found, it has to be sought in parameters which apply to well defined situations whose status is recognized under international law, and whose objective nature makes them, if needs be, reviewable by an independent and impartial tribunal.

2.2.2 Self-defence

Self-defence is a justification for enforcement measures by the receiving State which was invoked with some regularity by the classical writers on diplomatic law.[53] But its direct application encounters difficulties. Apart from the question whether its supporters have always drawn a clear dividing line between self-defence under international and under domestic law,[54] the fact must be kept in mind that the (international) concept of self-defence has undergone significant changes especially with the entry into force of the UN Charter: self-defence today is a well-defined, but restrictive right.[55]

Yet self-defence as a limitation of inviolability has its defenders even today. Denza notes that this right can form a basis for arrest or detention in certain circumstances,[56] and reference to self-defence was also made in the Sandström draft and the ILC commentary.[57]

The Draft Articles on State Responsibility do recognize the right as a justification for a State's failure to fulfil an international obligation, but refer in that regard

[52] Foreign Affairs Committee (n 9), para 42.

[53] See Hugo Grotius (Francis W Kelsey, tr) *De Jure Belli ac Pacis Libri Tres* (Clarendon Press, Oxford 1925) 444; Cornelius van Bynkershoek (Gordon J Laing, tr), *De Foro Legatorum Liber Singularis* (Clarendon Press, Oxford 1946) 90; Värk (n 1) 117.

[54] Bynkershoek, for instance, talks about 'self-defence to save one's self from imminent peril', Bynkershoek (n 53) 90.

[55] Its invocation in particular in cases in which 'conspiracy' had been at the root of the accusations against the diplomatic agent, would meet with difficulties today. See Värk (n 1) 117.

[56] Denza (n 12) 223.

[57] See text to n 30 and *ILC Yearbook* 1958 vol II, 97, art 27, commentary, para 1.

to self-defence as enshrined in the UN Charter.[58] Article 51 of the UN Charter however, subjects self-defence to certain conditions, of which the first is the existence of an 'armed attack' on the receiving State. That, by itself, is more restrictive than the situation envisaged by some of the drafters: it goes, for instance, beyond the 'imminent threat' to the security of the State which ILC Member El-Erian mentioned in 1957.[59]

There is, furthermore, a temporal aspect that attaches to the right of self-defence: the words 'if an armed attack occurs' in the UN Charter indicate that the invocation of this justification presupposes an ongoing attack. It is a point which played a role when the Foreign Affairs Committee of the House of Commons investigated the question of the abuse of diplomatic privileges and immunities. In this context, Freeland (Legal Adviser to the Foreign and Commonwealth Office) noted that a right to seize persons in self-defence might exist if there were 'continued firing of weapons from the premises of an embassy'—as opposed to situations where someone 'starts firing' from such premises.[60]

A criterion which is even more difficult to fulfil, is formed by the threshold requirement which inhabits the concept of an 'armed attack'. Giving evidence before the Committee, Vallat (a former ILC Member), stated that it would be difficult for a receiving State to justify 'run[ning] into an embassy because there had been one or two shots fired, even if that happened to cause an injury or a death'.[61]

It is a view that is not unopposed. In the literature, Mann expressed the view that it would be a 'wholly unacceptable and unrealistic' suggestion that authorities would 'have to wait for the death of a third person before they can intervene', and voiced his surprise about the fact that the Committee appeared to have listened to this 'with a remarkable lack of concern'.[62] Herdegen, on the other hand, would allow coercive 'countermeasures' in the context of self-defence if there were shooting from the premises of a mission, but would make this dependent 'on the duration of the threat'.[63]

The interpretation which the ICJ has given to the right to self-defence, lends support to Vallat's view. In *Nicaragua*, the Court established a threshold for the

[58] *ILC Yearbook* 2001 vol II Pt 2, 27, art 21 and ibid 74, art 21, commentary, para 1. On the Charter right, see Charter of the United Nations (adopted 26 June 1945, entry into force 24 October 1945) 1 UNTS XVI, art 51.

[59] *ILC Yearbook* 1957 vol I, 90, para 23 (El-Erian). See also Grotius' reference to a 'threatening peril', Grotius (n 53) 444.

[60] Foreign Affairs Committee (n 9), Minutes of Evidence, 28, para 50 (Sir John Freeland). A reference to the latter kind of situation had been made by Committee member Ivan Lawrence.

[61] ibid 34, para 78 (Sir Francis Vallat). Vallat's statement appears to address inviolability of premises, but the question as put by Ivan Lawrence had also referred to 'act[s] to prevent further shooting'. See also John Beaumont, 'Self-Defence as a Justification for Disregarding Diplomatic Immunity' (1991) 21 Can YB Int'l L 391, 394.

[62] Frederick Mann, *Further Studies in International Law* (OUP, Oxford 1990), 334–35. Mann raised these points in the context of VCDR art 22, rather than art 29. That carries a significance of its own: on the basis of the codification history, it may appear easier to construct inroads into personal inviolability than into premises inviolability (see text to nn 16–22 above). In spite of that, Mann clearly would have allowed the justification of self-defence even in the latter case (ibid 337).

[63] Herdegen (n 33) 753.

assumption of an 'armed attack': such an attack constituted a 'most grave' form of the use of force and had to be set apart from 'other less grave forms'.[64] '[S]cale and effect' were important for the determination of the existence of an armed attack; 'mere frontier incident[s]' would not qualify.[65]

These findings significantly raise the bar for situations which could be considered under Article 51 of the UN Charter. '[M]ere frontier incidents', after all, can certainly involve the loss of life—a consideration which invites a critical assessment even of cases in which diplomats had engaged in violence, and even where such activities resulted in the deaths of persons.

That does not mean that self-defence is *per se* inapplicable to emergency situations caused by diplomatic agents. But its practical significance is severely restricted. Many situations mentioned in the literature, will not qualify: when Denza, for instance, recounts the disarming of the Yugoslav Ambassador to Sweden, who in 1988 was found 'lying under a blanket in a sandpit and brandishing a fully loaded pistol',[66] she certainly does not refer to an incident which would reach the required gravity of an 'armed attack'.

If, in an extremely exceptional case, the relevant gravity could be established, further requirements would have to be fulfilled: in particular, measures adopted by the receiving State would have to be proportionate[67] and restricted to the specific situation.[68] The latter condition in particular gives a certain shape to acts adopted in self-defence which varies, to a degree, from that suggested in the classical literature: it limits such measures to conduct required by the circumstances and thus rules out punitive measures against persons enjoying the right of diplomatic inviolability.[69]

2.2.3 Necessity

A clear dividing line between necessity and self-defence is not always apparent from the classical literature on the topic: often, one is seen as an element of the other.[70] And yet, there is reason to be more discerning. Necessity, as understood in contemporary international law, opens options which are closed to self-defence.

[64] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 14, 101, para 191 (hereinafter '*Nicaragua*'). See also *Case Concerning Oil Platforms (Iran v United States of America)* (Judgment) [2003] ICJ Reports 161, 187, para 51.

[65] *Nicaragua*, 103, para 195. [66] Denza (n 12) 223.

[67] See Herdegen (n 33) 753; Foreign Affairs Committee, Minutes of Evidence (n 60) 28, para 50 (Sir John Freeland, with reference to the required failure of alternative measures).

[68] See Beaumont (n 61) 398.

[69] Värk notes that it was popular in the fifteenth to seventeenth centuries to consider self-defence even as a basis for trial and punishment of diplomatic agents, Värk (n 1), 117. Yet Grotius had already observed that the killing of an Ambassador was possible 'not by way of penalty, but in natural defence', Grotius (n 53), 444. At the same time, he would have allowed the detainment and questioning of ambassadors (ibid)—measures which would typically go beyond acts which are strictly indicated by the circumstances of a situation of self-defence.

[70] See Grotius (n 53) 444 ('all human laws have to be so adjusted that in case of dire necessity they are not binding').

In the shape it received in Article 25 of the Draft Articles on State Responsibility, it applies to situations in which essential interests of the relevant State are imperilled;[71] the commission of an 'armed attack' is therefore not required. At the same time, necessity carries additional requirements which may at times be stricter than those envisaged by self-defence.

With regard to the situation of necessity, the Draft Articles demand that a 'grave and imminent peril' against an 'essential interest' must have come into existence.[72] In this regard, the justification of necessity corresponds well to a need of receiving States, which has been expressed in the literature by reference to the 'vital interests' which might be endangered by certain diplomatic acts.[73] The Commentary to the Draft Articles provides limited assistance towards the interpretation of the phrase 'essential interests': it notes that the extent of the essential nature 'depends on all the circumstances, and cannot be prejudged'.[74] The ILC would allow interests of the State and its people under this heading, but also interests 'of the international community as a whole'.[75]

In this context, the question may arise whether such interests could include the property of private individuals.[76] It is not a consideration that can be excluded from the outset. Some private property—the equipment of privately run hospitals, for instance—may indeed constitute 'essential interests', for its functioning may be essential for the physical integrity of persons under the jurisdiction of the receiving State. Damage to other forms of property may result in considerable economic loss but might be not irreparable and might not directly threaten interests on a comparable level. In cases of that kind, necessity would not be an applicable circumstance precluding the wrongfulness of an enforcement measure, and the receiving State may have no measures at its disposal except the sanctions envisaged in the VCDR.[77]

The danger which the essential interest faces, must be 'grave and imminent'.[78] While the receiving State will have to be the first arbiter to assess the situation, the ILC has made clear that its discretion is limited: the peril 'has to be objectively established and not merely apprehended as possible'.[79] In a similar vein, Denza notes that the relevant danger must be 'of an extreme and continuing character'.[80]

It is a condition which can considerably limit the reach of application of necessity. Following the shooting at the Libyan mission in London, for instance, UK authorities searched, on 27 April 1984, members of the mission who left the

[71] *ILC Yearbook* 2001 vol II Pt 2, 28, art 25(1)(a). [72] ibid.

[73] See on this Herdegen (n 33) 754; Ludwik Dembinski, *The Modern Law of Diplomacy: External Missions of States and International Organizations* (Nijhoff, Dordrecht, London 1988) 197–98.

[74] *ILC Yearbook* 2001 vol II Pt 2, 83, art 25, commentary, para 15. [75] ibid.

[76] See text to n 4 above.

[77] Including the expulsion of the relevant diplomat, see text to n 24 above. Depending on the circumstances of the case, the 'reasonable' period to be given to diplomats in these situations to allow them to leave the receiving State might, however, be significantly curtailed. VCDR art 39(2) has certainly been interpreted in a flexible manner in State practice following adoption of the VCDR, Denza (n 12) 355.

[78] *ILC Yearbook* 2001 vol II Pt 2, 28, art 25(1)(a).

[79] ibid 83, art 25, commentary, para 15. [80] Denza (n 12) 223.

People's Bureau.[81] But the search came ten days after the incident and it could thus not have been based on necessity: a danger to essential interests was no longer 'imminent'.[82]

A particularly restrictive condition is imposed with regard to the measures that can be adopted in situations of necessity: such actions must constitute 'the only way' to protect the relevant interest. With regard to that, the Commentary emphasizes that the invocation of necessity is not possible 'if there are other (otherwise lawful) means available, even if they may be more costly or less convenient'.[83]

In that regard, the immediate British reaction after the 1984 incident, is illuminating.[84] If it is indeed possible for a receiving State, even in situations already marked by the use of lethal force, to first engage in talks with the Foreign Ministry of the sending State,[85] then to terminate diplomatic relations and expel the relevant diplomatic personnel,[86] the scope of enforcement measures under necessity may be very small: in many situations, coercive action will clearly not be the 'only way' to safeguard the essential interest.

The Draft Articles also make reference to the consequences of measures adopted by the State invoking necessity and specify that such measures may not 'seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole'.[87] In this context, Bao supports the view that the rule of inviolability itself 'may be generally regarded as an underlying principle of the international community' and concludes that an act safeguarding essential interests at the expense of diplomatic inviolability 'is well beyond the acceptable measures which a receiving State can take within the regime of diplomatic law'.[88]

It is certainly true that such measures exert a negative impact on an essential interest of the international community. At the same time, the inclusion of the adverb 'seriously' invites an evaluation of the consequences of the relevant enforcement measures—a consideration which is of importance not least because equally legitimate interests of the State and of the international community may be affected by the diplomatic act that causes the peril. The ILC thus accepts that a balancing mechanism has to be applied: 'the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective'.[89]

The seriousness of the consequences therefore has to be determined on the merits of the individual case. The extent of the gravity of the danger to the protected interests, the damage caused to the inviolability of the diplomatic agent, but also

[81] Foreign Affairs Committee (n 9), para 102.

[82] The Foreign and Commonwealth Office, in fact, sought to base the search on the justification of self-defence (ibid). On the difficulties of that approach, see above, section 2.2.2.

[83] *ILC Yearbook* 2001 vol II Pt 2, 83, art 25, commentary, para 15.

[84] See text to n 9 above. [85] Foreign Affairs Committee (n 9), paras 74–75.

[86] ibid para 76. [87] *ILC Yearbook* 2001 vol II Pt 2, 28, art 25(1)(b).

[88] Bao 157. [89] *ILC Yearbook* 2001 vol II Pt 2, 84, art 25, commentary, para 17.

the duration of the intrusion will all have to be considered as valid considerations in that regard. A diplomat who is about to cause serious damage to a military installation, might well find himself subject to enforcement measures by the receiving State in the form of being escorted off the premises against his will. That, too, is an infringement of inviolability. But it is temporary in nature, and it serves to protect a vital interest of the State in a situation of ongoing peril. Such infringement does not fulfil the criterion of 'seriousness': it was limited to the parameters of the specific situation and terminated when the peril had disappeared.

The availability of necessity is thus not precluded by the mere fact that the relevant obligation concerned diplomatic inviolability. The greater difficulty, it appears, lies in another field: in the fact that there must be no other means at the disposal of the receiving State to deal with the situation at hand. The caution which States have applied in emergency situations, highlights that there are few incidents in which alternatives measures can positively be said not to have been in existence.

2.3 Emergency situations threatening the interests of individuals

2.3.1 The right to life

In the literature, the right to life has retained an important position in relation to emergencies in which diplomatic acts threaten interests of individuals. Denza, for instance, speaks of possible limitations to diplomatic inviolability where the 'overriding duty to protect human life' is concerned.[90]

This position would presuppose a true conflict of norms which has to be resolved on the basis of a hierarchical solution. But Denza does not elaborate on the legal grounds for this assumption, nor does she explain the extent of the relevant duties of the receiving State.

That a State has positive duties in relation to the right to life, has been accepted by the major human rights treaties which refer to it as a right 'to be protected by law'.[91] In *Osman*, the European Court of Human Rights (ECtHR) found that this included the obligation to take 'appropriate steps to safeguard the lives of those within its jurisdiction'.[92] Yet the Court also stated that 'not every claimed risk to life' would be a basis for this:[93] the risk to life, as created by third parties, had to be 'real and immediate', and the State must have known or 'ought to have known' of its existence.[94]

[90] Denza (n 12) 223. On the diplomatic bag, see VCDR art 27(3) and Chapter 14.

[91] International Covenant on Civil and Political Rights (adopted 19 December 1966, entry into force 23 March 1976) 999 UNTS 171, art 6(1) (hereinafter 'ICCPR'); Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222 (adopted 4 November 1950, entry into force 3 September 1953), art 2(1) (hereinafter 'ECHR'); American Convention on Human Rights (adopted 22 November 1969, entry into force 18 July 1978) 1144 UNTS 123, art 4(1) (hereinafter 'ACHR').

[92] *Osman v The United Kingdom* [2000] 29 EHRR 245, para 115.

[93] ibid para 116.

[94] ibid.

In situations like the one triggered by the shooting at the Libyan mission in 1984, the establishment of these parameters would not appear to cause difficulties: there, a real and immediate risk to human life certainly existed. In this regard, the conditions of the protective duty resemble the parameters of necessity: here, too, a close temporal proximity between the danger and the situation is to be required.[95] The searching of the diplomats days after the incident, however, fails to fulfil the conditions: the mere apprehension of a risk does not suffice to establish the obligation of the State.

But even the existence of a protective duty does not yet determine its status under international law. All it means is that there are two seemingly divergent norms which have an impact on the same situation: the protective duty under human rights law meets the obligation to respect diplomatic inviolability.

The reference to the former obligation as an 'overriding duty'[96] suggests that its proponents consider this obligation and the underlying right to carry an inherently higher character in the international legal system. Some authors have indeed gone as far as to claim *jus cogens* character for the right to life.[97]

Yet it has always been difficult to determine with certainty the provisions of international law that belong to the circle of *jus cogens* norms. The destructive effects of *jus cogens* militate against an overly inclusive understanding of this category—the more so, as attempts have been made in the past to exploit this very effect of peremptory norms.[98] These difficulties have led to extreme results: courts are reluctant to assess a meeting of norms on the basis of *jus cogens* alone:[99] academic commentators on the other hand have all too often yielded to the temptation of assigning *jus cogens* status to rules—frequently, without providing satisfactory substantiation.[100]

At times, attempts are made to approach the concept of *jus cogens* by focusing on the non-derogability of the relevant norms—an understanding which the Vienna Convention on the Law of Treaties (VCLT) appears to support.[101] On

[95] See text to nn 78–82 above. [96] See text to n 90 above.

[97] Karen Parker and Lyn Beth Neylon, '*Jus Cogens*: Compelling the Law of Human Rights' (1988–1989) 12 Hastings International & Comparative Law Review 411, 431.

[98] In the 1950s for instance, Shurshalov argued that non-interference in the internal affairs of States was a 'basic principle and concept' which rendered invalid those treaties that were in conflict with it. His conclusion on the *jus cogens* character of non-interference was that a whole range of treaties—including the NATO and SEATO pacts—were invalid: Jan Triska and Robert Slusser, 'Treaties and Other Sources of Order in International Relations: The Soviet View' (1958) 52 AJIL 699, 717, 718 (reference to Vladimir Mikhailovich Shurshalov, *Osnovaniia deistvitel'nosti mezhdunarodnykh dogovorov* (Moscow, Izd-vo Akademii Nauk SSSR 1957) 140–54.

[99] See on this Marko Milanovic, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 Duke Journal of Comparative and International Law 69, 71, and Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100 AJIL 291, 305, with particular reference to the ICJ.

[100] For further examples, ranging from the duty not to commit transboundary environmental harm to the 'right to life of animals', see the discussion in Shelton (n 99) 303.

[101] The VCLT talks about peremptory norms (*jus cogens*) as those 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character', Vienna Convention on the Law of Treaties (adopted 23 May 1969, entry into force 27 January 1980) 1155 UNTS 331, art 53 (hereinafter 'VCLT').

that basis, it is tempting to advance the argument that those human rights from which no derogation is possible, should stand a chance of being included in this group.[102] The four rights which in the three leading human rights treaties fall in this category, are the freedom from torture or inhuman or degrading treatment or punishment,[103] freedom from slavery,[104] the right to life,[105] and the *nullum crimen sine lege* principle.[106]

But even the classification of non-derogable rights as *jus cogens* is not undisputed.[107] Where the right to life is concerned, inroads certainly exist: the European Convention on Human Rights, while stating that no derogation shall be made from it, allows an exception in cases of 'deaths resulting from lawful acts of war'[108] and even permits limitations of the right.[109] Nor could it be said that a globally accepted scope of the right has been established. Quite apart from differences on the domestic level,[110] the fact remains that even the existing regional human rights regimes disagree on the boundaries of the right to life.[111] Doubt also attaches to the question whether State practice does in fact support the elevated character of that right.[112] In light of these considerations, it appears difficult to establish the 'acceptance' and 'recognition' of its elevated character by the international community, to which the VCLT refers:[113] the necessary consensus can hardly be identified.[114]

That does not mean that international law does not recognize the importance of this right which, in the words of the ECtHR, represents the 'supreme value in the hierarchy of human rights'.[115] Nor does it mean that the receiving State is not

[102] See Richard Lillich, 'Civil Rights', in Theodor Meron (ed), *Human Rights in International Law: Legal and Policy Issues* (Clarendon Press, Oxford 1984) 115, 118, n 17, and *Michael Domingues v United States*, Report No 62/02, Case 12.285, Inter-American Commission on Human Rights, OEA/Ser.L/ V/ II.116, rev 1 Doc 5 (22 October 2002), para 49.

[103] ICCPR art 7; ECHR art 3; ACHR art 5.

[104] ICCPR art 8(1) and (2); ECHR art 4(1); ACHR art 6.

[105] ICCPR art 6; ECHR art 2; ACHR art 4.

[106] ICCPR art 15; ECHR art 7; ACHR art 9.

[107] For a discussion, see Lee Caplan, 'State Immunity, Human Rights and *Jus Cogens*: A Critique of the Normative Hierarchy Theory' (2003) 97 AJIL 741, 772 et seq; Herdegen (n 33) 755.

[108] ECHR art 15(2). [109] EHCR art 2(2).

[110] The different treatment of the death penalty in retentionist and abolitionist States is perhaps one of the best known examples in this context. See Laurence Rothenberg, 'International Law, U.S. Sovereignty, and the Death Penalty' (2004) 35 Geo J Int'l L 547, 555.

[111] See on this *Vo v France* [2005] 40 EHRR 12, para 75, on the differences between ECHR and ACHR where the temporal aspects of the right to life are concerned (with the ACHR providing a protective duty for the right to life 'in general, from the moment of conception'), ACHR art 4(1). But see also the restrictive interpretation given to that norm in *Baby Boy v United States*, Case 2141, IACHR, Report No 23/31, OEA/Ser.L/V/II.54, doc. 9, rev. 1, paras 20(h), 25, 30.

[112] See on this Dror Ben-Asher, *Human Rights Meet Diplomatic Immunities: Problems and Possible Solutions* (Harvard Law School, Cambridge 2000) n 242. See also for a generally critical view Anthony D'Amato, 'It's a Bird, It's a Plane, It's Jus Cogens!' (1990) 6 Connecticut Journal of International Law 1, 2, with particular reference to Parker and Neylon (n 97).

[113] See n 101 above.

[114] Herdegen presumably reaches a similar conclusion when arguing that 'considerations to the effect that the protection of human life […] may operate as an autonomous basis for justifying countermeasures leave the path of orthodox reasoning', Herdegen (n 33) 755.

[115] *K-H W v Germany* (2003) 36 EHRR 1081, para 66.

capable of adopting the relevant protective measures if the lives of persons under its jurisdiction are seriously endangered.

But such measures have to be subject to conditions which the international community recognizes. The fact, after all, must be taken into account that enforcement measures, even if they were caused by an intention to protect life, can have grave consequences on the affected diplomatic personnel and may in some cases even result in harm greater than the one it sought to avoid. It is for that reason that they need to be embedded in a framework of justifications which is recognized under the law and that provides clear parameters for the specific emergency situations that may permit such action.[116] By itself, however, the protection of the right to life is incapable of claiming a status superior to that of other values in international law.

2.3.2 Self-defence

Self-defence, as discussed above, can constitute a basis for enforcement measures,[117] yet it presupposes the existence of an armed attack.[118] The question, however, arises whether, with regard to that element, an attack on nationals of the relevant State and their individual interests suffices or whether there has to be an attack on the State as such.

The distinction was broached even during the ILC debates. Speaking to paragraph 2 of the Sandström draft, which had mentioned self-defence,[119] the Chairman voiced his concerns about the fact that such a reference was 'open to a variety of interpretations' and noted that it was not clear whether the provision referred to the defence of the receiving State or of individuals.[120]

The more extensive understanding of the right, which would have encompassed the interests of individuals, appears to have been accepted in the older literature,[121] but it also finds supporters among contemporary scholars on diplomatic law. Värk thus notes that actions in self-defence could be taken as preventative measures in cases of 'threat of irreparable damage to person or property regardless of whether the threat is directed against the state, its agents, or its nationals'.[122]

That view, however, is not uncontested. In the context of the 1984 incident at the Libyan People's Bureau, Higgins noted her scepticism regarding the application of the concept 'to violent acts by the representatives of one state […] directed against the [receiving State's] citizens'.[123] The observation was made in the context of the inviolability of mission premises, but it carries equal force with regard to the inviolability of diplomatic personnel.

[116] See, in particular, text to n 75 above and text to nn 129–30 below.
[117] See section 2.2.2 above. [118] See text to n 59 above.
[119] See text to n 30 above. [120] *ILC Yearbook* 1957 vol I, 90, para 19 (Chairman).
[121] That, for instance, is how Beaumont understands Bynkershoek's reference to the possibility of 'repel[ling] by force' assaults on citizens, even if initiated by an Ambassador. Beaumont (n 61) 392, Bynkershoek (n 53) 89.
[122] Värk (n 1) 117. [123] Higgins (n 2) 646.

There is, in fact, not much evidence that receiving States would be happy to invoke self-defence on the basis that their nationals had been affected by armed attacks by diplomats.[124] France, after the shooting at the Iraqi embassy in 1978, does not appear to have made reference to such a right,[125] and the House of Commons Foreign Affairs Committee, following the 1984 incident, even expressed the view that self-defence 'could not have acted as a lawful basis' for forcibly entering the premises of the mission.[126]

It is therefore questionable whether self-defence under these circumstances can claim a solid foundation in the interpretation which States have given to Article 51 of the UN Charter. And there is reason to support a restrictive position: an understanding along these lines would give self-defence a very wide scope, and the possibility of abuse by the receiving State cannot be dismissed, if enforcement measures could take an entirely private altercation as their basis.

In any event, however, self-defence would still have to fulfil the requirements to which reference has been made above.[127] The threshold element in particular, which inhabits the concept of an 'armed attack', causes difficulties in that regard[128] and must indeed be considered one of the greatest challenges to the application of this justification, even if it were accepted that an attack on nationals would suffice. Self-defence for the protection of individual interests thus faces obstacles on such a scale that its scope of application must be said to be exceedingly small.

2.3.3 Distress

The fact that the right to life does not constitute a norm of hierarchically higher status than diplomatic inviolability, does not mean that international law does not recognize its value and importance. Both in the classical and contemporary literature on diplomatic law, it is indeed the danger to the lives of persons in the receiving State through diplomatic action which caused particular concerns to authors and led them to advocate the possibility of taking protective measures.[129]

In international law today, the particular value of human rights is also reflected in the justifications available to States which find themselves in breach of their international obligations. Within the Draft Articles on State Responsibility, the ground precluding wrongfulness which best reflects the importance of the right, is that of distress.[130]

Distress can indeed only be invoked if the author of the relevant measure sought to protect his own life or that of persons entrusted to his care.[131] That requirement is certainly fulfilled if police forces of the receiving State have themselves come under attack—as, for instance, in the incident at the Iraqi Embassy in Paris in 1978.[132] For other situations, in which lives had been 'entrusted to the author's

[124] See Brown (n 45) 86. [125] Värk (n 1) 117.
[126] Foreign Affairs Committee (n 9), para 95; Herdegen (n 33) 738.
[127] See, in particular, text to nn 64–65. [128] ibid. See also Beaumont (n 61) 394.
[129] See Bynkershoek (n 53) 89; Hardy (n 44) 51.
[130] *ILC Yearbook* 2001 vol II Pt 2, 27, art 24. [131] ibid art 24(1).
[132] See text to n 3 above.

care', the ILC notes that there had to be a 'special relationship between the State organ or agent and the persons in danger'.[133]

Such a relationship might not be established for all State organs; but it certainly must be assumed where organs (such as police officers) are concerned whose very function is the protection of persons under the jurisdiction of the State. It is also at that stage that the positive duty which the human right to life involves, plays again a significant role.[134] Following the case law outlined above, a special relationship must therefore be held to exist when law enforcement authorities of the receiving State knew or should have known of the 'real and immediate risk' to persons under the jurisdiction of the State from acts of the diplomatic agents:[135] for in this situation, the positive protective duty of the relevant State organs has placed the relevant lives 'under their care'.

And this is not the only ground on which this relationship can be based. If, for instance, diplomatic acts endanger the lives of their colleagues, a protective duty would also arise on the basis of Article 29 VCDR.

An incident involving the French Ambassador to Yugoslavia, Pierre Sebilleau, in the year 1976 may be recalled in that context: in November of that year, the Yugoslavian Foreign Minister had arranged a hunt which several diplomats attended, including Sebilleau and the Ambassador of Austria.[136] In the course of that event, Sebilleau was hit by a bullet, when the gun of his Austrian colleague (due to careless handling of the weapon) went off.[137] Sebilleau was taken to a hospital where he died two hours later.[138]

If, in an incident of this kind, the authorities of the receiving State could have intervened to save the life of the diplomat, a 'special relationship' between the State organs and the diplomat would have found its basis in Article 29. Action of that kind could then have included enforcement measures to the degree that distress permits.

Silva introduces another scenario which has some relevance in that regard: that of a diplomat suffering 'from a fit of madness or [being] under the effect of alcohol or of drugs'. He asserts that, in situations of this kind, the authorities of the receiving State could likewise resort to enforcement 'until [the diplomat] returns to normal'.[139] It might indeed, under such circumstances, not only be the lives of other persons, but that of the diplomatic agent himself which is endangered by his actions, and thus Article 29 could again establish a special relationship. But the right to resort to coercion would not be triggered in any situation of the kind outlined by Silva: not every use of alcohol or drugs (and not every 'fit of madness') establishes a peril for the diplomat or his surroundings.

[133] *ILC Yearbook* 2001 vol II Pt 2, 80, art 24, commentary, para 7.
[134] See text to n 92 above. [135] See text to n 94 above.
[136] 'French Envoy in Belgrade Killed on Hunting Trip' *New York Times* (7 November 1976).
[137] 'Envoy Shot Envoy' *Irish Times* (8 November 1976).
[138] 'French Ambassador Killed at Yugoslav Hunt' *Washington Post* (7 November 1976).
[139] Do Nascimento e Silva (n 4) 93.

And not every measure is permitted in situations of distress. Like necessity, distress imposes more specific requirements. But where necessity required the act of the receiving State to be the 'only way' to safeguard an essential interest,[140] distress is a more generous justification: measures may be adopted if there had been 'no other reasonable way' to save the lives in question.[141]

The comparison of the 1984 incident at the Libyan People's Bureau in London and the 1978 shooting at the Iraqi embassy in Paris has relevance in that regard. The British reaction—the fact that the United Kingdom contacted the Libyan government first, that she terminated diplomatic relations and entered the premises only after the Libyan diplomats had left[142]—does indicate that options other than enforcement are at the disposal of receiving States in situations of this kind. Yet to the French authorities, being compelled to sit out the gunfire and wait until the danger had passed may have appeared an excessive burden, and one which would not have fulfilled the requirements of reasonableness.

It is exactly at that point that distress shows a suppleness that necessity lacks. The ILC, in its Commentary on the Draft Articles on State Responsibility, made clear that the words 'no other reasonable way' did indeed intend 'to strike a balance between the desire to provide some flexibility regarding the choices of action by the agent in saving lives and need to confine the scope of the plea having regard to its exceptional character'.[143] The fact, therefore, that abstention from enforcement had been the choice of one receiving State, does not necessarily mean that another diplomatic host who resorted to enforcement in a similar situation, has thereby left the bounds of reasonableness.

At the same time, distress also involves, where the consequences of the measure are concerned, a balancing exercise: the relevant act must be 'unlikely to create a comparable or greater peril'.[144] In the eyes of the ILC, the interests which the author seeks to protect must 'clearly outweigh the other interests at stake in the circumstances', and if the relevant measure 'endangers more lives than it may save or is otherwise likely to create a greater peril it will not be covered by the plea of distress'.[145]

It is a condition which may require the receiving State to make fine distinctions—both with regard to the relevant danger and to the methods at its disposal. The attitude of the diplomatic agents, the weapons (if any) which were employed, the acts that were already committed, the extent and imminence of the danger to other persons, and the probability of its realization are all factors which have to be considered in that regard. Such considerations will also have an impact on the available options and may, for instance, result in the prioritization of non-lethal weapons over the use of deadly force, and in the prioritization of warnings over the use of force of any kind, where the situation permits this and where this would not further increase the existing danger.

[140] See text to n 83 above.
[141] *ILC Yearbook* 2001 vol II Pt 2, 27, art 24(1).
[142] See text to n 9 above and Foreign Affairs Committee (n 9) paras 74–77.
[143] *ILC Yearbook* 2001 vol II Pt 2, 80, art 24, commentary, para 6.
[144] ibid 27, art 24(2)(b).
[145] ibid 80, art 24, commentary, para 10.

It is an exacting requirement. But it does not rule out coercive action: depending on the existing peril, there is adequate room for receiving States to employ the necessary measures. If, for instance, such action results in the detention or temporary incapacitation of the diplomatic agent while at the same time saving the lives of persons, the coercive act clearly cannot be said to have caused a 'greater' or even 'comparable' peril than the one it sought to avoid.

3. Conclusion

The provision on personal diplomatic inviolability is a principal example for the employment of absolute terms, which must be considered a particular characteristic of the VCDR.[146] On the basis of its literal meaning, it would allow for no exceptions at all and would thus compel receiving States to stand at the sidelines even in situations where diplomatic agents cause a danger to the security of the State or to the safety of persons under its jurisdiction.

In that regard, the VCDR fails to provide an adequate response to a legitimate need of the receiving State. Recourse to physical violence by diplomatic agents may, thankfully, be a relatively rare situation, yet the employment of security personnel at diplomatic missions can turn incidents of this kind into a more common feature in diplomatic relations. If such personnel are employed as service staff, they, too, benefit from personal inviolability, as long as they acted in the course of their duties.[147]

This examination, however, has shown that international law does recognize options at the disposal of receiving States in situations of this kind. It is a matter that has a long pedigree in scholarly discourse on diplomatic inviolability. And yet, it is worth noting that the grounds for State action which have been discussed in the classical literature on the topic, have often received a shape in modern international law which gives them extremely small scope of application.

That is certainly the case where self-defence is concerned. In cases involving diplomatic personnel, situations of true self-defence will be a rare occurrence: as understood under international law, self-defence requires an armed attack of such gravity that diplomatic action will seldomly qualify in this regard.

Claims to the effect that the receiving State faces an 'overriding duty' to protect life,[148] likewise face challenges. The very existence of such a duty has, under human rights law, only been accepted where a 'real and immediate risk' to the lives in question exists; and even then, the alleged higher rank of the obligation to protect life is questionable: *jus cogens* in particular does not appear to be a suitable mechanism for the construction of a hierarchy in this context.

[146] See Chapter 20. [147] See n 3 above. [148] Denza (n 12) 223.

Some of the 'circumstances precluding wrongfulness' to which the Draft Articles on State Responsibility refer, are more likely to offer legally accepted grounds for enforcement measures.[149] Yet they carry their own difficulties.

Two justifications in particular—necessity and distress—appear to offer appropriate grounds for the priorization of certain interests in situations of emergencies caused by diplomatic agents. Neither of them requires the threshold of an armed attack; both are tailored towards situations of peril. Their challenges lie in different fields. Necessity is reasonably permissive in view of the protected interest: it suffices that an 'essential' interest is subjected to grave and imminent danger. But it is restrictive with regard to the measures that can be adopted: such measures must be the 'only way' to safeguard the affected interest.

Distress is more permissive where the measures are concerned: it suffices that the author had 'no other reasonable way' of saving the interest. But it is restrictive with regard to the protected interests: it applies only when the author's life or the lives of those entrusted to his care, are affected. Both grounds also require a weighing up of the relevant interests to avoid the causation of even greater harm. Yet within these parameters, State action is possible—including enforcement measures against diplomatic agents in situations of this kind.

Distress in particular emerges as a suitable option where diplomats have caused significant danger in the receiving State: by comparison to the other justifications and the restrictions imposed on them under international law, it constitutes a ground which approaches the relevant situation with a degree of flexibility: at the very least, measures adopted under this justification do not need to be 'the only way' of safeguarding the interest.

It is true that even distress does not cover all areas of dangerous conduct, let alone areas of diplomatic misconduct in general. It is thus a far cry from the ICJ's position that a diplomat could be briefly arrested to prevent the commission of a crime.[150] Even the interests addressed by necessity are not as extensive as that.

But there are reasons for this restrictive position on the exercise of enforcement jurisdiction. The more the justifying situation moves away from true emergencies involving essential interests, the greater is the possibility that the State will have alternatives to coercive action (such as the expulsion of the perpetrators) and that the possibility of effective reparation might exist for individuals (for instance, by pursuing a claim in the courts of the sending State, whose jurisdiction the VCDR expressly confirms).[151]

And the wider the boundaries of enforcement are drawn, the greater is the potential of abuse. It is a significant advantage of the justifications envisaged by the Draft Articles on State Responsibility that they establish extremely specific conditions, which open the door to enforcement only for the duration of the situation of emergency. They are thus based on objective parameters; State discretion is

[149] Self-defence is mentioned among these grounds in the draft articles, but in this regard, the ILC itself makes reference to the Charter of the United Nations (*ILC Yearbook* 2001 vol II Pt 2, 27, art 21).

[150] See text to n 33 above. [151] VCDR art 31(4).

significantly reduced. As the balancing of interests, especially in the case of distress, has shown, the relevant conditions may apply even to detailed particulars of the measures which the receiving State is entitled to adopt.

It would appear, as has been mentioned above, that States today do not often infringe the inviolability of diplomatic personnel. But the history of diplomatic relations knows cases where this has happened, and to say that it will never happen again, places a large amount of trust in members of the international community, whose governments, after all, follow a wide range of political ideologies and are beholden to widely varying constituencies. Handing them the option of enforcement in any case of misbehaviour would give them a power which can no longer be said to find a basis in the will of the international community as expressed in the VCDR.

What is required for the solution of emergency situations caused by diplomats is not a blank cheque for enforcement agents around the world. What is needed is the establishment of strictly limited exceptions under which every State is subjected to the same parameters which have found the consensus of the international community: conditions which are clear and accessible, objective in character, and by their nature well defined.

7

The Privileges and Immunities of the Family of the Diplomatic Agent

The Current Scope of Article 37(1)

*Simonetta Stirling-Zanda**

Introduction

Article 37(1) VCDR extends the privileges and immunities listed under Articles 29 to 36 to the 'members of the family of a diplomatic agent forming part of its household, if they are not nationals of the receiving State'.[1]

Privileges and immunities 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[2] 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).[3]

The extension of Article 37(1) has been discussed in a wide body of authoritative literature, both before codification[4] and after codification[5] within the context

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[1] A diplomatic agent according to art 1(e) 1961 VCDR is the head of the mission (art 1(a), art 14, for 'classes' or a member of the diplomatic staff (art 1(d)), ie members of the staff of the mission having diplomatic rank. On preparatory works of art 1, see Eileen Denza, *Diplomatic Law, Commentary on the Vienna Convention on Diplomatic Relations* (4th edn, OUP, Oxford 2016) 13–14; on questions of terminology and whether the family can be considered 'diplomatic personnel', J Craig Barker, *The Protection of Diplomatic Personnel* (Ashgate, Aldershot 2006) 18.

[2] See however art 31(3) in relation to art 31(1)(a), (b), and (c); Patrick O'Keefe, 'Privileges and Immunities of the Diplomatic Family'(1976) 25 ICLQ 329, 345–6.

[3] Jean Salmon, *Manuel de Droit Diplomatique* (Bruylant, Brussels 1994) 385, para 510; on the general question of 'protection', see Barker (n 1).

[4] Mario Giuliano, 'Les relations et immunités diplomatiques' (1960) 100 Recueil des Cours de l'Académie de Droit International 108; A B Lyons, 'Personal Immunities of Diplomatic Agents' (1954) 31 BYIL 299.

[5] Salmon (n 3) 379–88; Jonathan Brown, 'Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations' (1988) 37 ICLQ 53; Clifton E Wilson, 'Diplomatic Privileges and Immunities: The Retinue and Families of the Diplomatic Staff ' (1965) 14 ICLQ 1265

of the Vienna Convention, in the light of customary law,[6] preparatory works,[7] domestic decisions, and 'incidents' gathered from national and international press. The purpose of this chapter is to examine whether—and if so how—fifty years of domestic practice, mainly in the legislative field, has helped to clarify the meaning of Article 37(1).

1. The Principle in the Light of Preparatory Works at the ILC and at the Conference

Article 24(3) of the 1955 Report[8] of the Special Rapporteur of the ILC (Sandström) already contained the core of Article 37(1) VCDR.[9] According to the Rapporteur's commentary to this article, while the general subject of who should benefit from privileges and immunities lent itself to controversy, there was no disagreement on the fact that such beneficiaries should comprise the diplomatic agents' family.[10]

The article was extensively discussed in June 1957 at the ILC's ninth session, when the term 'household' replaced the words 'under the same roof'.[11] The revised version of 24(3) (new Article 28(1)), figured in the 1957 ILC's Report to the twelfth session of the General Assembly (GA) and reads:

> Apart from diplomatic agents, the members of the family of a diplomatic agent forming part of his household, and likewise the administrative and technical staff of a mission, together with the members of their families forming part of their respective households, shall, if they are not nationals of the receiving State, enjoy the privileges and immunities mentioned in articles 22 to 27.[12]

in part; 1279, including historical practice; Robert A Wilson, 'Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations' (1984) 7 Loy of L A Int'l and Comp L Rev 113, 130.

[6] *ILC Yearbook* 1955 vol II UN Doc A/CN.4/91 'Projet de codification du droit relatif aux relations et immunités diplomatiques' Rapport présenté par A E F Sandström, (French) 14, para 14; on the development of diplomatic law through history: Eileen Young, 'The Development of the Law of Diplomatic Relations' (1964) BYIL 141, 153, 170.

[7] Denza (n 1) 319–20.

[8] *ILC Yearbook* 1955 vol II, (n 6) 12.

[9] ibid art 24(3), which states: 'Les privilèges et immunités des bénéficiaires reviennent aussi aux membres de leurs familles et à leurs domestiques privés étrangers pourvu qu'ils habitent sous le même toit.'

[10] ibid 17, paras 57–58: '57. […] La question de savoir à quelles personnes les privilèges et immunités diplomatiques reviennent a suscité des controverses'. However, (re paras 3 and 4) '61 […] Tout le monde est d'accord pour reconnaître que le bénéfice des privilèges et immunités doit s'étendre aux membres des familles des bénéficiaires habitant sous le même toit.'

[11] *ILC Yearbook* 1957 vol I, 134–37. The Japanese member suggested that 'living under the same roof may be replaced by the formula used in the art. 1 of the Harvard Law School Draft, namely members of his "household" '. ibid 135, para 13. The principle was adopted unanimously but for one abstention. The principle that the members of a diplomatic agent's family should enjoy the same immunities as the agent himself, though not if nationals of the receiving State was unanimously agreed.

[12] *ILC Yearbook* 1957 vol II, 140, art 28(1).

The commentary specifies that '[i]t is the general practice to accord members of the diplomatic staff of a mission the same privileges and immunities as are enjoyed by heads of mission, and it is not disputed that this is a rule of international law.' However:

> The Commission did not feel it desirable to lay down either a criterion for determining who should be regarded as a member of the family, or a maximum age for children. The spouse and children under age at least, are universally recognized as members of the family, but cases may arise where other relatives too come into the matter. In making it a condition that a member of the family wishing to claim privileges and immunities must form part of the household, the Commission intended to make it clear that close ties and special circumstances are necessary qualifications.[13]

The 'Summary of observations'[14] of States on the 1957 Draft Articles shows that only Switzerland and Belgium[15] commented on Article 28(1) of the 1957 draft.

Further draft articles—with some modifications—were adopted at the tenth session of the ILC[16] and inserted, with commentary, into the report to the General Assembly (GA).[17] Article 28(1) (now 36(1)), however, remained unchanged.[18] This final draft version would later serve as working text at the Conference, which opened in Vienna on 2 March 1961.[19]

At the conference, technical and administrative staff were ultimately not included among the categories of people entitled to full privileges and immunities, while no definition of the family was added[20] and Article 36(1)—Article 37(1) of the present Convention—was adopted unanimously.[21] In summary, the fundamental principle of immunities and privileges for family members has remained

[13] ibid 140–41.

[14] 'Summary of observations received from Governments and conclusions of the Special Rapporteur A Emil F Sandström' (mimeographed), A/CN 4/116 2 May 1958 (hereinafter 'Observations of Governments').

[15] ibid. 'In Switzerland, the family circle enjoying privileges and immunities is limited to the spouse and minor children and, in the case of heads of mission, to parents and parents-in-law. The advantage of this system is that it avoids abuse and controversy, while not precluding the receiving State from making exceptions in special cases.' '… In Belgium these privileges and immunities are granted only to the wives and children of diplomatic agents and of administrative and technical staff, and to no other members of their families.' (73–74).

[16] *ILC Yearbook* 1958 vol II, 89–105. [17] ibid.

[18] ibid 101. The general comment to art 36 reads: '(2) It is the general practice to accord to members of the diplomatic staff of a mission the same privileges and immunities as are enjoyed by heads of mission, and it is not disputed that this is a rule of international law. But, beyond this there is no uniformity in the practice of States in deciding which members of the staff of a mission shall enjoy privileges and immunities. Some States include members of the administrative and technical staff among the beneficiaries, and some even include members of the service staff. There are also differences in the privileges and immunities granted to the different groups. In these circumstances, it cannot be claimed that there is a rule of international law on the subject, apart from that already mentioned.'

[19] United Nations Conference on Diplomatic Intercourse and Immunities, Vienna, 2 March–14 April 1961, Official Records, Volume II, A/CONF 20/14, 3 (hereinafter 'Conference Records Vol I').

[20] See relevant remarks on the subject by the Indian member, ibid 57, para 52. Mr Bouziri's position (Tunisia) also sums up well general feelings towards the whole of art 36: ibid 31, para 34.

[21] For a comprehensive summary of members' positions: Mehmet Yavuz, 'Scope of Diplomatic Family in Vienna Convention on Diplomatic Relations' (2013) IV Law and Justice Review 163–82.

basically unchanged throughout the various versions produced by the ILC, such that Article 28(1) of the 1957 draft contains the essential principle underpinning what is today Article 37(1); the limited immunities which technical and administrative staff do now enjoy, are covered by Article 37(2). There are presently no reservations to Article 37(1)[22] by contrast to a considerable number of reservations to its second paragraph.

2. Who Are the 'Members of the Family of a Diplomatic Agent Forming Part of the Household' that Must Be Accepted by the Receiving State Today?

The 1961 Convention has restricted the concept of family[23] to family members[24] forming part of the diplomatic agent's household:[25] 'In making it a condition that a member of the family wishing to claim privileges and immunities must form part of the household the Commission intended to make it clear that close ties and special circumstances are necessary qualifications.'[26] This intention has been translated into domestic legislation as well as bilateral agreements.[27]

In any event, there was, both prior to and at the conference, international consensus on the fact that family members include a spouse[28] and minor children,[29] with the practice of some States being more liberal than others' in accepting special circumstances.

It is not certain that the immunities of the family of diplomatic agents other than the Ambassador[30] extend to conduct prior to marriage.

[22] Reservations to the VCDR, available at: <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20III/III-3.en.pdf> accessed 15 May 2016.

[23] *ILC Yearbook* 1958 vol II, 102, Commentary to draft art 36 [previously art 28; VCDR art 37], para 11: '[…] The Commission did not feel it desirable to go farther and lay down a criterion for determining who should be regarded as a member of the family, nor did it desire to fix an age limit for children. The spouse and children under age, at least, are universally recognized as members of the family, but in some cases other relatives may also be regarded as qualifying as "members of the family" if they are part of the household. In making it a condition that a member of the family wishing to claim privileges and immunities must form part of the household, the Commission intended to make it clear that close ties or special circumstances are necessary qualifications. Such special circumstances might exist where a relative kept house for an ambassador, although she/he was not closely related to him; or where a distant relative had lived with the family for many years, so as, in effect, to become a part of it.'

[24] Wilson (n 5) 1279–95.

[25] French: '*Ménage*'; Italian: '*Membri della famiglia …che convivono…*'; German: '*Haushalt*'; Spanish: '*Formen parte de su casa*'. For a comprehensive study of 'household', O'Keefe (n 2) 333–40.

[26] If, on the one hand, introduction of the 'household' limitation was clearly a development in terms of existing customary law, it does not appear to have changed what, in some cases, was already a restrained practice (see Switzerland and Belgium above n 15).

[27] See below, section 2.1.

[28] Wilson (n 5) 1283, with regard to domestic case law on controversial issues such as separation and pending divorce proceedings; Brown (n 5) 63–66.

[29] O'Keefe (n 2) 337.

[30] Wilson (n 5) 1283.

2.1 Discretionary agreements 'on condition of reciprocity'

On the general point of reciprocity,[31] in response to the original Report of 1957, some States commented[32] upon the choice between codification in the form of draft articles—where reciprocity should be an explicit normative condition—and in the form of a treaty, which would guarantee reciprocity to a large extent.[33] Opting for the latter solution explains why Article 47 does not mention reciprocity, although it does prohibit the receiving State from discriminating between sending States.[34]

There is, however, no discrimination if a restrictive application by the receiving State is a response to a restrictive application of a disposition to its own mission in the sending State (paragraph 2). Equally, States can—either by custom or by agreement—grant each other more favourable treatment than that which is required by a given provision. Therefore, bilateral treaties 'on condition of reciprocity' that extend the notion of family are not discriminatory.

Specific 'normative' reciprocity in relation to the composition of the family is particularly relevant insofar as difficulties in reaching consensus on its composition meant that any extensive interpretation of Article 37(1) was left to States' discretion. However, due to the cultural elements involved,[35] reciprocity may not be attainable in reality between countries of fundamentally different religious and social backgrounds, irrespective of theoretical approaches to what 'should'[36] be considered to be universally accepted values.

The VCDR itself specifies or implies a number of instances when certain issues can be agreed bilaterally.[37] In the case of Article 37(1), preparatory works show that deviations from the rule, such as exceptions to the principle of nationality under Article 37(1), or agreement on the family's composition and the age of children,

[31] Michel Virally, 'Le principe de réciprocité dans le droit international contemporain' (1967) 222 Recueil des Cours 5; Jean-Paul Niboyet, 'La notion de réciprocité dans les traités diplomatiques de droit international privé' (1935) 52 Recueil des Cours 253; Paul Lagarde, 'La réciprocité en droit international privé' (1977) 154 Recueil des Cours 163.

[32] Observations of Governments (n 14 above) for differing views on the subject of reciprocity.

[33] Responding to these comments the Rapporteur considered that 'if a codification in the form of a treaty was contemplated, then reciprocity was to a large extent guaranteed by the treaty. Reciprocity may, however, be conceived of as a condition governing the grant of advantages more extensive than the minimum laid down as obligatory. If it is the intention to give expression to this idea, then either a special provision may answer the purpose or else a clause may be added in each article in which the question of reciprocity arises. If the draft does not take the form of a convention, the question of reciprocity will become more important. Preferably, a decision should be postponed until after the articles have been reviewed, by which time it will be clearer whether a reciprocity clause is necessary.' ibid at 9.

[34] According to Denza (n 1) the aim of art 47 is to obtain 'in each state party a uniform regime'.

[35] Salmon (n 3) 141, para 380. Conflicts of values may dictate a State's decision to set aside a foreign 'personal status' (by applying *'ordre public international'*), for instance in cases of polygamy and repudiation.

[36] ibid 382: 'Dans une période de rapide évolution des mœurs la situation de concubine, d'époux de fait ou de "compagnon" ne peut plus être ignorée.'

[37] Art 47(2)(b) admits States' extension to each other of a treatment more favourable than what is required under the VCDR. Examples of discretion concern size of mission (art 11); arts 15, 17, 33(4), 41(3). Terms such as 'normally', 'reasonably' (art 38), 'to the extent admitted by the receiving state' (art 37.4) also allow for States' discretion.

are possible. No research exists to our knowledge on the number and nature of bilateral treaties presently in force, on the subject of the diplomatic agent's family. However, national legislation is or should be available for anyone to view; should States entertaining diplomatic relations consider such relations to be in violation of the VCDR, they would be free to voice their concern and to object. Lack of protestation may therefore be considered to constitute tacit acceptance.[38] Existing practice, however limited, appears to show a conciliatory approach that reflects both an apparent general tolerance of cultural differences and an acceptance of domestic discretion on particular matters.[39]

3. The Factors Guiding the Composition and the Nature of the Mission

3.1 The spirit of the Vienna Convention

Beyond what conventional and customary law clearly require, the very nature of diplomatic relations commands cooperation and open-mindedness in the execution of the Convention.[40] In particular, privileges and immunities do not mean that the receiving State forfeits its sovereignty.[41]

The rule concerning the requirement of agreement by the receiving State to the appointment of the head of a mission does not apply to other diplomatic agents and their families.[42] According to Article 7, subject to limitations of nationality and size of the mission, 'the sending State may freely appoint the members of the staff of the mission'.[43] Article 10(1) lays down requirements for notification, but the article[44] does not give any further indications as to what the effects of notification are. It can be understood as meaning that international law dictates that any member of the family designated as such by the sending State enjoys privileges and immunities by virtue of the mere fact of notification or, to put it in legal terms, privileges and immunities take legal effect because of the notification itself. This is a theoretical presumption. In reality, notification is not sufficient, but requires compliance with the receiving State's procedural and substantive legislation—albeit

[38] This could be theoretical as practices may be 'unwritten'. See, for instance, the Holy See's practice of a six-week approval time from date of application. In the case of a homosexual candidate for the post of French Ambassador to the Holy See, approval was put on hold for nine months, until France dropped its bid: Harriet Sherwood and Kim Willsher, 'France Drops Bid to Appoint Gay Vatican Ambassador, Reports Say' *The Guardian* (London, 12 October 2015).

[39] See below, section 3.2.

[40] Salmon (n 3) 141, para 216.

[41] The *Vitianu* case explains very clearly why the diplomatic agent's rights cannot come into existence without the approval, will, and participation of the receiving State. The decision also expands on the various forms that that approval can take: *Vitianu Case* Tribunal Fédéral (Switzerland) 24 June 1949, ASDI 1950, 146; ADILC, 1949, no 281; Salmon (n 3) para 234.

[42] Refusal of '*agrément*' of the Head of the mission, in practice, may depend on the personality of the members of family, Salmon (n 3) 144, para 223.

[43] Similar to art 4 of the 1957 draft articles, *ILC Yearbook* 1957 vol II, 133.

[44] Brown (n 5) 56–58.

in accordance with the VCDR—in terms of the content of the notification. The question of whether that legislation is in compliance with international law and whether, if not, it can be contested, is not to be dismissed as irrelevant; however, the fact is that anyone who claims the status of member of the mission and in particular the benefits of privileges and immunities, must prove that he/she is entitled to receive them.[45] There is no automatic entitlement. The reality is therefore that the receiving State enjoys a considerable margin of discretion in deciding who should qualify, who does qualify—and who does not.

In theory, Article 9(1) offers a safeguard against unwanted agents.[46] However, it does appear from scant practice that members of the family have, at least, the right to enter the territory of the receiving State[47] and are therefore not subject to immigration controls, though they are not exempted from ordinary visa requirements.[48] There may be evidence of a trend for receiving States to try and obtain as much information as possible about incoming diplomatic agents whose name is notified to them.[49]

Article 11 could add an indirect form of limitation by allowing the receiving state to impose a ceiling. It could theoretically be invoked to ask for a reduction of family members, for instance in the case of multiple spouses and children, though no specific practice appears to exist on this matter.[50] Whatever the actual use of the above dispositions, in practice the sending State names those who will compose the mission, but the host State retains a measure of *'droit de regard'* as to how the mission will be composed.

3.2 Domestic legislation

The concept of family[51] varies from State to State[52] and therefore both the host and the sending States' legislation is relevant for the purpose of Article 37(1): the sending State will determine the personal legal status of the family member within that State[53] but the law of the receiving State may not consider that determination as being in line with principles of domestic family law. Article 37(1) could be considered in some respects as containing a reference to the two systems of law, leaving the choice of law to the receiving States, albeit within the framework of international conventional law. This view is supported by the legislation of many

[45] Salmon (n 3) 165, para 263. [46] ibid 481, para 626.
[47] See however VCDR art 39(1). [48] Salmon (n 3) 385, para 510.
[49] ibid 164, para 262. See Netherlands' Protocol Guide for Diplomatic Missions and Consular Posts, 2.2 <http://www.diplomatmagazine.nl/wp-content/uploads/protocol-guide-for-diplomatic-missions-and-consular-posts-january-2013.pdf> accessed 15 May 2016.
[50] Salmon (n 3) 156, para 248. [51] Brown (n 5) 63.
[52] For UK practice, Denza (n 1) 320–21.
[53] As Salmon (n 3) 380 states, '[L]e concept de famille peut lui-même varier dans le même système de droit (légitime, naturelle, adoption, alliance, etc.)'. The status itself will depend upon questions of nationality and domicile. There is no conventional law on personal status. For example, France makes wide use of foreign law while the US applies its own law.

States where immunities in general and diplomatic immunities in particular are part of their 'private international law' legislation.[54]

An unresolved question is whether the host State violates international law by objecting to specific members of the family joining the 'household', the more so as the decision does not need to be explained[55] and no judicial practice appears to exist on this matter.

3.2.1 Questions of procedure

An examination of available State legislation reveals that the procedures for certifying individuals as diplomatic agents[56] differ from State to State but that such procedures are strictly regulated in precisely laid out legislative documents. As is the case in the US with certificates delivered by the State Department,[57] certification can be determinant in terms of proving the status of a diplomat, in a way that is binding on domestic courts. In France, Belgium, Switzerland, and many other countries, an individual whose name is notified to the '*service du protocole*' is provided with a personal identity card (or '*carte de légitimation*') that allows the precise regime of privileges and immunities enjoyed by the cardholder to be identified. There is no open 'register' of the domestic practice of States but it is assumed that relevant information is made available upon request by the foreign offices of the States concerned.

3.2.2 The substantive practice of States

According to the principle of the certainty—and transparency—of the law, States should make their own legislation on the meaning of 'family' for the purpose of the VCDR, openly available for anyone to consult.[58] Often this is not the case though, as with questions of certification, it is likely that such information will be made available upon request.

While guidelines on the diplomatic protocols of many western States are available on the internet, this rarely applies to non-western States, in which case careful research of domestic law is necessary. Examples from domestic legislation offer a

[54] Eg Code de DIP Tunisien, art 19. Léna Gannagé 'Les méthodes du droit international privé à l'épreuve des conflits de cultures' (2013) 357 Recueil des Cours 223; Sami Aldeeb and Andrea Bonomi (eds), *Le droit musulman de la famille et des successions à l'épreuve des ordres juridiques occidentaux* (Schulthess, Zurich 1999); Elisa Giunchi, *Muslim Family Law in Western Courts* (Routledge, London 2014).

[55] VCDR art 9(1). [56] Salmon (n 3) 168, para 266.

[57] US Dept of State, Diplomatic and Consular Immunity, Guidance for Law Enforcement and Judicial Authorities, (rev July 2011) <http://www.state.gov/documents/organization/150546.pdf> accessed 16 May 2016.

[58] The creation of a 'universal diplomatic guidance' register would help in terms of drawing up a comprehensive picture of present domestic legislation, allowing a clear account to emerge of how States interpret VCDR art 37(1).

diverse view of the more or less liberal interpretation given by States to the concept of 'family' with a variety of attitudes that are a clear reflection of cultural diversity.

In Belgium,[59] diplomatic agents and members of their family must be registered with the '*Direction du Protocole*', as each member of the mission is required to carry an identity document. In terms of current practice, family members constitute the spouse, the 'legal' partner (according to conditions specified in a '*circulaire*') and children who are entirely under the charge of the member that is entitled to the benefits and who are part of the household.[60] For the purpose of obtaining a '*permis de séjour*' in Belgium, parents and parents in law are not considered to be members of the household or members of the mission enjoying privileges and cannot, therefore, obtain a special identity card from the Protocol directorate. Failure to comply with regulations on registration upon arrival and departure can affect future requests.[61]

Switzerland's conditions are particularly liberal in respect of cohabitation and same sex partners and of children, whether children of a 'spouse' or of a cohabiting partner.[62]

Turkey's position is clearly spelled out in a 'Guide to Diplomatic Missions in Turkey', available on the web.[63] It stipulates that '[o]n the basis of reciprocity children between 18–25 years of age and studying in Turkey and; [sic] the parents and parents in law of the [sic] all type of card bearers can obtain 4th category ID card – Blue Foreign Mission Card – which provides the bearer no privileges and immunities other than residence permit exemption.' It accepts ' "unmarried partners (not the same sex), however legally recognized by the regulations of the sending state", upon the notification of the Mission by a verbal Note […]'.[64]

More examples of national legislation can be found on the web.[65]

[59] Royaume de Belgique, Ministère des Affaires Etrangères, Direction du Protocole, Note circulaire: Procédure administrative en vue de l'accréditation des membres du personnel diplomatique et du personnel administratif et technique des missions diplomatiques en Belgique ainsi que des membres de leur famille (10 Juin 2012), 1.13 <http://diplomatie.belgium.be/en/services/Protocol/circular_notes/diplomatic_missions> accessed 16 May 2016; see at the same site also Circular Note: The privileged status of the spouses and unmarried legal partners of the staff members of diplomatic missions (16 May 2008): 'In Belgium, the term "spouses" is used to describe two people forming a couple under the institution of civil marriage. In Belgium, civil marriage may take place between people of the opposite sex and between people of the same sex. Polygamous marriage is considered to be contrary to public policy and morality and is therefore not accepted as legal marriage in Belgium.'

[60] For a comprehensive updated view of Belgian practice, Berthold F Theeuwes (ed), *Diplomatic Law in Belgium* (Maklu, Antwerpen 2014).

[61] Circulaire Administrative (n 59), para 1.13.

[62] Switzerland, Federal Department of Foreign Affairs, 'Persons Admitted as Members of the Family Group (last update December 2012)' <https://www.eda.admin.ch/eda/en/fdfa/fdfa/organisation-fdfa/state-secretariat/protocol/manual-for-embassies-and-consulates/members-family/persons-admitted-members-family-group.html> accessed 16 May 2016.

[63] Republic of Turkey, Ministry of Foreign Affairs, 'Guide to Diplomatic Missions in Turkey' <http://www.mfa.gov.tr/data/Guide-to-Diplomatic-Missions-in-Turkey.pdf> accessed 16 May 2016.

[64] ibid 11, 2.2.1.

[65] United States, Department of State, 'Diplomatic and Consular Immunity – Guidance for Law Enforcement and Judicial Authorities' (revised 2015) <http://www.state.gov/documents/organization/150546.pdf> accessed 16 May 2016; Thailand, Department of Protocol, 'Guidance on Protocol Practice' (2014) <http://www.mfa.go.th/main/contents/images/text_editor/files/140103165905_140103160010_Guidelines%20on%20Protocol.pdf> accessed 15 May 2016; France, Ministère des

As far as judicial practice is concerned, citation of isolated judicial decisions on issues that are unregulated either by the Convention or by bilateral agreements, may be relevant to the national jurisdiction from where the decision emanates, but unless replicated in other jurisdictions they only demonstrate and reinforce States' discretionary competence on a number of cognate situations.[66]

3.2.3 Same-sex partners

This is a constantly evolving issue, but one which, in the specific field of diplomatic relations, on the whole does not reach the courts and the public sphere in general.[67] A Canadian article on the subject clearly and comprehensively sums up the level of discreet acceptance that generally applies in practice.[68] If more research were available it would probably offer an interesting insight into an increasing, though still modest recognition of diversity around the world, echoing slow domestic legislative changes in respect of same-sex partnerships and in some cases marriage. French rules of private international law show how complex the question of recognition is for national courts faced with international same-sex unions, when the union is celebrated abroad according to domestic criteria.[69]

The Turkish 'Guide' contains a disposition of rare clarity on this particular subject: 'As the Turkish laws do not allow; [sic] a same-sex partner cannot be accepted as a family member of a diplomat and therefore no ID card could be issued. They can however apply for a residence permit to the relevant Turkish authorities (without the intermediary of the Ministry) as a regular foreigner. The Ministry kindly reminds the Missions not to present same sex partners as private servants.'[70]

Affaires Etrangères et de la Coopération Internationale, Protocole (Guide), *mis à jour* 2012 <http://www.diplomatie.gouv.fr/fr/le-ministere-et-son-reseau/protocole/> accessed 16 May 2016; The Netherlands, n 49 above; Israel, Being a Diplomat in Israel <mfa.gov.il> accessed 18 May 2016; Spain, Ministerio de Asuntios Exteriores y de Cooperacion, 'Practical Guide for the Diplomatic Corps accredited in Spain' (Madrid 2010) <http://www.exteriores.gob.es/Portal/es/ServiciosAlCiudadano/SiViajasAlExtranjero/Documents/guia_practica_ingles_2010.pdf> accessed 16 May 2010. For more instances of State practice on the topic, see Wilson (n 5) 1279 et seq (pre-convention); Brown (n 5) 63 et seq; Yavuz (n 21) 176–78.

[66] Eg does the spouse who does not live within the 'household' still enjoy immunity and privileges? When should a distant relative be considered as part of the 'family'? What about the age of children? See Salmon (n 3) 381–82, para 606.

[67] See, however, n 38 above; or the instance of the US Ambassador to Australia, *Huffington Post*, Huffpost Queer Voices (13 August 2013) <http://www.huffingtonpost.com/2013/08/13/john-berry-australia-amba_n_3745668.html> accessed 16 May 2013; and the instance concerning US Ambassadors to Spain and Denmark, Sunnivie Brydum, 'Obama Nominates Two More Openly Gay Ambassadors' *Advocate* (14 June 2013) <http://www.advocate.com/politics/2013/06/14/obama-nominates-two-more-openly-gay-ambassadors> accessed 16 May 2016. On UK and US practice see Denza (n 1) 321 and 323.

[68] Sneh Duggal, 'Same Sex Diplomats Point to Progress' *Embassy News* (Ottawa, 22 January 2014) <http://www.embassynews.ca/news/2014/01/21/same-sex-diplomats-point-to-progress/45056?page_requested=1> accessed 16 May 2016.

[69] Hélène Péroz, 'La loi applicable aux partenaires enregistrés' (2010) 137 Journal du droit international *(Clunet)* 399.

[70] Republic of Turkey (n 63) para 2.2.1.

3.2.4 Polygamy in its various forms

Polygamy[71] is increasingly being considered illegal in many countries. This is the case in Canada, for instance, where a Research Report of the Department of Justice concludes that 'polygamy violates women's rights to be free from all forms of discrimination' and therefore violates several treaties.[72] The Tunisian '*Code de Statut personnel*' already prohibited polygamy by 1956.[73] France's general stance on polygamy is complex and depends upon specific circumstances; for diplomatic purposes, the concept of 'family' does not include a polygamous couple, a solution similar to that of Belgium.[74] The UK 'does not accept more than one wife of a polygamous married diplomat'.[75]

4. Questions of Nationality

Members of the family enjoy the privileges and immunities specified in Articles 29 to 36 if they are not nationals[76] of the receiving State.

According to preparatory works, some States were concerned that granting a concession of privileges and immunities to nationals of the receiving State would stir resentment against discriminatory treatment.[77] On the other hand, Belgium commented on possible dangers of not granting immunity to a spouse because her nationality differs from that of the sending State's, a question also raised by The Netherlands in relation to Draft Article 30.[78] The VCDR solution is that,

[71] Yadh Ben Achour, *Le rôle des civilisations dans le système international – Droit et relations internationales* (Bruylant, Brussels 2003) 290 para 249.

[72] Department of Justice, Canada, 'Polygamy and Canada's Obligations under International Human Rights Law' Research Report (September 2006) <http://www.justice.gc.ca/eng/rp-pr/other-autre/poly/chap8.html> accessed 16 May 2016; Brown (n 5) 64, quotes evidence of one instance when Australia has given effect to a polygamous marriage.

[73] <http://www.e-justice.tn/fileadmin/fichiers_site_francais/codes_juridiques/Statut_personel_Fr.pdf> accessed 15 May 2016; however, polygamy is still allowed in most Muslim countries: Maurice Borrmans, 'Le nouveau Code algérien de la famille dans l'ensemble des codes musulmans de statut personnel, principalement dans les pays arabes' (1986) 38 Revue Internationale de droit comparé 133.

[74] Belgium (n 59).

[75] O'Keefe (n 2) 346; Denza (n 1) 321 on UK practice and 323 on US practice; Salmon (n 3), 385, para 512.

[76] O'Keefe (n 2) 340–43.

[77] Conference Records Vol I (n 19 above), 205 para 59 (Iranian delegate); 196, para 46 (Japanese delegate).

[78] Observations of Governments (n 14 above): According to Belgium 'There would appear to be some danger in this restriction, e.g. the possibility that the wife of the head of a mission or of a diplomatic agent might be liable to criminal proceedings. It seems advisable to stipulate that, at any rate, the wife of the head of a mission shall enjoy diplomatic immunity even if she is a national of the receiving State. The Rapporteur thinks that this question is not without importance. Pressure may be brought to bear on a diplomatic agent if his wife is subject to the jurisdiction of the receiving State. On the other hand, such cases are surely rather rare and, at all events, the situation can very easily be prevented from arising.' (76). The Netherlands suggested an amendment to the effect that, if the member of the family was a national of both the sending and the receiving State, he should enjoy the same benefits as if he were a national of the sending State only. ibid 80.

in the absence of special agreements,[79] members of the diplomatic agent's family holding the nationality of the receiving State do not enjoy the privileges and immunities specified in Articles 29 to 36 and are therefore treated in the same way as all other nationals. Privileges and immunities, however, should not be denied to family members who are foreign nationals and who are permanent residents of the receiving State.[80]

Concerns also emerged in relation to the nationality of children born in a receiving State where *jus soli* was the applicable law,[81] though it was held that the question was one of private international law rather than diplomatic law.[82] No relevant disposition was included in the VCDR, but a special Protocol on the subject was opened for signature on 18 April 1961.[83]

5. Gainful Occupation

No disposition within the VCDR similar to Article 42 in respect of diplomatic agents, bars members of their family from exercising professional or commercial activities in the receiving State, but without the benefit of immunity.[84] There is, however, evidence[85] of a reticence among States to allow members of the family to work, in the absence of conventional agreements, particularly in the case of non-European missions.[86]

[79] See State practice cited in Salmon (n 3) 384.

[80] Salmon (n 3) 384, para 508. 'Permanent residence' is relevant in other situations, eg VCDR art 38.

[81] Conference Records Vol I (n 19 above) 202, para 3, on art 35 (deleted): 'Mr. de Erice y O'Shea (Spain), introducing the working group's redrafting of article 35, said that the problem of the nationality of the children of diplomatic agents born in the territory of the receiving State was an extremely complex one, which causes serious difficulties for many countries.'

[82] ibid para 9: according to Mr Ponce Miranda (Ecuador) '[…] Nationality legislation involved matters of public policy (*ordre public*) in which the foreign law was always set aside. The attempt to make the foreign law prevail over the territorial law of the country concerned was particularly unfortunate because in many States, including Ecuador, nationality was regulated by the Constitution itself.' See also, within the same contribution, paragraph 11, another passage where strong concerns for domestic law are being addressed. Acquisition of nationality by marriage was also mentioned: see Mr Monaco (Italy), ibid para 13.

[83] Optional Protocol Concerning Acquisition of Nationality (18 April 1961) <http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961_nationality.pdf> accessed 16 May 2016.

[84] Brown (n 5) 63; Denza (n 1) 324–27 with examples of practice.

[85] Spain, Practical Guide (n 65), 21, 2.2.8.

[86] See COE Recommendation 'R (87) 2', regarding a model of agreement allowing members of a family the exercise of a gainful occupation, adopted by Committee of Ministers on 12 February1987 and Explanatory Memorandum, <http://www.coe.int/t/dlapil/cahdi/Source/Adopted_texts/Recommendation_87_2_EN.pdf> accessed 16 May 2016. Additional privileges and immunities may be contained in bilateral agreements, most of which are styled as consular agreements, but other agreements, such as Treaties on Friendship, Commerce, and Navigation may contain provisions that pertain to the immunities of consular and diplomatic personnel and to the embassy and consular offices.

6. Disquiet with Immunities and Suggested Solutions

A vast body of literature is dedicated to abuses of immunities and to proposed solutions.[87] However, there is no evidence that the family is more likely to abuse their immunities than the agent himself or herself. If anything, a case could be made for a reinforced protection of the family's interests. If one of the rationales for granting immunity to family members is based on humanitarian considerations,[88] granting absolute diplomatic immunity to abuses of the rights of spouses and children would seem incongruous. It may then be that some mechanisms should be devised by which the protection of such family members may be guaranteed as a remedy for lack of jurisdiction.[89]

On the wider issue which could obviously also affect the diplomatic agent's family, it may be that practice should develop in the sense of a progressive distinction between criminal activities that are a threat to the interests of the host State (in the sense of jurisdiction based on the protection principle) and crimes that only affect individual interests. Ultimately, it may become a question of proportionality between the interests of maintaining good foreign relations and that of preserving State security.

Conclusion

The lack of precision in defining the two key notions of 'family' and 'household' in the VCDR has meant that States have retained a large margin of discretion in the interpretation of both terms, to be exercised within the context of a long history of customary practice. Nothing in the preparatory works contradicts this statement. States have used their discretion reasonably, within the spirit of the Convention, in codifying their own views of how both terms should be interpreted within their own domestic legal systems.

Faced with situations requiring interpretation of Article 37(1), legal officials should refer to bilateral treaties, where such treaties exist, the preparatory works of

[87] In general: J Craig Barker, *The Abuse of Diplomatic Privileges and Immunities* (Ashgate, Aldershot 1996). For the particular case of the US, see Terry A O'Neill, 'A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978' (Comment) (1980) 54 Tul L Rev 661, 665; R Scott Garley, 'Compensation for "Victims" of Diplomatic Immunity in the United States: A Claims Fund Proposal' (1980) 4 Fordham Int'l LJ 135; Mitchell S Ross, 'Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities' (1989) 4 Am U J Int'l L & Pol'y 173.

[88] See Brown (n 5) 15.

[89] Most common claims concern divorce, alimony, child custody, child support, and paternity: on family courts dealing with these issues and on the failure of the United Nations wage garnishment program of 1999 see Amanda M Castro, 'Abuse of Diplomatic Immunity in Family Courts: There's Nothing Diplomatic About Domestic Immunity' (2014) XLVII Suffolk Univ LR 353, 362 et seq.

the VCDR, general rules of treaty interpretation including the principle of good faith,[90] customary law, general principles of law,[91] domestic legislation, and judicial and non-judicial practice.[92] Resort to considerations of '*ratio legis*' may help: the main one may be that pressure could be exercised on the family, which would impair the mission of the diplomatic agent.[93] Other theories have, however, been put forward, such as international courtesy or exercise of common humanity.[94]

Beyond the narrow field of diplomatic law, an overview of State practice such as it emerges—primarily from domestic legislation—shows that States have now reached a certain level of international stability in terms of what they mean by the term 'family'. However diverse and at times conservative, such State practice shows restraint and recognition of each others' differences: there are few, if any examples of open conflicts as to what the term 'family' means and few, if any, contestations of each other's legislative dispositions. Whatever the cultures of individual States, there is evidence of mutual understanding and of restraint with regard to extending or imposing domestic rules. It is unlikely that what may presently be interpreted as discriminatory practices—for instance in relation to same sex partners—will be phased out by legal instruments rather than through progressive changes in cultural attitudes.

Finally, there is, in general, no indication that Article 37(1) requires to be modified. It may, however, become necessary to introduce some parallel mechanisms to provide the family itself with remedies for family related claims that cannot at present be responded to.

However, our initial intention of trying to ascertain the meaning of Article 37(1) by looking at practice, has been partly defeated by a frustrating difficulty in gathering judicial practice[95] and in obtaining 'guides' or legislative documents relative to privileges and immunities granted by various States to their beneficiaries. Such documents are probably available on request, but not easy to find on the web or in

[90] Vienna Convention on the Law of Treaties (adopted 23 May 1969; entry into force 27 January 1980) 1155 UNTS 331, arts 31, 32, 33.

[91] Statute of the International Court of Justice (adopted 26 June 1945, entry into force 24 October 1945) art 38(c).

[92] ibid art 38(d); Brown (n 5) 63ff.

[93] See Sir G Fitzmaurice's comment that: 'Lastly, unless the members of a diplomatic agent's family enjoyed immunity, pressure could be brought to bear on the diplomatic agent through his family.' *ILC Yearbook* 1958 vol I, 162. See also Foreign Affairs Committee (UK), 'The Abuse of Diplomatic Immunities and Privileges' HC Paper 127 (1984–85) Minutes of Evidence, Appendix 4.

[94] According to Wilson (n 5) 1282, the then Soviet view favoured motives of courtesy while US relied on humanitarian considerations. However, in *Skeen v Fed Rep Of Brazil*, 566 F. Supp. 1414 (1983),121 ILR 482, Columbia, US, District Court dismissed the plaintiff's argument that a family member is an employee or agent of the foreign government, indicating instead that 'there is a strong argument that extension of diplomatic immunity to family members is a courtesy accorded to the diplomat rather than a recognition of any official status of the family members themselves' (F. Supp 1416–17).

[95] Castro (n 89), 362, n 72 states some of the reasons behind underreporting and misreporting in the US: William G Morris, 'Constitutional Solutions to the Problem of Abuse of Diplomatic Crime and Immunity' (2007–2008) 36 Hofstra L Rev 601, 608–11.

libraries. It would help if such guides or legislative documents were made available under a uniform heading and widely distributed in English. In particular, it would be useful if some observatory of diplomatic practice were to become the universal depository of such guides and legislative practice in order to allow research of this type to be carried out as rigorously as one would wish.

8

The Inviolability of Diplomatic Agents in the Context of Employment

Lisa Rodgers

1. Introduction

The VCDR sets up a series of immunities for diplomats against criminal, civil, and administrative jurisdiction. Jurisdiction in relation to employment claims is not specifically mentioned. The exclusion of provisions relating to the employment claims of diplomatic staff as against their employers is understandable: these claims are dealt with (more or less successfully) by international Conventions and domestic statutes on State immunity. The exclusion of any mention of employment jurisdiction in relation to the employees of diplomatic agents is more problematic. Potentially, the diplomatic immunity entrenched in the VCDR covering criminal, civil, and administrative jurisdiction represents an absolute barrier to those claims, unless the (private servant) employee can prove that he/she falls within the 'commercial' exception in Article 31(c). This article provides that there is no immunity for 'an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions'.

Personal servants wishing to challenge diplomatic immunity in this way face a very great number of hurdles. First, there are a set of jurisdictional hurdles which vary according to the status accorded to the VCDR in domestic law. The translation of the VCDR into domestic law is not uniform. Where immunity is recognized, some States have directly incorporated the VCDR into domestic law, whilst others have sought to recognize the provisions of the VCDR through the codification of customary international law on immunity. Second, there is often political interference in claims relating to diplomatic immunity, exemplified by the ability of the Secretary of State in the UK (in a Foreign and Commonwealth Office Certificate (FCO)) to determine which person is entitled to immunity. Thirdly, it is by no means certain that a personal servant will be able to satisfy the relevant definitions in the VCDR. For example, personal servants have struggled to show both that their work was a 'commercial activity' under Article 31(c) VCDR, or that their actions were outside of a diplomatic agent's official functions. Finally, where a 'balancing exercise' has been undertaken between diplomatic immunity

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and individual rights (and some courts have refused to contemplate this balancing exercise at all), there have been few instances where the courts have accepted diplomatic immunity as a disproportionate or illegitimate action.

The aim of this chapter is to investigate the VCDR in the context of the case law on diplomatic immunity and the employment rights of personal servants. It will start with an investigation of the flexibilities within the VCDR for bringing employment claims against diplomatic staff, and how these flexibilities have been interpreted at national level. Next there will be an examination of the interaction between the VCDR and other international norms in theoretical terms. The chapter will then proceed to consider how that interaction has so far worked itself out in practice, and the particular challenges raised against diplomatic immunity as a breach of due process norms. The chapter will then consider the potential of denying diplomatic immunity on the grounds of a breach of human rights arising in the context of employment (for example, through forced labour or slavery). Here there will be an analysis of the recent case law on State immunity *ratione materiae* as far as it extends to protect diplomatic staff. The suggestion in this case law is that there may be personal liability for diplomatic staff involved in the most heinous breaches of *jus cogens* norms. Although that jurisdiction currently only extends to a breach of criminal law, the potential of the decisions in this area to present a way forward for civil breaches by diplomatic staff in the employment context will be examined.

2. The Flexibilities within the VCDR and Employment Claims

The most obvious challenge to diplomatic immunity has operated within the bounds of the 'commercial' exception to immunity provided in Article 31(c) VCDR. This provides that a diplomat is not immune from prosecution for commercial activities outside a diplomat's official functions. Domestic workers employed by diplomatic staff have attempted to show both that the domestic work relationship is 'commercial' and also that the act of employment of a domestic private servant is outside the official functions of the diplomat, in order to persuade the judiciary that their employment claims should proceed. This section will first consider the arguments pertaining to the 'commercial' nature of the work relationship between a private servant and their domestic employers and will then consider whether that relationship is outside the diplomatic official functions.

There is no definition under Article 31(c) to enable courts to decide whether the employment of personal servants would be a commercial relationship or not. The negotiation history of the VCDR reveals that there was no consensus amongst the drafting parties on this matter. The Report of the ILC on Diplomatic Intercourse and Immunities mentioned that commercial activity should be a 'continuous act' rather than a single act of commerce, but provided no further definition.[1] Similarly,

[1] Report of the International Law Commission to the General Assembly: Diplomatic Intercourse and Immunities, Summary of Observations Received from Governments and Conclusions of the

at the UN Conference on Diplomatic Intercourse and Immunities there was some discussion of the nature of a commercial activity and whether that would include investing in a company or not, but no definitive conclusion was reached.[2] As a result, national courts have been left to interpret the nature of 'commercial activity' for the purpose of diplomatic immunity. This interpretation has tended to be narrow, and to block the employment claims of domestic workers. A telling example of this approach is provided in the US case of *Talbion v Mufti*.[3] In this case a Filipina domestic worker made a number of employment claims against the First Secretary of the Jordanian Embassy based in Washington. Her claims were blocked by the court on the grounds of diplomatic immunity. The court held that 'commercial activity' in the Article 31(1) exception, 'does not encompass contractual relationships for goods and services incidental to the daily life of the diplomat and family in the receiving State'.[4] It 'relates only to trade or business activity engaged in for personal profit'.[5]

It may be argued that such a narrow reading of the definition of commercial activity in the VCDR in the context of employment claims is unjustified. There are a number of reasons that have been put forward to support this argument.[6] First, in the negotiation history for the VCDR, the stated purpose of the commercial activity exception was to ensure that aggrieved (private) parties should be able to obtain a remedy where a diplomat has violated the law.[7] A 'purposive' approach would therefore involve a reading of the VCDR which leant towards compensation for victims rather than protection of diplomatic immunity (as long as the activity did not interfere with a diplomat's official functions). Second, the activity of domestic workers is, as a matter of fact, considered 'commercial' in other legal settings (for tax purposes for example). Indeed, the sheer scale of the domestic workers industry and the revenue that it generates means that it does not make sense to consider domestic work outside of the commercial framework. Finally, and this relates to the US context particularly, there is no justification for stating that a commercial activity should only include activity 'for personal profit'. This is contrary to the plain language of the VCDR. In any event, there is an argument that an exploitative diplomatic employer does gain 'personal profit' from the employment of domestic workers. For example, financial gains result from the refusal of exploitative diplomatic employers to grant minimum pay and minimum employment standards. For all of these reasons, it may be argued that a wide reading of the provisions of the meaning of commercial activity should be

Special Rapporteur (2 May 1958) UN Doc A/CN 4/116, 56 <http://legal.un.org/ilc/documentation/english/a_cn4_116.pdf> accessed 10 May 2017.

[2] 'Summary Records of Plenary Meetings and of Meetings of the Committee as a Whole' UN Conference on Diplomatic Intercourse and Immunities (2 March–14 April 1961) UN Doc A/CONF 20/14, 21.

[3] 73 F 3d 535 (4th Cir 1996). [4] ibid 538. [5] ibid 537.

[6] Amy Tai, 'Unlocking the Doors to Justice: Protecting the Rights and Remedies of Domestic Workers in the Face of Diplomatic Immunity' (2007–08) 16 Journal of Gender, Social Policy and the Law 175, 192.

[7] Report of the Commission (n 1) 56.

permitted, to allow a greater number of personal servants to be able to bring their employment claims.

The second element of the 'commercial' exception to diplomatic immunity requires that the employment of personal servants must be outside the 'official functions' of the diplomat. Article 3(1) VCDR provides a list of general functions of a diplomatic mission, including 'representing the sending State in the receiving State', and 'protecting the receiving State in the interests of the sending State'. Diplomatic employers have sought to argue that the functions in Article 3 should be broadly interpreted and that they should include those activities which are incidental to diplomatic purposes. This line of argument was pursued in the *Talbion* judgment (referred to above). In this case the court held that domestic services provided to diplomats were 'not meant to be treated as outside a diplomat's official functions'. The court found that services such as 'dry cleaning' and 'domestic help' were 'incidental to daily life' for a diplomat and therefore part of the scope of a diplomat's immunity.[8]

More recently however, (some) courts have sought to distinguish the *Talbion* judgment on the basis that these comments were *obiter* and were not justified by supporting argument.[9] Indeed, in a number of jurisdictions there has been an increased willingness to consider that the employment of personal servants is outside a diplomat's official functions. In the US case of *Park v Shin*,[10] the court considered that although the actions of Shin's private servant enabled Shin to spend more time on consular functions, those functions only benefitted the consular mission indirectly and were therefore not official functions. Of course, this was a judgment on the provisions of the VCCR, under which consular staff are arguably given fewer privileges than diplomatic staff under the VCDR. That said, the structure of the employment relationship between domestic servants and consular staff is very similar to the structure of the employment relationship between domestic servants and diplomatic staff. From the point of view of justice for domestic servants, there is no reason why the two situations should be treated differently.[11] In the UK jurisdiction, the *Talbion* judgment has likewise been distinguished. In *Wokuri v Kassam*,[12] the court referred to the decision in *Talbion* that domestic services were private acts which were outside official functions. However, the court argued that the concern in *Talbion* was the meaning of 'commercial activity' in Article 31(1)(c) VCDR rather than the definition of official functions for the purposes of that Article.[13] In the *Wokuri* case, the court was unable to find that the domestic worker's claims arose out of acts performed in the exercise of her employer's functions as a member of a diplomatic mission.

Although this willingness to view the work of domestic servants as outside official functions has been helpful to some domestic servants, the problem is that it can be difficult to reconcile these decisions with the need to prove that domestic

[8] *Talbion* (n 3) 539.
[9] *Mr Jarallah Al-Malki, Mrs Al-Malki v Ms Cherrylyn Reyes, Ms Titin Suyadi* [2013] WL 5338237.
[10] 313 F 3d 1138. [11] Tai (n 6) 187. [12] [2012] EWHC 105.
[13] ibid para 26.

work is a 'commercial' function. If, as decided in *Park* or *Wokuri*, the employment of diplomatic staff is private and so outside official functions, then it will be rather contradictory to argue that the nature of domestic work is not private but commercial for the purposes of Article 31(1)(c) VCDR. Indeed, this very contradiction was discussed in the case of *Al-Malki*. In the Employment Appeal Tribunal judgment in this case, the court was willing to accept that the actions of domestic workers may be outside the official functions of a diplomat. The court referred to the reasoning in the *Wokuri* case and also the later case of *Abusabib v Taddese*.[14] It initially approved the position in *Abusabib* that there can be a 'spectrum' of activities performed by employees of diplomatic staff, some of which may be closely related or ancillary to diplomatic functions (as defined in Article 3(1) VCDR) and some of which may not. On that scale, the employment of a domestic worker, 'who performed no task outside the diplomat's home, had such little connection with the functions of the diplomat's mission that it would fall at the end of the spectrum which was outside the proper scope of official functions'.[15] However, the court was unwilling to find that the employment of a domestic worker was a 'commercial activity'. The court stated that the pursuit of a profession or a commercial activity with a view of profit was an action with a purely 'private interest'. Furthermore, it was unable to find that the employment of a personal servant was purely private and referred to the fact that the actions of the domestic servant were incidental to official functions.[16] As a result, 'a plea of diplomatic immunity would be bound to be given effect'.[17]

Indeed, the whole discussion of the 'spectrum' of activities performed by employees of diplomatic staff was abandoned when the case reached the Court of Appeal. The focus was on the intention of the drafters of the Convention when designing the Article 31(1)(c) exception. It was argued by the Court of Appeal that the exception was to be interpreted narrowly and was not intended to cover employment for the provision of domestic services at the mission. Such employment was not an action relating to any commercial activity undertaken for the financial benefit of the diplomatic agent. It was 'still less' an action relating to an activity relating to a commercial activity outside the diplomat's official functions.[18] Again, it was stated that the employment of a domestic servant at a mission was an activity 'incidental to the daily life of the diplomatic agent', which *enabled* that agent to carry out his/her official functions. The Court argued that a broader interpretation of the commercial exception under Article 31(1)(c) to include domestic service contracts would 'frustrate the principle of reciprocity and the importance of diplomatic immunity'.[19] It would dramatically restrict the field of operation for diplomatic agents in respect of the making of any contract for the supply of goods

[14] UK/EAT/424/11. [15] ibid para 31. [16] *Al-Malki* (n 9) para 12.
[17] ibid para 22.
[18] *Mr Jarallah Al-Malki, Mrs Al-Malki v Ms Cherrylyn Reyes, Ms Titin Suyadi* [2015] EWCA Civ 32, para 19.
[19] ibid para 29.

or services. This restriction would not have been intended by the drafters of the Convention.

The employment of domestic workers by diplomatic staff has also been considered in cases concerning the operation of residual immunity under the VCDR. Residual immunity is found in Article 39(2) VCDR which provides that when a diplomatic post comes to an end, diplomatic privileges also come to an end (or at least does so at the moment the diplomat leaves the country). However, that does not apply 'in respect of acts performed by such a person in the exercise of his functions as a member of the mission'. In that instance, immunity continues to subsist. The question has therefore arisen whether diplomatic immunity subsists in relation to liability for acts related to the employment of domestic staff once diplomatic staff have left their post. This point was considered in the American case of *Swarna*.[20] In this case, it was stated that Article 39(2) applies a 'functional immunity' which applies to a former diplomat's 'official acts' but not 'private acts'.[21] In the *Swarna* case, it was stated that official acts included acts directly related to the functions of a mission in Article 3 VCDR, and to the 'employment of subordinates at the diplomatic mission'. Residual immunity did not extend to claims arising from the employment of a personal domestic servant, as that employment was 'completely peripheral to the official's diplomatic duties'. This decision was followed in *Baoanan v Baja*,[22] which concerned a number of claims by a personal servant against the permanent representative of the Philippines to the United Nations. In the *Baoanan* case, the court made it clear that liability under the residual immunity provisions under Article 39(2) should be considered separately to the provisions under Article 31(1)(c) VCDR. Even if a diplomatic agent's conduct is deemed to fall outside the commercial activity exception for the purposes of main immunity, residual immunity may still be defeated. The court found that domestic employment is not *inherently* an act performed in the exercise of diplomatic functions, nor is it *inherently* related to the functions of a diplomatic mission in Article 3 VCDR.

Swarna and *Baoanan* have been heralded as a significant step forward in the relaxation of diplomatic immunity provisions. There are now situations in which it is very likely that domestic servants will be able to claim against diplomatic staff within the scope of the VCDR. This effectively ends absolute immunity for diplomatic staff and brings this more in line with the international position of 'restrictive immunity' in relation to State and consular immunity. Domestic servants simply have to wait for the end of a diplomatic posting before filing suit.[23] In relation to residual immunity, it does appear that there is a level of international agreement that domestic servants can bring claims relating to their employment against diplomatic staff.[24] However, the structure of diplomatic immunity still

[20] *Vishranthamma Swarna v Badar Al-Awadi, Halal Muhammed Al-Shaitan, and State of Kuwait* 607 F. Supp. 2d 509 (SDNY 2009).

[21] ibid 519. [22] 627 F. Supp. 2 d 155 (SDNY 2009).

[23] Martina Vandenberg and Alexandra Levy, 'Human Trafficking and Diplomatic Immunity: Impunity No More' (2012) 7 Intercultural Human Rights Law Review 77, 91.

[24] For examples see the decisions in *Wokuri* (n 12) and *Abusabib* (n 14), which both cite the *Swarna* case.

leaves the majority of domestic workers employed by diplomatic staff without recourse to justice. As a result, claims by diplomatic staff have been attempted on the basis that, even where (main) diplomatic immunity applies, that immunity should be set aside as a result of a breach of international norms which stand above immunity either as a matter of substance (*jus cogens* norms) or procedure (the right to a fair trial). Section 3 will consider the theoretical basis of this challenge, whilst section 4 will consider the practical attempts to challenge diplomatic immunity on a procedural norm basis. Section 5 will analyse the potential of the challenge to diplomatic immunity on the basis of *jus cogens* norms.

3. The Interaction of Diplomatic Immunity and Other International Norms

The interaction between diplomatic immunity and other international and or procedural norms is extremely complex, both theoretically and practically. The theoretical complexities of this interaction will be considered in this section; sections 4 and 5 will consider the practical questions surrounding the interpretation of that theory. In theoretical terms, it falls first to decide the normative hierarchy or relationship between diplomatic immunity and other norms of international law. This is very difficult to determine because it depends to a certain extent on how the aims of diplomatic immunity generally and the VCDR more specifically are viewed. On the one hand, diplomatic immunity may be viewed as stemming from the wider concept of State immunity (representative theory). This tends towards a more restrictive approach to the immunity doctrine. On the other hand, diplomatic immunity may be seen as functionally necessary and so requiring an absolute procedural bar to other claims (at any level). Second, the relationship between diplomatic immunity and other international norms is constantly evolving. For example, in the context of the interaction between diplomatic immunity and human rights, there have been significant developments at the international level which directly impact on the immunity question. At international level, there has been an increased willingness to hold to account perpetrators of serious human rights violations, which arguably changes the viability of international law which provides absolute (criminal and civil) immunity for diplomatic staff.[25]

The interaction of diplomatic immunity with other international norms strongly depends on the question as to which theory is considered to form the basis of diplomatic immunity.[26] The representative character theory suggests that as diplomatic immunity essentially exists to further sovereign aims, diplomatic immunity law should proceed in line with the law on State immunity. This is interesting

[25] Craig Barker, 'Negotiating the Complex Interface between State Immunity and Human Rights: An Analysis of the International Court of Justice Decision in *Germany v Italy*' (2013) 15 International Community Law Review 415, 421.

[26] On the three principal theories that have been invoked as bases for diplomatic immunity, see Chapter 1.

because recently there has been a change in the international community's stance on State immunity. There is now an increased willingness to consider State immunity restrictively rather than as an absolute procedural bar. Moreover, there is no reason under the representative theory why diplomats should have immunity outside of official acts. This is for two reasons. First, under the State immunity doctrine, States only have immunity for acts of a sovereign nature (acts *jure imperii)*.[27] There is no immunity for acts which are not sovereign because they can be carried out by private actors (acts *jure gestionis*). Second, if diplomats are direct representatives of the State, then there is arguably no justification for immunity outside those acts which are considered official by that State. There is also no real explanation under this theory why members of the diplomatic household should have immunity.[28] The argument from the second theory—that of functional necessity—may be more difficult to reconcile with restrictive notions of immunity. The functional necessity doctrine possibly leads to the argument that a State should safeguard immunity privileges absolutely as a matter of international law. There are two streams to this argument. The first stream is that of reciprocity. In the United States particularly, the government has regularly intervened to preclude domestic workers from litigating their claims on the basis that to do otherwise would put American foreign servants at risk.[29] The second stream is that of personal inviolability. The argument proceeds on the basis that diplomats have the 'right' to protection as they carry out their mission.[30] This right is a personal right akin to that afforded under human rights instruments. This argument implies a certain detachment of the law of diplomatic immunity from that of State immunity. Whilst the latter is concerned with the concept of equality between States, the former is a personal right which extends well beyond that granted to a State.[31]

The argument that diplomatic immunity is a personal right is very controversial. For a start it has no real basis in international law as reflected in its instruments. The preamble to the VCDR specifically states that diplomatic immunity is 'not to benefit individuals'. Furthermore, if diplomatic immunity is considered a personal right (with the status of a human right), then this has the potential to be considered over and above other human rights norms. It can act to prevent a proper balancing exercise between diplomatic and other human rights. On the other hand, adopting the representative theory has the potential to allow a greater consideration of other competing human rights or *jus cogens* norms. The argument may proceed that diplomats are only properly representing the State when acting within the ambit of State authority. As no State has the authority to act in contravention of *jus cogens* norms as a matter of international law (*jus cogens* norms are peremptory and cannot be the subject of derogation), acts of diplomats which

[27] Craig Barker, *The Protection of Diplomatic Personnel* (Ashgate, Aldershot 2006) 82.

[28] Derrick Howard, 'Twenty-First Century Slavery: Reconciling Diplomatic Immunity and the Rule of Law in the Obama Era' (2012–13) 3 (1) Alabama Civil Rights and Civil Liberties Law Review 121, 140.

[29] Tai (n 6) 184.

[30] See the judgment of the court in *Al-Malki* (n 9).

[31] Hazel Fox, *The Law of State Immunity* (2nd edn, OUP, Oxford 2008) 75.

conflict with peremptory norms of international law are necessarily acts outside official State functions and should not be protected by immunity. These arguments will be considered in more detail in section 6.

4. The Application of Diplomatic Immunity as an Absolute Bar to Claims

In practical terms, there has been a reluctance amongst domestic courts to move beyond an 'absolute' approach to diplomatic immunity (as functional necessity) in the context of employment. There are a number of reasons for this. One sticking point is the traditional role of domestic courts in the field of international law. Whilst some courts may regard their role as extending to the application of international law where that conflicts with domestic statute, many courts remain wedded to the idea that the role of the domestic court is to apply domestic law, albeit as far as possible consistently with international rules.[32] This has led to a literal interpretation of domestic statutes to uphold diplomatic immunity. A good example is provided in the case of *Sabbithi* in the US.[33] This case concerned claims against a diplomat for breach of provisions of the Victims of Trafficking and Violence Protection Act 2000 (TVPA). The Claimants argued (*inter alia*) that their claims under the TVPA should be given precedence over diplomatic immunity as a result not only of their severity, but also because the TVPA was enacted after the VCDR. The court disagreed. It noted that the TVPA was silent on the issue of the immunity of diplomats and the insertion of a clause denying immunity in breach of the TVPA would be beyond the court's powers. Furthermore, the court was reluctant to read a statute so as to modify the United States Treaty obligations in the absence of a clear statement from Congress.[34]

The Claimants in *Sabbathi* also raised the argument that the defendant's acts of trafficking violated *jus cogens* norms of slavery and slavery-like practices which were relevant to the employment situation. The court did not specifically reject the idea that prohibition of slavery could be a *jus cogens* norm, and there is strong evidence to suggest that the prohibition is considered of the highest political, social, and legal importance. It appears in the main human rights instruments and is arguably a feature of customary international law.[35] However, the court rejected the argument that in international law there is a 'normative hierarchy' between diplomatic

[32] Barker (n 25) 420.

[33] *Sabbithi v Saleh* 605 F. Supp. 2d 122 (DDC 2009).

[34] ibid 130.

[35] Article 4 Universal Declaration of Human Rights provides that 'no one shall be held in slavery; slavery and involuntary servitude shall be prohibited', Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR). Article 4 European Convention on Human Rights echoes this. Article 4 (1) provides that 'no one shall be held in slavery or servitude', and article 4(2) states that 'No one shall be required to perform forced or compulsory labour', Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 April 1950, entered into force 3 September 1953) 213 UNTS 221 (European Convention on Human Rights, as amended) (ECHR).

immunity and *jus cogens* norms which requires *jus cogens* norms to be respected. It stated that there was 'no evidence that the international community has come to recognize a *jus cogens* exception to diplomatic immunity'.[36] The court recognized that this position could create injustice for Claimants, but reiterated the position that 'this court will not create new exceptions to the longstanding policy of diplomatic immunity' and 'any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Convention [VCDR] … shall be dismissed'.[37] This position was also followed by the UK Court of Appeal in the case of *Al-Malki*. Here the question was whether the fact that the employees had been the subject of trafficking (prohibited in international law) could act to deny the diplomatic Respondents' immunity. The Court found that it had not been established that international rules relating to trafficking took precedence over rules relating to immunity. As a result, the Respondent's diplomatic immunity in relation to the Claimant's employment claims was upheld.

There have also been other grounds upon which (employment) claims against diplomatic staff have been rejected. Some courts have rejected the notion that the nature of the offence alleged against the diplomatic agent (including whether it reaches the level of a *jus cogens* rule) is relevant to a consideration of a claim of diplomatic immunity at all. The argument proceeds on the basis that diplomatic immunity is a 'procedural' bar to claims and so cannot be balanced with any substantive rule. The operation of diplomatic immunity does not contradict any (*jus cogens*) prohibition but merely 'diverts any breach of it to a different method of settlement'.[38] However, this is not necessarily the case in relation to other 'due process' rights (such as the right to a fair trial). These kinds of rules can be engaged by the instigation of a 'procedural bar'. This position was considered in the UK case of *Al-Malki*. In *Al-Malki*, the Claimants challenged diplomatic immunity on the basis that it denied them the right to access a court under Article 6 of the European Convention on Human Rights (ECHR). On the one hand, the recognition of diplomatic immunity as a 'procedural bar' was a distinct advantage to the Claimants because the court was forced to accept that Article 6 was thereby engaged. However, that advantage was diluted by the Court's approach to the 'balancing act' required under that Article. In the *Al-Malki* case the relationship between diplomatic immunity and Article 6 was considered in relation to two factors: whether diplomatic immunity could be considered a legitimate aim and whether the restriction of access to a court on the basis of diplomatic immunity was proportionate. The Court of Appeal found that the recognition of diplomatic immunity did pursue a legitimate aim: that of 'complying with a State's international law obligations to prevent hindrance to the diplomat in performing his functions'.[39] The application of diplomatic immunity in this context was also proportionate and thereby Article 6 did not apply in this case. The court referred to the position that 'restrictions on the right of access to court which reflect generally

[36] *Sabbathi* (n 33) 129. [37] ibid 130. [38] Fox (n 31) 525.
[39] *Al-Malki* (n 18) para 68.

recognised rules of public international law' would generally be considered proportionate. Diplomatic immunity was a generally recognized rule of international law and the ECHR should therefore be interpreted so far as possible in conformity with it.[40]

It is true that this case did not provide a positive outcome for the Claimants. However, it did reveal the fact that where immunity is considered a procedural bar, it can be challenged by other procedural or due process norms (such as Article 6 ECHR). This effectively allows the relationship between immunity and due process to be an interpretive exercise.[41] It could be argued that the mere fact that diplomatic immunity is entered into the balancing exercise with other due process norms is a good starting point for a reconsideration of the absolute nature of diplomatic immunity. Indeed, in other areas, the absolute nature of immunity is already being eroded to a certain extent. One area of note is that of State immunity. In this area Claimants have been successful in claiming that immunity denies Article 6 rights. The potential of this area of law to cross-fertilize into diplomatic immunity will be considered in the next section. In particular there will be a discussion of developments in the area of State immunity *ratione materiae*. It is argued that developments in this area may feed into changes to the content of the VCDR, because the subject matter of the claims is similar: the liability of individual State agents in violating international norms and domestic regulations. It is argued that if the law is amended in this area, it makes sense from the point of view of justice for these changes to be reflected in the law on diplomatic immunity.

5. The Potential of Challenges to State Immunity (*Ratione Materiae*)

In the law on State immunity, the 'restrictive' approach has been increasingly explored both in the academic literature and in the case law relating to employment rights. The 'restrictive' approach has a number of elements. First, in the law on State immunity at both international and domestic level, restrictions on State immunity are specifically stated. Article 11 of the UN Convention on Jurisdictional Immunities of States and their Properties provides that a State does not have immunity in respect of 'a proceeding which relates to a contract of employment' (subject to a number of exceptions listed in that article). This restriction has also been incorporated domestically. For example in the State Immunity Act 1978, it is stated that a State is not immune in relation to contracts of employment where the contract is made in the UK or the work is to be 'wholly or partly performed there'.[42] The second element of this restrictive approach is the understanding that

[40] ibid para 70.

[41] Rosanne Van Alebeek, 'Domestic Courts as Agents of Development of International Immunity Rules' (2013) Leiden Journal of International Law 575, 599.

[42] State Immunity Act 1978 s 4(1).

a State does not have immunity for acts *jure gestionis* (States performing functions which could just as easily be performed by private parties). State immunity exists only for acts *jure imperii* (strictly sovereign acts). On this basis immunity does not extend to employment contracts. The third element of this restrictive approach is in relation to the application of State immunity as against other international norms. In relation to due process rights (such as the right to a fair trial under Article 6 ECHR) it has been held that although State immunity can be a legitimate aim (as a result of the need to ensure comity and good relations between States), the proportionality element of the balancing exercise must be considered carefully. Where the function of an employee does not interfere with sovereign interests, State immunity should be denied.[43]

It is clear that there is no current appetite for taking the same restrictive approach to diplomatic immunity that has been taken in relation to State immunity. A number of reasons have been cited for this. First, the aims of each doctrine are stated to be different. Whilst sovereign immunity exists to promote comity and good relations between States, diplomatic immunity is there to ensure the efficient performance of the functions of diplomatic missions and the personal protection of individuals involved in those missions.[44] Second, there is evidence of a change in attitude towards the restrictions imposed by State immunity in the international community.[45] Such a change is not in evidence in relation to diplomatic immunity. However, the question arises whether there might be a closer relationship between developments in the area of State immunity *ratione materiae* and diplomatic immunity. State immunity *ratione materiae* concerns the immunity of high ranking officials as agents of the State for breaches of criminal and civil law. This kind of immunity (*ratione materiae*) is therefore personal rather than State-wide. It may thus represent a potential cross-over function between (pure) State immunity and diplomatic immunity which may lead to more restrictive understandings of diplomatic immunity and an increase in jurisdiction for employment claims. Of course, care must be taken in any such analysis and it is only one possible avenue which may be explored to assist employment claimants. An alternative, and perhaps more direct, approach (changing the terms of the VCDR) will be considered in section 6.

It is accepted as a matter of customary international law that State immunity offers individual employees of a foreign State protection in respect of acts undertaken on behalf of that State.[46] Recent decisions demonstrate that the protection of individuals under the doctrine of State immunity *ratione materiae* is broadly applied, but that 'State practice is in a state of flux in this area'.[47] The position was examined in detail in the recent case of *Jones*, appealed from the UK House of

[43] *Fogarty v United Kingdom* (2002) EHRR 12; *Cudak v Lithuania* (2010) EHRR 15.
[44] *Al-Malki* (n 18) para 73.
[45] For example, the changes in the rules of international law relating to State immunity in the UN Convention on the Jurisdictional Immunities of States and their Property (adopted 2 December 2004, not yet in force), A/Res/59/38.
[46] *Jones v United Kingdom* (2014) 59 EHRR 1. [47] ibid para 214.

Lords to the European Court of Human Rights (ECtHR).[48] This case concerned allegations of torture and unlawful detainment against one of Saudi Arabia's officials, Lieutenant Colonel Abdul Aziz. Saudi Arabia claimed State immunity *ratione materiae* in relation to these acts. The Claimant asserted that the imposition of State immunity *ratione materiae* breached his right to a fair trial under Article 6 ECHR. The House of Lords in the UK found that State immunity *ratione materiae* acted as a procedural bar to all claims, and its operation precluded an examination of any of the merits of the claim. The Claimant challenged this decision in the ECtHR, but the ECtHR agreed with the House of Lords' position. It referred in detail to the case of *Al-Adsani*,[49] which was a decision of the Grand Chamber on very similar facts. In *Al-Adsani* it was held that the grant of immunity *ratione materiae* pursued a legitimate aim for the purposes of the balancing exercise under Article 6: the aim was the maintenance of comity and good relations between States. The action was also proportionate because it reflected generally accepted principles of international law. The court found that 'Just as the right of access to court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.'[50] The ECtHR stated that the question in the *Jones* case was whether there had been an evolution in accepted international standards since *Al-Adsani* to warrant an exception to immunity in the case of torture. The ECtHR found that the bulk of the authority still pointed to State immunity being upheld in cases of torture. However, it did recognize that 'in light of the developments currently underway in this area of public international law, this is a matter which needs to be kept under review by Contracting States'.[51]

The evolution of the public international law rules in allowing exceptions to State immunity *ratione materiae* is instructive for our purposes, as they might suggest cross-over developments in the area of diplomatic immunity. One point of interest, is that individuals only benefit from State immunity *ratione materiae* where the impugned acts are within the scope of official functions. In some jurisdictions it has been argued that action in breach of *jus cogens* norms can never be carried out in an official capacity and so can never benefit from State immunity. For example in the case of *Samantar*[52] the Court of Appeals of the United States found that 'We conclude that, under international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity.'[53] This case is now being appealed to the Supreme Court. There is further support for this 'normative hierarchy' between *jus cogens* norms and State immunity law in the comments of the dissenting judge in the case of *Al-Adsani*.[54] In that case,

[48] ibid para 203. [49] (2002) 34 EHRR 11. [50] ibid para 56.
[51] *Jones* (n 46) para 215. [52] *Samantar v Yousef* (2010) 130 S Ct 2278.
[53] Cited in *Jones* (n 46) para 125.
[54] State immunity is a right *jus dispositivum* (a right which can be modified by international consensus) and therefore does not reach *jus cogens* level (fundamental rights of international law from which States cannot derogate). The effect is that a breach of *jus cogens* denies immunity.

Judge Loucadis (in dissent) explained that 'once it is accepted that the prohibition of torture is a rule of international law prevailing over State immunity rules, no such immunity can be invoked in respect of any judicial proceedings whose object is the attribution of legal responsibility to any person for any act of torture'.[55] Furthermore, in relation to the question of whether all action by State personnel is official, it has been recognized for some time that in the context of crimes at least, there can be dual liability of both States and individuals. This is reflected in the Draft Articles on States Responsibility, which provide that rules on attribution are without prejudice to the question of individual responsibility under international law of any person acting on behalf of the State.[56]

In the context of civil liability (including liability for employment claims), there has traditionally been more reluctance to find that civil elements are either a matter of *jus cogens* or a matter of personal liability. There is however some suggestion that even this is changing. In his dissenting judgment in *Jones,* Judge Kalaydjieva stated that he found it difficult to accept the differences between civil and criminal jurisdiction in questions of State immunity.[57] He suggested that there was no justification for the accepted position that civil proceedings against State officials involve a greater interference in the internal affairs of a foreign State than criminal proceedings and therefore could not invoke individual responsibility. For grave actions, personal responsibility should be available in both civil and criminal jurisdictions.[58] There is also considerable support for the argument that there can be universal civil as well as criminal jurisdiction. In the *Jones* case, the Claimants referred to the Convention against Torture which provides for universal civil jurisdiction in Article 14. That Article states that each party to the Convention 'shall ensure in its legal system that the victim of an act of torture obtains redress, and has an enforceable right to fair and adequate compensation, including the means for as full a rehabilitation as possible'.

Finally, there is the suggestion that due process itself should become a *jus cogens* norm. This suggestion was made by Judge Cançado Trinidade in the *Jurisdictional Immunities* case of 2012.[59] This case was not in fact a case of State immunity *ratione materiae,* but of pure State immunity. It concerned the validity of a claim of State immunity made by Germany in respect of violations of international humanitarian law, including forced labour. Italy claimed that an exception to State immunity existed where there had been international crimes committed in breach

[55] *Al-Adsani* (n 49) para O-V2.

[56] Article 58 Draft Articles on State Responsibility for Internationally Wrongful Acts adopted by the International Law Commission at its fifty-third session (2001), *ILC Yearbook* 2001 vol II Pt 2, 30, art 58.

[57] *Jones* (n 46) OII-5.

[58] In this case, Judge Kalaydjieva doubted the correctness of the reliance of the majority on *Al-Adsani*. He argued that this case could be distinguished on the basis that the questions were 'limited to state immunity and did not concern the compatibility of extending it to named stated officials'. *Jones* (n 46) OII-7.

[59] *Case Concerning Jurisdictional Immunities of the State (Germany v Italy; Greece intervening) (Judgment)* (International Court of Justice, General List No 143, 3 February 2012).

of *jus cogens* norms. The ICJ's approach pursued the (traditional) line that customary international law did not treat a State's entitlement to immunity as dependent on the gravity of the impugned act. State immunity was a procedural bar and confined to determining whether the courts of one State could have jurisdiction over another. Trinidade disagreed with both of those assertions. He argued that the gravity of breaches of human rights and international law, and the *jus cogens* status of those rights determined the operation of State immunity. Furthermore, he argued that the 'fundamental character of the right of access to justice' supported the removal of immunity in situations of grave violations of human rights: it is a true 'droit au Droit . . . . [w]e are here, in sum, in the domain of *jus cogens*'.[60]

The developments in this area are arguably relevant in terms of potential directions in the law on diplomatic immunity. A central concern under the law of State immunity *ratione materiae* is that immunity exists only so far as a State official's actions come within official functions. This same concern resonates in the law on diplomatic immunity. In the context of diplomatic immunity, personal servants of diplomatic staff have sought to argue that their work comes outside the official functions of the diplomatic mission, with some limited success. Courts have accepted that the work is outside these official functions on the basis of the nature of the work relationship (which is private). The difficulty has been that this conflicts with the argument that domestic work is a commercial/private matter. However, comments and arguments made in the development of the law on State immunity *ratione materiae* potentially suggest a solution to this conundrum. As part of the development of this law, there have arisen suggestions that when officials commit breaches of the law considered of fundamental importance in international terms (in the employment context this may include forced labour or slavery), diplomatic action is always outside official functions. For these *jus cogens* breaches, the liability is personal and not linked to the State. Indeed, it has also been suggested that the public/private distinction between official/public and non-official/private acts is unhelpful in the context of immunity and can be abolished. The fact that the liability (for *jus cogens* breaches) is personal does not mean that it should be considered 'private' and outside public liability or concern. Such breaches are fundamentally a matter of public concern. As Judge Trinidade stated in *Jurisdictional Immunities*: 'crimes against humanity are not to be considered … private acts: they are crimes'. They 'cannot simply be removed or thrown into oblivion by reliance on (State) immunity'.[61]

The comments about the status of due process law are also interesting in the context of diplomatic immunity. In the current law on diplomatic immunity, it appears fairly easy to override due process considerations. The argument proceeds on the basis that the functional necessity of diplomatic action means that diplomats must be inviolable. This inviolability creates a procedural bar against competing claims which is not affected by the seriousness of the allegations against the impugned diplomat. In this context any balancing act between the provisions

[60] ibid para 217. [61] ibid para 129.

of diplomatic immunity and due process norms is bound to favour diplomatic immunity. However, if due process and the right to a fair trial gain the status of *jus cogens* as a matter of international law, then the balancing process with diplomatic immunity must be reconsidered. As a *jus cogens* norm, it would arguably override diplomatic immunity, which, despite assertions of its absolute operation, has not been suggested as a *jus cogens* norm in its own right. In the corresponding balance, it would at least allow the substantive nature of the proceedings to be considered and a more detailed and fairer balancing process to take place. Any blanket immunity would definitely be in breach of due process generally and Article 6 specifically.

Of course, although the comments and suggestions made in the context of State immunity *ratione materiae* are interesting in terms of the possible development of diplomatic immunity law, these comments are *obiter* and are not yet a matter of judicial precedent. Arguably they do not reflect the agreed international position on State immunity law. Furthermore, the translation of progressive ideas to the field of diplomatic immunity is potentially difficult in the face of the persistence of the conservative position in the VCDR. It is difficult to argue that the international community's stance on immunity is changing when there have been no significant amendments to the VCDR as the international Convention of relevance in this field since its inception. Perhaps then, the biggest potential for Claimants in terms of gaining jurisdiction in employment matters is to make changes to the specific terms of the VCDR. The next section considers where changes can potentially be made in the VCDR to reflect a fairer balance between the protection of diplomatic staff and the employment claims of their personal servants.

6. Changes to the VCDR

Although the preamble to the VCDR states that the purpose of the privileges and functions of the diplomatic mission are not to provide personal benefit but to further the purposes of the mission, the current wording of the VCDR arguably does provide for this benefit to the detriment of functional responsibility. The inviolability of diplomatic agents (Article 29 VCDR) is put above the functions of the mission. Arguably the absence of a link between functional necessity and inviolability needs to be challenged because it leads to the diplomatic person having immunity for matters which are not, in fact, necessary to the mission. This more nuanced understanding could be reflected at the outset in Article 29. A possible reading might be: 'The person of a diplomatic agent shall be inviolable *for the duration of the diplomatic mission and for all diplomatic functions*.'

Diplomatic functions are currently listed in a very generalist way in Article 3(1) VCDR. There are no specific exceptions in Article 3 to these provisions or examples of instances which would be outside official functions. It appears that this promotes an absolutist approach to functional necessity. It could be made clear at this stage that there are certain actions of diplomatic agents which would not

promote good relations between States and which could not be considered a functional necessity. A clause could be inserted to the effect that any act which is a violation of norms of international law will not be considered within the official functions of the mission. No State which is part of the international community could authorize such action.

More specifically, there should be a clause incorporated into the VCDR which deals specifically with violations in employment matters, just as there is in the UN Convention on Jurisdictional Immunities. A new provision should be inserted into Article 31 which states that the employment of domestic servants is outside a diplomat's official functions. It should be stated in this section that as a result of this employment being outside official functions, the diplomat is liable for any breaches of it which are recognized by international law (in due course this could be extended to breaches of national employment law provisions, but this is perhaps a step too far given current international feeling). There could then be a non-exclusive list of those actions which would be in breach of international human rights and *jus cogens* norms. In the context of employment these norms might include for example: slavery, forced servitude, and forced labour. For completeness' sake, it could be stated that the domestic servants of diplomatic staff should not be prevented from having jurisdiction to bring their claims in relation to such matters.

There is also the argument that Article 37 VCDR should also be amended in the light of a restrictive approach to the scope of official functions. It should be made clear in this Article that its provision does not extend to the employment of domestic servants, or to any breach of law connected to the employment of domestic servants committed by members of the diplomatic household. Such actions do not further the official functions of the mission, or the development of good international relations between States.

7. Conclusions

The 'inviolability' of domestic agents has traditionally been founded on two main premises. The first premise is that diplomatic agents are State representatives, and are entitled to the privileges granted more widely to the State. This protection serves not only personal but also international ends. The second premise is that diplomatic agents are entitled to 'functional' immunity; they require the freedom to carry out their diplomatic mission efficiently. Both of these understandings of the nature of diplomatic immunity are reflected in the VCDR. The 'representative character' function of inviolability is reflected in the second and third paragraphs of the VCDR's preamble. The 'functional necessity' element of immunity is reflected in paragraph four of the preamble. However, there are indications that the 'functional necessity' version of the need for diplomatic immunity was the dominant mode of thinking in the VCDR's drafting. One reference of particular importance in the context of the employment is the 'commercial' exception to diplomatic

immunity. This requires that immunity is removed where a diplomat carries out a commercial or professional activity outside official functions. There are also other references in the VCDR to the extension of protection only in relation to official functions, with Article 28 being another example.

So far, there is nothing to suggest that there is any conflict between the 'representative character' function of diplomatic immunity and the functional necessity approach. Diplomatic personnel are representatives of the State and so their immunity extends so far as they are conducting official functions. In fact, however, the functional necessity argument has been attached to inviolability to the extent that there is very little (or nothing) that the diplomatic agent conducts during his diplomatic employment which can extend beyond the 'official'. The suggestion is that the diplomatic agent is *personally* inviolable, and that inviolability is not sensitive to the nature (or seriousness) of the acts carried out by the diplomat. This argument tends to result in absolutist notions of immunity. These absolutist notions are in conflict with the understanding of the extent of immunity under representative character ideals. On this argument there are limits to diplomatic immunity, just as there are limits to State immunity. Certain (State or diplomatic) acts are private acts and so are outside the scope of protection. Other acts may be in breach of international law which means that they are not subject to State or diplomatic immunity. In particular diplomatic actions which are in breach of *jus cogens* norms are deemed not to be subject to immunity because *jus cogens* norms operate over and above other norms of international law.

This tension and conflict is very interesting and important in the context of employment law. In the context of employment law, the absolutist position has been taken almost exclusively. On the one hand, this is perhaps understandable because employment claims have generally not been considered fundamental rights of international standing in the same way as other rights. This is of course itself subject to challenge,[62] but there is arguably currently insufficient international acceptance of the status of 'normal' employment rights to make this a viable exception to immunity in its own right. That said, there are two situations in which important international (*jus cogens*) norms are potentially engaged. The first is in relation to the fundamental right to a fair trial, and the second is the fundamental right to freedom from slavery, forced labour, or servitude. Both norms have been raised to try to override diplomatic immunity. So far, no authoritative decisions have been made in favour of upholding these *jus cogens* norms in the employment relationship. They have been blocked by a number of arguments pertaining to the inviolability of diplomatic staff in conjunction with their 'official functions'.

In this chapter, it is argued that there is no reason in principle why this should continue to be the case, particularly given developments in other areas of international law (the law on State immunity *ratione materiae*). Inviolability should not

[62] There is a wealth of literature on the relationship between employment rights and fundamental (human) rights. See eg Judy Fudge, 'The New Discourse of Labour Rights: From Social to Fundamental Rights?' (2007) 29 (1) Comparative Labor Law and Policy Journal 29.

be seen as a personal right applied absolutely against *jus cogens* norms. The scope of official functions should be interpreted narrowly and should not extend to actions which breach international standards of law. Moreover, the international community should consider changing the terms of the VCDR to reflect the vulnerability of employees of diplomatic agents. It is hoped that this would help to prevent the current injustices to which the personal servants of diplomatic staff are both potentially and actually subject. It is also hoped that greater certainty at international level about the relationship between *jus cogens* norms and diplomatic immunity would lead to more progressive interactions between States and the positive development of international relations as a whole.

9

Private Domestic Staff

A Risk Group on the Fringe of the Convention

Wolfgang Spadinger

The case of the abuse of a private domestic worker by a member of the Indian Consulate General (Devyani Khobragade) in New York in 2013 has drawn the attention of the world's media on the topic of Private Domestic Staff (PDS). How is it possible that in the twenty-first century labour exploitation and abusive treatment of workers is tolerated in diplomatic households and to which extent does the legal framework including the VCDR condone or even favour such behaviour? And what are the challenges for States, which want to stay close to the letter of the convention, and adhere to the provisions, in order to prevent abuse and labour exploitation of PDS?

In many countries, cultural traditions suggest that families of a certain layer of society keep domestic staff at their homes. This group usually includes diplomats, who take their domestic workers to their foreign postings to provide continuation of their living conditions in the best possible way. Modern patterns of family life mean that parents, who both work or single mothers have to rely on a domestic worker permanently living in their residence to take care of infants or children. The contribution of domestic staff to the well-being of diplomatic families and therefore indirectly also to the functioning of foreign missions is considerable, host countries all over the world are confronted with the fact that there is an incontestable demand for PDS in the diplomatic community. Globalization, and the increasing power and significance of emerging non-European countries often cherishing the tradition of employing PDS have contributed to increased significance of this particular group.

1. Defining the Group

The VCDR has addressed this need and established a distinct category for private domestic staff (in the language of 1961 still called 'private servant') in Article 1(h) VCDR. This category is different from the 'members of the service staff' in

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Article 1(g), who are employed by headquarters authorities of the sending State and posted at missions abroad for a limited period of time.

As a matter of fact, the notion of the 'private servant' as set out in Article 1(h) VCDR, a faithful personal employee of a diplomat, following him into every remote corner of the world for a lifetime does no longer entirely correspond to today's realities. The model has given way to a variety of employment patterns for domestic workers in diplomatic households including service staff contracts (Article 1(g) VCDR), PDS contracts, or local work contracts with a diplomatic mission. Receiving States therefore have the task to assess the character and the status of a person doing housework in a diplomatic residence. There are, basically, three possible categories:

1.1 Service staff (Article 1(g) VCDR)

Members of the service staff would have a strong link both to the sending State and to the official business of the mission. They would typically either work in the office of a diplomatic mission, eg as drivers, cleaners, or handymen or at the residence of the Ambassador. It is decisive that they are mandated to work in their position by a central authority of the sending State. Usually they would have the same nationality as the sending State, although Article 1 VCDR does not specifically say so.

1.2 PDS (private servant, Article 1(h) VCDR)

In contrast to service staff, PDS do have a contractual relationship with an employer, who himself is a mission member. This can be the head of mission or any other diplomat or mission member, whom the receiving State permits to bring and employ domestic staff. Concerning citizenship, Article 1(h) VCDR specifically sets out that PDS may have a nationality different from the sending State of their employer.

1.3. Local staff

This category is not contained in the VCDR at all, as local staff are only contracted by a diplomatic mission and have no direct ties to the central authorities of the sending State. Local staff need to be resident in the sending State; in some countries, a work permit is required as well. They do not hold any privileges and immunities (an exception may arise from a benign interpretation of Article 38(2) VCDR). While in general the share of local staff by comparison to posted personnel is clearly on the rise, the prohibition in most countries on the 'import' of local staff, sets limits on the use of local staff for domestic work.

The categorization, which has to be made at the beginning of domestic staff's work in a diplomatic household, is crucial and has ample consequences for the legal framework applicable to the contractual relationship with the employer and to the

possibilities of the authorities of the receiving State to monitor the fulfilment of the obligation by the employer and interference in case of non-compliance. With service staff, the possibilities of the receiving State are limited. Remuneration is deemed to be an internal affair between the sending State and the staff member. It is generally assumed that they are on the payroll of the central authorities of the sending State as is the case with administrative and technical staff. Also social security questions are supposed to be dealt with within the internal context of the sending State. The specific provisions on social security in Article 32 VCDR apply only to PDS but not to service staff. In terms of privileges, Article 37 VCDR completely exempts service staff from paying income taxes in the receiving State. With the notable exception of immunity in criminal cases the protection of service staff (and consequently of their employment contracts) is tantamount to that of administrative and technical staff.

Local staff, on the other end of the spectrum, do fully fall under the applicability of the local legislation of the receiving State. All taxes have to be paid on income derived from the employment, and social security provisions have to be respected. As far as a local staff member is concerned, the authorities of the receiving State can obtain full access to the individual (interrogation, testimony, and even detention is possible without direct violation of the VCDR), to his residence (unless it is in a household shared with a privileged person) and financial assets (bank account). On the other hand, sending States and their diplomatic missions are under no obligation to notify to the receiving State the employment of their local staff. They are not registered in any specific way by the Ministry of Foreign Affairs (MFA), and there is no possibility of the receiving State to question the modalities of employment or the treatment of local staff, unless there is a specific complaint insinuating a violation of local legislation based on poor compliance with Article 41 VCDR.

In Austria the applicability of national labour law is limited to the very general provisions of the Civil Code (ABGB). In addition, binding provisions of certain labour related Acts eg on workers' protection, maximum hours, or annual leave apply, whereas there is no stipulation of a minimum wage. Minimum wages in Austria are contained in so-called collective bargaining agreements between employer groups (eg handicraft or trade) and the trade unions of the respective employees. Embassies do not fall into any employer group. Therefore no minimum wage is applicable in a strict sense, although it is widely recognized that remuneration has to be above the minimum of personal sustainability (at the time of writing 857 Euro/month).

It is characteristic for local staff that they possess permission to reside in the receiving State. Thus, they are less dependent on the sending State or the diplomatic mission, where they are employed. In case of difficulties in the labour relationship with the employer, local staff tend to exploit all possible options including the termination of the employment with a view to seek other work opportunities. PDS and service staff do not have this choice. Their work contracts are strictly pegged to the employer and once the relationship is broken, the employer reports the termination of the employment and de-registers the domestic worker at the MFA. The de-registration leads to the loss of the residence permit. In Austria, the

legitimation card regulation of 2010 foresees that once the criteria for holding a 'diplomatic' ID-card (such ID-cards are issued to all categories of mission staff according to the VCDR and VCCR) do no longer apply, the card is declared null and void.

The general challenge for the MFA of a receiving State is to prevent that domestic workers are brought and registered under an inappropriate categorization, where there is less possibility of control and it is easier to exploit them. A typical pattern would be the attempt to register PDS as service staff. This would give the employer the advantage of not being bound by the minimum wage decree. Further, the social security provisions of Article 33 VCDR would not apply to this employment and the possibility of the MFA to monitor the well-being of the domestic worker is severely curtailed. In this context it should be kept in mind that generally the VCDR in Article 7 provides for general freedom of appointment by the sending State. Challenging or discussing a diplomatic mission's categorization of a staff member by the receiving State is a risky operation, because the sending State is legally in the stronger position and, of course, this mere 'technical' dispute might escalate and infringe the bilateral relations between the two countries.

The receiving State is therefore well advised to elaborate on the criteria for the distinction between the two groups and communicate these criteria to all missions affected in a transparent and effective way. The Austrian MFA would permit service staff only as domestic workers in residences of Ambassadors or heads of career consulates. For all other diplomats and mission staff members, the only possibility to employ domestic workers is to hire PDS. But it is even more important to verify that the service staff is really posted abroad by the MFA or any equivalent central authority of the sending State. The risk that embassies are recruiting domestic workers independently and without knowledge and permission of headquarters is evident. In the context of the VCDR, 'being posted' requires a mandate by the sending State, meaning its central authorities and not its diplomatic missions. The crucial distinction is the act of sending the domestic worker to his/her post. The Austrian MFA therefore requests as a general policy that for the registration of service staff, a verbal note by the central authorities posting the person to a mission abroad is indispensable. A verbal note by the same authority only declaring that a domestic worker will be taking up employment at a diplomatic mission will not be considered sufficient. The service staff's nationality, as already touched upon, is also a strong indicator. Experience has shown that central authorities have very strong tendencies to post only their own nationals abroad, so the posting and the nationality requirement often coincides.

Another pattern that has recently emerged, is to present a PDS as a child of the employer for registration at the receiving State's MFA. It is typical for this scenario that a pair of working parents or a single mother would have a couple of infants or small children and a significantly older sibling. This (in most cases, female) youngster has been made part of the family by express adoption of the adolescent or similar procedures. It is clear that this modus operandi requires careful preparation and involves a strong will by the employer to make ongoing labour exploitation a

part of his family life. Challenging this form of deceit is extremely difficult, as it also touches upon issues of cross-cultural family life and traditions.

2. The VCDR Framework for PDS

The VCDR is relatively open on who is entitled to employ PDS. Article 11(2) VCDR allows receiving States to refuse to accept officials of a particular category within similar bounds and on a non-discriminative basis. This provision is different from the limits that can be set under Article 11(1) VCDR, which provide a tool to tailor mission sizes according to the needs of a particular mission. As a consequence, a number of receiving States have used Article 11(2) VCDR to peg the employment of PDS to certain criteria (eg rank and function of the employer). Whether the main reason is to curb immigration and to keep PDS numbers down altogether, whether it is a reflection of considering PDS a rank privilege or whether this is an attempt to reduce the risk of labour exploitation of PDS by junior diplomats, is not clear and not easily deductible from the circular notes of the countries concerned.

In March 2014 Belgium for instance circulated a verbal note which limited the possibility of taking on PDS to heads of diplomatic and career consular missions. Only one exception was made (for 'humanitarian cases'). This means a significant limitation of PDS employment, against the backdrop of one of the largest multilateral diplomatic communities in the world (EU, NATO, and other international organizations in Brussels) and a constant rise in the numbers of PDS over the last ten years.

When it comes to privileges and immunities, PDS find themselves again on the lower end of the social ladder. Article 37(4) VCDR specifies that they shall, if they are not nationals of or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reasons of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. Exercising jurisdiction over PDS is pegged, however, to non-interference with the functions of the mission.

Denza deducts from this provision and from Article 38(2) VCDR (which deals with PDS who are nationals of the receiving State) that PDS of that group categorically have no privileges and immunities. If Article 37(4) VCDR is applicable, they have only two privileges which are properly regarded as privileges of the employer:[1] exemption from tax on wages and exemption from social security provisions. In the light of this, it becomes clear, why PDS are seen as a group rather on the fringe of the convention than one of the five different categories of mission members set out in Article 1 VCDR. Attributing the existing PDS privileges, as small they might be, to the employer contributes to the assumption that the employer is really the master of the 'servant' and has unlimited power over his domestic worker.

[1] Eileen Denza, *Diplomatic Law* (3rd edn, OUP, Oxford 2008) 411.

With other scholars[2] I believe, however, that PDS do have privileges and immunities of their own, although they are limited. The reason why their degree of privileges and immunities is significantly lower than that of service staff, is the recognition that PDS do not operate in the realm of the exercise of governmental authority but as domestic workers for individuals, who themselves are protected by the convention because of their functions for the mission.

3. The Social Insurance Issue

The most specific reference to PDS is contained in Article 33 VCDR on the exemption from social security provisions. While Article 33(1) VCDR stipulates a general exemption for posted personnel (singling out the diplomatic agent, but made applicable to administrative and technical staff and service staff by virtue of Article 37 VCDR), this exemption is limited in the case of PDS through Article 33(2) VCDR. According to the text of the convention, non-nationals and non-residents of the receiving State shall only be exempted, if 'they are covered by the social security provisions which may be in force in the sending State or a third State'.

Basically, two possibilities exist to interpret this qualification. The PDS might be covered by the social security provisions in the country of origin or nationality in a general way. Evidence for the availability of this option is provided through those amendments proposed during the codification process which took as their basis the similar regulation in the ILC's draft articles on consular intercourse and immunities.[3] The reference in Article 33(5) to existing and future social security agreements also points in this direction.

The second interpretation would deduct that the social security provisions apply to the actual employment, ie the job that the domestic worker is performing in the household of the diplomatic employer. An argument in favour of this interpretation is the fact that the VCDR arguably presupposes that PDS need to be included in some social insurance, be it by the receiving State, the sending State (of the employer), or a third State (the country of nationality of the PDS). A situation should be avoided in which PDS are not insured at all, which might be the case if they are just generally covered but the specific job profile does not entail active participation in the social security system.

Also, social security as such is a term which is not defined in the VCDR. If reference is made to the use of the term by the International Labour Organization (ILO), a relatively complex pattern might emerge, as the list of components is rather comprehensive. Most public social security systems include health and accident insurance, unemployment insurance, and contributions to a pension fund.

[2] Niklas Wagner, Holger Raasch, and Thomas Pröbstl, *Wiener Übereinkommen über diplomatische Beziehungen vom 18. April 1961, Kommentar für die Praxis* (Berlin, Berliner Wissenschaftsverlag 2007) 329.

[3] UN Docs A/CONF/C 1/L265; A/CONF 20/14, 182, 193.

Typically, health and accident insurance is of key importance for PDS because illness and work-related injuries are at least as common in their cases as for anybody else working in the hospitality sector. Since statistically the kitchen is the most dangerous room in a household, the risk of injury of PDS, whose tasks most likely include preparing meals, is a given. Unemployment insurance—on the other hand—is a insurance which in the case of PDS will most likely be paid in vain. As their residence title is pegged to the work contract with the employer, they are not technically on the labour market, they are not entitled to start working anywhere but in another diplomatic household, and they will not qualify to ever reap unemployment benefits. Contributions to pension funds pose a similar problem. Many social security systems contain a minimum period of countable contributions, in Austria, for example, fifteen years, in order to start pension disbursements when the beneficiary reaches retirement age. Within the system of the VCDR, and the (still dominant) pattern that PDS follow their employer to various postings, pension fund contributions will not be sufficient to trigger benefits for PDS.

In Austria, and maybe in other countries as well, national legislation has turned its back to holders of privileges and immunities. Article 5 of the Austrian Social Security Act 1961 excludes all persons working for an 'extraterritorial' employer: they are exempted from the applicability of the Act, as long as they are not Austrian citizens. This applies to diplomats and technical and administrative staff, as well as to service staff and PDS. Indeed, natural persons enjoying diplomatic privileges and immunities are deemed 'extraterritorial' by the bureaucracy of the social security administration. Exceptions to this exclusion exist where a bilateral social security agreement applies.

As the interrelationship between the provisions of Article 33 VCDR and its interpretation and various regulations emanating from the national sphere are complex and do not facilitate effective implementation, a number of countries, including Germany[4] and Belgium, have adopted a policy of demanding health insurance for PDS with a national or a renowned international provider and an insurance policy which includes the territory of the receiving State with adequate coverage. Recently, Austria followed this example and made it possible to obtain health and accident insurance either with the public social security institution or with a private sector insurance company.

4. Prevention of Exploitation and Abuse

Developing a transparent and fair system for honouring the VCDR and enabling the employment of PDS on the one hand and providing an effective tool against misuse on the other, is a challenging task and needs comprehensive policy elements to complement existing international and national legislation. In contrast to the general relations between employer and employee governed by collective

[4] Wagner, Raasch, and Pröbstl (n 2) 284.

bargaining agreements, in Austria, which has a quite important number of around 200 PDS, there is the lucky situation of a binding minimum wage decree for domestic workers. In contrast to the collective bargaining agreements mentioned earlier, it is applicable regardless of the employer group.

Upon the start of employment, rights and duties need to be specified in a written service agreement. A model agreement is provided by the MFA. This agreement needs to be signed by the employer and employee. Only adults (persons over the age of eighteen) are permitted to work as PDS in Austria. PDS have to be working full time and need to live in a common household with the employer.

Remuneration depends on the minimum wage. Wages shall be paid monthly, by the last day of the calendar month. As of January 2013, the minimum wage for domestic staff in Austria is 1.100 Euro paid for full-time employment. All wages have to be paid into an Austrian bank account of which the PDS is the only holder. Thus, both the employee and the employer can at any point in time prove that they have paid or received the money. The bank statements and proof of remuneration transfer must be kept and presented annually for the renewal of the PDS ID-card.

There has to be a room for the exclusive and private use of the PDS complying with health care and construction regulations, and featuring appropriate furnishings, including a lockable cupboard. PDS must be given healthy and sufficient food.

Working hours, including standby duty, must not exceed the maximum laid down in the minimum wage decree. If excess hours are necessary in exceptional cases, the employee is entitled to additional hours of rest or will be given extra money to the amount specified in the minimum wage decree. Cutting short any breaks or an interruption of the night's rest is permitted only when the employee's services during such times are necessary for urgent, non-deferrable, or unavoidable reasons.

Employees are entitled to a leisure period beginning not later than 2 pm on one working day of each week and one work-free Sunday every other week. This leisure period starts at the end of the working hours on Saturday and must extend to the start of work on Monday. Austrian legal holidays have to be respected with regards to PDS too. In addition, the employee must be granted the time required to meet her religious duties. Such time is agreed between the employer and employee. The employee is further entitled to take leave for thirty-five calendar days per year. The full amount of remuneration is due for the holiday period.

PDS need to be registered by a public social security institution or by a private health insurance company. If the employer pays the insurance premium, he is entitled to deduct a certain amount from the PDS' wages. If the PDS is prevented from working on account of sickness, she is entitled to the remuneration for a period of at least six weeks. The employment relationship must not be terminated due to sickness or an accident at work. For pregnant employees additional restrictions apply. An absolute ban on work is imposed for the period starting eight weeks prior to the expected delivery date and ending eight weeks after giving birth.

The employment contract may be terminated at any time by giving notice. The period of notice is two weeks. If a trial period is agreed, the employment

relationship can be terminated by either party at any time effective immediately. A trial period may not last for longer than one week. PDS may be dismissed with immediate effect only on very important grounds. Such grounds include disloyalty, persistent neglect of the employee's duties, untrustworthiness, and violence against the employer. Upon termination of the employment relationship, the employer is obliged, at her cost, to give the employee a written reference ('Dienstzeugnis') on the duration and type of service rendered.

In terms of eligibility on the employer side, foreign PDS can be brought into Austria if the employer is a diplomat, or career consul, or a senior official of an international organization. With the exception of heads of diplomatic missions or career consulates, only one person per household may be employed.

Other countries, especially those with large diplomatic communities due to the presence of headquarters of an international organization, have developed similar protection mechanisms for PDS. In Switzerland, a 1998 directive of the MFA and the 2011 Private Household Employees Ordinance regulate the working conditions of the around 400 PDS in Geneva and Berne. Additional obligations include the duty of the employer to find PDS in the Swiss labour market before bringing PDS in from abroad, and the requirement of all PDS to be able to communicate in English, French, German, Italian, Portuguese, or Spanish. In order to free PDS from dependency on a single employer, an Employment Registration Desk has been established in Geneva.

Belgium requires the use of a standard work contract set out by the MFA for all PDS. On the arrival of PDS in Brussels, interviews with PDS, often in a group setting are conducted. Further, visa applications from prospective PDS are scrutinized at the respective embassies, so there are means of control even before they get permission to enter the country. More countries are expected to follow this example. The OSCE has embarked on a series of workshops to coordinate a common position and to sensitize relevant actors in four workshops in Geneva, Kiev, The Hague, and Brussels. The seminars brought together senior MFA staff from all OSCE member states. As a result, nine countries including Canada, Ireland, and Poland have adopted new measures to protect PDS, and a practitioners' handbook was published by the OSCE secretariat in 2014.[5]

The experience of recent years has shown that although the vast majority of diplomatic employers treat their PDS in a correct way, there are cases of abuse, labour exploitation, and in isolated cases even patterns of physical violence and trafficking in human beings. It is evident that in the contractual relationship between a diplomatic employer and a PDS, the employer is in a clearly stronger position. Their main advantage and leverage lies in the fact that the PDS depends on the working relationship with respect to her residence title as well. Leaving the employer means to return to the country from which they came. In addition, the gap between the

[5] Organization for Security and Co-operation in Europe/Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings: *Handbook: How to Prevent Human Trafficking for Domestic Servitude in Diplomatic Households and Protect Private Domestic Workers* (Wien, 2014).

minimum wages in western countries (eg 1.100 Euro in Austria, 1.200 CHF in Switzerland) and average wages for unskilled labour in typical countries of origin (around 50 Euro in Indonesia or the Philippines), may prompt employers to offer less pay and drive PDS to compromise on the remuneration. There is also a gap in sophistication between employers who are educated and versatile professionals and prepared to work in all corners of the world, and PDS who sometimes can hardly read and write, have a very limited command of foreign languages, and are sometimes out of their own country for the first time.

The most common scenarios of exploitation are withholding pay or parts of the remuneration and excessive working hours. The risk of underpayment is particularly high when wages are paid in cash against receipt, or when the counter-value is transferred to the family of the PDS by the employer. This is why Austria has introduced mandatory payment of wages into a bank account in the sole name of the PDS. Monitoring the working hours of PDS is extremely difficult, as diplomatic employers are protected by the immunities of Article 30(1) VCDR. If there are complaints by PDS, they usually deplore working hours from early morning until late at night. While it can be affirmed that diplomatic household chores, especially if there is a lot of entertaining of guests, are time consuming, the widespread concept that the live-in PDS is considered part of the family, plays with the children, and accompanies the family of the employer virtually everywhere, makes it next to impossible to judge what is working time and what is not.

Abusive working relationships are most commonly also characterized by psychological pressure and verbal abuse. The latter is likely to exceed the occasional telling off of the domestic worker for an error committed or a task forgotten. Instead, it is systematic and aspires to convey the message that the PDS is unworthy in general terms, and has no rights in the receiving State. With no proper information of their own, PDS are, in view of the tremendous difference in social status, inclined to believe what is said to them. Hence intimidation by the employer has become an effective tool to make PDS submissive.

Prevention measures and national regulations and policies complementing the VCDR therefore need to be accompanied by monitoring. Countries, where labour exploitation of PDS is an issue have therefore introduced the requirement of making each domestic worker appear at the MFA at the beginning of their work for the employer. On this occasion, a short interview is conducted by a protocol officer. In Austria, this procedure is repeated each year on the occasion of the renewal of the PDS' identity cards. In this context, the bank statements of PDS have to be submitted and are checked for absence of circumvention patterns. In order to strengthen PDS and to increase their self-esteem and autonomy, the MFA and the Home Office organize specialized briefings for PDS once a year. Further, information material is disseminated on Lateinamerikanische exilierte Frauen Österreich (LEFÖ), a non-governmental organization (NGO) which has been designated as the official intervention centre for victims of trafficking in women in Austria. LEFÖ, which offers psychosocial help, advice, and counselling for its clients, also runs a women's shelter where female victims of trafficking, including domestic servitude, are protected from their abusive exploiters. In 2014, six PDS fled from

their diplomatic employers and sought help and shelter with LEFÖ. This number by itself shows that even with a relatively high level of prevention and monitoring measures, labour exploitation is very difficult to eradicate.

5. When Cases Go to Court

When a case of exploitation of a PDS is detected and reported to the MFA, a procedure is put in place to assess the actual working and living conditions of the PDS in the diplomatic household. This is a process which also involves prompting the mission or the organization of which the employer is a member or an official to comment. At the end of this assessment a criminal and a civil component of the case usually emerges.

On the basis of the findings of the police investigations (which, at this stage, is limited by the declarations of the PDS), the criminal component will consist of the suspicion of a criminal offence, which is brought to the attention of the public prosecutor. This might be trafficking in human beings, fraud, assault, dangerous threat, or duress, all punishable under the Austrian Penal Code (StGB). The prosecutor's office determines whether the employer may be prosecuted. According to the Articles 31(1) and 37(2) VCDR, diplomats and technical and administrative staff enjoy immunity from criminal jurisdiction. Therefore after a determination of the status of the perpetrator, the prosecutor would suspend criminal proceedings according to Article 197 of the Austrian Code of Criminal Procedure (StPO). However, it is possible to ask the sending State if it wishes to waive diplomatic immunity, or—depending on the gravity of the case—to even request that immunity is waived by the sending State. According to the practice of the US State Department the response to such request is linked to the subsequent introduction of a procedure under Article 9 VCDR ('Waive or Leave').

If the criminal procedure is suspended for the time being and the diplomat or member of the administrative and technical staff remains in his post, the question arises as to what happens with the proceedings, once the employer is de-registered after the termination of his assignment. Art 39(2) VCDR stipulates that privileges and immunities expire when the functions of a person enjoying them have come to an end. However they will subsist with respect to acts performed as a member of the mission. Thus the crucial question would be, if the employment and the work of the PDS is 'in the exercise of his function'. In light of the multiple tasks that PDS have to fulfil—ranging from cleaning and washing to the preparation of food for the employer, his family and guests and taking care of the children—a generally correct answer to this question is hard to find. An Ambassador or a senior diplomat who has to fulfil many entertainment functions and has to host receptions and dinners in order to expand his network and to complement his duty might be covered by the ongoing functional immunity of this provision, a Third Secretary with a family of six, or an Attaché who is a single mother and who make use of PDS first and foremost as caretaker of the children, might not. In most cases, the PDS will be working to assist both the official and the private life segments of the

employer, thereby constituting an obstacle to a clear-cut determination on the subsistence of his immunities after the end of his posting.

A general observation of case law in various countries shows that the traditional approach is conservative rather than innovative. There is a tendency to be generous with regard to the establishment of immunities resulting in lack of jurisdiction by the court. However, in a PDS case in early 2014 the Vienna Labour Court confirmed, for the first time ever, that the immunity of a junior diplomat had ended with the termination of his posting. But even then, further prosecution is difficult. Only the most serious of the above-mentioned criminal cases would trigger international cooperation between authorities and make a warrant or extradition possible. In case of cross-postings the employer might also be protected by immunities he enjoys in his new receiving State.

If cases of abuse concern employers who enjoy privileges and immunities in their capacity as career consuls, consular officers, or officials of an international organization, the question of immunity for the criminal offence is a different one. While the provisions regarding PDS in the VCCR are tantamount to those in the VCDR (eg classification criteria, social insurance), the immunities of the career consul are limited on the basis of functional necessity. Article 41(1) VCCR sets out that consular officers may only be arrested or detained because of a grave crime and pursuant to a decision by the competent judicial authority. Furthermore, immunity from criminal jurisdiction is strictly limited to acts carried out in performance of consular functions. The immunities of officials of international organizations are determined by headquarters agreements which each single organization has concluded with the host country. As a basic principle, executive representatives of the organization or 'senior officials' enjoy privileges and immunities as bilateral diplomats (eg Section 38 UN Headquarters Agreement).[6] A majority of regular staff members enjoy fewer privileges and immunity, usually summarized in an article of the Headquarters Agreement. For instance, Section 37(a) UN Headquarters Agreement foresees immunity from legal process of any kind in respect of acts performed by staff members in their official capacity. Employment of PDS would generally not be assumed to fall under the official capacity of an official of an international organization.

In the Khobragade case mentioned at the beginning of this chapter, the employer of a PDS who had allegedly mistreated her, held the position of a Deputy Consul General of India in New York, when she was arrested for felony on the basis of a number of serious federal indictment allegations such as visa fraud, seizure of the PDS passport, and illegal wages. As Khobragade enjoyed only the immunities of the VCCR and not full diplomatic immunities under the VCDR, detention and arrest by US law enforcement agencies was legally correct. Later, when she was released and while the prosecutor prepared the indictment, she was quickly transferred and reassigned to the multilateral mission to the UN in New York by

[6] Agreement between the Republic of Austria and United Nations Regarding the Seat of the United Nations in Vienna, Law Gazette (BGBl) Nr 99/1998.

her sending State. From the moment of her registration in the new capacity, she began to enjoy full diplomatic immunity according to Article 31 VCDR. When the indictment was finally received by the competent New York criminal court, the court had to acknowledge that diplomatic immunity made it impossible to make the employer stand trial.

With the development of the concept of human rights in its contemporary guise, the question of access to justice for PDS becomes more and more important. It is therefore significant, especially with regard to the private law aspects of these situations, that several countries, especially those with large diplomatic communities have embarked on introducing out-of-court mechanisms to resolve and settle work-related conflicts between PDS and their employers by arbitration and mediation.

In this respect Switzerland has pioneered institution building. Following the installation of WTO headquarters in Geneva in 1995, the Canton of Geneva established a mediation institution called the Bureau de l'Amiable Compositeur (BAC). The purpose of this body, which is composed of three former senior international officials and politicians is to find extra-judicial solutions in work-related disputes between PDS and diplomatic employers. So far the BAC has worked on around 1,000 cases of which a quarter have resulted in amiable agreements. In Belgium, the Commissie voor Goede Diensten (a commission for good practices) was established in 2005. This multidisciplinary commission has been dealing with labour related conflicts between foreign missions or its diplomatic employees and their staff, and is not confined to situations involving PDS. This commission has dealt with a total of 100 cases.

Austria continues to put strong emphasis on prevention, including a policy of closely monitoring the work relationships of PDS with their employers. Thus, early detection and intervention of labour exploitation is possible in most cases. If undue elements were established in the relationship, it is the objective of the MFA to quantify them in monetary terms. This is done by specifically designated assessment questionnaires, analysis, and finally by mediation, involving the parties themselves or their representatives. In 2014, three PDS cases were solved by means of an out of court settlement, and a total of 10,000 Euros was disbursed to the PDS involved. Although the capacities of the MFA for mediation are limited, it turned out that the procedure chosen proved to be effective, on the condition that the problem is detected and addressed at an early stage.

In summary it has become clear that the VCDR has provided the basis for making PDS one of the auxiliary pillars of diplomacy, from 1961 until today. Although patterns of employment, customs in diplomatic life, and personal and family lifestyles have changed, there is still a justifiable demand for PDS. The VCDR has made it possible to make PDS operational, but has failed to protect them against labour exploitation and abuse. It has to be conceded, though, that this problem was neither on the agenda at the negotiations more than fifty years ago, nor was it the intention to write a social convention. Therefore the existing provisions of the convention, which need to be duly respected, have to be complemented by a mix of national legislation and policy. This network of rules and customs has

to be established and maintained in the knowledge that PDS are the group with the weakest status in the VCDR and with a view to protecting them against any abuse. Only if all stakeholders, ranging from foreign missions, international organizations, and the diplomatic employers to the MFA, pertinent NGOs, and the judiciary, work together to support a well-balanced policy mix securing adequate treatment, PDS will be able to continue to make their contribution to the effective functioning of diplomacy.

Part IV

Property Immunity

10

The Protection of Public Safety and Human Life vs the Inviolability of Mission Premises

A Dilemma Faced by the Receiving State

Yinan Bao

The inviolability of mission premises is one of the core provisions in the VCDR.[1] Though the inviolability of mission premises has been regarded as the cornerstone of modern diplomatic relations and one of the best established rules of diplomatic law,[2] it faces controversies and challenges in contemporary State practice. To be specific, in various situations the absolute inviolability of mission premises that is stipulated in Article 22(1) of the VCDR conflicts with the protection of public safety and human life. It can be stated that in the emergency situations caused by *force majeure* and criminal activities inside the diplomatic mission, the authorities of the receiving State will face a dilemma in which they must determine whether the protection of public safety and human life should override the inviolability of mission premises.

The major task of this chapter is to critically review Article 22(1) of the VCDR, as well as to examine emergency situations caused by *force majeure* and criminal activities inside mission premises. Particular attention will be paid to the examination of various justifications that may preclude the receiving State from State responsibility arising from the breach of its obligation under Article 22(1) of the VCDR, especially the debate over the applicability of the right of self-defence. The author will contend that none of the proposed justifications is able to override the absolute inviolability of mission premises. Instead of providing a straightforward solution to the dilemma faced by the receiving State, the author will advise the authorities of the receiving State to adopt alternative measures to solve the dilemma.

[1] As of May 2016, there are 190 parties to the VCDR.

[2] As the ICJ points out in the *Tehran Hostages Case*: 'There is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies.' See *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3, para 38.

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1. The Nature of the Dilemma

1.1 The inviolability of mission premises as stipulated in Article 22(1) of the VCDR

Generally speaking, mission premises play a dual role in modern diplomatic practice. In the first place, they serve as the ordinary and major working places for the diplomatic mission. At the same time, they also represent the sovereignty of the sending State and the dignity of its occupiers.[3] As such, the significance of inviolability in modern diplomatic law was quickly recognized by scholars as well as in State practice. By the eighteenth century, the inviolability of mission premises was generally accepted as a solid rule of customary international law.[4] Under the contemporary regime of diplomatic law, the core rules concerning the inviolability of mission premises are codified in Article 22(1) of the VCDR.[5]

With regard to this provision, one crucial point is that the text of Article 22(1) specifies no explicit exception to the inviolability of mission premises. It is worth noting that the original draft articles prepared by Special Rapporteur Sandström did provide that the exception to the general rule of inviolability could exist 'in an extreme emergency, in order to eliminate a grave and imminent danger to human life, public health or property…'.[6] During the later discussion in the ILC, the extent of the inviolability of mission premises attracted two distinct opinions. The first opinion was that inviolability should always be unconditional and absolute, as the inviolability of mission premises 'was a most important one from the standpoint of relations between sovereign Governments',[7] and as such, any exception to the general rule of inviolability would inevitably

[3] The Commentary on the relevant draft articles of the ILC in 1958 mentions that '[t]he inviolability of the mission premises is not the consequence of the inviolability of the head of the mission, but is an attribute of the sending State by reason of the face that the premises are used as the headquarters of the mission'. This sentence reveals the relationship between the significant role of mission premises and their inviolability. See 'Draft Articles on Diplomatic Intercourse and Immunities', *ILC Yearbook* 1958 vol II, 95.

[4] Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law* (CG Fenwick tr, Carnegie Institution of Washington, Washington 1916) 394; Ivor Roberts (ed), *Satow's Diplomatic Practice* (7th edn, OUP, Oxford 2016) 225, para 13.8.

[5] It is worth noting that the inviolability of mission premises has two distinct aspects. In addition to art 22(1) which stipulates immunity from any kind of enforcement action by officials of the receiving State, there is another aspect of inviolability which requires special protection of the mission premises. This aspect is stipulated in art 22(2). For the purpose of this chapter, only the aspect of inviolability contained in art 22(1) will be discussed.

[6] Article 12 of the 'Draft Articles on Diplomatic Intercourse and Immunities', *ILC Yearbook* 1955 vol II, 16. Original text in French. The official English translation can be found in UN Doc A/CN.4/91, as cited in Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on the Diplomatic Relations* (4th edn, OUP, Oxford 2016) 118.

[7] Comment by Tunkin during the discussion on the ILC's Draft Articles at the 394th meeting, 9th session of the ILC, see *ILC Yearbook* 1957 vol I, 54, para 37.

weaken it.[8] In contrast, the second opinion followed Sandström's original proposal which suggested that only conditional inviolability should be conferred upon the mission premises. According to this opinion, there could be exceptions to the general rule of non-entry of mission premises.[9] The ILC considered both opinions in its ninth and tenth session and concluded that 'to attempt to enumerate [exceptions to the general rule of inviolability of mission premises] would open the door to countless disagreements and might well undermine the very principle of inviolability'.[10] And so, in 1958, the ILC's final version of the Commentary asserted that 'the receiving State is obliged to prevent its agents from entering the premises for any official purpose whatsoever'.[11] During the 1961 Vienna Conference, the same divergence reappeared in the form of proposed amendments. To be specific, the delegates of Mexico proposed that 'the head of mission shall cooperate with local authorities in case of fire, epidemic or other emergency'.[12] Though the Mexican amendment does not expressly mention the term 'exception', it can be inferred that this proposal requires the diplomatic mission to concede its inviolability under such situations, at least through cooperation. A second amendment was jointly proposed by the delegates of Ireland and Japan, which suggested that the inviolability of mission premises shall not prevent the receiving State from 'taking measures essential for the protection of life and property in exceptional circumstances of public emergency and danger'.[13] A third amendment, proposed by the delegate of Spain, specified that the head of the mission shall grant permission to the local authorities to enter the mission premises 'in case of danger to the life or property of subjects of the receiving State'.[14] None of these proposed amendments was successfully supported by other delegates. As a result, all of them were withdrawn before further discussions.[15] In the end, the provision of Article 22(1) of the VCDR maintains, without change, the interpretation of the inviolability of mission premises provided in the Commentary on the Draft Articles. As such, the correct interpretation of Article 22(1) of the VCDR is that no exception is allowed to the general rule of inviolability of mission premises.

[8] Zourek's comment at the 456th meeting, tenth session of the ILC, see *ILC Yearbook* 1958 vol I, 130, para 12. See also Amado's argument, *ILC Yearbook* 1957 vol I, 56, para 64 and Pal's comment, para 67.

[9] See Sir Gerald Fitzmaurice's initial proposal, *ILC Yearbook* 1957 vol I, 54, para 33(c).

[10] ibid 57, para 71; *ILC Yearbook* 1958 vol I, 130, para 14.

[11] Commentary on the ILC's Draft Articles (n 3) 95.

[12] Ernest L Kerley, 'Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities' (1962) 56 AJIL 88, 102; *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, *Vol II* (United Nations, New York 1962) 20, UN Doc A/CONF 20/C 1/L 129. See also Kai Bruns, *A Cornerstone of Diplomacy: Britain and the Negotiation of the 1961 Vienna Convention on Diplomatic Relations* (Bloomsbury, London 2014) 129.

[13] Kerley (n 12) 102; *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records, Vol II* (n 12) 24, UN Doc A/CONF 20/C 1/L 163. See also Bruns (n 12) 129.

[14] *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records, Vol II* (n 12) 25, UN Doc A/CONF 20/C 1/L 168. See also Bruns (n 12) 129.

[15] 'Report of the Committee of the Whole' UN Doc A/CONF 20/L 2, *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records, vol II* (n 12), para 106.

1.2 Emergency situations in which controversy arises

As was pointed out in the above section, though Article 22(1) of the VCDR provides no exception to the inviolability of mission premises, the original draft articles prepared by Sandström did list typical emergency situations when the inviolability of mission premises might be compromised to protect public safety and human life. In fact, as early as 1932, the Commentary on the Harvard Research Draft Convention on Diplomatic Privileges and Immunities mentioned the same issue and provided that:

> The draft does not undertake to provide for well-known exceptions in practice, as when the premises are on fire or when there is imminent danger that a crime of violence is about to be perpetrated upon the premises. In such cases it would be absurd to wait for the consent of a chief of mission in order to obtain entry upon the premises. Like acts of God and force majeure these are necessarily implied as exceptions to the specific requirement of prior consent for entry.[16]

Although as of today there is no universally agreed definition of the term 'public safety' in international law, the concept can be construed as closely linked with emergency situations and especially closely linked with the protection of human life, as was proposed in both Sandström's original draft articles and the Commentary on the Harvard Draft Convention cited above. Moreover, it is also recognizable that most emergency situations that involve a threat to public safety will also involve a threat to human life.

Based on the Commentary on the Harvard Draft Convention and Sandström's original draft articles, two distinct kinds of emergency situations can be identified: emergency situations caused by *force majeure* and those caused by criminal activities inside the diplomatic mission. These two kinds of emergency situations will be examined in the following section.

1.2.1 Emergency situations caused by force majeure

Although by the time of the 1961 Vienna Conference, there had been no textbook definition of the term '*force majeure*' available, now an authoritative definition can be found in Article 23 of the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001.[17] According to this article, the term '*force majeure*' is defined as:

> [T]he occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

Based on this definition, several typical emergency situations can be identified as caused by *force majeure*, such as: fire, flood, earthquake, volcano eruption, tsunami,

[16] League of Nations Committee of the Experts, 'Harvard Research Draft Convention on Diplomatic Privileges and Immunities' (1932) 26 AJIL Sup 15, 52.

[17] GAOR 56th Session Sup 10, 43 (hereinafter 'Draft Articles on State Responsibility').

and epidemic, to list but a few. With regard to the controversy arising from emergency situations caused by *force majeure*, several points are worth discussing. First, as was pointed out above, Article 22(1) of the VCDR stipulates that the inviolability of mission premises requires that the agents of the receiving State[18] shall not enter the mission premises without securing prior consent from the head of the mission. It is not clear from the text of this provision whether 'consent' shall always be express. Thus, it may be argued by the receiving State that under an emergency situation such as a fierce fire, the firefighters should presume that they are authorized to enter the mission premises to extinguish the fire and prevent further threat to public safety and human life. Just as Sen pointed out:

> In such an emergency, it may be necessary to take immediate action, and if the envoy cannot be contacted with a view to obtaining his permission, much damage and even loss of human life may be caused.[19]

Indeed, it is highly possible that during emergency situations such as a fierce fire and catastrophic earthquake, the communication facilities inside the mission premises may be seriously damaged, or it may even be the case that the head of the mission himself is wounded. For instance, during the catastrophic earthquake which happened in Haiti in January 2010, the Taiwanese Ambassador was seriously injured.[20] It is therefore impractical for the local rescue teams to secure consent from the Ambassador before entering the mission premises and carrying out the rescue operation. In such a scenario, the question arises whether the authorities of the receiving State should be allowed to enter into the mission premises to save human life including the life of the head of the mission. Should there really be 'presumed consent' in this kind of emergency situation? With regard to this issue, Nahlik once pointed out that

> [P]roviding for the possibility of a presumed consent, even in exceptional cases only, could be construed in a way encouraging the authorities of the receiving State to presume the occurrence of such an exceptional situation. … [T]he problem was thus left to the interpretation on the merits of each case whether in a particularly exceptional situation such consent could be presumed.[21]

[18] According to one authority of diplomatic law, the term 'agents' includes those 'persons clothed with governmental authority', namely enforcement officials such as police and judicial officials. See Eileen Denza, 'Diplomatic Privileges and Immunities' in J Craig Barker and John P Grant (eds), *The Harvard Research in International Law: Contemporary Analysis and Appraisal* (Fred B Rothman & Co, New York 2007) 163. Another authority specifies that the term 'agents' includes 'all organs of the receiving State (members of the armed forces, the police, officials of the tax, employment or customs administrations, etc)', and bailiffs. See Bertold F Theeuwes (ed), *Diplomatic Law in Belgium* (Maklu Publishers, Antwerpen 2014) 47.

[19] Biswanath Sen, *A Diplomat's Handbook of International Law and Practice* (3rd edn, Martinus Nijhoff Publishers, Dordrecht 1988) 113.

[20] Taiwan News Staff Writer, 'Taiwan Ambassador to Haiti Taken to Hospital, Embassy Destroyed' *Taiwan News Online* (Taipei, 13 January 2010) <http://www.etaiwannews.com/etn/news_content.php?id=1154379> accessed 2 May 2016.

[21] Stanislaw E Nahlik, 'Development of Diplomatic Law: Selected Problems' (1990) 222 Recueil des Cours 187, 275.

Furthermore, as Sen contended, presumed consent may also lead to unexpected consequences. For example, the authorities of the receiving State may deliberately create an emergency due to fire by throwing an incendiary bomb.[22] Therefore, it seems that no presumed consent is allowed under Article 22(1) of the VCDR. Even in emergency situations caused by *force majeure*, consent by the head of mission is compulsory. Obviously, such a conclusion means that express refusal by the head of mission will make it impossible for the authorities of the receiving State to enter the mission premises even in emergency caused by *force majeure*. Unsurprisingly, such a conclusion receives criticism from scholars. For instance, Silva commented that: 'In these cases it would be absurd to wait for the consent of the head of mission and the possibility of a refusal would still be more absurd.'[23] Nevertheless, the reality is that refusal by the head of mission is not unheard of. Just as Denza pointed out: 'There had been refusals of consent even when fire or yellow fever were raging.'[24] On 1 January 1956, a fierce fire happened inside the Soviet embassy in Ottawa. According to the description of the incident, the Soviet diplomatic staff attempted to put out the fire themselves even though the Canadian firemen were ready just outside the embassy. It is reported that it was only after tense negotiations with the Soviet Ambassador that the firemen were allowed to enter the mission premises and do their job. When the fire was finally put out after six hours, the embassy building had already been destroyed by the fire.[25] In October 2000, a fierce fire happened in the US embassy in Moscow. It is reported that the US mission staff managed to extinguish the fire by themselves.[26] In these two cases, it can be implied that when the fire broke out, the head of mission intentionally did not provide consent of entry and so the firefighters were not allowed to enter into the mission premises.

The reason why the head of mission usually feels reluctant to give consent of entry can be explained with the following two infamous incidents. Both involve the notorious 'KGB firefighters' and their successful acquisition of confidential material from the US embassy in Moscow. On 28 March 1991, when a fire broke out inside the US embassy in Moscow, a small number of Soviet firefighters entered the embassy and extinguished the fire. However, it was found later that four KGB (Soviet security agency) officers had posed as firefighters and had successfully 'pulled out secure telephones and communications equipment as well as passports and personnel [sic] effects of embassy personnel'.[27] This incident

[22] Sen (n 19) 113.

[23] GE Do Nascimento e Silva, *Diplomacy in International Law* (AW Sijthoff, Leiden 1972) 96.

[24] Denza (n 6) 119.

[25] 'Soviet Embassy Fire' *City of Ottawa* <http://ottawa.ca/en/residents/arts-heritage-and-culture/city-ottawa-archives/exhibitions/witness-change-visions-8> accessed 2 May 2016.

[26] US Embassy in Moscow Almost Burned Down' Pravda Report (14 October 2000) <http://www.pravdareport.com/news/russia/14-10-2000/37100-0/> accessed 2 May 2016.

[27] James Gerstenzang and Don Shannon, 'KGB Snooped During Embassy Fire' *Los Angeles Times* (Washington 1 May 1991) <http://articles.latimes.com/1991-05-01/news/mn-1029_1_classified-operations> accessed 2 May 2016.

is almost a replay of a similar event that happened on the night of 27 August 1977.[28]

What makes the absolute inviolability of mission premises in emergency situations caused by *force majeure* more controversial is that similar situations received different treatment in other international conventions. To be specific, Article 31(2) VCCR [29] provides that: 'The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.' Likewise, the CSM[30] further elaborates on the same issue. According to Article 25(1):

> Such consent may be assumed in case of fire or other disaster that seriously endangers public safety, and only in the event that it has not been possible to obtain the express consent of the head of the special mission or, where appropriate, of the head of the permanent mission.

Whether the provisions in the VCCR and the CSM provide a feasible solution to the controversies in Article 22(1) of the VCDR is debatable. After all, it must be emphasized that the nature and significance of the inviolability of consular premises and special missions are essentially different from those of the mission premises of permanent diplomatic missions. Considering the aforementioned arguments and incidents, it can be asserted that inviolability of mission premises should keep absolute, and *force majeure* cannot be deemed as a justification to override the inviolability of mission premises.

1.2.2 Emergency situations caused by criminal activities inside the diplomatic mission

Concerning emergency situations caused by criminal activities inside the diplomatic mission, one remarkable case is worth noting. That case is the fatal shooting of policewoman Fletcher in St James's Square in London on 17 April 1984. On that day, Fletcher was on duty in St James's Square to maintain order during a peaceful demonstration outside the Libyan People's Bureau (viz, the Libyan Embassy). She was killed 'by shots of automatic gunfire from a window' of the Libyan mission premises.[31] Subsequently the head of the Libyan diplomatic mission expressly refused entry by the British police to carry out a search and commence an investigation. The incident was discussed in the Report by the UK Foreign Affairs Committee several months later. Particularly, the controversy about whether the inviolability of mission premises can be overridden in emergency situations caused by criminal activities inside mission premises when public safety and

[28] 'The Embassy Moscow Fire of 1977' *Association for Diplomatic Studies and Training* <http://adst.org/2014/08/the-embassy-moscow-fire-of-1977/> accessed 2 May 2016.

[29] 596 UNTS 261, adopted 24 April 1963, entered into force 19 March 1967.

[30] 1400 UNTS 231, adopted 8 December 1969, entered into force 21 June 1985.

[31] Grant V McClanahan, *Diplomatic Immunity: Principles, Practices, Problems* (Hurst & Company, London 1989) 5. See also Foreign Affairs Committee (UK), 'The Abuse of Diplomatic Immunities and Privileges' HC Paper 127 (1984–85) para 74.

human life are in great danger was discussed. The report drafted by the Committee quoted the argument in Hardy's *Modern Diplomatic Law* in which a similar scenario was depicted:

> [I]t would be a manifest abuse, and indeed an instance of outright foolishness, if, in the event of … a man shooting with a rifle from the window of a mission, the local authorities were not able to go in and deal with the matter.[32]

However, for similar reasons to those discussed in the emergency situation caused by *force majeure*, Hardy concluded that: '[E]ven if a mission fails to use its premises in accordance with legitimate purpose, its inviolability must still be respected by the receiving State.'[33]

Sir Francis Vallat agreed with Hardy, and he recalled a similar discussion during the 1961 Vienna Conference, which concluded that:

> [I]t was considered that in the interests of international relations there should really be a protection of embassies, an inviolability of premises, without exception. One of the fears was if specific exceptions were made in the Convention this would give a certain power of appreciation to the receiving State which it was thought might lead to trouble and be undesirable.[34]

The report also commented on another controversy: whether the right of self-defence can be invoked against the inviolability of the mission premises in emergency situations when public safety and human life are in great danger. The report examined various opinions from scholars and concluded that the right of self-defence 'could not have acted as a lawful basis for the forcible entry of the Bureau premises'.[35] The conclusion of the UK Foreign Affairs Committee was later endorsed by the UK Government's White Paper.[36] Nevertheless, the official conclusion of the UK government was not free from controversy. For instance, Mann argued that:

> [T]he inviolability of a mission's premises is by no means absolute, but must give way if the mission has allowed such danger to arise in its premises as to provoke the receiving State and take measures reasonably necessary to protect the security of the life and

[32] Michael Hardy, *Modern Diplomatic Law* (Manchester University Press, Manchester 1968) 44; Foreign Affairs Committee (n 31), para 90.

[33] See Hardy (n 32) 44. This conclusion is similar to Denza's opinion discussed earlier in this chapter, see text to n 24 above. Similar to Denza, Cameron also points out that the breach of art 41(1) and 41(3) of the Vienna Convention does not justify the breach of the inviolability of mission premises in art 22(1). See Iain Cameron, 'First Report of the Foreign Affairs Committee of the House of Commons' (1985) 34 ICLQ 610, 612.

[34] Foreign Affairs Committee (n 31), para 91.

[35] ibid para 95. See also Rosalyn Higgins, 'The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience' (1985) 79 AJIL 641, 646–47.

[36] Secretary of State for Foreign and Commonwealth Affairs (UK), 'Government Report on Review of the Vienna Convention on Diplomatic Relations and Reply to "The Abuse of Diplomatic Immunities and Privileges"' (Cmnd 9497, 1985), para 83 in which the former conclusion in the Report was accepted by the UK government.

property of the inhabitants. … It is therefore impossible to agree with the conclusions of the House of Commons Committee, accepted in paragraph 83 of the Government White Paper.[37]

Also, it is worth mentioning the opinion of Denza. Although she admits that the inviolability of mission premises shall not be overridden even in cases of manifest abuse such as criminal activities, she acknowledges the justification of the invocation of the right of self-defence as a last resort to protect human life.[38] Evidently, some other scholars agree with Denza on this issue.[39] Whether the right of self-defence can be invoked as a valid justification to override the inviolability of mission premises will be further analysed in section 2.1.2 of this chapter.

1.3 The dilemma faced by the receiving State

The above section identifies two distinct kinds of emergency situations in which the absolute inviolability of mission premises in Article 22(1) of the VCDR might be challenged. As was pointed out earlier, Article 22(1) of the VCDR does not allow any exception to the absolute inviolability of mission premises. As such, the absolute inviolability of mission premises forms an international obligation for State parties to the VCDR and accordingly, every receiving State shall observe such an obligation. Failure to comply with absolute inviolability will lead to the breach of the obligation under Article 22(1) of the VCDR, as it is stipulated in Article 12 of the Draft Articles on State Responsibility: '[W]hen an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.'

Nevertheless, it can be seen from the above analysis that frequently the authorities of the receiving State have to decide whether they should enter the mission premises so as to prevent further threat to public safety or save human life even without securing express consent from the head of the diplomatic mission. The issue is more critical when they find that they must stop an ongoing criminal act inside the mission premises but their request for entering the mission premises is expressly refused by the head of the mission as exemplified by the situation following the death of Fletcher. Thus, what the authorities of the receiving State have to decide is whether they shall strictly observe the obligation of the inviolability of mission premises as required by Article 22(1) of the VCDR even when the emergency situation will lead to the great danger of public safety and the possible loss of human life, or breach the inviolability of mission premises anyway so as to protect public safety and human life and then bear the State responsibility

[37] Fritz A Mann, '"Inviolability" and other Problems of the Vienna Convention on Diplomatic Relations' in Fritz A Mann, *Further Studies in International Law* (OUP, Oxford 1990) 336.

[38] Denza (n 6) 123.

[39] John S Beaumont, 'Self-Defence as a Justification for Disregarding Diplomatic Immunity' (1991) 29 Canadian YBIL 391, 398.

arising from the breach. Inevitably, this thorny issue becomes a dilemma faced by the authorities of the receiving State in the two kinds of emergency situations mentioned above: if they do stick to their obligation under Article 22(1) of the VCDR, they may face the unwelcomed consequences caused by *force majeure* or criminal activities inside the mission premises. Public safety is threatened and probably, human life will be lost. They may be criticized by the general public for their indifference to save human life and their inability to stop blatant criminal activities inside the mission premises. On the other hand, if they choose to breach the inviolability of mission premises, they will probably receive official protest from the sending State and will be held responsible for such a breach. Moreover, considering the nature of diplomatic relations, including the fact that a receiving State is also a sending State with regard to its own diplomatic mission overseas, the breach of the inviolability of mission premises in its capital may lead to the possible breach of the inviolability of its own mission premises in foreign capitals. Obviously, this reciprocal nature adds to the misgivings of the authorities of the receiving State, and increases the dilemma faced by that State. As Higgins incisively pointed out:

> Virtually every State that is host to a foreign diplomatic mission will have its own diplomats operating abroad, and its own embassy in the territory of the sending State. Every State wants its own diplomats operating abroad, and its own diplomatic bags, embassies and archives, to receive those protections that are provided by international law. Honoring those same obligations vis-a-vis the diplomatic community in one's own country is widely perceived as a major factor in ensuring that there is no erosion of the international law requirements on diplomatic privileges and immunities.[40]

Thus, as it was commented in the Report from the UK Foreign Affairs Committee:

> In all these matters, of course, considerations of reciprocity will be important. … [R]eciprocal action may be taken against our diplomats overseas. … [T]he fear of reciprocal action … must always weigh in consideration.[41]

Obviously, the 'deterrent effect of reciprocity' usually makes the authorities of the receiving State refrain from disregarding the inviolability of mission premises in the dilemma of deciding whether the protection of public safety and human life shall prevail over the inviolability.[42]

To sum up, considering the aforementioned factors, it can be revealed that when facing the dilemma of judging whether the protection of public safety and human life shall prevail over the principle of diplomatic inviolability, the authorities of the receiving State may not easily find a straightforward solution.

[40] Higgins (n 35) 641. [41] Foreign Affairs Committee (n 31), para 66.

[42] Omer Yousif Elagab, *The Legality of Non-forcible Countermeasures in International Law* (OUP, Oxford 1988) 117, as cited in LANM Barnhoorn, 'Diplomatic Law and the Unilateral Remedies' (1994) 25 Netherlands Yearbook of International Law 39, 64.

2. Attempts to Solve the Dilemma: Examination of Possible Justifications

In order to solve the dilemma faced by the receiving State, it is necessary to examine possible justifications which may relieve the receiving State from State responsibility arising from the breach of the inviolability of mission premises in the two aforementioned kinds of emergency situations. Reviewing relevant rules in contemporary international law, the most helpful source of such kind of justifications can be found in Articles 20 to 26 of the Draft Articles in State Responsibility in which six defences to the breach of an international obligation are enumerated. These defences are: consent, self-defence, countermeasures, *force majeure*, distress, and necessity. Among these six defences, consent is obviously inapplicable in the present context: if the head of the mission provides consent for entry into mission premises in emergency situations,[43] there will be no breach of the inviolability of mission premises and so no dilemma for the authorities of the receiving State will ever arise. Countermeasures are also not applicable in this context, as Article 50(2)(b) of the Draft Articles on State Responsibility expressly provides that '[a] State taking countermeasures is not relieved from fulfilling its obligations … [t]o respect the inviolability of diplomatic or consular agents, premises, archives and documents'. Also, the debate concerning the invocation of *force majeure* in emergency situations has been discussed already in the former section. Thus, only the remaining three defences will be examined in the following sections.

2.1 The right of self-defence

2.1.1 The conditions of invoking self-defence in contemporary international law

Self-defence is a classical doctrine of customary international law, and its modern international law origin can be traced back to the *Caroline Case* in 1837 in which the conditions of invoking the right of self-defence were proposed as:

> A necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation … The act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.[44]

[43] For instance, see the incident involving a fire at the Israeli embassy in Paris on 23 May 2002, 'Fire Destroys Israeli Embassy in Paris' *People's Daily* (Beijing, 23 May 2002) <http://english.peopledaily.com.cn/200205/23/eng20020523_96337.shtml> accessed 2 May 2016.

[44] 'Correspondence between Great Britain and the United States, respecting the Arrest and Imprisonment of Mr. McLeod, for the Destruction of the Steamboat Caroline' (1841) 29 British and Foreign State Papers 1126, 1138, in Christopher Greenwood, 'Caroline, The' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP, Oxford 2012) vol I, 1141, para 5.

Nowadays, a typical textbook definition of self-defence in customary international law can be cited as follows:

> [The use of force] in response to an immediate and pressing threat, which could not be avoided by alternative measures and if the force used to remove that threat was proportional to the danger posed.[45]

The conditions for invoking the right of self-defence are self-evident from the definition: the existence of an immediate threat, no alternative measures must have been available, and the principle of proportionality must have been observed.[46] The situations in which the right of self-defence can be applied in customary international law are proposed by Dixon as follows:

1. In response to and directed against an ongoing armed attack against State territory.
2. In anticipation of an armed attack or threat to the State's security, so that a State may strike first, with force, to neutralize an immediate but potential threat to its security.
3. In response to an attack (threatened or actual) against State interests, such as territory, nationals, property, and rights guaranteed under international law. If any of these attributes of the State are threatened, then the State may use force to protect them.
4. Where the 'attack' does not itself involve measures of armed force, such as economic aggression and propaganda. All that is required is that there is an instant and overwhelming necessity for forceful action.[47]

The above proposed definition and conditions indicate a wide possibility for the application of the right of self-defence in customary international law, and admittedly, some of the points are indeed not free from controversy.[48] By contrast, a much more restrictive application of the right of self-defence is stipulated in Article 51 of the UN Charter, which provides:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

It can be seen that the right of self-defence under Article 51 of the UN Charter differs significantly from the right of self-defence in customary international law in the following several aspects. First, while in customary international law the

[45] Martin Dixon, *Textbook on International Law* (7th edn, OUP, Oxford 2013) 328.

[46] There is general agreement among authorities on these conditions, although some scholars challenge each of them. See Christine Gray, *International Law and the Use of Force* (3rd edn, OUP, Oxford 2008) 148–56.

[47] Dixon (n 45) 328.

[48] Especially points 3 and 4. See generally, Greenwood (n 44) paras 9–10, 41–51. The present author remains critical of points 3 and 4. See the comment on the wide interpretation of the customary international law application of the right of self-defence (text following n 56).

application of the right of self-defence may not have to be confined to the actual existence of an 'armed attack', Article 51 of the UN Charter expressly prescribes 'armed attack' as a prerequisite to the application of the right of self-defence. Thus, under the UN Charter, the application of the right of self-defence without an actual armed attack is inconceivable. Indeed, Article 51 is the sole source for the application of the right of self-defence within the UN Charter, and according to that article the existence of an actual 'armed attack' is obviously indispensable to the invocation of that right.[49] Notably, Brownlie commented on Article 51 of the UN Charter that: '[I]t is not incongruous to regard Article 51 as containing the *only* right of self-defence permitted by the Charter'(emphasis added).[50]

Since 'armed attack' is the key element of the conditions that must be in place if the right of self-defence is to be applied, the question has been raised as to the exact meaning of the term 'armed attack'. In the narrowest sense, an armed attack can be deemed as 'an invasion by the regular armed forces of one State into the territory of another State'.[51] In addition to this paradigm, there have been several attempts to clarify the meaning of the term 'armed attack' in Article 51 of the UN Charter. For instance, according to the US Foreign Relations Committee, the term 'armed attack': '[C]learly does not mean an incident created by irresponsible groups or individuals, but rather an attack by one State upon another'.[52]

Brownlie further elaborated that: '[A] co-ordinated and general campaign by powerful bands of irregulars, with obvious or easily proven complicity of the government of a State from which they operate, would constitute an "armed attack" '.[53] The ICJ in the *Nicaragua Case* provided a similar statement in which the Court pointed out that an 'armed attack' can be identified as:

> the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to (*inter alia*) an actual armed attack conducted by regular forces, or its substantial involvement therein.[54]

In addition to the existence of an actual armed attack (or at least activities amounting to an actual armed attack), another distinct difference between the application of the right of self-defence in customary international law and the UN Charter is the possibility that the right of self-defence may be applied in customary

[49] Christopher Greenwood, 'The ICJ and the Use of Force' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (CUP, Cambridge 1996) 373, 379.

[50] Ian Brownlie, *International Law and the Use of Force by States* (OUP, Oxford 1963) 271.

[51] Gray (n 46) 128. It is worth noting that art 2(4) of the UN Charter uses the term 'threat or use of force' instead of 'armed attack'. Whether this difference suggests that the term 'armed attack' should always be understood in a more narrow sense is not clear.

[52] As cited in Brownlie (n 50) 278. Though the comment is on the term 'armed attack' as it appears in art 5 of the North Atlantic Treaty, it can be considered to apply as well to the term used in art 51 of the UN Charter.

[53] Brownlie (n 50) 279.

[54] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 195. The statement is actually based on Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX).

international law to protect vital State interests other than the State territory from invasion. As Bowett expressly pointed out in his classical work *Self-Defense in International Law*, the function of self-defence is 'to justify action otherwise illegal, which is necessary to protect certain essential rights of the State against violation by other States'.[55] Similarly, Dixon also admitted that 'a number of States argue that aggression can take many forms, not only the classic attack against territory, especially in the modern age'.[56] Here the interpretation seems to suggest that any possible threat to interests other than State security and State territory may trigger the application of the right of self-defence, such as the attack or threat of attack on the nationals of a State by another State. Obviously, this wide interpretation is far beyond the scope of application of the right of self-defence in Article 51 of the UN Charter. To what extent such a wide interpretation reflects the actual State practice of the right of self-defence remains highly controversial. Indeed, there is little evidence of State practice to support such a wide interpretation, not to mention the indispensable opinion juris.

Notwithstanding the differences between the application of the right of self-defence in customary international law and the UN Charter, it is admitted that the customary international law application of the right of self-defence 'continued to exist alongside the treaty law (ie, the UN Charter)'.[57] Just as the ICJ commented on the continuing relevance of the customary international law application of self-defence:

> Article 51 of the Charter is only meaningful on the basis that there is a 'natural' or 'inherent' right of self-defence and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter … It cannot, therefore, be held that article 51 is a provision which 'subsumes and supervenes' customary international law … The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content.[58]

2.1.2 Can self-defence be invoked in emergency situations to override the inviolability of mission premises?

This section deals with the possibility of invoking the right of self-defence in emergency situations. Obviously, the right of self-defence cannot be invoked in emergency situations caused by *force majeure* for the reason that such an emergency situation has nothing to do with any threat caused by an armed attack or involvement of the use of force. The prerequisite of invoking the right of self-defence

[55] Derek William Bowett, *Self-Defense in International Law* (Manchester University Press, Manchester 1958) 270.

[56] Dixon (n 45) 331. Gray, on the other hand, argues that there is no obvious rule in customary law that a State can invoke the right of self-defence to protect its nationals abroad. See Gray (n 46) 156–60.

[57] Malcom N Shaw, *International Law* (7th edn, CUP, Cambridge 2014) 821.

[58] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 176.

cannot be met in this kind of situation. And so, the issue of invoking the right of self-defence is relevant exclusively to emergency situations caused by criminal activities inside mission premises.

To examine the applicability of the right of self-defence in this kind of situation, the debate over the applicability of the right of self-defence in the aforementioned Report from the UK Foreign Affairs Committee is especially worth noting. Concerning the applicability of self-defence to override the inviolability of mission premises when there is an ongoing criminal act performed inside the mission, Draper commented as follows:

> Self-defence is an important principle of customary international law, exemplified, but not exhausted, by Article 51 of the UN Charter. From the nature of self-defence it derives from the law of nature from which international law derives its being. It comes into play when acts of force are committed by States, although it is not limited to such contingencies. Thus, in the incident of the shooting of Woman Police Officer Fletcher on 17 April, 1984, by an inmate within the Libyan Embassy whose status and identity was unknown, it can properly be contended that, an immediate response, counter-fire might have been directed at the Libyan Embassy windows by the police. Further, in the period immediately after the firing from the embassy, entry might have been carried out by the police, with firearms, if available, and sufficient force used within the embassy to overpower the assailant or any person armed and remove all weapons found inside. Such acts would, in exercise of the right of self-defence, probably have been required immediately after the firing from within or during continued firing.[59]

Several points can be summarized from Draper's comments. First, Draper contended that the customary international law doctrine of self-defence can be applied in emergency situations caused by criminal activities (in this incident, the shooting from the Libyan Embassy window) inside the mission premises even if the threat does not involve the attack on the territory of the receiving State. Secondly, Draper radically proposed that in this kind of emergency situation, the authorities of the receiving State (in this situation, the UK police) are entitled to invoke self-defence to override the inviolability of mission premises (ie, to resort to counter-fire and even to enter the premises to carry out a search). Thirdly, Draper suggested that, provided that the measures adopted are proportional to the threat, and the actions are taken in time (immediately after the firing from the embassy), the conditions for invoking the right of self-defence under customary international law should be considered as fully met. Notably, several scholars hold the same or similar opinions as Draper's. For example, Sir John Freeland, in reply to the question whether 'self-defence in international law is held to refer only to the self-defence of States against other States rather than individuals', replied as follows: 'I think self-defence not only applies to action taken directly against a State but also to actions directed against nationals of that State.'[60] Freeland further elaborated his appreciation of

[59] Gerald Draper, 'Memorandum', in Foreign Affairs Committee (n 31), Appendices to the Minutes of Evidence, 71–72.

[60] Foreign Affairs Committee (n 31), Minutes of Evidence, 28, para 47 (Sir John Freeland).

the application of the right of self-defence to protect human life against the inviolability of mission premises:

> I certainly would not exclude the possibility of its being justifiable in a case where, for example, there is continued firing of weapons from the premises of an embassy, where every other method has been tried and has failed to stop that, for it then to be lawful to go into the embassy to stop it.[61]

Similar, but not identical to Freeland's hypothetical scenario of 'continued firing from the embassy', is the extraordinary scenario proposed by Sir Francis Vallat, who was the deputy legal advisor of the British Foreign Office during the drafting process of the VCDR:

> Suppose the embassy were being used as a kind of fortress for a running battle with people in the street, [the right of self-defence] might then become justifiable, but I find it difficult to imagine that before an international tribunal of repute one would be held to be justified to run into an embassy because there had been one or two shots fired, even if that happened to cause an injury or death.[62]

Compared with Freeland's opinion, Vallat seemed to adopt a moderate approach. He rejected that the right of self-defence can be invoked if only one or two shots have been fired from the embassy. He seemed to emphasize the condition of necessity, and in his opinion, one or two shots fired from the embassy cannot be regarded as such a threat to the public safety even though the shots could cause the injury and death of some persons. His contention of such a threshold for testing the conditions of necessity was strongly criticized by Mann. Mann pointed out that Vallat's argument: 'seems to mean that the authorities have to wait for the death of a third person before they can intervene—a proposition which must be described as wholly unacceptable and unrealistic'.[63] Accordingly, Mann argued that if public safety or human life is endangered by the abuse of diplomatic inviolability, there is no doubt that the right of self-defence could and should be invoked to override the inviolability of mission premises, so as to save life and property and prevent further threat to public safety. He argued, if 'a large quantity of explosives is stored in the premises of an embassy and constitute a danger of the utmost gravity to a large, inhabited section of a town', it would be absurd to wait for the explosion and actual enormous damage occurred before the local authorities take any action to prevent the consequences. Based on the same logic:

> [O]nce shots have been fired from an embassy and an undertaking to prevent similar acts has been declined by the diplomat in charge, the receiving State should be entitled to enter the embassy, search it and remove such weapons as may be found.[64]

These extraordinary examples and arguments proposed by aforementioned scholars received criticism from other scholars. The problem of the above cited arguments is obvious: all these arguments fail to notice that the prerequisite

[61] ibid para 50. [62] ibid 34, para 78 (Sir Francis Vallat).
[63] Mann (n 37) 334–35. [64] ibid.

for invoking self-defence is the existence of an 'armed attack'. Obviously a mere shot from a window of the embassy cannot amount to the 'armed attack' condition as stipulated in Article 51 of the UN Charter. Even though Freeland argued that the attack on a national of a State may constitute an 'armed attack', it is highly controversial whether such a wide interpretation reflects customary international law. As Brown pointed out, 'There appears to have been no example of a State exercising such a right of self-defence.'[65] Higgins is also 'skeptical as to the applicability at all of the international law concept of self-defense to violent acts by the representatives of one State within the territory of another, directed against the latter's citizens'.[66] Both Brown and Higgins held the opinion that even in an emergency situation when there is actual shooting coming from the embassy, the invocation of the right of self-defence to override the inviolability of mission premises cannot be justified. Moreover, it would be too radical for the authorities of the receiving State to override the inviolability of mission premises merely based on the imaginary extreme scenarios and extraordinary deduction from scholars such as Vallet and Mann. Interestingly, the Report from the UK Foreign Affairs Committee concluded that the right of self-defence cannot be adopted to override diplomatic inviolability in most kinds of emergency situations and it emphasized that the inviolability of the mission premises should be generally observed.[67] However, it is worth noting that the UK government later, in its official response to the Report, did recognize the possibility of overriding the inviolability of the diplomatic bag based on the right of self-defence so as to protect national security, public safety and human life, though it did not expressly suggest that this conclusion might also apply to the inviolability of mission premises.[68] Last but not least, it is also worth noting that Article 21 of the Draft Articles on State Responsibility[69] implies that the invocation of self-defence to preclude the receiving State from being held responsible for breach of its obligation under Article 22(1) of the VCDR requires a more restrictive interpretation of the right of self-defence, which suggests that the invocation of the right of self-defence should be confined to the conditions required by Article 51 of the UN Charter. If this is the case, the invocation of the right of self-defence to override the inviolability of mission premises under any emergency situation in the absence of an armed attack will be extremely questionable. To sum up, it can be asserted that the invocation of the right of self-defence to override the inviolability of mission premises is far from justified.

[65] Jonathan Brown, 'Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations' (1988) 37 ICLQ 53, 86.

[66] Higgins (n 35) 647.

[67] Foreign Affairs Committee (n 31) paras 95, 97, and 111. The only exception expressly mentioned in the report is the protection of human life, which is considered to enjoy priority over the inviolability of the diplomatic bag.

[68] Cmnd 9497 (n 36) para 48.

[69] Article 21 provides: 'The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.'

2.2 Distress and necessity

Distress and necessity are two classic types of defences that may justify an otherwise existing breach of an international obligation.[70] Whether they can be invoked as justifications for the authorities of the receiving State to override the inviolability of mission premises in emergency situations will be analysed in the following sections.[71]

2.2.1 Can distress be invoked as a justification to override the inviolability of mission premises?

According to Article 24 of the Draft Articles on State Responsibility:

> The wrongfulness of an act of a State … is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

Based on this provision, it can be concluded that the essential prerequisite to invoke distress as a valid defence to preclude wrongfulness of an otherwise unlawful act of a State lies in the immediate necessity to save someone's life—either that of the author of the act or of other persons entrusted to the author's care.[72]

At first glance, it seems that distress can be appropriately invoked to override the inviolability of mission premises in emergency situations caused by criminal activities inside the diplomatic mission. Take the aforementioned infamous Fletcher incident as an example: if what Sir John Freeland and Sir Francis Vallat depicted became a reality, it might be reasonable to argue that the authorities of the receiving State such as those colleagues of policewoman Fletcher who were on the scene had to counter-fire at the window of the Libyan Embassy, to suppress the perpetrator and prevent further threats to public safety and human life. Indeed, distress differs from *force majeure* in that the author of the act (in the present context, the authorities of the receiving State) has free will to decide whether to undertake such an act.[73] That implies, in face of the breach of an international obligation on the one hand and the immediate necessity to save someone's life on the other hand, the author of the act deliberately chooses the latter option as a priority on the basis that complying with the specific international obligation 'would almost certainly cause his or her death or that of the persons entrusted to his care'.[74] This

[70] See Elena Fasoli, 'Distress' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP, Oxford 2012) vol III, 168, paras 2–4; Attila Tanzi, 'Necessity' in ibid vol VII, 583, paras 1–2.

[71] Since the emergency situation caused by *force majeure* has been discussed earlier, in the following sections only the emergency situation caused by criminal activities of the diplomatic mission will be the focus of the analysis.

[72] The Commentary on the Draft Articles on State Responsibility clearly points out that the application of art 24 is limited to cases where human life is at stake. This is the prerequisite for invoking distress as a valid defence. See James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, Cambridge 2001) 176.

[73] James Crawford, *State Responsibility: The General Part* (CUP, Cambridge 2013) 301.

[74] Fasoli (n 70) para 7.

is reflected in the text of Article 24 through the reference of there being 'no other reasonable way' to avoid the consequence, apart from breaching the relevant international obligation. However, the crucial issue is, whether the reaction and the measure adopted by the authorities of the receiving State such as counter-fire or even storming the mission premises can be deemed 'reasonable' within the ambit of the condition to invoke distress. As cited above, Sir Francis Vallet frankly admitted that it would not be convincing to disregard the inviolability of mission premises if 'there had been one or two shots fired'.[75] Here it is obvious that no uniform criteria can be set—a criticism that is apparent from Mann's opinion on Vallet's assertion. Besides, it is also worth noting that to invoke distress requires that the measure adopted must be the only feasible way to prevent the loss of life. In the Fletcher incident, whether the disregard of the inviolability of mission premises was the 'only feasible way' is also questionable. Performing counter-fire directly against mission premises immediately after one or two shots were fired from the embassy window without even contacting the diplomatic mission or the Ministry of Foreign Affairs (MFA) of the sending State seems not to be an appropriate response to the emergency. The condition for invoking distress as is stipulated in Article 24 of the Draft Articles on State Responsibility should be interpreted in a restrictive way to save human life in extreme emergency situations, rather than to allow the abuse of the unilateral power of the receiving State to justify the breach of its international obligation under Article 22(1) of the VCDR. Considering these facts, it may be concluded that distress cannot be justified to override the inviolability of mission premises in emergency situations caused by criminal activities from within the mission premises.

2.2.2 Can necessity be invoked as a justification for breaching the inviolability of mission premises?

Whereas the possible invocation of distress is confined to emergency situations to save human life, the invocation of necessity covers issues related to the safeguarding of 'essential interests'. To be specific, Article 25(1)(a) of the Draft Articles on State Responsibility prescribes that necessity can be invoked as a valid defence to preclude the wrongfulness of a State's act if the act 'is the only means for the State to safeguard an essential interest against a grave and imminent peril'. It can be seen from Article 25(1)(a) that the invocation of necessity is subjected to three essential conditions. In the first place, there should be an 'essential interest' for the State to protect. The term 'essential interest' is not strictly defined in the text of Article 25(1)(a) so it can be suggested that the interpretation of 'essential interest' varies from case to case and cannot be prejudged.[76] Secondly, the essential interest of the State must have been threatened by 'a grave and imminent peril'. Like the term 'essential interest', what can be deemed 'grave' is subject to interpretation in

[75] See n 62 above. [76] Tanzi (n 70) para 14. See also Crawford (n 72) 183.

different circumstances.[77] Finally, the State's act should be 'the only means' that the State can feasibly take to protect the essential interest. The term 'only means' suggests that necessity may not be invoked 'if there are other (otherwise lawful) means available, even if they may be more costly or less convenient'.[78] Obviously, if the receiving State intends to invoke necessity to override the inviolability of mission premises, it must fulfill all these three conditions. With regard to the first condition, in both the emergency situations caused by *force majeure* and criminal activities inside the diplomatic mission, it can be acknowledged that public safety and human life can be properly deemed 'essential interests' that require to be safeguarded. However, what is worth noting is that Article 25(1)(b) of the Draft Articles on State Responsibility specifies a proviso to the invocation of necessity: the act of the State shall not 'seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole'. It is submitted that the inviolability of mission premises is generally regarded as an underlying principle of public international law. Just as the ICJ pointed out in the judgement of the *Tehran Hostages Case*:

> [T]he principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established regime.[79]

As the Commentary on the Draft Articles on State Responsibility points out, necessity 'arises where there is an irreconcilable conflict, between an essential interest on the one hand and an obligation of the State invoking necessity on the other', and so, 'necessity will only rarely be available to excuse non-performance of an obligation and … it is subject to strict limitations to safeguard against possible abuse'.[80] Since the issue whether the essential interests of public safety and human life shall prevail over the well-established principle of the inviolability of mission premises is far from settled, it can therefore suggest that the proviso of Article 25(1)(b) of the Draft Articles on State Responsibility can invalidate the invocation of necessity to disregard the inviolability of mission premises in the aforementioned emergency situations.

With regard to the second condition, the issue is even less clear. For instance, if a large quantity of explosives is found stored in the mission premises, can such a situation be justly deemed as forming a 'grave and imminent peril' to public safety and human life? Mann's argument is that such a situation be regarded as an emergency which forms such a peril. However, the cause and effect of storing a large quantity of explosives in mission premises and the 'actual enormous damage' is not free from controversy. After all, in the absence of any specific criteria of 'grave and imminent peril', it is too radical for the authorities of the receiving State to disregard the inviolability of mission premises merely based on imaginary consequences.

[77] ibid. [78] Crawford (n 72) 184.

[79] *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, para 86.

[80] Crawford (n 72) 178.

Finally, it is also not convincing to assert that in the aforementioned emergency situations, the breach of the inviolability of mission premises is the 'only means' to safeguard public safety and human life. The reason is perhaps similar to that which has been discussed with regard to the invocation of distress. As will be proposed in the last section of this chapter, there are several alternative measures that the authorities of the receiving State can adopt when they are faced with the dilemma whether they should breach the inviolability of mission premises to protect public safety and human life. It can therefore be concluded that the invocation of necessity to override the inviolability of mission premises in emergency situations cannot be justified.

3. Alternative Measures to Solve the Dilemma

As discussed above, the traditional justifications listed in the Draft Articles on State Responsibility do not solve the dilemma faced by the authorities of the receiving State. Thus, in order to provide a solution, alternative measures will be proposed in the following paragraphs.

To begin with, various administrative measures can be adopted by the receiving State to tackle the dilemma. To be specific, if the receiving State can build up effective communication channels between its local authorities and the diplomatic mission of the sending State as well as the MFA of the sending State, some practical difficulties may be overcome. It is admitted that normally, a foreign diplomatic mission will contact the MFA of the receiving State on important issues. However, it must also be appreciated that usually contacts between the diplomatic mission and the MFA of the receiving State are less efficient when emergency situations happen. For instance, if there happens to be a serious earthquake or similar natural disasters, the diplomatic mission may not be able to contact the MFA of the receiving State if the Ambassador himself is seriously wounded.[81] In such an emergency situation the local authorities may be in confusion and face the dilemma of whether they should come to the rescue immediately, without obtaining consent from the head of the mission. If there is an effective communication channel between them and the MFA of the sending State, such difficulties can be greatly reduced, and the dilemma arising from the conflict of the inviolability of mission premises and the necessity to protect human life may be solved. In such cases when the protection of human life is a great priority, it is better for them to obtain consent directly from the MFA of the sending State, and this is perhaps more efficient than waiting for the MFA of the receiving State to contact the MFA of the sending State.

Essentially, this alternative measure requires better coordination and cooperation between the local authorities (police, firefighters, rescue teams, and medical

[81] See the incident cited in 'Taiwan Ambassador to Haiti Taken to Hospital, Embassy Destroyed' (n 20).

service teams, etc) and foreign diplomatic mission. This can be achieved by setting up a direct hotline between the police bureau, the fire department, hospitals, and the foreign diplomatic mission, as well as the MFA of the sending State. As a result, the improvement of direct communication may be helpful and effective to solve the dilemma faced by the authorities of the receiving State in emergency situations.

In addition to improvement in coordination and cooperation between the local authorities and the foreign diplomatic mission and the MFA of the sending State, coordination and cooperation between the local authorities and the MFA of the receiving State also need to be improved. As suggested in the First Report from the UK Foreign Affairs Committee, the liaison between local police and the Foreign and Commonwealth Office should be improved so that enough consultation will be received in time by local authorities such as the police and firefighters.[82] Obviously, legal advisers and international lawyers in the MFA are far more familiar with specific rules of diplomatic law than local police officers, firefighters, rescue teams, and medical service teams. And so their advice may provide useful guidance for the local authorities to solve dilemmas arising from the conflict between the inviolability of mission premises and the protection of public safety and human life.

4. Conclusions

By reviewing the draft history of Article 22(1) of the VCDR, it can be concluded that the inviolability of mission premises is absolute, without any exception to the general rule of inviolability. This assertion suggests that even in emergency situations when public safety and human life are threatened by *force majeure* or criminal activities from within the mission premises, the consent from head of the mission of the sending State is still the prerequisite for authorities of the receiving State to enter the mission premises. Without securing express consent from the head of the mission, the authorities of the receiving State will run the risk of breaching the international obligation of Article 22(1) of the VCDR, and such a breach will give rise to State responsibility of the receiving State. As such, the authorities of the receiving State will inevitably face a dilemma: in emergency situations caused by *force majeure* or criminal activities from within the diplomatic mission, they have to determine whether the absolute inviolability of mission premises should be overridden by need to protect public safety and human life.

The most important conclusion to be drawn from this chapter is that the dilemma cannot be solved by simply adopting radical measures to disregard the inviolability of mission premises. After examining various defences which might preclude the receiving State from being held responsible for the breach of the inviolability of mission premises, it can be stated that none of the defences are

[82] See Foreign Affairs Committee (n 31), paras 125–26.

applicable in emergency situations caused by *force majeure* or criminal activities originating within the diplomatic mission. The crux lies in the fact that the conditions required to invoke these defences cannot be fully met. Thus, classic defences such as the rights of self-defence, distress, and necessity cannot justifiably be invoked by the authorities of the receiving State to allow the breach of the inviolability of mission premises in emergency situations. In order to effectively solve the dilemma, the authorities of the receiving State are advised to adopt various alternative administrative measures such as facilitating communication between the authorities of the receiving State and the diplomatic mission as well as the MFA of the sending State so as to improve coordination and cooperation between them. In addition, the coordination and cooperation between the authorities and the MFA of the receiving State also need to be improved. By adopting these alternative administrative measures, the dilemma faced by the receiving State may be effectively solved.

11

Contemporary Developments Relating to the Inviolability of Mission Premises

Juan E Falconi Puig

1. Background

The VCDR guarantees the sovereignty and equality of States and seeks the maintenance of international peace and security, as well as friendly relations between nations.

It has recognized the status of diplomatic agents that from ancient times have been those who have developed friendly relations between the countries, independent of their different governmental, constitutional, and legal systems.

Generally law—national or international—which has been embodied in legal texts reflects the reality of a given moment and a specific geographical area, but these legal texts are also lagging behind the technological advances and the development of systems and procedures in all subjects. These norms were the product of necessity—to regulate life in society and, in this case, within the international community.

Therefore, it is easy to see that international conventions may turn obsolete or become outdated in one or more of the topics covered in those documents. That is the case of the VCDR, which was adopted more than fifty years ago. It has become outdated because the needs of the past are not the same as contemporary requirements. In those days there was no globalization and no technological progress along the lines of the internet, which has substantially transformed communications, to mention only one of the most important daily examples. Today constitutions incorporate e-government. Reality is in constant change and with it, the law which, if not updated, has no practical legal application.

With this brief background, we will review in this summary some aspects for a possible update of the VCDR.

Article 22 VCDR enshrines the absolute inviolability of mission premises and imposes a special protective duty on receiving States in that regard. It also provides an express and categorical prohibition of search, requisition, attachment, or execution. This last aspect should be understood as any order or judicial decision of a competent authority designed to execute a financial decision against the

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diplomatic premises or equipment and furniture that are part of them. But cases both of violation and of respect of the inviolability of diplomatic premises have arisen in the past.[1]

This inviolability means that agents of the receiving State may not enter the mission premises without the consent of the Head of Mission. But the natural interpretation of this rule is that this prohibition covers not only the agents of the receiving State but also any other person, whether or not a national of either the sending or the receiving State. This is followed by paragraph 2 of Article 22, in which the receiving State is ordered to take adequate measures to protect the premises of the mission against any intrusion or damage, without making distinctions as to where such disturbance may come from—its authors can thus be any person and thing, even if it is only temporarily in the host country.

But beyond that, it should be noted that the obligation of the receiving State extends to avoiding disturbances to the peace of the mission, and to ensure that there is no interference with its dignity. This means that, to give a graphic example of the situation, a group of people or even an individual (who may well be a national of the sending State) cannot enter the mission without the authorization of the Head of Mission, and cannot protest, shout, make noise, or demonstrate outside the mission, disturbing its tranquillity and eventually attacking its dignity. In any of these cases, the Head of Mission or another of its officers may require from the receiving State the adoption of any appropriate measures to protect the premises in order to ensure that no one enters, damages, or disturbs the peace of the mission. Such activities may and indeed do occur when protests exceed normal limits, disturb the tranquillity, and even, sometimes, interrupt the normal movement of people and vehicles in front of mission premises.

But the nature and scope of this provision go so far that even in emergencies which originate in accidents or acts of nature, *force majeure*, or unforeseen circumstances, it would still be necessary to have the authorization of the Head of Mission in order to enter the premises. Article 14 VCDR further elaborates on the three kinds of Heads of Mission, but excludes the rest of the diplomatic members of the mission, notwithstanding their rank.[2]

Another example could be a gas leak: even if it puts at risk the health of the people within the premises of a diplomatic mission, it cannot be controlled and repaired by specialized technicians without the authorization of the Head of Mission for entering the premises.[3]

Disturbing the peace of a mission or undermining its dignity does not necessarily mean physical attacks to its premises. It includes yelling or verbal expressions that, because of their volume or content, affect the tranquillity and dignity of the mission, the State, and the represented government.

[1] Ivor Roberts (ed), *Satow's Diplomatic Practice* (6th edn, OUP, Oxford 2012) 102, at para 8.11; 103, at para 8.12.

[2] Roberts (n 1) 91 at 7.27; 92. [3] VCDR art 14.

Article 22(3) VCDR which extends protection to the furniture and goods of the mission is a logical consequence of the principle of inviolability. The same applies to vehicles of the mission. They cannot be subjected to registration, implying inspection of any kind; to requisition, which involves the loss of use of movable property and means of transport; or to an embargo as a measure of execution in the case of an injunction on the goods, or an execution that involves the divestment of these assets to pay with them an obligation of economical content. This is logical because both local goods and furniture belong to the sending State and are protected by absolute immunity—which is one of the most important privileges established in usage and international conventions on diplomatic affairs.

Its importance is based on the premise that those assets which are held in property or in lease, according to Article 23 VCDR, are exempt from all taxes, national, regional, or municipal, since the scope and spirit of the Convention as international law is generally considered to be above national laws, and goes beyond the courtesy due to diplomatic representatives of a foreign State because they are privileges originally established by customs instituted over time.

And yet while these legal texts remain valid and current in the field of premises and property, they necessarily have to be updated in other aspects such as security, secrecy, and reliability in communications to remain faithful to the principles and original foundations of the same Convention.

At this point a brief digression is necessary to clarify that when a convention or international agreement takes precedence over the sovereign laws, which for internal scope are enacted in a State independently of its system of government, the sovereignty of this State is not affected since it is the State itself which precisely in the exercise of that sovereignty has decided to adhere to the relevant international convention.

On the other side, the consent of the receiving State for the appointment of Ambassadors is a requirement *sine qua non*—as indeed is the consent for the establishment of diplomatic relations in general. Such consent, however, implies a tacit acceptance of the diplomatic privileges and immunities—including those that exist under customary law—by the receiving State. Obviously express acceptance occurs in positive international law, reflected in the treaties and conventions, when the State originally subscribes to an instrument or adheres to it later as in the present case of the VCDR.

Among these privileges and immunities there is the inviolability of embassies and even of the Ambassador's residence, which is necessary to enable them to fully, safely, and peacefully carry out their work. It follows that inviolability cannot be altered by the receiving State and its agents under any conditions, even in emergencies. In practice, however, there have been some exceptions, such as in the fire at the US embassy in Moscow, when firefighters were allowed to enter.[4]

[4] Esther Fein, 'American Embassy in Moscow Is Severely Damaged by Fire' *New York Times* (29 March 1991) <http://www.nytimes.com/1991/03/29/world/american-embassy-in-moscow-is-severely-damaged-by-fire.html> accessed 19 May 2016.

On the other hand in April 1984 the inviolability of the Libyan Embassy in London was respected after shots had been fired from the building of the mission at the crowd (which had assembled during a demonstration by the opponents of Colonel Gaddafi) killing Police Officer Yvonne Fletcher. The British government broke off diplomatic relations with Libya and, in consequence, all the diplomats of that country had to leave the United Kingdom, including, obviously, the person who had fired the shot and caused the death of the Police Officer.

Among the measures that were taken later by the United Kingdom, the Diplomatic and Consular Premises Act was passed in 1987 which we will briefly examine later.

2. Privacy and Communications

On this subject, we shall start by pointing out that all persons have the right to privacy of their communications, and this has been recognized not only by the international conventions on human rights,[5] but also in the constitutions of most countries, at least in the Western world.

Article 27 VCDR explicitly instructs the receiving State to '[…] permit and protect free communication on the part of the mission for all official purposes'.

In this way it becomes important to highlight that the documents and archives of the mission are inviolable, not only when they are inside the premises of a mission, but wherever they are (Article 24 VCDR). And this is directly related to what is mentioned in Article 27, since such documents and archives are, generally, a product of communications between the mission, the Foreign Office or other government institutions, and colleagues of the receiving State. As a result, Article 27 VCDR charges the State to allow and protect communications of the mission for all official purposes with its government and the other missions and consulates, wherever they are.

In this way the mission will be able to employ all the adequate means of communication since this norm—due to the way it has been formulated—always remains topical. The phrase 'all correspondence' thus also includes today's communication via the internet, such as emails, or via mobile phone, through diverse application software offered for communication, to mention only some of them. Communication through these means shall always be confidential and inviolable, despite the fact that these means of communication did not exist at the time when the VCDR was signed or entered into force. Nonetheless, the London newspaper *The Guardian* stated in 2014, that it was easier for the police to tap into mobile phone communications than to obtain money from a cash machine.[6]

[5] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 12; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 10.

[6] James Ball, 'EE, Vodafone and Three Give Police Mobile Phone Records at Click of a Mouse' *The Guardian* (10 October 2014) <https://www.theguardian.com/world/2014/oct/10/automatic-police-access-customers-mobile-phone-records-like-cash-machine-ripa-three-ee-vodafone>.

In the same vein, the diplomatic bag which contains documents, communications, and even other objects, cannot be opened or detained.

3. The Case of Yvonne Fletcher

Going back to the subject of inviolability of the premises of diplomatic missions enshrined in Article 22 of the VCDR it is opportune to refer to the case of Yvonne Fletcher.

WPC Fletcher was a policewoman who was killed with a shot from a sniper from the Libyan embassy in 1984. The bullet was intended for the protesting Libyan dissidents. The shooting resulted in an eleven-day siege of the embassy which only ended when the killer, along with twenty-one members of the embassy, was allowed to leave the building and Britain under diplomatic immunity. Yvonne Fletcher's death caused the breakdown of diplomatic relations between the two States.

To be brief, after the shooting, a series of events took place, starting with the request of the British authorities to be allowed to enter the embassy in search of guns and explosives, which was not accepted by the Libyan Embassy. Later, and after breaking diplomatic relations, the UK had to allow the personnel that were inside the embassy to leave the country, among them the person responsible for the shot that ended the life of the police officer.

After the murder of Yvonne Fletcher, the Diplomatic and Consular Premises Act was passed in 1987, and it sets out the conditions for the acquisition and loss of diplomatic or consular status for the premises, including the request to the Secretary of State asking for his consent to confer the relevant status on diplomatic or consular premises.[7] However, such request would not be necessary in cases that had been accepted immediately before this Act entered into force.[8]

As a result, the recognition of Embassy grounds as diplomatic premises covered by the VCDR depends on acceptance by the British Secretary of State, acceptance which can be withdrawn only if doing so is permissible under international law.[9]

This provision, that the Secretary of State must be satisfied that to withdraw consent or withdraw acceptance is permissible under international law, means there is no actual conflict of laws between the Vienna Convention and the local law.

This implies that the Secretary of State must come to the conclusion that his decisions are in accordance with international law and this is normal, since all government officers and private persons apply the law on a daily basis and are in this regard subject to judicial supervision.

This British law could be mentioned as an exception to international law, but in truth, considering it was enacted in 1987, and commonly understood to derive from the murder of WPC Yvonne Fletcher, it is not known that any diplomats

[7] Diplomatic and Consular Premises Act (1987) c 46, s 1.
[8] ibid s 9(2). [9] ibid s 1(4).

posted to the United Kingdom or any diplomatic premises have been the object of a conflict because of the application of this law.

In most cases, the withdrawal of acceptance by the Secretary of State would not be clearly compatible with international law. The VCDR does not concede exceptions to the inviolability principle, other than the consent of the sending State. There is no exception relating to the conduct of the sending State or embassy personnel. Embassy personnel are to respect the laws of the receiving State, and the premises are not to be used in any manner incompatible with the functions of the mission (Article 3 VCDR), but that does not allow for the interpretation that failure to comply with this obligation could result in loss of the inviolability of embassy premises.[10]

Even if the United Kingdom were to sever diplomatic relations with another country, it would still be required to respect and protect the premises of the mission.

The decision that still needs to be taken is to surmount the conflict of laws by enacting new rules to preserve diplomatic privileges and guarantees for the work of diplomatic agents. But those new rules must consider human rights, freedom of expression and information among other rights, because even though it is absolutely necessary to maintain diplomatic immunities and privileges, these privileges should not be exercised to the detriment of fundamental rights or affecting them.

4. Conclusion

The VCDR was adopted to ensure peace, to guarantee the privileges and immunities of diplomats, and to ensure friendly relations among States by protecting diplomatic missions through the inviolability of the premises and of course, immunity of diplomats. This does not mean that it constitutes a way to commit crimes and ultimately abuse by diplomats after which they could claim immunity to get impunity—nor was such a reading even conceived or considered.

Making a comparison with the case of Members of Parliament, it is the law and generally accepted that when MPs commit crimes outside the parliamentary arena, they are not covered by immunity. This could be an example for diplomats because justice and human rights must prevail; it is the ultimate goal of the law, even if it is necessary to impose corrective sanctions on diplomats who have committed offences of any kind.

It is a reality that there will always be abuses by people vested with immunity. The most common cases are perhaps traffic-related offences, but there have been also offences against human rights. Evidently there is a conflict between immunity and access to justice, between human rights and terrorism.

These are aspects that must be carefully analysed under customary and conventional international law, to offer member States reliable solutions to these conflicts that are a part of a new reality in the twenty-first century that needs to be regulated.

[10] VCDR art 3.

Perhaps a sort of solution could be a new and specialized International Diplomatic Council to decide about a diplomat's responsibility while ensuring the principles of inviolability and immunity. After a procedure in which all privileges and rights of the defence are guaranteed, a determination could be made as to whether or not there was a participation of the relevant diplomat in any kind of offence or crime.

Judgment, however, should be rendered only in the sending State, if the International Diplomatic Council concludes that there are sufficient reasons to begin legal proceedings and/or a trial in the sending State.

12

The Non-Customary Practice of Diplomatic Asylum

Péter Kovács and Tamás Vince Ádány

1. Introduction: The Silence of the Vienna Convention

The VCDR does not contain any explicit clause on diplomatic asylum. For authors discussing the issue of asylum or refuge in diplomatic premises in the context of the Convention, the usual starting point is immunity of diplomatic immovable properties, namely Article 22 on the premises of the mission and Article 30 on the diplomat's residence.

There had been several proposals for a special, but in itself a very restrictive, clause on shelter in the *travaux préparatoires* of the ILC:

> Except to the extent recognized by any established local usage, or to save life or prevent grave physical injury in the face of an intermediate threat or emergency, the premises of a mission shall not be used for giving shelter to persons charged with offences under the local law, not being charges preferred on political grounds.[1]

A more precise alternative formulation was also proposed by Sir Gerald Fitzmaurice:

> Persons taking shelter in mission premises must be expelled upon a demand made in proper form by the competent local authorities showing that the person concerned is charged with an offence under the local law, except in the case of charges preferred on political grounds.[2]

The Soviet member of the ILC, Mr Grigory Tunkin argued for removing the reference to 'political grounds'; however the enfolding debate was influenced by the majority of the ILC which shared the point of view offered by JPA François. He questioned the competence of the ILC to formulate an opinion on the matter, and even contested the *raison d'être* of such a clause. The Dutch member warned of the complexity of the issue and pointed out that the Rapporteur had formulated his proposition without a preliminary study and emphasized that the proceedings of the 6th Committee leading to the adoption of Resolution 685(VII) of the General

[1] *ILC Yearbook* 1957 vol I, 54. See also: Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th edn, OUP, Oxford 2016) 114.

[2] *ILC Yearbook* 1957 vol I, 54.

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Assembly had not revealed any intention to deal with diplomatic asylum.[3] Doing so would have meant an *ultra vires* act on behalf of the ILC[4] and a decision was made to delete the draft article 'on the understanding that under modern international law and practice a failure by mission to comply with the rules on diplomatic asylum did not entitle the receiving State to enter mission premises'.[5]

Apparently the Members of the United Nations did not complain about this deliberate silence either in the 6th Committee or in the General Assembly.[6]

In 1975, the ILC discussed the opportunity of putting on its agenda the questions of diplomatic asylum, but it was finally concluded that the governments were not at all ready to adopt any concrete disposition on this subject, due to fears of complicating the interstate relations in a context where even the customary basis is doubtful.[7]

The Institute of International Law issued a resolution in 1950, offering a definition of asylum including territorial and diplomatic locations as well,[8] but unlike some other resolutions of the Institute this one seems to have failed to significantly alter subsequent State practice.

2. Historical and Contemporary Examples

2.1 The South American answer based on regional treaties, regional custom, and ambiguous practice

2.1.1 The relevant South American treaty law

The South American approach is manifested in three conventions, namely the 1928 Havana Convention on Asylum,[9] the 1933 Montevideo Convention on Political Asylum,[10] and the 1954 Caracas Convention on Diplomatic Asylum.[11]

Following the early example of the Treaty on International Penal Law[12] signed at Montevideo in 1889, the 1928 Havana Convention recognizes a limited form of diplomatic asylum reserved for political offenders as a right or a humanitarian gesture (as custom or applicable conventions or national laws prescribe it).[13] As

[3] *ILC Yearbook* 1957 vol I, 54–55. [4] ibid. [5] ibid.

[6] UNGA Res 1450 (1959) A/RES/1450(XIV).

[7] *ILC Yearbook* 1977 vol II Pt 2, 129–30; see also Patrick Daillier, Mathias Forteau, Nguyen Quoc Dinh, Alain Pellet, *Droit International Public* (8th edn, LGDJ, Paris 2009), 751, para 460.

[8] Arnold Raestad and Tomaso Perassi (rapporteurs), *L'asile en droit international public (à l'exclusion de l'asile neutre)*, (resolution) (11 September 1950) <http://www.justitiaetpace.org/idiF/resolutionsF/1950_bath_01_fr.pdf> accessed 6 June 2016.

[9] Convention on Asylum (adopted 20 February 1928, entry into force 21 May 1929), 132 LNTS 323 (hereinafter 'Havana Convention').

[10] Convention on Political Asylum (adopted 26 December 1933, entry into force 28 March 1935) 34 OAS Treaty Series A-37 (hereinafter 'Montevideo Convention').

[11] Convention on Diplomatic Asylum (adopted 28 March 1954 entry into force 29 December 1954) 1438 UNTS 101 (hereinafter 'Caracas Convention').

[12] Treaty on International Penal Law (adopted at the First Inter-American Conference on Private International Law, 23 January 1889) OAS Official Records, OEA/Ser.X/l. Treaty Series 34, arts 15–18.

[13] Havana Convention art I.

the International Court of Justice observed: 'the intention was (…) to put an end to the abuses which had arisen in the practice of asylum and which were likely to impair its credit and usefulness. This is borne out by the wording (…) which is at times prohibitive and clearly restrictive.'[14] The Montevideo Convention *inter alia* rephrased the introductory articles[15] and clarified the qualifying competence of the host State.[16]

Generally, the Caracas Convention is considered as the reaction of the Organization of American States to the Haya de la Torre judgment. Here, the political motives of persecution are emphasized,[17] the institution is stipulated as a 'right'[18] and the urgency[19] of the action is formulated in a much more precise manner than before. The premises suitable for granting diplomatic asylum were enumerated.[20]

From the three aforementioned treaties, the Caracas convention is the only one to provide for diplomatic asylum as a genuine right of the State, while the Havana and the Montevideo Conventions rather treat it as a special institution which could be considered—under certain circumstances—as lawful.

From the South American practice, let us emphasize the *communis opinio* as formulated by the ICJ, ie 'asylum may be granted on humanitarian grounds in order to protect political offenders against the violent and disorderly action of irresponsible sections of the population'.[21]

2.1.2 Haya de la Torre's famous refuge of the Columbian Embassy in Lima

As it is taught in all law faculties of the world, on 3 October 1948, Víctor Raúl Haya de la Torre—a Peruvian politician previously exiled several times—tried to take power through a military coup. After this attempt was crushed, the government declared him and his party, the American People's Revolutionary Alliance, responsible for the plot. The Minister of Interior sent a 'note of denunciation' against Haya de la Torre to the Minister for the Navy who approved it and the public prosecution qualified the object of the investigation as a crime of military rebellion.

On 27 October 1948 a military junta seized power and 'issued on November 4th a decree providing for Courts-Martial for summary procedure in cases of rebellion, sedition and rioting, fixing short time-limits and severe punishment without appeal'[22] which was however not applied by the magistrates in the proceedings against Haya de la Torre. The junta renewed the state of siege and the suspension of constitutional rights, which was ordered on 4 October 1948 by the former, since then reversed government.

On the 3 January 1949 Haya de la Torre entered the Colombian Embassy and asked for refuge that he enjoyed until 1954. The dispute between Peru and

[14] *Asylum Case (Colombia v Peru)* (Merits) [1950] ICJ Rep 282.
[15] Montevideo Convention, art 1. [16] ibid art 2. [17] Caracas Convention art I.
[18] ibid art II. [19] ibid arts V, VII, and IX. [20] ibid art I.
[21] *Asylum Case (Colombia v Peru)* (Merits) [1950] ICJ Rep 282–83. [22] ibid 272.

Colombia focused on the proper interpretation of the Havana Convention (the only relevant international treaty on asylum in force between the two countries), and the relevant custom as far as Colombia stated and Peru contested that the ambassador had the right to qualify as political persecution the criminal procedure launched against Haya de la Torre.

The International Court of Justice—finding the effective South American practice ambiguous[23]—emphasized the strict interpretation of the criteria of urgency[24] and warned against the abuses by the states granting asylum[25] as well as by the prosecuting states, ie territorial states.[26] The Court observed that 'the grant of asylum by the Colombian Government to Victor Raúl Haya de la Torre was not made in conformity with Article 2, paragraph 2 ("First"), of that Convention.'[27]

Colombia was incorrectly attesting 'a right for Colombia, as the country granting asylum, to qualify the nature of the offence by a unilateral and definitive decision, binding on Peru'.[28] Peru, on the other hand, was not able to claim 'a violation of Article 1, paragraph 1, of the Convention on Asylum signed at Havana in 1928'.[29]

Failing to find a case of urgency within the meaning of the Havana Convention, the Court found that 'the grant of asylum from January 3rd/4th, 1949, until the time when the two Governments agreed to submit the dispute to its jurisdiction, has been prolonged for a reason which is not recognized by Article 2, paragraph 2, of the Havana Convention'.[30]

Peru and Columbia did not understand how to execute the judgment, and that is why they seized the Hague judges with a request for interpretation. The ICJ refused to answer *in merito*[31] and finally, the two states arrived at an agreement granting a safe leave for Haya de la Torre who departed the Embassy in April 1954 and went into exile.

2.1.3 Refuge at the diplomatic missions during Pinochet's coup d'état *(1973)*

The refuge secured by embassies during Pinochet's coup (11 September 1973) shall also be mentioned here, when about fifty Chilean nationals were admitted into the Canadian Embassy and 500 into the Mexican Embassy in Santiago. The mission of New Zealand and the Swedish Embassy were also active in this field.[32] In retaliation, Edelstam, the Swedish Ambassador, was expelled by the military authorities for this activity. Edelstam said that 'the role of the Swedish Embassy is to save the lives of people who are in danger'.[33]

[23] ibid 286. [24] ibid 284. [25] ibid 286. [26] ibid 284. [27] ibid 288.
[28] ibid. [29] ibid. [30] ibid 287.
[31] *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case* (*Colombia v Peru*) (Judgment of 27 November 1950) [1950] ICJ Rep 395.
[32] Kurt Bassuener, 'The Fall and Rise of Chilean Democracy: 1973–1989', in Jeremy Kinsman and Kurt Bassuener (eds), *A Diplomat's Handbook for Democracy Development Support* (3rd edn, The Centre for International Governance Innovation, Geneva 2013) 429.
[33] ibid.

2.1.4 Manuel Noriega at the nunciature in Panama City

In December 1989, American commandos entered Panama in order to capture President Noriega. The dictator asked for temporary refuge at the Apostolic Nunciature, where he was accepted, although the nuncio, Monsignore Laboa, 'had at no moment contemplated granting General Noriega's request for political asylum'.[34] The Holy See did not speak of asylum, but of 'a person in refuge'.[35] Apparently a nearby non-diplomatic building was also used in those days for the same purpose.[36] Finally, after a five-day stay, the nuncio convinced Noriega to leave the nunciature and to surrender to the Americans.[37]

2.1.5 Pedro Carmona in the Columbian ambassador's residence of Caracas

In 2009, Pedro Carmona, who had attempted to overthrow the Venezuelan leader Hugo Chavez, was granted political asylum by the Colombian Government after he had fled into the Ambassadors' residence. According to BBC, Colombian Foreign Minister Guillermo Fernández de Soto said the decision was taken 'after careful consideration' and 'in accordance with the norms of international law'. Venezuela's Foreign Minister, Luis Alfonso Dávila, has criticized the decision stating that the fugitive businessman was not facing death or being politically persecuted, but was under investigation for a criminal charge.[38] Pedro Carmona was finally allowed to leave Venezuela.

2.1.6 José Manuel Zelaya Rosales, the President of Honduras and his fellows in the Brazilian Embassy of Tegucigalpa

The former president of Honduras had to flee his country after a court order to detain him. He nonetheless returned with an apparent intent to retake power, but instead he had to seek refuge in the building of the Brazilian Embassy on 21 September 2009. The crowd of his supporters in front of the embassy was finally disbanded by the Honduran Government after initiating a curfew.[39] The tense situation adversely affected even the OAS.[40]

[34] Larry Rochter, 'The Noriega Case: Panama City; Papal Envoy Asserts Psychology, Not Ultimatum, Swayed Noriega' *New York Times* (New York, 6 January 1990) <http://www.nytimes.com/1990/01/06/world/noriega-case-panama-city-papal-envoy-asserts-psychology-not-ultimatum-swayed.html> accessed 16 July 2016.

[35] Kevin Buckley, *Panama* (Simon and Schuster, New York 1992) 250.

[36] Rochter (n 34).

[37] ibid. See Ivor Roberts, *Satow's Diplomatic Practice* (6th edn, OUP, Oxford 2009) 103, para 8.12.

[38] 'Venezuelan Coup Leader Given Asylum' *BBC News World Edition* (London, 27 May 2002) <http://news.bbc.co.uk/2/hi/americas/2009907.stm> accessed 17 July 2016.

[39] Paul Behrens, 'The Law of Diplomatic Asylum – A Contextual Approach' (2013) 35 Michigan Journal of International Law 359–60.

[40] Rita Corsetti, 'Trimestre internazionale: 1 luglio–30 settembre 2009' 76 Rivista di Studi Politici Internazionali 620.

Honduras submitted an application against Brazil to the ICJ on 28 October 2009. This document indicated that '[Mr José Manuel Zelaya Rosales and] an indeterminate number of Honduran citizens', who had taken refuge in the Brazilian Embassy in Honduras since 21 September 2009, were 'using [its] premises … as a platform for political propaganda and thereby threatening the peace and internal public order of Honduras, at a time when the Honduran Government is making preparations for the presidential elections which are due to take place on 29 November 2009'. It was also stated that '[t]he Brazilian diplomatic staff stationed in Tegucigalpa are allowing Mr. Zelaya and his group to use the facilities, services, infrastructure and other resources in order to evade justice in Honduras'.[41]

Later, a friendly settlement was reached (on 7 January 2010 Zelaya was able to leave the building with safe conduct to the Dominican Republic)[42] and Honduras manifested her intention to discontinue the procedure.[43]

2.3 Examples from European practice

2.3.1 Diplomatic shelter during the Spanish Civil War (1936–1939)

Citing George Scelle, Denza refers to the large scale provision of shelter during the Spanish Civil War (1936–1939) particularly by the Swiss Embassy.[44] The Argentinian Embassy sheltered a politician, Mrs Pilar Primo de Rivera y Sáenz de Heredia until she was able to join the Francoists,[45] and the French Embassy did the same for José Ungria Jiménez[46] between 1936 and 1937.

Other published data from the Madrid National Historical Archive show that thousands had found shelter in twenty-six embassies, prominently in the diplomatic missions of Chile, Norway, Panama, Turkey, and Romania,[47] and it is also noted that the diplomatic corps adopted a nearly uniform stance on asylum.[48] This example refers to sheltering *en masse*, mostly in territories under the People's Front Government (or Republican Government) but it is to be noted that the Chilean Embassy continued sheltering people also after Franco's victory.[49] The

[41] *Certain Questions Concerning Diplomatic Relations (Honduras v Brazil)* (Application) 28 October 2009 <http://www.icj-cij.org/docket/files/147/15935.pdf> accessed 17 July 2016, paras 5–6.

[42] Mica Rosenberg and others, 'Dominican Republic Offers to Host Honduras' Zelaya' *Reuters* (21 January 2010) <http://uk.reuters.com/article/uk-honduras-zelaya-idUKTRE60K02U20100121> accessed 17 July 2016.

[43] *Certain Questions Concerning Diplomatic Relations (Honduras v Brazil)* (Order of 12 May 2009) [2010] ICJ Rep 304.

[44] Denza (n 1) 117.

[45] Francisco J Romero Salvadó, *Historical Dictionary of the Spanish Civil War* (Rowman & Littlefield, Scarecrow Press 2013 Plymouth) 266.

[46] ibid 332.

[47] Antonio Manuel Moral Roncal, 'An Analysis of Foreign Diplomatic Aid to the Catholic Clergy during the Spanish Civil War (1936–1939)' in (2013) 4 Religions 101.

[48] Joe Robert Juárez, 'Argentine Neutrality, Mediation, and Asylum during the Spanish Civil War' (1963) 19 The Americas 392.

[49] Jean Grugel and Monica Quijada, 'Chile, Spain and Latin America: The Right of Asylum at the Onset of the Second World War' (1990) 22 Journal of Latin American Studies 353.

police authorities or the militias sometimes entered the diplomatic premises for the purpose of capturing the people seeking for refuge.[50]

2.3.2 Historical examples from Hungary

In the mid-twentieth century, Hungarian political elites underwent violent change in a short course of time. Among the tragedies of the war, during the 1944 pro-Nazi coup and German occupation both sides sought temporary refuge in various diplomatic premises, while thousands of persecuted Jews and other Hungarian citizens were offered shelter sometimes by the same legation. Later, in the aftermath of the 1956 revolution, prominent leaders mostly failed in finding safe haven in Budapest embassies.

2.3.2.1 Refuge for Prime Minister Kállay at the residence of the Turkish envoy
During the Second World War, Hungary was fighting for the Axis Powers, but in the words of former American ambassador John Flournoy Montgomery it was an 'unwilling satellite'.[51] In 1942, Miklós Kállay was appointed Prime Minister by Governor Horthy with an official mandate of assuming continuity but with another secret one to prepare Hungary's surrender (if possible only to the British or American powers in order to avoid Soviet occupation). The German secret services were however informed by their own agents about the results of the 'secret' peace-negotiations and Hitler decided to occupy Hungary and to force Governor Horthy to appoint a Quisling government.

The plan was executed on the 18–19 March 1944 when Horthy was invited to Klesheim Palace, near Salzburg, upon Hitler's invitation. After Horthy's return, Kállay resigned and sought refuge at the residence of the Turkish envoy upon the latter's invitation, until 19 November 1944. Even if the building was encircled by the Gestapo, Kállay could rather easily accept relatives and guests, but his correspondence was photographed—as it later became clear—by the envoy's butler, an undercover agent of the Gestapo. When Turkey's diplomatic relations terminated with Germany, preserving this refuge became more and more difficult for the envoy and finally Kállay decided to leave. He was aware of the fact that Bogdan Filov—former right wing, pro-German and anti-semitic Prime Minister and one of the regents of Bulgaria who was a refuge at the Turkish legation in Sofia after Bulgaria left the Axis and joined the Allies in September 1944—had been surrendered to the Soviet Union.[52]

[50] This happened vis-à-vis the Argentinian and the Peruvian embassies as well as the Nazi German embassy under evacuation where Chilean, Romanian, Dutch, and Norwegian diplomats were prevented from taking up shelter. See eg nn 46–47.

[51] John Flournoy Montgomery, *Hungary, the Unwilling Satellite* (Devin-Adair Co, New York 1947).

[52] Nicholas Kállay, *Hungarian Premier: A Personal Account of a Nation's Struggle in the Second World War* (Columbia University Press, New York 1954). The Hungarian original text is cited in this chapter: Kállay Miklós, *Magyarország miniszterelnöke voltam 1942–1944*, (Europa Historia, Budapest 1991 Budapest) 197–212, 209. In fact, Filov asked for refuge not in the legation but at the envoy's residence in the famous Chamkoria resort (today: Borovets) in the Rila Mountains on 8 September. The envoy informed the new Bulgarian government led by General Georgiev about his status, and this new

After Kállay left the legation and surrendered, he was imprisoned and then deported to Mauthausen and Dachau. He finally escaped in a rather adventurous way from a transport and became an active member of the Hungarian expatriate colony.

2.3.2.2 *Refuge for Hungarian Nazi leader Szálasi at the German legation in autumn 1944*

When Governor Horthy wanted to regain his margin of manoeuvring in order to confine his temptation to leave the Axis and to surrender to the Allies, the Reich (continuously informed by pro-Hitler politicians and high-ranking military officers) decided to overthrow Horthy's regime. As a pre-emptive measure, Horthy ordered the arrest of Ferenc Szálasi, the leader of the Hungarian pro-Nazi party, but the Hungarian police did not rush to execute the order. Nevertheless, on 27 September 1944 the German legation offered shelter to the Hungarian Nazi leader which he—together with some close collaborators—accepted and enjoyed until 15 October 1944. On that day, the Governor's covert plan of turning sides in the war was hindered by the Germans and their pro-Hitler allies in the Hungarian army. After Horthy was forced to resign, Szálasi not only left the diplomatic premises but obtained the post of Prime Minister as well as the title of 'leader of the nation'.

2.3.2.3 *Refuge for the Horthy family at the nunciature*

On the morning of 16 October 1944, when SS troops surrounded the Royal Palace in the Hungarian capital in order to force Governor Horthy to resign and to annul the armistice and the declaration of breaking the alliance with Germany, Horthy's wife, daughter-in-law, and grandson along with their nanny left the Palace upon his demand, and a car brought them into the neighbouring building of the nunciature. Half an hour later, the SS entered the nunciature, looked for hidden people, even in the underlying caverns, but left the building shortly thereafter, putting guards at the entrance. Veesenmayer, the German envoy, soon arrived and asked the family to join the then resigned Horthy, who had already been brought into the building of the German legation. After a short discussion, the family surrendered and accepted German *Schutzhaft* (ie SS internment to a castle near Weilheim).[53]

coalition government ordered his arrest on 12 September 1944. Filov was then transferred with other arrested politicians to the Soviet army, and he was later sentenced to death in Bulgaria by the so-called People's Court (extraordinary tribunal for liquidating political enemies) and executed in February 1945. The authors of this chapter thank Assistant Professor Dobromir Mihajlov for his valuable help in the clarification of the events in Bulgaria, on the basis of the following book: Maria Zlatkova, *Bogdan Filov: Zhivot mezhdu naukata i politikata* (Alteia, Sofia 2007) 294–95.

[53] Edelsheim Gyulai Ilona, *Becsület és kötelesség (Honour and Obligation)* (Europa, Budapest 2000) 330–31 (the author is the Governor's daughter-in-law whose memoirs were published some years before her death).

2.3.2.4 *Diplomatic missions sheltering Hungarian Jews in order to protect them from deportation and murder during the Holocaust (1944): a series of heroic gestures and humanitarian assistance*

After Hungary was occupied by German troops on the 19 March 1944, a Quisling government directed by Döme Sztójay was appointed by Governor Horthy. The Sztójay government issued many decrees on the spoliation, ghettoization, and deportation of the Hungarian Jews. The accelerated deportation effected the whole countryside Jewish community between May and July 1944 and the Budapest Jewry was forced to move into established ghettos waiting for their deportation orchestrated by the Hungarian public administration, the Hungarian gendarmerie, and Adolf Eichmann the Nazi 'specialist' of the so called *Endlösung* with his few collaborators.

Foreign countries tried to stop these events, the outcome of which could be calculated by those who could have read the so called 'Auschwitz Protocol', prepared on the basis of information provided by two escaped prisoners.[54] The Holy See, the Swedish King and some governments exercised pressure on Horthy to stop the deportation, and in Budapest the accredited diplomatic missions of neutral states tried to save as many people from the Holocaust as possible. In these operations, sheltering in diplomatic premises also had its role to play.

Despite the actions of Sztójay's puppet government in rural Hungary, no ghetto was yet established for the Jewish population of Budapest. Jewish residents of the city had to move into so called 'David shield' (or 'yellow star') houses. At this time these buildings were distributed throughout the city, one such building was designated for each Budapest district. Horthy arrived at the decision not to let the Budapest Jewry be deported; he removed Sztójay and appointed the Lakatos government (with the mission of forsaking the war). After the successful Hungarian Nazi coup of 15 October 1944 organized by the German legation forced Horthy to resign, the new government headed by Szálasi 'as nation-leader and Prime Minister' returned to the ghettoization as the antechamber to deportation.

The diplomatic missions of neutral countries in Budapest intervened with the new government and succeeded to pass agreements that allowed them to continue to issue 'protecting papers' (*Schutzpass* in German) for Jewish people who had declared their intention to immigrate or had close family ties or economic interests *vis-à-vis* their countries or countries represented by them[55] if such countries had no actual diplomatic representation in Budapest.

[54] *The Auschwitz Protocol, The Vrba-Wetzler Report* [Transcribed from the original OSI report of the US Department of Justice & the War Refugee Board Archives] <http://www.holocaustresearchproject.org/othercamps/auschproto.html> accessed 30 September 2016.

[55] This was the case with the missions of El Salvador. Its Consul in Bern, José Arturo Castellanos, and his deputy George Mantello were in close contact with Carl Lutz, the Swiss Consul in Budapest charged also with delivery of El Salvadorian 'citizenship certificates'. Margie Burns, *El Salvador, A Rescuing Country* (The International Raoul Wallenberg Foundation) <http://www.raoulwallenberg.net/saviors/others/el-salvador-rescuing-country> accessed 30 September 2016. In the same manner, the Portuguese legation worked also for Brazil.

In order to better protect the persecuted people from the danger threatening their lives—having a legitimate fear of the insufficient protection offered only by identity cards—the missions also reached an agreement to the effect that they could temporarily settle the holders of these documents in buildings under the protection of their governments. Due to the masses of people concerned, traditional diplomatic buildings were insufficient for this purpose and the legations bought or hired buildings and flats that they put under their protection, and often the diplomatic shield of the mission was also set up on the wall besides inscriptions like 'building under the protection of the Swiss government' or 'building under the protection of the Kingdom of Sweden'.

The initiator of this idea was probably Carl Lutz, the Swiss Vice-Consul and Friedrich Born, the Representative of the International Committee of the Red Cross (ICRC), but the world knows much better the name of Raoul Wallenberg of the Legation of Sweden. We have to mention also the Portuguese Sampayo Garrido and Carlos de Liz-Teixeira Branquinho, the Spanish Angel Sanz Briz and his successor (Italian by birth) Giorgio Perlasca and the nuncio Angelo Rotta. These buildings were located mostly close to each other and they were mentioned in the contemporary papers and legal texts as the 'international ghetto'.[56] On the other hand, at different venues of the capital some sub-sections of the diplomatic missions were open under various titles (eg Office of Enquiry for Disappeared; Office of Relief and Humanitarian Assistance; ICRC orphanage) which could always hide the persecuted persons, often as employees of the mission.

These shelters offered a certain level of protection from the chaos of the Hungarian Nazi ('Arrow Cross') party rule when armed insurgents and members of the Arrow Cross party and adjoining mob elements started the killings and the pillaging. Often, the physical presence of the diplomats was also necessary to stop the atrocities.

The exact number of people saved this way cannot be established with complete certainty, but several tens of thousands rescues are attributed to these diplomats. It is assumed that Carl Lutz saved 62,000 lives, Raoul Wallenberg 30,000, Friedrich Born 15,000, Angelo Rotta 15,000, Giorgio Perlasca 5,200, Angel Sanz Briz 5,000, Garrido and Branquinho 1,000. The humanism and bravery of these men cannot be challenged and most of them are recognized as 'Righteous Among The Nations' in the Israeli Yad Vashem Institute.

It is, however, important to assess how this extended interpretation of 'diplomatic premises' could have been reached during those tragic weeks, covering in the end more than a hundred buildings.[57] The special status of these buildings

[56] For those who know Budapest, the 'international ghetto' or 'small ghetto' could be located to the north from the Margit Bridge at the 'Pest side' of the capital, approximately half an hour's walk from the 'large ghetto'.

[57] According to László Karsai, the leading expert on the Hungarian Holocaust, seventy-six buildings were protected by the Swiss legation and thirty-six by the Swedish legation. The ICRC had more than thirty orphanages. László Karsai, 'Az ismeretlen Wallenberg (The Unknown Wallenberg)' *Népszabadság* (Budapest, 3 April 2007).

cannot be explained only by the classic rules of diplomatic law. Veesenmayer, the German envoy, advised the Hungarian Foreign Minister Kemény on 20 October 1944 to reject the proposals of the Budapest diplomatic missions as being contrary to international law.[58] Nevertheless, the Szálasi government entered into talks with them probably out of their need for official recognition. As a *coup d'etat* government widely known for coming into power with the military help of Germany, the regime wanted to break its isolation: but in the end, only Spain and Turkey recognized the government. According to newer research, Nuncio Angelo Rotta probably misled the Szálasi government to believe that the Holy See also recognized their position.[59] Sweden succeeded in delaying the issue of recognition ad infinitum. The diplomatic missions successfully used other tools as well, including threats and pressure concerning the future; but bribery was also widely relied on—and there certainly were also people in the public administration and in the police who acted according to their own conscience, religious belief, humanism, or courage.

2.3.2.5 *Prime Minister Imre Nagy and his fellows at the Yugoslav Embassy of Budapest in 1956*

The reformist communist Imre Nagy acted as Prime Minister of a coalition government during the 1956 Hungarian Revolution. As such, he *inter alia* introduced a multi-party system and declared Hungary's neutrality. He condemned the Soviet military invasion on 4 November and declared that 'our troops are in combat' but he fled with several members of his government as well as with their relatives to the Embassy of Yugoslavia. The embassy received them without qualifying the situation as asylum or refuge but tried to convince Nagy to step down, to recognize the new Kadar-government,[60] and urged the revocation of the above-mentioned decisions.[61] On 22 November Nagy and his fellows left the embassy upon a promise of safe conduct, but their bus took them to a military airport and they were forced to leave the country. From the next day they were being interned in Snagow (Romania). From there Nagy and some of his comrades were brought back in April

[58] ibid. See also Elek Karsai and László Karsai, *Vádirat a nácizmus ellen–Dokumentumok a magyarországi zsidóüldözés történetéhez 4. 1944. október 15–1945. január 18* [Indictment against Nazism – Documents for the Study of the Persecution of Jews in Hungary, vol 4, From 15 October 1944 to 18 January 1945] (Ballasi, Budapest 2014) 21.

[59] ibid 17. His motives were probably related to maintaining his capability to save further lives.

[60] Janos Kadar had previously been a high-ranking communist party member, for a few days even a minister of Nagy's government, but subsequently accepted to lead a Moscow-oriented policy. He stayed in power until 1988–89 as General Secretary of the Communist Party.

[61] During a secret meeting on 2–3 November 1956 at the Adriatic Brioni island, the Yugoslav leader Tito convinced the Soviet Premier Khrushchev to have trust in Kadar and apparently offered also his cooperation to isolate Nagy for a transitional period. On 8 November 1956, the Yugoslav Foreign Minister Ranković formally proposed that Nagy step down, thus contributing to the normalization of the situation. For more details see eg the work of the former Yugoslav Ambassador to Moscow: Veljko Micunovic, *Moscow Diary* (Doubleday & Co, New York 1980) cited by Johanna Cushing Granville, *The First Domino: International Decision Making During the Hungarian Crisis of 1956* (Texas A&M University Press, 2004) 105–10, 109.

1957 to a criminal investigation and trial, leading to their execution in 1958 or to long term prison sentences.

2.3.2.6 *Cardinal Mindszenty at the US Embassy of Budapest between 1956–1971*

József Mindszenty, Cardinal, Archbishop of Esztergom and *ex lege* first Archbishop (ie Primate) of Hungary, was imprisoned by the Hungarian Nazis in 1944–1945 as well as by the Communists between 1949–1955. After that he lived under house arrest until he was liberated by a unit of the Hungarian army during the revolution on 30 October 1956.

On 4 November 1956, when the Soviets invaded Hungary, József Mindszenty—together with Egon Turchányi his secretary and counsellor—walked to the US Embassy and asked for refuge. In his diary, the decision was explained by the fact that this was the closest embassy to the Parliament building where he had been invited by the Deputy Prime Minister. The subsequent events are recounted in a similar way in the Mindszenty memoirs[62] and the American diplomatic records as published in Foreign Relations of the United States (FRUS).[63]

According to Mindszenty, he received Eisenhower's permission for the grant of 'asylum' within half an hour and Turchányi[64] received the same within four hours. There were signs that someone (Imre Nagy or one of his staff) had warned the Embassy on 3 November about this possibility.[65] While they were waiting, Mindszenty realized that a member of Imre Nagy's government in the Revolution was also present. He was Béla Kovács (former Secretary General of the Smallholders' Party, arrested in 1947 by the Soviet Army and deported to the Gulags until 1955, brought back to Hungary for the continuation of his sentence (1955–April 1956)). Kovács was also seeking refuge but on 5 November he was asked by the diplomats to leave.[66] He survived Communist retaliations, and even tried to come to terms with the new government.

[62] Mindszenty József, *Emlékirataim* (Apostoli Szentszék Kiadója, Budapest 1989). For an English translation see: József Mindszenty, *Memoirs by Jozsef Cardinal Mindszenty* (Weidenfeld & Nicolson, London 1974). Subsequent pagination follows the Hungarian original text.

[63] John P Glennon, Edward C Keefer, Ronald D Landa, and Stanley Shaloff (eds), *Foreign Relations of the United States, 1955–1957, Eastern Europe, Volume XXV* (United States Government Printing Office, Washington, 1990) <https://history.state.gov/historicaldocuments/frus1955-57v25> accessed 26 September 2016.

[64] Turchányi eventually left the building, but during an attempt to flee Hungary in the company of a US citizen, he could not escape arrest and was condemned to life imprisonment—John P Glennon, Edward C Keefer, Ronald D Landa, Stanley Shaloff (eds), *Foreign Relations of the United States, 1955–1957, Eastern Europe, Volume XXV* (United States Government Printing Office, Washington, 1990) Document *163 Editorial Note*, p 387. He was pardoned in 1963 and died a few years later.

[65] Mindszenty (n 60) 443–44 (the word 'asylum' was used by Mindszenty). See also *163 Editorial Note*, FRUS XXV 387.

[66] Wailes, the Chargé d'affaires telegraphed as follows: 'Kovacs apparently left but may come back and I will let him in vestibule with his lieutenants with firm understanding it is tentative and no asylum is granted.' See: *162 Transcript of a Teletype Conversation Between the Legation in Hungary and the Department of State, November 3–4, 1956* in FRUS XXV 383–84.

The FRUS documents make reference also to a warning from Washington that Mindszenty and Turchányi would come and 'were about to seek asylum at the American Legation'. When asked for his advice, Bearn replied that while the United States opposed asylum in principle, nevertheless it was justified in this case since 'it involved hot pursuit endangering human life'.[67] One FRUS reference cites a cable message as follows: 'Cardinal Mindszenty wishes to seek asylum with Legation. Approval granted.'[68]

It is important to cite the contemporary American perception of diplomatic asylum described in FRUS. On November 8, Bearn sent a memorandum to Murphy on the subject of asylum for the Cardinal. He noted that the United States in the past had 'strongly disapproved of the principle of diplomatic asylum' but had been willing to afford temporary refuge in order to save human life. As an authority Section 225.2 of the Foreign Service Regulations ('Restrictions on Extending Asylum') was cited. It reads:

> As a rule, a diplomatic or consular officer shall not extend asylum to persons outside of his official or personal household. Refuge may be afforded to uninvited fugitives whose lives are in imminent danger from mob violence but only for the period during which active danger continues. Refuge shall be refused to persons fleeing from legitimate agents of the local government. In case such persons have admitted to the diplomatic or consular premises, they must be surrendered or dismissed from such mission or consular office.

Since the Cardinal's life had been in jeopardy as he was in flight from a foreign invader, the provision of sanctuary was considered justified.[69]

Notes from several White House brainstorming sessions also illustrate the ambiguity of the US position in the matter of diplomatic asylum: '… Cardinal Mindszenthy [sic] is in our legation. We will refuse to turn him over. We will try to keep him quiet. Our international position is not too strong on trying to safeguard him.'[70]

As it is well known, Mindszenty lived at the Embassy till 1971 and the respective chapters of his memoirs are very bitter, especially concerning the rules isolating him and permitting contacts in Hungarian almost exclusively with his mother. (However, in the first days of his admission, the American diplomats even organized a press conference for him.) He was forbidden to meet the Hungarian employees of the Embassy. However, he could perform his functions as a priest at the Embassy and he could receive visits of other Ambassadors or diplomats accredited in Hungary.

Refuge was granted until the conclusion of an arrangement with the Hungarian authorities, but this depended on the success of discrete negotiations between

[67] *163 Editorial Note*, FRUS XXV 386. [68] ibid 386–87. [69] ibid 387.

[70] The meeting at the White House took place on 5 November 1956. Participants were Eisenhower, Nixon, Phleger, Hagerty, Goodpaster. The quote reflects Phleger's assessment. *168. Memorandum of a Conference With the President, White House, Washington, November 5, 1956, 10:20 a.m.* in FRUS XXV, 394.

Hungary and the Holy See. The outcome of these talks was that the Roman Curia invited Mindszenty to move to Vienna or to Rome. In the meantime, it declared the seat of the Archbishop of Esztergom to be vacant.

Mindszenty's isolation was premeditated and sometimes it can be felt also as a tool to accelerate the Cardinal's decision on the acceptance of the offer of Rome to leave Hungary under the aforementioned conditions. (From time to time, it was mentioned that it would be useful to convince Mindszenty to accept transmitting verbal messages through American diplomats instead of sealed letters.[71]) Mindszenty did not want to submit himself to such a control, and in order to avoid conflicts he restricted voluntarily the number of his communications. At other parts of the memoirs, it is revealed that Mindszenty's returning tuberculosis was considered a threat to the health of the staff of the legacy and this fact made his isolation from the American staff even more pronounced.[72] In fact, Mindszenty felt more and more the signals that the US government—acting in the policy of the *détente*—would be glad if he would have been able to take the decision to leave the building.[73]

2.3.3 Diplomatic shelter granted by embassies during the 1968 invasion of Czechoslovakia by troops of the Warsaw Pact

The Canadian Embassy in Prague sheltered some foreign but mostly Czechoslovak citizens 'due to genuine fears of concentration of foreign armed forces in the city' when the invasion crushed the so called Prague Spring (1968) of Dubček.[74]

The official Canadian position was previously formulated *in abstracto* as early as 1961:

> … our consulates and diplomatic missions abroad may not grant asylum on the premises of a post except in extra-ordinary circumstances. The sort of circumstances that we have in mind is where temporary asylum would be granted on humanitarian grounds to a person, whether a Canadian citizen or not, if he is in imminent personal danger to his life during political disturbances or riots, with care being taken to ensure that the humanitarian character of the mission's intervention should not be misunderstood.[75]

[71] The State Department wanted to avoid transferring communications of unknown content between the Cardinal and the Vatican, as well as to avoid censoring such letters. See (n 64) 227. *Memorandum From the Deputy Assistant Secretary of State for European Affairs (Beam) to the Deputy Under Secretary of State for Political Affairs (Murphy)* in FRUS XXV, 555–56.

[72] Mindszenty (n 60) 479. [73] ibid 473, 479.

[74] Laura Madokoro, 'Good Material: Canada and the Prague Spring Refugees', in (2010) 26 Refuge 161. Simona Leonavičiüte, *Diplomatic Asylum in the Context of Public International Law* (Mikolas Romeris University, Faculty of Law, International Law Joint Master Program, Thesis, Vilnius 2012).

[75] Originally published by Jean Gabriel Castel, *International Law Chiefly as Interpreted and Applied in Canada* (3rd edn, Butterworth, London 1976) 519–20 cited by Cole Charles V, 'Is There Safe Refuge in Canadian Missions Abroad?' (1997) International Journal of Refugee Law 659, cited also by Leonavičiüte (n 74) 47.

2.3.4 Diplomatic shelter for Soviet dissidents in Moscow

Members of the Pentecostal religious community long campaigned against the discrimination and harassment they faced in the Soviet Union. In 1963 a group of them pleaded for asylum at the US Embassy in Moscow, but they left the building after a Soviet promise to relieve their situation. Instead, prison sentences, detention in psychiatric hospitals, and the removal of their children followed.[76] Some member of this group, frustrated by their continued failure to emigrate (the Vashchenko family and the Chmykhalov family) entered the US Embassy of Moscow again in 1978 and lived in its the basement for several years. In 1983, Soviet consent to their emigration was at last acquired.[77] The Soviet Union agreed to resolve the matter, if it was done as 'quietly' as possible.[78] Some family members first left the Embassy, returned to their homes and applied for visas to the leave the Soviet Union, which were finally granted for all of them.

2.3.5 Romanian citizens belonging to the Hungarian minority in the Hungarian Embassy of Sofia (1988–1989)

In the last years of the rule of Nicolae Ceauşescu, the Romanian communist dictator, a general policy was launched under the neutral title of 'systematisation policy' threatening the disappearance of the diverse cultural and mainly architectural monuments of the multicultural Romania. The different linguistic minorities of Transylvania were deeply concerned by this policy and the inherent danger of the demolition of their traditional houses and villages and their forced resettlement in concrete block dwellings of neighbouring cities. Moreover, the Hungarian minority's contacts with Hungary and family members living on the other side of the border were continuously hindered. (At the same time, Romania gave the possibility of emigration to the German speaking minority as well as to the Jewish minority pending a *per capita* payment by the Federal Republic of Germany (FRG) and Israel under the title: 'compensation for costs of schooling'.)

Against such a background twelve people belonging to the Hungarian minority from Romania took shelter in the Hungarian Embassy in Sofia, in order to get the opportunity of free immigration to Hungary. They stayed there between 14 September 1988 and 17 February 1989, when according to an *ad hoc* Hungarian-Bulgarian-Austrian-ICRC agreement, they were brought through Vienna to Hungary by a plane of Austrian Airlines.

[76] Christopher Marsh, *Religion and the State in Russia and China: Suppression, Survival, and Revival* (Continuum, New York 2011) 82, 103.

[77] See eg *'Siberian Seven', Records of the Hearing before the Subcommittee on Immigration Refugees and International Law of the House of Representatives*, 16 December 1982, 1–63; see further: Leonavičiüte (n 74).

[78] George P Shultz, *Turmoil and Triumph: Diplomacy, Power, and the Victory of the American Deal* (Maxwell Macmillan, New York 1993, Simon and Schuster e-book edition 2010) 170.

2.3.6 East German nationals at the central European embassies in 1989

When Gorbachev's perestroika challenged the credibility of the hard liner communist rule, hundreds of East German citizens wanted to 'emigrate' to the Federal Republic of Germany which had formerly been allowed to very few people. A catalyst event for these attempts was the highly publicized case of Bernhard Marquardt, who was allowed to leave East Germany after seeking refugee in the US Embassy in East Berlin.[79] Various measures by the embassies and also by the East German authorities made it more difficult to apply for asylum in East Berlin diplomatic buildings, so many applicants entered into different diplomatic missions (mainly the West German embassies in Budapest, Prague, and Warsaw) in order to wait for an 'exit visa' from these countries. Some of them applied for political refugee status but most of them wanted only to leave East Germany. Their number reached 100–150 in each mission and they at least hindered if not completely paralysed the ordinary functioning of the diplomatic and consular buildings.[80] That is why eg in Budapest, the West German embassy had to rent some neighbouring houses from private persons in order to be able to normally host the people seeking for emigration.

Finally, the Hungarian government made an agreement with the ICRC and West Germany, to bring 101 East Germans by plane to Vienna on 24 August 1989. Hundreds of East Germans waiting in non-diplomatic buildings, such as hostels and camping sites were also able to leave Hungary when the border was opened at the Pan-European Picnic (Sopron, 19 August 1989). As for the East German citizens in the diplomatic missions in Prague, an agreement was reached to the effect that they had to return formally to their country for some days with the promise that their application for emigration visas would be accepted and that they would soon be able to continue their trip to West Germany. (Thousands of East Germans wanted to jump on the special trains but such attempts were brutally obstructed.) The same 'special train' operation was used also in Warsaw.[81]

2.3.7 Albanians in the embassies in Tirana 1989

A similar situation occurred in Tirana in the last months of the Communist dictator Enver Hodža and hundreds of Albanians asked for refuge and emigration possibility.[82] According to Leonavičiüte, 6,000 people ran into the Belgian, Dutch, Norwegian, Polish, and Turkish embassies.[83] The police forces made futile attempts to prevent them from entering, and finally their individual lot was solved by the sudden collapse of the regime.

[79] John Benjamin Roberts, 'Diplomatic Asylum: An Inappropriate Solution for East Germans Desiring to Move to the West' (1987) 1 Temple International and Comparative Law Journal 236–37.
[80] ibid 231–34. [81] Denza (n 1) 117. [82] ibid.
[83] Leonavičiüte (n 74) 48.

2.3.8 Refuge in the Romanian Embassy in Chişinău

In September 2008, the Romanian Embassy in Chişinău was host to the sons of a Moldavian politician, Sergiu Mocanu, chief counsellor of Vladimir Voronin, the former head of State of Moldova. They were criminally prosecuted for a brawl in a disco but they claimed to be persecuted because of their father's political activity.[84] The Mocanu boys stayed for a year in the building of the Embassy that they left only when a Moldavian court changed the pre-trial detention warrant to a warrant on house arrest.[85]

2.3.9 Julian Assange in the London Embassy of Ecuador

The Australian national Julian Assange has become famous for having created the WikiLeaks portal where he published thousands of classified, secret, and top secret documents, most of them written by American diplomats on their receiving States and the politicians and policies thereof. The published documents mentioned intelligence activities also within NATO allies and a general taping of governmental and private phone conversations. Many documents concerned Camp Delta of Guantanamo and the treatment of its detainees.

Despite evident warnings, Assange continued and enlarged his activity. In 2010, he was under investigation in the United States[86]—where previously criminal investigations against army or intelligence community defectors Bradley (Chelsea) Manning and Edward Snowden were also launched, who both leaked mass amounts of information to the public. Assange was also wanted in Sweden, where an Interpol arrest warrant was issued against him because of sexual offences allegedly committed during his temporary stay in Sweden. According to other sources,[87] a European Arrest Warrant was issued for sexual molestation and rape

[84] See European Court of Human Rights, *Mocanu v Moldova* (Decision) no 24163/09.

[85] 'Sons of Sergiu Mocanu Quit Romanian Embassy' *Moldova Azi* (Chişinău, 23 September 2009) <http://www.azi.md/en/story/5964> accessed 15 September 2016; 'Moldovan Politician's Sons Leave Romanian Embassy after One Year' *Moldova.org* (Chişinău, 24 September 2009) <http://www.moldova.org/en/moldovan-politicians-sons-leave-romanian-embassy-after-one-year-203694-eng/> accessed 15 September 2016.

[86] Ellen Nakashima, Jerry Markon and Andrew Blake, 'WikiLeaks Founder Could Be Charged under Espionage Act' *The Washington Post* (Washington, 30 November 2010) <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/29/AR2010112905973.html> accessed 15 September 2016, Elisabeth Bumiller, 'Army Broadens Inquiry Into WikiLeaks Disclosure' *The New York Times* (New York, 30 July 2010) <http://www.nytimes.com/2010/07/31/world/31wiki.html> accessed 15 September 2016.

[87] Anders Rönquist (Ambassador, Swedish Ministry for Foreign Affairs) 'Communication from Working Group on Arbitrary Detention, Reference: G/SO 218/2' (Stockholm, 3 November 2014) UF2014/58264/UD/FMR, Alison Duxbury, 'Assange and the Law of Diplomatic Relations' in (2012) 16:32 *ASIL Insights* <https://www.asil.org/insights/volume/16/issue/32/assange-and-law-diplomatic-relations> accessed 20 July 2016, Steven Erlanger 'Julian Assange to Be Questioned by Sweden Over Rape Claim, Ecuador Says' *The New York Times* (New York, 11 August 2016) <http://www.nytimes.com/2016/08/12/world/europe/julian-assange-sweden-ecuador.html?_r=0>. 'Julian Assange Sex Assault Allegations: Timeline' *BBC News* (London, 5 February 2016) <http://www.bbc.com/news/world-europe-11949341> accessed 20 July 2016.

and Assange unsuccessfully applied against the allegations before the Svea Court of Appeal (in Sweden) on 24 November 2010.[88] Probably on 19 June 2012 he entered the building of the Embassy of Ecuador in London where he has been living since then. According to Ricardo Patiño, Minister of Foreign Affairs, Mr Assange had applied for political asylum and the government was considering the request.[89] Some days later, it was accepted.[90]

Several times he attended press conferences from the window of the embassy. At the time of the closure of the present text, he is still staying in the same premises.

2.4 Asian examples

2.4.1 The Persian Shah's wives at the British Embassy at the end of the nineteenth century

Satow refers to a case when 300 wives of the Shah entered the building of the British legation in order to protest against the Shah's decision to marry the daughter of his gardener. The details were written in the biography of Mortimer Durand serving in Tehran between 1894 and 1900 and Satow's analysis is that it was rather a case of collective shelter.[91] According to Denza, we should see here that 'taking shelter in a foreign mission to emphasize grievances was particularly a custom in Persia'.[92] In this sense, it was rather a solemn demonstration of the upset of the Emperor's wives than a real will to seek for protection.

2.4.2 A Soviet soldier in the US Embassy of Kabul

The Soviet Army invading Afghanistan in 1979 had defectors and captured soldiers: surrender was, however, punishable as a military crime. Aleksandr Vasilyevich Sukhanov, a Soviet soldier wanted to return to the Soviet Union but without any punishment and persecution. He asked for refuge in the American Embassy of Kabul on 31 October 1985 and relatively soon, on 5 November 1985,

[88] UNHCR Working Group on Arbitrary Detention, 'Opinion No. 54/2015 Concerning Julian Assange (Sweden and the United Kingdom of Great Britain and Northern Ireland)' (22 January 2016) UN Doc A/HRC/WGAD/2015.

[89] Ministerio de Relaciones Exteriores y Movilidad Humana, Ecuador, 'Joint Press Conference Quito – London with Julian Assange: Statement by Minister of Foreign Affairs Ricardo Patiño' (9 July 2014) <http://shanghai.consulado.gob.ec/joint-press-conference-quito-london-with-julian-assange-statement-by-minister-of-foreign-affairs-ricardo-patino/> accessed 20 July 2016.

[90] Ministerio de Relaciones Exteriores y Movilidad Humana, Ecuador 'Statement of the Government of the Republic of Ecuador on the Asylum Request of Julian Assange – News Release No. 042' (10 May 2013) <http://cancilleria.gob.ec/statement-of-the-government-of-the-republic-of-ecuador-on-the-asylum-request-of-julian-assange/?lang=en>, Arturo Wallace, 'Julian Assange: Why Ecuador is Offering Asylum' *BBC News* (London, 16 August 2012) <http://www.bbc.com/news/world-europe-19289649> accessed 20 July 2016.

[91] Roberts (n 37) 111 para 8.26.

[92] Denza (n 1) 116.

an American-Soviet agreement was reached about the safe return in order not to hamper the meeting between Reagan and Gorbachev.[93]

2.4.3 North-Korean defectors in embassies accredited to China and the Chinese position

Dozens of North Koreans have tried to leave one of the most militarized countries of the world. Because the immediate neighbourhood of foreign embassies in Pyongyang is strongly protected and controlled, those who would like to emigrate from the Communist country, try to profit from tourist trips in China, virtually the only foreign country the visit of which is allowed by the regime. The defectors tried to enter the Japanese, Canadian, South Korean, and US embassies: sometimes they succeeded, sometimes they did not. As we know from reports of Human Rights Watch, the Chinese police sometimes tolerated these acts in Beijing and in some consular towns, but sometimes they intervened very strongly. For example, on 8 May 2002 the Chinese police entered Japan's consulate of Shenyang for the capture of five North Koreans who had sought refuge. In 2002 some refugees were arrested by Chinese public security officers when they tried to get into Japanese, Canadian, South Korean, and US diplomatic missions.[94] The Chinese courts released them on humanitarian grounds and did not put any obstacle in the path of their emigration to South Korea.[95]

In 2002, two defectors managed to enter the US Embassy, fifteen of them entered the German Embassy, and twenty-five the Spanish mission.[96] (In Vietnam, nine North Koreans were sheltered by the Danish Embassy in Hanoi.)[97]

The Chinese authorities issued at that time a document clarifying their position vis-à-vis diplomatic refuge: they do not recognize it and moreover they expected the cooperation of the embassies in putting an end to this form of emigration and asylum seeking.[98]

[93] Leonavičiüte (n 74) 46. See also 'Soviet Soldier Leaves US Embassy in Afghanistan' *The New York Times* (New York, 5 November 1985) <http://www.nytimes.com/1985/11/05/world/soviet-soldier-leaves-us-embassy-in-afghanistan.html> accessed 20 July 2016; 'Soviet Soldier Goes Back To Army In Kabul' *KNT News Service* (Orlando, 5 November 1985); 'Soviet Soldier Goes Back to Army in Kabul' *Orlando Sentinel* <http://articles.orlandosentinel.com/1985-11-05/news/0340230089_1_sukhanov-soviet-soldier-soviet-union> accessed 20 July 2016.

[94] Human Rights Watch (hereinafter 'HRW'), *The Invisible Exodus: North Koreans in the People's Republic of China* (Report) vol 14 No 8 (November 2002) <https://www.hrw.org/reports/2002/north-korea/norkor1102.pdf> 28.

[95] ibid 31, Suh Dong-man, *DPRK Briefing Book: North Korean Defectors and Inter-Korean Reconciliation and Cooperation* (7 May 2002) <http://nautilus.org/publications/books/dprkbb/refugees/dprk-briefing-book-north-korean-defectors-and-inter-korean-reconciliation-and-cooperation/> accessed 20 July 2016.

[96] HRW (n 94) 3, Leonavičiüte (n 74) 48.

[97] Leonavičiüte (n 74) 48.

[98] Letter from Chinese Ministry of Foreign Affairs to Foreign Embassies, (31 May 2002) published in HRW (n 94) 35.

2.4.4 Chen Guangcheng, the Chinese activist

Chen Guangcheng was a civil rights activist in rural areas of the People's Republic of China. After two years of house arrest, he managed to find his way into the United States Embassy in Beijing in April 2012[99] and enjoyed its hospitality until mid-May 2012. Originally, he did not wish to leave China, and apparently avoided the use of the word 'asylum'.[100] Finally, according to a Chinese-US agreement, he was able to leave the Embassy and fly to the US.[101] He started to attend law school, and he still maintains his involvement in human rights advocacy, proving that exile does not necessarily result in silence of the refugee.[102]

2.5 African examples

2.5.1 The Durban Six

Under the apartheid regime, in September 1984, six prominent South African personalities of various anti-apartheid movements and organizations asked for refuge at the British consulate in Durban. The British consul did not want to keep them indefinitely and they asked for refuge at the embassies in Pretoria of the United States, France, Netherlands, and Germany which however refused them. The British consul convinced them to leave the consular building even if no safe conduct was promised by the apartheid government. With one exception, the police arrested them when leaving the consulate. They were charged with treason, but subsequently acquitted.[103]

2.5.2 Meriam Ibrahim at the US Embassy in Sudan

A more recent example is that of Meriam Ibrahim (or Mariam Yahia Ibrahim Ishag), a Sudanese woman married to a Christian man and sentenced to death because her marriage was considered apostasy under Sudanese law. A massive international protest followed the preparation and the subsequent phases of this 'criminal procedure', even more so after the judgment was unsealed, and finally a court ordered her release. Even when released from the jail and death row where she gave birth to her second child, she was prevented from leaving the country to go to the US.

[99] Duxbury (n 85).

[100] Shalini Bhargava Ray, 'Optimal Asylum' (2013) 46 Vanderbilt Journal of Transnational Law 1217.

[101] Malcolm Moore and Peter Foster 'Deal Over Blind Activist Chen Guangcheng Agreed Between US and China' *The Telegraph* (London, 4 May 2012) <http://www.telegraph.co.uk/news/worldnews/asia/china/9246981/Deal-over-blind-activist-Chen-Guangcheng-agreed-between-US-and-China.html> accessed 20 July 2016.

[102] Lijia Zhang, 'Banished, but Not Gone' *The New York Times* (New York, 29 April 2013) <http://www.nytimes.com/2013/04/30/opinion/global/Chen-Guangcheng-banished-but-not-gone.html?rref=collection%2Ftimestopic%2FChen%20Guangcheng> accessed 30 September 2016.

[103] Susanne Riveles, 'Diplomatic Asylum as a Human Right: the Case of the Durban Six' (1989) 11 Human Rights Quarterly, 139–41.

The next day she was accepted at the US embassy of Khartoum on 26 June 2014, and at the end of July, she and her family were able to leave Sudan with the involvement of the Italian Government to finally arrive in New Hampshire.[104]

3. Lessons to Be Taken From the Examples

The diplomatic premises of the United States abroad are probably among the most popular choices of asylum seekers, and the number of documented cases allow us to examine the considerations of the sending State of the targeted diplomatic mission. The most famous case was probably that of Cardinal Mindszenty's refuge at the Budapest mission between 1956–1971. Several other, more recent, cases on admission by American diplomats have also been presented under the points dedicated to the African or Asian examples.

A document became recently available in a rather unusual way, which seems to summarize the current US approach in the matter. *The Guardian* newspaper published in 2010 this document,[105] allegedly signed by then Secretary of State Hillary Clinton. This document[106] seems to be authentic mostly because of its inherent logic supported by its international legal and political background.[107]

For our current observations the most important aspects of this document are in paras 40–42 and 46–48 of Section E on 'Temporary Refuge – Cautions and Guidance'. Most importantly, the document clearly states that the United States and most other countries do not recognize the concept of diplomatic asylum or accept that the granting of refuge in an embassy is an authorized use of diplomatic facilities.[108] If someone asks permission to stay in a US Governmental facility located in a foreign country, then this is considered as a request for temporary refuge. While the right to asylum is denied by this document, the possibility of such requests is implicitly accepted—as a possible reason of such requests the document identifies that those persons act in an 'erroneous belief that safe passage out of the host country will be assured'. This however is seen as a highly unlikely scenario: instead, a protracted stalemate, a possibly adverse impact on US interests, and

[104] 'Meriam Ibrahim Freed Again in Sudan, Flees to U.S. Embassy' *NBC News* (27 June 2014) http://www.nbcnews.com/news/world/meriam-ibrahim-freed-again-sudan-flees-u-s-embassy-n142316, and 'Meriam Ibrahim Freed from Death Row in Sudan' <https://www.amnesty.org.uk/meriam-ibrahim-freed-death-row-sudan-apostasy-pregnant-mother> accessed 20 July 2016.

[105] 'US Embassy Cables: How to Handle a Defector—A How-to Guide for Embassy Staff' *The Guardian* (London, 28 November 2010) <https://www.theguardian.com/world/us-embassy-cables-documents/235430> accessed 20 July 2016.

[106] ibid. See the subject designation in the header: 'Walk-in Guidance for 2009: Handling Foreign National Walk-Ins, Defectors, and Asylum Seekers'.

[107] The assessment of the authenticity is also aided by similarities found by comparing this text and the diplomatic records from the Foreign Relations of the United States (FRUS) documentation, cited in the Cardinal Mindszenty case (nn 63–70).

[108] 'US Embassy Cables: How to Handle a Defector – A How-to Guide for Embassy Staff' *The Guardian* (London, 28 November 2010) para 40 <https://www.theguardian.com/world/us-embassy-cables-documents/235430> accessed 20 July 2016.

even some deterioration of diplomatic relations is foreseen.[109] Consequently, the persons requesting temporary refuge should be informed that their safe conduct or their entry into the US cannot be granted, and also that their stay may be a further source of danger for themselves.[110]

Having said all that, temporary refuge may be granted in instances in which compelling evidence shows that there is an imminent, immediate, and exceptionally grave physical danger.[111] In those exceptional cases, where temporary refuge is considered by the diplomatic post, a set of seven questions should also be taken into account, assessing the risks and benefits for the US when accepting the person in the facilities.[112]

In summary, humanitarian urgency seems to be the basic consideration for the exceptional admittance of persons in imminent danger, due to manifest political or racial persecution by the authorities or by a mob.

Laypersons generally believe that by entering a diplomatic facility they miraculously leave their country and arrive in a new one. As untrue this common misunderstanding is, it still can be one reason why many attempts are made to obtain diplomatic asylum in conflict areas around the world.[113] Another more solid motivation is the relative safety offered by these premises. The above series of historical examples do not enable us to outline a universal customary regulation, however certain conclusions can still be stipulated.

The adoption and the entry into force of the 1961 Vienna Convention did not change significantly the attitude of States towards diplomatic asylum and diplomatic shelter. Examining various regional practices, the lack of consistency shows that, contrary to common assumptions, no major difference is perceivable between the practices of the States of South America and of other continents.[114]

Sending States do not want to complicate their relations vis-à-vis receiving States (and generally even less to intervene into domestic matters) and that is why:

(i) They try to reduce the duration of sojourn for the strict minimum possible.

(ii) If feasible, they try to convince or to influence the asylee to leave the diplomatic premises upon his own free decision.

(iii) They isolate their guests from active contacts.[115]

[109] ibid para 41. [110] ibid para 42. [111] ibid paras 46–47

[112] ibid para 48.

[113] See Congressman Romano Mazzoli's question in the 'Siberian Seven' case: 'Is an Embassy Abroad Considered U.S. Soil?' United States Senate Committee on the Judiciary, Subcommittee on Immigration and Refugee Policy, *Hearing before Subcommittee on Immigration Refugees and International Law of the House of Representatives, (Records of the Second Session, 16 December 1982)* (Washington: US GPO, 16 December 1982) 16 <https://catalog.hathitrust.org/Record/002761207> accessed 20 September 2016.

[114] On the general position see eg Neale Ronning, *Law and Politics in Inter-American Diplomacy* (John Wiley & Sons, New York 1963) 95; John Benjamin Roberts (n 77) 244; or on the differences within Latin America see eg Angela M Rossitto, 'Diplomatic Asylum in the United States and Latin America: A Comparative Analysis' (1987) 13 Brooklyn Journal of International Law 131.

[115] Arturo E Balbastro, 'The Right of Diplomatic Asylum' (1959) 34 Philippine Law Journal 352, Ronning (n 114) 91.

This isolation can be very useful for the territorial State as well: especially in case of a lengthy sojourn, a *modus vivendi* that is very comfortable for the territorial State can be developed. The asylum seeker, if he is a politician, is neither punished and turned into a martyr, nor is he allowed to return to domestic political life. The receiving State can tolerate such conditions for a long time and even in the absence of a legal obligation to do so, it is often inclined to enter into bargaining and into offering de facto safe conduct in order to obtain some reasonable benefits from the situation.

Territorial (or receiving) States do not accept that a persecuted person could obtain a subjective right of free emigration (safe conduct) only because of successful entry into the diplomatic premises of a (sending) State.[116] Territorial (or receiving) States generally consider such admittance of a person into a diplomatic building illegal, nevertheless they tolerate the situation and are refraining from exercising reprisals and especially from the forced entry and the armed seizure of the 'refugees'.[117] Instead, other forms of reprisals or retortions can be and sometimes are effectively exercised.[118]

Sending States are acting with awareness of the formal illegality or at least inadequate justification of the given situation from the point of view of diplomatic law. Nevertheless, urgency and humanitarian considerations, state of necessity, or at least moral obligations were (and can be) often invoked for the justification of sheltering.[119]

State practice seems consistent in denying refuge in the embassies for common criminals—although sometimes it is not a self-evident category. The diplomatic missions usually hand over persons if they consider them common criminals.[120]

In case of foreign military intervention, occupation, civil war, or *coups d'etat*, humanitarian considerations and urgency are expressed with acuity. In case of foreign military occupation, the State of the occupying forces will be in a similar situation as the territorial (receiving) State. Because of the illegality of the foreign military intervention and the manifest and per se unconstitutional nature of the *coup d'etat*, the new powers generally also feel the importance of showing tolerance where diplomatic shelter is concerned.[121]

The typical context of diplomatic asylum is bilateral. (The sending State's mission grants shelter to a citizen of a receiving State.) Nevertheless triangular or quadrangular or even more complex situations are not at all uncommon, for example a third country occupies the receiving State whose citizen is granted refuge (Kállay, Mindszenty, Nagy, etc). Another form of the triangular version exists when the given foreigner does not trust the territorial State and is afraid of being sent back to

[116] See eg Roberts (n 37) 111 para 8.25; Duxbury (n 85) 1; Ronning (n 114) 95; John Benjamin Roberts (n 77) 241.

[117] Roberts (n 37) 111 para 8.25; Ronning (n 114) 95.

[118] See eg John Benjamin Roberts (n 77) 237.

[119] See Caracas Convention (n 11) art 3, and Riveles (n 100) 158.

[120] See eg Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge, New York 1997) 126; Ronning (n 114) 90 and 96.

[121] Ronning (n 114) 90.

the country of origin because he would like to emigrate to a third country (eg the 1988–89 Central European cases). The quadrangular or maybe even pentangular version is symbolized by the Assange case where an Australian citizen asked for shelter at the Ecuadorian Mission having the fear of being extradited to the United States or surrendered first to Sweden then extradited to the United States. The bilateral, triangular etc version can go through some metamorphosis in the course of time. (In the Mindszenty case, the Cardinal was fleeing from the Soviet Army, so the USSR could be considered as the third angle, but finally, the third party directly involved in the solution was the Holy See.)

Numerous authors consider that the spirit or the letter of certain human rights instruments should also be taken into consideration.[122] The most often cited relevant rules are the 1951 Refugee Convention (and especially the non-refoulement principle)[123] and that of the European Convention of Human Rights (ECHR, concerning the responsibility of the extraditing State for death or other harm that occurred in the requesting State, and in particular the jurisprudence on Articles 2 and 3 ECHR) and the same can be said about the pertinent rules of the International Covenant on Civil and Political Rights, the Inter-American Convention on Human Rights, etc. It depends on States whether the head of the mission is entitled to take the decision on admission or whether this remains within the capacity of the Ministry of Foreign Affairs of the sending State. Apparently, most sending States are confident that the head of the mission is in such a position as to better evaluate the local situation and of taking the decision.[124] On the other hand, the head of the mission is eligible to offer only a very short, temporary shelter.[125]

Generally, sending States approve the decision taken on the spot.[126] It is, however, shocking, that in situations where the actions of diplomats are evidently justified by all moral and historical perspectives, like the shelter offered to persecuted Jews in 1944, the local diplomats were criticized or even received negative sanctions by their sending States because they had acted ultra vires or because of their alleged financial irresponsibility. This happened *inter alia* with Carl Lutz[127] (see 2.3.2.4), who was blamed for this after his return in 1945 but rehabilitated in 1958. Giorgio

[122] See eg Robert Kogod Goldman and Scott M Martin, 'International Legal Standards Relating to the Rights of Aliens and Refugees and United States Immigration Law' (1983) 5 Human Rights Quarterly 309; John Benjamn Roberts (n 77) 239 f and 251 note 141; Riveles (n 100) 142; Anthea J Jeffery, 'Diplomatic Asylum: Its Problems And Potential as a Means of Protecting Human Rights' (1985) 1 South African Journal on Human Rights 23; Balbastro (n 112) 133.

[123] See eg Maarten den Heijer, *Extraterritorial Asylum under International Law* (Leiden University, 2011) <https://openaccess.leidenuniv.nl/bitstream/handle/1887/16699/04.pdf?sequence=12> 130 Suzanne Riveles (n 100) 152.

[124] See eg John Benjamin Roberts (n 77); for the actual application in the Saulo case see Balbastro (n 112) 352.

[125] Such consequence can be deduced from eg the telegram of Mr Wailes (n 64): 'If they do come back and we have bombing at noon as threatened in ultimatum, I will take them in for few minutes as vestibule largely glass.'

[126] See eg Ronning (n 114) 92.

[127] Alexander Grossman, *Nur das Gewissen: Carl Lutz und seine Budapester Aktion Geschichte und Portraet* (Wald, Im Waldgut 1986) 104.

Perlasca's activity was recognized only after 1987 and Raoul Wallenberg was captured by the Soviet Army and probably died in 1947 in the infamous Lubyanka prison. Thus the merits of these heroes of Yad Vashem were recognized for the historical records only at the end of their lives or even after their deaths.

Most of the historical and contemporary examples can be considered ex post facto justified from moral perspectives, with only a few notable exceptions, eg the admittance of the Hungarian Nazis during the preparations of the plot of 15 October 1944 that later really proved to be a first step towards a major intervention in the domestic affairs of the territorial country. It also happens that receiving States change their attitudes: first, they considered the situation illegal, but later (due to a change of regime and of paradigm) it was considered as historically justified (see, for instance, Hungary's approach toward the Mindszenty affair during and after Communist rule). Taking into consideration the context, the refusal sometimes also generates political and academic criticism.

The maintenance of the current legal situation seems to be more beneficial than the creation of a treaty based international regulation, be it either a separate treaty or a modification to the 1961 Vienna Convention.[128]

[128] See eg Rossitto (n 106) 135. For a rare position advancing the opposite opinion, see Peter Porcino, 'Toward Codification of Diplomatic Asylum' (1976) 8 New York University Journal of International Law and Politics 435.

13

The Protection of Diplomatic Correspondence in the Digital Age

Time to Revise the Vienna Convention?

*Patricio Grané Labat and Naomi Burke**

1. Introduction

This chapter considers whether the VCDR adequately protects diplomatic documents and communications from interference in the digital age. In particular, it examines the obligations set out in VCDR Articles 24 and 27 related to the inviolability of diplomatic archives, documents, and correspondence in light of the use of new technology not in existence at the time of the drafting of the VCDR. Such technology includes email, electronic storage and transmission of information (for example through online networks or cloud servers), video-conferencing, and other forms of electronic communications.

Diplomatic correspondence is increasingly shared by electronic means and archived electronically. The term 'diplomatic cable' refers to a confidential message in text form exchanged between a State's diplomatic mission and its foreign ministry. Whereas diplomatic cables were once sent by telegram in Morse code using submarine cables and deciphered at their destination, modern diplomatic cables are shared electronically, often through emails or through online networks or servers. For example, it was reported that as of 2008, the US State Department uses the same computer system for email and diplomatic cables, the difference being that the contents of diplomatic cables are automatically archived.[1] Diplomatic cables are typically categorized according to the confidential nature of the material contained therein, for example, top secret, secret, confidential, restricted etc. For highly confidential information, some States use special encrypted computers

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[1] Brian Palmer, 'What's a "Diplomatic Cable"?' *Slate Magazine* (29 November 2010) <http://www.slate.com/articles/news_and_politics/explainer/2010/11/whats_a_diplomatic_cable.html> accessed 12 May 2016.

kept in secure rooms, accessible only to certain members of the diplomatic staff that hold the required codes and passwords enabling access to the computers and decryption.

The use of such technology may make unauthorized access to diplomatic correspondence and archives easier and adversely affect both the inviolability of such documents provided for under the VCDR and the legal obligations of receiving States. For example, in November 2014 the existence of new malicious software named 'Regin' was discovered.[2] The bug, created for cyber-espionage, was of a level of sophistication that indicated it had been created by a State. Surveillance software has also been developed by corporations and sold to governments, for example FinSpy software, which when installed on a computer allows remote surveillance of the use of the computer and its contents.[3]

Unauthorized access to diplomatic correspondence and archives by non-State actors also poses challenges not considered at the time the VCDR was drafted. It is unsurprising that non-State actors were not contemplated by the drafters. At the time the VCDR was adopted in 1961, States were the primary subjects of international law. The content of diplomatic correspondence and archives was primarily of concern to States, not individuals. The scope of public international law was at that time in the process of considerable expansion. First, new mechanisms for inter-State cooperation emerged, in the form of international organizations to which States delegated partial competence to exercise their sovereign powers. International law also developed to address the rights and responsibilities of non-State actors, including the expansion of international humanitarian law to include national liberation movements and the adoption of multilateral human rights treaties creating rights for individuals in 1966.[4] But the VCDR does not create rights and obligations for non-State actors. It does not contemplate the actions of non-State actors and the impact that they may have on the protected information and on the obligations of States under the treaty.

Facilitated by new technology, processes of globalization have led to the emergence of information as a global public good in itself. The participation of non-State actors in international relations is also increasingly significant, and the use of communication media by such entities has contributed to the development of a global or transnational public sphere.[5] Against this background, non-State actors whose sole purpose is to distribute information around the globe through electronic means have been created. A prime example of one such non-State actor is

[2] Rory Cellan-Jones, 'Regin, New Computer Spying Bug, Discovered by Symantec' *BBC News* (23 November 2014) <http://www.bbc.co.uk/news/technology-30171614> accessed 12 May 2016.

[3] Nicole Perlroth, 'Software Meant to Fight Crime is Used to Spy on Dissidents' *New York Times* (30 August 2012) <http://www.nytimes.com/2012/08/31/technology/finspy-software-is-tracking-political-dissidents.html?_r=0> accessed 12 May 2016.

[4] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

[5] Angela Crack, *Global Communication and Transnational Public Spheres* (Palgrave Macmillan, New York 2008).

the WikiLeaks organization, whose activities in relation to diplomatic cables will be considered in Section 3 of this chapter.

In light of the increasing ease of unauthorized access to diplomatic correspondence and archives through electronic means, and the interest of non-State actors in such documents, this chapter considers whether the VCDR framework still adequately protects diplomatic correspondence and archives from interference or whether it should be amended.

In order to evaluate the effectiveness of the VCDR legal framework, this chapter first considers, in Section 2, the obligations of States under the VCDR regarding the inviolability of diplomatic archives and diplomatic correspondence, including an analysis of how such protection applies to electronic information. Section 3 uses WikiLeaks as a case study, to identify the legal challenges posed by non-State interception of protected information under the existing legal framework of the VCDR and public international law more generally. Using this case study, the chapter attempts to determine whether the VCDR adequately regulates the use of information obtained and disseminated by a non-State actor using new technology. Section 3 analyses the legal implications under the VCDR resulting from the use of unlawfully obtained diplomatic cables as evidence in legal proceedings before national and international courts and tribunals and considers in particular how courts, as State organs, should deal with such information. It also examines what legal remedies are available to States whose diplomatic correspondence and archives have been intercepted and disseminated through the use of new technology, and submitted as evidence in legal proceedings.

In identifying the challenges posed to the inviolability of diplomatic correspondence and archives by new technology and new actors, the chapter offers a critical assessment of the VCDR in the digital age.

2. The VCDR Legal Framework for the Protection of Diplomatic Archives and Correspondence

This Section provides some historical background before recalling the provisions of the VCDR relating to the protection of diplomatic archives and correspondence. It then considers the VCDR framework in light of the challenges posed by non-State actors and new technology to the protection of diplomatic archives and correspondence.

2.1 Historical background

Throughout history, States have attempted (often successfully) to intercept the confidential communications of other States. Yet, the need to protect diplomatic correspondence from spying or other unwelcome interference cannot be considered a driving force behind the drafting of the VCDR. There is no indication in the drafting history of the VCDR that legal uncertainty surrounding the interception

of diplomatic messages was a key motivation driving the codification of the rules on diplomatic law. The United Nations General Assembly (UNGA) simply considered codification of diplomatic law to be 'necessary and desirable as a contribution to the improvement of relations between States' and requested that the ILC consider its codification as a priority topic.[6]

The issue of non-State interference with archives and correspondence was not raised as an issue when the provisions of the VCDR were negotiated. But concerns about the risks posed by new technology, including the use of wireless transmitters by diplomatic missions, were expressed during the debate. Indeed, whether a sending State was entitled to install and use a wireless transmitter was a subject of significant dispute at the Vienna Conference.

In 1961, only the more developed States operated wireless transmitters. Less developed States were concerned that they were at a significant disadvantage (and that transmitters could be used to broadcast to listeners in the receiving State).[7] As a result, Argentina, India, Indonesia, and the United Arab Republic proposed that a wireless transmitter could only be used with the consent of the receiving State 'after making proper arrangements for its use in accordance with the laws of the receiving State and international regulations'.[8] The United Kingdom and other more developed States, on the other hand, objected to the requirement of consent or the need for permission for foreign missions to operate a diplomatic wireless. Accordingly, there was a move towards compromise, with a clause that eventually became the final sentence of Article 27(1): 'the mission may install and use a wireless transmitter only with the consent of the receiving State'. While the wording does require the consent of the receiving State, no reference is made to subjection to local laws and procedures (which could have included a duty to submit to inspection). Negotiations on the text of Article 27 foreshadowed the concerns that would later arise from the use of new technology, including satellites, email, and electronic data storage. Underlying the position of many States were concerns regarding inequality of resources as between States and the inability of States to regulate virtual conduct within their territories.

2.2 Protection of diplomatic archives, documents, and correspondence

2.2.1 Diplomatic archives and documents

Article 24 of the VCDR provides that '[t]he archives and documents of the mission shall be inviolable at any time and wherever they may be'. This provision extended the protection that already existed under customary international law for the protection of archives and documents of a diplomatic mission.[9] For example,

[6] United Nations, General Assembly Resolution 685 (VII), 400th Meeting, 5 December 1952.
[7] Eileen Denza, *Diplomatic Law* (3rd edn, OUP Oxford 2008), 215.
[8] UN Doc A/CONF 20/L 15 and Add l, United Nations Conference on Diplomatic Intercourse and Immunities, Annexes—Proposals and amendments submitted to the plenary Conference, 77.
[9] Denza (n 7) 192–93.

the drafting history of the VCDR indicates that the term 'at any time' was used to clarify that inviolability continued in the event of the cessation of diplomatic relations or outbreak of armed conflict.[10] This term forms the basis of Rule 84 of the Tallinn Manual on the International Law Applicable to Cyber Warfare, which provides that 'diplomatic archives and correspondence are protected from cyber operations at all times'.[11] Similarly, the concept of protecting diplomatic documents 'wherever they may be' developed customary international law by making it clear that archives not on the premises of the mission and not in the custody of a member of a mission were also entitled to inviolability.

The terms 'archives and documents' in Article 24 are not defined in the VCDR. There was a considerable debate during the negotiation of the VCDR regarding the use of these terms. The Secretary to the ILC suggested the inclusion of the term 'and documents' on the basis that 'some documents, such as memoranda in the process of being drafted by the counsellors of the embassy, were not necessarily, and might never become, part of the archives'.[12] The United States opposed this addition as being 'confusing and unnecessary'.[13] Other representatives agreed, believing this addition to be redundant as 'archives' included documents. On that basis, there was a proposal for the phrase 'archives and correspondence' to be used.[14] However, the addition of 'correspondence' was met with resistance. For example, the Special Rapporteur noted that it 'would be difficult to define the meaning of correspondence', and that 'the word "documents" included official letters, so that nothing would be gained by the suggested addition'.[15] Despite opposition from the United States, the suggestion of the Secretary to the ILC to include 'and documents' was ultimately accepted, as evinced by the final wording of Article 24.

Other treaties have included comprehensive definitions of the term 'archive', which may offer guidance for the interpretation of that same term in the VCDR. The VCCR provides that 'consular archives' include:

> all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the ciphers and codes, the card indexes and any article of furniture intended for their protection or safekeeping.[16]

This more extensive definition has been applied by analogy to the VCDR by the UK House of Lords in the *Shearson Lehman Brothers* case, where 'archives' was interpreted to include all papers and documents held by an organization and not just those documents that the organization intended to retain as a formal record.[17]

[10] UN Doc A/CONF.20/C1/L 149 (amendment of France and Italy).

[11] Michael N Schmitt, *Tallinn Manual on the International Law Applicable to Cyber Warfare* (CUP, Cambridge 2013) 233. The Tallinn Manual was written by an independent 'International Group of Experts' and consists of a set of non-binding guidelines on the rules applicable in cyber warfare.

[12] See contribution by Mr Liang, *ILC Yearbook* 1958 vol I, 135.

[13] See contribution by Mr Sandström, *ILC Yearbook* 1958 vol I, 135.

[14] See contribution by Mr Alfaro, *ILC Yearbook* 1958 vol I, 135.

[15] See contribution by Mr Sandström, *ILC Yearbook* 1958 vol I, 136.

[16] VCCR art 1(k).

[17] *Shearson Lehman Brothers Inc v Maclaine Watson & Co Ltd (No 2)* [1988] 1 All ER 122.

Given that 'archives' is not a defined term in the VCDR, a reasonable interpretation of that term in accordance with the rules of interpretation under customary international law (which take into account the object and purpose of a treaty) is that the protection set out in Article 24 also applies to electronic archives. As Denza notes, the term 'archives' in the VCDR is 'normally understood to cover any form of storage of information or records in words or pictures and to include modern forms of storage such as tapes, sound recordings and films, or computer disks'[18] and today includes 'data held by electronic means, such as those stored on computer hard and floppy disks, CD-ROMs, memory sticks and whatever other new information storage methods are invented'.[19] Denza looks to the purpose of Article 24 (namely, to protect confidential information) and concludes that 'it is clearly right that the words "archives and documents" should be regarded as covering modern methods of storage such as computer disks'.[20] This view was affirmed by the High Court of England and Wales in 2013.[21] Accordingly, diplomatic cables sent and stored electronically could be considered to constitute both documents and archives, entitled to inviolability under Article 24.

On this basis, it can be concluded that the move away from paper archives and documents towards electronic data storage does not, at least in theory, affect the protection granted to diplomatic archives under the VCDR. Accordingly, no amendment to the Convention seems necessary in order for electronic archives to fall within the scope of the VCDR. Electronic archives, like paper archives, are 'inviolable at any time and wherever they may be'. In practice, however, the fact that archives are stored electronically may make them more vulnerable and susceptible to interference, either by States or by non-State actors.

Article 24 of the VCDR does not specify what exactly the obligations of States are regarding the inviolability of diplomatic archives. While a State clearly may not interfere with diplomatic archives of another State, it is unclear what degree of action is required from States to prevent interference with diplomatic archives by persons or entities that are not organs of the State.

In contrast, Article 22 of the VCDR, which provides that the premises of a diplomatic mission shall be inviolable, also specifies that the receiving State 'is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage'.[22] It is reasonable to interpret that duty on the part of States to include protecting the premises of the mission against intrusion or damage from non-State actors. Similarly, it is fairly clear that the obligation of a receiving State under Article 29 to 'take all appropriate steps to prevent any attack'

[18] Eileen Denza, 'Privileges and Immunities of Diplomatic Missions' in Ivor Roberts (ed), *Satow's Diplomatic Practice* (6th edn, OUP, Oxford 2009) 113.

[19] Anthony Aust, *Handbook of International Law* (3rd edn, OUP, Oxford 2010) 120.

[20] Denza (n 7) 195.

[21] *R Bancoult (on the application of) v Secretary of State for Foreign and Commonwealth Affairs*, [2013] EWHC 1502 (Admin), para. 41. See text to n 68, below.

[22] VCDR art 22(2).

on the 'person, freedom or dignity' of a diplomatic agent extends to providing protection from attacks from non-State actors.[23]

The scope of Article 24 is less clear. The commentary to the draft articles prepared by the ILC in 1957 states '[A]s in the case of the premises of the mission, the receiving State is obliged to respect the inviolability itself and to prevent its infringement by other parties.'[24] However, the language of Article 22 (of 'a special duty to take all appropriate steps') was not repeated in Article 24.

While this lack of certainty may not have been significant at the time the VCDR was drafted, the increased interest of non-State actors in sensitive diplomatic information means that the scope of Article 24, or at least its lack of clarity, may have important adverse consequences for the protection of diplomatic documents and archives. This potential gap in the VCDR legal framework will be analysed further in Section 3, regarding the use of confidential diplomatic cables leaked by non-State actors.

2.2.2 Official correspondence of the diplomatic mission

Article 27(2) provides that '[t]he official correspondence of the mission shall be inviolable' and defines the term 'official correspondence' as 'all correspondence relating to the mission and its functions'. It is not clear from the wording of the second sentence of Article 27(2) whether only correspondence emanating from the mission is to be considered inviolable, or whether correspondence to the mission from the sending State is also inviolable.[25]

Denza considers that there are two aspects to Article 27(2).[26] First, it is unlawful for official correspondence of the mission to be opened by the authorities of the receiving State. This obligation of the receiving State may overlap with the obligation under Article 24, which protects mission documents 'wherever they may be'. Second, it may preclude official correspondence from being used as evidence in the courts of the receiving State.

Difficulties may arise in enforcing the inviolability of the official correspondence pursuant to Article 27(2). Because there is no obligation for mission correspondence to bear visible marks of identification, it is not possible for authorities to know whether correspondence relates to the mission and its functions without opening it and reading it. In practice, a receiving State is likely to intercept and read correspondence by means that can be very difficult to detect. To avoid interception, missions will send information by coded telegram (as a diplomatic cable) or by sealed diplomatic bag. States with better resources and access to more

[23] VCDR art 29.

[24] Report of the International Law Commission on the work of its ninth session, 23 April–28 June 1957, UN Doc A/3623, p 135.

[25] Denza (n 7) 226.

[26] ibid. This element of the protection of art 27(2) has been called into question by the recent UK Court of Appeal decision in the case of *Regina (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)* 2014 WLR 237 discussed in section 3 below.

advanced technology and know-how may find it easier to determine when official correspondence sent by electronic correspondence has been intercepted.

As with the definition of 'archives' under Article 24, 'correspondence' can, in accordance with customary international law rules on treaty interpretation, be interpreted to include electronic correspondence. There is therefore no need for an amendment to the VCDR in order for email or other electronic transmission of correspondence to fall within the scope of protection of Article 27(2). Article 27(1) of the VCDR provides that '[I]n communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means.' The reference to 'all appropriate means' supports the conclusion that the protections under Article 27, including protection of (a) 'free communication' of the diplomatic mission and (b) its 'official correspondence', necessarily extend to electronic forms of communications and documents. Treaties concluded after the VCDR explicitly refer to electronic correspondence. For example, Article 11(3) of the Agreement on the Privileges and Immunities of the International Criminal Court provides that the 'Court may use all appropriate means of communication, including electronic means of communication'.[27] Accordingly, diplomatic cables sent electronically between embassies and missions abroad and the sending State can be considered to constitute 'correspondence' within the meaning of Article 27(2) (as well as 'documents' within the meaning of Article 24).

Article 27(1) requires States to 'permit and protect free communication on the part of the mission for all official purposes'. The obligation to 'protect free communication' may be understood as creating obligations additional to those concerning the inviolability of official correspondence. Arguably, States are required not only not to interfere with the official correspondence of diplomatic missions but also to protect that correspondence from interference by persons and entities that are not State officials or organs. In the context of human rights treaties, the obligation 'to protect' requires States to protect individuals and groups against human rights abuses, both by the State and by third parties. In this context, the 'duty to protect' provides:

> generally, that states have a positive obligation in certain circumstances to prevent private actors from infringing on the rights of other individuals. In essence it requires states to prevent, punish, investigate and redress human rights violations.[28]

For example, in the *Velasquez Rodriguez* case, the Inter-American Court of Human Rights held that States had an obligation of 'due diligence' to prevent human rights violations.[29] A similar argument can also be made in respect of the interpretation

[27] Agreement on the Privileges and Immunities of the International Criminal Court 2002, 2271 UNTS 3 (adopted 9 September 2002).

[28] Sheri P Rosenberg SP, 'Responsibility to Protect: A Framework for Prevention' (2009) 1 Global Responsibility to Protect 442, 447.

[29] *Velasquez Rodriguez Case* (Judgment), Inter-American Court of Human Rights Series C No 4 (29 July 1989).

of the obligation to protect free correspondence, namely that States are obliged to prevent interference with diplomatic correspondence by third parties.[30]

In practice however, Denza notes that the provisions of Article 27(1) and (2) are 'widely disregarded by those States which have the technical capacity to intercept embassy communications'.[31] The willingness of States to intercept correspondence despite the clear language of Article 27 suggests that any clarification or revision of the text of the VCDR might not have any impact on States' compliance with their obligations in respect of State conduct.

2.2.3 The diplomatic bag

For reasons of efficiency, diplomatic missions now send the majority of correspondence and documents using electronic means. The diplomatic bag is primarily used to send hard copies and items that cannot be sent electronically such as goods or currency.

Article 27 of the VCDR provides that the diplomatic bag shall not be opened or detained (paragraph 3) and that '[t]he packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use' (paragraph 4).

Article 27(3) and (4) of the VCDR was drafted to balance the need for confidentiality of diplomatic correspondence with the need to safeguard against possible abuse.[32] This was controversial during the negotiating process. Certain States (eg the Soviet Union) favoured unconditional inviolability, whereas others supported the existing customary law rule which permitted the 'challenge and return' of a diplomatic bag. The final wording of Article 27(3) prohibits the opening of a diplomatic bag under any circumstances. A number of Arab States entered reservations on this point when ratifying the VCDR, to allow them to open diplomatic bags in certain circumstances.[33]

New technology presented challenges to the inviolability of the diplomatic bag. There is no indication that the representatives that took part in the negotiation of the VCDR considered the possibility of scanning or testing diplomatic bags (eg for nuclear material, drugs, explosives, weapons, etc) without opening or detaining the bags. Article 27 does not expressly prohibit the scanning of the diplomatic bag on its arrival in the receiving State (for example, to confirm that bag contains only 'diplomatic documents or articles intended for official use', as required by Article 27). In practice, the ability of States to scan diplomatic bags has been the subject of great contention.

[30] Won-Mog Choi, 'Diplomatic and Consular Law in the Internet Age' (2006) 10 Singapore Yearbook of International Law 117, 124.

[31] Denza (n 7) 11.

[32] Christine M Nelson, 'Opening Pandora's Box: The Status of the Diplomatic Bag in International Relations' (1988) 12 Fordham Int'l LJ 494, 503.

[33] Including Kuwait, Libya, Saudi Arabia, and the Yemen Arab Republic.

The general practice was that diplomatic bags were not subject to scanning. The diplomatic bag became 'the ideal container for the international transport of contraband and weaponry'.[34] To deal with these abuses of the diplomatic bag, in the mid-1980s certain States sought recognition of a right to 'verification of the bag'[35] including through scanning (eg see the positions of Austria and Italy).[36] There were a number of proposals in support of non-intrusive examinations.[37] But this practice was not without controversy. In 1988, New Zealand stated that 'electronic screening could, in certain circumstances, result in a violation of the confidentiality of the documents contained in a diplomatic bag'.[38] This was a fear of certain less developed countries, as noted by the representative from Zaire who in 1985 noted that many developing countries could not afford devices to use by way of reciprocity.[39] Similarly, the representatives of Spain and Argentina feared that sophisticated scanning technologies could be used to read documents in diplomatic bags.[40]

The discussion on the scanning of diplomatic bags was one among a number of controversial issues that gained the attention of the ILC. Indeed, the 1987 International Conference on Drug Abuse and Illicit Trafficking had specifically drawn the ILC's attention to the possible misuse of the diplomatic bag for the purpose of drug trafficking.[41] In that vein, expressing its concern over the violation of rules of diplomatic law, the UNGA requested the ILC to draft a protocol concerning the status of the diplomatic courier and the diplomatic bag, 'which would constitute development and concretization' of the VCDR.[42] It also invited its Member States to submit to the Secretary-General their observations on ways to implement the provisions of both the VCDR and the VCCR in 1976.[43]

The Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag Not Accompanied by Diplomatic Courier and Draft Optional Protocols ('Draft Articles on Diplomatic Bag') were adopted by the ILC at its forty-first session, in 1989, and submitted to the General Assembly. In accordance with Article 23 of its Statute, the Commission decided to recommend to the UNGA that it convene an international conference of plenipotentiaries to study the draft articles and the optional protocols and to conclude a convention on the subject.[44] In 1995, the UNGA brought the Draft Articles to the attention of its Member States as a reminder of a field of international law that may be subject to codification at an appropriate time in the future.[45]

In fact, the Draft Articles on Diplomatic Bag provide valuable guidance for a future codification, as they take into consideration recent technological developments. For instance, Article 28 provides that the diplomatic bag 'shall be exempt

[34] Nelson (n 32) 507. [35] *ILC Yearbook* 1985 vol II Pt 1, 57–58.
[36] Denza (n 7) 240. [37] Nelson (n 32) 496. [38] Denza (n 7) 239–40.
[39] Nelson (n 32) 494. [40] ibid. [41] *ILC Yearbook* 1988 vol II Pt 2, 91, para 437.
[42] UNGA Res 31/76 (13 December 1976) UN Doc A/RES/31/76.
[43] UNGA Res 3501 (XXX) (15 December 1975); UNGA Res 31/76 (13 December 1976) UN Doc A/RES/31/76.
[44] *ILC Yearbook* 1989 vol II Pt 2, 13, para 66.
[45] UNGA Res 50/416 (11 December 1995) UN Doc A/50/216.

from examination directly or through electronic or other technical devices'. In its commentaries the ILC explained that '… the inclusion of this phrase [through electronic or other technical devices] was necessary as the evolution of technology had created very sophisticated means of examination which might result in the violation of the confidentiality of the bag, means which furthermore were at the disposal of only the most developed states'.[46]

There have been a number of disputes in practice concerning Article 27(3) and (4). For example, there has been some dispute about what actually constitutes a 'diplomatic bag', what constitutes the requisite 'external marks' which would qualify it as a diplomatic bag, what limits should be placed on the term 'articles for official use', and the extreme circumstances in which a diplomatic bag has been opened.[47] Most recently, in November 2013, the UK accused Spain of a 'serious infringement' of international law by opening a diplomatic bag as it crossed the border from Gibraltar. Spain argued it did not constitute a 'diplomatic bag' for the purposes of Article 27 of the VCDR, as it had originated with the office of the Governor-General, who was not a member of a diplomatic mission.[48] The UK responded that it was clearly marked as the property of Her Majesty's Government and that the Governor's Office in Gibraltar had sent diplomatic bags for more than two decades.[49] It is unclear whether the basis for the UK argument was that correspondence of the Governor General constituted diplomatic correspondence within the meaning of the VCDR, or that the bag was entitled to immunity as a result of an agreed practice between the two States. This incident illustrates that despite the strong wording of Article 27 protecting the inviolability of the diplomatic bag, diplomatic disputes over such incidents continue to occur. Still more disputes may arise as a result of the greater reliance by States on the use of new technology to transmit official documents.

The question has been raised as to whether the protections of Article 27(3) could be extended to cover electronic transmissions, through the creation of a 'virtual diplomatic bag'.[50] However, the concept of a virtual diplomatic bag may be unwarranted. An attempt to expand the concept of diplomatic bag to cover electronic documents may be both unnecessary and incompatible with the essence of the concept. Electronic transmission is now the most efficient way of communication and is already protected under Article 27(2). Expanding the definition of the

[46] Paragraph (6) of the commentaries of the ILC to Article 28 of the Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag Not Accompanied by Diplomatic Courier, *ILC Yearbook* 1989 vol II Pt 2, 43.

[47] See Denza (n 7) 231–43.

[48] The Governor of Gibraltar is the representative of the British monarch in Gibraltar. Fiona Govan, 'Spain Dismisses Gibraltar Diplomatic Bag Incident' *The Telegraph*, (London, 27 November 2013) <http://www.telegraph.co.uk/news/worldnews/europe/gibraltar/10477856/Spain-dismisses-Gibraltar-diplomatic-bag-incident.html> accessed 12 May 2016.

[49] Peter Dominiczak and Fiona Govan, 'David Cameron: Gibraltar Diplomatic Bag Incident Was an "Extremely Serious Action"' *The Telegraph* (London, 27 November 2013) <http://www.telegraph.co.uk/news/worldnews/europe/gibraltar/10478182/David-Cameron-Gibraltar-diplomatic-bag-incident-was-an-extremely-serious-action.html> accessed 12 May 2016.

[50] Choi (n 30) 131.

diplomatic bag to obtain the protections of Article 27(3) for electronic documents may be missing the point.

The concept of diplomatic bag still has its place but it cannot encompass electronic documents because its ordinary meaning implies physicality. Any attempt to redefine that concept to include a form of 'virtual diplomatic bag' is neither reasonable nor necessary, given the fact that electronic transmissions would fall more easily within the term 'archives and documents' and 'official correspondence' and thus receive the protection under Articles 24 and 27(2). In order for electronic communications or data to be protected by Article 27(3), presumably they would have to be placed in a virtual diplomatic bag, visibly marked as such.

Unlike Articles 24 and 27(1) and (2), which can be interpreted to encompass electronic archives and documents and official correspondence, it is more difficult to interpret the ordinary meaning of Article 27(4) (which refers to 'the packages constituting the diplomatic bag') as including a virtual diplomatic bag, under customary international law rules of treaty interpretation. If States wish to expand the concept of the 'diplomatic bag' to comprise a virtual or electronic diplomatic bag (eg cloud servers or online storage and transmission sites), it may be advisable for those States to negotiate and agree on the mechanism whereby a virtual diplomatic bag could be marked as such and receive the protections under Article 27(3), such as an additional protocol to the VCDR. However, engaging in treaty making to expand the definition of 'diplomatic bag' may be unnecessary, considering that electronic communications are already entitled to protection under Article 27(2) as are electronic documents under Article 24.

2.3 Conclusions about the adequacy of the VCDR in the digital age

For the reasons stated above, it appears that no amendment to the VCDR is required in order to extend the protections of Article 24 (archives and documents) and Article 27 (official correspondence) to diplomatic documentation transmitted or stored electronically. Article 24 can be interpreted to include archives and documents in electronic form. Similarly, the protection of diplomatic correspondence set out in Article 27(1) and (2) can be interpreted to include correspondence in electronic form and transmitted electronically. The scope of protection of diplomatic archives, documents, and official correspondence set out in the VCDR is, on its face, adequate, even in the digital age, and does not call for amendment of the Convention.

However, the fact that technology has made it easier for non-State actors to intercept information, coupled with the increasing participation of non-State actors in international relations, means that the protection of diplomatic archives, documents, and official correspondence set out in the VCDR may need to be strengthened. In relation to archives and documents in particular, it is unclear what the obligations of States are regarding the protection of archives from unauthorized third party access. The ILC commentary to Article 24 indicates that the obligation

of inviolability extends to preventing infringement by third parties. However, specific language to this effect was not included in the text of the VCDR. As for Article 27(1), the obligation to protect free communication can be interpreted as including the obligation to protect correspondence from interference with third parties, but the text does not provide clear guidance in this regard.

The obligations of States regarding the inviolability of diplomatic documents, archives, and correspondence and the protection of communication should be clarified and possibly enhanced, to require affirmative action by the receiving State to prevent interference by non-State actors with protected diplomatic information within the receiving State's jurisdiction. States could be required to take all appropriate measures (including the enactment of laws and regulations) to prevent and prosecute interception, interference with, or disclosure of, protected diplomatic documentation. For example, under the law of the United States, whoever publishes or furnishes to another official diplomatic codes or correspondence shall be fined or imprisoned for no more than ten years, or both.[51] The creation of an obligation to criminalize interference with diplomatic correspondence could enhance the applicability of VCDR provisions guaranteeing freedom of communication and the inviolability of diplomatic documents in practice.

However, should such provisions extend beyond criminalization of the act of interference (and include criminalization of dissemination of material unlawfully obtained by others) this may have consequences for the obligations of States under international human rights law. In general States are entitled to restrict the right to freedom of expression, but they must show that the particular restrictions are necessary, legitimate, and proportionate to the specific threat they claim justifies the restriction.[52] The UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, in response to the disclosure of confidential information by WikiLeaks (including classified diplomatic correspondence) stated:

> Public authorities and their staff bear sole responsibility for protecting the confidentiality of legitimately classified information under their control. Other individuals, including journalists, media workers and civil society representatives, who receive and disseminate classified information because they believe it is in the public interest, should not be subject to liability unless they committed fraud or another crime to obtain the information.[53]

[51] 18 USC 952 (June 25, 1948, ch 645, 62 Stat 743; Pub L 103–322, title XXXIII, §330016(1)(L), 13 September 1994, 108 Stat 2147).

[52] See eg Article 19 of the International Covenant on Civil and Political Rights which provides that the right of freedom of expression may therefore be subject to certain restrictions, 'but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.' International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171.

[53] Joint Statement on WikiLeaks, UN Special Rapporteur on the Promotion and Protection the Right to Freedom of Opinion and Expression and the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, 10 December 2010.

The specific obligations of States in respect of the protection of diplomatic documents from interference by third parties would thus have to be carefully drafted in order to take into account the international human rights obligation of States.

The VCDR does not contain any provisions concerning its amendment or revision. The general rule on amendment and revision of treaties set out in Article 39 of the VCLT is that a treaty may be amended by agreement between the parties. Typical procedures for the amendment of a treaty include the convening of a revision conference (which can be expensive and time consuming) or the use of a simplified procedure of amendment by correspondence conducted by the treaties depositary.[54] Accordingly, the UN Secretary-General (the depositary of the VCDR) could, on the request of the parties, circulate a proposed amendment clarifying that the obligations of Articles 24 and 27 include an obligation to protect diplomatic documents, archives, and correspondence from interference by third parties.

The obligations of State parties to the VCDR could also be clarified by less formal means. The parties could adopt a declaration setting out an authoritative interpretation of the relevant articles. Alternatively, an international court or tribunal seized of a dispute regarding the interpretation of Articles 24 or 27 could clarify what the precise obligations of States are under the VCDR.

3. The Use of Leaked Diplomatic Cables as Evidence in Legal Proceedings

To examine the challenges and practical consequences posed by the interception and dissemination of protected diplomatic communications by non-State actors, this section takes the use of diplomatic cables leaked by WikiLeaks as a case study.

3.1 Case study: WikiLeaks

WikiLeaks was launched in 2007 as a site where whistleblowers could anonymously share information of public concern. According to its website, WikiLeaks is a not-for-profit media organization whose stated goal is to 'bring important news and information to the public' by providing an 'innovative, secure and anonymous way for sources to leak information to our journalists'.[55] On 28 November 2010, WikiLeaks began publishing classified US diplomatic cables that had been sent to the US State Department from its embassies and consulates abroad between December 1966 and February 2010. The diplomatic cables, along with other classified documents, were provided to WikiLeaks by Private Chelsea Manning (formerly known as Bradley Manning) who was at that time an intelligence analyst in

[54] Jan Klabbers, 'Treaties, Amendment and Revision' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP, Oxford 2014).

[55] 'About' (*WikiLeaks*) <https://wikileaks.org/About.html> accessed 12 May 2016.

the US Army.[56] The cables were accessed from an international computer network of the US Department of Defence known as the Secure Internet Protocol Router Network ('SIPRNet') used to transmit confidential information in a secure environment. On 1 September 2011 WikiLeaks decided to publish all of the 251,287 unedited diplomatic cables that had been leaked by Private Manning.

If the disclosure of the diplomatic cables to WikiLeaks and the public had been carried out by a foreign State it would have constituted a breach of that State's obligations under the VCDR. However, the conduct of Private Manning (a US national employed by the United States and not known to be acting under the direction and control of another State) cannot be attributed to a foreign State. A US court-martial found such conduct to constitute a violation of the US Espionage Act among other laws, and Private Manning was prosecuted. Even if the United States was considered to have a duty to prevent unauthorized interference with diplomatic archives by others, the obligations of Article 24 would not apply since there was no host State/receiving State relationship. The actions of Private Manning do not constitute a violation of the United States' obligations under the VCDR, since such obligations concern the treatment afforded to foreign diplomatic missions within the territory of the contracting State.

Whether the actions of WikiLeaks could be attributed to a foreign State warrants consideration. While some media reports stated that the WikiLeaks headquarters was in Pionen, Sweden, housed in a Cold War bunker thirty metres underground,[57] later reports clarified that this was not the organization's 'headquarters', but rather a site that housed the Bahnhof computer centre, which hosts two WikiLeaks servers.[58] It is reported that WikiLeaks located the servers in Sweden as Sweden 'offers legal protection to the disclosures made on the site'.[59] WikiLeaks is a project of the 'Sunshine Press Productions'. Sunshine Press Productions was incorporated in Iceland as a private limited company on 26 January 2011. According to the WikiLeaks website, despite 'rumours' of some government or intelligence agency affiliation, the organization 'is not a front' for any such entity.[60] Assuming that to be correct, there are no known State affiliations.

On the basis of the facts available it appears that WikiLeaks is not an official State organ, does not exercise governmental authority, is not under the direction or control of any State, nor has its conduct been adopted by any State as its own. As such the conduct of the organization is unlikely to be attributable to

[56] In August 2013, Chelsea Manning was sentenced to thirty-five years in prison for numerous violations of the Espionage Act (18 US Code Chapter 37). Julie Tate, 'Bradley Manning Sentenced to 35 Years in WikiLeaks Case' *The Washington Post* (Washington, 21 August 2013) <https://www.washingtonpost.com/world/national-security/judge-to-sentence-bradley-manning-today/2013/08/20/85bee184-09d0-11e3-b87c-476db8ac34cd_story.html> accessed 12 May 2016.

[57] Glenda Kwek, 'WikiLeaks goes underground … in a bunker deep in Sweden' *Sydney Morning Herald* (Sydney, 6 December 2010) <http://www.smh.com.au/technology/technology-news/wikileaks-goes-underground--in-a-bunker-deep-in-sweden-20101206-18mii.html> accessed 12 May 2016.

[58] Kelly Minner, 'Architecture of WikiLeaks' (*Arch Daily*, December 2012) <http://www.archdaily.com/95432/architecture-of-wikileaks/> accessed 12 May 2016.

[59] Jean-Pierre Hombach, *The Secret about Acta* (Lulu 2012) 135.

[60] 'About' (WikiLeaks) <https://wikileaks.org/About.html> accessed 12 May 2016.

Sweden or any other State in accordance with the rules on attribution of conduct under customary international law, set out in Articles 4–10 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).[61] Accordingly, the acts of WikiLeaks are unlikely to constitute the acts of a State or to give rise to the direct international responsibility of any State for a breach of its VCDR obligations.

A question that remains is whether any State bears some share of responsibility under the VCDR for the leaks of the protected diplomatic documentation, even though the conduct of WikiLeaks cannot be attributed to the State. As set out in Section 2.2.1 above, it is unclear what obligations States have regarding the protection of diplomatic archives, documents, and official correspondence from unauthorized access by third parties (ie non-State actors or agents). The ILC commentary to VCDR Article 24 (archives and documents of the mission) indicates that the obligation of inviolability of archives and documents includes the obligation 'to respect the inviolability itself and to prevent its infringement by other parties'.[62]

Even if it was clarified that obligations under the VCDR included the specific obligation to prevent and punish unauthorized interference with diplomatic correspondence by third parties (as suggested in section 2.3 above), it is not clear that the responsibility of Sweden would be engaged concerning the acts of Wikileaks. As noted in section 2.3 above, international human rights law limits the extent to which States can limit the right to freedom of expression.

3.2 Use of leaked diplomatic documentation and obligations of States under the VCDR

Diplomatic cables published by WikiLeaks have been submitted as evidence in several cases before international and national courts, both by States and non-State parties. The use of protected diplomatic documentation that has been impermissibly disclosed or disseminated in that manner may have legal implications under the VCDR.

3.2.1 National courts

Before national courts, the admission of a leaked cable as evidence may involve a violation of a State's obligations under the VCDR, whether the cable is submitted by the State itself or by a non-State party. This is because national courts, as organs of a State, have an obligation to enforce the inviolability of documents entitled to protection under the VCDR.

[61] International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, Report on the work of its fifty-third session, *ILC Yearbook* 2001 vol II Pt 2, 40–52.

[62] Report of the International Law Commission on the work of its ninth session, 23 April–28 June 1957, UN Doc A/3623,137.

This issue has been given close consideration by the UK courts, particularly in the course of the *Bancoult* litigation,[63] relating to the creation of British Indian Ocean Territory (BIOT), the eviction of the inhabitants of BIOT, and their resettlement in Mauritius.[64] The former inhabitants of BIOT have challenged their eviction via numerous legal routes. The most recent *Bancoult* litigation concerns a challenge to the decision of the UK government to establish a Marine Protected Area (MPA) around BIOT. The MPA makes commercial fishing illegal, which will make it more difficult for the former inhabitants of BIOT to support themselves if they are eventually permitted to return to the territory, as is their hope.

In the *Bancoult (No 3)* case,[65] the plaintiff sought to rely on the contents of a classified diplomatic cable sent from the US Embassy in London to the US State Department in Washington in May 2009, both as an aid during cross-examination of witnesses and as evidence in its own right. The cable was published by *The Guardian* and other newspapers pursuant to an agreement with WikiLeaks. The diplomatic cable purported to record observations made by British officials about the proposal to create the MPA and indicated that prevention of the resettlement of BIOT was a goal shared by the United States and the UK.[66] The cable further suggested that the motive behind the creation of the MPA was not the protection of the environment or, at a minimum, was not only the protection of the environment, but also included the prevention of resettlement of the islands.

In June 2013, the High Court of Justice of England and Wales (the 'High Court') held that the information contained in the leaked diplomatic cable at issue could not be submitted as evidence in judicial proceedings before the English courts as such reliance would constitute a breach of VCDR Articles 24 and 27(2).[67] Specifically, the High Court indicated that the cable could not be relied upon as evidence as it enjoyed immunity under the VCDR, incorporated into English law by the Diplomatic Privileges Act of 1964, which provides that the archives of diplomatic missions remain inviolable at all times. The plaintiff had argued that the original 'document' was electronic and that once it had been transmitted by the embassy, it ceased to be 'official correspondence of the mission' within the meaning of Article 24. The High Court rejected this argument reasoning that:

[63] *R* (*Bancoult) v Foreign & Commonwealth Office (No 3)* [2013] EWHC 1502 (Admin); *Regina (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)* [2014] EWCA Civ 708.

[64] On 8 November 1965, a new colony of BIOT was formed from islands previously forming part of the UK colonies of Mauritius and the Seychelles. The basis for this was the British Indian Ocean Territories Order, a statutory instrument made under the Colonial Boundaries Act 1895. BIOT now consists of six main island groups comprising the Chagos Archipelago of 55 islands with a total land area of 60 km². In 1971, the BIOT Commissioner promulgated BIOT Ordinance No 1, which provided that no person was entitled to be present or remain in the territory, unless in possession of a permit. BIOT, Ordinance No 1 of 1971, Article 4.

[65] *R* (*Bancoult) v Foreign & Commonwealth Office (No 3)* [2013] EWHC 1502 (Admin).

[66] 'US Embassy Cables: Foreign Office Does Not Regret Evicting Chagos Islanders' *The Guardian* (London, 2 December 2010) <http://www.guardian.co.uk/world/us-embassy-cables-documents/207149> accessed 12 May 2016.

[67] *R* (*Bancoult) v Foreign & Commonwealth Office (No 3)* [2013] EWHC 1502 (Admin).

The context, object and purpose of the 1961 Convention require the words 'document' and 'correspondence' to include modern forms of electronic communication with the possible exception of communication by voice only. Likewise, an electronic storage system of such information is an 'archive'.[68]

The High Court cited the decision of the House of Lords in *Shearson Lehman Bros Inc v Maclaine Watson & Co Ltd* with approval.[69] In that case, the International Tin Council (an organization whose archives enjoyed the same inviolability as those of a diplomatic mission under UK law) sought to prevent the use in litigation of documents it claimed were part of its official archives. The House of Lords concluded that a document which was stolen or otherwise improperly obtained from a diplomatic mission could not be used in court proceedings.[70] The House of Lords rejected the argument that Article 24 was restricted to protecting against executive or judicial action by the host State.[71] Instead, Lord Bridge set out what has become a landmark decision on this point, noting that:

The underlying purpose of the inviolability is to protect the privacy of diplomatic communications. If that privacy is violated by a citizen, it would be wholly inimical to the underlying purpose that the judicial authorities of the host State should countenance the violation by permitting the violator, or anyone who receives the document from the violator, to make use of the document in judicial proceedings.[72]

In 2013, the High Court in *Bancoult (No 3)* found that quotation of Lord Bridge set out above provided a complete answer to the use of the leaked diplomatic cable in question. The High Court agreed with the finding of the House of Lords in *Shearson Lehman Bros Inc* that as the purpose of inviolability under the VCDR is to protect the privacy of diplomatic communications, it would be contrary to that purpose to permit the use of such documents in judicial proceedings when said privacy is violated by an individual.[73] The High Court added that 'it is the information in the document which is the object of the protection conferred by Articles 24 and 27.2, not just the document itself'.[74]

However, on 23 May 2014, the Court of Appeal reversed the High Court's decision on the admissibility point in the *Bancoult (No 3)* case holding that the cable released by WikiLeaks was admissible as evidence.[75] The Court of Appeal considered that it was not bound by the decision of the House of Lords in *Shearson Lehman Bros Inc* regarding improperly obtained documents as it was not part of

[68] ibid para 43.

[69] *R* (*Bancoult) v Foreign & Commonwealth Office (No 3)* [2013] EWHC 1502 (Admin), para 40 citing *Shearson Lehman Bros Inc v Maclaine Watson & Co Ltd (No 2)* [1988] 1 All ER.

[70] *Shearson Lehman Bros Inc v Maclaine Watson & Co Ltd (No 2)* [1988] 1 All ER, 124 (j). The documents at issue in the case had, for the most part, been conveyed to third parties by employees of the ITC with express or implied authority to do so.

[71] *Shearson Lehman Bros Inc v Maclaine Watson & Co Ltd (No 2)* [1988] 1 All ER, 124 (j).

[72] ibid.

[73] *R* (*Bancoult) v Foreign & Commonwealth Office (No 3)* [2013] EWHC 1502 (Admin), para 41.

[74] ibid.

[75] *Regina (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)* [2014] EWCA Civ 708.

the *ratio* of the decision. Moreover, the House of Lords addressed a case where the document had not been obtained through illicit or improper means. The Court of Appeal considered that, in contrast to the *Shearson Lehman Bros Inc* case, the leaked cable in the *Bancoult (No 3)* case was in the public domain, had not been obtained from the mission illicitly or by improper means, and the party wishing to adduce the document as evidence had not been complicit in its publication.[76]

The Court of Appeal also considered the meaning of the term 'inviolability' in Articles 24 and 27(2) of the VCDR. The court concluded that this term referred to freedom from any interference on the part of the receiving State, but that it did not cover admissibility. In interpreting the term 'inviolability' the Court of Appeal considered that the purpose of the immunity conferred by Articles 24 and 27(2) was to 'ensure the efficient performance of the functions of the diplomatic missions'.[77] Where the protection against disclosure of documents and archives did not contribute to the efficient performance of the mission, the Court considered that the concept of inviolability would not apply. The Court defined 'inviolability' as 'freedom from any act of interference on the part of the receiving state' and held that 'the concept of inviolability has no relevance where no attempt is being made to exercise *compulsion* against the embassy'.[78] Accordingly, Lord Dyson held that the admissibility of a diplomatic cable leaked by a third party did not violate Article 24 of the VCDR because it had already been disclosed to the world, stating:

> in our judgment, it makes no sense for the concept of inviolability of the mission to be extended to prevent a document that is in the worldwide public domain from being admitted in proceedings in England and Wales, simply because it emanated from a diplomatic mission in the UK.[79]

Therefore, the cable was treated as admissible evidence in court. On the merits, the Court of Appeal held that even if it had been admitted in evidence, it would have decided that the decision to create the MPA had not been made pursuant to any improper motive.

In other countries, WikiLeaks cables have been deemed inadmissible on the basis that they were illegally obtained, without specific reference to VCDR obligations. The case of *Sener*, in the Spanish National Court concerned a US corporation, Solar Reserve, which had received a contract to build a solar power plant in Spain.[80] Two companies not selected for the contract, Acciona and SENER, brought a claim before Spain's National Court claiming misuse of power and that the decision to award the contract to Solar Reserve was arbitrary. The appeal was based on a cable released by WikiLeaks which referred to discussions between the Minister of Energy and the US Ambassador, where the Minister noted that it

[76] ibid para 37.
[77] ibid para 64. [78] ibid paras 61 and 58. [79] ibid paras 64–65.
[80] *Sener Ingenieria y Sistemas SA (Sener)*, Audencia Nacional, 26 June 2013 SAN 2890/2013. See also Méndez R, 'La Audiencia rechaza los cables de Wikileaks en un recurso de Acciona' *El País*, 6 July 2013.

would be difficult for Solar Reserve to 'jump the queue' ahead of the companies that had applied within the specified time period.[81]

The court rejected the appeal by Acciona and SENER upholding the tender process and the scoring which awarded the contract to Solar Reserve. In relation to the cable disclosed by WikiLeaks, the court decided not to take into account this document. On this point, the court stated that the disclosure of the cables from the US Embassy constituted illegally obtained evidence whose consideration was forbidden in accordance with Article 11 of the Judiciary Act, as had been highlighted on multiple occasions by the Constitutional Court. The Court reiterated that the use of evidence obtained through a violation of fundamental rights (in this case the right to confidentiality of communications) was not consistent with the right to effective judicial protection or the right to a fair trial.

The UK courts thus provide the most thorough analysis of the question with the High Court and Court of Appeal in the *Bancoult (No 3)* case providing two different and conflicting answers as to the admissibility of a WikiLeaks cable as evidence. The concern of both courts was whether the admission of the cable as evidence would amount to a violation of the UK's obligations under the VCDR. The Court of Appeal took into account the particular nature of WikiLeaks cables, the fact that they are already in the public domain and that the person seeking to rely on the content of the leaked cable was not 'the violator' or someone who had received the document from the violator. The Court of Appeal considered that the protection of diplomatic documents in the VCDR was functional and that inviolability was not a value in its own right but rather was only applicable where it contributed to the effective functioning of the diplomatic mission. The approach of the High Court, in contrast, offers better protection to the inviolability of diplomatic archives, documents, and correspondence. It is noted, however, that the link between the obligation of a State under Article 24 and a requirement that courts of a State party should deem documents published by WikiLeaks inadmissible as evidence is somewhat remote.

Although the contents of the leaked cables may be widely known, allowing the cables to be used in court has legal consequences which may be detrimental to the State whose diplomatic archives and documents were unlawfully disseminated. Diplomats might communicate less freely if they considered that their communications could be used as evidence against the State they represent in the event that such communications were accessed without authorization. Accordingly, interpreting inviolability to mean that leaked documents are inadmissible in the courts of VCDR State parties would be consistent with the object and purpose of the VCDR as it contributes to the effective functioning of diplomatic missions.

[81] 'Spain's National Court Rejects Appeal from Acciona and SENER Regarding a CSP plant by SolarReserve' (*CSP World*, 8 July 2013) <http://www.csp-world.com/news/20130708/001116/spains-national-court-rejects-appeal-acciona-and-sener-regarding-csp-plant> accessed 12 May 2016.

3.2.2 International courts and tribunals

Before international courts, the use of leaked diplomatic cables as evidence raises slightly different legal issues. As international courts and tribunals are not organs of any State, the admission of leaked cables as evidence by a non-State party will not have an impact on the VCDR obligations of States. International courts and tribunals have nevertheless shown some reluctance to rely on leaked diplomatic documents as evidence, including those published by WikiLeaks. This section analyses the practice of international courts and tribunals in dealing with leaked diplomatic cables submitted as evidence and the legal issues raised.

3.2.2.1 Non-State actors

Leaked cables have also been submitted as evidence by non-State actors. While both the European Court of Human Rights and the European General Court avoided relying on leaked cable evidence to support their decisions, the Special Tribunal for Sierra Leone demonstrated willingness to address the leaked information.

WikiLeaks cables were submitted as evidence by the applicant at the European Court of Human Rights in the *El-Masri* case.[82] The Court, in finding that the allegations of the applicant as to his rendition and detention had been established beyond reasonable doubt, stated that it drew inference from 'the available material and the authorities' conduct' to reach its finding.[83] The decision does not directly refer to evidence contained in the leaked cable.

At the European General Court, WikiLeaks cables were referred to by an Iranian bank, Bank Mellat, as evidence that Member States of the European Union, in particular the UK, were subjected to pressure from the US government to ensure the adoption of restrictive measures against Iranian entities.[84] The Council of the European Union argued that no account should be taken of the diplomatic cables.[85] The Court held that the fact that some Member States were subject to diplomatic pressure, 'even if proved' did not in itself imply that such pressure affected the contested measures.[86] The Court thus avoided the issue of whether evidence contained in leaked cables could be relied upon.

At the Special Tribunal for Sierra Leone, Counsel for the defendant Charles Taylor filed a motion for disclosure and/or investigation of alleged US government sources within the Tribunal, based on two leaked diplomatic cables published by the UK newspaper *The Guardian*. In a decision of 28 January 2011, the Trial Chamber held that the cables did not indicate that the US government had any influence over the organs of the Court or that contacts of the US government within the Court had a relationship with the US government that could be

[82] *El-Masri v the former Yugoslav Republic of Macedonia,* Application no. 39630/09, Grand Chamber, Judgment, 13 December 2012.

[83] ibid para 167.

[84] *Bank Mellat v Council of the European Union* (supported by EU Commission), Judgment of the General Court, Case T-496/10, 29 January 2013.

[85] ibid para 99. [86] ibid para 103.

considered an interference with impartiality and independence.[87] While the Trial Chamber dismissed the motion, it was willing to consider the content of the cables and noted in its decision that the cables had been published by *The Guardian* newspaper.[88]

3.2.2.2 States

Independent of rules of procedure of international courts regarding the admissibility of leaked evidence, the submission by a State of a leaked diplomatic cable as evidence before an international court could potentially constitute a breach of that State's obligations under the VCDR. An initial question arising from the use of leaked diplomatic cables as evidence by States in international legal proceedings is whether such use constitutes an adoption of the conduct of WikiLeaks for the purposes of attribution under the law of State responsibility.

Article 11 of the ILC's ARSIWA provides that conduct which is not attributable to a State under Articles 4–10 shall nevertheless be considered an act of that State under international law 'if and to the extent that the State acknowledges and adopts the conduct in question as its own'. The commentary to the ARSIWA indicates that the adoption of conduct for the purposes of attribution goes beyond mere support or endorsement.[89] It is unlikely that the use of a leaked cable would constitute an adoption of the conduct of WikiLeaks in publishing information acquired in violation of the inviolability of diplomatic archives. In the *United States Diplomatic and Consular Staff in Tehran* case, the ICJ considered that the adoption by the government of Iran of the acts of private actors as governmental policy constituted an approval and endorsement of those acts, with the effect that the conduct of the private actors was attributable to Iran.[90] The ARSIWA commentary notes that in the context of that case, conduct described as 'endorsement', 'the seal of official governmental approval', and 'the decision to perpetuate' was sufficient for the purposes of attribution under Article 11 but that in general mere support or endorsement would be insufficient for that purpose.[91] In none of the cases where States have sought to use leaked cables as evidence have they explicitly endorsed the conduct of either Private Manning or the WikiLeaks organization in publishing cables which have been accessed unlawfully. In the absence of a public statement specifically adopting the wrongful conduct as its own, it is unlikely that

[87] *Decision on Urgent and Public with Annexes A-N Defence Motion for Disclosure and/or Investigation of United States Government Sources within the Trial Chamber, the Prosecution and the Registry based on Leaked USG Cables*, SCSL-03-1-T (28 January 2011) <http://www.rscsl.org/Documents/Decisions/Taylor/1174/SCSL-03-01-T-1174.pdf> accessed 12 May 2016.

[88] ibid (n 15).

[89] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *ILC Yearbook* 2001 vol II Pt 2, 53.

[90] *United States Diplomatic and Consular Staff in Tehran* (*United States of America v Iran*), Judgment, ICJ Reports 1980, 3.

[91] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *ILC Yearbook* 2001 vol II Pt 2, 53.

a State could be held directly responsible for the acts of WikiLeaks in accordance with Article 11 of the ARSIWA.

Aside from the issue of direct responsibility of a State for the conduct of Private Manning or WikiLeaks, the use of a leaked cable as evidence by a State may violate the obligation of States that diplomatic archives and correspondence shall be inviolable. As discussed above in the context of national courts, this will depend on whether obligations regarding the inviolability of diplomatic documents are considered to relate only to the initial act of unauthorized access or also extend to prevent the use of diplomatic documents that have been obtained unlawfully. So far, this question has not been the subject of a decision by an international tribunal.

At the ICJ, a reference to a leaked diplomatic cable contained in a footnote of pleadings to be read out by counsel during oral proceedings in the *Interim Accord* case was reportedly removed from the copy of the pleadings circulated to the President of the Court and interpreters prior to proceedings by the Registrar. The verbatim records of pleadings in the case available on the ICJ website contain a reference to WikiLeaks documents.[92] The Court does not refer to any WikiLeaks sources in its decision in the case.

In the *ConocoPhillips v Venezuela* ICSID arbitration, Venezuela requested the arbitral tribunal to reconsider its previous decision on jurisdiction and merits in the case, referring, *inter alia*, to evidence contained in a US diplomatic cable leaked by WikiLeaks.[93] In a decision of March 2014 the arbitral tribunal concluded that it did not have the power to reconsider its previous decision. Thus it did not make a decision regarding the status of the cable submitted by Venezuela. Similarly, in *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, Turkmenistan (as well as the claimant) submitted WikiLeaks evidence in support of its arguments, but the ICSID tribunal made no reference to the cables in its analysis.[94]

The question of the admissibility of WikiLeaks cables as evidence arose in the arbitration between Mauritius and the UK under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS). The dispute concerned the same facts that were at issue in the *Bancoult* legislation before the UK Courts.[95] Mauritius challenged the compatibility of the declaration by the UK of an MPA around BIOT with the UK's obligations under UNCLOS. Mauritius submitted the diplomatic cable at issue in *Bancoult* as evidence as to the motive behind the

[92] *Public sitting held on Tuesday 22 March 2011, at 10 am, at the Peace Palace, in the Case Concerning Application of the Interim Accord of 13 September 1995* (*the former Yugoslav Republic of Macedonia v Greece*), CR 2011/6, ns 44 & 108.

[93] *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/30.

[94] *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, ICSID Case No ARB/10/1, Award (2 July 2013) paras 8.1.10 and 8.1.21.

[95] Notification and Statement of Claim of 20 December 2010 in the Dispute Concerning the 'Marine Protected Area' Related to the Chagos Archipelago (*The Republic of Mauritius v The United Kingdom of Great Britain and Northern Ireland*) <http://archive.pca-cpa.org/1.%20Notice%20of%20Arbitration.pdfdc8e.PDF?fil_id=2583> accessed 12 May 2016.

creation by the UK of the MPA.[96] The UK in its Counter-Memorial stated that as the document 'appears to have been obtained illicitly by a person who was not authorised to obtain it', it would rely on the inviolability of the document pursuant to Articles 24 and 27(2) of the VCDR.[97] Article 293 of UNCLOS provides that Part XV dispute resolution mechanisms, including Annex VII tribunals, shall apply the Convention and other rules of international law not incompatible with the Convention. Accordingly, the arbitral tribunal was required to apply the provisions of the VCDR to the extent that such provisions were not incompatible with UNCLOS.

The Annex VII tribunal endorsed the English courts' evaluation, finding that it saw no basis to question the conclusion reached following the examination of the relevant individuals, that the content of that meeting was not as recorded in the leaked cable. The tribunal added that it did not 'consider it appropriate to place weight on a record of such provenance'.[98] This language suggests that the tribunal's reluctance to rely on the WikiLeaks cable was based on the uncertain probative value of the cable, and not solely on the manner in which it came to be in the public domain.

The issue facing an international court considering the admissibility of a leaked cable submitted by a State is similar to that faced by a national court to whom leaked cables have been submitted, either by a State or a non-State actor. While information contained in WikiLeaks cables may be in the public domain, the use of such evidence may have legal consequences for the State whose diplomatic archives and documents were unlawfully disseminated. The admissibility of leaked cables as evidence involves a policy choice by the relevant court. The approach that best protects the inviolability of diplomatic archives and documents as set out in the VCDR is that which considers leaked cables inadmissible. This approach admits that inadmissibility of leaked diplomatic documents as evidence may contribute to the effective functioning of diplomatic missions.

3.3 Remedies

If a State is considered to have violated its obligations under the VCDR through use of leaked diplomatic cables, its responsibility will be engaged in accordance with the ARSIWA. Regarding the remedies available to a State whose diplomatic archives and correspondence have been unlawfully accessed or obtained by another State, the sensitive nature of the information at issue may lead to such matters

[96] *Chagos Marine Protected Area Arbitration* (*The Republic of Mauritius v The United Kingdom of Great Britain and Northern Ireland*), Memorial of Mauritius, para 7.98 <http://archive.pca-cpa.org/2.%20Memorial%20on%20Merits1142.pdf?fil_id=2584> accessed 12 May 2016.

[97] *Chagos Marine Protected Area Arbitration (The Republic of Mauritius v The United Kingdom of Great Britain and Northern Ireland*), Counter-Memorial of the United Kingdom, 234, n 730 <http://archive.pca-cpa.org/4.%20counter%20memoriale29c.pdf?fil_id=2586> accessed 12 May 2016.

[98] *Chagos Marine Protected Area Arbitration* (*The Republic of Mauritius v The United Kingdom of Great Britain and Northern Ireland*), Award of 18 March 2015, para 542 <http://www.pcacases.com/pcadocs/MU-UK%2020150318%20Award.pdf> accessed 12 May 2016.

being settled by negotiation, rather than through a public dispute settlement proceeding drawing attention to the confidential information.

However, for States wishing to enforce the inviolability of their diplomatic documents by means of international legal proceedings, they may resort to the ICJ, in accordance with the Optional Protocol to the VCDR, Concerning the Compulsory Settlement of Disputes (the 'Optional Protocol') that provides for the jurisdiction of the ICJ.

At the Vienna Conference, States were divided as whether to include a dispute resolution provision in the VCDR text. However, a majority accepted a proposed amendment, submitted by Iraq, Italy, Poland, and the United Arab Emirates, that the dispute resolution provision be made into an optional protocol. The draft optional protocol was subsequently adopted by a large majority.

The Optional Protocol contains provisions for the settlement of disputes 'arising out of the interpretation or application of the Convention'. Article I of the Optional Protocol provides that these disputes shall lie within the compulsory jurisdiction of the ICJ. An application can be made to the ICJ by any party to the dispute who is a party to the Optional Protocol. The Optional Protocol also provides for alternatives means of dispute settlement, namely arbitration or conciliation. Article II allows parties to agree, within two months of notification of the dispute, to settle the dispute via arbitration, while Article III allows the third option of conciliation. In the case of conciliation, the Conciliation Commission must make its recommendations within five months, and if not accepted within two months by the parties, either party can commence proceedings in the ICJ.

Despite the broadly held view of ILC members that the option of third party adjudication would be necessary, the nature of diplomatic disputes has meant that States resolve such disputes through political channels and that the Optional Protocol has rarely been used. There is, of course, one very well-known case in which the Optional Protocol was invoked as a basis of jurisdiction, namely the *United States Diplomatic and Consular Staff in Tehran* case.[99] In that case both Iran and the United States had signed and ratified the Optional Protocol without reservations. The United States based its claims on four treaty obligations, one of which was the VCDR and the Optional Protocol. The ICJ made it clear that:

> Optional protocols manifestly provide a possible basis for the Court's jurisdiction with respect to the United States' claim under the Vienna Conventions of 1961 [VCDR] and 1963. It only remains therefore whether the present dispute in fact falls within the scope of their provisions.[100]

The ICJ looked at the claims of alleged violations of Iran's obligations under the VCDR and the VCCR with respect to the inviolability of the United States diplomatic premises and the archives, *inter alia*. The ICJ held that '[b]y their very nature all these claims concern the interpretation or application of one or other of the

[99] *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* ICJ Reports 1980, 3.

[100] ibid 24, para 45.

two Vienna Conventions'.[101] The ICJ also held that Articles II and III regarding arbitration and conciliation respectively do not apply unless recourse to arbitration and conciliation has been proposed by one of the parties to the dispute and the other has expressed its readiness to consider the proposal.[102] Neither party had proposed such alternative methods of dispute settlement. In fact, Iran had refused to enter into any discussion of the matter.

The ICJ ruled that the failure of Iran to take appropriate steps to ensure the protection of the United States Embassy in Tehran constituted in itself a 'clear and serious' violation of Article 22, paragraph 2 (special duty to protect the premises of the mission), and Articles 24 (inviolability of archives and documents), 25 (duty to accord full facilities), 26 (freedom of movement and travel), 27 (freedom of communication and inviolability of the diplomatic bag), and 29 (inviolability of the person of a diplomatic agent) of the VCDR, and Articles 5 (consular functions), and 36 (freedom of communication) of the VCCR. Similarly, with respect to the attacks on the Consulates at Tabriz and Shiraz, the inaction of the Iranian authorities also entailed breaches of its obligations under the provisions of several articles of the VCCR.[103]

The judgment in favour of the United States had no immediate effect as Iran failed to observe it. However, Denza believes that it helped the United States put pressure on Iran, justified the economic sanctions against Iran, and made clear to the international community that the seizure had no legal basis.[104]

4. Conclusions

Section 2 concluded that the use of new technology does not in itself require amendment of the Convention in order to offer full protection to diplomatic archives and correspondence. However, ambiguities in the VCDR legal framework become problematic when non-State actors interfere with diplomatic archives, with the assistance of new technology. The analysis of section 3, regarding the use of leaked diplomatic cables, demonstrates some of the inadequacies of the protection of diplomatic documents set out in the VCDR. While Article 24 clearly states that diplomatic archives are inviolable, it does not provide an answer as to whether this inviolability extends to the use of diplomatic cables intercepted by a third party. International courts and tribunals have approached the question on an *ad hoc* basis and for the most part have avoided giving a definitive answer. The UK Courts, in contrast, have considered the question in detail, but the High Court and Court of Appeal reached opposite conclusions, both on the basis of plausible legal reasoning.

The provisions of the VCDR do not provide a clear answer as to how courts should deal with evidence leaked by third parties. An amendment to the VCDR

[101] ibid 25, para 46. [102] ibid 26, para 48. [103] ibid 26, para 67.
[104] Denza (n 7) 515.

could clarify what the exact obligations of States are in regard to the protection of diplomatic archives and documents that have been illegally obtained and disclosed by third parties, and in particular whether the obligations of States as to inviolability amount to a prohibition on reliance on the content of those documents as evidence in domestic or international legal proceedings.

14

The Diplomatic Duffle Disparity—A Third World Perspective

Sana Sud

The VCDR was the first concerted effort towards the codification of diplomatic relations. Once it was ratified, set parameters were defined for the inviolability of diplomats in foreign countries rather than erstwhile customary practice[1] which was dependent on the mutual relationship between the States concerned. Although this did help to bring international diplomacy on an even keel, occasionally the balance got tilted to the other side. The granting of inviolability to protect the diplomat from the infringement of his rights in the receiving State has occasionally been misunderstood by the diplomat as a licence to foment trouble in that country under the garb of inviolability, more so when the economic and ideological disparity was apparent.[2]

In 1961, diplomatic immunity was a necessity for a diplomat in a foreign State to carry out his official functions without being harassed.[3] But in today's world, inviolability is acting as a weapon in the hands of the diplomat and the increase in State-sponsored terrorism invites a fresh look at its nonchalant abuse.[4] At the time of codification the major concerns regarding the abuse of the inviolability of the diplomatic bag focused on it being used for contraband goods,[5] but in the

[1] Paul Gore-Booth (ed), *Satow's Guide to Diplomatic Practice* (5th edn, Longman, London 1979) 107.

[2] Lance Bartholomeusz, 'Eileen Denza: Diplomatic Law, Commentary on the Vienna Convention on Diplomatic Relations' 2009 20(4) Eur J Int Law, 1286, 1288.

[3] Hampton Davis (then Assistant Chief of Protocol for Special Protocol Services at the State Department) stated at a Congressional hearing: 'You can imagine that if every Tom, Dick and Harry can be hauled into court because his dog is barking too long, he wouldn't be able to get his work done. And it's not really his work, it's the work of his state.' Unknown Author, *Judiciary Committee Hearings, Diplomatic Immunity: Hearings Before the Sub Committee on Citizens and Shareholders Rights and Remedies of the Committee on the Judiciary United States Senate,* 95th Cong (1978), 2nd Session on S 476, S 477, S 478, S 1256, and S 1257 and HR 781 (Forgotten Books, Washington DC 2015) 129.

[4] Zeidman, Amy 'Abuse of the Diplomatic Bag: A Proposed Solution' (1989–1990) 11 Cardozo Law Review 427, 428.

[5] Foreign Affairs Committee (UK), 'The Abuse of Diplomatic Immunities and Privileges' HC Paper 127 (1984–85), Minutes of Evidence 6 para 29. For an incident emerging after the entry into force of the VCDR, see 'Drugs in Diplomatic Luggage' *The Times* (London, 13 June 1980): 'The Foreign Office was alerted last night after drugs worth £500,000 were found in diplomatic luggage bound for the Moroccan Embassy in London. More than 600 lb of cannabis was found in a crate

twenty-first century, the scenario has changed completely, so much so that 'inviolable' diplomats may, under the cover of diplomatic immunity, carry items that can threaten the peace and tranquillity of the receiving State.[6]

Many disturbing events have occurred in the past with the probability of the situation worsening in the future, because of diplomats exploiting the immunity of the diplomatic bag. Diplomatic law was instituted to create a balance, as it is the purpose of law,[7] in the interest of two States, not to protect diplomats from flouting the local laws[8] of the receiving State. With the pendulum seemingly swinging the other way, it is imperative to review procedures that can be used to restore the balance. It is time that the national interest and security of receiving State should hold the same weight as the protection of diplomats in the receiving State.

1. The Law and its Abuse

As per age-old practice, the diplomatic bag customarily held the status of being inviolable, but such inviolability was not foolproof. An attempt was made to rectify it in the VCDR. The lack of change in the law was justified so as to protect the channels of communication between diplomats stationed abroad and the sending State. It has been seen in retrospect that the diplomatic bag had been one of the safest means of communication.[9] At the time of codification, inviolability of diplomatic bag was a major concern but with changing times, where most of the communication now happens in real time through virtual files over the internet, reliance on the traditional diplomatic bag as a form of communication might not have the same significance as it had at the time of codification.[10]

Diplomatic immunity, unlike other international law principles, is adhered to as it is based on the principle of reciprocity. If a receiving State refuses to grant immunity to the diplomats of a sending State, the sending State will in turn not grant immunity to the diplomats of the receiving State. Thus, to ensure that their

marked "household effects" which was travelling under diplomatic immunity. The crate fell off a fork-lift truck at Harwich, Essex, and split open, spilling cannabis onto the dock side.' See also Clifton E Wilson, *Diplomatic Privileges and Immunities* (The University of Arizona Press, Tuscon 1967) 136–37.

[6] Eileen Denza, *Diplomatic Law* (4th edn, OUP, Oxford 2016) 198, and Chuck Ashman and Pamela Trescott, *Diplomatic Crime: Drugs, Killings, Thefts, Rapes, Slavery, and Other Outrageous Crimes* (Acropolis Books Ltd, Washington DC 1987) 190–223.

[7] George Whitecross Paton, *A Textbook of Jurisprudence* (OUP, Oxford 2007) 37–38.

[8] Rosalyn Higgins, 'The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience' (1985) 79 AJIL 641.

[9] Anthony Aust, A *Handbook of International Law* (2nd edn, Cambridge University Press, Cambridge 2010) 122.

[10] However, see also 'Diplomatic Bag: The Inside Story' (*BBC Online*, London, 10 March 2000) <http://news.bbc.co.uk/2/hi/uk_news/672786.stm> accessed 20 June 2014, stating that '[w]hile much information is now sent from the Foreign Office to its overseas missions via satellite, the diplomatic bag remains a lifeline for embassy staff'.

own diplomats get all the relevant benefits, the receiving State has to grant those benefits to the diplomats of sending States.

The granting of diplomatic immunity often creates a dilemma between obligations under international law and the security of one's State. It is, in fact, an age-old tussle between the supersedence of municipal law versus international law.

The diplomatic bag has been defined as 'a package containing official correspondence, and documents or articles intended exclusively for official use, whether accompanied by diplomatic courier or not and which bear visible external marks of their character'.[11] The bag can be an accompanied bag or an unaccompanied bag. The diplomatic bag can be transported through various mediums which have been elaborated under Article 27 of the VCDR.[12] In earlier times, bags were, for security reasons, transported through a diplomatic courier but due to financial constraints diplomatic bags are now mostly unaccompanied. There is also a provision for the captain of a ship and the pilot of a commercial aircraft to act as a de facto courier when transporting the diplomatic bag.[13]

Article 27(3) clearly mentions that the diplomatic bag cannot be detained or opened as long as proper external marks have been applied. Article 27(4) qualifies what constitutes a diplomatic bag functionally (it may contain only articles and files for official use) and externally (the marks and identification needed).[14]

The blanket power of immunity granted to the diplomatic bag without any checks and balances has the ability of being abused and this has been done on many occasions, a few of which have been documented. There are several instances where the bag has been used to smuggle drugs, explosives, weapons, art, diamonds, money, radioactive materials, and even people.[15]

An incident of kidnapping and abusing the status of the diplomatic bag occurred in 1964.[16] A former Israeli citizen, who had been an interpreter at the Egyptian Embassy in Rome, was found inside an Egyptian diplomatic bag at the airport in Rome.[17] The Israeli was found to be drugged and gagged inside the diplomatic bag after authorities had heard muffled noises from the bag. In the end, the Italian Government declared two Egyptian diplomats *persona non grata*.[18]

The weapon used to kill the First Secretary of the Jordanian Embassy in Ankara in 1985 was smuggled into Turkey in a diplomatic bag from Syria.[19]

[11] *ILC Yearbook* 1989 vol II Pt 2, 15. [12] VCDR, art 27.

[13] ibid 27(7). [14] ibid.

[15] Denza (n 6) 70–71; and *Ashman and Trescott* (n 6) 190–223, stating that '[i]t is understood that diplomats will smuggle anything that is profitable, in a diplomatic bag. Further examples are pianos, whiskey and cigarettes depending on what is in demand.'

[16] Denza (n 6) 67; Ashman and Trescott (n 6) 122–23; Ivor Roberts, *Satow's Diplomatic Practice* (6th edn, OUP, Oxford 2009) 117.

[17] Denza (n 6) 67; Roberts (n 16) 117. [18] Denza (n 6) 67.

[19] 'Abu Nidal and Islamic Jihad terrorists assassinated the First Secretary of the Jordanian Embassy in Ankara, Turkey. The Syrian national charged with the murder confessed that the murder weapon had been brought into Turkey under diplomatic seal', Ashman and Trescott (n 6) 220–21.

Another such incident happened with Umaru Dikko, the former Nigerian Minister of Transportation, who was accused of embezzling enough money to nearly bankrupt Nigeria.[20] Dikko fled to London, but was later kidnapped by a Nigerian abduction team. Dikko was drugged, chained, and, along with three other men, put in crates which 'had the labels indicating their origin "Nigerian High Commission" and destination "Nigerian Ministry of Foreign Affairs" but had no official seal'[21] or 'diplomatic bag' written on it. Before these crates were loaded on a plane for Nigeria, it was discovered that they were not properly marked as required under the Vienna Convention. If the crates had been marked properly, four men might have been successfully shipped out of London in a diplomatic bag.[22]

The bag has also been used to smuggle out assassins. The Bulgarian Embassy harboured the attempted assassins of Pope John Paul II and sent one of them to freedom in a diplomatic bag.[23]

However, this privilege is not a licence to flout the jurisdiction of the receiving State. Under Article 41 of the Vienna Convention, diplomats, while being beneficiaries of the relevant immunities, are still bound to follow the local laws of the receiving State.[24] Yet the Convention grants few remedies to the receiving State to prevent abuse of the diplomatic bag.[25] If such abuse is suspected, the only legal remedy is to protest to the mission or to terminate diplomatic relations.[26]

To prevent such blatant exploitation of the immunity granted to the diplomatic bag for its functionality without having to resort to extreme steps, there has been a long-standing debate on whether the use of X-ray scanners, canine sniffers, or radioactivity detectors to provide a minimal check on the legality of the bags is permitted.[27] The Vienna Convention expressly denies the detention or opening of the diplomatic bag.[28] However, since neither scanning nor other discussed means had been invented or widely used in 1961, it leaves the door wide open to States to interpret the Convention.[29]

The benefit of allowing an interpretation that would allow scanning is that it would enable the authorities to detect and prevent smuggling.[30]

[20] Bruce Weber, 'Umaru Dikko, Ex-Nigerian Official Who Was Almost Kidnapped, Dies' *New York Times* (Africa, 8 July 2014) <http://www.nytimes.com/2014/07/08/world/africa/umaru-dikko-ex-nigerian-official-who-was-almost-kidnapped-dies.html>.

[21] Denza (n 6) 196.

[22] Ashman and Trescott (n 6), 204–10; Peter Davenport, 'Mercenaries Held After Kidnap of Doped Nigerian' *The Times* (London, 7 July 1984) 1; see also ibid 2, col 6.

[23] 'After an attempt to assassinate the Pope, the Bulgarian Embassy was reported to have smuggled one of the attempted assassins out of the country in a truck presented as a diplomatic bag', United States Senate, 'Hearing before the Subcommittee on the Security and Terrorism of the Committee on the Judiciary' (24 July and September 1984) 138 <https://www.ncjrs.gov/pdffiles1/Digitization/97998NCJRS.pdf> accessed 25 September 2015.

[24] VCDR art 41(1). See also Higgins (n 8) 79.

[25] Leslie Shirin Farhangi, 'Insuring against Abuse of Diplomatic Immunity' (1986) 38:6 Stanford Law Review 1517, 1527.

[26] Denza, (n 6) 123. [27] ibid 200. [28] VCDR art 27(3).

[29] Denza (n 6) 126–27.

[30] Foreign Affairs Committee (n 5), Minutes of Evidence, 5, Lori Sharipo, 'Foreign Relations Law: Modern Developments in Diplomatic Immunity' (1990) Annual Survey of American Law 28, 29.

2. Policies of States Regarding the Scanning of Diplomatic Bags

Even though scanning is not expressly prohibited by the Vienna Convention some States have interpreted it as being a 'constructive opening of the bag'.[31] Some argue that since electronic scanning could damage or decipher documents and/or equipment containing sensitive information, it would undermine the very essence behind the provisions concerning the diplomatic bag—ie, the protection of free communication between the sending State and its mission abroad—and thus cannot be allowed in the spirit of the Convention.[32]

Bahrain, Kuwait, Libya, Qatar, Saudi Arabia, and Yemen interpret the provisions of the Vienna Convention as not granting absolute immunity to diplomats. Therefore, they have entered a reservation to the applicability of Article 27 to the effect that, if the diplomatic bag holds articles which are not for official purposes, these States reserve a right to open the bag in front of a diplomat or a person authorized by the sending State or to return it to the State it came from.[33] This is an adaptation from Article 35(3) of the VCCR or Article 36 of the VCDR which deals with the personal baggage of a diplomat.

The stance of the United States is that the x-ray scanning of diplomatic baggage is equivalent to electronically opening a bag. The United States does not subject a properly marked and handled diplomatic bag to any form of detection or scanning and does not want any other State to subject its diplomatic bags to such treatment. It also feels that States which limit the size and weight of the bag are acting contrary to Article 25 of the Vienna Convention.[34] As per the US State Department, they are one of the largest senders of diplomatic bags.[35] These stringent measures can be attributed to the application of the principle of reciprocity.

However, the United States maintains a policy that if credible information is received that the diplomatic pouch contains articles or documents not intended for the official use of the diplomat, it reserves the right to reject entry. Such properly designated diplomatic bags can even be returned to the sending State.[36] This is a further modification of diplomatic law as it cannot be derived from the Convention.

The United Kingdom's Foreign and Commonwealth Office has expressed the government's view that 'remote examination by equipment or dogs would be

[31] Higgins (n 8) 647. [32] Denza (n 6), 241.

[33] 'It must be noted, however, that the practice of challenging a consular bag where it is suspected to have contained unauthorised contents is still in operation', Gore-Booth (n 1), 117. See also VCCR art 35.

[34] US Department of State, 'Diplomatic Pouches' <http://www.state.gov/ofm/customs/c37011.htm> accessed 22 June 2014.

[35] US Department of State, 'Study and Report Concerning the Status of the Individuals with Diplomatic Immunity in the United States' (1988) 55.

[36] US State Department, 'OAS Diplomatic Note no 06-B: New Diplomatic Pouch Procedure' (2014)<http://www.state.gov/documents/organization/222181.pdf> accessed 12 June 2014.

lawful under the Vienna Convention'.[37] Although the government has expressed its view that minimal checks by scanning and sniffer dog are not violative of the Convention, the United Kingdom has not used any of these methods in examining diplomatic bags as a receiving State. This can be attributed to its fear that its own diplomats may be subjected to such examination in accordance with the principle of reciprocity. Thus scanning and any form of internal examination are not considered except in cases where very strong grounds for suspicion exist.[38] In fact, when Kuwait started scanning diplomatic bags in 1984, the UK led the international protest against it.[39]

The Canadian government holds the stance that electronic scanning of diplomatic bags amounts to constructive opening of the bag and is an 'unacceptable breach'. It does have a policy of 'challenge and return' due to 'public safety and civil aviation security considerations and the need to safeguard against abuses' in cases of serious suspicion.[40]

The New Zealand government 'based on its acknowledgment of the fact that electronic screening could, in certain circumstances, result in the violation of the confidentiality of the documents contained in a diplomatic bag' stated that in their view electronic screening was not permitted under the VCDR.[41]

Turkey also prohibits scanning and checking and has a weight limit of 30 kg per bag. Any diplomatic bag exceeding that limit has to have its contents disclosed in a '*takir*' which has to be approved by the Ministry of Foreign Affairs of Turkey.[42] The diplomatic bag is expected to be of both reasonable height and weight. Furthermore, any baggage weighing beyond 30 kg and arousing serious concerns about its content can be opened in the presence of a member of the diplomatic mission with the approval of the Ministry of Foreign Affairs in Turkey.[43]

Israel also has a policy of scanning all baggage regardless of the question whether their carriers are holders of diplomatic passports.[44]

Egypt, due to the revolution that engulfed the country in 2012, has started x-raying diplomatic bags to check for illegal weapons being imported.[45]

[37] Higgins (n 8) 647.

[38] HM Revenue and Customs (UK) 'DIPPRIV2100—Diplomatic bags: overview' <http://www.hmrc.gov.uk/manuals/dipprivmanual/dippriv2100.htm> accessed 14 June 2014.

[39] ibid.

[40] Gergő Pasqualetti, 'Carry on Excellencies!' (2012) 9:1 Miskolc Journal of International Law 43, 49 <http://epa.oszk.hu/00200/00294/00018/pdf/EPA00294_miskolc_journal_2012_01_03_pasqualetti1.pdf> accessed 23 May 2014; see also Kim Zetter, 'TSA Leaks Sensitive Airport Screening Manual' (*Wired*, 7 December 2007) <http://www.wired.com/threatlevel/2009/12/tsa-leak/> accessed 22 June 2015.

[41] *ILC Yearbook* 1988 vol II Pt 1, 147; also see Pasqualetti (n 40) 47.

[42] Republic of Turkey, Ministry of Foreign Affairs, 'Diplomatic Bags' (31 May 2005–216950) <http://www.mfa.gov.tr/31_05_2005--216950-diplomatic-bags.en.mfa> accessed 18 June 2014.

[43] ibid.

[44] Israel, Ministry of Foreign Affairs, Protocol Division 'Being a Diplomat in Israel' (Jerusalem, October 2008), 76 <http://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/Being_a_Diplomat2.pdf> accessed14 June 2014.

[45] 'Egypt Screens Diplomatic Bags after Weapons Claim', *Business Standard* (Cairo, 7 February 2011) <http://www.business-standard.com/article/economy-policy/egypt-screens-diplomatic-bags-after-weapons-claim-111020700197_1.html> accessed 19 June 2014.

India has a compulsory screening process as per the Bureau of Civil Aviation. If screening of the bags is refused or if it is not possible to scan the bags for explosives, there is a cooling off period of 24 hours before the bag is granted clearance.[46]

Pakistan also employs scanning mechanisms for diplomatic bags.[47]

3. Analysis and Solution

We can see from the varying policies of States that the most developed countries generally have no scanning or detection policies but have also allowed themselves the privilege of opening the bag if they harbour serious doubts about the contents of the bag or have credible information that an abuse of the diplomatic bag may have occurred. In those cases, a member of the diplomatic mission must be present. If that member refuses the opening of the bag, the bag will be returned to the sending State.

Many members of the ILC suggested that electronically scanning the diplomatic bag would help maintain the delicate balance[48] as this is the most frequently suggested means for the prevention of abuse.[49] Scanning can be construed as permissible in accordance with Article 27(3) only if it is non-intrusive and does not decipher the exact nature of the contents of the bag. Conversely, preliminary scanning might not be useful as it could be relatively easy to deceive the receiving State's scanner if the sending State is aware of its limitations. On the other hand, sniffer dogs and radioactivity detectors, if used, would be in full compliance with the Convention.[50]

It can be observed from the above arguments that economically and technologically less able countries are more open to the idea of scanning or the detection of drugs through sniffer dogs, or the restriction of weight and size of bags than their counterparts in most developed countries. At the outset, in the 1970s when scanning of baggage became popular in airports, it was the developed States which adopted the interpretation that scanning did not violate Article 27(3) of the Convention.[51] But very quickly they changed their minds and started attaching more weight to the principle of inviolability.[52] It is no secret that the stance of the

[46] Yatish Yadav, 'US Officials Invoke Vienna Convention for Diplomatic Bag' *The New Indian Express* (New Delhi, 19 December 2013) <http://www.newindianexpress.com/nation/US-Officials-Invoke-Vienna-Convention-for-Diplomatic-Bag/2013/12/19/article1953288.ece> accessed 8 July 2014. See also 'IB Doesn't Trust Us, Delhi Keeps Opposing Us, Complained US' *The Indian Express* (New Delhi, 22 March 2011) <http://archive.indianexpress.com/news/ib-doesn-t-trust-us-delhi-keeps-opposing-us-complained-us/765501/> accessed 8 July 2014.

[47] 'Western Missions Oppose Diplomatic Bag Scanning' (*Dawn*, 10 May 2010) <http://www.dawn.com/news/857373/western-missions-oppose-diplomatic-bag-scanning> accessed 23 July 2014.

[48] *ILC Yearbook* (1986) vol I, 42. Mr Chafic Malik expressed the opinion that '[s]ince electronic and mechanical devices were proving quite effective in preventing acts of sabotage against civil aircraft, examination of the diplomatic bag … by such means should be permitted'.

[49] 'Thorny Issue: Peeking into a Privileged Pouch' *The New York Times* (1 August 1988), at B6.

[50] Anthony Aust (n 9) 124.

[51] Pasqualetti (n 40) 46.

[52] 'The UK Government in its 1985 review of the Vienna Convention noted the alternative view that any method for finding out the contents of the bag is tantamount to opening it, which is illegal',

developed States is informed by the principle of reciprocity which makes it likely that their own diplomats will be treated the same way in other States.[53]

This is the case because the most developed States have the relevant technological capability and know how to detect any article of serious concern in diplomatic bags while maintaining their stance of inviolability by not using the standard preliminary methods for detection.[54] This would, however, restrain developing States from officially employing the necessary equipment or other preliminary means of discovering the nature of the contents of diplomatic bags. Thus, the most developed countries have an unfair advantage in practice[55] which runs counter to the entire basis of the VCDR.

The violation of diplomatic immunity by the receiving State is not a new development but is an age old practice by those States which have the technological and economic means to do so. In 1999 the United States government found out that a Russian Attaché had placed a listening device in the conference room of the US State department and was spying on their activities.[56] In 2001 it was discovered during a trial that the FBI had built a tunnel under the Soviet Embassy in Washington to eavesdrop on it and also conducted guided tours for senior FBI personnel to show their capacities.[57]

As mentioned earlier in this book,[58] diplomatic immunity is based on a number of theories; one of the oldest being the theory of personal representation which operates on the premise that the diplomat is to be given the same privileges and immunities as that of a visiting foreign sovereign as he acts on behalf of the sovereign.

It has been claimed by a US intelligence contractor that the United States has been monitoring thirty-five world leaders, including those of Germany, Mexico, and Brazil,[59] across the globe.[60] From this we can draw the conclusion that, if US can violate the privacy of sovereigns in their own countries where US has no jurisdiction, it definitely would claim the ability of violating the immunity of their representatives on its own territory where, as per the Convention, the receiving State has no jurisdiction either.

Denza (n 6) 195. See also *ILC Yearbook* vol II Pt 1, 147. The US State Department also takes the view that 'any provision which would allow scanning of the bag risks compromising the confidentiality of sensitive communications equipment', Unknown Author (n 3); Pasqualetti (n 40) 46.

[53] Pasqualetti (n 40) 53.

[54] *ILC Yearbook (*1989) vol II Pt 2, 43: '… the inclusion of this phrase was necessary as the evolution of technology had created very sophisticated means of examination which might result in the violation of the confidentiality of the bag, means which furthermore were at the disposal of only the most developed states'.

[55] Bartholomeusz (n 2) 1286. [56] ibid 1288. [57] ibid. [58] See Chapter 1.

[59] Mark Landler and David E Sanger, 'Obama May Ban Spying on Heads of Allied States' *The New York Times* (28 October 2013) <http://www.nytimes.com/2013/10/29/world/europe/obama-may-ban-spying-on-heads-of-allied-states.html?pagewanted=all&_r=0> accessed on 12 May 2014.

[60] James Ball, 'NSA Monitored Calls of 35 World Leaders after US Official Handed over Contacts' *The Guardian* (25 October 2013) <http://www.theguardian.com/world/2013/oct/24/nsa-surveillance-world-leaders-calls> accessed 14 June 2014.

Furthermore, on being questioned the United States government stated that 'it will cease all collection of intelligence from friendly States',[61] leaving enough space to speculate that it has not ceased to collect 'intelligence information' from hostile foreign leaders or in certain instances allies that have turned hostile.[62]

New Zealand also had developed plans with National Security Agency hackers to hack into the Chinese Embassies in Auckland to attain information.[63]

There are also claims that Russia, another former superpower, had violated the privacy of heads of States who were attending the G20 summit through the use of pen drives which were capable of downloading sensitive information from their laptops.[64]

The same US intelligence contractor further alleges that the US government had been spying on the diplomatic missions of the European Union in Washington and New York, and even on the building in which EU Summits are held in Brussels.[65] Also, computers in these diplomatic premises were hacked, which is a violation of Article 22 of the Vienna Convention (it constitutes an abuse of the inviolability of diplomatic premises).[66]

United Nations personnel are also granted similar rights under Article 105(1) of the UN Charter which states clearly that the UN has immunity and privileges to the extent needed for functional necessity, similar to the justification for the diplomatic immunity under the Vienna Convention. This is also guaranteed under the Article III Section 3 of the General Convention on the Privileges and Immunities of the United Nations of 1946 to which the United States, the United Kingdom, France, and Russia are party.[67] Article III Section 10 also gives the UN personnel the same privileges when they are despatching and receiving their correspondence by courier or in bags. Such couriers and bags have the same immunities and privileges as diplomatic couriers and bags.[68]

It is important to note the words of Richard Butler, the former UN Chief Weapons Inspector for Iraq, who observed that while he was serving in that position, his 'calls from the UN were monitored by the United States, the United

[61] Lander and Sanger (n 59). [62] ibid.

[63] David Fisher, 'Leaked Papers Reveal NZ Plan to Spy on China for US' *The New Zealand Herald*, (19 April 2015) <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11434886> accessed 16 June 2014. See also Ryan Gallagher and Nicky Hager, 'New Zealand Plotted Hack on China With NSA' *The Intercept* (18 April 2015) <https://firstlook.org/theintercept/2015/04/18/new-zealand-china-gcsb-nsa-auckland-hack/> accessed 16 June 2014.

[64] Nick Squires, Bruno Waterfield, and Peter Dominiczak, 'Russia Spied on G20 Leaders with USB Sticks' *The Telegraph* (29 October 2013) <http://www.telegraph.co.uk/news/worldnews/europe/russia/10411473/Russia-spied-on-G20-leaders-with-USB-sticks.html> accessed 18 June 2014.

[65] Derek Scally, 'Tricky Leaks: Snowden vs NSA' *The Irish Times* (28 December 2013) <http://www.irishtimes.com/news/world/tricky-leaks-snowden-vs-nsa-1.1634632> accessed 4 July 2014.

[66] VCDR art 22.

[67] Convention on the Privileges and Immunities of the United Nations (adopted 13 February 1946, entered into force 17 September 1946) 1 UNTS 15.

[68] Bartholomeusz (n 2) 1288.

Kingdom, France and Russia'. He said that when he wanted to make unmonitored calls, 'he would leave the UN building' to do so,[69] indicating the blatant violation of obligations under International law.

A former member of British Prime Minister Tony Blair's cabinet asserted that British intelligence services monitored UN Secretary-General Kofi Annan's telephone conversations in the period leading up to the war in Iraq in 2003. Allegedly, this was done by placing bugging devices in Mr Annan's office.[70] The General Convention on the Privileges and Immunities of the United Nations, however, gives the Secretary-General and all Assistant Secretaries-General 'the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law'.[71]

A proven history of violations of the personal immunity of sovereigns, United Nations personnel and premises, and diplomatic missions leads to the conclusion that it is probable that the same perpetrators will also adopt measures to detect the contents of diplomatic bags, as they definitely have the relevant technological proficiency.[72]

Moreover, there have also been allegations that the United States has developed a remote scanner which can scan items from a distance of up to 50 metres which is more than enough to keep the portable scanner out of sight and scan without the knowledge of the diplomatic courier or any other observer.[73] It also employs x-ray scanners in vans, known as Z Backscatter Vans, which have the capability of scanning an entire vehicle which passes them, to detect bombs and explosives.[74] Allegedly, Russian scientists have developed a similar technology of detecting traces of explosives from 5 metres away.[75]

[69] 'UN Bugging Scandal Widens' *BBC News World Edition* (27 February 2004) <http://news.bbc.co.uk/2/hi/asia-pacific/3492146.stm> accessed 17 July 2014; see also Frederic L Kirgis, 'Alleged Monitoring of United Nations Telephone Calls' *The New York Times*, (10 March 2004).

[70] Brian Whitaker and agencies, 'Bugging Devices Found at UN Offices' *The Guardian* (18 December 2004) <https://www.theguardian.com/world/2004/dec/18/iraq.iraq> accessed 20 July 2014.

[71] Convention on the Privileges and Immunities of the United Nations (n 67), Article V, Section 19.

[72] 'Surprisingly, airport scanners are more often used by less wealthy States than superpowers. Presumably this is because big players already possess various sophisticated means to discover the contents of suspicious packages even well before security checkpoints […] so they can afford the luxury of not having to screen other States' diplomatic bags and to claim on the basis of reciprocity that their own bags should not be screened', Pasqualetti (n 40), 52.

[73] 'Hidden Government Scanners Will Instantly Know Everything about You From 164 Feet Away' *Gizmodo* (10 July 2012) <http://gizmodo.com/5923980/the-secret-government-laser-that-instantly-knows-everything-about-you> accessed 15 December 2016.

[74] Scott W Kendall, 'Comment Taking It to the Streets: Uncovering the Secret Mobilization of Backscatter X-Ray Technology and the Concerns Surrounding its Use' (2013) Houston Law Review 609; Conor Friedersdorf, 'The NYPD Is Using Mobile X-Ray Vans to Spy on Unknown Targets' *The Atlantic* (New York, 19 October 2015) <http://www.theatlantic.com/politics/archive/2015/10/the-nypd-is-using-mobile-x-rays-to-spy-on-unknown-targets/411181/> accessed 12 December 2016.

[75] Sergei M Bobrovnikov, Evgeny V Gorlov, Victor I Zharkov, Yury N Panchenko, 'Lidar Detection of Explosive Traces' (2016) EPJ Web of Conferences 27001 <http://www.epj-conferences.org/articles/epjconf/pdf/2016/14/epjconf_ilrc2016_27001.pdf> accessed 15 December 2016.

The technology of remote scanning is very much prevalent in society,[76] and is already being employed in various European airports.[77] Any extrapolation from this forces us to accept the stark reality that the contents of the diplomatic bags in the most developed nations (which possess the relevant technological capability), are an open secret, damaging the sanctity they once had. Thus to maintain the equilibrium between technologically and economically capable countries and the rest of the States of the world, which was the purpose behind the conception of the Vienna Convention, there is need for a minimal amount of scanning of diplomatic bags.[78] Once that amount of scanning is officially accepted, the need to covertly examine the bag should be obviated. This will serve a threefold purpose: firstly, it would help maintain an equal power equation vis-à-vis the immunities granted to foreign diplomats; secondly, with overt checking it will ensure that scanning is only carried out to the extent sanctioned by law and that the sanctity of the bag is not violated, and thirdly—and most importantly—it will curb abuse of the bag and restore it to its former use, that of transporting official documents and articles.

However, this also raises certain issues. Firstly, what will be the minimum standard to be used for scanning of bags? Secondly, one has to make sure that the liberty of minimal scanning does not tip the scales back in the favour of the receiving States so that they are able to interfere or harass the diplomats.

Even at the time of conception of the Vienna Convention, the international community was well aware of the possibility of abuse of the bag;[79] hence the need for insertion of Article 27(4) to make certain that the diplomatic bag would be used only for transporting official documents and articles. However, the drafters were unable to put adequate mechanisms in place to ensure that the law is not abused. In effect, even though Article 27(4) very explicitly referred to the materials which constitute the contents of the bag, the Vienna Convention left no means of ensuring that this rule would be followed. On the contrary, it made the bag fully inviolable if it had the requisite diplomatic markings on it, in turn making Article 27(4) effectively redundant.

One can infer that to ensure compliance with Article 27(4) and that the diplomatic bag does not pose a security threat, a minimum amount of scanning is crucial.

Thus as elaborated above, States can employ canine sniffers to detect smuggling of narcotics and living beings, radioactivity detectors can be employed to safeguard against the transfer of bombs. The ILC discussed the possibility of using sniffer

[76] Kendall (n 74) 622.

[77] Ben Vogel, 'Brussels Embraces Remote Screening for Centralised Checkpoint' (*IHSAirport360,* 15 July 2014) <http://www.ihsairport360.com/article/4496/brussels-embraces-remote-screening-for-centralised-checkpoint> accessed 13 June 2014; see also 'Centralised Remote Screening'(OptoSecurity, eVelolcity Integrated Security Software) http://www.optosecurity.com/checkpoint-screening-solutions/evelocity/overview/ accessed 28 July 2014.

[78] Pasqualetti (n 40) 12.

[79] Montell Ogdon, *Juridical Bases of Diplomatic Immunity* (John Byrne & Co, Washington DC 1936), 10–30.

dogs to sniff out narcotics, as they were deemed to be a non-intrusive means of examination, and as such examination was not enough to read the contents of the bag in general.[80] There may also be use of minimal x-ray scans which can be taken in the presence and in view of a representative of the diplomatic mission or the diplomatic courier if States accept this. However, such a scan has its shortcomings: the outline of the contents can easily be forged to fool the machine once the mechanisms of operating it are known. Moreover, a lingering doubt may remain in the minds of the sending State as to whether it is the only scan being done.

An alternative option is that which is adopted by Turkey ie, to stipulate a fixed weight/size for each diplomatic bag so as to keep some sort of check on the quantity to be transmitted. Anything beyond a reasonably decided uniform weight[81] has to be declared and confirmed by the sending State. As it is the object of the Vienna Convention to maintain the sanctity of the bag, which should only be carrying official documents and articles, it suffices to say that files and paperwork for official use should not exceed a reasonable weight and should not exceed a reasonable standard.

It would also help if Article 35 of the VCCR were made applicable through interpretation to Article 27(3) of the VCDR. Six States, even though they ratified the VCDR, expressly stated by means of reservations that the provision of Article 35 VCCR will be their practice for dealing with diplomatic bags governed by the VCDR as well.[82] This principle was also present as a part of customary law before the advent of the VCDR and should be reinstated as a continuing practice. Even in the commentary of the ILC, it was admitted that in exceptional cases, where there is a serious concern as to the inappropriate nature of the goods transported through diplomatic bags, receiving States have, with the prior permission of their Ministry of External Affairs, opened the bag in the presence of a member of the diplomatic mission.[83] Many States, such as Canada,[84] the United Kingdom,[85] and the United States[86] along with Turkey[87] also use the same practice in exceptional cases when there is a threat to security.

The major concern after adopting this procedure in practice would be the abuse of this provision by the receiving State. This too can be kept in check through certain provisions. There is, first and foremost, the implicit rule of reciprocity:[88] if a State wrongly and without sufficient reason detains or opens the bag, it must fear that its own diplomats will get the same treatment. This in itself is sufficient, as it is the reason why scanning has not been introduced in the first place.

[80] Mr Yankov observed to the International Law Commission that '[s]niffer dogs are unlikely to be so well educated that they could read the contents of a diplomatic bag', *ILC Yearbook* (1988) vol I, 232.

[81] Republic of Turkey, Ministry of Foreign Affairs (n 42).

[82] Vienna Convention on Consular Relations (adopted on 24 April 1963), 500 UNTS 95.

[83] Pasqualetti (n 40) 45. [84] ibid. [85] HM Revenue and Customs (UK) (n 37).

[86] US State Department (n 35).

[87] Republic of Turkey Ministry of Foreign Affairs (n 42).

[88] Pasqualetti (n 40) 47; Higgins (n 8) 647.

Secondly, there should be an independent institution; an organ of the General Assembly which would have representatives of all member States of the VCDR and in which no State has a veto power. Any case of misuse of diplomatic power by diplomats or harassment by the receiving State could be discussed in such a forum. Failure to resolve the issue should be brought to the ICJ as provided under the Optional Protocol of the VCDR[89] for the States that ratified it. There is however a drawback to this: firstly, only sixty-six States[90] are party to this Protocol. Furthermore, the United States,[91]one of the largest senders of diplomatic bags, is no longer party to this Protocol, thus making it to an extent redundant when it comes to putting countries on equal footing.

Also, the ICJ has long been suspected of having the force of the developed States behind it,[92] thus diminishing the fairness of the decision. Furthermore, for those States which are not party to the Protocol, the ICJ has jurisdiction which relies on the consent of the parties, and States have the option not to subject themselves to the Court's jurisdiction or to withdraw midway through proceedings.[93]

Alternatively one can formulate an independent specialized tribunal which can function along the lines of the WTO Dispute Settlement Body (DSB) which works on the principle of members of the DSB being drawn from each member State of the WTO Agreement and of ratification of the relevant award which has binding effect on the two States. If the affected States are unwilling to adhere to such an award, the member States of a diplomatic DSB could remove all diplomatic relations with the non-complying party. Other forms of disapproval could be adopted too, like economic sanctions, which could put added pressure on States to adhere to the award. There could also be a form of appeal to satisfy States concerned about the possible appearance of bias.

The major flaw in this system and that of the ICJ's compulsory jurisdiction is to get all VCDR member States to become parties to this forum.

There is however a consideration on which countries would accept this forum of adjudication. It is to be seen in the premise on which diplomatic relations rest: the fact that disputing States have a fundamental interest to retain good relations with other States, as no State can survive alone. International relations have been sculpted to a large extent on the basis of economic interests of States, as it was the reason behind colonial States exploring the world for raw materials and markets in the era of industrial development and the era of colonialization, and it retains its relevance today, as has been seen when Iran signed the nuclear deal in 2015, so that the economic sanctions against it would be removed.[94]

[89] Optional Protocol to the Vienna Convention on Diplomatic Relations, Concerning the Compulsory Settlement of Disputes (18 April 1961, Adopted on 24 April 1964) 596 UNTS 261.

[90] ibid. [91] ibid.

[92] Eric A Posner and Miguel FP de Figueiredo, 'Is the International Court of Justice Biased?' (2005) 34 Journal of Legal Studies 624 <http://www.ericposner.com/Is%20the%20International%20Court%20of%20Justice%20Biased.pdf> accessed 22 November 2015.

[93] *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v U.S.)* (Separate opinion of Judge Ago) [1986] ICJ 14, 181.

[94] Unites States Department, 'Joint Comprehensive Plan of Action' <http://www.state.gov/e/eb/tfs/spi/iran/jcpoa/> accessed 20 November 2015.

Moreover, if every State is a participatory member of both the forum and the diplomatic DSB, it would work as a democratic decision-making body and will hold the approval of the international community. The subset of the General Assembly could act as a specialized forum to discuss the tenacious relationships between nations thus avoiding having to wait for discussion in the General Assembly, which already has a lot of issues on its agenda. This would create a certain fear in the minds of both diplomats and receiving States and enforce abidance by the Convention through its deterrent effect. As mentioned earlier, without a body to guarantee adherence to the law, it is difficult for it to be observed. This body will maintain the delicate balance on which the principles of diplomatic law reside.

Conclusion

Diplomatic law's main purpose is to create trust between States to facilitate their relations with one another by providing uniform rights and duties. It is up to the States to either abuse those privileges or to use them for better relations. We can observe from history that international law does not flourish in circumstances where all States are not given equal status[95]—as was the case during the Roman Empire, which had developed rudimentary elements of diplomatic law, but could not advance it due to its hegemonic rule. The same holds true in today's world. If the most developed nations continue acting in a manner which does not give equal status to all States, it would be difficult for diplomatic law and international relations to flourish. Thus the above measures of minimal screening should be adopted to guarantee an even playing field for all States involved.

[95] Maria Moutzouris, 'Sending And Receiving: Immunity Sought By Diplomats Committing Criminal Offences' Rhodes University 64; Linda Frey and Marsha Frey, *The History Of Diplomatic Immunity* (Ohio State University Press, Ohio 1999) 6 and 57; Eileen Young, 'The Law of Diplomatic Relations' 40 (1964) British Yearbook Of International Law 143.

Part V

Diplomatic Duties

15

Legal Duties of Diplomats Today

Sanderijn Duquet and Jan Wouters

1. Introduction

International diplomatic law lays down comprehensive obligations to be observed by sending States and their diplomats in their relations with receiving States. These duties fulfil a key role in the diplomatic system. Even before the coming into force of the VCDR, customary international law had already clearly established diplomatic obligations. Moreover, legal scholars noted the existence of a strong moral responsibility of diplomats to respect obligations in the receiving State.[1] However, even the most duty-bound diplomat may find him- or herself under conflicting legal (and sometimes moral) obligations when posted abroad. Should one publicly condemn a grave human rights violation that occurred in a receiving State? Can a diplomatic mission support a good cause by raising funds or awareness? A modern take on the performance of diplomatic functions seems to require that diplomats engage with the public and employ new communication methods. The present chapter aims to trace how norms on diplomatic duties—which obviously have further developed since the coming into force of the VCDR—affect the current conduct of diplomatic relations. Its central tenet is that the Vienna Convention, against the backdrop of global changes and related diplomatic challenges, provides a remarkably stable and flexible legal framework for the conduct of diplomatic activities. It is truly a living instrument that allows for creativity in its application. Many States have seized its potential, both as receiving and sending States. Receiving States, for instance, have found alternative judicial and non-judicial ways to request diplomats to comply with their obligations. Sending States, from their side, relentlessly attempt to blend the performance of diplomatic functions—most prominently the ascertaining of conditions in the receiving State and the protection of the interests of the sending State and of its nationals—with their adherence to diplomatic duties. These dynamics test the limits of the diplomatic system and result in fascinating diplomatic practices worldwide.

[1] Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th edn, OUP, Oxford 2016) 374 and references therein.

Legal Duties of Diplomats Today. Sanderijn Duquet and Jan Wouters.

Following this introduction we investigate the nature of diplomatic duties. Using recent examples of diplomatic incidents in State practice, we comment upon the five main obligations of diplomats under Articles 41 and 42 of the Vienna Convention. Based on empirical evidence, we reflect on the extent to which the obligations of diplomats outlined by the Vienna Convention meet the demands of today's world (section 2). The seeking of compliance with these obligations is the central theme of the third part of the chapter. Following a discussion of the addressees of the duties (individual diplomats, diplomatic missions, and the sending State), our focus shifts to the point of view of receiving States seeking to hold diplomatic agents accountable for breaching their obligations under international and national law (section 3). Some concluding reflections are offered at the end of the chapter (section 4).

2. The Obligations of Diplomats as Conceived in the VCDR

The Vienna Convention covers a wide variety of topics which relate to the sending and receiving of diplomats. The majority of these concern the rights of diplomats, conceptualized as immunities, inviolabilities, privileges, and entitlements.[2] These far-reaching restrictions on the sovereignty of States would not have withstood the test of time if no strings would have been attached. Indeed, the quasi-unchallengeable rights of diplomats bring about a wide range of obligations that receiving States have to observe. Therefore literature often notes that most, if not all, duties of diplomats serve as the corollary of the immunities. In other words, diplomatic rights and duties are seen as corresponding notions.[3] This is correct in the sense that the VCDR adheres to a certain balance between rights and duties of receiving and sending States, which enables the diplomatic system, historically grounded in the principle of reciprocity, to function. Yet, the system designed by the VCDR is not truly synallagmatic. Strict adherence to the reciprocity principle might hinder equal treatment of diplomatic missions, as it would enable States to discriminate according to immunities and privileges received by their own missions abroad. Such acts would be irreconcilable with the text of Article 47 VCDR. Furthermore, the ILC clearly ruled out the idea that a State only has to grant immunities if a diplomatic agent fulfils his or her duties. In its 1958 Commentary to the Draft Articles on Diplomatic Intercourse and Immunities, the ILC submitted that '[f]ailure by a diplomatic agent to fulfil his obligations does not absolve the receiving State from its duty to respect the agent's immunity'.[4]

[2] The VCDR contains a large number of rules on immunities, inviolabilities, and privileges, as well as, for example, a duty to treat diplomats with 'due respect' (Art 29 VCDR). The VCDR even imposes obligations on third States so as to allow diplomats to perform their functions (Art 40 VCDR). See for further reading Parts III and IV in this volume, which study the rights of diplomats.

[3] Ivor Roberts (ed), *Satow's Diplomatic Practice* (6th edn, OUP, Oxford 2011) 150; Silviya Lechner, 'What Difference Does Ius Inter Gentes Make? Changing Diplomatic Rights and Duties and the Modern European States-System' (2006) 1 The Hague Journal of Diplomacy 235–59, 240–41.

[4] 'Draft Articles on Diplomatic Intercourse and Immunities with Commentaries', *ILC Yearbook* 1958 vol II, 104. The same idea was confirmed in the commentary (104) of the article on the use of

In contrast to the many obligations of receiving States, the Convention offers less detailed guidance with regard to the duties of individual diplomats and of sending States. Two rather general articles of the VCDR are devoted to the diplomatic duties: Article 41 VCDR consists of three paragraphs and four obligations; Article 42 adds a fifth duty. The concise wording of the Treaty is contrasted with a substantive practice and, as will be shown in the following section, the Convention treats duties in less expressive terms all the way through.[5]

2.1 Individual obligations of diplomats

2.1.1 The obligation to respect the laws and regulations of the receiving State

One can find the first set of obligations of diplomats in Article 41(1) VCDR. The provision contains two distinct, stand-alone duties, discussed in this subsection and the next one (2.1.2). The first sentence of Article 41(1) VCDR spells out that diplomats have to abide by local laws and regulations. By its very nature, this provision serves as the most direct counterpart for the special 'protection' status of diplomats in the receiving State. The VCDR's wording, however, is somewhat misleading where it refers to 'persons enjoying privileges and immunities'. A clear distinction must be drawn between these concepts. In the case of privileges, certain laws and regulations simply do not apply. Thus, as far as privileges such as the exemption of taxes are concerned, Article 41(1), first sentence, is without an object. In contrast, the provision is all the more meaningful in cases where certain laws and regulations cannot be enforced, for example, in the case of immunities and inviolabilities enjoyed. Here, the special status of diplomatic agents entails that they must comply with applicable laws and that they are exempt from the underlying substantive liability. A diplomatic agent is not immune from the jurisdiction of his or her sending State (Article 31(4)) or any third State that can lawfully establish jurisdiction. The sending State can also decide to waive diplomatic immunity of the diplomat in the receiving State (Article 32). As such, the system has created extra incentives for persons enjoying immunity to respect local laws and regulations. It also puts into question the theory of diplomatic obligations as the corollary of the rights enjoyed, since the latter are largely procedural in nature.[6]

Article 41(1), first sentence, is commonly understood as the duty for diplomats to adhere to the rules of the receiving State. The obligation to respect local regulations applies to official as well as private activities.[7] Obligations can stem from contract law (eg the payment of rent or debts owed to providers of services), labour law (eg the duties of a diplomat as a responsible employer), penal law (eg the duty to respect the physical integrity of others), human rights law, or—an area of great concern worldwide—traffic laws and regulations: most receiving States explicitly

the premises of the mission: '[f]ailure to fulfil the duty laid down in this article does not render article 20 (inviolability of the mission premises) inoperative […]'.

[5] Charles Chatterjee, *International Law and Diplomacy* (Routledge, New York 2007) 183.

[6] See Denza (n 1) 257 and 374.

[7] Roberts (n 3) 151.

request diplomats to abide by traffic regulations upon arrival and remind them of this regularly.[8] In addition to these substantive obligations, Article 41(1) also contains an implied obligation for diplomats to be knowledgeable about the local laws and regulations.

The duty to respect local laws is referred to in a number of other VCDR provisions. First, pursuant to Article 26 and notwithstanding the freedom of movement and travel of the members of the mission, the receiving State can proclaim restrictions concerning personal, or official visits to zones entry into which is prohibited for reasons of national security. This may concern areas of the territory that are subject to special regulations by definition, such as military zones or nuclear plants.[9] An example of a more questionable use was provided in 2010, when the Central African Republic imposed the immediate requirement for notification of its Ministry of Foreign Affairs (MFA) prior to any travel by members of the diplomatic corps to areas 'under tension', without specifying what areas were considered off limits.[10] A similar restriction was adopted by the Syrian government in 2006. Diplomats were required to request permission for all travel outside of Damascus and 'even for travel to outlying suburbs such as Saboura, where many diplomats live'.[11] Second, Article 36 VCDR contains a similar reference to the duty to abide by local legislation, covering the guaranteed entry in the territory of goods for official or personal use. The article enables receiving States to prohibit the import of drugs, weapons, and other objects which would pose a substantial threat to the public order. However, what is less well known is that it also permits States to adopt administrative regulations allowing the import of certain goods within the limits of quotas.[12] These restrictions usually target alcoholic beverages, tobacco products, and fuel for vehicles. In Switzerland, alcoholic beverages and tobacco products may be brought into the country free of import duties by diplomatic

[8] See, for example, the French directives <http://www.diplomatie.gouv.fr/en/the-ministry-of-foreign-affairs-158/protocol/immunities/article/respect-for-local-laws-and> accessed 23 August 2014. In the Belgian practice, the Protocol Directorate of the Federal Public Service Foreign Affairs reminds members of diplomatic missions of their obligation to respect Belgian road traffic laws and regulations in the Circular Note of 18 March 2014 ('Respect for traffic rules and regulations') and in that of 5 March 2014 ('Registration of diplomatic vehicles'). The Norwegian Government asks members of missions to pay particular attention to Norwegian legislation concerning speed limits, alcohol, and driving and parking regulations: Norwegian Ministry of Foreign Affairs, 'Diplomat in Norway', <http://www.regjeringen.no/nb/dep/ud/dep/forbindelser/diplomat_noway.html?id=666838> accessed 23 August 2014.

[9] Frédéric Dopagne, Sanderijn Duquet, and Bertold Theeuwes, *Diplomatiek recht toegepast in België* (Maklu, Antwerp 2014) 146.

[10] WikiLeaks, 'MFA Note seeks to regulate travel by diplomats in the CAR' (21 April 2009, Cable 09BANGUI86_a) <https://wikileaks.org/plusd/cables/09BANGUI86_a.html> accessed 27 August 2014.

[11] WikiLeaks, 'Chargé Raises SARG Travel Restrictions With MFA' (26 April 2007, Cable 07DAMASCUS401_a) <https://wikileaks.org/plusd/cables/07DAMASCUS401_a.html> accessed 27 August 2014.

[12] The obligation even allows agents of a receiving State to inspect the personal baggage of a diplomatic agent in his or her presence when there are serious grounds for presuming that it contains articles that violate such local rules (Art 36(2) VCDR). Such inspection cannot be conducted in the case of a diplomatic bag (Art 27(3) VCDR).

missions in those quantities that are 'required for official purposes'. The term 'official purposes' covers acts in the performance of various diplomatic functions as well as small-scale cocktail parties organized by the mission.[13] States determine quotas on the basis of reciprocity or make their purchase subject to a prior authorization by local authorities.[14] Third, on other occasions, the Vienna Convention is more subtle in formulating that local laws and regulations apply. For example, when diplomatic agents perform consular functions, permissible under the terms of Article 3(2) of the VCDR, it is implied that they have to respect local laws while doing so.[15] Diplomats, for example, cannot perform marriages in the embassy's premises unless it is permitted under local law.[16] Practice varies around the globe: Filipinos, for example, can get married in their country's embassy in Qatar, and, recently, the first gay couple were married at the British Embassy in Vietnam. Other diplomatic representations (eg that of the Netherlands to the Philippines and the American mission to Japan) note on their websites that citizens cannot get married at the embassy. Belgium, in its practice as a sending State, recently revoked this competence altogether.[17]

Violations of Article 41(1) VCDR have been a source of resentment for local governments since the early days of the VCDR. In more recent years, the annoyance has become much more 'common', as citizens have become more vocal in expressing their disapproval of the behaviour of certain diplomats in their home towns. The topic also serves as a popular item in the media. In the Netherlands, a TV show featured short items in which a reporter confronted diplomats with their obligations as responsible road users in The Hague.[18] When the reporter, in one of his quests, was physically assaulted by an employee of the Angolan Embassy, the Ministry of Foreign Affairs felt compelled to invite the Ambassador to discuss the

[13] The exemption also applies to large-scale official receptions (the example is given of a reception in connection to the World Economic Forum in Davos), provided that the politicians of the receiving country in its capacity as the host country are invited to it. See Ordinance relating to customs privileges for diplomatic missions in Bern and consular posts in Switzerland of 23 August 1989, SR 631.144.0; and the Swiss Manual for Embassies and Consulates, 'Importation of alcoholic beverages, tobacco products and foodstuffs' (Eidgenössisches Departement für auswärtige Angelegenheit, Bern 2011).

[14] See eg the reciprocal arrangements between Belgium, the Netherlands, and Luxembourg, Ministerial Decree of 17 February 1960, Belgian State Gazette 18 February 1960.

[15] Article 3 of the VCCR spells out that '[consular functions are] exercised by diplomatic missions in accordance with the provisions of the present Convention'. Article 5 VCCR subjects the performance of a number of consular functions to the laws and regulations of the receiving State; Roberts (n 3) 151.

[16] 'An Average of Eight Civil Marriages a Week at Philippine Embassy' *Gulf Times* (Qatar, 18 May 2013) <http://www.gulf-times.com/qatar/178/details/353009/an-average-of-eight-civil-marriages-a-week-at-philippine-embassy>; British Embassy Hanoi, 'The British Embassy Celebrates its First Same Sex Marriage in Vietnam' <https://www.gov.uk/government/world-location-news/the-british-embassy-celebrates-its-first-same-sex-marriage-in-vietnam> both accessed 19 August 2014.

[17] See Chapter 4 of Belgium's new Consular Code, Law of 21 December 2013, Belgian State Gazette 30 April 2014, entry into force 15 June 2014, deleting arts 165(2) and 170bis of the Civil Code.

[18] 'PowNews' is a TV-show broadcasted on *NPO 3*, operated by a Dutch public broadcasting organization. The short pieces called *diplomatenjacht* ('hunting for diplomats') were a recurring item in 2013 and 2014.

incident.[19] Moreover, the Dutch government shortly thereafter released a statement that it would 'avail itself of every opportunity to deal with foreign diplomats who commit acts of serious misconduct while in the Netherlands' and that it would 'more frequently ask for diplomatic immunity to be waived'.[20] This is remarkable, since the Netherlands, similar to most countries, has a tradition of Members of Parliament questioning the Minister of Foreign Affairs on the ill-behaviour of diplomats at regular times on behalf of the citizens.[21] The role which citizens can play in this, either directly or via the media, is new and it can at first sight add extra dynamics of accountability to the diplomatic system.

2.1.2 The obligation to not interfere in the internal affairs of the receiving State

The second obligation under Article 41(1) serves a more political purpose. The last sentence of the provision speaks of the duty for persons enjoying immunities to not 'interfere in the internal affairs' of the receiving State.[22] An example provided in the 1958 ILC Commentary is the prohibition to take part in political campaigns.[23] Instances of direct meddling in political campaigns are rare, although infractions have been reported in recent years. States, rightfully so, do not appreciate that ambassadors take sides in, or speak at, pre-election rallies.[24] However, diplomatic cables obtained by WikiLeaks indicate that these practices still occur. Prior to the 2006 Peruvian presidential election, for example, the US Ambassador met with opposition leader Castaneda to discuss appropriate strategies for dealing with the other candidate and later President Humala. A leaked cable noted that Castaneda's views on Humala's popularity, and 'on the ways to undermine it, are worth paying attention to'.[25] A 2009 cable, moreover, reveals that the US Embassy in Venezuela donated $10 million to opposition parties and NGOs to counter

[19] L Klompenhouwer, 'Politie onderzoekt mishandeling verslaggever door diplomaten' *NRC Handelsblad* (Rotterdam, 20 November 2013) <http://www.nrc.nl/nieuws/2013/11/20/politie-onderzoekt-mishandeling-powned-verslaggever/> accessed 19 August 2014.

[20] Ministry of Foreign Affairs, 'Netherlands to Seek More Frequent Waiver of Diplomatic Immunity' <http://www.government.nl/news/2014/04/23/netherlands-to-seek-more-frequent-waiver-of-diplomatic-immunity.html> accessed 19 August 2014.

[21] See eg Parliamentary Question 2009Z07389, 20 April 2009 (NL), on the non-payment of parking tickets by diplomats. In Belgium, the Minister of Foreign Affairs recently communicated a list of the missions that most often receive parking tickets, and of the missions that most often fail to pay these tickets in his response to the written parliamentary question no 5-9872, 18 September 2013 (BE).

[22] See for an extensive discussion: Paul Behrens, *Diplomatic Interference and the Law* (Hart Publishing, Oxford 2016).

[23] ILC (n 4) 104.

[24] See eg a speech by the Russian Ambassador to Serbia who praised the nationalist Serb Progressive Party (SNS) at the party's rally in Belgrade on 29 October 2011, as reported by WikiLeaks <https://wikileaks.org/gifiles/docs/16/167072_-os-russia-serbia-gv-russian-diplomat-criticized-for-speech.html> accessed 17 August 2014.

[25] WikiLeaks, 'Lima Mayor Luis Castaneda on Ollanta Humala' (13 January 2013, Cable 06LIMA158_a) <https://wikileaks.org/plusd/cables/06LIMA158_a.html> accessed 1 November 2016.

the Chavez Government.[26] It is also doubtful whether an ambassador can make statements after elections, for example, to congratulate the winner. In the wake of elections, it is advisable that missions only release neutral statements, for example, to congratulate the people of the sending State on holding a peaceful election or to have the sending State's government rather than the ambassador convey a message of congratulations.[27] It is also commonly accepted that an embassy can deliver a message of congratulations on behalf of its Head of State or government.[28] States that consider diplomats who sit together with, or openly support, opposition leaders (outside of election periods) in violation of Article 41(1) are a different case.[29] In February 2014, the government of Venezuela announced that it had expelled the US Embassy's Chargé d'Affaires and two consular agents for inciting anti-government protests.[30] The diplomats were declared *persona non grata* after releasing statements approving of protests in Caracas against President Maduro.[31] This incident followed a similar expulsion in 2013 of US diplomats accused of meeting with opposition leaders and encouraging 'acts of sabotage' against Venezuela.[32]

The above examples reveal a certain tension between Article 41 and Article 27(1) of the Vienna Convention. The latter article obliges host States to permit and protect free communication through appropriate means for official purposes on the part of the missions on its territory. The one exception to this rule for the mission is the instalment and use of a wireless transmitter, for which the consent of the receiving State is required. In the Australian practice, such permissions are also required for the installation of satellite receiving dishes on the premises of the mission and are made subject to reciprocal approval in the country making the request, while, in Sweden, certain radio transmitters are explicitly exempted from the license obligation.[33] It is not disputed that missions can, in principle,

[26] ibid, and WikiLeaks, 'Request for Additional Funds to Help Strengthen Local Governments and Civil Society Groups' (27 March 2007, Cable 09CARACAS404_a) <https://wikileaks.org/plusd/cables/09CARACAS404_a.html> accessed 20 August 2014.

[27] See eg the joint statement of the embassies of the US, UK, and the Netherlands to congratulate the local government on a well-administered election day in Georgia on 15 June 2014 <http://georgia.usembassy.gov/news-events/emb_news2014t/16062014js.html> accessed 18 August 2014.

[28] See eg the congratulatory message of the Chinese Prime Minister on the assumption of office of the Prime Minister of India, posted on the website of the Embassy of the People's Republic of China in India on 27 May 2014, <http://in.chineseembassy.org/eng/embassy_news/t1159881.htm>; or the message on the website of the Embassy of Vietnam in Washington DC, in which the Vietnamese President and Prime Minister on 7 November 2012 congratulated Barack Obama on his re-election as President of the US, <http://vietnamembassy-usa.org/news/2012/11/congratulations-president-obama>, both accessed 18 August 2014.

[29] Roberts (n 3) 153.

[30] The chargé d'affaires was the most senior US diplomat in Caracas at the time; the US and Venezuela have not appointed Ambassadors in each other's capitals since 2010.

[31] G Gupta and B Ellsworth, 'Venezuela Expels Three US Diplomats, Protests Rumble' *Reuters* (Caracas 17 February 2014).

[32] B Ellsworth and E Chinea, '*Yankees Go Home!*: Venezuelan President to Expel Top US Diplomat' *Reuters* (Caracas 1 October 2013).

[33] Australian Department of Foreign Affairs and Trade, 'Protocol Guidelines', §5.4.2-3, <http://dfat.gov.au/about-us/publications/corporate/protocol-guidelines/Pages/protocol-guidelines.aspx>; and the Swedish Protocol Department of the Ministry of Foreign Affairs, 'Diplomatic Guide', §19.6

communicate freely with the sending State's government,[34] other missions and consulates, international organizations, and the sending State's nationals located in the receiving State's territory. The wording of the VCDR is also favourable in this regard: the protection of 'the interests of the sending State and of its nationals, within the limits permitted by international law' constitutes a function of a diplomatic mission (Article 3(1)(b) VCDR). The safeguarding of such interests often requires the consultation of nationals, including corporations investing in the foreign State.[35] In the 1958 ILC Commentary, it was explicitly accepted that '[t]he making of representations for the purpose of protecting the interests of the diplomatic agent's country or of its nationals in accordance with international law does not constitute an interference in the internal affairs of the receiving State within the meaning of this provision'.[36] It is unclear whether the protection of the interests of the sending State would go as far as allowing a diplomat to criticize the trial in the receiving State's court of law of local staff employed by the sending State's government. An example was nevertheless provided in January 2006 by a US diplomat in Ethiopia who described the decision by Ethiopian government authorities to try 129 opposition leaders, journalists, and local aid workers on charges including treason and genocide as 'divisive'.[37] On the other hand, criticizing a third State, which is strictly speaking not an interference in the 'internal' affairs of the receiving State, is not allowed if it would jeopardize the relations between the latter and the former.[38]

As was observed earlier, the maintenance of lines of communication with opposition groups, NGOs, and citizens of the receiving State tends to be more ambiguous. Although States generally allow foreign diplomatic agents to interact with Members of Parliament and representatives from business, academia, civil society organizations, arts, and so on, this is not the case everywhere. One of the reasons is that such meetings are a convenient way to exercise influence locally without having to interact directly with government bodies.[39] In addition, there

<http://www.government.se/government-of-sweden/ministry-for-foreign-affairs/diplomatic-portal/diplomatic-guide> both accessed 15 October 2015.

[34] But see the restrictions, stemming from Article 41(2) VCDR, as to how the mission is supposed to conduct business (discussed in section 2.2).

[35] Paul Behrens, 'Diplomatic Interference and Competing Interests in International Law' (2012) 82 British Yearbook of International Law 178–274, 195.

[36] ILC (n 4) 104.

[37] A Al-Hilweh, 'Trial of Opposition Activists' *Irin News* (Addis Ababa, 5 January 2006) <http://www.irinnews.org/report/57721/ethiopia-trial-of-opposition-activists-divisive-us-diplomat> accessed 18 August 2014.

[38] According to Richtsteig, such statements are not permitted 'soweit sie geeignet sind, die politischen Beziehungen des Empfangsstaat zu einem dritten Staat zu belasten, und soweit sie die Grenzen der legitimen Wahrnehmung eigener Interessen überschreiten'; Michael Richtsteig, *Wiener Übereinkommen über diplomatische und konsularische Beziehungen: Entstehungsgeschichte, Kommentierung, Praxis* (2nd edn, Nomos, Baden-Baden 2010) 102.

[39] See eg a 2006 e-mail of the Chargé d'Affaires of the US Embassy in Damascus: 'we are also attempting to reach to Syria's wider civil society. This wider civil society in Syria may provide a significant opportunity for US influence but equally presents some of the greatest challenges'; WikiLeaks, 'Reaching Out to Syrian Civil Society' (21 December 2006, Cable 06DAMASCUS5422_a) <https://wikileaks.org/plusd/cables/06DAMASCUS5422_a.html> accessed 27 August 2008.

exists an increased need to interact with the unorganized part of society.[40] The internet allows for more efficient communication with 'ordinary' citizens; setting up a website is an essential requirement for the diplomatic mission nowadays. The argument can also be made that such contacts are in the 'interests of the sending State' and are a normal exercise of a diplomat's functions. Moreover, other diplomatic functions benefit from contacts with locals too: learning the views of academia, civil society, opposition parties, and the like will contribute not only to the 'promotion of friendly relations' between the sending State and the receiving State (and not just their governments), but also to the development of their economic, cultural, and scientific relations (Article 3(1)(e) VCDR) and to ascertaining 'conditions and developments' in the receiving State (Article 3(1)(d) VCDR).[41]

Quite a number of States consider it improper interference in domestic affairs when diplomats actively get involved in human rights related issues. Some legal scholars have expressed doubts as to whether uttering disapproval regarding a human rights situation is permitted or appropriate in a diplomatic context.[42] Increasingly, however, scholars argue that international human rights law requires diplomats, as agents of their government, to respect, protect, and promote human rights. Balancing these two views, Behrens argues that the application of general principles of harmonization offers a way out of the conflict between diplomatic and human rights law.[43] Three arguments are worth mentioning in this context. First, multilateral human rights treaties and domestic laws contain various types of extraterritorial jurisdiction clauses.[44] Acts or omissions by diplomatic or consular agents may engage the responsibility of the sending State.[45] Second, one can qualify States' human rights commitments as a matter of 'legitimate international interest' rather than purely a matter of 'internal' affairs of the receiving State. This idea especially holds true when both the sending and receiving State are party to the same human rights treaty and there is a mutual interest in safeguarding the protection system set up by it.[46] Third, it can be argued that the mission is merely exercising its functions as understood in Article 3 VCDR while it is protecting the

[40] See eg the statement made by then US Secretary of State Hillary Clinton in R Stengel, 'Q&A: Hillary Clinton on Libya, China, the Middle East and Barack Obama' *Time Magazine* (New York 27 October 2011). See for further reading from a political science perspective, Jozef Bátora, *Foreign Ministries and the Information Revolution: Going Virtual?* (Martinus Nijhoff Publishers, Leiden and Boston 2008) in particular 29–32.

[41] For further reading, see Behrens (n 35) 220, who submits that the 'five traditional functions provide a strong method of countering accusations of meddling. In this regard, diplomats will often be able to invoke not only the text of the VCDR, but its application in State practice as well'.

[42] Jean Salmon, *Manuel de Droit Diplomatique* (Bruylant, Brussels 1994) 129. See for a discussion Richtsteig (n 38) 103; Behrens (n 35) 202.

[43] Paul Behrens, 'None of Their Business?: Diplomatic Involvement in Human Rights' (2014) 15 Melbourne Journal of International Law 190–227.

[44] See for an extensive discussion, Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP, Oxford 2013).

[45] This is the view taken by the European Court of Human Rights in *Banković and Others v Belgium and Others* (App No 52207/99) ECHR 19 December 2001, §73; and, more recently, in *Hirsi Jamaa and Others v Italy* (App No 27765/09) ECHR 23 February 2012, §75.

[46] Roberts (n 3) 153.

sending State's interests. In the light of these findings, modern theory often accepts that diplomatic missions can disclose (gross) violations of human rights in the receiving State.[47] However, as Behrens argues, there is no evidence that receiving States accept diplomatic allegations of grave human rights violations as exceptions to the rule against interference.[48]

Despite the legal and scholarly support, continuous and open criticism of a receiving State (and its human rights track record) will often work counterproductively for diplomats.[49] In the first instance it remains—both from a legal as well as pragmatic point of view—most effective to employ 'normal' diplomatic means to draw the government's attention to a certain matter. Disclosing situations to the public at large, for example through a public statement or by supporting certain causes, still should be considered as a means of last resort when negotiations with the receiving State have failed. Other ways of reporting abusive practices in the host States have also been sought and found. A particular example is that of the Dutch Embassy in Zimbabwe. The mission uses the Embassy's cat to keep Dutch citizens informed about current events in the country.[50] Since 2012, the cat eavesdrops on embassy personnel when they deliberate with 'politicians, artists and other interesting figures'. He writes weekly short opinion pieces on the mission's Facebook page with a cheerful tone, yet between the lines is quite critical on the government's (human rights) policy and the behaviour of government officials.[51] The Embassy insists that the pieces should not be seen as its official opinion, but as that of a 'strange, superstitious cat that reports what it has heard in the corridors'.[52] While this initiative deserves credit for its inventiveness and commitment to inform citizens, one may wonder whether the mission's official Facebook page is the appropriate place to do so.

2.1.3 The obligation to abstain from professional and commercial activities

According to Article 42 VCDR, diplomats cannot practice professional or commercial activities for personal profit in the host State. Unlike the obligations

[47] Denza (n 1) 377. International Law Institute, 'The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States' (1989) 63 Institut de Droit International Annuaire 338, Article 3.

[48] Behrens (n 43) 197.

[49] After issuing comments (perceived as critical) of the Czech President's decision to attend a Second World War commemoration in Moscow in the midst of the Ukraine crisis in April 2015, the US Ambassador to the Czech Republic was informed by the receiving country that the door of Prague Castle 'was closed' to him; M Kahn, 'Czech PM Criticizes Country's President after US Diplomatic Spat' *Reuters* (Prague 6 April 2015).

[50] The Embassy Cat, Professor Lovemore Shumba, 'cat-municates' through <https://www.facebook.com/DutchEmbassyZimbabwe> accessed 18 August 2014.

[51] The cat has, among others, commented on President Mugabe's expensive trips abroad, racist statements by one of the President's adjutants, 'catrights', and the handling of 'pussy riots' by local police forces.

[52] See J Roerig, 'Ambassade zet poes inop Facebook' *De Telegraaf* (Amsterdam, 18 October 2012) <http://www.telegraaf.nl/buitenland/20948538/__Ambassade_zet_poes_in_op_Facebook__.html> accessed 18 August 2014.

discussed above, Article 42 addresses the diplomatic agent rather than 'all persons enjoying privileges and immunities'. Consequently, family members of the agent remain free to perform professional and commercial activities for the purposes of personal gain in the receiving State.[53] Family members who wish to engage in profitable activities will most likely be obliged by the receiving State to follow administrative processes (eg to obtain a work permit) as set out in local laws or bilateral agreements.[54] Such an obligation stems directly from Article 41(1) VCDR on the respect for domestic regulations (eg labour law, tax regimes, and social security provisions of the host State).[55] In addition, family members are subject to obligations as imposed on receiving States by, for example, the European Union or other (regional) international organizations, on labour standards or qualifications for certain professions.[56]

Legal discussions on the application of Article 42 often revolve around the question whether a particular activity of a diplomatic agent classifies as a 'professional or commercial activity' as understood in the VCDR.[57] Traditionally, not all profitable activities seemed to be excluded a priori. At the 1961 Vienna Conference it was submitted that '[t]he proposed provision was not meant to debar diplomats from the exercise of literary or artistic activities or to prevent a diplomatic agent from acting as counsel in proceedings before the International Court of Justice'.[58] This idea has been translated into the national practice of some receiving States. Swiss law, for example, contains a provision that spells out that teaching activities on specialized subjects may constitute an acceptable side activity for which permission can be obtained by a diplomat.[59] However, over the years, it has become more difficult to draw the line. The discussion is particularly relevant in the context of Article 31(1)(c) VCDR, which excludes immunity from civil and administrative jurisdiction for professional or commercial activity carried out by a diplomat. In the context of this provision, the discomfort of immunity only arises in cases

[53] Denza (n 1) 324; Salmon (n 42) 386.

[54] Bilateral agreements used by European States are based upon the model agreement recommended in this regard by the Committee of Ministers of the Council of Europe, Annex to Recommendation R (87) 2 of 12 February 1987.

[55] See eg the French Ministry of Foreign Affairs' instruction that 'dependants authorized to engage in paid employment in France are liable to tax, as residents are, as provided under general law', <http://www.diplomatie.gouv.fr/en/the-ministry-of-foreign-affairs-158/protocol/privileges/article/exemption-from-taxation> accessed 23 August 2014.

[56] See Directive 2005/36/EC of 7 September 2005 on the recognition of professional qualifications, as amended by Directive 2013/55/EU of 20 November 2013 OJ [2013] L354/132.

[57] Even at the 1961 Vienna Conference, there was no agreed definition of the meaning of 'commercial activity': see the remarks of the American delegate, Mr Cameron, in 'Official Records of the UN Conference on Diplomatic Intercourse and Immunities' (Vienna, 2 March-14 April 1961) UN Doc A Conf 20/14, 21.

[58] UN Conference on Diplomatic Intercourse and Immunities (n 57) 212. This idea has been translated into the national practice of some receiving States. See eg the rule in Swiss law that teaching activities on specialized subjects may constitute an acceptable side activity for which permission can be obtained.

[59] Art 21(3) Ordinance to the Federal Act on the Privileges, Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State of 7 December 2007, 192.121 (last revised 15 July 2013).

of continuous commercial activity rather than single acts of commerce by diplomats.[60] This was confirmed in a recent American court case examining the term 'commercial activity' as used in the VCDR. According to the Court, the term does not have so broad a meaning as to include occasional service contracts, but 'relates only to trade or business activity engaged in for personal profit'.[61]

It is less clear whether fundraisers or charity events classify as commercial activities. The US Government, in its practice as a sending State, prohibited American ambassadors from participating in the so-called 'ice-bucket challenge' to raise money for amyotrophic lateral sclerosis (ALS).[62] An internal memo sent to diplomatic missions explained that 'concerns about preference and favouritism always arise' when ambassadors participate in charitable fundraising. The memo further reiterated that 'there are firmly established rules preventing the use of public office, such as our ambassadors, for private gain, no matter how worthy a cause'. This view stands out, given the Vienna Convention's *travaux préparatoires* and the views adopted by other States. Nevertheless, a principled approach has the advantage of eliminating at least some of the ambiguities surrounding the concept of 'personal profit'.

Finally, Article 42's wording, which targets the diplomat and not the sending State, does not bar the diplomat from carrying out tasks for the profit of that State. Such acts may trigger immunity from the civil and administrative jurisdiction of the diplomat as well as immunity of the State. The two regimes, however, should not be confused. State immunity is far more restricted and distinguishes acts of a governmental or public nature (*jure imperii*) and non-sovereign acts (*jure gestionis*) falling outside the scope of immunity from jurisdiction. It transpires from the Vienna Convention, in particular from Article 31(1) VCDR, that this distinction is not relevant to the case of immunity of the diplomatic agent. The diplomat's immunity from civil jurisdiction applies to legal proceedings which are based upon official acts, but also to legal action which concerns the agent's private sphere. Immunity from civil jurisdiction is subject only to exceptions exhaustively listed in Article 31(1) VCDR.[63] However, according to the same provision, these exceptions do not apply where the activity in question has been carried out on behalf of the sending State.

2.2 Obligations relating to how the mission conducts official business

The Convention sets out a fourth obligation, targeted at diplomatic missions in general. Under Article 41(2) of the VCDR, official business between a mission

[60] See Denza (n 1) 251, who refers to the drafting process of the VCDR.

[61] *Sabbithi v Al Saleh*, 605 F. Supp. 2d 122 (DDC 2009); *Gonzales Paredes v Vila*, 479 F. Supp.2d 187, (DDC 2007).

[62] M Lee, 'US Diplomats Barred from Ice Bucket Challenge' *Associated Press* (New York City, 21 August 2014) <http://bigstory.ap.org/article/us-diplomats-barred-ice-bucket-challenge> accessed 23 August 2014.

[63] Grant V McClanahan, *Diplomatic Immunity: Principles, Practices, Problems* (Palgrave Macmillan, New York 1989) 130.

and a receiving State's government has to be conducted with or through that State's Ministry of Foreign Affairs 'or such other ministry as may be agreed'. This requirement concerns the manner in which the diplomatic function is carried out, making it procedural rather than substantive in nature.[64] The obligation grants a monopoly for conducting business to the receiving State's MFA. The Vienna Convention does not exclude the possibility that diplomatic missions reach out to other government actors, but makes such contacts dependent on prior agreement, whether express or implied.[65] The underlying rationale of this rule is that it enables a sending State's government to control all contacts a diplomatic mission may have with its civil servants.[66] It is noted in scholarship that this principle has always been qualified: the mission can have direct contact with other ministries, agencies, or administrations.[67] This view finds support in the 1958 ILC Commentary which allowed specialist attachés to deal with other authorities directly.[68] The need has only increased since. Three modern developments have contributed to a less rigid reading of Article 41(2) VCDR: the higher degree of specialization of missions, the decentralization processes in receiving States, and the growing interconnectedness of diplomatic and consular tasks.

First, throughout the years, Ministries of Foreign Affairs have become increasingly aware of the need to organize their missions abroad in the most efficient way possible. The demands of the modern diplomatic practice justify a higher degree of professionalism and specialization within diplomatic missions. The internal structure of modern diplomatic missions reflects this idea. In the past embassies were portrayed as 'one entity'. In today's practice, the organizational chart of medium- or large-scale missions is more sophisticated. Under the authority of an ambassador, multiple departments are operational that observe police and justice tasks, economic affairs, and cultural and social affairs.[69] The specialists working in embassies, moreover, may be seconded by ministries other than the Ministry of Foreign Affairs. It is recognized that the technical sections of the mission interact with the services addressing their specific function.[70] One may think in that regard of intelligence security specialists being housed in embassies sent by the sending State who are in direct contact with the receiving States' Ministries of Defence and Justice.

Second, receiving States' internal structures have become more complicated than had been the case in the early 1960s. A considerable number of nations have federal or semi-federal structures, or have transferred competences to local levels. As a result, important law- and policy-making powers have been conveyed to constituent parts of States—sometimes even including the power to conduct external policies and conclude treaties. Diplomatic missions accredited in those

[64] Roberts (n 3) 153. [65] ILC Commentary (n 4), 104. [66] Roberts (n 3) 153.
[67] Richtsteig (n 38) 103; Denza (n 1) 384; Salmon (n 42) 138.
[68] ILC Commentary (n 4), 104.
[69] See eg Netherlands Embassy and Consulates in China, 'Organization Chart' <http://china.nlembassy.org/organization/organisation-chart> accessed 17 August 2014.
[70] ILC Commentary (n 4) 104; Roberts (n 3) 153.

States have a legitimate interest to maintain contacts at local or regional levels. A narrow reading of Article 41(2) VCDR, in the sense that it would enable a receiving State's MFA to prohibit a diplomatic mission to carry out business with regional entities, would be difficult to reconcile with the purpose and objectives of the diplomatic system. Yet in contrast to the widely accepted practices of missions dealing with other ministries at the federal level, receiving States may be less comfortable with direct interactions of missions with sub-State entities. As such, it may be the case that the MFA still requires prior agreement, according to the letter of Article 41(2). The German Federal Foreign Office has clarified by a circular note addressed to foreign missions that for all matters of '*grundsätzlicher Bedeutung*' ('of fundamental significance') they should not correspond directly with '*Landes- oder Kommunalbehörden*' ('regional or local authorities').[71] At first sight, a different view is held in Belgian practice. Foreign missions are allowed and even 'encouraged' to have direct contact with the communities and regions.[72] Nevertheless, here too we observe that the federal Ministry of Foreign Affairs deals with certain topics exclusively. In its guidelines on the topic, Belgium reserves strictly political matters, requests for official visits to the Prime Minister, and questions concerning the application of the VCDR to the MFA.[73]

Third, in practice the growing interconnectedness of politics and economic and commercial affairs of sending States abroad, and between diplomatic and consular functions, has also contributed to an increase in the business conducted by diplomatic missions with local authorities. Diplomatic functions are mostly carried out through interaction with the central government of the receiving State, as opposed to consular functions, which are performed through contact with local actors, such as enterprises, police or prison officers, the cultural sector, and so on.[74] However, without denying the important differences between diplomatic and consular functions, it is fair to say that in modern practice a complete distinction of these tasks is unfeasible. Both Vienna Conventions foresee the possibility of consular functions being performed by diplomatic agents.[75] As explained, the legal framework governing the performance of consular functions by diplomats is the VCCR rather than the VCDR.[76] Interestingly, it can be noted that Article 70(3) VCCR expressly permits diplomatic missions to interact with local authorities. It allows missions to address the local authorities of the consular district in the

[71] Richtsteig (n 38) 103.

[72] See the response of the Belgian Minister of Foreign Affairs to the question of Senator Anciaux, 1995–1996 Bull Q R Sen no 1–15, in which he stated: '[m]ême si, dans les relations internationales, la règle générale est que les États accréditants ont une connaissance approfondie de l'organisation et des caractéristiques de l'État accréditaire, l'attention d'un nouvel ambassadeur est toujours attirée sur la structure fédérale de notre pays et celui-ci est encouragé à entretenir des contacts avec les autorités communautaires et régionales'.

[73] Salmon (n 42) 138–39.

[74] Roberts (n 3) 79, 249, and 259.

[75] See Articles 3(2) VCDR and 3 VCCR.

[76] See also Article 70(1) VCCR: '[t]he provisions of the present Convention apply also, so far as the context permits, to the exercise of consular functions by a diplomatic mission'. Denza (n 1) 32; Roberts (n 3) 78–79.

exercise of their consular functions. As a result, when a diplomatic agent performs consular functions, receiving States cannot invoke article 41(2) VCDR to object to embassies addressing sub-State entities.

In conclusion, it has been observed that in current practice, Article 41(2) is no longer interpreted as requiring the explicit prior authorization of the Ministry of Foreign Affairs each time a diplomatic mission wishes to cooperate with other government actors. The obligation for diplomatic missions under Article 41(2) should be understood, first, as the duty to always refer topics of the highest importance to the MFA and, second, to keep this Ministry generally informed about exchanges with other government actors at the central and local levels.[77]

2.3 Obligations relating to the use of the premises of the mission

A fifth obligation can be found in Article 41(3) of the Vienna Convention. According to this provision, the premises of a mission must not be used in any manner incompatible with the diplomatic functions of the mission as laid down in the VCDR, general international law, or special agreements in force between the sending and the receiving States. The VCDR does not preclude foreign States from acquiring real property in the host State; rather, it obliges receiving States to facilitate the acquisition (Art 21(1)). In that sense, the requirement in Brazil for a sending State to solicit the government's prior authorization for the purchase of property that it will assign as its diplomatic mission, and to consult it with regard to the localization of such premises, is questionable in light of the principles of diplomatic law.[78]

Article 41(3) indicates that this obligation has to be analysed in the light of the rules of diplomatic law: to know in what manner diplomatic premises may be used, one has to study how diplomatic functions are defined in the VCDR, general international law, and bilateral agreements. It is thus fair to say that this obligation is also a qualified one. Moreover, the duty is closely related to the obligation in Article 41(1) to respect the laws and regulations of the receiving State. The reference in Article 41(3) to diplomatic functions as laid down 'by other rules of general international law or by any special agreements' was included to cover instances of diplomatic asylum where it is accepted as a practice between the sending and the receiving State.[79] In case of the absence of such agreements or other arrangements, offering refuge may be at odds with diplomatic functions, the non-interference principle, or with the VCDR's object and purpose.[80]

[77] Roberts (n 3) 153.

[78] Ministry of External Relations, 'Manual of Rules and Procedures on Privileges and Immunities: A Practical Guide for the Diplomatic Corps Accredited in Brazil' (Brasilia, 2010) 72.

[79] See Denza (n 1) 385. Diplomatic asylum may be permitted under customary international law or by virtue of an international agreement.

[80] Richtsteig (n 38) 102–03 notes that the premises may not be used to shelter or detain individuals, including the sending State's own nationals, without the receiving State's approval. See for an assessment in the context of the diplomatic missions the European Union operates in third countries, Sanderijn Duquet and Jan Wouters, 'Seeking Refuge in EU Delegations Abroad: A Legal Imbroglio Explored' (2015) 40 European Law Review 723–44.

While acknowledging the importance of other international agreements, the Vienna Convention remains the main source for deducing guidelines for the appropriate use of the premises. According to Article 41(3) the definition of 'diplomatic functions' serves a key role in this exercise. The provision is based on the assumption that diplomats know what their functions are and what kind of behaviour is appropriate.[81] While this may have been the case generally in 1961, this assumption has come under pressure in recent years. Legal uncertainties are compounded by the fact that Article 3 VCDR is not exhaustive.[82] In the following paragraphs we analyse the compatibility of three cases with Article 3 as well as other VCDR provisions that may offer guidance on the use of diplomatic premises.

A first case concerns the organization of elections on the premises of a mission. Most States do not oppose to this, but practice seems to require that prior notification is given.[83] Whether this is a matter of diplomatic courtesy or of legal obligation is open for debate. While the organization of elections is not the core business of an embassy, it is reconcilable with the diplomatic function to protect, in the receiving State, the interests of the sending State and of its nationals (Article 3(1)(b) VCDR). In any case, it is clear that by notifying the receiving State the latter can take the necessary (security) measures and inform local authorities. Moreover, it also provides the Ministry of Foreign Affairs with the opportunity to remind the mission of some of its obligations under the Vienna Convention, for example, its duty not to use these elections to interfere in the internal affairs of the host State, or, as is the case in Australian practice, to reiterate that 'local regulations may apply'.[84] Some countries have even more detailed guidelines. Belgium, for example, asks diplomatic missions to 'refrain from making use of Belgian public media in the election campaign or for the elections themselves' and to 'take all possible precautions to avoid demonstrations or rallies around polling stations'.[85]

Second, it is not disputed that commercial activities cannot be carried out in the premises since diplomats, as mentioned above, are not allowed to engage in such activities. Under Article 1(i) VCDR, the 'premises of the mission' are 'the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission'. The qualification as 'premises of the mission' does not depend on a title to property

[81] Chatterjee (n 5) 184.

[82] See for further reading on the diplomatic functions: Jan Wouters, Sanderijn Duquet, and Katrien Meuwissen, 'The Vienna Conventions on Diplomatic and Consular Relations' in Andrew F Cooper, Jorge Heine, and Ramesh Thakur (eds), *The Oxford Handbook of Modern Diplomacy* (OUP, Oxford 2013).

[83] See eg the Swedish Government's Note on Elections (34A) <http://www.government.se/sb/d/16264/a/194554>; the Australian Government's Protocol Guidelines on Foreign Elections <http://www.dfat.gov.au/protocol/protocol_guidelines/16.html> and the Belgian MFA's Circular Note of 15 January 2007, 'Organising of elections on the premises of a diplomatic mission' <http://diplomatie.belgium.be/en/binaries/Elections_EN_tcm312-172683.pdf> all accessed 20 August 2014. The Belgian MFA requires that it is informed in a timely manner of the exact opening hours of the polling stations and of the number of people participating in the elections.

[84] Australia's Protocol Guidelines on Foreign Elections (n 83).

[85] Belgium's Circular Note of 15 January 2007 (n 83).

but relates to the activities performed on those premises, which have to fall within the functions of a diplomatic mission in accordance with Article 3 VCDR.[86] An implication is that a diplomat's family member who is allowed to engage in a professional or commercial activity (see the discussion in section 2.1.3) cannot carry it out in the head of mission's residence. In some receiving States, practices exist in which the status of mission premises is temporarily granted to premises other than those of the mission. The Norwegian Government, for example, occasionally allows this status to non-premises 'to enable the mission to serve alcoholic beverages at for instance a national day reception held at a hotel', an activity that would otherwise be subject to licensing by the municipal authorities.[87] One condition that applies is that the purpose of the event cannot be of a commercial nature.[88]

A related matter is the question as to what extent embassies can organize social events or sports activities, especially when visitors are asked to contribute financially. Some argue that the line is drawn when the contribution exceeds the costs of the event (or, in other words, where there is a profitability goal).[89] The United States Government interprets this provision to mean that 'mission premises may not be leased or rented for social events or used for events which are not related to the conduct of diplomacy'.[90] Furthermore, it specified in a 2002 Circular Note addressed to the *corps diplomatique* in Washington DC that the use of premises for a fee to host private events, such as wedding receptions, is not permitted. Several other receiving States condone certain commercial activities, be it on reciprocal grounds or as a practice that has evolved in the course of time. In such cases, however, chances are that in case of tensions in diplomatic relations between sending and receiving States, the latter notifies the former that it will no longer accept the practice. It so happened that the US, in the aftermath of a diplomatic row with India over the arrest of a consular official, was requested by the Indian Government to close down the American Community Support Association facilities in New Delhi in order to discontinue 'commercial activities being undertaken from its embassy premises'.[91] At the sports and leisure centre, operated by the

[86] Salmon (n 42) 190. According to the European Court of Human Rights '[i]t is sufficient for the property to be "used for the purposes of the mission" of the foreign State'. See *Manoilescu and Dobrescu v Romania and Russia* (App No 60861/00) ECHR 3 March 2005, §77.

[87] Norwegian MFA (n 8).

[88] Other conditions are that the Head of Mission must be present at and hosting the event; the event is invitation-only; the owner of the premises must have agreed on the conditions by the government.

[89] Denza (n 1) 384.

[90] US Department of State, 'Circular Diplomatic Note' (Washington DC, 15 May 2002) <http://www.state.gov/documents/organization/32433.pdf> accessed 19 August 2014.

[91] R Lakshmi and K De Young, 'India Targets Expatriates' Privileges at US Club Amid Dispute over Diplomat's Arrest' *The Washington Post* (Washington DC, 8 January 2014) <http://www.washingtonpost.com/world/india-moves-to-end-expat-privileges-at-us-club-sign-of-anger-at-diplomats-arrest-in-ny/2014/01/08/761554d6-7850-11e3-a647-a19deaf575b3_story.html>; 'US Embassy Asked to Stop Commercial Activities in India' *DNAIndia* (New Delhi, 8 January 2014) <http://www.dnaindia.com/india/report-devyani-khobragade-case-us-embassy-asked-to-stop-commercial-activities-in-india-1947193> both accessed 23 August 2014.

mission, yearly memberships had been offered for purchase to non-members of the mission—a practice which the USA would not have allowed as a receiving State—to use the swimming pool, gym, and bowling alley, as well as the hairdresser, bar, and restaurant.

A related issue is the accommodation of fundraisers in support of a charitable cause. It was explained earlier in the chapter that in the 'ice bucket saga' the US State Department adopted a rather strict view on the matter. Other countries do not object to it in their practices as sending States. Recently, the Australian embassy in Amman hosted a fundraiser for a Jordanian NGO assisting Syrian refugees.[92] In view of the argument—also voiced by the US—that such activities provoke concerns about preference and favouritism and that there is essentially an element of 'personal profit' (Article 42 VCDR), it is debatable whether the accommodation of fundraisers constitutes a function of a diplomatic mission. Moreover, *in casu*, the cause can be perceived as contrary to the duty not to interfere in the internal affairs of the host State (Article 41(1) VCDR). An online fundraising event, recently organized by the Embassy of Sierra Leone in Washington DC to fight the Ebola virus disease, is another fascinating case testing the limits of diplomatic duties by provoking questions on the use of technology and the internet inside a diplomatic mission in violation of the VCDR.[93] This is of relevance, since online devices may be used not only for commercial activities, but also for far more serious issues such as the execution of cybercrime or cyberterrorism against communication facilities in the receiving State.[94] Activities carried out via a website, set up or managed from an embassy's premises, are in principle subject to the obligations under Article 41(3) VCDR. However, challenges remain for receiving States in controlling improper use.

A third case of questionable use of diplomatic premises are surveillance activities. A recent example was provided by Edward Snowden's 2013 leak of classified NSA documents revealing that acts of espionage had been conducted from within the US Embassy in Berlin. From the roof of the mission, a special unit of the CIA and NSA allegedly monitored telephone communication in Germany's government quarter.[95] The illegality of acts of espionage under international law is debated. While general public international law does not outlaw spying by itself, rules on the unlawfulness of espionage have emerged in special regimes, most prominently in humanitarian law.[96] The Vienna Convention does not expressly deal with secret

[92] 'Australian Embassy Hosts Fundraiser for Syria' *Jordan Times* (Amman 5, August 2014) <http://jordantimes.com/australian-embassy-hosts-fundraiser-for-syria> accessed 19 August 2014.

[93] The embassy sold t-shirts with the text 'Join the Embassy: Together We Can Save Lives' in August 2014, using an online social fundraising platform specialized in selling custom apparel <https://www.booster.com/ebolapandemicreliefsierraleone> accessed 20 August 2014.

[94] Won-Mog Choi, 'Diplomatic and Consular Law in the Internet Age' (2006) 10 Singapore Yearbook of International Law 117–32, 121.

[95] 'Embassy Espionage: The NSA's Secret Spy Hub in Berlin' *Der Spiegel* (Hamburg, 27 October 2013) <http://www.spiegel.de/international/germany/cover-story-how-nsa-spied-on-merkel-cell-phone-from-berlin-embassy-a-930205.html> accessed 21 August 2014.

[96] Simon Chesterman, 'Secret Intelligence' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* vol IX (OUP, Oxford 2012) 67.

intelligence gathering. However, accusations of espionage are relatively common in diplomatic practice and spying is sometimes invoked as a justification for a *persona non grata* declaration.[97] Despite the condemnation by most receiving States of the involvement of diplomats in such activities, it has proven difficult to draw a line between permitted intelligence gathering and acts prohibited under diplomatic law.[98] The VCDR, on the one hand, considers the ascertaining of conditions in the receiving State, and the reporting thereon, to be a function of a diplomatic mission (Article 3(1)(d)). It also is not uncommon for the mission to employ intelligence experts. One may think in that regard of military attachés, whose names have to be submitted for approval by the receiving State under Article 7 VCDR. On the other hand, information acquired through a violation of the law of the host State cannot be justified under diplomatic law.[99] The observation task of diplomats may only be completed by 'lawful means'. Such means can be defined in local laws, for example in espionage acts, by which diplomats have to abide (Article 41(1) VCDR). Moreover, in the *Tehran Hostages* judgment, the ICJ referred to espionage as an 'abuse of [diplomatic] functions'.[100] In light of the above, it is safe to conclude—despite the continued existence of certain practices—that the Vienna Convention prohibits intelligence activities in diplomatic premises that have been qualified as unlawful under national or international law.

3. The Consequences of a Breach of Diplomatic Obligations

As a general rule, failure by a diplomatic agent to fulfil his obligations 'does not absolve the receiving State from its duty to respect the agent's immunity'.[101] Nevertheless, receiving States have to deal with pressures to preserve order in their territory. They may have good reasons to object to certain acts of diplomats or missions. The following subsections discuss well-established as well as less well-established ways to request diplomats and sending States to observe their obligations.

[97] In the Spring of 2014, Ukraine expelled a Russian military attaché after the latter was caught receiving classified information on Ukraine's cooperation with NATO; D Sergiyenko, 'Ukraine Ousts Russian Diplomat on Espionage Charges' *The Moscow Times* (Moscow, 1 May 2014).

[98] See for a detailed discussion: Sanderijn Duquet and Jan Wouters, 'Diplomacy, Secrecy and the Law' in Corneliu Bjola and Stuart Murray (eds), *Secret Diplomacy: Concepts, Contexts and Cases* (Routledge, London 2016).

[99] Chatterjee (n 5) 184; Roberts (n 3) 89; Stefan Talmon, 'Tapping the German Chancellor's Cell Phone and Public International Law' (Cambridge Journal of International and Comparative Law Blog, 2013) <http://cjicl.org.uk/2013/11/06/tapping-german-chancellors-cell-phone-public-international-law/>; Katharina Hone, 'International Law Leaves Everyone Vulnerable in Cyberspace' (Diploblog 2014) <http://www.diplomacy.edu/blog/international-law-leaves-everyone-vulnerable-cyberspace> both accessed 21 August 2014.

[100] *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep §84.

[101] ILC Commentary (n 4) 104; Marjoleine Zieck, 'Diplomatiek En Consulair Recht' in Nathalie Horbach, R Lefeber, and Olivier Ribbelink (eds), *Handboek Internationaal Recht* (TMC Asser Press 2007) 290; Richtsteig (n 38) 101.

3.1 Sending States and their diplomats: whose obligation is it?

A question that has been left untouched until now is the assessment of who exactly bears obligations under diplomatic law.[102] A diplomat observes a function as the representative of his or her State but the VCDR, in some instances, addresses diplomats directly: Article 41(1) is directed at 'all persons enjoying such privileges and immunities'. The wording of the VCDR reflects that the diplomatic 'agent' is more than a 'mere messenger of a sovereign', as the function was conceptualized historically.[103] Grotius already considered that diplomats are 'not simply the limb of the sending state but persons with their own rights, the right of embassy'.[104] Notwithstanding, the obligations under diplomatic law are considered obligations of the sending State.[105] It is the sending State that entered into the Vienna Convention and that is responsible for compliance by its agents. Retaliatory steps taken by a host State to the detriment of individual diplomats are prohibited; this is the case even when they are intended as a countermeasure against (perceived) wrongs of the sending State, since such acts would undermine the institution of diplomacy.[106] In a number of cases however, diplomats may incur individual responsibility for breaches of their duties. This is certainly true in regard to private acts that breach Article 41(1), first sentence, or Article 42, for which the diplomat enjoys immunity (except in the three cases exhaustively listed in Art 31(1) VCDR) but is not exempted from liability. The VCDR's wording regarding the rules on the 'conduct of business' (Article 41(2)) and 'premises' (Article 41(3)) is much more general. It is the mission as a whole that has to observe these obligations rather than the individual diplomat. However, most of the diplomats' and the missions' obligations run parallel to those of the sending State.

3.2 Avenues for redress under diplomatic law

Over the years, international lawyers have extensively discussed how the breach of international legal obligations under the VCDR relates to the sanctions foreseen in that Convention and the general international law of State responsibility.[107] There are only a limited number of specific means to address violations of obligations by the diplomatic agent and/or the sending State. When a wrongdoing

[102] In its 'Draft Articles on State Responsibility', *ILC Yearbook* 2001, vol II, the ILC mainly focuses on the responsibilities of receiving States.

[103] Lechner (n 3) 245.

[104] Geoff Berridge, 'Grotius' in Geoff Berridge, HMA Keens-Soper, and Thomas G Otte (eds), *Diplomatic Theory from Machiavelli to Kissinger* (Palgrave Macmillan, Basingstoke 2001) 60.

[105] Denza (n 1) 374. See also eg the Dutch Government's position on 'Diplomatic Immunity', as reflected on their website <http://www.government.nl/issues/embassies-consulates-and-other-representations/diplomatic-immunity> accessed 22 August 2014.

[106] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, Cambridge 2002) 292.

[107] Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17 European Journal of International Law 483; Robert D Sloane, 'On

occurs, a receiving State has to resort to means of defence and sanctions provided for in diplomatic law itself.[108] Only diplomatic retorsions (ie 'unfriendly' conduct not inconsistent with any international obligation and thus by definition allowed under diplomatic law) are justifiable.[109] Based on functional grounds, the ICJ has excluded the use of general countermeasures in a diplomatic context.[110] It stressed that the existence of a 'diplomatic system', which lays down particular obligations for participating States, identifies wrongdoings as well as a limited number of specific means to address them.[111] Moreover, even in circumstances not related to the conduct of diplomatic relations, countermeasures are only allowed as long as these 'respect the inviolability of diplomatic or consular agents, premises, archives and documents'.[112]

In light of the foregoing, it is useful to recall the measures which a receiving State seeking compliance with the VCDR can adopt vis-à-vis a sending State. Actions that are considered admissible in the 'system' of the Vienna Convention range from soft options to harder ones. First, minor offences may be drawn to the attention of the head of mission or the foreign government. If the former so decides, he or she can take appropriate action (eg disciplinary sanction) regarding the diplomat in question. A receiving State may also ask the agent to voluntarily remedy any damage caused or, where appropriate, to voluntarily pay a fine, without immunity being lifted.[113] As has been explained, the receiving State can also request the sending State to waive its agent's immunity (Art 32 VCDR).

In a second step, grave breaches of diplomatic obligations or the recurring of (minor) offences may give rise to more resolute measures. The receiving State can withhold certain privileges enjoyed by the mission. This so-called 'restrictive reading of the Convention' can occur across the diplomatic spectrum. Practice has seen numerous applications: a request to downsize the mission (Art 11 VCDR), a prohibition to use radio communication equipment (Art 27(1) VCDR), and

the Use and Abuse of Necessity in the Law of State Responsibility' (2012) 106 American Journal of International Law 447.

[108] The ICJ, in *Tehran Hostages* (n 100), made clear that if a State violates a rule of diplomatic law, the injured state will be entitled to respond, but it can only apply those sanctions that are foreseen in the diplomatic system. See: Sloan (n 107) 492; L A N M (Bert) Barnhoorn, 'Diplomatic Law and Unilateral Remedies' (1994) 25 Netherlands Yearbook of International Law 39.

[109] See Salmon (n 39) 481, who submits that the VCDR 'admet la rétorsion mais ne fait aucune place aux représailles'. Such acts do not amount to countermeasures as understood by the ILC in its Draft Articles on State Responsibility (n 102) 133.

[110] '[V]iolations of diplomatic or consular immunities could not be justified even as countermeasures in response to an internationally wrongful act by the sending State' as this would undermine the institution of diplomatic relations. See the ILC's 2001 Draft Articles on State Responsibility (n 102) 134 on the *Tehran* Judgment.

[111] It is in this sense that the *Tehran Hostages Case* should be read: if a State violates a rule of diplomatic law, the injured state will be entitled to respond, but it can only apply retorsions that are foreseen in the diplomatic system—see Sloane (n 107) 492. On the 'special sanctions rule', see Barnhoorn (n 108) 43 et seq.

[112] See article 50(2)(b) of the ILC's 2001 Draft Articles on State Responsibility (n 102) 131; Salmon (n 42) 481.

[113] This is, among others, common in the Belgian (Dopagne, Duquet, and Theeuwes (n 9) 82) and Norwegian practice (n 8).

the adoption of quotas on the import of certain products by the mission (Art 36(1) VCDR). Such 'restrictive applications' of the VCDR are permissible under the Convention. This being said, the admissibility of a violation (eg the lifting of immunity) as a countermeasure remains doubtful under the 'system' of the Convention, as explained above. Some receiving States inform missions that a certain measure will be taken when a particular violation of a local law occurs. Norway, for example, reserves, on the basis of technical regulations, the right to investigate instances of interference caused by a mission's radio transmitters. The country also announced that it may impose such modifications or improvements to the installation as are necessary to resolve the problem.[114]

Ultimately, it is possible for the receiving State to have the diplomat in question removed from the territory. Usually, a request to the sending State to recall the agent will precede a *persona non grata* declaration, although both concepts are often confused. A third hypothesis is observed in practice, in which the sending State withdraws the diplomatic agent because the receiving State announces that it will no longer respect his or her diplomatic status with regard to a particular case.[115] The consequences are the same: the diplomat will return to the sending State, or, at least, terminate his functions with the mission (Art 9 VCDR).[116] This decision is a political one for which no reasons have to be given and against which no judicial appeal lies. In a recent Canadian court case, it was submitted that the 'usual rules of administrative law – those concerned with procedural fairness and the rule of law – do not apply'.[117]

Lastly, when diplomatic relations between sending and receiving States are in a difficult condition, for example, in cases of alleged interference, a number of other measures may be applied. The most serious one is the severance or termination of diplomatic (and sometimes also consular) relations, which happens only exceptionally. A recent example is Venezuela's 2014 breaking off (on the grounds of interference in internal affairs) and restoring of diplomatic ties with Panama.[118] Canada closed its Tehran embassy and expelled Iranian diplomats in 2012: during the suspension of diplomatic relations, Italy serves its interests, while Oman represents Iranian interests in Canada.[119]

[114] Norwegian MFA, n 8.

[115] See eg the recalling by Saudi Arabia of the First Secretary in its Embassy in India. The diplomatic agent was accused of confining and raping two Nepali women who worked as his domestic help. India had insisted on him being questioned by the police, but not on his removal. N Razdan, 'Saudi Arabian Diplomat Accused in Rape Case Leaves India' *BBC News* (London, 17 September 2015) <http://www.bbc.com/news/world-asia-india-34276049> accessed 3 April 2017.

[116] Jean d'Aspremont, 'Persona Non Grata' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* vol VIII (OUP, Oxford 2012); Denza (n 1) 61–73; Salmon (n 42) 348; Roberts (n 3) 206–15.

[117] *Copello v Canada* (Minister of Foreign Affairs), FCA 295 (Federal Court of Appeal, Can LII, 2003), §§ 21–22.

[118] The countries did not have diplomatic relations between 5 March and 2 July 2014, 'Venezuela Restores Ties with Panama as New President Sworn In' *France 24* (Paris, 2 July 2014) <http://www.france24.com/en/20140702-venezuela-maduro-ties-panama-new-president/> accessed 22 August 2014.

[119] Government of Canada, 'Canada-Iran Relations' <http://www.canadainternational.gc.ca/iran/canada-iran/index.aspx> accessed 22 August 2014.

3.3 The diplomatic system as a self-enforcing system

The diplomatic legal framework, by itself, has the capacity to be self-enforcing. The principle of reciprocity—a fundamental underlying principle of the diplomatic system—can also be conceptualized as a mechanism fostering compliance. Typically, reciprocity is seen as the embodiment of the States' desire to see the protection they offer to foreign diplomats in their territory equally accorded to their own diplomats who are accredited in another country.[120] In other words, reciprocity serves as the incentive for State parties to the VCDR to apply the highest standards of protection: it is in their own and their diplomats' best interest to do so. Yet, in addition to the principle of reciprocity as an interest, it also serves the related function of a legal sanctioning mechanism because it de facto facilitates the compliance of diplomats with their obligations under Article 41 VCDR.[121] In this sense, Bruno Simma and Dirk Pulkowski noted that 'at least at the time when the Vienna Convention was drafted, the ILC appears to have been of the view that the symmetry of its obligations would allow reciprocal reprisals'.[122] In the event of the violation of a well-accepted rule concerning, for instance, the freedom of movement of diplomats, the injured State may feel entitled to act in the same way as the State responsible for the violation. Such measures are in violation of the non-discrimination principle of Article 47 VCDR.[123] A more appropriate solution in the system of the Convention is for sending States to ask for compliance by noting that diplomats of the receiving State are fully entitled to such rights in the former States' territory.[124]

The reciprocity principle also has a preventive nature. Most States, in their practice as sending States, instruct their diplomats to respect obligations under the VCDR. As such, a State will want to avoid the failure of its diplomats to meet their obligations under the Vienna Convention since it may cause the receiving State to react. Similarly, protocol services of receiving States draw the rules embodied in Articles 41 and 42 to the attention of diplomats in the *corps diplomatique*, often in an administrative note sent to the missions present in a certain capital.[125]

[120] Alain Plantey, *Principes de Diplomatie* (2nd edn, Editions A Pédone 2000) 207–08.

[121] Lechner (n 3) 245.

[122] Simma and Pulkowski (n 107) 513, referring to the ILC Commentary (n 4) 105.

[123] Article 47(2)(a) VCDR allows for retorsions as well as for a restrictive reading of provisions of the Vienna Convention, yet without breaching the latter; Salmon (n 42) 54.

[124] See the example of the restriction of the movement of diplomats in Syria in 2006, discussed in n 11. By way of reaction, the American embassy, in an attempt to convince the Syrian MFA, noted that: 'diplomats normally travel all over the country to which they are posted and do not need to ask permission for such trips, adding that no such restrictions are imposed on Syrian diplomats posted to Washington or New York'.

[125] See the examples provided with regard to traffic codes (n 8). In a similar vein, see the reference in Roberts (n 3) 150, to the Memorandum on Diplomatic Immunity, sent to all new diplomats taking up posts in London, in which the UK Foreign and Commonwealth Office insists on respect for the obligations under Article 41 VCDR; see also the reminder by the Norwegian MFA that local regulations apply to the use of real estate and that 'it may be necessary to obtain relevant permits from the municipal planning and building authorities' (n 8).

3.4 The outlook for alternative compliance mechanisms

In national practice a clear trend can be discerned towards the regulation of practices with a view to limiting abuses, for example in relation to employment law disputes, traffic offences, rental disputes, or the performance of profitable activities by family members of diplomats. States, especially those that host a large number of diplomats, tend to look for creative solutions to 'force' diplomats to abide by obligations. In this, nations have been predominantly concerned with the individual duties of diplomats, especially those relating to respect for local regulations. Given the particular characteristics of the diplomatic system, proposals mostly focus on actions other than judicial enforcement vis-à-vis diplomatic agents.

As an alternative to soft compliance mechanisms, States have used media to pressure diplomats into compliance when other attempts remain unsatisfactory. One notable example is the release of general data on traffic offences as well as the names of the missions who topped the list.[126] Such 'naming and shaming' exercises receive extensive press attention and may cause sending States to remedy the situation. In addition, the application of 'unfriendly' policies that are not inconsistent with the VCDR remains popular. Previously, the restrictive application of the Convention (sometimes on the basis of reciprocity) to target either diplomats or the sending State was discussed. Yet, States seem to become more inventive in their attempts to enforce local laws. A noteworthy example of a US practice, picked up by the Netherlands and Belgium, is to withhold diplomatic licence plates of missions with outstanding traffic tickets.[127]

Some proposals have focused on reparation rather than retribution. When the American Congress passed the Diplomatic Relations Act (DRA), concerns arose in relation to the immunity from jurisdiction of diplomats. Taking a victim-oriented approach, Garley proposed to establish a 'Claims Fund' to provide adequate protection for the rights of US citizens.[128] The fund would compensate both tortious and criminal acts of foreign diplomats; yet, the offending mission's obligation to reimburse the fund would be strictly voluntary. Such proposed solutions to common problems in the diplomatic system have remained largely underdeveloped since.

[126] See for Belgium, UK, and US, B Waterfield, 'Belgium's Fury over Unpaid Parking Fines by Diplomats in Brussels' *The Telegraph* (London, 26 December 2013) <http://www.telegraph.co.uk/news/worldnews/europe/belgium/10538122/Belgiums-fury-over-unpaid-parking-fines-by-diplomats-in-Brussels.html>; 'Diplomats Owe £67m in London Congestion Charge Fines' *BBC News*, 11 July 2013, <http://www.bbc.com/news/uk-23266149> both accessed 24 August 2014. An interesting study on the correlation between political corruption of sending States and parking violations by diplomats was conducted by Raymond Fisman and Edward Miguel, 'Corruption, Norms and Legal Enforcement: Evidence from Diplomatic Parking Tickets' (2007) 115 Journal of Political Economy 1020–48.

[127] See the responses of the Belgian Minister of Foreign Affairs to parliamentary question CRIV 53 COM 236, 18 May 2011, 2 and written question no 5-9872 (n 21).

[128] Richard Scott Garley, 'Compensation for "Victims" of Diplomatic Immunity in the United States: A Claims Fund Proposal' (1980) 4 Fordham Int'l LJ 135–59.

4. Concluding Thoughts

International diplomatic law is based on a careful balancing of rights and obligations combined with strong reciprocal interests, both for sending and receiving States. This chapter focused on the obligations included in Articles 41 and 42 VCDR within the larger context of diplomatic intercourse. Article 3 VCDR on diplomatic functions also plays a crucial role, especially where the limitations of the scope of the duties is concerned. Moreover, the VCDR provisions relating to immunities, privileges, and inviolabilities cannot be disconnected from the obligations of diplomats. In addition, it was found that obligations of diplomats increasingly stem from international law and human rights law, and, at least as far as Member States of the European Union are involved, EU law.

Recent State practice also illustrates how complex societies shape a diplomat's obligations. First, practice confirms that technological advancements provoke a new set of questions on the interpretation of diplomatic duties. New espionage techniques and the increased use of cyberspace and social media by missions require a certain degree of flexibility in interpreting the VCDR. Second, we discerned a trend of 'mediatisation of diplomacy'. Diplomats use old and new media to interact with citizens, but also with States, for example to pressure them into compliance. Related to that is the rise in citizens' expectations. In their home States, citizens question governments when foreign diplomats repeatedly fail to observe their obligations. More problematic are citizens' expectations related to certain functions of diplomats—eg the participation in popular fund-raising activities or the use of an embassy for parties or sports activities—that may be at odds with diplomatic obligations. However, the issue here seems to relate to an overly broad conception of the tasks of diplomats rather than a failure to comply with obligations as such.

In light of technological developments, altered citizens' expectations and an increase in international and regional legal obligations, State practice has been subject to change over the past fifty years. Throughout this chapter we provided examples mostly of instances in which the obligations of diplomats had not been observed. Nevertheless, the Vienna Convention's system still stands. While legal arguments based on the VCDR are regularly invoked by States and sometimes rebutted, and a balance between rights and obligations is sought, the system as such has been questioned only very rarely. It remains remarkable to see how the Vienna Convention constitutes both a living instrument and a timeless charter of diplomacy.

16

The Duty of Non-Interference

Paul Behrens

1. Introduction

The duty not to interfere in the affairs of the receiving State is one of the principal obligations incumbent on diplomatic agents. It can look back on a long history;[1] yet its relevance for contemporary diplomatic relations is undiminished today. Diplomatic conduct which raises concern in this regard, frequently involves verbal messages: in August 2016, for instance, the Iraqi government asked for the withdrawal of Thamer Al-Sabhan, the Saudi Ambassador to the country, after he had stated that Shia militia were contributing to tensions with the Sunni part of the population in Iraq.[2] At times, however, the relevant conduct can dispense with words altogether and still send out a clear (and at times even dramatic) message. The case of Kevin Vickers, the Canadian Ambassador to Ireland, may be recalled in that context. In May 2016, Vickers, who had been invited to a ceremony commemorating the deaths of British soldiers in the 1916 Easter Rising, forcefully tackled a protester who had interrupted the proceedings.[3]

Today, the rule against interference has, with effect for diplomats at permanent missions in inter-State diplomacy, found its codification in the Vienna Convention. By so doing, the drafters made clear that the rule is more than a matter of protocol and courteoisie, but a legal obligation. However, the concept as enshrined in Article 41(1), remains vague: the VCDR refers to the 'duty not to interfere in the internal affairs' of the receiving State, but does not clarify which types of behaviour would fall within this remit. The ordinary meaning of the word 'interference'

[1] In that context, the case of the Spanish Ambassador to England in the 1580s, Don Bernardino de Mendoza, can be recalled. The Ambassador was involved in the 'Throkmorton plot'—a conspiracy to overthrow the rule of Elizabeth I. Acting on advice of Alberico Gentili, the English government decided to order the Ambassador's expulsion. Paul Gore-Booth (ed), *Satow's Guide to Diplomatic Practice* (5th edn, Longman, London 1979) 179, para 21.16.

[2] 'Iraq Asks Saudi Arabia to Remove Ambassador' *BBC Online* (28 August 2016) <http://www.bbc.co.uk/news/world-middle-east-37210557>.

[3] 'Canadian Ambassador Kevin Vickers Tackles Protester at Easter Rising Event in Dublin' *BBC Online* (26 May 2016) <http://www.bbc.co.uk/news/world-europe-36390617>.

does not serve to narrow the scope,[4] and the ICJ, in the few cases in which it had the opportunity to explore the concept of diplomatic interference, did not offer a definition of the term.[5]

In its discussions on the 'Draft Articles Concerning Diplomatic Intercourse and Immunities' the ILC did, however, restrict the relevant meaning of diplomatic interference in at least one respect. The original amendment, which introduced the rule of non-interference, had made reference to interference in the 'foreign politics' of the receiving State. That mention did not survive the debates. Early in the debate, the British member Fitzmaurice took issue with the phrase and stated that it was the role of diplomats 'precisely, if not to interfere, at least to concern themselves with its foreign policy'.[6] It was a view shared by other members,[7] and the 1957 draft articles only make reference to the 'internal affairs' of the receiving State, as does the VCDR itself.[8]

That limitation apart, the rule against interference still enjoys a wide scope and can indeed relate to nearly any diplomatic involvement in matters in the receiving State. On the basis of the way in which the obligation has been approached in State practice and in the literature, the relevant conduct is best understood as behaviour which introduces an outside element into internal matters of the receiving State, and, by so doing, causes a disturbance.[9]

Yet the practical application of a concept whose boundaries are drawn as wide as that, can easily cause difficulties and may indeed hamper the fulfilment of tasks which diplomatic agents feel entitled to perform. The fact must be taken into account that the VCDR expressly recognizes the existence of certain functions which attach to the diplomatic office and which may well have an impact on the same situation in which receiving States claim that conduct of interference has come into existence. Similar difficulties arise when diplomatic agents involve themselves in the protection or monitoring of human rights in the host

[4] See on this *Oxford English Dictionary* (OUP, Oxford, online version 2014) <http://www.oed.com>, 'interfere (v)', 4b and 5.

[5] In the 1950 *Asylum Case*, the ICJ noted that diplomatic asylum was, in principle, 'an intervention in matters which are exclusively within the competence' of the territorial State, *Asylum Case (Colombia v Peru)* (Judgment) [1950] ICJ Rep 266, at 275; and in the 1980 *Tehran Hostages Case*, the Court stated that interference was one of the 'abuses of [diplomatic] functions', and acknowledged that it was difficult to determine exactly when the diplomatic function of observation would involve acts such as espionage or interference (*Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran*) ICJ Reports 1980, 38, para 84 and 39, para 85). A 2009 application by Honduras, claiming a violation of VCDR art 41(1) by Brazil, never reached decision stage (*Application Instituting Proceedings by the Republic of Honduras against the Federative Republic of Brazil*, 28 October 2009 <http://www.icj-cij.org/docket/files/147/15935.pdf>, para 11).

[6] *ILC Yearbook* 1957 vol I, 145, para 76 (Fitzmaurice).

[7] See ibid 146, para 2 (Ago), para 7 (Tunkin), and para 11 (Yokota).

[8] At times, the claim is advanced that the ILC had imposed a further restriction by excluding diplomatic activities performed on instructions. Cf Eileen Denza, *Diplomatic Law* (4th edn, OUP, Oxford 2016) 377. That position does not hold up to scrutiny: the ILC records show that a reference in the draft commentary to the effect that diplomats may not interfere 'outside their functions', did not find favour with the majority and was deleted. See *ILC Yearbook* 1957 vol I, 220, para 74 (García Amador) and cf ibid para 77 (Tunkin) and para 80 (Chairman).

[9] See Paul Behrens, *Diplomatic Interference and the Law* (Hart Publishing, Oxford 2016) 56.

country—conduct which is not specifically addressed in the VCDR but which, under certain circumstances, can rely on equally valid bases in international law.

This chapter provides an examination of the rule of interference and the relevant competing norms whose simultaneous existence can inform the evaluation of diplomatic conduct in situations of this kind. It explores both confrontational and conciliatory methods to resolve the meeting of the divergent provisions and in so doing, critically engages with the question whether it is possible at all to establish objective parameters for the assessment of the underlying conduct, or whether interference is, as some have suggested, a concept which may not be susceptible to the application of objective guidelines in the field.[10]

2. Diplomatic Interference and Competing Norms

In many cases of alleged interference, the sending State does not put up a legal defence. And yet, on occasion sending States insist that their diplomats did not deserve a negative reaction, because of certain circumstances which have to be taken into account. There are two situations in particular in which defences have been advanced. The first arises when the sending State considers the conduct to fall within ordinary diplomatic functions: the envoy was 'merely doing his job'. The second concerns diplomatic involvement in human rights: in these cases, it may be the overly sensitive attitude of the receiving State that is to blame, or the envoy has again only performed tasks which fall within the ordinary functions of a mission.

2.1 Diplomatic interference and diplomatic functions

Allegations of diplomatic interference have been advanced in a wide range of situations—including incidents in which diplomatic agents made critical remarks on governmental policies, engaged in debates with members of the opposition in the receiving State, and made addresses to the public which the host government considered propaganda.

But it is not an uncommon feature in such cases that the same instrument which outlaws diplomatic interference permits diplomatic agents to take an active interest in the topics in question. It is a problem which the US Ambassador to Zimbabwe, Christopher Dell, highlighted in a radio interview in 2007. Following a question about President Mugabe's allegations that foreign diplomats were supporting the opposition, Dell stated that the government of Zimbabwe relied heavily on those parts of the VCDR which outlawed interference in internal affairs, while 'conveniently ignoring other Articles of the Convention' obliging receiving

[10] Cf Government of the Netherlands, Memorandum of Reply concerning the Bill for approval of the Vienna Convention on Diplomatic Relations, Statement of 8 March 1983, Bijl Hand II 1982/83—16644 (R1158) No 7, 36–37, in Robert Siekmann, 'Netherlands State Practice for the Parliamentary Year 1982–1983 (1984) Netherlands Yearbook of International Law 308.

States 'to allow diplomatic missions to ascertain […] the conditions and developments in the receiving State'.[11]

The difficulty arises in particular from the fact that the tasks of the diplomatic mission which the VCDR recognizes, reveal a concept which is similarly wide as that of the diplomatic duty enshrined in Article 41(1). Article 3(1) makes reference to five functions—representation, the protection of interests of the sending State and its nationals, negotiation, observing circumstances in the receiving State (and reporting on them to the sending State), and the promotion of friendly relations between both States. In this context, there are three aspects in particular which contribute to a considerable potential for friction between the relevant tasks and the duty of non-interference.

For one, as in the case of the formulation of diplomatic duties, the ILC was reluctant to go into much detail where the wording of the permissive norm of Article 3 was concerned. The five functions are therefore phrased in a rather general way, with only two restrictions which are expressly mentioned: the protection of interests is subjected to 'the limits permitted by international law', and the function of observation is likewise restricted to 'all lawful means'.[12] Yet it would be wrong to read too much into that wording: Do Nascimento e Silva is right when he points out that 'every provision' of the VCDR ultimately has to be performed within the limits of international law anyway.[13] The scope of the codified tasks is therefore extensive: the function of representation in particular can cover most areas of diplomatic life in the receiving State; the promotion of friendly relations certainly covers direct engagement with political parties and people in the host country, even where such activities constitute, in the eyes of the diplomatic hosts, partisan conduct or propaganda.

The protection of interests of the sending State is similarly wide in nature. A 2004 incident involving the British High Commissioner in Kenya (Edward Clay) offers an illustration. Clay had, before the British Business Association in Kenya, launched a strongly worded attack on alleged corruption in the government of the receiving State.[14] That conduct of this kind would result in criticism, may not appear surprising (the Kenyan Foreign Minister accused Clay of 'abus[ing] us' and called on him 'to explain the facts of the case or else […] shut up').[15] Yet on the face of it, there is no reason why conduct of this kind should not find its basis in Article 3(1)(b). Britain was the biggest foreign investor in Kenya;[16] corruption in the receiving State therefore would have had a direct effect on her

[11] SW 'Radio Africa's Violet Gonda talks with United States ambassador to Zimbabwe Christopher Dell in an interview for the Hot Seat programme', *SW Radio Africa* (20 March 2007) <http://www.zimbabwejournalists.com/print.php?art_id=1992>.

[12] VCDR art 3(1)(b) and (d).

[13] Geraldo Eulálio Do Nascimento e Silva, *Diplomacy in International Law* (A W Sijthoff, Leiden 1972) 63.

[14] Jeevan Vasagar, 'Kenyan President Faces Rebellion on Sleaze' *The Guardian* (London, 24 February 2005); Lucas Barasa, 'Criticism That Rubbed Officials The Wrong Way' *The Nation* (Kenya 3 February 2005).

[15] Vasagar (n 14). [16] ibid.

economic interests. Whether the way in which the High Commissioner protected these interests still constituted a lawful measure, is a different question to which this study will return.[17]

In its commentary on the Draft Articles on Diplomatic Intercourse and Immunities, the ILC referred to one particular activity as an example for interference: the frequent case of diplomats taking part in 'political campaigns'.[18] That reference too, is general in nature: 'political campaigns' can cover a wide area and might even include the observation of human rights demonstrations in the receiving State. Yet it is doubtful whether State practice after the adoption of the Vienna Convention allows the conclusion that the international community is willing to withdraw such activities from the remit of the function of observation.

A second reason for the prevailing difficulty concerning the co-existence of the rule against interference and diplomatic functions lies in the fact that the fulfilment of diplomatic tasks often presupposes the existence of preliminary and ancillary acts. The function of observation offers an example: some sources of diplomatic agents may feel more at ease if the flow of information goes in both directions and may indeed make this a condition for sharing their knowledge. In other instances, the details of some developments are only accessible to diplomats if they participate, to a certain degree, in the developments themselves.

And the need for preliminary and ancillary acts is further underlined by the rule of Article 26 (freedom of movement): the rationale for this freedom must at least in part be seen in the fact that it is a necessary aspect of the function of observation.[19]

Conduct which supports the function of observation may be as ostensibly harmless as the asking of questions and the discussion of particular events (although this too has sometimes triggered negative reactions).[20] At the other end of the range is conduct which involves the diplomat directly in ongoing developments. An example is the 1989 case of two British diplomats[21] in Romania who joined students and workers in their march on the national television station.[22] At the time, their conduct came under attack in their own State.[23] The diplomats themselves made express reference to the function of observation,[24] and there is little doubt that they had the opportunity to observe events in considerable detail. Whether the meeting of the function of observation and the duty of non-interference should in this case be resolved in favour of Article 3, is a different matter.[25]

[17] See text to nn 92–95 and nn 99–100, below.

[18] *ILC Yearbook* 1958 vol II, 104, art 40, para 2.

[19] Denza (n 8) 173.

[20] Cf '"Unacceptable" overseas interference over expelled envoy: Gambia' *Agence France Presse* (30 August 2001).

[21] Martin White, 'Why We Joined Student Protests, by Britons' *Press Association* (26 December 1989).

[22] Alan Travis, 'Rebirth of Romania: Thatcher Praises People's Courage' *The Guardian* (London 28 December 1989).

[23] British Members of Parliament criticized their actions (Travis, n 22), as did a former British Ambassador, see text to n 113 below.

[24] Robin Stacey, 'British Envoys Joined Revolt; Romania' *The Times* (London 27 December 1989).

[25] See text to nn 114–116 below.

The third consideration relates to the fact that even the functions which are named in Article 3(1)(a) VCDR are not meant to constitute an exhaustive list. The words '*inter alia*', which were included in the chapeau, make clear that the named tasks represent only selected members of that conceptual category. In principle, it is possible for additional functions to join their counterparts if they can find a basis in customary international law or through bilateral agreement. The list does give the clearest indication of tasks on which the international community has been able to find consensus, but the question of the existence of functions outside this provision gains some relevance where diplomatic involvement in human rights is concerned—a point which the following sub-section addresses.

2.2 Diplomatic involvement in the human rights situation in the receiving State

Diplomatic involvement in human rights has traditionally met with criticism not only by the receiving State, but by academic commentators as well. The 1979 edition of Satow, for instance, still supported a restrictive line when it stated that a head of a mission must occupy himself only with the interests of the subjects of his own State 'and especially not with those of the subjects of the local sovereign'.[26]

And yet, the consideration cannot be dismissed that human rights involvement may be based on grounds which are recognized under international law. A situation of this kind arises when the rules of diplomatic law themselves allow activities of this kind—a question which will be explored in sub-section 2.2.1. On other occasions, grounds outside diplomatic law—in particular, norms addressing the State of which the diplomatic agent is an organ—may call for involvement in the human rights situation of the receiving State. That scenario will be discussed in sub-section 2.2.2.

2.2.1 Human rights involvement within the framework of diplomatic functions

Since Article 3 does not include an exhaustive list of diplomatic tasks,[27] it is possible that customary law has identified further functions, and that these functions extend to diplomatic involvement in human rights.

But that assessment cannot be made lightly. There are numerous instances in which sending and receiving State held divergent views where the evaluation of diplomatic involvement in human rights was concerned,[28] demonstrating that there is continued sensitivity among States from different geographical regions and with different political systems where diplomatic involvement in human rights is

[26] Gore-Booth (n 1) 450. But see, for a change in direction, Ivor Roberts (ed), *Satow's Diplomatic Practice* (OUP, Oxford, New York 2009) 153, para 9.58.

[27] See text after n 25 above.

[28] See on this Paul Behrens, '"None Of Their Business?" Diplomatic Involvement in Human Rights' (2014) 15 Melbourne Journal of International Law 190, 197–98.

concerned. Given these disagreements, it is difficult to speak of a *sui generis* function to this effect which customary law recognizes: consistency of State practice can hardly be established.[29]

On the other hand, it is conceivable that human rights involvement constitutes in certain situations an emanation of one of the traditional functions which the Convention recognizes.

That is particularly clear where diplomats act as messengers of the views held by their governments, and therefore pursue the function of representation. But the function of observation, too, lends itself to obvious overlaps with diplomatic human rights monitoring: Article 3(1)(d) is certainly broad enough to encompass the human rights situation of the receiving State, at least as long as the relevant information can be obtained through publicly accessible sources. The wording of the article also takes into account the sometimes dynamic nature of the target of observation ('developments') and would, for instance, embrace the monitoring of demonstrations against perceived human rights abuses. The observation function may even cover conduct which the receiving State would consider active participation in such events. The inclusion of necessary preliminary and ancillary acts in the consideration[30] may also support the position that diplomatic agents are at times required to go beyond a merely passive presence on the sidelines—in situations, for instance, when they have to engage in conversations with the protesters themselves to obtain a clearer picture of ongoing events.[31]

Even the protective function (Article 3(1)(b)) can serve as a basis for diplomatic involvement in human rights. At first sight, it seems to go in quite a different direction: the rights in question appear to be interests of nationals of the receiving and not the sending State. But human rights violations in one State may well have an impact on the interests of another. Sen points out that such violations 'may sow the seeds of a revolution whose repercussions may not be confined within the boundary of the particular state'[32]—an observation which was dramatically reinforced by the wave of revolutions that shook the Arab world in 2011. In other cases, human rights violations set in motion a flow of refugees which had a direct impact on the affairs of the sending State.

The significance of diplomatic tasks in this context is further underlined by Article 25, which places a duty on the receiving State to 'accord full facilities' for the performance of diplomatic functions. It is a rule which, as Denza has noted, is

[29] See *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)*, ICJ Reports 1986, 98, para 186 (hereinafter 'Nicaragua Case'). Nothing, of course, prevents individual States from recognizing diplomatic human rights involvement as a function in their bilateral relations, and there are numerous instances in which sending States were able to appoint diplomats whose stated purpose it was to deal with human rights or who were appointed as 'human rights attachés'. Behrens (n 9) 74.

[30] See text at nn 19–25 above.

[31] See on this the incident involving Robin Meyer, Second Secretary of the US Interests Section in Havana in 1996, Paul Behrens, 'Diplomatic Interference and Competing Interests in International Law', (2012) 82 BYIL 203.

[32] Biswanath Sen, *A Diplomat's Handbook of International Law and Practice* (Martinus Nijhoff, Dordrecht, London 1988) 54.

'usually invoked in order to lend additional weight to a diplomatic claim or protest based on a more specific provision'.[33] In the context of diplomatic human rights involvement, Article 25 gains particular significance where nationals of the receiving State are concerned who work for the diplomatic mission. Receiving States are not always welcoming towards such employment and have resorted to negative sanctions against such employees in the past.[34] In cases of this kind, the receiving State might not only violate human rights law, but also its duty under Article 25 of the Convention, and the diplomatic mission is entitled, on behalf of the sending State, to issue a critical evaluation of the receiving State's conduct and to demand the fulfilment of its obligation.

2.2.2 Human rights involvement based on other norms of international law

In the absence of traditional functions, diplomatic involvement in human rights may yet be able to rely on norms of international law outside the norms of diplomatic relations. The addressees of such norms will usually be States themselves, but where States make use of diplomatic missions as their organs,[35] diplomats are able to invoke these rules on their behalf. At the same time, they have to observe the limitations which international law imposes on the sending State.

The presence of such permissive rules becomes apparent when a receiving State alleges interference in matters over which it cannot claim exclusive ownership. The most prominent of these situations arises if the subject concerned is an obligation which the receiving State owes *erga omnes*.[36] In view of rights affected by *erga omnes* obligations, the ICJ pointed out that 'all States can be held to have a legal interest in their protection'.[37]

And reference to *erga omnes* norms is typically made where human rights are involved—particularly where they have been subjected to severe threat. Protection from slavery, racial discrimination,[38] the prohibition of torture,[39] and the outlawing of genocide[40] have all been accepted as norms carrying *erga omnes* character. Furthermore, given the connection between international crimes and serious human rights violations,[41] there is good reason to follow those authorities on

[33] Denza (n 8) 171.

[34] See Bhagevatula Murty, *The International Law of Diplomacy* (Martinus Nijhoff, New Haven, Dordrecht, Boston, London 1989) 501. For a 2009 case in Iran, see James Tapsfield, 'UK Embassy Staff Arrested for "Role" in Iranian Unrest' *Belfast Telegraph* (29 June 2009); 'British, French Embassy Workers on Trial Over Iran Protests' *CNN.com* (8 August 2009) <http://edition.cnn.com/2009/WORLD/meast/08/08/iran.detainee.trials/>.

[35] See on this point *ILC Yearbook* 2001 vol II Pt 2, 44, art 6, commentary, para 4.

[36] *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3, 32, para 33 (hereinafter 'Barcelona Traction').

[37] ibid. [38] ibid 32, para 34.

[39] Cf International Criminal Tribunal for the Former Yugoslavia (ICTY), IT-95-17/1-T (Trial Chamber), *The Prosecutor v Anto Furundžija*, Judgment 10 December 1998, para 151.

[40] *Barcelona Traction*, 32, para 34.

[41] Cf ICTY IT-99-36-T (Trial Chamber), *Prosecutor v Brđanin and Talić*, Decision on Motion by Radoslav Brđanin for Provisional Release, Decision of 25 July 2000, fn 61.

international criminal law who suggest that the suppression of all international crimes should be an obligation *erga omnes*.[42]

A diplomat therefore who makes representations in these fields, can invoke a powerful basis for his conduct. In the literature, the view has been expressed that, given the importance of the rights affected by *erga omnes* obligations, all States must be able to intervene to defend them.[43] The ILC's Draft Articles on State Responsibility (DARS) provide for a right for any State to 'invoke' the responsibility of another State, if the latter has breached an *erga omnes* obligation,[44] and it seems clear that this at least includes the making of certain verbal representations: in Article 48(2) DARS, reference is made to particular claims that the invoking State can make against the responsible State—cessation of the wrongful act, assurances and guarantees for non-repetition and performance of the obligation of reparation.

Diplomatic statements which reflect critically on the failure of the receiving State to fulfil *erga omnes* obligations, certainly fall in this category. That does not mean that receiving States will generally display a welcoming attitude towards them: charges of interference can be expected, even if (or particularly when) the human rights violations were very serious. By itself, however, that does not weaken the basis for diplomatic conduct in this field.

This ground for diplomatic involvement gains additional strength if the sending State has not only the right to claim fulfilment of *erga omnes* obligations, but a positive duty to do so. But the identification of such duties in international law has proven difficult; and where they have been suggested in the literature, both their existence and extent tend to be subject to controversy.[45] The strongest case can arguably be made on the basis of Common Article 1 of the Geneva Conventions of 1949: under that rule, State parties 'undertake to respect and ensure respect' for the conventions 'in all circumstances'. Given the universal acceptance of the Geneva regime,[46] there is good reason to speak in this regard of norms which the

[42] See on this Larissa van den Herik, 'A Quest for Jurisdiction and an Appropriate Definition of Crime: Mpambara before the Dutch Courts' (2009) 7 JICJ 1117, 1129.

[43] Jeannie Rose Field, 'Bridging the Gap between Refugee Rights and Reality: A Proposal for Developing International Duties in the Refugee Context' (2010) 22 IJRL 512, 535. See also Institute of International Law, *The Protection of Human Rights and the Principle of Non-Intervention in the Internal Affairs of States* (Session of Santiago de Compostela, 1989) arts 1 and 2(2).

[44] *ILC Yearbook* 2001 vol II Pt 2, 126, art 48(1), and see ILC Study Group on Fragmentation of International Law, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (18 July 2006), A/CN 4/L 702 (hereinafter 'Study Group on Fragmentation'), C. Conclusions, fn 31.

[45] That is even the case where obligations deriving from the Genocide Convention are concerned: while the prohibition of genocide certainly carries *erga omnes* character, it is questionable whether the duty to prevent and prosecute the crime is of the same nature. Focarelli points out that not even contracting States have always felt an obligation to prevent the crime. Carlo Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?' (2010) 21 European Journal of International Law 125, 140.

[46] At the time of writing, the Geneva Conventions had 196 parties. International Committee of the Red Cross, 'States Parties to the Following International Humanitarian Law and Other Related Treaties as of 5 Dec 2016' <https://ihl-databases.icrc.org/ihl>.

international community accepts as applying to all its members; and it appears that the acts which State parties have to adopt under this provision would at least include diplomatic measures.[47]

Outside the Geneva Conventions, it is difficult to identify norms which stipulate for all States a duty to act if faced with *erga omnes* obligations. Where the ICJ did spell out duties incumbent upon all States, they tended to be negative obligations—such as the obligation not to recognize a particular situation[48]—and such duties may of course impact on the conduct of diplomatic agents as well.

Yet the *erga omnes* interests which are arguably of the greatest relevance in diplomatic relations concern a particular right enjoyed by peoples in receiving States: that of the realization of self-determination.[49] The political facets of the right in particular have informed diplomatic conduct in this regard. The right has thus become relevant in cases where diplomats sought contact with the political opposition in the receiving State[50] or engaged in active criticism of developments which they considered to endanger the realization of that right.

That self-determination carries *erga omnes* character, was confirmed in several decisions by the ICJ.[51] And yet, diplomatic involvement in this field will almost unavoidably give the impression of support for a particular faction; and it has therefore proved one of the most fertile fields for charges of meddling. In the ILC debates, several members referred to such conduct in a negative way: Ago, for instance, thought it 'improper action' for the head of a mission to give 'moral or financial support to a political party in the receiving State'.[52]

But here, the view of the international community may have undergone a change. It is certainly difficult to ignore the many instruments that call for the rendering of assistance by all States to peoples striving for self-determination,[53] and it is understandable that commentators like Faundez are inclined to say that the situation with regard to 'intervention' has now been reversed: where, traditionally, the involvement of third States was allowed only to assist the established government,

[47] Focarelli (n 45) 145.

[48] See eg *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 200, para 159 (hereinafter 'Wall Opinion').

[49] Charter of the United Nations (adopted 26 June 1945, entry into force 24 October 1945) 1 UNTS XVI, art 1(2) (hereinafter 'UN Charter'); International Covenant on Civil and Political Rights (adopted 19 December 1966, entry into force 23 March 1976) 999 UNTS 171, art 1(1) (hereinafter 'ICCPR'); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entry into force 3 January 1976) 993 UNTS 3, art 1(1) (hereinafter 'ICESCR').

[50] See on this the 2008 incident involving the US Ambassador to Bangladesh, Moriarty, who courted criticism when he invited the leaders of several political parties to a 'tea party' at his residence. 'US envoy discusses emergency with Bangladeshi Leaders' *BBC Worldwide Monitoring (Source: The Daily Star website, Bangladesh*, 16 July 2008); Harun ur Rashid, 'Diplomatic Norms and Some Local Diplomats', *United News of Bangladesh* (1 August 2008).

[51] *Case Concerning East Timor (Portugal v Australia)*, ICJ Reports 1995, 90, 102, para 29; *Wall Opinion*, 199, paras 155, 156.

[52] *ILC Yearbook* 1957 vol I, 149, para 36 (Ago). See also ibid 146, para 10 (Yokota).

[53] See eg UNGA Res 2625 (XXV) (24 October 1970) (hereinafter 'Friendly Relations Declaration'); UNGA Res 3328 (XXIX) (16 December 1974) and UNGA Res 31/33 (30 November 1976). At least some of these resolutions arguably reflect customary international law (cf *Nicaragua Case*, 100, para 188 in relation to the Friendly Relations Declaration).

involvement today appears to be only permitted if it assists people striving for self-determination.[54]

The right to self-determination, too, is capable of creating not only a common interest for the international community, but also certain duties for the sending State—both with regard to negative obligations (the duty not to give support to a situation which deprives peoples of this right)[55] and positive duties (the duty to assist in the realization of self-determination).[56] And the support of third States matters: peoples faced with severe curtailments of their political rights often have no other way to realise their right to self-determination but through assistance by those States and their diplomatic representatives.

On the other hand, the territorial integrity of the State against which self-determination is claimed, is likewise recognized in international law.[57] Given the existence of these diverging interests, there is good reason to accept certain limitations on the right and indeed to follow the conclusions of the so-called 'remedial school', which allows for a more explicit analysis. According to that view, peoples (outside the context of colonial or foreign oppression) must primarily strive to fulfil their right to self-determination internally; a right to external self-determination (eg through secession) exists only as a last resort, if internal self-determination has been denied to them.[58] These considerations assist in the identification of the extent to which diplomats as organs of their States can rely on self-determination as a basis for their conduct. It appears that at least the right to internal self-determination can be invoked as long as the relevant situation is covered by that concept.

This is of practical relevance in instances in which diplomatic agents assist a people's right to decide its own political development[59] by offering a critical view of irregularities in election procedures[60] or by defending the rights of the opposition. Assistance to self-determination may even extend to incitement of the local population to certain actions—as long as such actions do not themselves violate

[54] Julio Faundez, 'International Law and Wars of National Liberation: Use of Force and Intervention' (1989) 1 Afr J Int'l & Comp L 85, 96, with reference to the particular case of colonial domination.

[55] Cf *Wall Opinion*, 202, para 163 (findings) D.

[56] Friendly Relations Declaration, 5th Principle; UNGA Res 36/103 (9 December 1981), Annex, art 2(III) and *Wall Opinion*, 200, para 159. Against that view, cf *Wall Opinion* (Separate Opinion Kooijmans) para 40.

[57] On this, cf Friendly Relations Declaration, Preamble, para 15. Art 2 of the UN Charter, dealing with principles, states that members shall refrain from the threat or use of force *inter alia* 'against the territorial integrity' of any State (UN Charter art 2(4)). See also Conference on Security and Co-operation in Europe, *Final Act* (Helsinki 1 August 1975), 14 ILM (1975), 1292, at IV.

[58] *Reference Re Secession of Quebec* [1998] 2 S C R 217 (Supreme Court of Canada), para 138 (hereinafter 'Secession of Quebec'); Rob Dickinson, 'Twenty-First Century Self-Determination: Implications of the Kosovo Status Settlement for Tibet' (2009) 26 Ariz J Int'l & Comp L, 547, 553.

[59] See on this ICCPR art 1(1)2; ICESCR art 1(1)2.

[60] Cf the 2000 incident involving the British Ambassador to Peru, Robert Hart, who was accused of interference after he had noted that there had been 'a lot of irregularities during the [Peruvian presidential] campaign and during the day of the vote', Monte Hayes, 'Peru's Presidential Race Will Require a Run-Off' *Associated Press* (13 April 2000); 'Peruanischer Präsident Fujimori muß sich Stichwahl stellen' *Associated Press Worldstream – German* (13 April 2000).

international law. Incitement to lawful acts—such as an encouragement of voters to participate in forthcoming elections[61]—could thus find its ground in diplomatic support towards the realization of internal self-determination.

The question does, however, arise whether the protection of any human right can form the basis for diplomatic conduct. Freedom from slavery, from racial discrimination, and from torture are arguably rights whose protection has *erga omnes* character;[62] but it would be more difficult to consider other rights, including the right to life (by itself), in the same light.[63] Self-determination itself certainly presupposes the existence of other human rights,[64] including the 'classical' political rights—chief among them, the right to vote and to stand in elections;[65] but presumably also freedom of assembly, and association, and freedom of expression.[66]

On the other hand, self-determination is a group right, and its beneficiaries are entities which fulfil the criteria of a 'people'.[67] That constitutes a difficulty in those cases in which a diplomat made representations because the rights only of selected individuals had been violated. The general rule here will have to be that this is not an act which assists in the realization of a right owed *erga omnes*. But that rule must allow for exceptions: it is not uncommon that the receiving State targets individuals precisely because of their relevance for the group—the leaders of the group, say, or prominent journalists—and that restrictions of their rights then affect the exercise of self-determination by the collective. In situations of this kind, diplomatic representations on individual human rights violations can still relate to the breach of *erga omnes* obligations.

Outside situations where the protection of human rights corresponds to *erga omnes* interests (or to a recognized diplomatic function), it is difficult to identify grounds in international law for representations on these matters. A basis of this

[61] See on this 'Newsline 04-04-26. Macedonian Presidential candidate rejects U.S., EU calls for participation in elections' *Radio Free Europe/Radio Liberty* (26 April 2004).

[62] See text to n 39 above.

[63] If the view is followed that the prohibition on international crimes has *erga omnes* character, then certain, but not all violations of the right to life would be embraced by that concept. The taking of life, for instance, can constitute a crime against humanity or a war crime. But to qualify under these crime categories, certain contextual elements need to be in place as well (cf Rome Statute of the International Criminal Court (adopted 17 July 1998, entry into force 1 July 2002), 2187 UNTS 3, arts 7(1)(a) and 8(2)(a)(i)).

[64] See Thomas D Musgrave, *Self-Determination and National Minorities* (Clarendon Press, Oxford 1997) 98.

[65] ICCPR art 25; American Convention on Human Rights (adopted 22 November 1969, entry into force 18 July 1978) 1144 UNTS 123, art 23 (hereinafter 'ACHR'); and cf First Protocol to the European Convention on Human Rights (adopted 20 March 1952, entry into force 18 May 1954), 213 UNTS 262, art 3. For a critical view, see Daniel Thürer, 'Self-Determination', in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law, Volume 4* (Max Planck Institut für ausländisches öffentliches Recht und Völkerrecht, Amsterdam etc 2000) 364, 367.

[66] *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, 32, para 55 (hereinafter 'Western Sahara Opinion'), and see *Socialist Party and Others v Turkey* (1999) 27 EHRR 51, at para 45.

[67] UN Charter art 1(2); ICCPR art 1(1); Friendly Relations Declaration, 5th Principle. See also *Secession of Quebec*, paras 123 et seq on the definition of 'people'; and Elizabeth Chadwick, *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict* (Martinus Nijhoff, Hague, Boston, London 1996), 4 and 5.

kind can of course be specifically constructed between the sending and the receiving State,[68] or it can be derived from the provisions of a multilateral treaty. The latter scenario is of some importance, as treaties have come into existence which allow State parties to take an interest in the protection of human rights without having to demonstrate that they were affected by alleged violations. The underlying obligation has thus become a duty *erga omnes partes*.[69]

Of particular importance are, in this context, certain human rights instruments which allow one State to bring an alleged human rights violation by another State to the attention of a supervisory body.[70] This procedure may be limited to situations in which the latter State has accepted the competence of that body to receive such communications,[71] but where that is the case, the State has renounced the right to claim that the relevant human rights situation is of no concern to other Member States. That has direct consequences for diplomatic representations: diplomatic involvement in human rights which are owed *erga omnes partes*, must be possible, and diplomats may criticize the perceived violations or even warn the receiving State of pending court action if the violations are allowed to continue.

Human rights treaties then can considerably enlarge the basis for diplomatic action in this area: in the circumstances outlined above, diplomatic representations can refer to any right which the treaty addresses. But diplomats wishing to invoke this justification must also be aware of the interplay between rights and restrictions which the treaty imposes—including the limits which it accepts for the concept of the right and the margin of discretion which individual States may enjoy in their interpretation of its scope and boundaries.[72]

3. Resolving the Situation: The Interplay Between Permissive and Restrictive Norms

The fact that diplomats are often able to invoke grounds under international law for conduct which the receiving State considers interference does not yet permit

[68] See n 29 above.

[69] See Study Group on Fragmentation, 23. With regard to States that are not party to the treaty, the more restrictive rules on human rights involvement, as outlined above, continue to apply. A prominent example would be the Genocide Convention: the '*erga omnes partes*' character of the duty to prevent the crime would, in light of article I of that Convention, be difficult to deny. *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*) ICJ Reports 2007, 1, 154, para 430.

[70] See Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222 (adopted 4 November 1950, entry into force 3 September 1953), art 33 (hereinafter 'ECHR'); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entry into force 21 October 1986) 1520 UNTS 217, art 47.

[71] ICCPR art 41(1); see also ACHR art 45(1) and (2) and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entry into force 26 June 1987), 1465 UNTS 85, art 21(1).

[72] See, for instance, *Handyside v The United Kingdom* (1979–1980) 1 EHRR 737, 759 at para 57, (but see also 754, para 49 in that case).

a legal assessment of the situation. What it means is that a situation has come into existence in which different norms, ostensibly pointing in different directions, have an impact on the same situation: the rule against interference meets competing norms of international law.

The Vienna Convention itself does not offer a solution for situations of this kind. Under general international law two options suggest themselves for consideration: confrontational mechanisms, which lead to the complete subordination of one norm under the other,[73] and conciliatory approaches, which seek to achieve a co-existence of the relevant rules.

The application of a confrontational approach is at times suggested on the basis of a superior value which one of the affected norms is considered to enjoy.[74] That method has been proposed in some areas of diplomatic law as well—especially where the protection of specific human rights meets the duty to protect diplomatic inviolability.[75]

Where the ban on diplomatic interference meets the exercise of diplomatic functions, the ILC, in its commentary on the draft articles, likewise appeared to suggest a hierarchical solution, by stating that representations made to protect the interests of the sending State or its nationals do 'not constitute interference in the internal affairs of the receiving State'.[76] But it is a phrase which raises more questions than it answers. The reference to 'representations' in particular is extremely general and could include the use of insulting language or, as no addressee is specified, messages of support to the opposition. It is questionable whether the international community supports such a wide scope of diplomatic representations at the expense of the rule of non-interference.

The establishment of a hierarchy between restrictive and permissive rules in this context is indeed questionable from the outset. The meeting of the rule of non-interference with diplomatic functions or with rights arising from *erga omnes* obligations is in fact not a situation in which a superior interest meets an inferior one. When the sovereign rights of the receiving State encounter the interests of the sending State in this context, there can be little doubt that the interests on both sides are accorded a high value by the international community.[77]

[73] Such approaches may be enshrined in treaties (see eg UN Charter art 103), but they may also derive from customary law—such as the *lex specialis* rule and the *lex posterior* rule. Study Group on Fragmentation, 8, para 2(5) and 17, para 24.

[74] See eg the view of the UN Sub-Commission on the Promotion and Protection of Human Rights on the 'primacy of human rights law over all other regimes of international law', Sub-Commission on the Promotion and Protection of Human Rights (UN Economic and Social Council), *The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights*, E/CN 4/Sub.2/2000/13 (15 June 2000), para 63.

[75] See on this Secretary of State for Foreign and Commonwealth Affairs (UK), 'Government Report on Review of the Vienna Convention on Diplomatic Relations and Reply to "The Abuse of Diplomatic Immunities and Privileges"' (Cmnd 9497, 1985), para 48, with reference to the 'overriding right to self-defence or the duty to protect human life'. But see on this problem Chapter 6, Section 2.3.1 above.

[76] *ILC Yearbook* 1958 vol II, 104, art 40, commentary, para 2.

[77] For the particular case of the promotion of friendly relations, which plays an important role in cases of diplomatic propaganda, *see also* UN Charter, art 1(2).

What is required is not subordination, but a mechanism that allows the core contents of the individual interests to survive. A more detailed and case-based analysis can achieve this by allocating a weight to the relative interests, corresponding to the position they occupy in the circumstances of the individual case, and by taking into account the impact which the diplomatic measure has in a specific situation.

These are features not of a hierarchical, but of a mediating method. An approach of this kind has better hope of commanding support among States and among international courts and institutions which largely prefer conciliatory methods to confrontational ones,[78] and it would also be better aligned with the view suggested by the ILC when it stated that the meeting of rules of international law 'should be resolved in accordance with the principle of harmonization […]'.[79]

Dogmatically, harmonization is best considered a technique of interpretation which takes into account the contents of the rules that impact on the particular situation[80] and thus avoids the assumption of a normative conflict.[81] It is an approach that finds recognition in the Vienna Convention on the Law of Treaties (VCLT), whose Article 31(3)(c), dealing with methods of interpretation, requires States to consider 'any relevant rules of international law applicable in the relations between the parties'.[82] The underlying rationale for harmonization in this sense appears to be that a conciliatory approach is possible as long as a way can be found for a State and its agents to comply with the conditions that the two rules impose.[83] As a result, one norm may well condition the meaning of the other.

Among the emanations of harmonization, the mechanism of proportionality must be considered to carry particular relevance in this context. Proportionality is well established as one of the general principles to which Article 38(1)(c) of the ICJ Statute makes reference[84]—it fills the gaps of the

[78] See Marko Milanovic, 'Norm Conflict in International Law: Whither Human Rights?' 20 (2009) Duke J Comp & Int'l L 69, 71.

[79] Study Group on Fragmentation, 25.

[80] ibid 8, para 4; and *see* Milanovic (n 78) 73.

[81] See Milanovic (n 78) 98 on the presumption against norm conflict in international law. Harmonization derives its support from the practice of international courts—see eg *Al-Adsani v United Kingdom* 2001-XI, EurCtHR (2001) 79, para 55; *Loizidou v Turkey*, 310 EurCtHR (ser A) (1995), para 43; *Case Concerning Oil Platforms (Iran v United States of America)* (Judgment) [2003] ICJ Reports 161, 182, para 41. But the principle is also supported in the literature: cf Wilfred Jenks, 'The Conflict of Law-Making Treaties', 30 (1953) BYIL 401, 427–28. Sadat-Akhavi had suggested a similar non-confrontational method which he termed the 'reconciliation of norms'. In his view, a differentiation between 'interpretation' and 'reconciliation' has to be made—Seyed-Ali Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* (Martinus Nijhoff, Leiden, Boston 2003) 25 et seq and 34 et seq. But the method of finding a way which reconciles apparently conflicting rules appears to be the adoption of an understanding which allows co-existence—this, however, is a task of interpretation.

[82] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entry into force 27 January 1980) 1155 UNTS 331, art 31(3)(c), and see on this Vassilis Tzevelekos, 'The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?' 31 (2010) Michigan Journal of International Law 621, 621, 624, 631, 644, with further references.

[83] For a similar approach, see Sadat-Akhavi (n 81) 34.

[84] See on this Thomas M Franck, 'On Proportionality of Countermeasures in International Law' 102 (2008) AJIL 715, 716; Riccardo P Mazzeschi, 'Enzo Cannizzaro, Il principio della proporzionalità

law,[85] and provides a default that applies unless States have specifically opted for a deviating regulation. Its presence has thus been recognized in fields as diverse as trade law and the use of force, human rights law, and the law of the sea, but also in those instances of diplomatic law where the rule of non-interference meets with norms that permit the diplomatic conduct in question.[86] For problems stemming from the meeting of divergent norms, it provides a mechanism which avoids the often destructive consequences of confrontation while at the same time appreciating the respective position of the affected interests.

The identification of the particular elements that constitute proportionality is a more difficult task. On the basis of the tests which have been suggested in the literature and in the courts as aspects of that principle,[87] it is clear that proportionality has to include at least the performance of a comparative analysis involving an examination of the impact of the measure in question and the aim which it pursues.[88] There are two approaches to this examination that make frequent appearances in case law and academic discourse: the test of the 'least restrictive means' and that of the 'cost-benefit analysis'.

The 'least restrictive means test' inquires whether, in a given situation, alternative measures had been available that would have achieved the same objective but imposed less of a burden on the affected interest.[89] Is it necessary to use a steam-hammer when a nutcracker is available?[90]

There is indeed evidence of an awareness among members of the international community and commentators on diplomatic law that a line has to be drawn between conduct which is required in the pursuit of a legitimate interest and activities that are in excess of that. Richtsteig, for instance, accepts the fact that diplomatic missions must be able to engage in a public correction of views held within the receiving State that affect interests of the sending State, but he limits this option to acts that are 'objectively necessary' to achieve that.[91] States themselves make reference to less intrusive alternatives when they highlight 'appropriate diplomatic procedures' or 'diplomatic channels' which, in their minds, would have been preferable to the means which the relevant diplomats had at times employed.

nell'ordinamento internazionale [The Principle of Proportionality in International Law, Giuffrè 2000]' 13 (2002) EJIL 1031, 1035 (with reference to Cannizzaro's work).

[85] Cf Mads Andenas and Stefan Zleptnig, 'Proportionality: WTO Law: In Comparative Perspective' 42 (2007) Tex Int'l LJ 371, 404.

[86] For the general applicability of proportionality in these fields, see Behrens (n 31) 226, 227.

[87] See Behrens (n 9) 116.

[88] For a more detailed analysis of the requirements of proportionality, see Behrens (n 31) 228–30.

[89] ibid 231–32.

[90] See Lord Diplock's phrasing of that simile in *R v Goldstein* [1983] 1 WLR 151, 155.

[91] Michael Richtsteig, *Wiener Übereinkommen über diplomatische und konsularische Beziehungen. Entstehungsgeschichte, Kommentierung, Praxis* (Nomos, Baden-Baden 1994) 98. Bliščenko and Durdenevskij argue in favour of the application of 'tact and resolve' where the image and interests of the sending State are to be protected ('Takt und Festigkeit'), Igor Pavlovič Bliščenko [Blischtschenko] and Vsevolod Nikolaevich Durdenevskij [Durdenewski], *Das Diplomaten- und Konsularrecht* (Staatsverlag der Deutschen Demokratischen Republik, Berlin 1966) 181.

In the 2004 incident involving Edward Clay, the British High Commissioner to Kenya, for instance,[92] it was of some significance that the diplomat's critical remarks had been made at a meeting of the British Business Association in Kenya.[93] His statements resulted in a summon by the Foreign Office of the receiving State and a statement by the Kenyan Foreign Minister, who criticized him for 'ignoring diplomatic channels in making his views known'[94]—a reference therefore to available alternatives at Clay's disposal. Similar phrases have been used when diplomats chose a public or semi-public audience for statements which touched on sensitive issues.[95]

The 'least restrictive means test' certainly offers a degree of protection to affected interests in the receiving State. Yet it is also a powerful weapon in the hands of the diplomat's hosts. Less invasive alternatives can often be found: even if diplomats talked directly with the host government, differentiations can be made: a diplomat could have used oral communication instead of a note verbale,[96] he could have applied less pressure in his lobbying activities—he might even have considered not doing anything at all, but letting envoys of a third State present the case.

The difficulty of such restrictions is apparent when the fact is taken into account that diplomatic representations may concern issues of great importance and urgency—such as the danger of the commission of international crimes in the receiving State. In these situations, envoys who have to comply with such limitations risk becoming the very caricature of their profession—honourable gentlemen who, to borrow a simile by Erich Kästner, attempt to solve the 'paralysis of the globe' with camomile tea.[97]

But there is a corrective mechanism which imposes a cap on calls for less intrusive means: alternative measures must be at least of equal efficiency to achieve the objective which the measure pursues. It is a condition which again finds its support in various branches of international law.[98]

[92] See text to n 14 above. [93] Barasa (n 14). [94] ibid (paraphrasing by Barasa).

[95] See also, for an incident involving the US Ambassador to Mozambique in 1998, 'US Ambassador Accused of Meddling with Mozambican Internal Affairs' *Xinhua News Agency* 15 September 1998; 'International News', *Associated Press*, 16 September 1998.

[96] See on this Paul Behrens, 'Diplomatic Communications, Forms of', in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP, Oxford 2012).

[97] Erich Kästner, 'Fabian: Die Geschichte eines Moralisten', in Franz Josef Görtz (ed), *Erich Kästner. Werke, Band III, Romane I*, (Munich, Vienna, Carl Hanser, 1998) 7, 31 (Malmy's words).

[98] See on this Andenas/Zleptnig (n 85) 283, 389. For an application of this condition in trade law, see *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO, Appellate Body Report, AB-2000-11, WT/DS135/AB/R (12 March 2001) (with reference to General Agreement on Tariffs and Trade (opened for signature 30 October 1947, entry into force 1 January 1948) 55 UNTS 187, art XX(b)). In human rights law, cf *C v Australia*, para 8.2. The phrasing in EU/Community law tends to be less clear—there, reference is often made to the fact that the choice has to be between several 'appropriate' measures, Case C-331/88 *The Queen v Minister for Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa* [1990] ECR I-4023, para 13; Case C-174/05 *Stichting Zuid-Hollandse Milieufederatie and Stichting Natuur en Milieu v College voor de toelating van bestrijdingsmiddelen* [2006] ECR I-2443, para 28. For an application of the requirement by the EFTA court, see *Re Finmark Family Allowance Supplement: EFTA Surveillance Authority v Norway* [2006] 2 CMLR 66, para 61.

And the question of equal efficiency is of considerable significance in various cases in which diplomatic agents were accused of employing methods which exceeded 'appropriate means'. It played a role in the Clay incident as well. The High Commissioner had a strong defence at his disposal: he had reportedly raised the issue of corruption with the government of President Kibaki before;[99] and could thus be said to have exhausted the less intrusive venues which diplomatic law provided to diplomats in these circumstances. Yet the incident also shows that diplomatic conduct may have different facets, of which the selected forum is only one. The fact that, in this incident, Clay had chosen a particularly forceful manner to express himself, still gives room to the question whether such conduct had been of the same efficiency as available alternatives—or indeed carried any efficiency at all.[100]

In considerations of proportionality, the 'least restrictive means' test is often joined by another examination—that of the 'cost-benefit analysis'.[101] Cost-benefit analysis—a test accepted in various branches of international law[102]—calls for a relationship of proportionality between the advantage gained (or expected to be gained) and the negative effects that the measure generates. Is the benefit derived from the opening of a nut worth the damage which the steamhammer will cause?

That is more than a mere comparison of competing interests:[103] it is an analysis that explores the way in which the diplomatic activity has shaped them. That means, on the one hand, the identification of the negative impact of the measure on the affected interest and, on the other, the identification of the benefit which the decision is expected to carry.[104]

What the analysis also includes is an understanding of the diplomatic measure within the framework of its situational parameters. Issues such as the gravity of the danger for the relevant interests, an existing urgency calling for diplomatic action and the damage caused if no measure were taken, have, in this context, a significant impact on the assessment. The combined weight of aspects like these may indeed tip the scales in favour of the measure adopted by the diplomatic agent.

The case of the German Ambassador to Sierra Leone (Prinz) may be recalled who, in 1993, was among diplomats accused by the Sierra Leonean Foreign Minister of interference,[105] after the envoys called for the release of five journalists

[99] Barasa (n 14).

[100] When talking about corruption in the government, Clay reportedly said that '[t]hey may expect we shall not see, or notice, or will forgive them a bit of gluttony because they profess to like Oxfam lunches, [but] they can hardly expect us not to care when their gluttony causes them to vomit all over our shoes'. ibid.

[101] Cf Andenas/Zleptnig (n 85) 388.

[102] Cf Behrens (n 31) 237.

[103] But see Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff, Geneva 1987) 392, art 35, para 1389, arguably supporting a different direction in international humanitarian law.

[104] See on this Andenas/Zleptnig (n 85) 390 (arguing that the 'effects of a measure' must not be 'disproportionate or excessive in relation to the interests affected').

[105] 'Western Diplomats Accused of Interference' *BBC Summary of World Broadcasts (Agence France Presse, France*, 25 October 1993). 'Sierra Leone Declares German Ambassador Persona Non Grata' (*Agence France Presse*, 8 November 1993).

who had been arrested following their criticism of the military rule in that country.[106] An assessment under cost-benefit analysis would have to yield the result that the objective of the diplomatic action—the protection of freedom of expression as a prerequisite for the right to self-determination—was recognized under international law[107] and had come under immediate and grave threat. By comparison, the diplomatic measures do not seem to have caused any disturbances in the receiving State (aside from irritation within the government); their impact was limited in time and the negative effects, if any, would not have been irreversible.

There are of course cases in which the scales are heavier on the side of the costs than on the side of the expected benefits. The last named aspect—irreversibility of the result—plays a significant role in the weighing process; as does the extent of the damage as well as foreseeable consequences which may arise through the measure in question.[108]

The above mentioned incident involving two British diplomats in Romania (Michael Brown and Susan Laffey) in 1989 illustrates the fact that the consequences of diplomatic measures can have a very tangible impact in the receiving State.[109] In December of that year, the two diplomats accompanied students and workers in their march on the national television station.[110] After the incident, Brown described how they had joined the cheering of the crowds and shouted '[d]own with Ceaucescus'.[111] He added that the diplomats 'drove to the TV building and went through the fence and walked through the forbidden zone and stormed the building with [the crowd]', before concluding, somewhat incongruously, that they had gone along as 'fairly passive observers'.[112]

The incident triggered critical reactions even in the sending State where the former British Ambassador Graham pointed out that 'active participation, as distinct from observation, in the politics' of the receiving State was 'inconsistent' with the status of a diplomatic agent.[113] That appears to suggest that the relevant conduct had been excessive in nature. Yet it might even have passed the first test of proportionality in light of the function of observation: standing passively at the sidelines might have been less intrusive, but would not have promised the same efficiency as marching with the protesters and obtaining a detailed view of events.[114]

[106] 'Western Diplomats Accused of Interference' (n 105).

[107] On the importance of freedom of expression for the realization of the self-determination of a people, see text after n 67 above (with particular reference to journalists who have been singled out by the regime of the receiving State). See also Western Sahara Opinion, 32, para 55.

[108] The need to consider foreseeable consequences was *inter alia* claimed by several States in their pleadings to the ICJ in the case concerning the legality of nuclear weapons. They noted that a proportionality assessment, as required for the exercise of self-defence, would also have to consider 'the high probability of an escalation of nuclear exchanges', *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, at para 43. While the Court did not wish to engage in a 'quantification' of such a danger, it found that the 'profound risks' associated with nuclear weapons had to be borne in mind if States wanted to use them in accordance with the proportionality requirements of self-defence. ibid.

[109] See text to nn 21–24 above. [110] White (n 21); Travis (n 22).

[111] Stacey (n 24). [112] ibid. [113] Quoted in Denza (n 8), 378.

[114] A spokesman of the British Foreign Office appeared to explain the need for direct participation by noting that, if Brown had 'not shown some degree of enthusiasm the crowd might have asked who

The application of cost-benefit analysis, however, is likely to show the situation in a different light. The fact remains that the expected benefit of the diplomatic action was not described by them as necessary assistance to human rights in grave danger or in similarly dramatic terms. In view of the function of observation, which Brown himself highlighted,[115] it is difficult to ignore the fact that the relevant events were also covered by independent observers on the same day,[116] so that the danger to the fulfilment of that task was significantly reduced. In light of the considerable impact of the diplomatic action, it is difficult to see how cost-benefit analysis would yield a finding in the diplomats' favour. It was, in fact, the classic example of a grossly disproportionate action.

The mechanism of proportionality thus allows for the kind of assessment which the blunt tool of the hierarchical approach denies. By its very nature, it involves the application of fine distinctions and presupposes a precise understanding of measures and interests, of the dangers and benefits that are to be expected.

It is true that such an approach imposes a burden on diplomatic agents in the field. But its application is worth the effort. It serves not only to avoid normative conflict: often enough, it will avoid political difficulties as well or will at least prevent the exacerbation of an already problematic situation. Its true advantage lies in the fact that it appreciates the right to existence of interests which are not only held dear by both sides to the disagreement, but which find bases of equal and undeniable strength in the law of nations.

4. Conclusion

Diplomatic interference is only one of several fields affected by the absolute language of the VCDR which, as a rule, does not reflect on the difficult question how the respective rights and duties are meant to interact.[117]

In light of the fact that diplomats usually find themselves in a weaker position by comparison to that of the government of the receiving State, and in light also of the increased appreciation within the international community of the challenges which the protection of human rights encounters in some receiving States, there is a certain temptation to advocate a more robust view of diplomacy and to allow diplomats greater discretion in that regard.

That position, however, would ignore the considerable impact which diplomatic measures can have on affairs of the host country, and it disregards the fact that

he was. There were concerns in the crowd about the activities of the security forces', Travis (n 22); and see Stacey (n 24). In view of that, the argument can be advanced that a more passive stance might not only have impeded observation activities, but endangered the persons of the diplomatic agents.

[115] White (n 21).

[116] See, for instance, 'Romania: A Fleeing Dictator Reported Captured' *IPS – Inter Press Service* (22 December 1989); Mort Rosenblum, 'International News (Bucharest, Romania)' *Associated Press* (22 December 1989).

[117] See on this Chapter 20.

some sending States are powerful political players who would not shy away from allowing their diplomats to employ a range of intrusive means—including the use of financial support, intimidation, and propaganda—to promote their interests.

Neither on the legal nor on the political level can it therefore be an appropriate approach to subordinate one of the affected interests to the other. What is required, is the application of a mechanism that protects the concerns of the receiving State while, at the same time, allowing diplomatic agents to pursue their legitimate functions in the host country.

The discussion in this chapter has shown that the methods of harmonization—in particular the principle of proportionality—are far better suited to this task than confrontational approaches which tend to dismiss the value of legitimate objectives and invariably induce destructive consequences.

Proportionality does involve exacting tests and may compel diplomatic agents to examine the availability of less intrusive means and to understand the consequences—the blessings as well as the curses—that can be expected from the adoption of contentious measures. And yet, there are indications that this is in many regards already part of diplomatic practice: such fine distinctions are commonly made where diplomats are, for instance, placed in the unenviable position of having to lodge a complaint with the government of the receiving State.[118]

Yet situations of perceived interference can cause difficulties to host governments as well: beholden to their own constituencies as they are, they may often feel the lure of taking harsh measures against diplomats thought to have meddled in internal affairs, even where this may lead to a deterioration in the relations between sending and receiving State.

It is suggested that the following considerations have an impact on situations of this kind and are of relevance both to receiving States and diplomatic agents in this particular context.

Firstly, the right to take measures and the need to take measures are different things. Where diplomatic agents are concerned, this observation has already been outlined above: an unnecessary act may not only lead to negative political consequences, but to the legal assessment that a violation of the rule against interference had indeed come into being. But similar considerations apply to receiving States: in many cases, it is only the fact that an enraged government made public accusations of diplomatic meddling which elevated an entirely containable form of diplomatic conduct to the level of a serious incident. Reactions of this kind are neither conducive to good bilateral relations, nor can there ever be a guarantee that the outcome of the dispute, even from the perspective of objective observers, will favour the host government, which will often have shown itself as an overly sensitive actor in international relations.

Secondly, where a perceived need to act exists, it is indispensable that the author of the measures has sound knowledge of the factual and legal parameters that

[118] See the example provided in Brian Barder, *What Diplomats Do: The Life and Work of Diplomats* (Rowman & Littlefield, Lanham 2014) 51.

inform the relevant situation. The factual parameters include the shape of the relevant measures, the availability of alternatives, the existing danger to the affected interest, and the likely negative consequences of the act. The legal parameters include the grounds on which the relevant interests are based, which may stem from an area quite different from diplomatic law (such as the norms of certain human rights regimes). This, again, is a consideration which applies to diplomats and their hosts alike: at times, legal norms outside diplomatic law (such as obligations to prevent certain forms of propaganda)[119] may well add force to the receiving State's position in situations of perceived interference.

Thirdly, a good understanding of the position taken by the international community in situations comparable to the one with which the receiving State and the diplomatic agents are faced, is important both for the evaluation of customary international law in the field and for the appreciation of possibilities which may aid the position of the relevant international actor. A receiving State, for instance, may find strong support within the international community for its view that the use of insulting language by diplomatic agents violates the boundaries of permitted conduct,[120] but would find it difficult to base a blanket ban on any contact with the opposition on broad consensus among independent States.[121] In a similar vein, the position taken by the agents of other States can be of decisive importance for diplomats of a particular sending State: it is not only instrumental for the evaluation of their past conduct, but may offer opportunities for the future. A diplomatic agent who speaks out in defence of certain human rights in the receiving State may, as a solitary voice, be easily dismissed and might even face severe criticism by his hosts. A diplomat who manages to get his colleagues behind his views and to construct a collective position, is a force to be reckoned with, and it will be difficult for any receiving State to claim that conduct of this kind has no backing by the international community.[122]

The phenomenon of diplomatic interference is an aspect of international relations to which receiving State from varying backgrounds assign, without doubt, considerable importance. To diplomatic agents, the danger of such accusations often means that a particular degree of caution in the making of representations, especially on contentious issues, is indicated, and that the adoption of such measures may have to pass rigorous tests of self-assessment.

But it does not mean that diplomatic action in these areas is outlawed, and it does not mean that such measures should be discouraged.

For the fields that prove particularly fertile for controversy between sending and receiving State, are often the ones that matter most to the people in the receiving

[119] See on this Behrens (n 9) 171–91. [120] ibid 211–12, 220.

[121] For the reactions which the government of Malta received when, in 1983, it sought to ban diplomatic contacts with the main opposition party, see Alexander MacLeod, 'Malta's Democracy Is Cast in Doubt' *Christian Science Monitor* (1 March 1983), and Henry Kamm, 'Malta Takes on the World in Diplomatic War' *New York Times* (20 February 1983).

[122] See eg an 2011 initiative by twenty Ambassadors accredited to Slovakia, to support the LGBT Pride March in that country, 'LGBT Police Readied For March' *Slovak Spectator* (6 June 2011), and 'Pride Diplomats React' *Slovak Spectator* (13 June 2011).

States. They are areas marked by the suppression of freedom of speech, by the denial of the right to self-determination, by the threat of the commission of international crimes.

Diplomatic comment on any of these topics may well raise objections by the host government—it would be surprising if it did not. Yet to the people in the receiving State, such action presents itself in a very different light.

For these are comments made by persons to whom governments might listen even if they have stopped listening to their own people. The very reason that they irk the leaders of States lies in the fact that their authors are not without influence. To the protection of human rights, the importance of these measures is inestimable: they give hope where hope is dearly required, and they draw the attention of the international community to the situation on the ground. Within the receiving State itself, human rights will often have no other defender of equal authority.

Part VI

Beyond the VCDR

17

Intersections between Diplomatic Immunities and the Immunities of International Organizations

*Alison Duxbury**

Diplomatic missions and international organizations, as well as their agents and officials, are entitled to privileges and immunities pursuant to international law. These privileges and immunities have different rationales, but use the common underpinning concept of functional necessity—the idea that immunity is granted in order to enable an entity or individual to fulfil designated functions.[1] Discussion of the privileges and immunities of international organizations and their officials at the ILC followed the reports on the privileges and immunities of diplomatic agents and State representatives of international organizations. The subjects of international immunities are frequently grouped together, as is evidenced by the discussion of allegations of sexual assault against Dominique Strauss-Kahn, the former Managing Director of the International Monetary Fund (IMF), where the language used frequently invoked the terminology of diplomatic immunity rather than the immunity of an official of an international organization.[2] Indeed, given the nature of Strauss-Kahn's submissions, the Supreme Court of New York discussed various articles of the VCDR in the context of Strauss-Kahn's claim that he

* The author thanks Grace Duncan and Anna Saunders for their research assistance in preparing this chapter.

[1] For example, the Preamble of the Convention on the Privileges and Immunities of the United Nations (opened for signature 13 February 1946, entered into force 14 December 1946) 1 UNTS 15 (General Convention) provides that 'the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes'. Representatives of States and officials 'shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization'. The Preamble to the VCDR provides that the purpose of privileges and immunities 'is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions'.

[2] For example, 'Dominique Strauss-Kahn Tried to Claim Diplomatic Immunity' *The Guardian* (London, 17 June 2011) <https://www.theguardian.com/world/2011/jun/17/dominique-strauss-khan-diplomatic-immunity> accessed 22 June 2016; Russ Buettner, 'Judge in Civil Case Rejects Immunity for Strauss-Kahn' *The New York Times* (1 May 2012) <http://www.nytimes.com/2012/05/02/nyregion/strauss-kahns-claim-of-diplomatic-immunity-is-rejected.html> accessed 22 June 2016.

was entitled to absolute immunity against civil liability as a result of his position in the IMF.[3]

While the law of diplomatic immunity is based on customary international law, the VCDR and national legislation, by contrast the legal status, privileges, and immunities of international organizations are governed by a range of different international treaties, including the Charter of the United Nations[4] and the constituent instruments of other international organizations,[5] specific treaties such as the Convention on the Privileges and Immunities of the United Nations ('General Convention') and its twin relating to the specialized agencies ('Specialized Agencies Convention'),[6] and host State agreements.[7] The provisions of these treaties are often implemented through national legislation. Even this description leaves aside the complex body of law relating to UN peace operations and the immunities provided in Status of Force Agreements for members of the armed forces on UN and other operations.[8]

This wide range of sources obscures the fact that diplomatic immunity and the immunity of international organizations are both based on the concept of functional necessity.[9] Nevertheless, there are significant differences in the way in which functional necessity is interpreted and applied—the most obvious distinction being that while diplomatic agents enjoy complete immunity from the criminal and civil jurisdiction of the courts of the receiving State (with a few exceptions),[10] for the most part officials of international organizations only enjoy immunity for acts performed in their official capacity.[11] Treaty articles provide for the inviolability of international organizations and also their immunity from the jurisdiction of national courts.[12] Diplomatic missions are also inviolable,[13] but their immunity from the jurisdiction of the courts of the receiving State is governed by the law

[3] *Diallo v Strauss-Kahn*, No 307065/11, 2012 WL1533179 (NYSup May 1, 2012) 11–12.

[4] Charter of the United Nations art 105.

[5] See eg Charter of the Association of Southeast Asian Nations (opened for signature 18 November 2007, entered into force 15 December 2008) art 17; Charter of the Organization of American States (opened for signature 30 April 1948, entered into force 13 December 1951) 119 UNTS 47 arts 133–134; Constitution of the International Labour Organization, Part XIII of the Treaty of Versailles (opened for signature 28 June 1919, entered into force 10 January 1920) art 40.

[6] General Convention (n 1 above); Convention on the Privileges and Immunities of the Specialized Agencies (opened for signature 21 November 1947, entered into force 2 December 1928) 33 UNTS 261 (Specialized Agencies Convention).

[7] For example, the Agreement Between the International Committee of the Red Cross and the Swiss Federal Council to Determine the Legal Status of the Committee in Switzerland (19 March 1993); Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations (26 June 1947).

[8] For a discussion of immunities in this context see Roisin Burke, 'Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity' (2011) 16 JC&SL 63.

[9] For a brief discussion of earlier theories explaining the grant of diplomatic immunities (extraterritoriality and representative character) see Kuljit Ahluwalia, *The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other International Organizations* (Springer, 1964) 34. See also discussion at the ILC: 'Diplomatic Intercourse and Immunities' *ILC Yearbook* 1957 vol I, 2–4.

[10] VCDR art 31(1).

[11] For example, General Convention (n 1 above) art V s 18(a).

[12] ibid art II, ss 2 and 3.

[13] VCDR art 22(1).

of State immunity, which has been subject to a number of exceptions in recent years.[14] Increasingly there have been calls by commentators for the immunity of international organizations and their officials or employees to be restricted or waived.[15] More fundamentally, the concept of functionalism as the underpinning theory of the law of international organizations has also been criticized for its failure to deal with the relationship between organizations and third parties who may have been adversely affected by their actions.[16] Such discussions have been prevalent when it has been claimed that an organization has breached a human rights obligation. This is exemplified by *Mothers of Srebrenica et al v The Netherlands and the United Nations,* when a foundation representing the relatives of those killed in the Srebrenica massacre brought an action against the United Nations and the Netherlands claiming they were responsible for failing to prevent genocide.[17]

The purpose of this chapter is not to analyse either the immunity of international organizations and their officials or diplomatic immunity in detail. There are many separate analyses of the two types of immunity, including a comparative study of both published in 1976.[18] Instead, the focus is on situations where the immunities have intersected; in particular, where work on the immunities of one type of international person (diplomats) has influenced the granting of immunity to the other (officials of an international organization). Given that diplomatic immunity preceded the immunity of international organizations, it would seem logical that diplomatic immunity influenced the application of immunities to the officials of international organizations. Chanaka Wickremasinghe has written that '[b]oth diplomatic immunities and the immunities of international organizations arise from considerations of functional necessity, and … the former have inspired the latter in some respects'.[19] It is certainly true that diplomatic immunities have inspired the immunities of international organizations, but the situation is more nuanced than a direct application of the immunity of one type of international person to the other.

The chapter will begin by highlighting the issues raised during the adoption of Article 7 of the Covenant of the League of Nations and Article 105 of the Charter of the United Nations. It will then move to the work of the ILC. Although it was

[14] The interaction between the diplomatic immunity and sovereign immunity is discussed in Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th edn, OUP, Oxford 2008) 126–28. The application of State immunity in the context of employment disputes involving staff at diplomatic missions is discussed below at section 2.2.

[15] For example, Kibrom Tesfagabir, 'The State of Functional Immunity of International Organizations and Their Officials and Why It Should be Streamlined' (2011) 10 CJIL 97.

[16] Jan Klabbers, 'The Transformation of International Organizations Law' (2015) 26 EJIL 9.

[17] *Mothers of Srebrenica et al v State of the Netherlands and the United Nations* (No 10/04437, 13 April 2012, Supreme Court of the Netherlands). See also *Stichting Mothers of Srebrenica v Netherlands* (App No 65542/12) ECHR 11 June 2013.

[18] Yu-Long Ling, 'A Comparative Study of the Privileges and Immunities of United Nations Member Representatives and Officials with the Traditional Privileges and Immunities of Diplomatic Agents' (1976) 33 W&L 91.

[19] Chanaka Wickremasinghe, 'Immunities Enjoyed by Officials of States and International Organizations' in Malcolm D Evans (ed), *International Law* (4th edn, OUP, Oxford 2010) 399.

suggested as early as 1957 by a member of the ILC that it was logical that the officials of international organizations be included in a codification of diplomatic immunity,[20] it was decided that the relations between States and intergovernmental organizations would be considered after the study of diplomatic privileges and immunities.[21] The focus will then turn to the extent to which domestic case law discussing the immunities of international organizations and their officials has referred to analogous immunities for diplomatic agents. There are a number of reasons as to why the VCDR and diplomatic immunities may be cited in cases concerning the immunities of international organizations and their officials, not least the express mention of the VCDR in treaties and national legislation dealing with the immunities of international officials. However, differences between the immunities have sometimes led to confusion in domestic courts about the precise ambit of the immunities of international organizations. A more complex interaction between international immunities and diplomatic immunity is evidenced in the case law on human rights, in particular the right of access to the courts embodied in Article 6 of the European Convention on Human Rights. This group of cases demonstrates that developments in the immunity of international organizations have paved the way for similar arguments in cases concerning diplomatic missions.

1. The Role of Diplomatic Immunity in Developing the Immunities of International Organizations

1.1 The League of Nations and United Nations

In comparison with the law relating to diplomatic privileges and immunity, the law surrounding the privileges and immunities of international organizations is relatively recent. Malcolm Shaw describes the law of diplomatic relations as 'one of the earliest expressions of international law',[22] while Eileen Denza in her commentary on the VCDR writes that the 'rules protecting the sanctity of ambassadors and enabling them to carry out their functions are the oldest established and the most fundamental rules of international law'.[23] Such an ancient lineage cannot be claimed for the immunities of officials of international organizations—although in 1947 Josef Kunz stated that '[t]he problem [of the privileges and immunities of international organizations] is not quite as new as it is sometimes supposed to be'.[24] It is therefore not surprising that the language of diplomatic immunity is incorporated into the terminology associated with the newer concept of the immunities

[20] 'Diplomatic Intercourse and Immunities' *ILC Yearbook* 1957 vol I, 3–4 (comments by García Amador, 383rd Meeting, 24 April 1957).

[21] 'Relations between States and Inter-Governmental Organizations' UNGA Res 1289 (XIII) (5 December 1958).

[22] Malcolm Shaw, *International Law* (7th edn, CUP, Cambridge 2014) 545.

[23] Denza (n 14) 1.

[24] Josef L Kunz, 'Privileges and Immunities of International Organizations' (1947) 41 AJIL 828.

of international organizations. For example, when discussing the immunities of 'agents' of international organizations in 1935, Jacques Secretan highlighted a number of treaty provisions dating back to the nineteenth century 'designed to secure the independence of the agents of the international community in regard to territorial authorities, more especially by extending to such agents the treatment described as "diplomatic privileges and immunities", or similar guarantees.'[25] The need to secure the 'independence' and 'neutrality' of agents of international organizations was a key feature of some of these early provisions.[26] Despite the similarities between diplomats and agents of international organizations, Secretan also recognized that the issues faced by the two types of international person were not the same: for example, agents of organizations may require protection from their own State in a situation where States are often reluctant to grant diplomatic privileges to their own nationals.[27] The difficulties that international officials may face in being required to work in a number of different countries, including their own, has subsequently been highlighted by other commentators.[28]

The Covenant of the League of Nations confirmed the link between immunity of diplomatic premises and persons and international organizations, State representatives, and international officials, by explicitly adopting the language of diplomatic immunity. Article 7 provided that the buildings occupied by the League shall be 'inviolable' and that representatives of members of the League and its officials 'when engaged on the business of the League shall enjoy diplomatic privileges and immunities'.[29] Earlier drafts of this provision at the Commission on League of Nations appeared to uphold the territorial theory for such privileges and immunities, in providing that League buildings 'shall enjoy the benefits of extraterritoriality'.[30] However, the term was omitted from the final draft at the suggestion of Larnaude who believed the term 'inviolable' was more accurate.[31] Despite the use of the term 'diplomatic' in Article 7 it was clear that there were differences between the immunity of officials and diplomats in the Covenant—most notably, the immunity of officials and State representatives of international organizations was limited to situations when a person was 'engaged in the business of the League'.

[25] Jacques Secretan, 'The Independence Granted to Agents of the International Community in their Relations with National Public Authorities' (1935) 26 BYBIL 56.

[26] See eg Kunz and Secretan's discussion of the provisions in various treaties governing the Central Commission for the Navigation of the Rhine and the European Danube Commission: Secretan (n 25) 59–62; Kunz (n 24) 828–29.

[27] Secretan (n 25) 65.

[28] Martin Hill, *Immunities and Privileges and International Officials – The Experience of the League of Nations* (Washington DC, Carnegie Endowment for International Peace 1947) 8–9; C Wilfred Jenks, *International Immunities* (London, Stevens and Sons 1961) xxxvii.

[29] Covenant of the League of Nations, Part I of the Treaty of Versailles art 7.

[30] See 'Amalgamation of Wilson's Second Paris Draft and British Draft Suggested by Lord Eustace Percy' art IV, 'Cecil-Miller Draft, January 17, 1919' art II-A, and 'Text Agreed on by Wilson and Cecil, March 18, 1919' art VI in David Hunter Miller, *The Drafting of the Covenant* (GP Putman's Sons 1928) vol II, 121, 133, and 582.

[31] 'Eleventh Meeting of the Commission' in Miller (n 30) vol I, 317. In 1947, Kunz described extraterritoriality as a basis for diplomatic privileges and immunities as 'an untenable fiction': Kunz (n 24) 837.

The privileges and immunities of the League were subsequently elaborated in a letter from the Swiss Federal Council to the Secretary General of the League. The staff of the Secretariat and the International Labour Office (with the same status as 'public officials') were accorded the privileges and immunities of diplomats. Other staff enjoyed more limited immunity.[32] Consequently, a division was drawn between different levels of staff; with one level enjoying inviolability and full immunity from civil and criminal jurisdiction, whereas the other was granted immunity for acts performed in their official capacity. This distinction has been maintained in many subsequent treaties, including the General Convention.[33] C Wilfred Jenks described the grant of immunity in the Covenant as general in character and believed that 'the use of the concept of diplomatic immunities for the purpose of defining international immunities furnish[ed] no answer to the novel questions which arise in connection with international organizations and their officials'.[34] This was acknowledged by a Committee established by the Council of the League of Nations to consider international law topics suitable for codification. In 1927 it expressed the view that due to differences between diplomats and League officials the privileges and immunities should not be identical.[35]

During the drafting of the Charter of the United Nations at the San Francisco Conference, privileges and immunities were discussed in Committee 2 of the Commission on Judicial Organization. When the item was introduced for discussion, the Canadian representative hinged a suggested text on the importance of ensuring the independence of the Organization and proposed the adoption of a treaty by the General Assembly on the topic.[36] The Mexican representative explicitly referred to diplomatic privileges and immunities for delegates to the Council and the Assembly, but qualified the grant of such privileges and immunities to matters within the delegates' duties.[37] According to the Mexican draft, some officials of the Secretariat would also enjoy such 'diplomatic privileges and immunities'.[38] A more detailed Charter provision was proposed by Belgium—State representatives would be entitled 'in the exercise of their duties, to the immunities granted to diplomatic officials' as would the Secretary-General and other high level officials. According to this proposal, other officials would be 'entitled to immunity from

[32] See *The Provisional 'Modus Vivendi' of 1921 with the Swiss Federal Council – Letter of July 19, 1921, from the Head of the Federal Political Department to the Secretary-General of the League of Nations*, 'I. Staff' reproduced in Hill (n 28) 121–27. This agreement divided the staff into two categories: staff in the first category were accorded broad immunities, including inviolability and immunity from civil and criminal jurisdiction. Staff in the second category (comprising the technical and manual staff) enjoyed 'complete immunity in respect of acts performed by them in their official capacity and within the limits of their duties'. However, they would be 'subject to local laws and jurisdiction in respect of acts performed by them in their private capacity'.

[33] General Convention (n 1 above) art V. [34] Jenks (n 28) 1.

[35] League of Nations, Committee of Experts for the Progressive Codification of International Law, *Report to the Council of the League of Nations on the Questions Which Appear Ripe for International Regulation* (1927) cited in *ILC Yearbook* 1977 vol II(1), 143.

[36] 'Documentation for Meetings of Committee IV/2: Privileges and Immunities' (1945) 13 *United Nations Conference on International Organization* 727.

[37] ibid 728. [38] ibid 728.

legal proceedings with regard to acts performed in the exercise of their duties.'[39] However, the subcommittee appointed to draft the provision stated that it

> … has seen fit to avoid the term 'diplomatic' and has preferred to substitute a more appropriate standard, based … on the necessity of realising [the UN's] purposes and, in the case of the representatives of its members and the officials of the Organization, on providing for the independent exercise of their functions.[40]

As a result, the standard for immunities in Article 105 of the Charter emphasizes that the UN's immunities are necessary 'for the fulfilment of its purposes' and that the immunities granted to representatives of members and UN officials are linked to 'the independent exercise of their functions'.[41]

Although the Committee which drafted Article 105 moved away from the language of diplomatic immunities, the terminology is again found in the General Convention. The sub-committee of the Legal Committee at the Preparatory Commission of the United Nations established to draft this Convention in 1945 emphasised the rationale of functional necessity in the Preamble and provided for the absolute immunity of the UN 'from any form of judicial process' as well as the inviolability of its property and assets.[42] It maintained the concept of restricted immunity for the majority of UN officials in providing that '[a]ll officials of the Organization shall: (a) be immune from legal process with respect to acts performed by them in their official capacity'.[43] However, the draft Convention used the language of broader diplomatic immunities in a number of provisions, including when discussing the privileges and immunities to be given to the Secretary-General, Assistant Secretaries-General and 'their wives and infant children'.[44] Analogies with diplomatic privileges and immunities were utilized at other points in the draft Convention; for example, when discussing UN communications[45] and the privileges and immunities of State representatives to the organization.[46] The draft Convention also attempted to deal with a problem unique to international organizations; that is, the 'jurisdictional gap' created by the grant of immunity. Although diplomats are immune from the jurisdiction of courts of a receiving State, they are not immune from the jurisdiction of the sending State.[47] As there is no equivalent jurisdiction for international organizations, a dispute resolution procedure (or a waiver of immunity) is needed.[48] Consequently, the draft Convention enabled the Secretary-General to waive the immunity of officials[49]

[39] ibid 730 (supplement).

[40] 'Privileges and Immunities: Report Submitted by Subcommittee to Committee IV/2' (1945) 13 *United Nations Conference on International Organization* 778, 779. The necessity of differentiating between the privileges and immunities accorded to diplomats and those granted to officials of international organizations had been recognized earlier: see discussion in Kunz (n 24) 841.

[41] Charter of the United Nations art 105.

[42] Preparatory Commission of the United Nations, Committee 5, Sub-Committee on Privileges & Immunities, 'Draft Convention on Privileges and Immunities' (8 December 1945) UN Doc PC/LEG/34 ('Draft Convention on Privileges and Immunities') preamble and arts 2(1)–(2).

[43] ibid art 6(1)(a). [44] ibid art 6(2). [45] ibid art III(9), (10).

[46] ibid art IV. [47] This principle has been codified in VCDR art 31(4).

[48] Jenks (n 28) xxxvii. [49] Draft Convention on Privileges and Immunities art 8(1).

and provided that the UN 'shall' make provision for the resolution of disputes of a contractual or private law character, or where an official has immunity.[50] The final Convention adopted in 1946 was closely modelled on the draft that was settled at the Preparatory Commission, with the major issues raised by members of the Sixth Committee of the United Nations being concerned with the exemption of officials from taxation and the exemption from national service obligations.[51]

1.2 Discussions at the International Law Commission

Although the ILC discussed diplomatic intercourse and immunities separately from the immunities of international organizations, the interaction between the two types of immunities was briefly raised during ILC discussions on the first topic. Following the *Reparations Case,*[52] with its acknowledgement of the international legal personality of the United Nations, in 1957 it was suggested that it was logical that the officials of international organizations be included in a codification of diplomatic immunity.[53] The particular position of government representatives to international organizations (as distinct from the staff members of such organizations) was highlighted with a question being raised as to whether they should be treated in the same way as diplomatic agents accredited to States.[54] In 1958, when discussing the draft articles concerning diplomatic privileges and immunities, Switzerland stressed the importance of the relationship between the work of the ILC on diplomatic intercourse and immunities and the 'effects which this convention is bound to have on other branches of law which are yet to be codified'.[55] This was of particular importance to Switzerland given its view that the rules governing privileges and immunities should be applied to international organizations situated in its territory *mutatis mutandis*.[56] The United States was also of the view that the treatment accorded to permanent diplomatic missions would impact on the 'treatment accorded representatives to certain international organizations and

[50] ibid art 8, s 3. In the final text of the General Convention, this provision is located in art 8 s 29. This section has recently been the subject of argument in an action brought by Haitians against the UN arguing that the UN is responsible for the cholera epidemic that broke out in Haiti in 2010. In the US District Court the plaintiffs argued that the UN's failure to provide for an alternative mode of settlement breached the organization's obligations under section 29 of the General Convention as a result of which it could not benefit from absolute immunity. This argument was rejected by a US judge who dismissed the claims: *Georges v United Nations*, No 13–CV–7146 JPO, 2015 WL 129657 (SDNY January 9, 2015). This decision was affirmed on appeal: *Georges v United Nations* (2nd Cir, No 15-455-cv, 18 August 2016).

[51] Sixth Committee of the General Assembly, 'Legal Questions: Summary Record of Meeting' (8 February 1946) UN Doc A/C 6/37.

[52] *Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174.

[53] See n 20 above.

[54] 'Diplomatic Intercourse and Immunities' *ILC Yearbook* 1957 vol I, 4–5 [35].

[55] 'Comments by Governments on the Draft Articles Concerning Diplomatic Intercourse and Immunities Adopted By the International Law Commission at Its Ninth Session in 1957' *ILC Yearbook* 1958 vol II, 111, 128.

[56] ibid.

members of their staffs' given the relationship between the two types of personnel in its Headquarters agreement with the UN.[57] Thus, despite the fact that the question of the relations between States and intergovernmental organizations would be considered after the study of diplomatic privileges and immunities, there was an early acknowledgement that the work on diplomatic privileges and immunities would influence later work on international organizations.

1.3 State representatives to international organizations

When the topic of the relations between states and intergovernmental organizations was placed on the agenda of the ILC it was divided into two separate parts: the first dealt with the status, privileges, and immunities of State representatives to international organizations, and the second related to the privileges and immunities of international organizations and their officials.[58] While this chapter will focus on the second part of the ILC's work, it is noteworthy that in the consolidated draft articles adopted in 1971 and presented to the General Assembly on the first topic (dealing with State representatives to organizations), broad immunities were outlined with the provisions being expressly modelled on the VCDR.[59] The final version of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character included references to the inviolability of the premises of a State's mission to an international organization, the residence of the head of the mission and the mission's archives and documents.[60] The Convention also applied to State delegations to organs and conferences of international organizations.[61] Freedom of movement for members of the mission and their families in the territory of the host State was protected, as was immunity from criminal and civil jurisdiction for the head of the

[57] ibid 133.

[58] The Special Rapporteur, Abdullah El-Erian, initially proposed that the topic of the privileges and immunities of international organizations be divided into three parts: the first would deal with the privileges and immunities of international organizations as bodies corporate, the second would cover officials of international organizations, and the third aspect would deal with representatives to international organization and other related questions: see 'Scope and Order of Future Work on the Subject of Relations between States and Inter-Governmental Organizations: Working Paper by Mr Abdullah El-Erian, Special Rapporteur' *ILC Yearbook* 1963 vol II, 186.

[59] The similarities (and differences) between diplomatic agents and State representatives to international organizations were raised on a number of occasions during the discussions surrounding the draft provisions. See, for example, the ILC's discussion of the Special Rapporteur's draft articles: *ILC Yearbook* 1971 vol I, 14 (Ustor and Ruda on the functions of a permanent mission to an international organization), 15–19 (El-Erian, Ustor, Sette Câmara, and Ruda discussing suggested changes to draft article 8 on accreditation to two or more organizations), 21 (Rosenne discussing appointment of members of a permanent mission), 29 (El-Erian discussing the draft provision dealing with the composition of a permanent mission), 30–1 (El-Erian on notification by the sending State), and 39–42 (discussing the inviolability of a permanent mission).

[60] Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (opened for signature 14 March 1975, not yet in force, UN Doc A/CONF 67/16) arts 23 (mission), 25 (archives and documents), and 29 (residence of head of mission and permanent diplomatic staff).

[61] ibid Part III.

mission and members of the diplomatic staff of the mission to the same extent as granted to diplomats by virtue of the VCDR.[62] The discussion at the ILC demonstrates that the earlier provisions on diplomatic privileges and immunities were very influential—representatives of States to international organizations were considered in many respects to be virtually identical to diplomats.[63] This view is confirmed by a statement of the Legal Counsel of the UN to the Sixth Committee of the General Assembly in 1967 to the effect that the Secretary-General would look to the provisions of the VCDR, where relevant, when interpreting the diplomatic privileges and immunities of representatives to UN organs and conferences.[64]

Despite the fact that the articles on State representatives replicated the VCDR in many respects and therefore may have been considered relatively unproblematic, when the United Nations Conference met in 1975 to consider the adoption of a Convention on the topic, the idea of granting broad diplomatic privileges and immunities to State representatives to international organizations was not uncontroversial. For example, the final draft of the Convention does not include an article on the inviolability of premises of delegations to an organ or conference of an international organization as it was blocked by a number of host States.[65] The application of high level privileges and immunities in the VCDR to State representatives to international organizations (as distinct from the more limited immunities granted on the basis of an organization's functions) was criticized by some States.[66] Although the text was approved, to date the Convention is not yet in force. Bekker comments that the fact that States were 'unenthusiastic' about the 1975 Vienna Convention had an adverse effect on the subsequent work of the ILC on the second part of the topic dealing with the status, privileges, and immunities of international organizations and their agents.[67]

1.4 International organizations and their officials

Given the obvious influence of the VCDR in drafting the provisions of the 1975 Vienna Convention on State representatives to international organizations, it would seem reasonable to suggest that a similar influence would be apparent when dealing with the second part of the topic. However, references to the VCDR in the earlier years of the ILC's work on this topic were rare. The ILC began its work on the status, privileges, and immunities of international organizations and their

[62] ibid arts 26 (freedom of movement), 28 (personal inviolability), 30 (immunity from jurisdiction).

[63] See comments by JG Fennessy, 'The 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character' (1976) 70 AJIL 62, 64.

[64] 'Statement Made by the Legal Counsel at the 1016th Meeting of the Sixth Committee of the General Assembly on 6 December 1967' [1967] UNJY 311–12.

[65] United Nations Conference on the Representation of States in Their Relations with International Organizations, 'Seventh Plenary Meeting: Summary Record' (11 March 1975) UN Doc A/CONF 67/SR 7, 26.

[66] See Fennessy (n 63) 63–64.

[67] Pieter HF Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Brill Nijhoff, Dordrecht 1994) 23.

officials with a preliminary report by the first Special Rapporteur, submitted to the ILC in 1977, analysing the current state of the law of privileges and immunities of international organizations.[68] Despite comparisons being drawn between relations amongst States on the one hand and international intercourse in the framework of international organizations on the other,[69] the VCDR is only mentioned in the conclusion of the ILC's preliminary analysis. It was noted that the ILC's work in this area would complete the body of work on the codification and the development of this branch of diplomatic law.[70] This desire to complete the codification of the rules on diplomatic law was mentioned subsequently,[71] although it was also clear that the two bodies of law were not the same.

During the late 1980s and early 1990s, provisions of the VCDR and the principles of diplomatic immunity were specifically referenced in the discussions of the ILC on the privileges and immunities of international organizations on a few occasions. ILC members noted the similarities and differences between the position of diplomats and international officials. For example, in a 1987 meeting one ILC member highlighted that in traditional diplomacy the relationship between a sending State and a receiving State was based on sovereign equality and the principle of reciprocity, which could also serve as a mechanism for legal protection. However, this mechanism of protection did not apply in relation to international organizations where the position was somewhat more complex given the triangular relationship 'sometimes established between the sending State, the host State and an international organization'.[72]

In terms of the individual draft articles on the privileges and immunities of international organizations, analogies with the VCDR appeared in the reports of the second Special Rapporteur, Leo Díaz González, when discussing certain topics. In his later reports, containing the proposed draft articles, the Special Rapporteur used the VCDR as a foundation for drafting articles on the inviolability of an international organization's premises (stating that this was identical to Article 22(1) of the VCDR, despite the different theoretical bases for such inviolability)[73]

[68] 'Preliminary Report on the Second Part of the Topic of Relations between States and International Organizations by Mr Abdullah El-Erian, Special Rapporteur' *ILC Yearbook* 1977 vol II Pt 1, 139.

[69] ibid 152.

[70] ibid 154. See also comments by Sette Câmara in the ILC when discussing the preliminary report: 'Preliminary Report on the Second Part of the Topic of Relations between States and International Organizations' *ILC Yearbook* 1977 vol I, [23]–[24].

[71] 'Second Report on the Second Part of the Topic of Relations between States and International Organizations' *ILC Yearbook* 1978 vol II Pt 1, 263; 'Relations between States and International Organizations (Second Part of the Topic)' *ILC Yearbook* 1983 vol I, 238 (Flitan); 'Third Report on Relations between States and International Organizations (Second Part of the Topic)' *ILC Yearbook* 1986 vol II Pt 1, 163, 168; 'Relations between States and International Organizations (Second Part of the Topic)' *ILC Yearbook* 1987 vol I, 188, 190 (Pawlak).

[72] 'Relations between States and International Organizations (Second Part of the Topic)' *ILC Yearbook* 1987 vol I, 188, 192 (Yankov). On the tripartite relationship, see also 'Preliminary Report on the Second Part of the Topic of Relations between States and International Organizations by Mr Abdullah El-Erian, Special Rapporteur' *ILC Yearbook* 1977 vol II Pt 1, 152.

[73] 'Fourth Report on the Relations between States and International Organizations (Second Part of the Topic)' *ILC Yearbook* 1989 vol II(1), 164. The Special Rapporteur commented that the inviolability of the premises of a diplomatic mission is based on the principle of reciprocity between States,

and the inviolability of archives and documents.[74] When outlining draft articles on the inviolability of communications and the means for such communications, the Special Rapporteur also gave consideration to Article 27 of the VCDR and noted that the rationale for immunity in the two situations was the same—that both organizations and diplomatic missions conduct their activities 'in a territory which is not their own'.[75] The report highlighted that the existing protection provided to the means of communication in the General Convention and the Specialized Agencies Convention are 'defined in relation to diplomatic missions'.[76] The Special Rapporteur referred to earlier discussions in the ILC on the protection to be afforded to diplomatic couriers and bags when a question arose whether such protection should be extended to the couriers and bags of international organizations.[77] Direct comparisons with Articles 23 and 36 of the VCDR were also drawn in the Special Rapporteur's sixth report when considering fiscal immunities.[78] These discussions demonstrate that individual articles of the VCDR, and the ILC's later work on the diplomatic courier and diplomatic bag, influenced the Special Rapporteur's reasoning and conclusions on certain issues with respect to international organizations.

When the ILC discussed the Special Rapporteur's reports, members also made reference to specific articles of the VCDR. For example, in 1987 Yankov suggested that Article 41 of the VCDR (and the equivalent provisions in the Vienna Convention on Consular Relations and the 1975 Vienna Convention) should be a model for a similar provision on the duty of organizations and their officials to respect the laws of the host State.[79] Comparisons with the VCDR's provisions were also drawn by Thiam in 1990 on the question of waiver of immunity[80] and by Hayes in 1991 when discussing fiscal immunities.[81] However, with many other matters on its agenda, the ILC gave low priority to its work on this topic and in 1992 the General Assembly endorsed the ILC's decision to discontinue its work in this field.[82] In making its recommendation the Commission referred to the lack of signatories to the 1975 Vienna Convention, the presence of existing agreements on the privileges and immunities of international organizations, and stated that the topic did 'not appear to respond to a pressing need of States or international organizations'.[83]

whereas the inviolability of international organizations is based on the right to respect for the privacy of international organizations, inherent in their legal personality.

[74] 'Fifth Report on Relations between States and International Organizations (Second Part of the Topic)' *ILC Yearbook* 1991 vol II Pt 1, 95–98.

[75] ibid 102. [76] ibid 106.

[77] ibid 106, 110. In 1989 the ILC had decided to confine the draft articles on the status of the diplomatic courier and the diplomatic bag to the couriers and bags of States.

[78] 'Sixth Report on Relations between States and International Organizations (Second Part of the Topic)' *ILC Yearbook* 1991 vol II Pt 1, 117, 121.

[79] 'Summary Record of the 2024th Meeting – 1 July 1987' *ILC Yearbook* 1987 vol I, 192.

[80] 'Summary Record of the 2179th Meeting – 22 June 1990' *ILC Yearbook* 1990 vol I Pt 1, 222.

[81] 'Summary Record of the 2233rd Meeting – July 1991' *ILC Yearbook* 1991 vol I Pt 1, 172–73.

[82] UNGA Res 47/33, [7]. See discussion in Bekker (n 67) 32–33.

[83] 'Relations between States and International Organizations (Second Part of the Topic)' *ILC Yearbook* 1992 vol II Pt 2, 53.

2. Judicial Consideration of the Intersection of Immunities

The VCDR and broader diplomatic immunities were referenced in the reports of the Special Rapporteurs and the discussions of the ILC on the topic of the privileges and immunities of international organizations and their officials at various points, but ultimately they did not appear to be influential on this later piece of work. This can be compared to the earlier draft articles on State representatives to international organizations where obvious parallels were drawn between State representatives to international organizations and diplomats and the work was expressly modelled on aspects of the VCDR. The next question this chapter will consider is the extent to which domestic courts dealing with cases involving the immunity of international organizations and their officials have referred to analogous immunities for diplomats. Has the VCDR been influential in judgments on the existence and extent of immunities for international organizations and their officials?

This section is not intended to comprehensively consider every case where diplomatic immunity has been raised when discussing the immunity of international organizations. Instead, the intention is to highlight some of the issues that have arisen with respect to the interaction between the two types of immunities in cases involving officials of international organizations. There are a number of reasons why diplomatic immunities and the VCDR may be cited in decisions concerning international immunities. First, as has already been highlighted, the relevant treaties providing for international immunities may explicitly grant immunities to international officials (usually senior staff) to the same extent as those granted to diplomats. Secondly, national legislation may grant officials of international organizations the same, or similar, immunities as provided to diplomats. The third type of cases (the 'human rights' cases) concern the immunity of organizations (as distinct from their officials). In domestic courts in Europe and in the European Court of Human Rights applicants have argued that the jurisdictional immunity of international organizations violates the right of access to the courts embodied in Article 6 of the European Convention on Human Rights.[84] In this context arguments raised by applicants in cases involving the immunity of international organizations have been utilized in subsequent cases where employees of diplomatic missions in employment disputes have attempted to circumvent the application of State immunity to their employers.

[84] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended, adopted 4 April 1950, in force 3 September 1953) 213 UNTS 221 (ECHR) art 6(1) provides that: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

2.1 Judicial consideration of diplomatic immunity in cases involving officials of international organizations

Certain senior officials of international organizations are granted immunities *rationae personae* by treaty law whereas other officials are granted immunity *rationae materiae*.[85] For example, the General Convention provides that the Secretary-General and Assistant Secretaries-General (and their spouses and children) are afforded the same privileges and immunities as diplomats.[86] The Specialized Agencies Convention includes a similar section for executive heads of agencies and their families.[87] Host State agreements may also grant staff members privileges and immunities comparable to those granted to diplomats accredited to the state.[88] Two cases in 1977, one in Austria involving an official of the International Atomic Energy Agency (IAEA), and the other in Switzerland concerning an official of the World Health Organization (WHO), demonstrate the way in which such treaty provisions may be argued in a national court.[89] In the first case, a child custody dispute involving a senior staff member of the IAEA, the Austrian Supreme Court held that the staff member was entitled to the immunity provided in Articles 31 and 32 of the VCDR by virtue of the headquarters agreement between the IAEA and Austria, which accorded staff members at the level of P-5 or above the same privileges and immunities as diplomats accredited to Austria.[90] In the second case, an official of the World Health Organization (also at the P-5 level) successfully pleaded diplomatic immunity in relation to a traffic incident in Geneva on the basis of the headquarters agreement between the Swiss Federal Council and the World Health Organization.[91] However, the judgment of the Administrative Tribunal of the Canton of Geneva in this case is confusing on the scope of the immunity enjoyed. On the one hand, the Tribunal acknowledged that the official was entitled to 'the personal inviolability of diplomatic agents', but on the other hand suggested a limited application: that 'he enjoyed immunity from criminal, civil and administrative jurisdiction for acts performed in the exercise of his functions, ie at all times

[85] Bekker (n 67) 155; Philippa Webb, 'Should the 2004 UN *State Immunity Convention* Serve as a Model/Starting point for a Future UN Convention on the Immunity of International Organizations?' (2013) 10 IOLR 319, 331.

[86] General Convention art V s 19.

[87] Specialized Agencies Convention art VI s 21.

[88] See eg Agreement between the Government of the French Republic and the United Nations Educational, Scientific and Cultural Organization Regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory (2 July 1954) which grants certain high-level officials the 'status accorded to heads of foreign diplomatic missions', although this broad immunity does not extend to French nationals: art 19. Other officials are dealt with pursuant to art 22 of this Agreement.

[89] 'Decisions of National Tribunals: Austria – *In re Karl Katary*, Decision of 3 March 1977' [1977] UNJY 256; 'Decisions of National Tribunals: Switzerland – *X v Department of Justice and Police,* judgement of 15 June 1977' [1977] UNJY 257.

[90] 'Decisions of National Tribunals: Austria – *In re Karl Katary*, Decision of 3 March 1977' [1977] UNJY 256, 257. However, the Court held that immunity was precluded by the fact that the staff member had earlier initiated court proceedings in Austria against the child's mother.

[91] 'Decisions of National Tribunals: Switzerland – *X v Department of Justice and Police,* judgement of 15 June 1977' [1977] UNJY 257.

except during his annual vacation'.[92] The Tribunal also stated that the immunity would stand unless 'there were reasons of public policy (*ordre public*) to the contrary' (for example, public safety).[93] Leaving aside the question whether this is a correct statement of diplomatic immunity, the Tribunal directly applied analogous diplomatic immunities and referred to the VCDR in its judgment.

Later cases have also confirmed the application of diplomatic immunity in the VCDR to senior officials of international organizations pursuant to treaty provisions.[94] In some cases, officials of the UN system have attempted to claim broader diplomatic immunities where they were only covered by immunity for their official acts. For example, in 1962 a claim of diplomatic immunity by an official of the United Nations High Commissioner for Refugees was denied by the Lower Court of the Seine on the basis that the General Convention restricted immunity to 'official acts' and that international officials could not be equated 'with envoys of foreign governments'.[95] The contrast between the two levels of staff members is also apparent in *De Luca v United Nations Organization*, where a former UN security guard claimed a breach of contract against the UN and various UN officials.[96] The US District Court began its judgment by referring to Article 5, section 19, of the General Convention which accords high-level officials the same immunities provided to diplomatic envoys. It then directly employed Article 31 of the VCDR to the position of the Assistant Secretaries-General named in the lawsuit.[97] In relation to the four UN officers at a lower level, the Court applied the functional immunity test in the US International Organizations Immunities Act (IOIA) to hold that each official was immune as the relevant actions were within their functions.[98] At times, the difference between levels of employees of an international organization can also cause confusion for domestic courts. In *Trempe v Staff Association of the International Civil Aviation Organization* the Superior Court of Quebec cited a number of articles of the VCDR and the Headquarters Agreement between Canada and ICAO before applying the functional immunity test to both a senior official of ICAO as well as another staff member.[99] This is despite the fact that the senior official would have been covered by broader diplomatic immunities.[100]

In some States diplomatic immunity and the VCDR may be invoked by defendants as national legislation explicitly grants international organizations and

[92] ibid 258. [93] ibid.

[94] See eg *Dr K v K* 2 Ob 166/98w, ILDC 356 (AT 2000) (Austrian Supreme Court of Justice); *Brzak v United Nations* 597 F 3d 107 (2nd cir, 2010) 8–9; *Georges v United Nations* No 13–CV–7146 JPO, 2015 WL 129657 (SDNY, January 9, 2015) 7–8.

[95] 'Decisions of National Tribunals: France – *Essayan v Jouve*, judgment of 1 October 1962' [1962] UNJY 290.

[96] *De Luca v United Nations Organization* 841 F. Supp. 531 (SDNY, 1994).

[97] ibid. The VCDR was also cited with respect to the suits brought against a former UN Secretary-General and a former Assistant Secretary-General.

[98] International Organizations Immunities Act 1945 s 7(b) (IOIA).

[99] 'Decisions of National Tribunals: Canada – *Trempe v Staff Association of the International Civil Aviation Organization and Others*, judgement' [2003] UNJY 585, 598–99.

[100] See analysis by Gillian MacNeil in the Oxford Reports of International Law of *Trempe v Staff Association of the International Civil Aviation Organization* (2003) ILDC 1748, [A5]–[A6].

their officials the same immunity as diplomats. Where the person concerned is a national of the host State this can cause added complexities for the application of immunity.[101] For example, in a civil action in Sierra Leone against the driver of a representative of the World Health Organization, who in the course of his employment hit another person causing serious injuries, both the driver and the employer claimed diplomatic immunity.[102] The plaintiff argued that the driver, a Sierra Leonean national, was not entitled to immunity as nationals were not entitled to the immunity of foreign diplomatic agents in the domestic legislation—the Diplomatic Immunities and Privileges Act 1961.[103] This argument appeared to be based on a negative reading of Article 37(3) of the VCDR which provides that members of the service staff who are non-nationals shall enjoy immunity from legal process in respect of acts performed in the course of their duties.[104] The plaintiff argued that the article could not apply to the defendant as he was a national of Sierra Leone. However, on the basis of the Diplomatic and Privileges Order of Sierra Leone the Court held that officials (including Sierra Leoneans) were immune from suit in respect of acts undertaken in the course of their official duties.[105]

Similarly, diplomatic immunities have been cited in cases involving international organizations in Kenya where legislation also assimilates the two types of immunities. In a 2009 case involving a transportation agreement between a company and the UN Children's Fund, the High Court of Kenya examined the commercial activity exemption in Article 31(1)(c) of the VCDR as Kenyan legislation applied aspects of the Convention directly to international organizations. The Court found that although the transportation agreement was commercial in nature it was related to the 'official functions' of the UN Children's Fund and therefore diplomatic immunity prevailed.[106] While the invocation of Article 31 in the context of an organization (as distinct from an agent or official) is problematic, the final result complied with the absolute immunity from suit for international organizations in the Kenyan Act.[107]

Where national legislation restricts immunities, at least one official of an international organization has argued that the applicable law is customary international law and that custom supports broader (diplomatic) immunities. As is highlighted by *De Luca*, in the US the immunities of international organizations are governed by the IOIA, which provides that officials enjoy immunity from legal process 'in

[101] See n 28 above.

[102] *Fillie v Representative, World Health Organization* (No CC1215/2005) 14 March 2007 (Sierra Leone High Court).

[103] ibid [17]. See also *Fillie v Representative, World Health Organization* (2007) ILDC 1540 [A2]. The plaintiff argued, unsuccessfully, that immunity had been waived in this case.

[104] *Fillie v Representative, World Health Organization* (2007) ILDC 1540, [A2].

[105] *Fillie v Representative, World Health Organization* (No CC1215/2005) 14 March 2007 (Sierra Leone High Court) [26].

[106] 'Decisions of National Tribunals: Kenya – *Tanad Transporters Ltd v United Nations Children's Fund*, Ruling of 1 July 2009' [2009] UNJY 487, 488.

[107] See Privileges and Immunities Act No 3 1970 sch 4 s 1 (Kenya).

relation to acts performed by them in their official capacity and falling within their functions'.[108] In *Diallo v Strauss-Kahn*[109] the former Managing Director of the IMF claimed immunity from a civil suit for sexual assault on the basis that the applicable law was not the IOIA, but rather the Specialized Agencies Convention with its broader diplomatic immunity for executive heads of specialized agencies.[110] As the US is not a party to the Specialized Agencies Convention and nor has it been implemented in US law, Strauss-Kahn argued that the Convention was customary international law and was therefore directly applicable in the US courts.[111] The Supreme Court of New York rejected this argument and held that even if the Specialized Agencies Convention represented customary international law (doubtful in the Court's view), the Act with its more limited functional immunity was binding on US courts.[112] Together, these cases demonstrate that national courts have dealt with a diverse range of circumstances when considering the relationship between diplomatic immunity and the immunity of international organizations in situations involving the officials of such organizations.

2.2 Immunities and the right of access to the courts

The third type of cases evidencing the intersection between diplomatic immunity and the immunity of international organizations are the 'human rights cases', where it has been argued that the jurisdictional immunity of international organizations violates human rights, in particular the right of access to the courts (in Europe, embodied in Article 6 of the European Convention on Human Rights (ECHR)). In a much-discussed decision of the European Court of Human Rights, *Waite v Germany*, the applicants argued that the German courts had wrongly denied jurisdiction in their employment dispute against the European Space Agency (ESA) on the basis of the organization's immunity.[113] The applicants argued that the German courts had disregarded the priority of human rights in the ECHR over immunity rules and that the proper functioning of the ESA did not require immunity from jurisdiction in the circumstances.[114] The Court rejected this argument, finding that the organization's immunity had both a legitimate objective (to ensure its proper functioning), and was proportionate to the objective of enabling the ESA to perform its functions efficiently.[115] In assessing the requirement of proportionality, the Court referred to the existence of an alternative remedy for staff members provided by the ESA,[116] as well as the possibility that requiring the ESA to be subject to domestic labour legislation would thwart the proper functioning of the organization.[117]

[108] IOIA s 7(b). [109] *Diallo v Strauss-Kahn* (n 3). [110] ibid 4.
[111] ibid 4–5. [112] ibid 9.
[113] *Waite v Germany* (App No 26083/94) ECHR 18 February 1999. The case was heard together with *Beer v Germany* (App No 28934/95) ECHR 18 February 1999.
[114] *Waite v Germany* (n 113) [60]. [115] ibid. [116] ibid [68]–[69].
[117] ibid [72].

Since *Waite* there have been a number of cases where European domestic courts have been asked to lift the immunity of international organizations on the basis that it conflicts with Article 6 of the ECHR.[118] Such decisions have considered (and in some cases, applied) the language of the 'alternative remedy' in *Waite* to determine if there is an adequate alternative remedy available to the complainant that would satisfy Article 6 of the ECHR. For example, in a 2003 Belgian employment case, *Siedler v Western European Union*, the Court of Cassation held that the Western European Union's treaty-based immunity was incompatible with Article 6(1) of the ECHR.[119] The Court examined various features of the internal appeals commission provided by the Western European Union and found that it did not satisfy Article 6(1) as it lacked independence from the organization.[120] However, this approach has not been universally applied. Outside the employment context, in 2008 a United Kingdom court questioned the need to perform an Article 6 analysis to determine the availability of an alternative forum in the face of an immunity claim by an international organization.[121] Similarly, in *Mothers of Srebrenica et al v The Netherlands and the United Nations* the Supreme Court of the Netherlands held that the UN enjoys absolute immunity from prosecution even in the face of allegations of a failure to prevent genocide.[122] The Supreme Court stated that the UN's immunity was absolute and that it was unnecessary to use the criteria formulated in *Waite* to examine the right of access to the courts in Article 6.[123] The validity of the UN's immunity claim in this case was upheld by the European Court of Human Rights.[124]

The important point from the perspective of diplomatic immunity is that the influence of the arguments in *Waite* has not been confined to cases involving international organizations. Subsequently, the case has been referenced in European Court of Human Rights' decisions in which applicants have argued that State immunity has infringed an individual's right of access to the courts. These arguments have been raised when employees (or former employees) of diplomatic missions have attempted to bring employment disputes before the courts of the receiving State. For example, in *Fogarty v United Kingdom* an Irish national who

[118] *Western European Union v Siedler (Appeal Judgment)* (No S 04 0129 F) 21 December 2009 (Belgian Court of Cassation); *X v European Patent Organisation* (No 08/00118) 23 October 2009 (Supreme Court of the Netherlands); *Mothers of Srebrenica et al v State of the Netherlands and the United Nations* (No 10/04437) 13 April 2012 (Supreme Court of the Netherlands). For discussion of such cases see August Reinisch, 'The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals (2008) CJIL 285; Cedric Ryngaert, 'The Immunity of International Organizations Before Domestic Courts: Recent Trends' (2010) 7 IOLR 121.

[119] *Western European Union v Siedler (Appeal Judgment)* (No S 04 0129 F) 21 December 2009 (Belgian Court of Cassation).

[120] *Western European Union v Siedler* ILDC 297 (IT 2005) [H2].

[121] 'Decisions of National Tribunals: United Kingdom – *Entico Corporation Ltd v UNESCO*, Decision of 28 March 2008' [2008] *UNJY* 477, 487–88.

[122] *Mothers of Srebrenica et al v State of the Netherlands and the United Nations* (Supreme Court of the Netherlands, Case No 10/04437) 13 April 2012 (Supreme Court of the Netherlands) [4.3.14].

[123] ibid [4.3.5]–[4.3.6].

[124] *Stichting Mothers of Srebrenica v Netherlands* (App No 65542/12) ECHR 11 June 2013 [164].

had been employed in the US embassy in London claimed she had been discriminated against on the basis of her sex.[125] The UK courts declined to hear the case on the basis of the doctrine of State immunity, and consequently, Fogarty claimed a violation of Article 6 of the ECHR in the European Court of Human Rights. In assessing this argument the Court applied the analysis in *Waite* to consider if the limitation on access to the courts inherent in State immunity pursued a legitimate aim and was proportionate to 'the aim sought to be achieved'.[126] The Court concluded that sovereign immunity did pursue a legitimate aim (promoting comity and good relations between States) and could not be regarded as a disproportionate restriction on the right of access to the courts. In its view, recruitment of staff to diplomatic missions was a process that could involve sensitive and confidential material and, by conferring immunity on the US, the UK had not exceeded its margin of appreciation in limiting an individual's access to a court.[127]

The analysis in *Waite* has been applied in other cases involving employment law claims against embassies, but with very different results. In *Cudak v Lithuania,* a case involving the dismissal of a secretary and switchboard operator at the Polish embassy in Vilnius, a Grand Chamber of the European Court of Human Rights distinguished *Fogarty* and found that the restriction on the applicant's right of access to the courts was not proportionate to the aim pursued by State immunity.[128] On the basis that the applicant's duties could not be described as relating to the sovereign interests of Poland, the Grand Chamber held that the Lithuanian courts had failed the proportionality aspect of the test in *Waite* and overstepped their margin of appreciation in applying State immunity.[129] In *Sabeh El Leil v France*[130] a Grand Chamber of the European Court of Human Rights also held that a French court had 'failed to preserve a reasonable relationship of proportionality'[131] in upholding sovereign immunity in a case involving a dispute between an accountant and his employer, the Kuwaiti Embassy in Paris.[132]

These cases have recently been comprehensively examined by the UK Court of Appeal in *Benkharbouche v Embassy of the Republic of Sudan* and *Janah v Libya*.[133] In both cases, domestic staff members of embassies situated in London brought claims against their employers for unfair dismissal, breaches of working regulations, and in *Janah*, for racial discrimination and harassment.[134] Both applicants were prima facie barred from bringing their claims by virtue of s 16(1)(a) of the State Immunity Act 1978 (UK) ('SIA'), which retains the rules of diplomatic immunity in disputes concerning the employment of staff at a mission.[135] The Court of Appeal held that this section of the SIA was incompatible with Article 6

[125] *Fogarty v United Kingdom* (App No 37112/97) ECHR 21 November 2001.
[126] ibid [33]. [127] ibid [38].
[128] *Cudak v Lithuania* (App No 15869/02) ECHR 23 March 2010 [74]. [129] ibid.
[130] *Sabeh El Leil v France* (App No 34869/05) ECHR 29 June 2011. [131] ibid [67].
[132] ibid [62]. As in *Cudak,* the Court held in *Sabeh El Leil* that the employee's duties (as an accountant) could not be linked to the sovereign interests of Kuwait.
[133] *Benkharbouche v Embassy of the Republic of Sudan* [2015] EWCA Civ 33 ('*Benkharbouche*').
[134] ibid [3]–[4].
[135] See State Immunity Act 1978 (UK) s 16(1)(a) and discussion in *Benkharbouche* (n 133) [9].

of the ECHR on the basis that 'international law does not require the grant of absolute immunity from all employment claims by employees of diplomatic missions'.[136] On that basis the Court made a declaration of incompatibility under s 4(2) of the Human Rights Act 1998 (UK).[137]

Although these cases only mentioned diplomatic immunity in relation to its interaction with State immunity, they demonstrate the way in which arguments in cases concerning the immunity of international organizations have been used in employment disputes involving diplomatic missions. A more direct application of these arguments to diplomatic immunity is demonstrated by the UK Court of Appeal decision in *Reyes v Al-Malki and Secretary of State for Foreign and Commonwealth Affairs*.[138] The Court had to determine whether the immunity of a Saudi diplomatic agent and his wife should prevail in a case involving allegations of racial discrimination and harassment and human trafficking by a domestic staff member. The UK Court of Appeal held that 'although there are important differences between state immunity and diplomatic immunity', in terms of determining whether diplomatic immunity pursues a legitimate and proportionate aim, the analysis in *Fogarty* was apposite.[139] However, the Court of Appeal agreed with submissions of counsel for the Secretary of State for Foreign and Commonwealth Affairs to the effect that although sovereign immunity had been subject to a number of restrictions in recent years, there was nothing to suggest that the international community 'feels that a similar adjustment is required in relation to diplomatic immunity'.[140] The Court held that the ECHR must be interpreted as far as possible in conformity with the United Kingdom's other international law obligations and that the restriction on access to the courts inherent in diplomatic immunity was not disproportionate.[141] In the end, the result in *Reyes* accorded with the decision in *Waite* where it was also held that immunity pursued a legitimate and proportionate aim. Given that this case is subject to an appeal it is too early to determine whether these arguments will prevail in the long term. However, these cases demonstrate the way in which an argument first utilized in the context of an international organization (the ESA) in the European Court of Human Rights has now been adopted in the context of diplomatic and State immunity, despite the differences in the immunities granted pursuant to international law.

[136] *Benkharbouche* (n 133) [48]. The Court examined the practice of a number of different States in arriving at this conclusion: see [41]–[52]. The applicant also successfully argued that the application of State immunity breached art 47 of the European Charter of Fundamental Rights and Freedoms, which is similar in content to art 6 of the ECHR: see [69]–[81].

[137] ibid [86].

[138] *Reyes v Al-Malki and Secretary of State for Foreign and Commonwealth Affairs* [2015] EWCA Civ 32. For further discussion of this case see Chapter 8.

[139] ibid [70]. [140] ibid [74]. [141] ibid [70].

3. Conclusion

In 1967 at the Sixth Committee of the General Assembly, the UN Legal Counsel began a statement on the privileges and immunities of the UN, State representatives to the organization and its officials, by discussing the VCDR.[142] Given that diplomatic immunity has certainly been influential on the development of the immunities of international organizations and their officials this is not surprising. Early expressions of the immunities of international organizations and their officials were phrased in the terminology of diplomatic privileges and immunities. As is evidenced by the General Convention, such language is retained in many treaties when discussing the immunity of high-level officials of international organizations. But as is also demonstrated by the discussions at the ILC on the relations between States and international organizations, while the provisions of the VCDR were a model for considering the privileges and immunities of State representatives to international organizations, this was not necessarily the case when the ILC came to consider the privileges and immunities of organizations and their officials. Nevertheless, the VCDR was raised, and comparisons with diplomatic immunities were drawn, at a number of points during the ILC's discussions.

The relatively few references to the VCDR in the ILC's later work on the relations between States and international organizations is indicative of the growth of a separate body of treaty law dealing with the privileges and immunities of a myriad of different international organizations. In 1947 Kunz recognized the need for a 'new law' on the topic of the privileges and immunities of international organizations, one which was 'independent and emancipated from that of the privileges of diplomatic agents'.[143] By 1961 Jenks was able to write that the law of international immunities no longer consists of 'general principles resting on the questionable analogy of diplomatic immunities', but instead comprises a 'complex body of rules set forth in detail in conventions, agreements, statutes and regulations'.[144] Despite the existence of this separate body of law, the interaction between diplomatic immunity and the immunity of international organizations is evident in case law discussing the immunities of officials of such organizations, particularly where treaties or statutes require such interaction. Perhaps the clearest indication of advances in the law relating to privileges and immunities of international organizations is the fact that arguments raised in cases involving challenges to the immunity of international organizations are now being used in similar attempts to restrict the immunity of States (in the activities of their diplomatic missions) and diplomats. The appropriateness of such arguments in the context of diplomatic immunity has been accepted by both domestic courts in Europe and also by the European Court of Human Rights, although the outcomes may have differed. Given the

[142] See above (n 64): 'Statement made by the Legal Counsel at the 1016th Meeting of the Sixth Committee of the General Assembly on 6 December 1967' [1967] UNJY 311–12.

[143] Kunz (n 24) 842.

[144] Jenks (n 28) xxxv.

continuing attempts to restrict the immunity of all types of international persons (including international organizations, States, and diplomats) notably in the context of human rights abuses, it will remain to be seen whether there will be further intersections between the law relating to diplomatic immunities and the immunities of international organizations.

18

The European Union and Diplomatic Law

An Emerging Actor in Twenty-First Century Diplomacy

Graham Butler

1. Introduction

This chapter intends to explore the legal framework of which the European Union (the 'EU' or 'the Union') avails in its role as a diplomatic actor. The EU is continuously pursuing a more distinctive foreign policy with its own global ambitions, and with every internal treaty revision, it begins to look more and more like a State of its own, with a permanent diplomatic corps to service its needs. Externally, official international diplomacy now extends beyond the strict observations contained within the VCDR and is conducted by international organizations and non-State actors such as the EU, which the Convention does not specifically cater for. International diplomatic law limits the role of diplomatic actors to States, yet non-States now take part in diplomacy around the world. With great ambition, questions now arise from how the EU uses and embeds existing international law for diplomatic activity given it is not a State. Its unique status as an enhanced international organization, in full knowledge of the State-centric nature of international diplomatic law, makes for a worthy case to analyse. The Union cannot ratify the Vienna Convention, yet it is a diplomatic actor throughout the world. This chapter delves into the legal encounters and experiments that the EU has tested for the conduct of its diplomatic endeavours. The build-up of diplomatic efforts over time by the Union has put down the question—how far can the EU go through the international diplomatic framework given its present legal status? With a multi-stakeholder approach now becoming more commonplace, this in turn brings forward even further questions about the capacity of new actors in the diplomatic field. It is important therefore to consider the issues of EU law on the one hand, and that of international law on the other to fully grasp the issues in this case. Developments regarding the EU as a diplomatic actor have legal ramifications, and are significant not just for the Union, but all third States and the diplomatic community on a global scale. This chapter deliberates and conclusively argues that the EU, as an entity that as a practical need has developed a sophisticated 'get-around' for its diplomatic activity,—albeit in a legally challengeable

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way in international law—to incorporate itself into a global diplomatic network and to ease the conduct of its international relations. In effect, the EU is breaking new ground as it is, in practice, changing the law surrounding diplomatic activity. This absence of an appropriate international legal framework for new diplomatic actors, for special international organizations such as the EU, brings new legal challenges for diplomacy in the twenty-first century. The chapter also discusses the internal and external challenges for the EU and the application-seeking of Vienna Convention principles for itself, in addition to examining the recent developments in the area of EU diplomatic law, and what the future may hold as the institutional framework of the Union continues to evolve.

1.1 The EU and the VCDR

The ICJ opinion in *United States v Iran* stated that '… the institution of diplomacy, with its concomitant privileges and immunities, has withstood the test of centuries and proved to be an instrument essential for effective co-operation in the international community, and for enabling States, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means'.[1] At the time of coming into force in 1964, the VCDR represented the codification of established practice, yet today, this model of traditional diplomacy may no longer be fit for purpose with international organizations of an advanced nature now an intricate part of the process. In the intervening period, international organizations have seen a transformation in the way they operate and how they have altered the global framework of traditional diplomacy, the most prominent of which who could be said to be at an advanced and unique stage of integration—the EU. The EU early in its own constitutional texts states that it, 'shall contribute to … the strict observance and the development of international law, including respect for the principles of the United Nations Charter',[2] representing a strong outward vision for its role in the global society. However, there are a number of sensitivities surrounding the EU as a diplomatic actor as its goes about partaking in such affairs, as it is unusual in the traditional sense for it becoming a diplomatic actor. The EU is a key figure in the transformation of diplomacy as we know it. Delegations of the European Union ('Delegations'), under the authority of the High Representative of the Union for Foreign Affairs and Security Policy,[3] are today operating in particular instances in a similar vein to full-scale diplomatic missions, attempting to become like some of their own Member States. Officially, they constitute the representation of the EU on a diplomatic level abroad, under the authority of the High Representative. While the EU and its Member States may be satisfied with the way in which the VCDR has been interpreted over a significant period of time, it has consistently thrown up

[1] *Case Concerning United States Diplomatic and Consular Staff in Tehran, United States of America v Iran* [1979] International Court of Justice 64.

[2] Article 3(5), Treaty on European Union (TEU).

[3] Article 221(2), Treaty on the Functioning of the European Union (TFEU).

issues within international law for the EU. As a result, questions arose as to the exact legal standing of these EU diplomatic missions and where they fit within the international legal order, including how the EU is challenging the underpinning of diplomatic practice that has been in place. The Union falls outside of the strict criteria of statehood set out in the Charter of the United Nations and the Vienna Convention.

A short but significant treaty, the VCDR in the international arena of diplomacy laid the groundwork for many international treaties and agreements that have subsequently been enacted throughout the world.[4] It is one of the most widely ratified global treaties and fifty years after coming into force, remains the cornerstone of international dialogue and diplomacy. With its wide acceptance comes an equally wide range of interpretation.[5] Diplomatic law and specifically the Vienna Convention was produced to serve, protect, and defend the operations, functionality, and the decorum of practices that have been in place for centuries. In the latter twentieth century, it has been proven that sovereignty is no longer vested solely in States, but also bedded in bodies like the EU,[6] a regional structure that is somewhere between the intergovernmental and the supranational levels. Yet, it would have taken incredible vision for anyone in the early 1960s, when negotiations were being conducted for the development of the Vienna Convention, that non-State entities may need to be catered for in international law at some juncture further down the line. It has been put that the right to be an actor in diplomatic activity is seen to flow from a sovereign State.[7] Ultimately, the EU's formulation as a non-State entity poses significant challenges to its reach, as it in principle cannot play in the same league as the nation States. The alliance of nation States rules in matters of diplomacy were developed by the nation States, for nation States, through the definitions now accepted by the Vienna Convention. This closed structure of public international law has unintentionally left new unique entities like the EU out in the cold, leading the way in supranational and international diplomacy.

The EU is a newcomer to the game of diplomacy, having only been created as the initial 'European Communities' in the 1950s. Not only is the EU of today a new recruit, but diplomatic practices have also seen substantial deviations from practice when the Vienna Convention came into force in the 1960s.[8] Yet little has changed in the interpretation of the strict nation State principle and the entities for which the Vienna Convention applies in this regard. Even if the Union wanted—and the EU Member States took no issue with a proposal—it would not be in a

[4] See Chapter 1.

[5] Paul Behrens, *Diplomatic Interference and the Law* (Hart Publishing, Oxford 2016) 38.

[6] Steven Blockmans, 'EU Global Peace Diplomacy: Shaping the Law on Statehood' in Dimitry Kochenov and Fabian Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (CUP, Cambridge 2013) 130.

[7] Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (3rd edn, OUP, Oxford 2008) 24.

[8] Jan Wouters and Sanderijn Duquet, '*Unus inter plures*? The EEAS, the Vienna Convention and International Diplomatic Practice' in David Spence and Jozef Bátora (eds), *The European External Action Service: European Diplomacy Post-Westphalia* (Palgrave Macmillan, London 2015) 162.

position to ratify the Vienna Convention. International diplomatic law does not cater for international organizations, but rather is State-orientated as it is based on the premise of statehood, closely associated with members of the United Nations. It could be construed therefore that international organizations would be excluded outright from not only ratifying the Vienna Convention, but also availing themselves of its provisions. Articles 48 and 50 of the Vienna Convention provide that only States may sign and ratify the international treaty. In order for the EU and its Delegations to be in line with the contemporary norms of diplomacy as observed by the traditional players, they must ensure their initial compliance with the articles specified within the Vienna Convention.

There are many legal challenges for the EU to overcome when it attempts to try and avail itself of the Vienna Convention for its purposes, namely, to get recognized by the world as a global actor, with an internationally renowned contingent of diplomats. Therefore, a continued tension is evident between EU diplomatic activity and the international legal framework governing such practices at present.[9] The Vienna Convention is being deployed by the EU to its widest possible extent. Where the principle of reciprocity woven within the text of the Vienna Convention is concerned, an actor like the EU cannot offer such mutual recognition as that would be a preservation of EU Member State competences. Protocol 7 therefore, as part of the EU Treaties, arranges for the privileges and immunities of the EU, with Chapter VI of the same Protocol covering the missions of third States accredited to the EU. Without specifically naming particular EU Member States, it notes, 'the Member State in whose territory the Union has its seat shall accord the customary diplomatic immunities and privileges to missions of third States accredited to the Union,'[10] or in other words, in Member States where the Union's institutions are active, in Belgium,[11]Luxembourg, France, and Germany. These steps, instigated by the Union, help to build it as a diplomatic actor.

2. Legal Framework for External Action of the European Union

The EU is challenged by internal obstacles and external hurdles as a diplomatic actor in international law. It has been held that customary law at the international level covering rights and privileges otherwise conferred upon States by the VCDR do not necessarily apply to international organizations.[12] Hence, the EU has to configure another way of operating. Complimenting it are provisions enshrined within the EU Treaties and its accompanying legislation of secondary nature that

[9] Ramses A Wessel and Bart Van Vooren, 'The EEAS's Diplomatic Dreams and the Reality of European and International Law' (2013) 20 Journal of European Public Policy 1350, 1363.

[10] Protocol 7, Chapter IV, Article 16 attached to the Treaties of the European Union.

[11] Frédéric Dopagne, Sanderijn Duquet, and Bertold F Theeuwes (ed), *Diplomatiek recht toegepast in België* (Maklu, Antwerp 2014) 39–42.

[12] Iain MacLeod, Ian D Hendry, and Stephen Hyett, *The External Relations of the European Communities: A Manual of Law and Practice* (Clarendon Press, Oxford 1996) 217.

are there to support it. While there are multiple political factors to be fully taken into consideration for the exercise of the EU within international diplomacy, greater legal competences take precedence before any action is deployed. Before the Treaty of Lisbon came into effect in 2009, which attempted to align ambition with reality, there was no encompassing treaty framework that dealt with the Union's external action and representation.[13] Article 13 of the Treaty on European Union (TEU) made important changes in this regard in creating a single framework for institutional coherence, and bestowed clear unambiguous legal personality upon the EU.[14] This was a welcome development that had for too long been brushed aside as an implicit understanding, but the Treaties of the Union now provide all actors with much needed legal clarity. Most importantly for lawyers in the field of EU external relations and diplomacy, such explicitness creates a better operating environment for the EU and for the understanding of its institutions on the world stage. The legal framework for the EU's institutions and various bodies was therefore strengthened; however, it did not fully settle the distribution of competences in the external relations, nor the decision-making procedures.

As an international organization, the EU is subject to international law in its relations with third States and other international organizations. For the external workings of the EU, the Treaties note, 'the Union delegations in third States and at international organisations shall cooperate and shall contribute to formulating and implementing the common approach'[15] and furthermore 'the Union delegations in third States and international conferences, and their representations to international organisations, shall cooperate in ensuring that decisions defining Union positions and actions adopted pursuant to this Chapter are complied with and implemented'.[16] Specific recognition that the EU is different in the international arena has been acknowledged with the passing of a resolution at the United Nations General Assembly in 2011,[17] granting the Union enhanced observer status—the first entity to achieve this.

2.1 EU diplomacy: Past and present

In order to garner a better sense of how the EU configures itself with diplomatic law, it is first important to contextualize the circumstances of how it came to today's fruition. From near the beginning of its creation, the institutions of the EU have developed their own unique network of diplomacy on an individual state-by-state basis, bilaterally, starting with mere information and communications offices in London and Washington DC in the 1950s, before gradually expanding as Delegations of the European Commission in African, Caribbean, and

[13] Eric Hayes, 'EU Delegations: Europe's Link to the World' in Knud Erik Jørgensen and Katie Verlin Laatikainen (eds), *Routledge Handbook on the European Union and International Institutions: Performance, Policy, Power* (Routledge, Abingdon 2013) 28.

[14] Article 47 TEU. [15] Article 32 TEU. [16] Article 35 TEU.

[17] A/RES/65/276 United Nations General Assembly. *Participation of the European Union in the Work of the United Nations*. New York, 10 May 2011.

Pacific Group of States in the 1960s,[18] which mainly dealt with low-level political affairs, eventually seeing an intensive growth in the 1990s,[19] leading all the way up to today's more simplified Delegations of the European Union throughout the world—a major transformation for European standards. This is particularly so given that EU Member States were not always so eager to allow institutions of EU to get involved in traditional diplomacy,[20] but eventually allowed for a shift in expertise in the Delegations from 'technicians' to 'diplomats'.[21] While the Vienna Convention catered for customary international diplomatic law that formed the accepted legal framework of inter-State diplomacy,[22] it would be correct to say that such diplomacy is today not only practiced by States, but also other stakeholders like the EU. The Treaty of Lisbon, coming into effect in 2009, allowed for the establishment of the European External Action Service ('External Action Service') in 2010,[23] the diplomatic arm of the European Union which maintains responsibilities for Delegations with a legal underpinning.

With significantly increased powers by comparison to the previous Delegations of the European Commission, and representing just one institution of the EU prior to the Treaty of Lisbon, the Delegations nonetheless acted as the natural base for all EU activity. The replacement Delegations of the European Union today did not appear out of nowhere, and succeeded them as near full-scale diplomatic missions made up of staff from the Commission, the Council, and EU Member States, with greater levels of responsibility for representing the Union as a whole. Yet they remain within the international legal framework second class to nation States as provided by the Charter of the United Nations as non-States. Delegations of the European Commission were not full diplomatic missions in the strict sense of the term either, but were often styled as such full-scale missions,[24] despite not actually having the complete competences of a full diplomatic mission. As a result, the EU (or then, European Communities) had to avail itself of alternative legal methods to form diplomatic missions in third States. Presently it opts for using Establishment Agreements with third States as a means of underpinning Delegations of the European Union. The Delegations, either previous ones of the Commission or current Delegations of the entire EU, have always had their competences expanded over time by the Member States, with an ever-increasing scope of capabilities. Accordingly, it can be said that the Vienna Convention does not serve the needs of

[18] Véronique Dimier and Mike McGeever, 'Diplomats Without a Flag: The Institutionalisation of the Delegations of the Commission in African, Caribbean and Pacific Countries' (2006) 44 Journal of Common Market Studies 483, 485.

[19] Michael Bruter, 'Diplomacy without a State: The External Delegations of the European Commission' (1999) 6 Journal of European Public Policy 183.

[20] Pierre Vimont, 'Foreword' in Joachim A Koops and Gjovalin Macaj (eds), *The European Union as a Diplomatic Actor* (Palgrave Macmillan, London 2015) x.

[21] David Spence, 'The European Commission's External Service' (2004) 19 Public Policy and Administration 61, 66.

[22] Jan Wouters and Sanderijn Duquet, 'The EU and International Diplomatic Law: New Horizons?' (2012) 7 The Hague Journal of Diplomacy 31, 31.

[23] Article 27(3) TEU.

[24] Ivor Roberts (ed), *Satow's Diplomatic Practice* (6th edn, OUP, Oxford 2009) 407.

modern twenty-first century diplomacy for unique entities when nation States are no longer the ultimate holders of sovereignty or lone actors in diplomacy in terms of international relations. States have been the established actors in the field of diplomacy since earlier times, and they were not subject to the same level of scrutiny that the EU has had to endure since the time of its establishment. Nonetheless, the practical functioning of the Delegations continues to resemble that of formal embassies, even as they further follow issues where it is possible to make a more separate distinct impact.

2.2 The Council decision to establish the European External Action Service

One of the numerous aims of external relations reform in the EU through the Treaty of Lisbon was the establishment of a new body charged with the Union's diplomacy under the direction of the High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the European Commission who in effect acts as the Foreign Minister of the European Union.[25] In July 2010, this monumental step was taken after a quadrilogue progress involving multiple actors to set up the European External Action Service,[26] which is now central to the EU's role in international diplomacy, putting numerous external relations policies of the European Union under one roof as its diplomatic service. The External Action Service is not an institution in its own right, but the basis for its establishment is provided in the Treaties. The Directorate-General for External Relations in the European Commission (RELEX) was dissolved and merged with Council-Secretariat external relations functions that form the External Action Service as we see it today, as a functionally autonomous body. The Delegations of the European Commission changed to Delegations of the European Union literally through 'the flick of a switch' in 2009.[27] The Delegations of the European Union were specifically mentioned in the Treaty of Lisbon, thus obtaining a firm legal basis, featuring as a direct result of the deepened ambition on the part of the EU to play a wider role in international affairs.[28]

With 'an astonishing amount of law' involved in the early day of the External Action Service as it made its first steps,[29] Council Decision 2010/427/EU ('the

[25] And who, for reasons of the CFSP/non-CFSP divide, has no Deputy.

[26] 'L 201/30. Council Decision of 26 July 2010 Establishing the Organisation and Functioning of the European External Action Service (2010/427/EU)' 30.

[27] David O'Sullivan, 'The EU's External Action – Moving to the Frontline' (EU's External Action—Moving to the Frontline, Institute of International and European Affairs, 18 June 2014). (Presentation).

[28] Article 221 TFEU: '(1) Union delegations in third countries and at international organisations shall represent the Union. (2) Union delegations shall be placed under the authority of the High Representative of the Union for Foreign Affairs and Security Policy. They shall act in close cooperation with Member States' diplomatic and consular missions.'

[29] Geert De Baere and Ramses A Wessel, 'EU Law and the EEAS: Of Complex Competences and Constitutional Consequences' in David Spence and Jozef Bátora (eds), *The European External Action Service: European Diplomacy Post-Westphalia* (Palgrave Macmillan, London 2015) 175.

Council Decision') flowing from Article 27(3) TEU gave Delegations of the European Union through the European External Action Service a new array of legal powers to conduct the external affairs of the Union in certain circumstances and was seen as a method of 'strengthening the EU's institutional capacity to rise to … challenges'.[30] The Council Decision even went as far as to reference the VCDR,[31] and how the EU would lead negotiations for such Establishment Agreements as a functionally autonomous body, whilst not being entirely independent of the other institutions, namely the Commission and the Council. The External Action Service is not an institution of the European Union in its own right,[32] and other than in the declarations to the EU Treaties, the External Action Service is specifically referenced in the TEU within Article 27. This is a miniscule amount compared to its head, the High Representative, who is extensively referenced on matters of external action and otherwise.[33] Arguably, not being an institution in its own right with standing equal to that of the EU institutions makes its tasks more difficult to execute fully, despite it also being subject to the Court of Justice of the European Union. Not all Delegations of the European Commission were the same in terms of their ability to act, and some Delegations had more prominence than others, resulting in the European External Action Service suffering 'from a number of birth defects and childhood diseases'.[34] This disparity became even more widely acknowledged upon their conversion to Delegations of the European Union, with some Delegations given wider coordination roles and additional new powers agreed by all the stakeholders in Brussels.[35]

2.3 Competence divisions

The nature of the European External Action Service is intrinsically complex with its mixture of competences divided between itself, the institutions of the EU, and that of its own Member States. This hybrid nature stems from the Union's own fragmented constitutional structure that has been in place since its foundation.[36]

[30] European External Action Service, 'Report by the High Representative to the European Parliament, the Council and the Commission' (European External Action Service 2011) <http://www.eeas.europa.eu/images/top_stories/2011_eeas_report_cor_+_formatting.pdf> accessed 10 June 2014, at 1.

[31] Article 5(6) 'L 201/30. Council Decision of 26 July 2010 Establishing the Organisation and Functioning of the European External Action Service (2010/427/EU)' (n 26) 30.

[32] The institutions of the EU are set out in Article 13 TEU, which does not include the External Action Service.

[33] See, for example, articles 15, 18, 21, 24, 26, 30, 33, 34, 36, 38, 41, 42, and 43 TEU, and articles 218, 220, 221, 234, and 243 TFEU.

[34] Jan Wouters and Hanne Cuyckens, 'Festina Lente: CFSP from Maastricht to Lisbon and Beyond' in Maartje de Visser and Anne Pieter van der Mei (eds), *The Treaty on European Union 1993–2013: Reflections from Maastricht* (Intersentia 2013) 237.

[35] Wessel and Van Vooren (n 9) 1350.

[36] Thomas Ramopoulos and Jed Odermatt, 'EU Diplomacy: Measuring Success in Light of the Post-Lisbon Institutional Framework' in Astrid Boening, Jan-Frederik Kremer, and Aukje van Loon (eds), *Global Power Europe – vol 1: Theoretical and Institutional Approaches to the EU's External Relations* (Springer 2013) 20.

External relations acts by the EU are split, and can be defined loosely between those that are within the largely intergovernmental Common Foreign and Security Policy (CFSP) and other supranational non-CFSP acts. With this abnormal mandate, clear hesitation was prevailing on the part of some EU Member States at the time of the Intergovernmental Conference that paved the way for the Treaty of Lisbon that gave effect to the current Treaties of the European Union.[37] The legal basis of Union measures in its external policies has nonetheless been subject to internal challenge at the Court of Justice of the EU since the Treaty of Lisbon.[38] Declaration 13 annexed to the Treaties concerning CFSP noted that, 'the creation of the office of High Representative of the Union for Foreign Affairs and Security Policy and the establishment of an External Action Service, do not affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third States and international organisations', as an apparent reference to quell the anxieties of EU Member States. Declaration 14 supplemented this, noting that the High Representative and the European External Action Service as internal EU actors 'will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third States and participation in international organizations, including a Member State's membership of the Security Council of the United Nations'.

With the division of competences between the EU's own institutions and the Member States, the External Action Service and its Delegations are deserving of their exceptional position in the international legal sphere.[39] These internal competences also ascend when Delegations of the European Union in third States host senior officials from an array of EU institutions.[40] While this may be a normal occurrence for EU Member States' external representations in the form of embassies, the process for the EU is tangibly different due to the various heads of the different institutions akin to Head of State or Head of Government figures. Much of these issues were not dealt with in the Treaty of Lisbon and it was left to the actors to develop an arrangement at a later point that was acceptable. The Union has tested, and continues to test the limits of its Treaties and the acceptability of its conduct by its own Member States in its diplomatic actions, without trying to overwhelm the national embassies belonging to its Member States. Given that

[37] Some EU Member States continue to be critical in the way the External Action Service operates. For more, see Knud Erik Jørgensen, 'EU Diplomacy in Global Governance: The Role of the European External Action Service' in Joachim A Koops and Gjovalin Macaj (eds), *The European Union as a Diplomatic Actor* (Palgrave Macmillan, London 2015) 40.

[38] For example, in terms of EU anti-piracy operations and potential wider remit of Union action, see Graham Butler, 'Pinpointing the Appropriate Legal Basis for External Action' (2015) 6 European Journal of Risk Regulation 323.

[39] Bart Van Vooren, 'A Legal-Institutional Perspective on the European External Action Service' (2011) 48 Common Market Law Review 475, 500.

[40] For a more general overview, see Leendert Erkelens and Steven Blockmans, 'Setting up the European External Action Service: An Act of Institutional Balance' (2012) 8 European Constitutional Law Review 246.

the Treaty of Lisbon and the Council Decision to establish Delegations of the European Union still left some gaps in the fulfilment of duties giving rise to potential legal vacuums, the Commission and the External Action Service developed a 'Working Arrangement' to cover outstanding matters they thought necessary to straighten out at that time.[41] This gradual development and shaping of the EU's diplomatic activities continues to show the resilience that it has to become a true global actor.

3. Internal Challenges

International law has been put to use in the EU's external relations policies, yet it is also used internally within third States.[42] Gradually since its inception, the Union has expanded its abilities both internally in terms of institution building and externally by attempting to formulate solid positions on matters pertaining to foreign policy and external relations. Always keen to accentuate its position on world issues, the EU's own internal matters which have implications for external diplomacy, would need to be in order first.

3.1 Ambassadors vs Heads of Delegation

An examination of the articles within the Council Decision on the establishment of the European External Action Service provides an insight into the thinking of the EU Member States that consented to its formation and the powers that were to be granted upon the leader of each Delegation of the European Union. Article 5 of the Council Decision covers the necessary provisions outlining the scope of the Delegations of the European Union, but also the Heads of Delegation. While outlining the numerous responsibilities of the role, not once in the document does it refer to the Heads of Delegations of the European Union as Ambassadors. Over time, the Union created a practice where procedures for accrediting Heads of their Delegations, originally Delegations of the European Commission, were standardized.[43] This can be explained by the obvious international law difficulties the EU may have faced internally by the Court of Justice of the European Union or externally, by the difficulty of prejudging whether third States would accept such a title. The Council Decision however did not broach the issue, perhaps deliberately in order to avoid binding itself. The process for presenting the credentials differs from nation State to nation State, in that since there is no 'Head of State' per se, the Presidents of both the European Council and the Commission sign the relevant

[41] European Commission Secretariat-General, 'Working Arrangements Between Commission Services and the European External Action Service (EEAS) in Relation to External Relations Issues' (European Commission 2012) (2012) 41133, 1–40.

[42] Bart Van Vooren and Ramses A Wessel, *EU External Relations Law: Text, Cases and Materials* (CUP, Cambridge 2014) 267.

[43] Jan Wouters and Sanderijn Duquet (n 22) 39.

papers,[44] the Letter of Credence, so as to ensure the competency bases are covered from the perspective of the EU and that of the Member State. Article 13(1) of the Vienna Convention ensures that the Head of Mission in the receiving State is given uniformity in term of presenting their credentials. Despite this all, the courtesy title of 'Ambassador' for the Head of the Delegations of the European Union has been in place for some time, even when the Delegations previously were only Delegations of the European Commission,[45] and is a respected principle now for EU 'Ambassadors' around the world, albeit with varying levels of recognition in receiving States.

The same principles apply, to a degree, to the actual diplomatic missions themselves. While the practical term of an 'embassy' can be used and understood when referring to a Delegation of the European Union, it is not the legal term given to them, as the used term in the Vienna Convention is 'diplomatic mission'. Despite this, a conscious effort has been made by the External Action Service and the Delegations of the European Union to opt for the customary title of 'Delegation', marking an obvious distinction to EU Member State embassies from the outset, for fear of misleading those unaccustomed with the intricate details of legal status. Furthermore, the multitude of official documents from the EU institutions bear all the hallmarks of Delegations of the European Union being in fact embassies of an EU kind, just without the formal title of 'embassy'.

3.2 Personnel documents and consular assistance

Officials staffing the Delegations of the European Union are not nationals of the Union, but rather, nationals of particular EU Member States first, and citizens of the European Union second, supplementing their nationality.[46] The issuing of European Union travel documents, *laissez-passers*, has not just been a creation of the European External Action Service, but has been used by officials from a range of EU institutions for some time. The United Nations has been issuing *laissez-passers* of their own kind for decades with their legal foundation being Article VII of the Convention on the Privileges and Immunities of the United Nations.[47] Some EU Member States that have their officials on secondment to the External Action Service in any capacity provide national diplomatic or official passports to their officials. Therefore, officials from Delegations of the European Union who do

[44] Henry G Schermers and Niels Blokker, *International Institutional Law: Unity within Diversity* (5th edn, Martinus Nijhoff Publishers, Leiden 2011) 1163.

[45] Philippe de Schoutheete and Sami Andoura, 'The Legal Personality of the European Union' (2007) LX Studia Diplomatica 1, 7.

[46] For an overview of European Union citizenship dynamics, see Helle Krunke and Felix Schulyok, 'National Citizenship and EU Citizenship: What Actual Competence Is Left for Member States in the Field of Citizenship?' in Thomas Giegerich, Oskar Josef Gstrein, and Sebastian Zeitzmann (eds), *The EU between 'An Ever Closer Union' and Inalienable Policy Domains of Member States* (Nomos 2014) 107–52.

[47] Convention on the Privileges and Immunities of the United Nations, United Nations Treaty Collection, 1946 <http://www.un.org/en/ethics/pdf/convention.pdf> accessed 10 June 2014.

not have the privilege of holding diplomatic or official passports from their own EU Member State can obtain documentation provided by the EU, determining their status as officials of the EU. More background work was required here, and in December 2013, the EU laid down a new regulation governing EU's *laissez-passers*.[48] Whatever the legal position of EU *laissez-passers*, they are no replacement for diplomatic passports issued by individual EU Member States, meaning that they are effectively useless should a third State not be aware of EU *laissez-passers* worthiness, or worse still, be unwilling to recognize their existence at all. While it is an internal predicament of the EU that it has no competence to issue passports for its own officials, it does aspire to possess such power one day. In the meantime, it is taking whatever steps necessary to progress its agenda with the knowledge of its Member States.

The EU is also involving itself in the implementation of citizens' rights according to the Treaties, specifically with regard to consular assistance. Some willing Member States of the EU have begun issuing consular services to citizens of the EU beyond their own nationals, with some even inserting Article 23 TEU inside their passports, stating, 'every citizen of the Union shall, in the territory of a third State in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State',[49] which is a practice divergent from international law generally. With EU Member States offering differing levels of consular services abroad, this supporting position that the Member States are beginning to engage in leads to the potential scope for European Union to be involved at some advanced stage in future involvement in consular matters, given its representation in more third States around the world than most of its Member States. This raises the inevitable question whether Delegations of the European Union would have the resources to manage and administer consular issues for citizens of the EU as a whole. At present, such issues remain with the Member States as a competence of theirs, but also that of nation States under the VCCR when legal get-arounds may have to be explored by the EU. Such options would include the negotiation of agreements with third States as a means of availing themselves of this ability, and more importantly, the willingness of the EU Member States to consent to it. An external challenge in this regard would be caused by the question of whether agreements on consular issues made within the European Union would be applicable in third States.[50] In the meantime, the Union continues to experience a range of legal obstacles if it is to reach its full potential in consular affairs on behalf of EU citizens.[51] Evidently, the Union

[48] 'L 353/26: Council Regulation of 17 December 2013 Laying down the Form of the Laissez-Passer Issued by the European Union (2013/1417/EU)' 26.

[49] This provision is similarly outlined in Article 46 (Diplomatic and consular protection) in the Charter of Fundamental Rights of the European Union.

[50] For more on consular issues and the European Union generally, see Annemarieke Vermeer-Künzli, 'Where the Law Becomes Irrelevant: Consular Assistance and the European Union' (2011) 60 International and Comparative Law Quarterly 965.

[51] Jan Wouters, Sanderijn Duquet, and Katrien Meuwissen, 'Caring for Citizens Abroad: The European Union and Consular Tasks' (2014) 19 European Foreign Affairs Review 563, 564.

is always seeking out opportunities for itself, be it for greater formal competences down the line, or in times when it makes practical sense, for attaining additional internal competences.

3.3 The High Representative of the Union for Foreign Affairs and Security Policy

A new multi-hatted leader for the EU's foreign, security, and defence affairs emanated from the Treaty of Lisbon, merging the former position of the Commissioner for External Relations and the previous High Representative for the CFSP, to form the new High Representative of the Union for Foreign Affairs and Security Policy, and its own body, the European External Action Service. This new position, the technical equivalent of an EU foreign and defence minister, was envisaged to put one face to the foreign and security policies of the EU and, more generally, to improve the overall internal coherence of the Union in its actions. Since the Treaty of Lisbon came into effect, just two people have held the position of High Representative: Catherine Ashton of the United Kingdom, serving a full term from 2009 through to 2014, and the incumbent Federica Mogherini, the former Italian Foreign Minister. Neither was in any way a high profile figure on the European stage before taking the position, which could be seen as a signal that EU Member States may have been hesitant to appoint a significant public figure to the role.

The creation of the formal High Representative role as the first Vice-President of the European Commission has been likened to 'a feat of constitutional innovation'.[52] Despite not being a formal Foreign Minister, being supported by what is not a full Ministry of Foreign Affairs, the Union's unique character as an international organization means treatment from the other actors should be different, given its unequivocal distinction from other international organizations to which it could be compared. A report conducted by the EU's finance watchdog, the Court of Auditors, noted that 'Member States and the EEAS [European External Action Service] have not yet fully exploited the potential for synergies between their networks of diplomatic representations',[53] despite noting the EEAS's success in its establishment, given the predicaments it was up against, both legally and politically.

4. External Challenges

The internal creation of the High Representative leads to commencing the examination of the external challenges the EU faces in diplomatic law. When acting in

[52] Geert De Baere and Ramses A Wessel (n 29) 186.

[53] Karel Pinxten, 'The Establishment of the European External Action Service' (European Court of Auditors 2014) Special Report 11 <http://www.eca.europa.eu/Lists/ECADocuments/SR14_11/SR14_11_EN.pdf> accessed 30 August 2014, at 22.

third States, it is in the European Union's interest that, through its Delegations, it does not become the additional twenty-ninth diplomatic actor after all of its Member States, but rather acts as an entity offering something new and dynamic. Consequently, the external encounters for Delegations of the European Union will now be analysed in the context of the challenges the EU faces within international law.

4.1 Position under international law

The aforementioned legal personality of the EU was guaranteed and codified as part of the Treaty of Lisbon within its own international legal order. However, the EU had been concluding international agreements with third States for some time previously, suggesting a willingness of the international legal community to accept the status of the EU externally, before achieving legal satisfaction internally. Proposals to establish diplomatic relations are rarely turned down.[54] This therefore would indicate that the EU met Vienna Convention-esque criteria for international legal personality, despite its own drawbacks, and did not actually enhance or damage its own capabilities internationally. While there are significant roadblocks in the operation of external EU diplomacy, such diplomacy is occasionally welcomed by smaller EU Member States, which do not have their own individual representation in most third States. On the other spectrum, larger EU Member States now have to justify the presence of some of their embassies for traditional diplomatic means, as globalization and an ever more interconnected world takes hold.[55]

4.2 Establishment agreements

While it has been noted that 'foreign offices prefer not to mention Vienna [Convention]',[56] the European Union cannot do so. Tradition has seen official diplomatic relations exist between entities that are States, which the Vienna Convention gave modern legal effect to at the time. The EU is not a State,[57] but an active participant in diplomatic networks.[58] Before Delegations of the European Union are established in third States, a bilateral agreement between the EU and a receiving State must be reached. The legal basis in Union law comes from Article 5(6) of the Council Decision which states that 'the High Representative shall enter into the necessary arrangements with the host State, the international organisation,

[54] Denza (n 7) 25.

[55] David Spence, 'Taking Stock: 50 Years of European Diplomacy' (2009) 4 The Hague Journal of Diplomacy 235, 258.

[56] Paul Behrens, 'The Curious World of Diplomatic Relations' *The Guardian* (London, 18 April 2011) <http://www.theguardian.com/commentisfree/2011/apr/18/vienna-convention-on-diplomatic-relations> accessed 29 July 2014.

[57] This has been confirmed by the Court of Justice of the European Union: *Opinion 2/13: Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (Court of Justice of the European Union) ECLI EU C 2014 2454.

[58] Wessel and Van Vooren (n 9) 1350.

or the third State concerned. In particular, the High Representative shall take the necessary measures to ensure that host States grant the Union Delegations, their staff and their property, privileges and immunities equivalent to those referred to in the Vienna Convention on Diplomatic Relations of 18 April 1961'.[59] This conferral on the High Representative provides the EU with internal powers to make external bilateral agreements with third States. Article 3 of the template 'Establishment Agreement' that the EU uses with third States at this juncture brings in the Vienna Convention.[60] While already a part of the European Union Treaties, the Establishment Agreements in Article 3.3 of the template reiterate a special onus that is placed on States hosting institutions and bodies of the EU (and indeed to all EU Member States) that reciprocity is a core principle the EU stands by for its diplomatic missions.

The European External Action Service has expressed that in the absence of the protection of international diplomatic law through the Vienna Convention, they are satisfied that the Establishment Agreements are sufficient and indeed, working well so far.[61] The EU has to date relied on the generous goodwill of the international diplomatic community to provide it with the necessary legal protection that it affords nation States under the Vienna Convention. This 'contracting-in' approach has not been fully settled in international law,[62] but it should be noted that such agreements are not binding on all States, but simply the two parties to the arrangement—the EU and the third State. Furthermore, while international law may catch-up in time with a firmer view of this EU action, they remain guiding principles between the two parties, as opposed to legally binding and enforceable obligations. In the absence of an international convention of the EU's own, such as the Convention on the Privileges and Immunities of the United Nations 1946 that affords the UN and its specialized bodies, privileges and immunities necessary to fulfil their functions,[63] Establishment Agreements will continue to be

[59] 'L 201/30: Council Decision of 26 July 2010 Establishing the Organisation and Functioning of the European External Action Service (2010/427/EU)' (n 26) 30.

[60] The article reads: '(1) The Delegation of the European Union, its Head and its members, as well as the members of their families forming part of their respective households, shall, on the territory of [THIRD COUNTRY], enjoy such privileges and immunities and be subject to such obligations as correspond to those laid down in the Vienna Convention on Diplomatic Relations of 18 April 1961 and respectively accorded to and assumed by Diplomatic Missions accredited to [THIRD COUNTRY], the heads and members of those Missions, as well as the members of their families forming part of their respective households. (2) The other provisions of the Vienna Convention on Diplomatic Relations of 18 April 1961 shall be applicable mutatis mutandis. (3) Those rights and privileges and immunities shall be accorded on condition that, in conformity with the provisions of article 16 of the Protocol 7 on the privileges and immunities of the European Union annexed to the Treaty on the European Union and the Treaty on the Functioning of the European Union, the Member States of the European Union accord the same rights and privileges and immunities to the Mission of [THIRD COUNTRY], to its Head and to its members, as well as to the members of their families forming part of their respective households.' This template does not appear to be publicly available, but is set out in Pieter Jan Kuijper and others, *The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor* (OUP, Oxford 2013) 52.

[61] Discussion with the Legal Affairs Division of the European External Action Service.

[62] Wouters and Duquet (n 8) 164.

[63] See Sanderijn Duquet and Jan Wouters, 'Diplomacy, Secrecy and the Law' in Corneliu Bjola and Stuart Murray (eds), *Secret Diplomacy: Concepts, Contexts and Cases* (Routledge, 2015) 85–107.

the normal course of procedure for the EU as a means of protecting its diplomats and its Delegations.

4.3 Working with EU Member States

Particular EU Member States have taken issue with certain aspects of arrangements that the European External Action Service and Delegations of the European Union occasionally opt for. To take one example: the question whether statements and actions taken by the High Representative are statements by the EU and its Member States or the EU alone can be a point of contention. These are merely technicalities, but again reflect the entirely legal nature that can be put on EU external action when taken to task by an actor if it disagrees with a position. Decisions to open or close Delegations of the European Union in a third State lie with the High Representative, but must be agreed to by both the Council and Commission,[64] with the number ever changing in an upward trend, resulting in about 140 Delegations throughout the world. While the Union itself has a direct presence in most of the world's States, this is supplemented with permanent missions of EU Member States which have over 3,000 embassies or consulates between them, often in the same places as the Delegations of the European Union. If the numbers are stacked, the External Action Service has 3,750 staff at its disposal, mixed between its base in Brussels and all of its Delegations around the globe, compared to the diplomatic corps of its Member States which amounts to just under 100,000 officials. On matters of finance and expenditure, the disparity between the two is even more divergent with approximately €476 million being spent annually by the European External Action Service, versus €7.5 billion by the twenty-eight foreign ministries of EU Member States.[65] This all points to the fact that despite having a worldwide presence,[66] that the EU is outnumbered, and vastly outspent. There is a reasonable assertion therefore that Delegations of the European Union function and operate at very different levels of proficiency in different third States given the complex competence differentials between the EU and its Member States, and the willingness of some Member States to allow Delegations to function in particular ways in third States. This is despite the regime the third State has in place for allowing an enhanced international organization like the Union to adopt rules normally accustomed to normal entities like nation States availing themselves of Vienna Convention principles.[67]

[64] Council Decision, article 5(1).

[65] European External Action Service, 'The HR and the European External Action Service from the Practitioner's Viewpoint' (Brussels, June 2014, Presentation).

[66] The EU has more missions in third States than most small- and medium-sized Member States.

[67] The difficulty the EU faces has proven to be even more difficult in international organizations. See eg Maximilian B Rasch, *The European Union at the United Nations: The Functioning and Coherence of EU External Representation in a State-Centric Environment* (Martinus Nijhoff Publishers, Leiden 2008).

5. Recent Developments

The EU is in many ways no different from any other diplomatic actor, in that it faces an array of diplomatic issues that need to be addressed. It could even be said that for the Union, its own construction plagues it with intricacies. As such, the External Action Service and its Delegations have to be constantly equipped with the right apparatus in order to meet the changing environment of international diplomacy. While it may be questioned if diplomacy under the Vienna Convention will survive or if it is even needed in many first world States, the EU demonstrates a willingness to be 'part of the club' while it is still around. This is not a question for lawyers on diplomacy's longevity, but legal solutions will be needed when the time arises. The lack of international recognition for the European External Action Service and its Delegations has not dented the appetite for them to continue in setting up office-sharing arrangements with its Member States in co-location initiatives. Spain has decided and agreed through a Memorandum of Understanding to establish their new embassy within premises belonging to the External Action Service in at least one location.[68] Although a number of these initiatives exist, only a small number of EU Member States have signed up to such arrangements to date.[69] It may take more time than anticipated for additional Member States to come around to this practice of developing multiple representations of Member States under one roof, but a beginning of such initiatives can be observed. This kind of initiative, amongst others, has been given the title of a 'diplomatic entrepreneur'.[70] In terms of rule-making, with current Delegations competences consented to by EU Member States, and third States accepting the terms laid out under the Establishment Agreements, the established practice thereby verifies Vienna Convention principles and results in the EU's legal standing being enhanced, giving new legal principles with a 'contracting in' arrangement. Just as in consular law, this lack of firm legal clarity could stoke international tensions should discrepancies and disagreements occur in the future.[71] This is not the first time that the EU has alternated international law and practice by processes which have been deemed truly remarkable.[72] Previously, the legal personality officially bestowed upon the EU had also been granted along similar lines to the Association of Southeast Asian Nations (ASEAN) by its own Member States under its Charter.[73]

[68] 'EEAS and Spain Sign Memorandum of Understanding on Sharing Diplomatic Premises in Myanmar/Burma' <http://www.eeas.europa.eu/statements/docs/2014/140210_02_en.pdf> accessed 8 June 2014.

[69] The EEAS have to date signed a number of co-location MoUs with Austria, the Czech Republic, Germany, Denmark, Finland, France, Italy, Luxemburg, Netherlands, Spain, and the United Kingdom.

[70] See generally Staffan Hemra, Thomas Raines, and Richard Whitman, 'A Diplomatic Entrepreneur: Making the Most of the European External Action Service' (Chatham House 2011) Chatham House Report.

[71] Annemarieke Vermeer-Künzli (n 50) 995.

[72] Frank Hoffmeister, 'The Contribution of EU Practice to International Law' in Marise Cremona (ed), *Developments in EU External Relations Law* (OUP, Oxford 2008) 127.

[73] Roberts (n 24) 290.

While the Vienna Convention and international law does not prevent the EU from engaging in diplomacy in a way that it is competent to adopt, further proficiencies and competence transfer may give rise to an upsurge in conflict between Union law and international law. This is especially true if EU Delegations continue to operate like normal embassies as opposed to something unique and special as they are at present. A court judgment, either from the Court of Justice of the European Union or the International Court of Justice is something the Union's diplomatic actors would be keen to shy away from, and to avoid altogether. The self-conducted review of the External Action Service in 2013 pointed to a range of issues and predicaments that it as a body encounters on a regular basis as it goes about its work.[74] Such deficiencies in its own opinion of itself have prompted a number of scholars specializing in the field of EU external relations law to recommend a number of changes to the wording of the Council Decision that gave the External Action Service its legal mandate.[75] Despite available evidence, any calls from the External Action Service for a revised legal framework to correct their apparent failings arising from their self-assessment may fall upon deaf ears as EU Member States may prefer to leave the External Action Service to its current state for the time being, at least under the current European Union Treaties. In either manner, the EU's practice is informally changing the law.

6. Conclusion

The central question this chapter sought to answer through explanation and demonstration is how the EU, its External Action Service, and its Delegations fit into the existing international legal framework that safeguards diplomatic activity. From examining developments both internal and external to the Union and research already completed in this field, some conclusions can be drawn on the European External Action Service's current status and its international legal diplomatic status, as well as its probable future direction in diplomacy. Shortcomings are evident, as international law has not kept pace with international practice. It can be claimed that the current Vienna Convention requires refinement to reflect the twenty-first century.[76] Whilst acknowledging the European External Action Service as an innovation of the EU's own making, the legal dimension of the operation of its Delegations can prove difficult. Despite this, it is apparent that third States are accepting the Delegations of the European Union as diplomatic actors in

[74] European External Action Service, 'EEAS Review 2013' <http://eeas.europa.eu/library/publications/2013/3/2013_eeas_review_en.pdf> accessed 8 August 2013.

[75] Steven Blockmans and others, 'EEAS 2.0: Recommendations for the Amendment of Council Decision 2010/427/EU on the European External Action Service' (Centre for European Policy Studies 2013) <http://www.ceps.eu/system/files/EEAS%202%200%20RecommendationsSR78_0.pdf> accessed 26 August 2014.

[76] Jan Wouters, Sanderijn Duquet, and Katrien Meuwissen, 'The Vienna Conventions on Diplomatic and Consular Relations' in Andrew F Cooper, Jorge Heine, and Ramesh Thakur (eds), *The Oxford Handbook of Modern Diplomacy* (OUP, Oxford 2013) 526.

their respective nation States.[77] The Vienna Convention is monopolized by nation States, leaving the European Union to continuously develop its legal mechanisms to build up an innovative method of Vienna Convention application for its diplomatic network as it continues to mature into a complete global actor. In effect, this is circumventing international law up to now, and theoretically extends the Vienna Convention's scope of application, mainly due to the fact there has been little development in formal international law on this issue. This innovation has been central to the EU's strategy of getting a foothold, as it 'contracts-in' the Vienna Convention as a legal instrument, doing bilateral agreements in a multilateral regime. The EU is proving there is a clear way of skirting outdated international legal texts by negotiating and concluding Establishment Agreements with third States, using principles of the Vienna Convention in order to obtain membership of their capital cities diplomatic club. The Union is therefore operating without the same international legal protections as States. While this by-passing may be occurring with or without the firm understanding by third States of what the EU is doing, such action by the External Action Service for its Delegations is actually solidifying the character of the EU on the global diplomatic stage, with the EU's diplomatic missions slowly being treated more like other permanent missions of nation States. Such progression for the EU and the under-regulation of its status internationally may present further conflict between Union law and international law at a juncture at some point in the future. The mere existence of a functioning European External Action Service, and its Delegations, are a noteworthy development for the legal field.

Third States to date have been willing to provide the EU and its Delegations with diplomatic status, equivalent to that contained within the Vienna Convention through the bilateral agreements that have been reached. The EU's setup is reliant on its external partners willing to accept its existence on a legal and political level, whilst the EU's own treaties reflect international legal norms. The fact that Delegations of the European Union actively participate in diplomatic affairs and are accepted by its Member States contributes to third States' inclination to allowing the EU to engage in diplomatic activity. Such willingness demonstrated by non-EU Member States to accept that the EU, although not a State, should be treated like one for the purposes of diplomatic relations may suggest that there may not be overwhelming opposition to allowing changes to the Vienna Convention to occur in favour of non-States such as the EU. This reconsideration of the international law in this field would have to take heed of the likelihood that opposition to such proposals may come from other prominent international organizations or bodies who would claim unfair treatment. The EU however has proven itself to be unlike other international organizations. Without this acceptance of the EU and Vienna Convention principles by third States, the EU would be without any place within the diplomatic framework. However, if the text of the Vienna Convention

[77] Edith Drieskens, 'What's in a Name? Challenges to the Creation of EU Delegations' (2012) 7 The Hague Journal of Diplomacy 51, 52.

was to change, it would be akin to opening up Pandora's Box, with not just EU matters being put on the table, but also the assembly of other discrepancies that would be found with in the Vienna Convention today.

There remain some unsettled legal problems, as State elitism is dragging down the EU. Despite its own array of competences to act upon, the EU is still trapped and limited from participating fully in diplomatic affairs, although changes have been taking place for the Union both practically and legally, internally and externally. The European External Action Service is effectively a 'prototype EU foreign ministry'[78] that will still need some years to develop further.[79] In the meantime, it is increasingly in a position to influence its own Member States into acting in particular ways that are conducive to improving coherence in EU foreign policy and external relations. The existing evidence supports the view that the lack of formal recognition for the EU and its current legal framework within the Vienna Convention does not prevent the EU from expanding its reach as it continues to cast itself as a credible and coherent international actor. With the External Action Service taking on a greater range of tasks internally within the Union, such as intelligence cooperation,[80] it is likely the External Action Service will continue to be involved externally on a diplomatic level for now. The EU has cleverly been using every legal avenue available at its disposal to avoid as much conflict with the articles contained with in the Vienna Convention as possible. This is despite some EU Member States attempting to put a halt to any further expansion of EU activity in certain areas, and particularly in international organizations. While legal-diplomatic issues at international organizations are generally of a complex nature, the position of the EU can be even more convoluted. Until there is such a time when international law begins to formally recognize the EU and its practices, outstanding questions shall remain on the legal and policy issues.

The Union's system of diplomacy needs to be seen from a much broader perspective,[81] and must be allowed further time to evolve more generally. It is recognized as a diplomatic actor, and accordingly, a major hurdle is already overcome. That being said, globalization challenges the sovereignty of nation States.[82] Delegations of the European Union are continuing to reformulate the views the wider world has on the strict terms of diplomatic activity. This commotion that was traditionally

[78] Frauke Austermann, 'The European External Action Service and Its Delegations: A Diplomatic Service of Different Speeds' (2015) 1 Global Affairs 51, 52.

[79] For a discussion on the type of actor that the External Action Service is, see Rebecca Adler-Nissen, 'Theorising the EU's Diplomatic Service: Rational Player or Social Body?' in David Spence and Jozef Bátora (eds), *The European External Action Service: European Diplomacy Post-Westphalia* (Palgrave Macmillan, London 2015) 17–40.

[80] Mauro Gatti, 'Diplomats at the Bar: The European External Action Service before EU Courts' (2014) 39 European Law Review 664, 666.

[81] Michael H Smith, 'The EU as a Diplomatic Actor in the Post-Lisbon Era: Robust or Rootless Hybrid?' in Joachim A Koops and Gjovalin Macaj (eds), *The European Union as a Diplomatic Actor* (Palgrave Macmillan, London 2015) 26.

[82] Pia Kerres and Ramses A Wessel, 'Apples and Oranges? Comparing the European Union Delegations to National Embassies' Centre for the Law of EU External Relations (TMC Asser Institute 2015) 9.

preserved for nations which engaged in diplomacy and friendly relations between entities and States through the exchange of Ambassadors has now well and truly extended beyond the traditional framework. The Vienna Convention catered specifically for entities possessing statehood, reflecting the international environment of State relations, sixteen years after the establishment of the United Nations. It would have been simply unattainable for the framers of the VCDR, and subsequent treaties like the VCCR, to foresee the future direction of powerful non-State supranational entities like the EU develop into fully-fledged diplomatic actors. Whenever the next Intergovernmental Conference will be formed to look at the EU Treaties, there is a reasonable prospect that Delegations of the European Union may flourish, given their apparent success since the Treaty of Lisbon in the short time they have been in operation.[83] Convergence of Member States' pragmatic functions may occur, and thus, the opportunities the EU has to develop its own competences are unique, and should not be held up indefinitely. That being noted, Member States are sensitive about the role of the EU and its Delegations abroad. Equally, the world's understanding of the EU as a diplomatic actor is greater now than it has been previously.

It would appear to be to be a core aspiration of the EU to one day obtain unified diplomatic representation on behalf of the entire EU and its Member States—to have embassies without being a State, in place of current EU Member States. This long-term aim however is being done on a gradual basis so as to not spook any Member States as the Union gradually appears like a full nation-State in the making, but paradoxically, Member States are also aware that there are changing demands that give rise to a greater need for the EU to act together in many instances. The External Action Service recognizes this and is cognizant of the fact that developing a diplomatic service for a multi-layered institution like the EU does not occur in a short timeframe, but rather over a prolonged period of years, and possibly decades. This patience and understanding in this regard is admirable, but such hope must be persistent enough for international diplomatic law to catch up with the EU's developing external nature. Whilst the Delegations of the European Union are still not on par with the permanent representations of some of its Member States in third States, improvements over the last number of years are becoming increasingly visible, strengthening the Union's ability to conduct diplomatic activity within the confines of the legal framework that currently surrounds it. A long road has been travelled from the non-diplomatic information and communication offices in the 1950s, to the Delegations as near-full diplomatic actors today. With this progress in the external environment, however, there appears a note of caution for the internal structure. The long-term future of the External Action Service as a functionally autonomous body is always up for discussion, with the Commission being best-placed to replace its functions at a given opportunity.

[83] Graham Butler, Review of Foreign Affairs Policy and External Relations: Discussion, Dublin: Houses of the Oireachtas, Oireachtas Joint Committee on Foreign Affairs and Trade, 16 January 2014. (Presentation).

This fact demonstrates that the External Action Service is subject to the political wind of Union affairs.[84] A report commissioned by the European Parliament on External Action has issued a number of recommendations for the improvement of EU diplomacy,[85] and such measures may be addressed in the future.

Just as the Vienna Convention codified the practice of diplomacy, the EU is operating somewhat akin to what nation State diplomats did before international treaties existed, and is thus operating without the necessary international legal protection. Whether the EU has been a clear success or failure yet in diplomacy, is still too early to say, but it will depend on the position of EU Member States. Legal documents can only provide one perspective on achieving the EU's status in international diplomacy. Notwithstanding the legal innovation and creativity of the EU, in 2013 the High Representative said the establishment of the European External Action Service and the evolving Delegations were like trying 'to fly a plane while still bolting the wings on'.[86] What we can say now is that even if the wings are eventually attached, it does not necessarily result in the EU flying like a bird in the fields of diplomacy and diplomatic law just yet.

[84] For discussion on this see Hrant Kostanyan, 'Analysing the Power of the European Union's Diplomatic Service: Do the EU Member States Control the European External Action Service?' (2016) 11 The Hague Journal of Diplomacy 26.

[85] Jan Wouters and others, 'The Organisation and Functioning of the European External Action Service: Achievements, Challenges and Opportunities' (European Parliament Directorate-General for External Policies of the Union 2013) 87–88.

[86] European External Action Service, 'EEAS Review 2013' (2013) 3.

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Skirting Officialdom

Sub-State Diplomats and the VCDR Lessons from Scotland and Wales

Francesca Dickson

1. Introduction

The Vienna Convention on International Relations is a central document in international law, demarcating who 'counts' as an official diplomat and the ways in which diplomacy between sovereign States must be carried out. As such it can perhaps be taken as a high water mark in diplomatic theory. Fifty years on from its incarnation, questions have been raised about the extent to which the treaty reflects current diplomatic practice. The paradiplomacy of sub-State governments offers a unique vantage point from which to address such questions. How this diplomacy manifests, how it differs from sovereign-States, and the interaction between diplomats and paradiplomats may yet tell us something about the status and relevance of the VCDR as it enters its sixth decade. Can sub-State diplomats carry out a similar range of activities to their State-level contemporaries? Does being part of an official, diplomatically accredited mission alter the substance of sub-State 'diplomacy'? In what sense is paradiplomacy supplementary to, or in competition with, State diplomacy? These are all questions addressed in this chapter, where the international representations of Scotland and Wales, as devolved regions of the UK, are considered.

Indeed, when trying to place paradiplomatic activities in the context of other pressures on the traditional diplomatic landscape as described and accounted for by the VCDR, the most obvious 'match' for its distinct challenges are those also posed by the increasingly assured diplomatic identity of the European Union. Much of what Wouters and Duquet, in their 2012 article on the EU and international diplomatic law, point to in terms of the quasi, State-like but non-State features of the EU as an international actor could also apply to sub-State authorities.[1]

[1] Jan Wouters and Sanderijn Duquet, 'The EU and International Diplomatic Law: New Horizons?' (2012) 7(1–2) The Hague Journal of Diplomacy 31–49.

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Both the EU and various sub-State authorities try and influence foreign governments, at local and national level, and have formal arrangements with such foreign governments—and occasionally with international organizations—and maintain a network of overseas representations that often have a similar functional remit as traditional nation-State Embassies.[2] Where the two cases diverge most substantially is in the ability of sub-State governments to formally 'opt-in' to the VCDR through operating out of the official diplomatic missions of its 'host' State. It is this unique, chameleon-like ability to choose the status and character of its diplomatic representations that makes the international activities of sub-State governments a potentially illuminating case study in international law, and in particular the ways in which the VCDR relates to non-State diplomacy.

2. Paradiplomacy and Diplomatic Law

In contrast to the European genesis of its better-known cousin, multi-level governance, the concept of paradiplomacy initially developed with reference to the (overwhelmingly economic) external activities of US States, 'para-' being derived from the word 'parallel'.[3] Although a distinct body of 'paradiplomatic' literature can be discerned from the late 1980s,[4] it has been more recently, perhaps throughout the last decade, that there has been a 'normalization' of the phenomenon.[5] In particular, the activities of ambitious European regions have proved fertile ground for paradiplomatic research,[6] whilst more recently studies of 'developmental'

[2] Wouters and Duquet identify these features in the EU's external identity, ibid 32.

[3] Robert Kaiser, 'Sub-State Governments in International Arenas: Paradiplomacy and Multi-Level Governance in Europe and North America' in Stéphane Paquin and Guy Lachapelle (eds), *Mastering Globalization: New Sub-States' Governance and Strategies* (Routledge, London 2005) 92.

[4] See Ivo Duchacek, 'Multicommunal and Bicommual Polities and Their International Relations' in I Duchacek, D Latouche, and G Stevenson (eds), *Perforated Sovereignties and International Relations: Trans-Sovereign Contacts of Subnational Governments* (Greenwood Press, New York, 1988) 3–29; Ivor Duchacek 'Perforated Sovereignties: Towards a Typology of New Actors in International Relations' in HJ Michelmann and P Soldatos (eds), *Federalism and International Relations: The Role of Subnational Units* (Clarendon Press, Oxford 1990) 1–34; Daniel Latouche, 'State Building and Foregin Policy at the Subnational Level' in Ivo Duchacek, Daniel Latouche, and Garth Stevenson (eds), *Perforated Sovereignties and International Relations: Trans-Sovereign Contacts of Subnational Governments* (Greenwood Press, New York 1988) 29–43; John Kincaid, 'Constituent Diplomacy in Federal Polities and the Nation-state: Conflict and Co-operation' in H Michelmann and Panayotis Soldatos (eds), *Federalism and International Relations: The Role of Subnational Units* (Clarendon Press, Oxford 1990) 54–77; Panayotis Soldatos, 'An Explanatory Framework for the Study of Federated States as Foreign-Policy Actors' in H Michelmann and Panayotis Soldatos (eds), *Federalism and International Relations: The Role of Subnational Units* (Clarendon Press, Oxford 1990) 34–53.

[5] Noe Cornago 'On the Normalization of Sub-State Diplomacy' (2010) 5 (1–2) The Hague Journal of Diplomacy 11–36.

[6] See Ugalde Zubiri, 'The International Relations of Basque Nationalism and the First Basque Autonomous Government (1890–1939)' (1999) 9(1) Regional and Federal Studies 170–185; Elin Royles, 'Small, Smart, Successful: A Nation Influencing the Twenty-First-Century World? The Emerging Welsh Paradiplomacy' (2010) 23 Contemporary Wales 142–70; David Criekemans 'Foreign Policy and Diplomacy of the Belgian Regions: Flanders and Wallonia' 2010 Discussion Papers in Diplomacy, Netherlands Institute of International Relations ('Clingendael').

paradiplomacy outwith the European and North American contexts have been visible within the sub-discipline.[7] As with multi-level governance, the framework of paradiplomacy can and has been used to consider and refer to external relations other than those of regions. City diplomacy is often referred to as paradiplomacy, yet is quite different from regional paradiplomacy due to the fact that it often lacks an equivalent representational tone. Therefore, for the purposes of this discussion, we will look only at paradiplomacy as it refers to the external relations of regions.

For those studying paradiplomatic practices, there is a central paradox: how do we reconcile the international presence of sub-State governments with the fact that they are not recognized as possessing any degree of sovereignty? As non-sovereigns, paradiplomats have no independent standing under the VCDR treaty, yet—undoubtedly—their diplomacy often looks and sounds very similar to that carried out by States. Sub-State identity is an increasingly salient one and sub-State governments, as diplomatic agents possess both representational qualities and official resources—highly prized diplomatic commodities. Therefore, the diplomacy that they undertake stands apart from that of other non-State actors—NGOs, Diasporas, multi-national companies—precisely because of its similarity to state diplomacy. Their relationship to this key treaty in diplomatic law is thus both complex and potentially illuminating.

Sub-State governments represent a key study in the ways that new actors are able to enter into international politics and become diplomats. In this case, a key feature of the new diplomacy in question is its hybrid status—sub-State diplomats are at once 'sovereignty bound and sovereignty free' possessing governmental qualities yet without an overarching responsibility for foreign affairs.[8] Away from the institutional checks and balances that come with such a responsibility, along with public attentions and expectations, sub-State governments face a less rigid operational context than their State-level contemporaries. How this impacts on the composition, and quality, of their diplomatic endeavours is a wider question that will be addressed both in this and subsequent chapters. In respect to the VCDR, the most pertinent question would seem to be whether the legal and political differences that the treaty identifies between sub- and State-level diplomacy actually result in a meaningful divergence in their diplomatic practices.

3. The UK's Devolved Regions and the VCDR

In this chapter we will be considering the UK's constitutional provisions in relation to sub-State diplomacy, and the activities of the Welsh and Scottish devolved governments in an international sphere. There are many other states—unitary and

[7] Most recently Fritz Nganje, 'The Developmental Paradiplomacy of South African Provinces: Context, Scope and the Challenge of Coordination' (2014) 9(2) The Hague Journal of Diplomacy 119.

[8] Brian Hocking, 'Regionalism: An International Relations Perspective' in Michael Keating and J Loughlin (eds), *The Political Economy of Regionalism* (Routledge, Oxford, 1999) 90–111.

federal—that permit their sub-State territories to carry out paradiplomatic activities, to various extents. The Belgian regions have the largest degree of international autonomy: representatives of Flanders and Wallonia have Belgian diplomatic status and are permitted to sign official international treaties, in fact they are often solely responsible for doing so.[9] Other regions, on the other hand, do not always benefit from diplomatic status for their officials. Catalonia, for example has tried and failed to secure it.[10] Some large European regions, on the other hand, maintain a significant amount of domestic autonomy but are generally content with State-level diplomatic representation. Bavaria, for instance, has multiple overseas trade and investment offices reflective of its size and GDP, yet only two Government representations abroad—in Quebec and the Czech Republic, both of which build on historical ties.[11]

The UK's arrangements are relatively permissive, falling roughly at a mid-point in terms of the international activities that sub-State governments are able to engage in. International relations—including relations with the European Union—remain firmly the responsibility of the UK Government and Parliament. There is, however, a clear recognition in the Memorandum of Understanding between the UK and its devolved regions of such devolved regions 'interest in international affairs where they touch on devolved responsibility'.[12] Specific concordats (documents setting out the specific principles and expectations underpinning working arrangements between the UK Government and devolved authorities), supplementary to the MoU, enumerate in greater detail arrangements for international and European affairs in the context of devolution. Three passages are of particular relevance to the devolved regions' diplomatic status, and are worth citing in detail.

As regards representation in the European Union, the concordat sets out an arrangement whereby devolved regions can maintain direct representation so long as it forms part of the wider UK representation in Brussels. According to the Concordat on Co-ordination of European Issues, devolved administrations are able to take part in 'less formal' discussions with EU institutions and with other EU Member States. They are also permitted to establish offices in Brussels to assist with their direct relationships—both with other regional governments and with the EU itself. The important proviso here is that these offices must serve the exercise of their specific devolved powers and functions, and must be consistent with

[9] Jan Bursens and Jana Deforche, 'Going Beyond Paradiplomacy? Adding Historical Institutionalism to Account for Regional Foreign Policy Competences' (2010) 5(1–2) The Hague Journal of Diplomacy 151–71, 162.

[10] Professor Michael Keating addressed these issues in his comparative study undertaken as part of an enquiry carried out by the Scottish Parliament's European and External Affairs Committee in 2010.

[11] Interview with author, senior official of the Bavarian State Government, June 2013.

[12] The UK Government, Cabinet Office, 'Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee' (October 2013) Section B4, Common Annex on the Concordat on Co-ordination of European Policy Issues. The MoU and its concordats can all be found here: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf>.

the 'responsibility of the UK Government for relations with the EU'. These entitlements are explicitly not intended to alter the pre-existing 'status and functions of the UK Permanent Representation in Brussels as the institution representing the United Kingdom'. Operationally, the Brussels offices of devolved administrations form part of the official diplomatic structure of the UK's EU representation, UK Rep, and as such their staff have British diplomatic status and are registered with the Belgian authorities accordingly.[13]

The status of the devolved administrations in Brussels is thus reasonably clear: they have diplomatic status because they form part of an official UK representation. Under the VCDR they are diplomatic agents of a sovereign State—the UK. So far, so straightforward. The key institutions of the European Union are restricted to Member States, naturally limiting the role of sub-State governments and creating a fairly 'neat' division between official and unofficial practices in Brussels. When we turn to the international role sub-State governments can play in a global setting, the picture becomes more complex. Under the heading 'Representation Overseas' in the concordat on International Relations, Common Annex (D4), the devolved administrations are permitted to establish overseas offices within the framework of their responsibility for devolved policy. Of most relevance here are those responsibilities which pertain to providing information on devolved matters to the public and regional governments and institutions, as well as the promotion of trade and inward investment. These offices must be established 'in consultation' with the FCO (the UK Foreign and Commonwealth Office), and 'where appropriate' these representations may form part of official UK Diplomatic or Consular Missions. When this latter option is selected, devolved representatives would then be permitted to 'make use of the diplomatic bag, the FCO telegram and other communications systems', as well as be accredited with diplomatic status.[14] Here, we see that sub-State governments are presented with a clear choice in their overseas representation: be part of an official UK mission and receive the resources and privileges associated, or 'go it alone'. The choice is also therefore whether to 'opt in' to the VCDR through operating as a subsidiary of the UK Diplomatic or Consular mission, or operate outside it as representatives without diplomatic status. The passage (D4.23) further makes reference to a distinction between official and unofficial activities, something that will be explored in further detail as part of this chapter.

Lastly, the same passage makes clear the UK's retention of overall authority and responsibility under the VCDR. It asserts that the FCO will continue to be responsible for policy on diplomatic and consular relations, both with third countries

[13] Paragraphs B4.26 and B4.27 of the Concordat on Co-ordination of European Union Policy Issues, part of the Memorandum of Understanding between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee (2013).

[14] Paragraph D4.23 of the Concordat on International Relations. Part of The UK Government, Cabinet Office 'Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee' (October 2013).

and on 'all matters concerning international organisations represented in the UK'. As part of this maintenance of authority, the FCO will remain the channel for all official communications 'on matters relating to Foreign and Commonwealth consulates and international organisations', including their staff in devolved territories. Importantly, the passage includes a procedure for the immediate reporting of any diplomatic representations made to devolved authorities, and indeed any suspected breach of diplomatic protocol taking place within their devolved competences, leaving the FCO to take any appropriate action under the VCDR or any applicable Consular Convention.

On the basis of the above, and taking the documents in their entirety, we can make a series of suppositions as to the diplomatic status of the UK's devolved governments. The first of these is that they can, indeed, be represented internationally by their own diplomatic agents. The limits to this representation are that, in order to conduct 'official' diplomacy, sub-State diplomats must 'opt-in' to the VCDR and operate out of the UK's overseas Embassies and Consulates, being under their auspices and ultimately accountable to the FCO. The second, however, is that representatives of Wales, Scotland, and Northern Ireland do not have to operate out of such UK-wide missions. Instead, they can—in 'consultation' with the FCO—establish independent offices overseas, but such offices do not benefit from the status of an official diplomatic mission. The outstanding question is therefore, with official diplomatic status within the grasps of the UK's sub-State governments—why would they choose to operate without it? What is the value of the diplomatic commodities listed in the second extract above—the diplomatic bag and official communications systems—for Wales, Scotland, and Northern Ireland? What types of unofficial diplomacy can they conduct outside of this system?

4. Wales' Overseas Offices

A consequence of devolution in 1999 was the new ability for Wales to 'autonomously engage with the world outside'.[15] This, according to a senior Welsh Government advisor, stood in contradistinction to the international strands of the previous Wales Office's activities, where engagement was 'very much as a sub-set of the UK'. Such an autonomous platform has resulted in two streams of external engagement, one driven by trade and investment and one driven by policy—'the ability to influence policy or to take part in policy formation'.[16] It is within this context that the status and activities of Wales' overseas offices must be considered.

The Welsh Government has an overseas network consisting of fourteen offices (including its representation in Brussels) and around thirty-two staff, alongside twenty to twenty-five officials working on external relations and related issues

[15] Interview with author, senior Welsh Government advisor March 2013. [16] ibid.

within the Welsh Government's Offices at home in Wales.[17] A separate, relatively new, office in London has been established to promote Wales to overseas investors and visiting VIPs. There is also a separate team of three staff based in Cardiff looking after the Wales for Africa programme and leading on fair trade issues. Within Wales itself the First Minister takes responsibility for international issues—he is officially the Minister for Europe, Wales for Africa, and International and External Relations. Other departments—economy, science and transport, education, and culture—also have a role in specific international policy areas. Wales is also a member of several multilateral fora—the network of regional governments for sustainable development (NRG4SD), the conference of European regions with legislative power (REGLEG), the conference of peripheral maritime regions of Europe (CPMR).

Reflected in these examples, the European policy context is really where Wales' international activities are most closely focussed. Partly this is because of the institutional access points provided to regions within European structures and policy making processes, and partly it is due to the direct impact of European policy on Wales itself. Indeed, a key Welsh government advisor made clear that outside of this European context, the ability of sub-State governments to contribute is greatly weakened; 'different parts of the world have different resource positions, they have different political traditions … and it becomes correspondingly more difficult to operate at a global level at the sub-state level, and much less meaningful I think'.[18]

The Welsh Government published their first written international strategy in July 2015, detailing a number of objectives: strengthening the Welsh economy, enhancing the profile and reputation of Wales, developing effective bilateral and multilateral relationships; co-operating in the sharing of information and best practice; increasing Wales' influence with 'appropriate' multilateral and international organizations and contributing to sustainable development and 'responsible global citizenship'. The strategy stresses the 'ultra-competitive' global environment facing Wales, and the need to seek out opportunities in key locations, nurturing links and relationships built over time.[19]

At a country level, Wales has representation in Belgium, China, the UAE, India, Ireland, Japan, and the USA. These overseas offices work closely with Welsh Government Ministers, who, according to the international strategy 'have a crucial role in supporting business and diplomatic relationships at the highest levels'.[20] But what type of 'diplomacy' do the Ministers and overseas offices carry out? Of Wales' fourteen international offices outside of the UK, all three Chinese offices alongside representations in Mumbai and Japan are housed outside of British

[17] Wales' overseas representation was once much more extensive—with representations in Australia and many European countries, but—like many other sub-State governments—was scaled back rather drastically in what was widely reported to be a cost-cutting exercise.

[18] Interview with author, senior Welsh Government advisor March 2013.

[19] Wales in the World: The Welsh Government's International Agenda 2015. The document can be accessed here: <http://gov.wales/topics/international/publications/international-agenda/?lang=en>.

[20] ibid.

Embassies or Consulates. In Shanghai, the Welsh Government representative has recently relocated to British House, which—while outside the Consulate—houses the British Council and the China Britain Business Council. In Dubai, Bangalore, Ireland, in all five USA offices, and in Brussels, Welsh Government representations form part of British Embassies, British Consulates, British High Commissions or, in Brussels, UKREP.[21] Numerically, this means that five out of fourteen offices operate outside of the VCDR, its representations are part of an 'unofficial' pool of diplomacy that takes largely on a region-region basis. As such there seem to be some identifiable benefits to such independent representation that make forgoing co-location with the FCO—and the associated diplomatic resources—worthwhile. The implications of this will be considered in greater detail in a subsequent section of the chapter.

Within Wales itself, the international affairs department carries out functions that may appear similar to the FCO; 'we advise on diplomatic issues, protocol' as well as 'working to raise the profile of Wales internationally'.[22] While there was some suggestion that colleagues in Whitehall would take umbrage at the suggestion that Wales has its own foreign office, functionally the department represents its 'nearest equivalent'.[23] Nonetheless, the Welsh Government staff working both in and out of Wales are not usually identified as diplomats, despite their day-to-day work being 'the diplomatic side' of external relations.[24] The current First Minister Carwyn Jones instigated a reorganization shortly after he took office in 2011 and brought these overseas offices under his portfolio, and therefore operationally under the remit of the International Relations department. Arguably, this move represents a broader shift towards viewing overseas representation as part of a more cohesive international—or diplomatic—strategy.

Despite Wales having its own international offices—both co-located with the FCO and independent of it—it is also clear that such representation is expected to form a supplement to the activities of the FCO and other UK-wide bodies, who have a remit to promote the interests of all the UK's constituent parts. According to Wales' international strategy, its Government does not aim to replicate the 'reach and depth of UK representations abroad', rather it works with UK bodies to ensure Welsh interests are reflected, and UK resources are drawn upon in the 'direct promotion' of these interests.[25]

Even where such strong interests call for a direct representation from Wales, co-location as part of a wider UK representation clearly has its advantages. It appears that these may—in part—depend upon the attitudes and legal requirements in the receiving state. For example, the Welsh Government's representative in the United Arab Emirates (UAE) is part of the UK British Embassy because of the specific international context there; a diplomatic passport is 'necessary to live and work

[21] ibid. [22] Interview with author, senior Welsh Government official, March 2013.
[23] ibid. [24] ibid.
[25] The Welsh Government, 'Wales in the World: The Welsh Government's International Agenda' (2015). Document can be accessed here: <http://gov.wales/topics/international/publications/international-agenda/?lang=en>.

there'.[26] Likewise, in the EU, Wales has diplomatic members of staff on its team, as the Welsh Government is able—indeed required—to act as part of UKREP. Working relationships with the FCO are 'generally good', a concordat governs the relationship and the Welsh Government will take advice if 'something innovative or possibly confrontational comes up. If we're involved in a particular country and we're having a visit for example then we'll take expert advice on the UK line'.[27]

The rationale for what the Welsh Government, as an independent entity, can and cannot do diplomatically is always referred back to devolved competences. If Wales is responsible for a policy area domestically, then it—and broadly the UK Government—accepts that where this area has an international dimension, the Welsh Government has a legitimate interest in it. One way of conceptualizing this accepted diplomatic 'space' is to consider it a border zone, with 'a back stop and a front stop'.[28] The backstop in this case would be issues where the Welsh Government knows that acting or intervening would be stepping clearly into the territory of the FCO. For example, the Welsh Government has been lobbied from time to time on highly controversial issues—Congolese rights under the Congo DRC, the 'Armenian question' (both from groups wanting the Welsh Government to recognize a genocide, and indeed from the Turkish Ambassador dissuading the government from entering the debate)—and has had to defer in these instances to the competence of the FCO. There is the potential for Welsh Ministers to pass on such representations informally to the FCO, but for the most part 'there is a back-stop, there is a line we won't cross in terms of competence'. The risk of sending out 'mixed messages', in particular a message overtly contrary to that of the UK State as a whole is taken seriously, and the duty on Welsh officials not to overstep this mark is seen as a legitimate 'return' for the recognition by the UK Government that Wales has the right to act in areas related to its own competence.[29]

As for a front stop, the Welsh Government would therefore 'only interest ourselves in the things for which we have devolved responsibility'.[30] Occasionally, however, maintaining a clear dividing line can be 'a little bit tricky'.[31] There is a fuzzy area in the middle of such a border zone, where the Welsh Government may act because they 'think it's the right thing to do'.[32] The examples quoted here were REGLEG, which aroused some suspicions in the UK Government when Wales joined the organization in 2000, and activities around climate change.

Nevertheless, unlike the Scottish Government, whose activities we will consider in the following section, the Welsh Government has prioritized region-region international linkages, which are rarely subject to any significant controversy. In fact, a senior Welsh Government official noted that, whereas the Scottish Government has two members of staff at the UK Embassy in Beijing, the Welsh Government 'don't have people in the Embassy, sitting on the side'. Instead, the Welsh Government prioritize the development of relationships at a regional level—for example with the Beijing Municipal Government and the Governments of Chongqing and

[26] Interview with author, Senior Welsh Government official, March 2013. [27] ibid.
[28] ibid. [29] ibid. [30] ibid. [31] ibid. [32] ibid.

Shanghai. This approach is seen to avoid some of the tensions caused by Scotland's approach, where it aims to deal directly with the Chinese Government.[33]

Dealing with foreign *regional* governments does not necessarily mean, however, that the 'diplomacy' is always informal, or simply public diplomacy. Though the UK's sub-State governments cannot sign international treaties, there is a formal element to much of their work. Bilaterally, Memoranda of Understanding were a frequently used *modus operandi*, particularly in the early years of Wales' paradiplomacy. They have fallen out of favour recently, 'we don't now look for a piece of paper to make a relationship work', though they are still widely used in China, where the MoUs are taken as a gesture of good will and a way of 'opening up the dialogue'.[34] Ministerial visits also form a key part of Wales' diplomatic relationships. Visits from the First Minister in particular are seen as hugely important, but all ministerial visits are viewed as a way to 'open doors', particularly in countries such as China where governmental structures are so significant.[35] The Welsh First Minister is a cabinet-rank Minister in the UK Government, and thus should benefit from the same FCO support and facilitation as other UK Government Ministers. Whether this always bears out in practice is questionable—problems with fast track, for example, have been cited in interview data.

Indeed, the Chinese context offers a particularly interesting case study in the decision-making process around 'opting in' to, or indeed out of, the VCDR. The Welsh Government has pursued a close relationship with the Chinese region of Chongqing since 2006, when the first Memorandum of Understanding between the two regions was signed. In September of that year, a Welsh Affairs Officer was assigned to the British Consulate General in Chongqing, tasked with taking forward the Wales-Chongqing relationship, and was quickly followed by a second post a year later. However, in January 2011 the Welsh Government opened a separate office in Chongqing, and the two posts were relocated there. The office is located near to both the British Consulate General and the British Council, but is not formally part of the Consulate. In the case of Chongqing, both private interview data and published ministerial reports hint at the advantages perceived by the Welsh Government in distancing themselves from the rest of the UK. In a written statement by Hugh Lewis, a Welsh Government Minister who visited Chongqing in 2013, he pointed to the relationship between Wales and Chongqing as the 'most extensive and most active between any part of the UK and China'.[36] Of particular testament to the strength of those government-level relationships was that 'Wales has largely been able to avoid getting caught up in the tensions which are apparent at national UK and China levels'.[37]

Operating independently at a region-region level means that without having the responsibility for a national foreign policy, there is an element of discretion or

[33] ibid. [34] ibid. [35] ibid.

[36] Welsh Government Minister Hugh Lewis, written statement to the National Assembly for Wales, 14 March 2013. The statement can be accessed here:<http://gov.wales/about/cabinet/cabinetstatements/previous-administration/2013/chinavisit/?lang=en>.

[37] ibid.

the ability to maximize the relationships for specific policy goals. Contrary to what one might expect, therefore, it appears that in certain circumstances, not being part of an official Embassy or Consulate may actually be beneficial to relationships 'on the ground', particularly in countries such as China where controversial foreign policy issues abound. Where the decision on whether or not to co-locate may be made on the basis of practicalities, this does not preclude the fact that this decision has other consequences for the representation, and in some cases these may be helpfully extricating the activities of a sub-State government from their State-contemporaries. This said, however, there are also security issues which may make co-location impractical, and these are apparent also in the Chinese context.[38]

Alternately, explanations *for* co-location with British Consulates may also confound expectations. In 2002, the Welsh Government opened its 'flagship' US office in New York's Chrysler building. However, in the face of mounting criticism over the operating costs of overseas offices in general, and this one in particular, the office was closed down in 2011 and staff moved to the UK Consulate, a move widely reported to be for cost-saving reasons.[39] There is a well-established link between paradiplomacy and the economic climate—one borne out clearly in Wales following the financial crisis in 2008; 'the sub-national diplomacy scene is low hanging fruit when it comes to re-ordering priorities in a time of monetary austerity'.[40] In the face of examples such as this, the decision of whether or not to utilize the diplomatic status and resources of the UK Government through overseas co-location appear largely pragmatic, possibly related more to the cost of commercial property in different locations than to the value to Wales' diplomacy of operating under the VCDR. Indeed, the general principle guiding the Welsh Government's overseas office location is that, where 'practical and economically viable', co-location is the preferred position.[41]

5. Scotland's Overseas Offices

Making a comparison between the diplomatic strategies of Wales and Scotland is not straightforward. Firstly, the Scottish SNP Government has clear ambitions for Scottish independence, ambitions at the forefront of global attention during 2014's referendum. Secondly, Scotland's overseas representation is divided between the activities of Scottish Development International (SDI) and the Scottish Government, unlike in Wales where the Welsh Government itself is the only outward-facing governmental body. SDI has twenty-nine offices in nineteen countries, including Scotland itself, while the Scottish Government has only four international offices in Brussels, Washington, Toronto, and Beijing. Seven of SDI's

[38] Private correspondence, Welsh Government official, July 2015.

[39] 'Wales Staff to Leave New York Chrysler Building', *BBC News* (23 December 2010) <http://www.bbc.co.uk/news/uk-wales-12066150)>.

[40] Interview with author, Senior Welsh Government advisor, March 2013.

[41] Private correspondence, Welsh Government official, July 2015.

international offices form part of official British representations. Importantly, all four of the Scottish Government offices also form part of official UK Embassies, Consulates, High Commissions, or UKREP.[42] Where the status of the Scottish Government's overseas offices is perhaps simpler to assess than in Wales—in that they are all official diplomatic representations as they operate out of official UK missions—the status of SDI's offices is less clear. The unambiguous trade and investment focus would seem to imply that these offices were not diplomatic entities, yet their co-location in seven instances with official UK missions suggests otherwise. As in the case of Wales' overseas offices, it appears that housing Scottish representations within UK missions is often a more pragmatic choice—both in terms of accessing foreign policy makers and in simple economic terms—than 'going it alone', but this is a choice which is dependent on the country the offices are located within and the attitudes of the relevant receiving governments.

However, what sets the two devolved regions' diplomacy apart most markedly is that Scottish diplomacy is frequently directed at national governments, in contrast to the Welsh Government's region-region partnership approach. For example, the stated aim of Scotland's North American offices is to establish 'solid government to government relationships at Federal and State level'.[43] This has been achieved through frequent meetings with the State Department and establishing links with White House staff in the US, while in Canada 'with the assistance of the High Commission' Scottish representatives have met with 'key federal officials from a number of ministries'.[44] Scottish overseas offices also support links with both the Scottish Canadian Parliamentary Association in Ottawa and the Friends of Scotland Caucuses in the US Senate and House of Representatives. This overseas representation in North America is the 'Scottish government's diplomatic mission to the region'.[45] It sees itself as having a role to play 'within the wider diplomatic communities' in the region, engaging proactively with other diplomats to 'heighten awareness of its existence and to establish connections and networks'.[46]

In China, the Scottish Government office in Beijing facilitates cooperation between the Scottish Government and both the State Council in China and the Legislative Council in HKSAR [the Hong Kong Special Administrative Region].[47]

[42] The Scottish Government, 'Scotland's International Framework' (published March 2015). The document can be accessed here: <http://www.gov.scot/Publications/2015/03/3466>. Further information on the Scottish Government's overseas representation can be found on their web pages: <http://www.gov.scot/Topics/International>.

[43] Written submission from the Scottish Government on the work of its overseas offices, provided to the Scottish Parliament's European and External Relations committee as part of their Connecting Scotland Enquiry. Meeting 26 March 2015, paragraph 28.

[44] ibid. [45] ibid.

[46] Written submission from the Scottish Government on the work of its overseas offices, provided to the Scottish Parliament's European and External Relations committee as part of their Connecting Scotland Enquiry. Meeting, 26 March 2015, paragraph 28 <http://www.parliament.scot/S4_EuropeanandExternalRelationsCommittee/Public_papers_26_March_2015.pdf>.

[47] Written submission from the Scottish Government on the work of its overseas offices, provided to the Scottish Parliament's European and External Relations committee as part of their Connecting Scotland Enquiry. Meeting 26 March 2015, paragraph 20.

Meanwhile, Ministerial visits focus on national level politicians, apparent in both Alex Salmond's highly publicized visit to China in 2010 and Nicola Sturgeon's more recent trips to both China and Washington in 2015.[48] According to Professor Michael Keating, giving evidence to a Scottish Parliamentary enquiry in 2010, 'nationalist Governments want to sign deals with states because that enhances their status'.[49] Yet, at the same time 'when it comes to practical functional matters, all Governments of whatever complexion are looking for regional level interlocutors'.[50] Indeed, it is not the case that the Scottish Government forgoes regional links entirely—they partner with 'priority geographic areas' in China such as Shanghai, Tianjin, and Province of Shandong—rather that, unlike many regional governments operating internationally, they also aim to deal directly with foreign national governments.

This focus on nation-State interactions is significant when assessing the effects that paradiplomatic activity may have on the relevance of the VCDR. Scottish Government diplomats are party to the convention as they operate exclusively out of official UK representations, most often dealing with official diplomatic representations of a foreign government. The type of diplomatic activities they engage in therefore mirror State practices very closely, yet their diplomatic status is one loaned from the UK Government. There is an outstanding question lurking here: where do Scottish diplomats take their political direction from: London or Edinburgh?

Taking the international activities of the Scottish Government at face value, one could be forgiven for assuming that it was a small state, rather than a sub-State authority. However, the vast majority of Scotland's diplomatic activities take place with the facilitation of the FCO: ministerial visits, cultural diplomacy carried out through events and activities in Brussels and the Scottish government's other overseas offices, the overseas offices themselves, and engagement with EU institutions. In a letter to the convenor of the Scottish Parliament's European and External Relations Committee, the Secretary of State for Scotland points to the fact that, of the fifty international visits made by the Scottish Government in a sixteenth-month period, most of these were facilitated by the UK Government.[51] The proportion of visits that the FCO is required to facilitate seems to depend

[48] See 'Alex Salmond Aims for Scots Success Made in China', *The Scotsman* (5 July 2010), <http://www.scotsman.com/news/alex-salmond-aims-for-scots-success-made-in-china-1-816255>; 'First Minister Nicola Sturgeon Leads China Trade Mission', *BBC Online* (25 July 2015), <http://www.bbc.co.uk/news/uk-scotland-scotland-business-33663593>.

[49] Professor Michael Keating giving evidence to the Scottish Parliament's European and External Relations Committee on 2 November 2010, page 1718 of the official report, published by the Scottish Parliament. The report can be accessed here: <http://archive.scottish.parliament.uk/s3/committees/europe/or-10/eu10-0502.htm>.

[50] ibid.

[51] Letter to Christina McKelvie MSP, Convenor of the Scottish Parliament's European and External Relations Committee from the Secretary of State for Scotland the Rt Hon Alistair Carmichael MP on 28 March 2014. The letter can be accessed here: <http://www.parliament.scot/S4_EuropeanandExternalRelationsCommittee/Inquiries/2014_03_28_Sec_of_State_to_Convener_additonal_info.pdf>.

on the target country in question, their openness towards sub-State governments, and the level that Scottish Government Ministers wish to access. Meetings with private firms and business leaders may form a part of the Scottish Government's diplomatic activities that they are able to orchestrate independently, but access to Ministers in a foreign national Government is something generally mediated by UK authorities.[52]

When sub-State governments operate solely at a region-region level, this may be interpreted as an area of diplomatic activity subsidiary to that taking place between nation states and therefore one which falls outside the scope of the VCDR, and the types of activity which it was intended to regulate. However, when one sub-State government enters into diplomatic relations with a foreign nation-State government, this strays more clearly and perhaps disruptively into a domain typically reserved for States. *These activities* may be precisely the type of interactions that fall squarely under the remit of the VCDR, yet the peculiar state-like yet non-sovereign status of Scotland as a devolved region of the UK may yet exclude it as an independent entity from the terms of the treaty. In official diplomatic activities, Scottish diplomats would be 'borrowing' their status from the UK Government, yet take their political direction from elsewhere. How this split between political accountability and legal status or authority might manifest in the future is a key challenge for the future robustness of the VCDR as a treaty regulating formal diplomatic relations.

It is in this manifestation—where contentious aspects of the host State or Federal government's foreign policy appear to have been challenged or undermined by one of its sub-State governments—that the implications of paradiplomacy potentially take on a geo-political significance. In the context of Scottish diplomacy within the UK, this situation arguably arose when a SNP delegation, including MPs and MSPs, led by former Scottish First Minister and current SNP foreign affairs spokesman in Westminster Alex Salmond, visited Iran during December 2016, shortly before the lifting of sanctions which followed an agreement between the E3+3 (France, Germany, UK, China, Russia, and the USA) and Iran on a nuclear deal. Though this agreement was reached on 14 July 2015, sanctions were only lifted once the International Atomic Energy Agency had verified that Iran had completed all of the necessary steps to reach 'implementation day', on 16 January 2016. The visit followed incremental and tentative improvements in the UK's relationship with Iran: a UK Embassy was reopened in Tehran in late August 2015, with Philip Hammond attending the opening ceremony, the first British Foreign Secretary to visit the city since 2003. The SNP's visit was arranged—and funded—by the Iranian Parliament.

[52] The failure of Alex Salmond to secure meetings independently with the French and Chinese governments was the subject of a series of reports in *The Daily Telegraph* in 2012, based on dossiers received in response to their FOI requests. The reports included an article by Simon Johnson, Scottish Political Editor, entitled 'Alex Salmond asked British Embassy for French PM meeting', *The Daily Telegraph* (5 July 2012) <http://www.telegraph.co.uk/news/uknews/scotland/9377002/Alex-Salmond-asked-British-Embassy-for-French-PM-meeting.html>.

Couched in a clear, and arguably compelling, business case for Scottish-Iranian trade following the lifting of sanctions, there was also a nascent foreign policy message being conveyed by the delegation, encompassing both human rights and nuclear disarmament. According to Alex Salmond, Iran's rapprochement with the West represented 'the single most positive development in international relations over the past year', and positioned Scotland as being at the forefront of a global movement to pursue new relationships with this emerging market place and trading partner. It was, Salmond argued, 'vital that Scotland is not left behind', necessitating rapid action—that he argued elsewhere was not being taken at a UK level—based 'on the sound Scottish principle of enlightened self interest'.[53] The visit to Iran entailed meetings with a high-level roster of government ministers and parliamentarians including Foreign Affairs Minister Dr Zarif and the speaker of the parliament Dr Ali Larijani, and secured the agreement for an exchange of full trade delegations in 2016.[54] According to an Iranian news agency, Tasnim, Alex Salmond further told the speaker of the Iranian Parliament that Scotland's 'ruling party has always been against the decisions Westerners make against Iran and believes these decisions, which have caused many problems for Iran as well as other countries, are fundamentally wrong'.[55] A report complied by the SNP delegation following the visit was submitted to Scottish Ministers and later released under freedom of information laws. The report argued that Iran 'recognises Scotland as separate to the rest of the United Kingdom', quoting an Iranian vice-minister as telling Alex Salmond that 'the door is not open to every delegation that visits Iran', but that the country was willing to work with Scotland.[56]

Putting the visit clearly in foreign policy terms, Alex Salmond told the Scottish *Herald*, on his return from Iran, that the trip highlighted how Scotland 'can use its political profile to create foreign policy initiatives and opportunities that the UK government would find difficulty in accessing', and referenced the warm welcome Scotland received, enjoying 'much more ministerial access than the recent UK Trade and Investment delegation to Tehran'.[57] According to the former First Minister

[53] Alex Salmond, cited by Michael Settle, 'Salmond heads SNP Delegation to Iran but is Accused of "Hollowing Out" UK Government's Role', *The Herald Scotland* (22 December 2015) <http://www.heraldscotland.com/news/14161564.Salmond_heads_SNP_delegation_to_Iran_but_is_accused_of__quot_hollowing_out_quot__UK_Government_s_role>.

[54] Alex Salmond, cited in a news report, 'Alex Salmond and Other SNP Politicians Hold Iran Trade Talks' *BBC Online* (23 December 2015) <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-35168780>.

[55] Tehran-based news agency 'Tasnim', cited by Michael Settle, 'Salmond Accused of Grandstanding Following Trip to Tehran', *The Herald* (23 December 2015) <http://www.heraldscotland.com/news/14162324.Salmond_accused_of_grandstanding_following_his_trip_to_Tehran>.

[56] Report compiled by the SNP's delegation to Iran, submitted to Scottish Ministers and released under the Freedom of Information Act, cited by Daniel Sanderson 'John Swinney turns down approach by Alex Salmond to discuss Iran trip', *The Herald* (7 March 2016) <http://www.heraldscotland.com/politics/14325143.John_Swinney_turns_down_approach_from_Alex_Salmond_to_discuss_Iran_trip>.

[57] Jamie Brotherston, 'SNP Delegation to Iran Highlights Scotland's Potential to Create Foreign Policy Initiatives', *The Herald* (27 December 2015) <http://www.heraldscotland.com/news/14168707.SNP_delegation_to_Iran_highlights_Scotland_s_potential_to_create_foreign_policy_initiatives/>.

'opposition to Western adventurism in the Middle East, a bilateral stance in trade talks and the intent to hold open discussions without lecturing and heckling' are all areas where Scotland can 'outplay' Westminster when it comes to foreign policy.[58] At one level of analysis, the SNP delegation to Iran and the political rhetoric surrounding it represents the proverbial storm in a teacup; Alex Salmond—known for being a provocative and outspoken advocate of Scotland's independent international standing—noisily marking out the territory of his new role as the SNP's foreign policy spokesman. It was, after all, not a Scottish Government delegation, and thus the talks held were by their nature exploratory—no member of the delegation was authorized to commit the Scottish Government to specific policy. The fact that the Scottish Government itself has appeared reticent to comment on the trip or publicly discuss the content of talks would indicate that they perhaps are taking a more cautious approach to the relationship. However, at a geopolitical level, the fact that it was not the Scottish Government, but rather a delegation of SNP politicians from both Westminster and Holyrood that were taking a forthright view on the future relationship between Scotland and Iran, on major areas of foreign policy such as nuclear proliferation and human rights, and on the perceived failings of the UK, and 'the west' more generally, may bear little relation on the lasting perception.

Another particularly 'thorny' issue in this area is recognition. In their analysis of the EU's diplomatic identity, Wouters and Duquet point to the possibility of a situation whereby 'the EU intends to accredit a diplomatic representative to a third country that is not recognized by all 27 Member States'.[59] This could happen, the authors argue, despite the fact that EU Member States retain the exclusive competence to recognize other States and/or governments, which is a preliminary condition to enter into diplomatic relations: 'States are the only actors in international law that are able to recognize other States – be it *de jure* or *de facto*'.[60] In the case of sub-State governments, similar scenarios have arguably emerged already. The Scottish Government, for example, has unequivocally called for the recognition of an independent Palestinian State. In a letter to the UK Foreign Secretary Philip Hammond in October 2014, Scottish External Affairs Minister Humza Yousaf called on the UK Government 'to take action and formally recognise the State of Palestine', and also outlined 'the Scottish Government's support for the opening of a Palestinian consulate in Scotland and highlighted the need for a Palestinian embassy in the UK'.[61] Though Scotland itself cannot formally recognize Palestine, the issuing of such unequivocal views on its status inevitably complicates perceptions of the UK's position. Similar instances have occurred in Wales, where—in

[58] ibid.

[59] Jan Wouters and Sanderijn Duquet, 'The EU and International Diplomatic Law: New Horizons?' (2012) 7 (1–2) The Hague Journal of Diplomacy 31–49, at 33.

[60] ibid.

[61] Scottish Government, Press Release 'Calls to Recognise Palestine: UK Government Urged to Open Palestinian Embassy' 12 October 2014 <https://news.gov.scot/news/calls-to-recognise-palestine> accessed 5 April 2017.

large part due to the size of the Somali Diaspora within Wales—the National Assembly and the Welsh Government have been key targets for activities designed to secure international recognition for Somaliland. In perhaps the most contentious 'diplomatic' move, the National Assembly for Wales extended an invitation to the Somaliland government to attend the Royal opening of the Senedd in 2006, an initiative interpreted by the Somaliland—and Welsh—presses as official recognition of the break-away government's legitimacy.[62]

The difference between the activities of sub-State governments, on the one hand, and small State governments on the other, may be one that is increasingly difficult to discern on a day-to-day level. However, under international law, this distinction remains a pertinent one. The difference also has some relevance in a more pragmatic sense: the Welsh Assembly's reported 'recognition' of Somaliland or the Scottish Government's support for a separate Palestinian State does not carry the same diplomatic or legal force as similar actions by a sovereign State. However, at a political level, this 'unofficial' recognition may indeed have an effect, albeit a lesser one. The ambiguity surrounding the status of sub-State governments is compounded by widespread confusion regarding the architecture of devolved or regional government (such as between the National Assembly for Wales as a legislature, and the Welsh Government as an executive) and the lack of a designated 'foreign office' from which diplomatic messages are directed.

Turning to Scotland's approach to international affairs more generally, the Scottish Government's latest international strategy, published in 2015, calls for an 'embedding' of internationalization across its areas of competence. It also points to the fact that internationalization has been identified as an integral strand in Scotland's Economic Strategy, and therefore, as with most sub-State governments participating at an international level, boosting trade and investment is a key priority taken forward to international representations. However, the strategy also identifies the importance of Scotland's role as a 'good global citizen', meaning that it will contribute to the promotion of international stability and equality worldwide, continuing its advocacy of human rights and pursuing its 'distinctive' international development programme.[63]

It is not common for sub-State governments to have such a pronounced normative dimension to their paradiplomatic activities, though both Flanders and two Spanish regions do have close development links with parts of South Africa and Latin America respectively.[64] Similarly, the Finnish region of Åaland has built a reputation around promoting its distinct model of conflict resolution and

[62] Martin Shipton, 'Wales Strikes Out on its Own in Recognition of Somaliland' *Western Mail* (original report 3 March 2006, re-reported in the *Somaliland Times*) <http://www.walesonline.co.uk/news/wales-news/wales-strikes-out-recognition-somaliland-2346712> accessed 5 April 2017.

[63] The Scottish Government, 'Scotland's International Policy Statement' (2015) <http://www.gov.scot/Publications/2015/03/7071>.

[64] Professor Michael Keating, giving evidence to the Scottish Parliament's European and External Relations Committee 2 November 2010, 1720–21 of the official report <http://archive.scottish.parliament.uk/s3/committees/europe/or-10/eu10-0502.htm>.

normative diplomacy around this area more generally.[65] Wales shares some similar ambitions, notably in its Wales for Africa programme and activities around a Fair Trade Wales, but is not as cavalier in terms of ambitions around promoting human rights norms, international stability, and managing international crises. The stated ambition to be a 'good global citizen' is distinctive about Scotland's international strategy and—surprisingly given its very limited formal competence in this area—Scotland has achieved significant recognition in this area as part of its 'nation branding' efforts.[66] Whether it is a speech about gender equality to the Chinese Friendship Association, declarations on UK Government defence and international development policy, or the appropriation of Chinese 'panda diplomacy', Scottish diplomacy aims to influence national-level politicians, offer its own 'line' on foreign policy, and generally take its brand of good global citizenry to the world stage.[67]

Alongside its international offices and those of SDI, the Scottish Government engages on specific policy issues identified in separate policy documents, as well as its One Scotland Partnership Country Plans with China, India, Pakistan, Canada, and the USA. As part of the SNP's programme for Government 2014–2015 a series of Investment Hubs in 'key overseas locations' will be piloted, bringing together 'resources and partners in particular location and co-ordinate and deliver activity on the ground'.[68] Within the Scottish Government itself, under First Minister Nicola Sturgeon there is a Cabinet Secretary for Culture, Europe, and External Affairs as well as a Minister for Europe and International Development. These titles reflect a subtle shift in the Scottish Government's international priorities post-referendum that foregrounds the European context ever more strongly: the Cabinet Secretary's previous title was Culture and External Affairs and the Ministerial portfolio was for External Affairs and International Development.

For sub-State governments, acting within the European context is seen as a more legitimate extension of their domestic competences than forays into the broader international environment. There is a general acknowledgement of Scotland's legitimate interest in decision-making at a European level as it impacts directly on Scotland itself in numerous policy areas. In the wake of 2014's referendum on Scottish independence, and in the shadow of a second UK-wide referendum on EU membership, this context now offers Scotland a space to conduct paradiplomacy

[65] Michael Wigell 'The Aland Example as Norm Entrepreneurship' 2013 (20) International Journal on Minority and Group Rights 67, 84.

[66] Scottish Government Strategic Research 'The Anholt-GFK Roper Nation Brands Index: 2012 Report for Scotland' (2012) <http://www.gov.scot/Publications/2012/12/4188>.

[67] Speech by First Minister Nicola Sturgeon to the Chinese Friendship Association in Beijing, 27 July 2015 <https://news.gov.scot/speeches-and-briefings/first-minister-at-the-chinese-friendship-association> accessed 5 April 2017; Scottish Government press release 'No Aid Money on Military Interventions' (21 February 2013) <http://www.gov.scot/News/Releases/2013/02/international-aid21022013>; Martin Hickman 'Alex Salmond Bamboozled the Public with Panda Advert' *The Independent* (11 April 2012) <http://www.independent.co.uk/news/media/advertising/alex-salmond-bamboozled-the-public-with-panda-advert-7631368.html>.

[68] The Scottish Government 'Scotland's International Policy Statement' (2015) 6 <http://www.gov.scot/Publications/2015/03/7071>.

that both engages directly with policy making through its representation under the banner of UKREP and allows it to foreground its 'pro-European credentials' to both domestic and European audiences.

Undoubtedly, Scotland's international presence has been marked strongly in recent years by the independence referendum. This applies to the activities the Scottish Government wishes to engage in, positioning itself as a pro-European small country, natural kin to its neighbours in the 'Nordic arc of prosperity'.[69] It is also represented in the relationship between the Scottish and UK Governments, who have been on opposing sides of a highly controversial campaign, and—naturally—whose working relationship has been duly challenged. It also means there has been a wealth of speculation, in policy documents or position papers and from parliamentary inquiries, shedding light on the ways in which the diplomacy of Scotland as a sub-State government is seen to be constrained (or otherwise) on account of this status, how it would differ as an independent state, and thus on the currency of official diplomatic status more generally.

The view of the SNP, immediately prior to the referendum on Scottish independence, was that Scotland would be better served by having 'diplomats directly serving its interests in key countries', not just in Brussels, Washington, and Beijing.[70] The same position paper argued that a 'Devo Max' model of devolution there could be 'Scottish interest sections' in British Embassies in major European countries, alongside the Scottish Government's existing overseas representation.[71] This position would seem to suggest that there is no major dissatisfaction with the role that Scottish Government officials are able to play when they act as diplomats as part of UK overseas representations. Indeed, the position paper fails to cite any real benefits that a wholly separate representation from an independent Scotland would realize.

From the UK Government's perspective, nothing was guaranteed in terms of any independent Scotland's ability to utilize existing UK diplomatic, security, and intelligence resources. There might be overlapping interests between the rest of the UK and an independent Scotland, but the UK would only cooperate to the extent that it was in its own interest, according to the UK Secretary of State for Foreign and Commonwealth Affairs.[72] The Secretary of State summed up the existing relationship as being about the successful promotion of Scottish businesses, arguing that it was for this reason that many of the Scottish Government's overseas offices

[69] Andrew Boyle, 'Scotland and Norway, a Special Relationship?' *The Guardian* (4 October 2011) <http://www.theguardian.com/commentisfree/2011/oct/04/scotland-norway-special-relationship>.

[70] The Scottish Government, 'Europe and Foreign Affairs: Taking Forward our National Conversation' (Edinburgh, September 2009) para 4.5 <http://www.gov.scot/Resource/Doc/283886/0086022.pdf>.

[71] ibid.

[72] Response from the UK Secretary of State for Foreign and Commonwealth Affairs to the sixth report from the Foreign Affairs Committee session of 2012–2013, 'Foreign Policy Considerations for the UK and Scotland in the Event of Scotland Becoming an Independent Country' July 2013, para 17 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/210012/30944_Cm_8644_Web_Accessible.pdf>.

were currently located within the UK's Embassies and High Commissions.[73] Certainly there is an argument that the ability of Scotland, and the UK's other devolved regions, to utilize a 'two-track' diplomatic strategy—drawing on UK structures and resources as well as initiate independent activities—may magnify their international influence, and effectiveness, in relation to similar sized small-states. For example, it has been argued that Scotland's influence in the European Union may actually be weakened should it gain membership as a small member State, rather than a region of a much larger state.[74] Importantly, however, this added value is only realized where the sub-State and nation-State governments have overlapping interests.

6. Conclusion

In trying to typify the diplomatic representations of sub-State governments—Scotland and Wales in this instance—we are perhaps best led to Berridge's classification of 'unconventional' bilateral diplomacy.[75] Though this typology is intended to describe the activities of States, when resident embassies of the 'conventional kind' cannot be maintained for one reason or another functionally—and indeed in some terminology—these unconventional activities describe fairly accurately the diplomacy of many sub-State governments. For example, the Welsh Government's overseas offices that operate outside of official UK missions bear many of the same characteristics of what Berridge terms 'representative offices': 'a mission that looks and operates much like an Embassy, the only difference being its *informality*'.[76] Additionally, a key structure of unconventional diplomacy as exposed by Berridge, interest sections, is precisely what the Scottish Government have called for under any possible 'Devo Max' model of devolution, allowing them to have a more clearly distinguished representation inside British embassies abroad.[77]

There is, therefore, a precedent and a series of structures relating to sub-State diplomatic representations abroad—both when they operate as part of, and independent from, their host State's mission. However, the proliferation of paradiplomatic activities still presents as-yet-unanswered questions. Which government are 'para-diplomats' ultimately accountable to? If co-location were in operation, then one would assume this was the foreign office of the host-State, in our case

[73] This number includes SDI offices.

[74] Response from the UK Secretary of State for Foreign and Commonwealth Affairs to the sixth report from the Foreign Affairs Committee of session 2012–13: 'Foreign Policy Considerations for the UK and Scotland in the Event of Scotland Becoming an Independent Country' July 2013, para 105 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf>. This argument is strongly refuted by the Scottish Government.

[75] Geoff Berridge, *Diplomacy: Theory and Practice* (3rd edn, Palgrave Macmillan, Basingstoke 2005) 137–43.

[76] ibid 145, emphasis in original.

[77] The Scottish Government, 'Europe and Foreign Affairs: Taking Forward Our National Conversation' (n 70) para 4.5.

the FCO.[78] However, where this might at times be a murky area—at other times it is abundantly clear that political direction is taken from the devolved, not the national government. In Scotland's case, for example, the Scottish Government representation in Brussels is clear that they take their political direction from 'Edinburgh, not London'.[79] Another key outstanding issue is the practice of recognition. As discussed earlier in the chapter, sub-State governments are not able to officially recognize breakaway governments or independent States, yet they do have a—often public—view on such matters. Though their informal support or recognition may not carry any weight in international law, it is not at all difficult to imagine a scenario where their positions were used to influence other members of the international community, and, certainly, may confuse and even hamper their host-State's policy in this area.

The title of this chapter uses the phrase 'skirting officialdom'. It is worth returning to this central theme in concluding our discussions. Wales and Scotland both carry out official and unofficial diplomatic activities. In Wales' case, the Government has overseas representations that form part of official UK diplomatic missions and representative offices that are independent of the UK's diplomatic structures, and thus by definition are 'informal' diplomatic entities. As the preceding sections discussed, the decision of whether or not to co-locate with the UK Government, and give Welsh representations diplomatic status—'opting in' to the VCDR—is made, perhaps surprisingly, on a fairly pragmatic basis. The Welsh Government does not seem to experience any major problems in carrying out their 'brand' of diplomacy outside of UK missions, and indeed—as referenced in the discussion of the Chongqing representation—acting outside of an official representation may even have its advantages. In the case of Wales, its emphasis on region-region linkages means that 'informal' diplomacy is, in most instances, perfectly adequate for its needs. Diplomacy between regional governments of this kind may look and sound much like 'official' or 'formal' diplomacy, it certainly has the pomp and ceremony to fit, yet it remains outside of the scope of the VCDR, subsidiary to interactions at a nation State level.

For Scotland, however, the decision to host its governmental representations exclusively within UK diplomatic missions tells us something different. In this case, the Scottish Government's desire to interact with State-level representations—in China, in the USA, in Japan, and in Canada—means that it requires the formality and diplomatic status that co-location with the UK brings. The Scottish experience thus perhaps demonstrates the continued importance of 'official' diplomatic representations, a message often subsumed by discussions of the broadening of diplomatic practices, the proliferation of diplomatic actors, and the weakening of

[78] Indeed this is what the Memorandum of Understanding between the UK and Devolved Governments states in no uncertain terms (2013), B4.27, D4.23 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf>.

[79] The Scottish Government 'Europe and Foreign Affairs: Taking Forward Our National Conversation' (n 70) para 2.6.

the traditional diplomatic system. To secure high-level access, to engage with the 'wider diplomatic community' and to be accorded the status of a diplomat—for all sorts of practical reasons—the Scottish Government has determined that acting under the umbrella of the UK State, and thus under the terms of the VCDR, is a necessary feature of its overseas representation.[80] Somewhat ironically, the bitterness of the pill in this case—given the Scottish Government's desire for independence, and generally fraught inter-governmental relations—is perhaps testament to the enduring relevance of a more traditional style of diplomacy.

[80] 'Wider diplomatic community' reference: written submission from the Scottish Government on the work of its overseas offices, provided to the Scottish Parliament's European and External Relations Committee as part of their Connecting Scotland Enquiry, Meeting 26 March 2015, para 28 <http://www.parliament.scot/S4_EuropeanandExternalRelationsCommittee/Public_papers_26_March_2015.pdf> and <http://archive.scottish.parliament.uk/s3/committees/europe/inquiries/euDirectives/documents/ScottishGovernmentsubmission.pdf>.

Part VII

Concluding Thoughts

20

Diplomatic Law Today

Has the Vienna Convention Met Its Expectations?

Paul Behrens

1. From Vienna to Vienna: An Unmitigated Success?

At the time of writing, fifty-five years have passed since the signing of the Vienna Convention on Diplomatic Relations. The intervening period has seen considerable changes in international relations: some actors have strengthened their position, and new faces have appeared in the diplomatic world. 'Traditional' diplomats—those sent by States to States—are joined by colleagues assigned to international organizations, by diplomats from the European External Action Service—even by representatives of entities that are not recognized as States. The preceding chapters have reflected on the changing face of diplomatic relations in that regard.

In light of this, one may wonder whether the strong position which legal observers and practitioners customarily assign to the regime of the VCDR has come under attack. There are, after all, rivals in the field. The competition started even in the early days of the Convention: shortly after the conclusion of the VCDR, the Vienna Convention on Consular Relations was signed; and not long afterwards the Convention on Special Missions. Today, a fair number of treaties in the field are asserting their existence and vying for the attention of States and their representatives.

And yet, in many regards, the VCDR appears to merit the high regard in which it is held. In its own field, it is tempting to consider it a uniquely successful conclusion to a process which, where international codification is concerned, had begun more than two hundred years earlier—when representatives of States for the first time agreed at Vienna to the conclusion of an instrument that regulated aspects of diplomatic law for a multitude of States.[1] And the remit of the Vienna Regulations of 1815, along with that of a second instrument, concluded three years later,[2]

[1] Congress of Vienna, *Règlement sur le rang entre les agents diplomatiques* (19 March 1815) Annex XVII of the Acts of the Congress 2 (1814–1815) *British and Foreign State Papers* 179.

[2] Protocole de la Conférence, tenue à Aix-la-Chapelle (21 November 1818) 5 (1817–1818) *British and Foreign State Papers* 1090.

remained narrow: codification, back then, was limited to questions of rank and precedence among diplomatic representatives. The reach of the VCDR on the other hand extends to areas as diverse as the immunity of diplomats, administrative and technical staff and service staff, functions and duties of the mission, the diplomatic bag, diplomatic correspondence and archives, taxation and duties of third States with regard to diplomats passing through their territory.

What is more: consensus on these rules came speedily, and it was to embrace a large number of members of the international community. It is a development which was foreshadowed at the drafting stage: it took the ILC only two years to produce a final set of draft articles after debates on the topic had started. (The law of treaties, by comparison, was considered at six sessions, and the ILC went through four successive Special Rapporteurs to accomplish its work on the subject.[3]) The conference of States, which agreed on the final text of the VCDR, took forty-four days to deliberate the topic,[4] and the treaty needed a mere three years to enter into force. The 'Vienna consensus' today spans political and cultural divides: it counts no less than 190 parties,[5] making it one of those rare treaties which have deserved the name of a quasi-universal instrument.

The significance of that achievement gains further clarity if the reach of the VCDR is compared to that of other instruments in the field of diplomatic and consular relations. The VCCR was concluded only two years after the VCDR; it took four years to enter into force and has, today, 179 parties.[6] The CSM, concluded 1969, needed more than fifteen years to enter into force and has only thirty-eight parties.[7] The CRSIO, concluded in 1975, has still not entered into force (it has no more than thirty-four State parties).[8] And the ILC Draft Articles on the Diplomatic Courier and the Diplomatic Bag, whose final version was agreed in 1989,[9] never even saw their transformation into a treaty text.

But the success of the VCDR is also reflected in the fact that many of its rules were taken aboard in later instruments in the field—often verbatim. Examples

[3] See, for a helpful summary, ILC, Summaries of the Work of the International Law Commission, Law of Treaties (22 July 2015) <http://legal.un.org/ilc/summaries/1_1.shtml>.

[4] See United Nations Conference on Diplomatic Intercourse and Immunities, Vienna 2 March–14 April 1961, *Official Records, Vol I: Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole* UN Doc A/CONF 20/14 (hereinafter 'Vienna Conference Records Vol 1').

[5] United Nations Treaty Collection, Vienna Convention on Diplomatic Relations, Vienna, 18 April 1961 (30 November 2016) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&clang=_en>.

[6] United Nations Treaty Collection, Vienna Convention on Consular Relations, Vienna, 24 April 1963 (30 November 2016) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3&clang=_en>.

[7] United Nations Treaty Collection, Convention on Special Missions, New York, 8 December 1969 (30 November 2016) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-9&chapter=3&clang=_en>.

[8] United Nations Treaty Collection, Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, Vienna, 14 March 1975 (30 November 2016) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-11&chapter=3&clang=_en>.

[9] *ILC Yearbook* 1989 vol II Pt 2, 75.

include the inviolability of diplomatic premises,[10] freedom of movement,[11] freedom of communication,[12] and the personal obligations of diplomatic agents.[13] Not every treaty in this field can claim to have exerted such influence: the drafters of the later instruments could, for instance, in some respects have chosen to take as their blueprint the 1946 UN Convention on the Privileges and Immunities of the United Nations.[14] That they referred back to the VCDR instead is a testament to the drafting work of the ILC in 1957 and its Special Rapporteur.

What Jean-Jacques Dordain observed about the nature of achievements, holds true in this regard as well: 'the biggest problem of success is that it looks easy'.[15] The danger certainly exists that the speedy acceptance of the VCDR leads its observers to forget the hard work of the drafters and the challenges they had to overcome. In the same vein, it can be too easy to overlook the fact that diplomatic law had been subject of passionate academic debate for centuries and that its path to clarity was, on the basis of State practice alone, not always determined in the international community. The long-standing controversies on the rights of the diplomatic 'suite' and on the need of sending States to accept a declaration *persona non grata* are witnesses to that.

But there is another danger that attaches to the impression of success: it thrives on the suspension of critical faculties. The fact that a treaty has gained an extremely wide degree of acceptance leads all too easily to the conclusion that it must have fulfilled the purpose which the international community associated with it, and that it has served to settle the controversies which informed the need for its adoption. In the case of the VCDR, that may not be an unreasonable expectation. When Yugoslavia in 1952 suggested to the General Assembly that codification of diplomatic law be undertaken as a matter of priority,[16] it was clear that she put great hopes into the clarity a written text would provide: the current situation, according to her representative, made it 'imperative' to lay down the relevant rules, 'and thus to confirm definite and precise rules of international law'.[17]

In that regard, however, a critical review of the current state of diplomatic law raises uncomfortable questions. The years since the entry into force of the VCDR have certainly seen their share of situations to which the conventional system has failed to provide satisfactory answers.

[10] VCDR art 22 VCDR. See, albeit with varying limitations, VCCR art 31; CSM art 25; CRSIO art 23.

[11] VCDR art 26. See VCCR art 34; CSM art 27; CRSIO arts 26 and 56.

[12] VCDR art 27(1). See VCCR art 35; CSM art 28(1); CRSIO arts 27 and 57.

[13] VCDR art 41(1). See VCCR art 55; CSM art 47; CRSIO art 77.

[14] Convention on the Privileges and Immunities of the United Nations (opened for signature 13 February 1946, entered into force 14 December 1946) 1 UNTS 15.

[15] Dordain, Director-General of the European Space Agency, made these remarks on the occasion of the successful landing of the probe *Philae* on the Rosetta comet in 2014. John Berman et al, 'European Probe Lands on Comet; European Space Agency Director: "Big Step for Human Civilization"' CNN (12 November 2014).

[16] *ILC Yearbook* 1956 vol II, 131.

[17] ibid.

The case of Julian Assange, the activist who was granted asylum in the embassy of Ecuador in London in 2012,[18] constitutes one example in the field. The incident gave rise to considerable controversy between sending and receiving State,[19] but observers of the case who sought legal advice from the text of the VCDR were engaging in a futile exercise: the treaty does not mention diplomatic asylum. Almost thirty years before the Assange case, London bore witness to another incident that raised questions of diplomatic law: the killing in 1984 of a young policewoman through shots emanating from the Libyan mission.[20] Those who referred to the VCDR in this context to ascertain the options for lawful reactions by the receiving State could almost be said to have knocked at the doors of absurdity: the Convention enshrines personal diplomatic inviolability as an absolute right, permitting of no exceptions, and allows entry of mission premises only with the consent of the head of the mission.[21] More recently, 'cablegate'—an incident beginning in November 2010, when the activist website WikiLeaks made more than 250,000 cables, created by US diplomatic missions, available to selected media in Germany, Spain, France, and the United States,[22] raised the question whether the law of the 1961 Convention is still able to guarantee the inviolability of diplomatic correspondence and diplomatic archives.

These incidents are symptomatic for three distinct groups of challenges which the system of diplomatic law faces today and to which a literal reading of the VCDR, for different reasons, provides no conclusive answer. But an investigation of their character has to be undertaken if the effectiveness of the VCDR in the twenty-first century is to receive an appropriate evaluation, and it also has to be performed before an attempt can be made to formulate approaches which could provide the necessary solutions under existing and future law. This is the remit of the following sections: section 2 examines the way that led to the emergence of principal challenges in the field; section 3 explores options to address the problems which diplomatic law faces today. The final section (4) returns to the fundamental question which stood at the beginning of this study, and seeks to evaluate the Convention in light of the hopes which its drafters attached to it, more than half a century ago.

[18] Sylvia Hui and Gonzalo Solano, 'Ecuador Says WikiLeaks Founder Seeking Asylum' *Associated Press* (19 June 2012).

[19] See on this Paul Behrens, 'The Law of Diplomatic Asylum – A Contextual Approach' 35 (2014) Michigan Journal of International Law 319, 320.

[20] See '1984: Libyan Embassy Shots Kill Policewoman' BBC Online <http://news.bbc.co.uk/onthisday/hi/dates/stories/april/17/newsid_2488000/2488369.stm> and see also Chapters 3, 6, and 11.

[21] VCDR arts 29 and 22.

[22] 'Background: WikiLeaks Documents in Public Interest' *Deutsche Presse-Agentur* (28 November 2010). See also text to nn 92–101.

2. The Boundaries of Success: Challenges to Diplomatic Law and their Reasons

By considering the above named difficulties in their respective contexts, it is possible to distinguish three challenges which arise to diplomatic law today: challenges which find their basis in the language of the convention itself; difficulties which derive from the meeting of rules of the VCDR with other norms of international law; and, finally, problems which arise from developments, mainly of a technological nature, which manifested themselves after the VCDR had entered into force.

That is not to say that there are no overlaps between the three groups. But a distinction along these lines is helpful in an effort to understand the reasons behind the emergence of these difficulties, and it is a necessary exercise for any attempt to formulate solutions.

2.1 Skirting the issue: the blind spots of the Convention

It may be tempting to consider the language of the VCDR one of its strongest points. On the whole, the treaty is clear, accessible, and—at least by comparison to some later instruments of international law—concise.[23]

That is, in large part, an achievement of the ILC, whose two sets of draft articles (in 1957 and in 1958) had already employed a remarkably clear structure, had avoided the overloading of articles, and used language that was easy to follow. Even today, the handwriting of the ILC is, to a considerable degree, visible in the text of the VCDR.

And yet, it is interesting to note that the adoption of a binding treaty had not been a foregone conclusion and that the language of the draft articles had been one of the very reasons for reluctance in that regard. The United States, as late as 1958, was opposed to the submission of the ILC draft articles to the General Assembly 'in the form of a convention', and it noted by way of explanation that some of the articles were evidence for an effort to reach compromise among differing views by governments on particular issues. The result was 'too frequently a vague or ambiguous statement, obscure in meaning and susceptible of different interpretations'.[24]

That may, at first sight, seem an uncharitable observation. And yet, a closer look at issues which continued to cause problems after the entry into force of the VCDR suggests that the United States had touched upon an issue that was based on facts, and that it is this particular circumstance which is at the root of several difficulties relating to legal assessment which haunt diplomatic law even today. The

[23] A comparison with more recent treaties may well lead to the impression that their drafters did not subject themselves to quite the same discipline as the ILC members in the case of the VCDR. See, for an example, Rome Statute of the International Criminal Court (adopted 17 July 1998, entry into force 1 July 2002) 2187 UNTS, art 8 (hereinafter 'ICCSt').

[24] *ILC Yearbook* 1958 vol II, 133 (Note Verbale by the United States of America of 24 February 1958). See also Chapter 5 above.

available evidence suggests that the drafters, on more than one occasion, ensured the eventual success of the instrument by charting a course around some of the trickier questions which had been foreseeable even at the time of codification.[25]

The concept of the 'family' of the diplomatic agent offers an example in the field. That immunity under diplomatic law must extend beyond its principal beneficiaries—diplomats themselves—had been clear even under customary international law. At the same time, extending immunity to the family of a diplomatic agent considerably expands the circle of persons who can move within the receiving State without fear of prosecution even for serious crimes; and it means that the cover of immunity is extended to persons who cannot be presumed to have received training on the nature and the limits of the diplomatic office.

The proper determination of the group of persons that can be deemed to belong to the 'family' of the diplomatic agent is thus of considerable significance—and had been so even in pre-conventional days. The way, however, in which the VCDR addresses this difficulty is by merely stating that the 'members of the family of a diplomatic agent forming part of his household' shall enjoy his privileges and immunities, as long as they are not nationals of the receiving State.[26]

Yet a universal concept of 'family' did not exist even when the ILC began its deliberations on the draft, and national laws differed widely where the treatment of family members of diplomatic agents was concerned. The question of immunities which, for instance, were to be given to parents or to spouses in polygamous marriages did not easily lend itself to an answer which would have found general consensus within the international community. When contemporary diplomatic law therefore has to find an answer to claims for immunity for same-sex spouses of members of the diplomatic mission—a point that was raised eg in relations between India and the Canadian High Commission in that country in 2007[27]—it deals in fact with variations on a theme that had been heard even in the early stages of the codification history.

And it is clear that the significance of the matter, and the variety of responses under domestic law, had been clear to members of the ILC.[28] In spite of this, the Commission decided to adopt a general formula ('members of their families forming part of their respective households')[29] instead of engaging in the difficult business of drafting a 'minimum list' of such members that could have hoped to meet with a consensus position during the negotiations.

At the Conference itself, several States tried to do exactly that and sought to reach a more precise definition of the members of the diplomatic family.[30] In the

[25] See also text to nn 45–46 below. [26] VCDR art 37.

[27] Charu Sudan Kasturi, 'Delhi in Same-Sex Diplomat Dilemma' *The Telegraph* (India, 7 May 2007).

[28] See on this *ILC Yearbook* 1957 vol I, 15–17 and 134–37, and in particular 134, para 4 (Chairman).

[29] *ILC Yearbook* 1958 vol II, 101, art 36(1).

[30] See United States of America, United Nations Conference on Diplomatic Intercourse and Immunities, Vienna 2 March–14 April 1961, *Official Records, Vol II: Annexes, Final Act, Vienna Convention on Diplomatic Relations, Optional Protocols, Resolutions* UN Doc A/CONF 20/14/Add.1 (hereinafter 'Vienna Conference Records Vol 2') 9, UN Doc A/CONF 20/C 1/L 17; Ceylon, ibid 16,

end, however, the conference too decided to take the simpler course and opted for the above-mentioned wording.[31]

The proper interpretation of this provision in cases of differing understandings adopted by sending and receiving State is therefore still a matter fraught with difficulty. In principle, customary international law must be held to fill the gaps which the Convention leaves,[32] but the problem here derives from the very fact that 'consistency' of State practice and *opinio iuris*, as an element of this source of international law, cannot in every case be established.

The determination of members of the family thus must often be left to the affected States themselves (and that typically means it is subject to the extent to which the receiving State is prepared to accept certain persons as members of the family).[33] It is not the only instance in which bilateral agreements have to take the place of international regulations.

Another difficulty which has significant relevance in modern diplomatic relations, but whose emergence had been entirely foreseeable at the time of the drafting of the convention, is the provision of asylum on mission premises. The decision to grant diplomatic asylum is adopted by agents of States with varying political and cultural backgrounds and has caused headlines in recent years: chiefly through the giving of asylum to Julian Assange in the premises of the Ecuadorian Embassy in London in 2012,[34] and the refuge afforded to the Chinese activist Chen Guangcheng in the US Embassy in Beijing in the same year.[35]

The fact has already been mentioned that the VCDR does not provide an answer to the underlying legal question;[36] but even at the time of drafting, diplomatic asylum had been able to look back on a long tradition in Latin American countries based not only on regional customary law, but also on a multitude of treaties dealing with the matter.[37] What is more: the International Court of Justice (ICJ) had already given judgments in two cases which had arisen from the granting of diplomatic asylum in Peru.[38]

It is perhaps not surprising that it was a Latin American country (Colombia) which suggested in the Sixth Committee that the question of asylum should be included in the ILC debates on diplomatic law. Most committee members, however, felt that this was a different question which should not be considered at this stage.[39]

UN Doc A/CONF 20/C 1/L 91; Argentina and Spain, ibid 18, UN Doc A/CONF 20/C 1/L 105; Italy, ibid 28, UN Doc A/CONF 20/C 1/L 198.

[31] See text to n 26 above. [32] VCDR, preamble, operative para 5.

[33] See, for examples, Eileen Denza, *Diplomatic Law* (4th edn, OUP, Oxford 2016) 320–24.

[34] See text to n 18 above.

[35] Jonathan Watts, 'Chen Guangcheng "Safe" in US Embassy' *The Guardian* (London, 27 April 2012); 'Chen Guangcheng Left US Embassy "After Family Threats"' *BBC Online* (2 May 2012) <www.bbc.co.uk/news/world-asia-17927860>.

[36] See text to n 19 above. [37] See for an overview, Behrens (n 19) 330 et seq.

[38] *Asylum Case (Colombia v Peru)* [1950] ICJ Rep 266; *Haya de la Torre Case (Colombia v Peru)* [1951] ICJ Rep 71.

[39] See Behrens (n 19) 322.

In 1956, the year before the ILC took up its discussions, an incident occurred outside Latin America, which was to become nothing less than the cause célèbre in the field: the granting of asylum to Cardinal Mindszenty in the American Embassy in Hungary. The ILC therefore was quite aware of the difficulties associated with this phenomenon in international law. Mindszenty was to stay in the embassy throughout its deliberations, all through the convening and conclusion of the Vienna Conference; he was still in the embassy when the VCCR was concluded, and even when the Convention on Special Missions was adopted.[40]

The provision of the VCDR which can be said to bear the closest proximity to a regulation of asylum is Article 41(3)—banning the use of premises of the mission 'in any manner incompatible with the functions of the mission' which were formulated in the VCDR itself or laid down 'by other rules of general international law or by any special agreements' between sending and receiving State. The ILC commentary makes clear that such agreements would include 'certain treaties governing the right to grant asylum in mission premises which are valid as between the parties to them'.[41]

In States which are subject to such agreements, the granting of asylum will, consequently, be considered in the context of the relevant local treaties. But the regulation does not provide any help in the cases of Assange or Guangcheng or in other instances in which one of the affected States is not party to these instruments.

The correct approach to this problem will have to take into account the position of customary international law in this field—but a clear position under this source is, again difficult to derive. When the General Assembly, through resolution 3321, invited members of the United Nations to express their views on diplomatic asylum,[42] the resulting responses showed such a degree of diversity, that it would be difficult to speak of consistent State practice and *opinio iuris* suggesting a clear position on that matter.[43]

That does not mean that the granting of diplomatic asylum can never find a legal basis outside the Latin American region. The fact must be taken into account that other interests may be involved, which assist the sending State, and which likewise have a strong basis in international law. These interests can include *erga omnes* obligations owed by the receiving State; but also human rights obligations owed by the sending State to persons under its jurisdiction.[44]

Yet it is, once again, not the VCDR itself which provides a solution in this area.

And there are other fields in which issues which were well appreciated by the drafters (but whose controversial nature was understood as well) did not make it into the Convention text—or even into the draft articles of the ILC. At times,

[40] In spite of the limitations imposed by the terms of reference, the ILC did in fact spend some time on the discussion of diplomatic asylum. *ILC Yearbook* 1957 vol I, 54–58, 220–21. ILC Member Fitzmaurice went so far as to suggest the inclusion of an article on that topic; but he was not successful in that endeavour. See ibid 54, para 33.

[41] *ILC Yearbook* 1958 vol II, 104.

[42] GA Res 3321 (XXIX) (14 December 1974).

[43] See Behrens (n 19) 334.

[44] For a detailed assessment, see ibid, in particular 336–48.

the reluctance to deal with a cumbersome problem was quite pronounced: on the question at what stage exactly a mission would be able to claim inviolability of its premises, ILC Member Bartos noted that the question was 'a very thorny one', and that it would be better, 'in the absence of any established rule […] for the Commission to refrain from mentioning the matter'.[45] And where exceptions to the personal inviolability of diplomatic agents were concerned, his colleague Spiropoulos found that it 'went without saying that private persons were entitled to defend themselves when attacked by diplomatic agents', but deemed it 'better to say nothing at all on the subject'.[46]

There is, it appears, some truth to the 1958 observation by the United States that the language of the draft at times remained vague and ambiguous; and all too often this appears to have been a deliberate approach. Yet, as the debate on the definition of the diplomatic 'family' has shown, the ILC carries only part of the blame: three years after the American note verbale, the Vienna Conference was only too happy to follow a similar course. It is, from the perspective of drafters who seek the conclusion of an instrument within a certain timeframe, an understandable approach. Yet it also constitutes an important qualification to claims that the clear language of the Convention helped to promote its extensive approval. Language may indeed be a principal reason for its considerable popularity: the truth is that an instrument whose text does not dwell on some of the most controversial issues in the field, attracts speedier approval than a treaty whose drafters are prepared to boldly march into the lion's den.

2.2 The mantle of the absolute: difficulties arising from the meeting with other norms of international law

The second challenge to diplomatic law in the form it received through the VCDR, is rooted in the fact that the convention is typically not the only instrument which has an impact on a situation in which a diplomatic mission requires legal assessment. Overlaps to the first challenge exist: many of these meetings of seemingly divergent norms were certainly foreseeable at the time of ILC debates (as the example of diplomatic asylum has shown).

And it is, again, the language of the convention which contributes to difficulties under this category. Accessibility and terseness come at a price: clothing the rights and obligations of diplomatic agents in absolute terms certainly allows the treaty to be understood by a wide circle of readers, but it does not allow the consideration of more complex (but often unavoidable) issues.

The Convention's understanding of the immunity of diplomatic premises is one example. Two brief sentences encompass the concept in the VCDR: they outline the inviolability of the premises and prohibit agents of the host State to enter them, 'except with the consent of the head of the mission'.[47]

[45] *ILC Yearbook* 1957 vol I, 53, para 17 (Bartos).
[46] ibid 90, para 21 (Spiropoulos).
[47] VCDR art 22(1).

Even at the time of drafting, the problems which absolute premises immunity would engender were apparent. In January 1956, the Soviet diplomatic mission in Ottawa refused entry to the embassy in a typical situation of emergency: a fire had broken out in the building.[48] But it appeared more important to the diplomatic staff to remove documents and other items from the premises than to grant access to firefighters. When access was finally given, it was too late: the fire department struggled for almost six hours, but was not able to save the building.

And yet, the consequences could have been worse. In many instances, the premises of an embassy are located on 'embassy row'—a street which houses more than one diplomatic mission. (In some cases, two diplomatic missions share the same building.)

If a mission under circumstances of this kind refuses entry to the fire brigade, the divergent obligations of the receiving State are clear: there is a duty not to enter the premises without consent of the head of the mission; yet towards the neighbouring mission, the host is under a 'special duty to take all appropriate steps' to protect its premises, too.[49]

This difficulty was not addressed in the VCDR. It is, in this context, interesting to note that neither the VCCR nor the CSM repeated the absolute language of 1961. The VCCR allows for an assumption of the consent of the head of mission 'in case of fire or other disaster requiring prompt protective action';[50] the CSM employs similar wording ('fire or other disaster that seriously endangers public safety'), if it had 'not been possible to obtain the express consent of the head of the special mission'.[51] In the case of the VCCR, the argument might be advanced that consular missions are not necessarily clothed with the same representative character as diplomatic missions, but the same limitation does not usually hold true in the case of special missions.

A second example concerns the phrasing of the diplomatic bag. In this regard, the relevant rule in the VCDR is even shorter: the Convention merely states that '[t]he diplomatic bag shall not be opened or detained'.[52]

The most famous incident in this field was arguably that of the former Nigerian transport minister, Umaru Dikko, in 1984.[53] In July of that year, several Nigerian diplomats arrived at Stansted airport, trying to send off two crates which were addressed to the Ministry of External Affairs in Lagos.[54] The curiosity of customs officials was aroused when they noticed holes in one of the crates and a smell of chloroform emanating from it. They proceeded to open it, and found inside Mr Dikko—a former member of the Nigerian government, who

[48] The case according to City of Ottawa, 'Soviet Embassy Fire' <https://web.archive.org/web/20161022220530/http://ottawa.ca/en/residents/arts-culture-and-community/museums-and-heritage/witness-change-visions-andrews-newton-33>.

[49] VCDR art 22(2). [50] VCCR art 31(2). [51] CSM art 25(1).

[52] VCDR art 27(3).

[53] See Ben Dobbin, 'International News' *Associated Press* (5 July 1984).

[54] David Pallister, 'The Strange Case of the Man in the Crate / Dikko Kidnap' *The Guardian* (London, 13 February 1985).

had fallen from grace, had relocated to London, and had now become the victim of a kidnapping plot.[55]

In this instance, the British government was able to claim that the crate had not constituted a 'proper' diplomatic bag: it missed the official seals which, it appears, are accepted as one of the elements of the 'visible external marks of their character' under the VCDR.[56] But there have been other cases in the field which raise questions about the possibility of opening diplomatic bags—that of a kidnapped Israeli citizen who was found in Italy in a diplomatic bag addressed to the Egyptian Foreign Ministry,[57] and, in a pre-conventional case, the incident involving Baron von Rautenfels, a German courier arrested in Oslo in 1917, whose bag, when opened, was found to contain bombs which were meant for ships leaving Norway.[58]

Some of the later conventions have, again, chosen a path which deviates from that of the VCDR: where the consular bag is concerned, the VCCR, for instance, does allow for a request to open it 'by an authorized representative of the sending State', if the receiving State has 'serious reason to believe' that the bag contains items other than articles for official use.[59] If the request is refused, 'the bag shall be returned to its place of origin'.[60]

But the fact that this 'challenge procedure' is missing in the VCDR, underlines the difficulties arising from the absolute terms which the Convention employs.

In the Dikko case, the obvious question emerged as to what the authorities would have done if the crate had fulfilled all procedural conditions. The British government noted that it would 'not hesitate to take the necessary action on the basis of the overriding right to self-defence or the duty to protect human life'.[61] One may have sympathy with this position, but it is, again, not a view which is immediately apparent from the VCDR, which in this context makes no reference to competing interests at all.

A third example is the rule against diplomatic interference. Here, too, the wording of the VCDR is terse and accessible, but ultimately unhelpful. The second sentence of Article 41(1) simply states that persons enjoying privileges and immunities 'have a duty not to interfere in the internal affairs' of the receiving State.[62] The ILC commentary provides an example for interference: in the view of the commission, diplomats 'must not take part in political campaigns'.[63]

[55] ibid.

[56] See on this Denza (n 33) 196–97.

[57] Denza (n 33), 203. Denza points out that Italy had not been party to the VCDR at that stage, ibid; but the inviolability of the diplomatic bag also constitutes a rule of customary international law. Jeffrey F Addicott, 'The Status of the Diplomatic Bag: A Proposed United States Position' (1991) 13 Houston Journal of International Law 221, 223–26.

[58] Denza (n 33) 203. [59] VCCR art 35(3). [60] ibid.

[61] Secretary of State for Foreign and Commonwealth Affairs (UK), 'Government Report on Review of the Vienna Convention on Diplomatic Relations and Reply to "The Abuse of Diplomatic Immunities and Privileges" ' (Cmnd 9497, 1985), para 48.

[62] VCDR art 41(1). [63] *ILC Yearbook* 1958 vol II, 104.

That difficulties in this context can arise when competing norms under international law are taken into consideration, has become particularly clear in more recent years, which have seen an increased involvement of diplomatic agents in the human rights situation in the receiving State.[64]

The 'Freedom House speech' of the British Ambassador to Uzbekistan, Craig Murray, in 2002, is a prime example in that field. In October of that year, Murray gave a speech at the opening of the offices of Freedom House, a US non-governmental organization, in Tashkent. Murray did not mince his words. Uzbekistan, in his view, was 'not a functioning democracy', nor did it 'appear to be moving in the direction of democracy'.[65] The Ambassador referred to 'between seven and ten thousand people in detention whom we would consider as political and / or religious prisoners'.[66] He mentioned the practice of committing people to psychiatric institutions to suppress dissent, the banning of political parties, torture in prisons, and the reported boiling to death of two prisoners.[67]

Murray did not have to wait long for the Uzbek reaction: he was summoned to the Foreign Ministry of that State and told that the government 'took issue' with the Freedom House speech.[68] What is more remarkable is that the sending State too displayed a certain ambivalence about these statements. The speech had been cleared with the UK Foreign Office,[69] but the Ambassador still faced criticism by his superiors. According to Murray's memoirs, he was told that '[n]o ambassador should ever make such a speech. That is the job of politicians. Your job is not to undermine UK-Uzbek relations'.[70]

International law, however, does recognize norms on which conduct of this kind can be based. It accepts, in particular, that the receiving State owes certain obligations not only to its own nationals, but to the international community 'as a whole': the relevant interests are thus elevated to the level of *erga omnes* interests. Recognized *erga omnes* interests include some of the most fundamental human rights obligations,[71] and they also extend to a people's right to self-determination.[72] Diplomatic agents who therefore seek to support peoples in their struggle to 'freely determine their political status and freely pursue their economic, social

[64] See Paul Behrens, '"None of Their Business?" Diplomatic Involvement In Human Rights' (2014) 15 Melbourne Journal of International Law 190.

[65] Craig Murray, *Murder in Samarkand* (Mainstream, Edinburgh 2006) 109. [66] ibid.

[67] ibid 108–12; Martin Williams, 'Human Rights Groups in Plea for Scots Envoy; Blair Is Asked to Return Ambassador to Tashkent' *The Herald* (Glasgow, 25 October 2003).

[68] Murray (n 65) 122.

[69] Nick Walsh, 'The Envoy Who Said Too Much' *The Guardian* (London, 15 July 2004).

[70] Murray (n 65) 152. [71] See, on the whole problem, Chapter 16, section 2.2.2.

[72] On the *erga omnes* character of the right, see *Case Concerning East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90, 102, para 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 199, paras 155–56; see also ILC Study Group on Fragmentation of International Law, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (18 July 2006) A/CN 4/L 702 23 n 32 and Iain Scobbie, 'Unchart(er)ed Waters? Consequences of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory for the Responsibility of the UN for Palestine' (2005) 16 European Journal of International Law 941, 946.

and cultural development',[73] can base their acts on grounds of international law[74] which are quite as strong as the receiving State's right to be free from interference.

Here, too, the VCDR does not suggest a solution for the brewing conflict of divergent norms.[75] And the identification of the appropriate method of resolving this difficulty is a complex task, whose particular challenge lies in the fact that the legal rules which situations of this kind involve, are both provisions which reflect essential interests of the international community. Mention has been made in a previous chapter of the fact that conciliatory solutions—methods which seek to preserve the core character of each of the relevant interests—are more likely to find support within the international community than hierarchical approaches, and that the principle of proportionality in particular has to play a significant role in mediating between the affected values.[76] It certainly is a mechanism whose existence has a strong basis in international law,[77] and whose application leads to viable and satisfactory results. But here again, finding the appropriate solution requires a look beyond the boundaries of the convention and an appreciation of the entire framework of international law. The VCDR itself keeps its silence on that point.

The result is a law that lacks the clarity which an express conventional regulation would have conveyed and which would have gone some way to avoid disagreements among States in instances marked by the co-existence of seemingly divergent mandates.

2.3 Smartphones, Skype, and WikiLeaks: The Vienna Convention in the twenty-first century

The third challenge to the application of the VCDR is perhaps the most obvious one. It is constituted by factual developments—chiefly of a technological nature—which took place after the entry into force of the convention, and which may be capable of changing the parameters of the situation within which diplomatic law today has to operate.

In this context, certain revelations about US intelligence activities, directed at diplomatic missions, merit consideration. In 2013, information leaked by Edward Snowden, an American systems analysts and former CIA employee, reached the press. They revealed US surveillance activities targeting thirty-eight diplomatic missions, including the Italian, French, and Greek embassies.[78] According

[73] International Covenant on Civil and Political Rights (adopted 19 December 1966, entry into force 23 March 1976) 999 UNTS 171, art 1(1); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entry into force 3 January 1976) 993 UNTS 3, art 1(1).

[74] See on this also Behrens (n 64) 207.

[75] The ILC Commentary does suggest a solution in cases in which diplomats make representations to protect interests of the sending State and its nationals. *ILC Yearbook* 1958 vol II, 104, art 40, commentary, para 2. For the difficulties which accompany that approach, see Chapter 16, section 3.

[76] See Chapter 16, section 3.

[77] See, in particular, Paul Behrens, *Diplomatic Interference and the Law* (Hart Publishing, Oxford 2016) 115.

[78] Ewen MacAskill, 'New NSA Leaks Show How US Is Bugging Its European Allies' *The Guardian* (London, 30 June 2013).

to a report by the German magazine *Der Spiegel*, methods used by the National Security Agency included bugging of embassies, but also tapping 'into the internal computer cable network'.[79]

The development of the internet and the universal use of e-mails as a principal means of communication among embassies, along with attempts by receiving States to gain access to such messages, were certainly developments which were difficult to foresee in the 1950s. That, however, does not mean that diplomatic law as developed through the centuries provides no lessons for situations marked by changed technological parameters.

Surveillance of diplomatic correspondence is certainly not a new phenomenon. The case of the Portuguese envoy in the days of the English Civil War may be recalled in that context—a diplomat who had been so certain that his correspondence would be intercepted by agents of the English Parliament that he sent out a packet 'containing an old newssheet, a figure of a man hanged, and several pairs of spectacles to assist the English parliamentary commissioners to decipher this valuable information'.[80] (Parliament, on that occasion, did not distinguish itself by a sense of humour: it ordered the diplomat's expulsion.)

The bugging of offices and of telephones was likewise not a new development by the time of the ILC's deliberations. In instances of this kind, the sometimes general language of the VCDR may yet prove an advantage. Its Article 27, which contains the rule that receiving States 'shall permit and protect free communication on the part of the mission for all official purposes' and states that 'official correspondence of the mission shall be inviolable',[81] is certainly broad enough to cover modern forms of communication. Nor is the argument entirely convincing that it may be difficult, in the case of e-mails, to distinguish between communication for 'official purposes' and communication for 'private purposes'. The same problem exists for more traditional forms of communication; yet the Convention expressly authorizes diplomatic agents to use 'messages in code or cipher'.[82] This allows at the very least an application by analogy to electronic communications which have been sent out in encrypted form from the diplomatic mission.

Recourse to the underlying principle behind a certain provision of the VCDR may indeed assist in many instances in which new technology causes problems in modern diplomatic relations. On occasion, however, the VCDR itself refers to circumstances which appear to have been rendered obsolete in the twenty-first century.

The operation of 'wireless transmitters' is a candidate for that category. Wireless transmitters were a popular technology for diplomatic missions in the 1950s—according to Fitzmaurice, the '"[d]iplomatic wireless", as it was called, was now quasi-universal and had virtually superseded other means of transmitting messages'.[83] He advocated regulation of their use, and the matter was subsequently

[79] Laura Poitras, Marcel Rosenbach, and Holger Stark, 'Codename "Apalachee": How America Spies on Europe and the UN' *Spiegel Online* (26 August 2013) <http://www.spiegel.de/international/world/secret-nsa-documents-show-how-the-us-spies-on-europe-and-the-un-a-918625.html>.

[80] Denza (n 33) 178–79. [81] VCDR art 27(1) and (2). [82] VCDR art 27(1).

[83] *ILC Yearbook* 1957 vol I, 76, para 65 (Fitzmaurice).

addressed in the VCDR through the clause that a diplomatic mission 'may install and use a wireless transmitter only with the consent of the receiving State'.[84]

In the ILC, Padilla Nervo had pointed out that wireless transmitters involved questions of 'public order'—there would be an 'impossible situation if some forty embassies in the same capital went on the air over any channels they wished'.[85] That appeared to have been one of the main reasons behind the norm and behind its application thereafter.[86]

In the age of Skype and smartphones, and at a time when many diplomatic missions reach the world at large through dedicated websites, arguments of this kind seem to have the charm of the quixotic.

However, some of the underlying reasons for existing restrictions on wireless transmitters provide an opportunity to reflect even on the dissemination of diplomatic messages through websites and other media.

The fact in particular that the receiving State may in this regard have to comply with obligations deriving from other treaties—a concern which was raised even during the debates at Vienna[87]—has retained its relevance today. A treaty that had already been concluded by the time of the ILC debates—the Broadcasting Convention of 1936—has direct impact on the subject matter of the broadcast message and contains, *inter alia*, the obligation of State parties to 'stop without delay within their respective territories any transmission likely to harm good international understanding by statements the incorrectness of which is or ought to be known to the persons responsible for the broadcast'.[88]

Provisions of this kind raise the spectre of State responsibility for messages disseminated on the territory of the relevant party. Cases have indeed come into existence in which diplomatic statements were perceived as carrying harmful messages—in 1980, for instance, the head of the Libyan mission to the United Kingdom approved of the decision of Libyan revolutionary committees to 'kill two more people'—ie dissidents to the Gaddafi regime—'in the United Kingdom' and stated that Libya was 'seriously thinking of cooperating with the IRA if the British Government continues to support those Libyans who are hiding here'.[89] In 2002, the Saudi Ambassador to the UK published a poem in which he praised a young

[84] VCDR art 27(1). [85] *ILC Yearbook* 1957 vol I, 77, para 81 (Padilla Nervo).

[86] See, for a case involving the Senegalese mission in the United States in 1978, Denza (n 33) 181–82.

[87] At the Vienna Conference, the representative of the United States referred in that regard to the 'Applicable International Postal and Telecommunications Conventions'. Conference Records Vol 1, 155, para 21 (Cameron). The 1959 Geneva version of the International Telecommunications Convention had made reference, *inter alia*, to the obligation of State Parties 'to limit the number of frequencies and the spectrum space used to the minimum essential to provide in a satisfactory manner the necessary services'. International Telecommunications Convention (adopted 21 December 1959, entry into force 1 January 1961) TIAS 4892, art 45.

[88] International Convention Concerning the Use of Broadcasting in the Cause of Peace (adopted 23 September 1936, entry into force 2 April 1938) 186 LNTS 301, art 3.

[89] Michael Horsnell, 'Gaddafi Men Sentence to Death Two Libyan exiles in London Threat to Link with IRA' *The Times* (London, 13 June 1980).

Palestinian suicide bomber,[90] stating that she 'died to honour God's word', and that she 'embraced death […] Doors of heaven are opened for her'.[91] The possibility that, in contemporary diplomatic relations, statements of this kind may appear on websites whose server is based in the receiving State, is obvious.

In instances of this kind, recourse to mandates of international law may assist in addressing the challenge caused by the dissemination of certain messages through modern media. This is certainly the case where such messages have reached the level of incitement to terrorism.[92] But it is a situation which cannot be resolved by referring to the wording of the VCDR on its own—it would be difficult to stretch the provision on wireless transmitters to encompass web-based messages as well. Nor does this seem to have been its principal rationale: considerations of the contents of the messages only enter into the evaluation of their lawfulness if additional norms of international law are taken into account.

A third example illustrating the impact of modern technology on diplomatic relations was provided by 'cablegate': the release by WikiLeaks of hundreds of thousands of cables sent by US embassies to the State Department.[93]

The leaking of embassy correspondence in such a way that an unlimited audience can gain immediate access, is a phenomenon of the twenty-first century which impacts on various rules of the VCDR. It raises questions about the duty of the receiving State with regard to the inviolability of official correspondence, which is guaranteed under Article 27(2) of the Convention. But it also raises questions about the inviolability of archives and documents of the mission, which Article 24 seeks to protect.

And the responsibility of receiving States in that regard has indeed been put to the test. Among the WikiLeaks revelations were the contents of a cable which was sent by the Political Counselor of the US embassy to London to the State Department in 2009, and which concerned the Chagos Islands. The Chagos Islands are a British overseas territory in the Indian Ocean, which achieved sad notoriety when, in the 1960s, the British government proceeded to expel the local population to allow the establishment of a US military base there.[94]

The Chagossians had since lobbied for the right to return to the islands, but the British government decided in 2010 to establish an 'marine protected area' (MPA) there instead. The cable was revealing for the attitude of the British government at that time. It referred to a conversation which the US Political Counselor had had with Colin Roberts, the FCO's director for Overseas Territories in May of that year. According to the cable, Roberts had asserted that the British did 'not regret the removal of the population', and that, according to the government's

[90] 'Diplomat Censured Over Bomb Poem' *BBC Online* (18 April 2002) <http://news.bbc.co.uk/1/hi/uk/1937696.stm>.

[91] Paul Harris, 'Saudi Envoy Praises Bombers' *The Observer* (London, 14 April 2002).

[92] See on this UNSC Res 1624 (14 September 2005), preamble, operative para 4; and para 1(a) of the text. See also UNSC Res 1373 (28 September 2001), para 5.

[93] See text to n 22.

[94] See *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*, [2014] Env LR 2, para 6 (hereinafter 'Bancoult (2013)').

current thinking, the establishment of a reserve would mean that there would be 'no human footprints' or 'Man Fridays' on uninhabited islands.[95]

The Chagossians sought to introduce the cable in their case against the British government—an initiative which, however, caused certain problems in view of the perceived obligation under the VCDR to protect the inviolability of official correspondence. In that regard, the Administrative Court relied heavily on the 1988 case of *Shearson Lehman Brothers,* in which it was found that use could not be made in court proceedings of a document that had been obtained in an illicit way, as this would be 'inimical to the underlying purpose' of the protection of the inviolability of diplomatic communications.[96]

The technological advances since the entry into force of the VCDR had been touched upon by Counsel for the claimant who asserted that the correspondence, as an 'electronic document', ceased to be 'official correspondence of the mission' once it had been transmitted by the embassy.[97] The Administrative Court gave that argument short shrift: under the 'object and purpose' of the VCDR, the words 'document' and 'correspondence' had to be read as including 'modern forms of electronic communication'.[98] The Bancoult claim was dismissed by the court.[99]

The consequences of this reasoning are staggering. If the decision were taken as guidance for the interpretation of Articles 24 and 27(2), the courts of receiving States would have to pretend that they have no knowledge of leaked e-mails, even if they are accessible to every teenager (or silver surfer) with a working internet connection. To a degree, the absurdity of the outcome is indeed based on a failure to take into account the character of the correspondence; although it is true that here, too, a solution to the problem can be found through the application of rules of interpretation which had been in place at the time of the conclusion of the VCDR. It may go too far to state that e-mail ceases to be diplomatic correspondence once the 'send' button has been pushed;[100] but documents which appear on a website, can certainly no longer be said to be within the exclusive domain of the diplomatic mission—at the very least, they have attained dual character as both diplomatic materials and materials in the public domain.

Publication of embassy cables on the website of a private organization also has an impact on the options available to the receiving State. In situations of this kind, the receiving State is in fact no longer capable of fulfilling its duties under Articles 24 and Article 27(2)—for the simple reason that it is no longer physically possible to guarantee the inviolability of the relevant documents. It should be noted that, when the case in 2014 reached the Court of Appeal, the court did indeed side with the (Chagossian) appellant on the question of the admissibility of the document,

[95] Richard Mills, 'Confidential London 00156', 15 May 2009 in 'US Embassy Cables: Foreign Office Does Not Regret Evicting Chagos Islanders' *The Guardian* (London, 2 December 2010), paras 7 and 8 <http://www.theguardian.com/world/us-embassy-cables-documents/207149>.

[96] Bancoult (2013), para 40.

[97] ibid para 42.

[98] ibid para 43, making one 'possible exception' for communication by voice only.

[99] ibid para 201.

[100] The argument advanced by Bancoult's Counsel appeared to go in this direction, ibid para 42.

but on the basis of a somewhat different reasoning.[101] (It did, however, decide that the admission of the cable would not have changed the outcome of the case.)[102]

Developments of a technological nature therefore, which arose only after the entry of the VCDR, merit a more discerning assessment. It may be tempting to see them as the main cause for concern in relation to the applicability of an instrument concluded in the 1960s. At the same time, solutions to this challenge often require not much more than a consideration of the rationale of the relevant rules of the VCDR. In that aspect at least, the general language of the convention might be considered a boon: often enough, it is broad enough to embrace even changes which have occurred decades after its entry into force.

3. Fifty More Years? The Future of the VCDR

3.1 The state of affairs: Solutions *de lege lata*

In the preceding sections, attempts have been made to suggest answers to common challenges which arise from the application of the VCDR and which are available under the existing framework of international law. The focus has, that far, been on the substantive law, and the solutions suggested extend to the need to take into account additional norms of international law which may have an impact on the existing situation,[103] but also (especially where situations are concerned which are marked by technological advances), a consideration of the rationale underlying the relevant norms of diplomatic law.[104]

Options which are of relevance where the interpretation of rules of the VCDR has reached its limit, vary depending on the circumstances of the situation. In many instances, it will be tempting to leave the resolution of difficult issues to bilateral agreement—be it express or implied. The difficulties arising from the problematic definition of the 'family' of the diplomatic agent, offer an example in the field.[105] In other instances, rules on a specific diplomatic issue may have developed in a particular region, so that it might be possible to speak of particular customary law—the regulation of diplomatic asylum in the Latin American region is a prime example in that regard.[106]

However, leaving the future of diplomatic law to bilateral and regional agreements comes at a price. It does not further the development of a concept of

[101] The Court of Appeal questioned the link between inviolability and inadmissibility (para 61); but it came close to the argument of impossibility of performance when it stated that inviolability of correspondence and archives 'can unquestionably promote and contribute to the efficient performance of a mission's functions in some cases. But it cannot do so where any damage that is done to a mission by the disclosure of an archive or document has already been done by their disclosure by a third party for which the party who wishes to adduce the evidence has no responsibility'. *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)* [2014] EWCA Civ 708, para 64 (hereinafter 'Bancoult (2014)').

[102] ibid para 93. [103] See, in particular, text to nn 71–75.

[104] See, in particular, text to nn 81–82 and to n 100 et seq. [105] See text to n 33.

[106] See text to n 37.

diplomatic law which can command general acceptance—it promotes the fragmentation of diplomatic law. If it had been one of the purposes of the Convention to contribute to the 'improvement of relations between States',[107] then a broad basis of consent appears more conducive to that aim than a situation in which every State dictates its own rules on diplomatic law and thus, inescapably, creates potential for strife.

The question may be asked, whether, at least *de lege lata*, more hope can in this regard be gained from the existing *institutional* solutions.

Alongside the VCDR, an optional protocol on the 'compulsory settlement of disputes' was concluded, which opened the possibility for State parties to refer disputes about the interpretation of the Convention to the ICJ. In theory, this would provide an efficient venue for cases in which sending States felt that their diplomats had been mistreated in the host country; and it might even prove useful for instances in which it is felt that diplomats themselves have overstepped the boundaries of the permitted. The ICJ is not a criminal court, but it is at least possible to positively establish the responsibility of the sending State, which diplomatic agents, as its organs, may have incurred.

And yet, the ICJ has only rarely been asked to deal with situations in which diplomatic law took centre stage. The *Asylum* case and the *Haya de la Torre* case—both referring essentially to the same subject matter—are among the rare examples in the field; and the *Tehran Hostages* case retains its reputation as one of the most important illustrations for an ICJ decision on diplomatic law. A case which Honduras brought against Brazil on the matter of alleged interference by the diplomatic mission of the latter State, was later withdrawn by the appellant and thus never reached decision stage.[108]

Among academic authorities, Denza has mooted the view that the length of procedures before the ICJ may be to blame for this lack of appetite for a judicial solution. Most of the relevant matters, she argues, 'must be resolved speedily by the Ministry of Foreign Affairs and other authorities of the receiving State […]'. It is a somewhat generalizing opinion: the fact remains that the ICJ, if suitably motivated, can act very quickly and has done so in the past.[109]

A more convincing reason is provided by the fact that the binary nature of judicial decisions often yields results which come at a cost to the pride of the State whose position had not been affirmed. The possibility of a (quite public) loss of face is not an outcome which many States cherish. That is a consideration which applies in equal measure to arbitral awards: while the parties before an arbitration

[107] UNGA Res 685 (VII) (5 December 1952), operative para 3.

[108] *Certain Questions Concerning Diplomatic Relations (Honduras v Brazil)* [2010] ICJ Rep 303, 304.

[109] In the *LaGrand Case*, for instance, Germany filed an Application Instituting Proceedings against the USA with the ICJ on 2 March 2016. On the same day, the Vice-President of the Court called on the USA to 'act in such a way as to enable any Order the Court will make on the request for provisional measures to have its appropriate effects'. Provisional measures were indicated by the ICJ on 3 March 2016. *LaGrand Case (Germany v United States of America)* [2001] ICJ Rep 466, 470, paras 1 and 3.

tribunal may have a greater say in the determination of the procedure, an arbitral award still carries authority and will usually mean that a 'winner' and a 'loser' emerges from the proceedings.

Linked to that consideration is the fact that disputes arising in diplomatic law often involve a political aspect. The fact must be borne in mind that diplomats are not only organs of the State, but are their governments' representatives abroad, and their decisions therefore reflect on the position taken by the respective administrations. In many situations, one may ask whether a judicial decision would really have helped to resolve the relevant issue. It took more than a decade to reach agreement on Cardinal Mindszenty's departure from the American embassy in Budapest, and when this was achieved, it was done on the basis of a political deal. Would it really have possible to include the political give-and-take that that involved, in a decision by a court or an arbitral tribunal?

3.2 Looking ahead: Solutions *de lege ferenda*

Considering the future of the VCDR is not a feat of political fiction. Future solutions can be validly based on existing structures—on methods which have been employed by the international community with regard to other aspects of diplomatic law, or even on structural changes which were used in altogether different areas of the law, but which offer valid analogies for diplomatic law.

But solutions which are based on an amendment of the Convention face difficulties from the outset. The VCDR—unlike some later multilateral treaties—does not provide for an 'Assembly of State Parties'[110] or for regular review conferences.[111] Changing the treaty with effect for all parties would therefore have to be done with the consent of all parties,[112] and it is questionable whether it is realistic to expect consensus on such a broad basis. The difficulty of finding acceptance on the concept of diplomatic asylum[113] and on the diplomatic bag[114] points in a different direction.

It is, of course, always possible to conclude a third optional protocol to the VCDR, binding only on those parties that agree to it. But such a protocol faces the difficulty regularly encountered by additional treaties of that kind. If they include new obligations on the ratifying States, members of the international community will wonder why they should become party to an instrument that puts them in a

[110] See ICCSt, art 112.

[111] See, on the option of review conferences, eg Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (adopted 10 October 1980, entry into force 2 December 1983) 1342 UNTS 137, art 8; ICCSt art 121.

[112] That situation may be compared, for instance, to ICCSt art 121(3), under which amendments can be agreed by a two-thirds majority of State parties.

[113] See Behrens (n 19) 323.

[114] See, for an overview of the ILC's work on the diplomatic bag (and its failure to reach codification), ILC, 'Summaries of the Work of the International Law Commission: Status of the Diplomatic Courier and the Diplomatic Bag not Accompanied by the Diplomatic Courier (15 July 2015) <http://legal.un.org/ilc/summaries/9_5.shtml>.

worse position than those that declared to be bound only by the original treaty. If it contains no changes to the existing situation, the question may be asked why it was necessary to conclude the protocol in the first place.

The fact remains that even the two optional protocols which were concluded on the same day as the VCDR, proved far less popular than the main treaty. The first Optional Protocol (concerning Acquisition of Nationality) has, to date, fifty-one parties.[115] The second Optional Protocol (on the compulsory settlement of disputes) has sixty-nine parties.[116]

The argument can be made that a third protocol might at least help to clarify certain positions—eg on the relationship of various norms of diplomatic law which seem to go in different directions (such as rules on the tasks of the diplomatic missions and the rule against interference) or the relationship between diplomatic law and other fields of international law. But it would be wrong to believe that even a limitation to that extent would not result, in the eyes of many States, in obligations which differ from those they assumed under the VCDR. This not only puts in doubt the popularity of such a protocol, but also raises concerns about the potential fragmentation of diplomatic law.

A change which has been mooted from time to time as a possible amendment of diplomatic law—on the institutional level, rather than the level of substantive law—is the establishment of a permanent court for diplomatic agents. Such a court, it is argued, could serve to fill the gap created by the fact that diplomats who abuse their positions, regularly escape punishment in the receiving State. Groff thus suggests an 'international diplomatic court' which provides a 'fair and impartial forum, administered by an international judiciary' and in which diplomats can expect to receive a 'fair hearing'.[117] Wright notes that a '"Permanent International Diplomatic Criminal Court" would be useful to provide an acceptable means of adjudicating offenses arising under the partial repeal of diplomatic immunity',[118] and provides detailed suggestions regarding the composition of the court, its mode of procedure (inquisitorial rather than adversarial), investigators, and attorneys attached to the court.[119]

But the proposal of a diplomatic court faces challenges which are difficult to surmount. The costs of such a system may well serve to dampen international enthusiasm for such an institution—as it did in the case of the ad hoc international

[115] United Nations Treaty Collection, Optional Protocol to the Vienna Convention on Diplomatic Relations, Concerning Acquisition of Nationality, Vienna, 18 April 1961 (8 December 2016) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-4&chapter=3&clang=_en>.

[116] United Nations Treaty Collection, Optional Protocol to the Vienna Convention on Diplomatic Relations, Concerning the Compulsory Settlement of Disputes, Vienna, 18 April 1961 (8 December 2016) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-5&chapter=3&clang=_en>.

[117] Joshua Groff, 'A Proposal for Diplomatic Accountability Using the Jurisdiction of the International Criminal Court: The Decline of an Absolute Sovereign Right' (2000) 14 Temple International and Comparative Law Review 209, 228.

[118] Stephen Wright, 'Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts' (1987) 5 Boston University International Law Journal 177, 185.

[119] ibid 187.

criminal tribunals.[120] It may also be difficult to find consensus within the international community on the precise forms of conduct that would trigger the jurisdiction of such a court—the fact must be taken into account that, at present, the Vienna Convention only provides the general rule that diplomatic agents have 'to respect the laws and regulations of the receiving State'.[121]

Most of all, however, the establishment of a diplomatic court invokes, once again, the problem of binary decisions and the resulting loss of face at least for one of the States participating in a case before such a body. Certain powers of a tribunal of this kind—Groff's court would have the power to administer 'appropriate punishment […], such as incarceration'[122]—would even exacerbate the situation. If it had been difficult enough to attract a good number of State parties to the second optional protocol, the chances of a third protocol, establishing a criminal court for representatives of a State, would not appear to be any better.

A permanent diplomatic court would also not be able to take into account the above-mentioned fact that disputes in this field are not always exclusively 'about the law', but that political factors often shape the relevant situations. In that regard, a solution may offer itself to sending and receiving States alike, which is available even under existing mechanisms of international law: ie, the possibility of mediation.

The employment of mediation in diplomatic relations is not an entirely new phenomenon (Algeria, for instance, mediated in the hostage crisis in 1980 between the United States and Iran).[123] The hallmark of mediation is that it does not move within the strict judicial framework that determines ICJ procedure and proceedings before an arbitral tribunal. The focus of mediation is not on determining the law in a particular case, but on finding a solution which is mutually acceptable. Mediation is often carried out by third States which do not have an interest in the case, but with increasing frequency also by individuals. Mediators observe conditions of strict confidentiality and seek to ascertain the interests of the relevant parties (which can include interests of a political nature), but they also outline the consequences of various courses of action (which can include consequences of a political nature).

One of the most prominent examples of mediation—the Beagle mediation, arising from a dispute between Argentina and Chile regarding the Beagle Channel and certain islands—illustrates some of the features of the process.[124] It is of particular

[120] And indeed, in the case of the International Criminal Court. See for an overview, Jon Silverman, 'Ten Years, $900m, One Verdict: Does the ICC Cost Too Much?' *BBC Online* (14 March 2012) <http://www.bbc.co.uk/news/magazine-17351946>; see also Lori Shapiro, 'Foreign Relations Law: Modern Developments in Diplomatic Immunity' (1989) Annual Survey of American Law, 281, 297. For references relating to the ad hoc tribunals, see Chapter 1, n 69.

[121] VCDR art 41(1). See also Shapiro (n 120), 297.

[122] Groff (n 117) 228.

[123] Francisco Orrego Vicuña, 'Mediation' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International* (OUP, Oxford 2012) para 25.

[124] On the history of the dispute, see Lisa Lindsey, 'The Beagle Channel Settlement: Vatican Negotiation Resolves a Century-Old Dispute' (1987) 29 J Church & St 435, 436–37; and Thomas Princen, 'International Mediation – The View from the Vatican' (1987) 3 Negotiation Journal 347.

interest, because the parties had already resorted to arbitration, but the arbitral award did not help to resolve the conflict.[125]

When, in the late 1970s, the parties were getting close even to military conflict over the matter,[126] formal mediation procedures were eventually accepted by both States, with the Pope acting as a mediator.[127] On the Vatican side, Cardinal Antonio Samorè was the principal agent in these proceedings. Samorè began by establishing the interests of the respective countries, and engaged in extensive shuttle diplomacy between Argentina and Chile in the pursuit of his mission.[128] The result of mediation in this instance was reached only after several years of negotiation, in the form of the 1984 Treaty of Peace and Friendship.[129]

Samorè summed up the characteristics of mediation as follows: it is a process requested by the parties themselves; the mediator is 'a third party, friend to both', who makes an effort 'to take their initial positions towards convergence'. Mediation is a 'form of suggestion, an advice, an exhortation' and marked by 'proposals aiming at eliminating differences, overcoming obstacles, finding points of concord […] [a]t the end of mediation, in fact, it is never possible to speak of victors or defeated. There can be none'.[130]

On that basis, it is clear that mediation is particularly well suited to taking into account the complexity of a diplomatic dispute—to a degree which judicial or arbitration proceedings can never hope to achieve. It can reflect the political factors that so often play a role in matters of this kind, avoid the loss of face that would, almost inevitably, be the outcome of a judicial decision, and serve to restore the good state of relations between States which had been disrupted by the relevant incident.

A change of the VCDR or its protocols is not necessary to achieve that—mediation already exists as an option under general international law and is in fact envisaged as a method for the peaceful settlement of disputes in Article 33 of the UN Charter. But there is certainly no obstacle to expressly refer to it in a protocol to the Convention (and a protocol of that kind may have greater chances of success than a protocol establishing a highly controversial diplomatic court). There are precedents for that: the World Intellectual Property Organization, for one, has an 'Arbitration and Mediation Center'[131] (whose success rate is particularly impressive where mediation is concerned),[132] and there is no reason why a body like that

[125] Lindsey (n 124) 437–39. [126] ibid 439–41.

[127] Argentina and Chile, Agreement to Accept Papal Mediation of Dispute Involving the Beagle Channel Region (Montevideo, 8 January 1979), Annex I, (1979) 18 ILM 1.

[128] On Samorè's work, see Julie Folger, 'A Proposal to End the Stalemate in the Caspian Sea Negotiations' (2002–2003) 18 Ohio St J Disp Resol 529, 558, n 124; Princen (n 124) 349–64 (see, in particular, 352 for the initial request for position statements); Lindsey (n 124) 444–48.

[129] Treaty of Peace and Friendship (Argentina and Chile) (adopted 29 November 1984) (1985) 24 ILM 11.

[130] Orrego Vicuña (n 123) para 44.

[131] On its work, see Ignacio de Castro and Panagiotis Chalkias, 'Mediation and Arbitration of Intellectual Property Disputes. The Operation of the World Intellectual Property Organization Arbitration and Mediation Center' (2012) 24 Singapore Academy of Law Journal 1059.

[132] In 2012, it was noted that 68% of mediations administered by the Center had resulted in settlement (by comparison to only 42% of arbitrations). ibid 1067–68.

could not be established for the purpose of settling disputes in diplomatic law. It is a solution which does not carry the dividing potential of court proceedings, but which recognizes the diverging interests which give shape to the position of States involved in a dispute of that kind.

4. Concluding Thoughts

The popularity of the Vienna Convention on Diplomatic Relations is, today, beyond reasonable doubt. The fact that subsequent protocols and attempts to amend the Convention had never achieved much traction in the international community, serves to strengthen, rather than weaken, that point: it underlines the fact that members of the international community hold the original treaty in sufficiently high esteem to be suspicious of subsequent attempts to add to it or to modify its provisions.

And it is interesting to take into account that this level of confidence about the codification of diplomatic law had not always existed. Mention has already been made of the objections raised by the United States in 1958,[133] and the perception of ambiguous language was not the only reason that informed that position. The US Acting Representative to the United Nations also voiced doubts about the success of any such undertaking: 'It is unlikely,' read the relevant communication, 'that a significant number of Governments would become parties to a multilateral convention of this character. Governments have consistently shown a reluctance to enter into multilateral treaties which prescribe rules for the treatment of diplomatic representatives of one Government in the territory of the other'.[134] The great number of States which the Convention has been able to attract to date, tells a different story: on that occasion, at least, the diplomatic crystal ball had not pointed in the right direction.

But the VCDR has seen its share of challenges; and fifty years into its lifetime, it is legitimate to ask the question whether it has indeed served to fulfil the expectations that were associated with it: primarily, the need for clarity and precision which had prompted the decision to proceed to the codification of diplomatic law in the first place.[135]

A surprising conclusion in that regard derives from the fact that it is not so much technological advances which cause the greatest difficulty pertaining to the application of the convention today. Neither the emergence of the internet, nor that of smartphones and netbooks does fundamentally change the character of the relevant rules. Diplomatic correspondence still requires inviolability, and the step from the use of cipher to the use of encrypted e-mails is short enough to allow for the application of a justifiable analogy.

[133] See text to n 24 above.
[134] *ILC Yearbook* 1958 vol II, 133, United States, at 1.
[135] See text to n 17 above.

The question of (potential) norm conflicts and the gaps deliberately left in the convention, may result in a situation which is more difficult to approach. But even in that regard, the situation has not fundamentally changed from that which observers of diplomatic law would have found in the 1960s. The problem of resolving the meeting of diplomatic immunity and the right to self-defence had existed even in Grotius' days.[136] The fact that no codified international rules on diplomatic asylum exist is regrettable, but that, too, is not a novel development: it reflects a problem that preceded the ILC debates by a long time. Nor are the mechanisms which are employed today to deal with difficulties of that kind different from those which were available to the users of the VCDR when the treaty first entered into force.

A much greater problem is occasioned by a change which may have been foreseeable, but which only gradually entered public awareness in the decades after the Second World War: the rise of the individual in international law.

Early indications of that change were, with regard to the personal protection of diplomatic agents, particularly observable in the 1970s. The rules of diplomatic immunity and inviolability still stood, as they had since the days of Byzantium.[137] But the chief danger no longer came from receiving States, who, by and large, respected the person of the diplomatic agent. The danger suddenly came from groups called Fuerzas Armadas Rebeldes,[138] Settam-e-Melli,[139] Popular Front for the Liberation of Palestine,[140] Rote Armee Fraktion,[141] Irish Republican Army,[142] and others.

Attacks carried out by groups of that kind led, in 1973, to the conclusion of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents ('Internationally Protected

[136] Cf Eileen Young, 'The Development of the Law of Diplomatic Relations' (1964) 40 BYIL 141, 152.

[137] See ibid 145.

[138] See on the kidnapping of the German Ambassador, Count Spreti, by the FAR in 1970: Edgar Calderon, 'Guatemala con primer secuestro de alto funcionario tras firma de paz en 1996' *Agence France Presse – Spanish* (27 February 2002); Esteban Engel, 'Deutscher Diplomat 1970 entführt' *Nürnberger Nachrichten* (19 December 1996).

[139] Cf in this regard the kidnapping of the US Ambassador to Afghanistan, Adolph Dubs, in 1979, Maya Shwayder, 'The Honored Dead: Other Ambassadors And Diplomats Killed In The Line Of Service' *International Business Times* (12 September 2012).

[140] In 1976, the US Ambassador to Lebanon was kidnapped at a checkpoint of the Popular Front (PFLP). Hours later, he was found dead. Three PFLP members were accused of the crime and sentenced to life imprisonment by a Lebanese court in 1994, but in 1996, two of them were found to be covered by a general amnesty that had been passed in 1991. 'Acquittals in Killing of U.S. Envoy' *Washington Post* (14 March 1996); 'Beirut Trial Ends in U.S. Envoy Slaying' *United Press International* (31 January 1996).

[141] The German military attaché Andreas von Mirbach was killed in Stockholm in 1975 by members of the Red Army Faction. 'Red Army Faction Member Taufer Freed After 20 Years for Sweden Murders' *Associated Press Worldstream*, 26 April 1995.

[142] The Irish Republican Army claimed responsibility for the 1976 death of Christopher Ewart-Biggs, the UK Ambassador to Ireland, who was killed when a land mine exploded under his car: Leonard Downie, 'British Envoy To Netherlands Shot to Death' *Washington Post* (23 March 1979).

Persons Convention') which, at the time of writing, has 180 parties.[143] Under the convention, States agree to make certain crimes against internationally protected persons (including diplomats) punishable under their domestic law.[144] The importance of this treaty in inter-State relations should not be underestimated, but the instrument has certainly not made attacks against diplomatic agents disappear. The killing of the US Ambassador to Libya in 2012, Christopher Stevens, by Islamic militants,[145] is a sad illustration of the fact that crimes of this kind have not vanished from the international plane.

It is not the only field of diplomatic relations in which the impact of individuals and groups is felt. The discussion of 'cablegate' has shown that the increased influence of individual actors can result in the complete destruction of any meaningful protection of diplomatic correspondence and diplomatic archives.

And yet, the question may be asked whether the fault for these development lies with the VCDR, and whether, in fact, any international treaty can be expected to deal satisfactorily with situations of this kind. By and large, international law is still a system whose main addressees are States themselves. Addressing individuals is a more complex issue, which requires a combination of different approaches to reach its greatest degree of efficiency—the mandates of domestic criminal law and general educational initiatives among them. It is well possible that this may constitute one of the major challenges to diplomatic relations in the twenty-first century.

The question, however, whether the VCDR itself has fulfilled its expectations, cannot stop at this stage.

What this examination has shown is that a number of factors—both foreseeable and unforeseeable at the time of the drafting of the Convention—exert an impact on the ability of the VCDR to deal with the challenges that contemporary diplomatic law faces, and that, in more than one case, the claim that the clarity of the treaty provides viable solutions, requires repositioning.

But a comprehensive study also has to take into account the state of diplomatic relations that would prevail without the existence of a treaty of this kind capable of governing key aspects of diplomatic life today. In that regard, however, denying the accomplishments of the Convention could hardly be the result of an honest reflection. The fact, in particular, cannot be ignored that the VCDR did clarify the law in a multitude of essential situations and, in doing so, laid to rest more than one controversy.

[143] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entry into force 20 February 1977) 1035 UNTS 167 (hereinafter 'Internationally Protected Persons Convention'). United Nations Treaty Collection, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, New York, 14 December 1973 (8 December 2016) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-7&chapter=18&clang=_en>.

[144] Internationally Protected Persons Convention, art 2(2).

[145] 'US Confirms its Libya Ambassador Killed in Benghazi' *BBC Online* (12 December 2012) <http://www.bbc.co.uk/news/world-africa-19570254>.

It clarified the fact that receiving States are within their right to declare a diplomatic agent *persona non grata*, without having to provide reasons—a point which was still the subject of considerable debate in the nineteenth century.[146] It clarified the status of administrative and technical staff and, importantly, the 'suite' of the diplomatic agents—issues which had not been settled in diplomatic law through the ages.[147] It clarified the situation of diplomatic agents who are nationals of the receiving State or resident therein.[148] It clarified the question of immunity applying to diplomats who own immovable property in the receiving State.[149] It clarified the question whether two or more States can be represented by the same diplomatic agent.[150] It simplified the ranks of heads of missions.[151] It included, for the first time in codified diplomatic law, a list of the functions of the mission[152]—an important aspect for the evaluation of the many situations in which the hosts claim that diplomatic agents have acted in a manner 'incompatible with their functions'.

This effort on its own has been of invaluable help in identifying the consensus which exists in the international community on the relevant matters of diplomatic law. And these are not questions which represent merely isolated points on a selected subject matter: taken together, they provide an extensive framework that lays down rules on wide areas of diplomatic life and work in the receiving State.

Its achievements, however, reach beyond the clarification of controversial issues. The fact must be kept in mind that Yugoslavia's call in 1952 for a text that would provide 'definite and precise rules' in the field[153] was not only a call for clarity. It was born of concerns about the state of diplomatic relations, as she saw it: the Explanatory Memorandum which was sent at the time to the Secretary-General of the United Nations, made express reference to recent 'violations of the rules of diplomatic intercourse and immunities' that had become 'increasingly frequent'.[154] The adoption of clear rules was seen as a remedy to the ongoing situation.[155]

The General Assembly took up that theme and stated its view, in the same year, that the codification of diplomatic law was 'necessary and desirable as a contribution to the improvement of relations between States'.[156] In a similar vein, the preamble of the Vienna Convention expresses the belief that a convention in this field would 'contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems'.[157]

[146] See, for today's regulation, VCDR art 9(1). For an incident that caused controversy in the nineteenth century, see the rejection of Mr Keiley as US Ambassador to the Austro-Hungarian empire, *ILC Yearbook* 1957 vol I, para 13 (Yokota).

[147] See VCDR art 37. Bynkershoek, for instance, still distinguished between members appointed by the Ambassador and those appointed by the 'sovereign', with regard to the treatment they may receive if wanted by the authorities of the receiving State, Young (n 136) 163.

[148] See VCDR art 38. [149] See VCDR art 31(1)(a). [150] VCDR art 6.

[151] VCDR art 14. See Young (n 136) 166–68 on the previous problem of the 'proliferation of classes' and about efforts at Vienna in 1815 to achieve a simplification of the system.

[152] VCDR art 3. [153] See text to n 17 above.

[154] *ILC Yearbook* 1956 vol II, 131.

[155] ibid, and see Chapter 5 above for the background to this initiative.

[156] UNGA Res 685 (VII) (5 December 1952), operative para 3.

[157] VCDR preamble, operative para 3.

There is little doubt that, where this ambitious aim is concerned, the evaluation of the VCDR has to remain on the positive side. Harmonization is a key element in that assessment: a treaty which manages to regulate a wide area while still relying on a genuine meeting of minds within the international community, will by necessity exercise an important influence on the fulfilment of this objective. It is the identification of a common set of values and principles, spanning the entire field of diplomatic law, that must be held to be the most significant contribution which its drafters made to a purpose of international law which is more important than ever before. Fifty-five years after its adoption, the Vienna Convention has rightfully earned a distinction which, to that degree, few instruments of international law can rival: it stands as a milestone on the path to international peace and understanding.

ANNEX

Vienna Convention on Diplomatic Relations (1961)

The States Parties to the present Convention,[1]

Recalling that peoples of all times have recognized the status of diplomatic agents,

Having in mind the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

Believing that an international convention on diplomatic intercourse, privileges, and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States,

Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

Article 1

For the purpose of the present Convention, the following expressions shall have the meanings hereunder assigned to them:

(a) the 'head of the mission' is the person charged by the sending State with the duty of acting in that capacity;
(b) the 'members of the mission' are the head of the mission and the members of the staff of the mission;
(c) the 'members of the staff of the mission' are the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission;
(d) the 'members of the diplomatic staff' are the members of the staff of the mission having diplomatic rank;
(e) a 'diplomatic agent' is the head of the mission or a member of the diplomatic staff of the mission;
(f) 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;
(g) the 'members of the service staff' are the members of the staff of the mission in the domestic service of the mission;
(h) a 'private servant' is a person who is in the domestic service of a member of the mission and who is not an employee of the sending State;

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(i) the 'premises of the mission' are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission.

Article 2

The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent.

Article 3

1. The functions of a diplomatic mission consist *inter alia* in:
   (a) representing the sending State in the receiving State;
   (b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
   (c) negotiating with the Government of the receiving State;
   (d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
   (e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.
2. Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission.

Article 4

1. The sending State must make certain that the *agrément* of the receiving State has been given for the person it proposes to accredit as head of the mission to that State.
2. The receiving State is not obliged to give reasons to the sending State for a refusal of *agrément*.

Article 5

1. The sending State may, after it has given due notification to the receiving States concerned, accredit a head of mission or assign any member of the diplomatic staff, as the case may be, to more than one State, unless there is express objection by any of the receiving States.
2. If the sending State accredits a head of mission to one or more other States it may establish a diplomatic mission headed by a chargé d'affaires ad interim in each State where the head of mission has not his permanent seat.
3. A head of mission or any member of the diplomatic staff of the mission may act as representative of the sending State to any international organization.

Article 6

Two or more States may accredit the same person as head of mission to another State, unless objection is offered by the receiving State.

Article 7

Subject to the provisions of Articles 5, 8, 9 and 11, the sending State may freely appoint the members of the staff of the mission. In the case of military, naval or air attachés, the receiving State may require their names to be submitted beforehand, for its approval.

Article 8

1. Members of the diplomatic staff of the mission should in principle be of the nationality of the sending State.
2. Members of the diplomatic staff of the mission may not be appointed from among persons having the nationality of the receiving State, except with the consent of that State which may be withdrawn at any time.
3. The receiving State may reserve the same right with regard to nationals of a third State who are not also nationals of the sending State.

Article 9

1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.
2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission.

Article 10

1. The Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed, shall be notified of:
   (a) the appointment of members of the mission, their arrival and their final departure or the termination of their functions with the mission;
   (b) the arrival and final departure of a person belonging to the family of a member of the mission and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the mission;

(c) the arrival and final departure of private servants in the employ of persons referred to in sub-paragraph (a) of this paragraph and, where appropriate, the fact that they are leaving the employ of such persons;
(d) the engagement and discharge of persons resident in the receiving State as members of the mission or private servants entitled to privileges and immunities.

2. Where possible, prior notification of arrival and final departure shall also be given.

Article 11

1. In the absence of specific agreement as to the size of the mission, the receiving State may require that the size of a mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission.
2. The receiving State may equally, within similar bounds and on a nondiscriminatory basis, refuse to accept officials of a particular category.

Article 12

The sending State may not, without the prior express consent of the receiving State, establish offices forming part of the mission in localities other than those in which the mission itself is established.

Article 13

1. The head of the mission is considered as having taken up his functions in the receiving State either when he has presented his credentials or when he has notified his arrival and a true copy of his credentials has been presented to the Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed, in accordance with the practice prevailing in the receiving State which shall be applied in a uniform manner.
2. The order of presentation of credentials or of a true copy thereof will be determined by the date and time of the arrival of the head of the mission.

Article 14

1. Heads of mission are divided into three classes, namely:
   (a) that of ambassadors or nuncios accredited to Heads of State, and other heads of mission of equivalent rank;
   (b) that of envoys, ministers and internuncios accredited to Heads of State;
   (c) that of chargés d'affaires accredited to Ministers for Foreign Affairs.
2. Except as concerns precedence and etiquette, there shall be no differentiation between heads of mission by reason of their class.

Article 15

The class to which the heads of their missions are to be assigned shall be agreed between States.

Article 16

1. Heads of mission shall take precedence in their respective classes in the order of the date and time of taking up their functions in accordance with Article 13.
2. Alterations in the credentials of a head of mission not involving any change of class shall not affect his precedence.
3. This article is without prejudice to any practice accepted by the receiving State regarding the precedence of the representative of the Holy See.

Article 17

The precedence of the members of the diplomatic staff of the mission shall be notified by the head of the mission to the Ministry for Foreign Affairs or such other ministry as may be agreed.

Article 18

The procedure to be observed in each State for the reception of heads of mission shall be uniform in respect of each class.

Article 19

1. If the post of head of the mission is vacant, or if the head of the mission is unable to perform his functions, a chargé d'affaires ad interim shall act provisionally as head of the mission. The name of the chargé d'affaires ad interim shall be notified, either by the head of the mission or, in case he is unable to do so, by the Ministry for Foreign Affairs of the sending State to the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed.
2. In cases where no member of the diplomatic staff of the mission is present in the receiving State, a member of the administrative and technical staff may, with the consent of the receiving State, be designated by the sending State to be in charge of the current administrative affairs of the mission.

Article 20

The mission and its head shall have the right to use the flag and emblem of the sending State on the premises of the mission, including the residence of the head of the mission, and on his means of transport.

Article 21

1. The receiving State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its mission or assist the latter in obtaining accommodation in some other way.

2. It shall also, where necessary, assist missions in obtaining suitable accommodation for their members.

Article 22

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment, or execution.

Article 23

1. The sending State and the head of the mission shall be exempt from all national, regional, or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.
2. The exemption from taxation referred to in this Article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the mission.

Article 24

The archives and documents of the mission shall be inviolable at any time and wherever they may be.

Article 25

The receiving State shall accord full facilities for the performance of the functions of the mission.

Article 26

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement and travel in its territory.

Article 27

1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the

other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the receiving State.

2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.
3. The diplomatic bag shall not be opened or detained.
4. The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.
5. The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.
6. The sending State or the mission may designate diplomatic couriers ad hoc. In such cases the provisions of paragraph 5 of this Article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.
7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.

Article 28

The fees and charges levied by the mission in the course of its official duties shall be exempt from all dues and taxes.

Article 29

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Article 30

1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.
2. His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability.

Article 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
   (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
   (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
   (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.
2. A diplomatic agent is not obliged to give evidence as a witness.
3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.
4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

Article 32

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

Article 33

1. Subject to the provisions of paragraph 3 of this Article, a diplomatic agent shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the receiving State.
2. The exemption provided for in paragraph 1 of this Article shall also apply to private servants who are in the sole employ of a diplomatic agent, on condition:
   (a) that they are not nationals of or permanently resident in the receiving State; and
   (b) that they are covered by the social security provisions which may be in force in the sending State or a third State.
3. A diplomatic agent who employs persons to whom the exemption provided for in paragraph 2 of this Article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this Article shall not preclude voluntary participation in the social security system of the receiving State provided that such participation is permitted by that State.
5. The provisions of this Article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

Article 34

A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(a) indirect taxes of a kind which are normally incorporated in the price of goods or services;
(b) dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
(c) estate, succession, or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of Article 39;
(d) dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State;
(e) charges levied for specific services rendered;
(f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23.

Article 35

The receiving State shall exempt diplomatic agents from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions, and billeting.

Article 36

1. The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:
   (a) articles for the official use of the mission;
   (b) articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles intended for his establishment.
2. The personal baggage of a diplomatic agent shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this Article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. Such inspection shall be conducted only in the presence of the diplomatic agent or of his authorized representative.

Article 37

1. The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36.
2. Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in Articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of Article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in Article 36, paragraph 1, in respect of articles imported at the time of first installation.
3. Members of the service staff of the mission who are not nationals of or permanently resident in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in Article 33.
4. Private servants of members of the mission shall, if they are not nationals of or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

Article 38

1. Except insofar as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.
2. Other members of the staff of the mission and private servants who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

Article 39

1. 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.
2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. 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.

3. In case of the death of a member of the mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.
4. In the event of the death of a member of the mission not a national of or permanently resident in the receiving State or a member of his family forming part of his household, the receiving State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as a member of the mission or as a member of the family of a member of the mission.

Article 40

1. If a diplomatic agent passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the diplomatic agent, or travelling separately to join him or to return to their country.
2. In circumstances similar to those specified in paragraph 1 of this Article, third States shall not hinder the passage of members of the administrative and technical or service staff of a mission, and of members of their families, through their territories.
3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. They shall accord to diplomatic couriers, who have been granted a passport visa if such visa was necessary, and diplomatic bags in transit the same inviolability and protection as the receiving State is bound to accord.
4. The obligations of third States under paragraphs 1, 2 and 3 of this Article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and diplomatic bags, whose presence in the territory of the third State is due to *force majeure*.

Article 41

1. 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. They also have a duty not to interfere in the internal affairs of that State.
2. All official business with the receiving State entrusted to the mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed.
3. The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of

general international law or by any special agreements in force between the sending and the receiving State.

Article 42

A diplomatic agent shall not in the receiving State practise for personal profit any professional or commercial activity.

Article 43

The function of a diplomatic agent comes to an end, *inter alia*:

(a) on notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end;
(b) on notification by the receiving State to the sending State that, in accordance with paragraph 2 of Article 9, it refuses to recognize the diplomatic agent as a member of the mission.

Article 44

The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

Article 45

If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:

(a) the receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives;
(b) the sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable to the receiving State;
(c) the sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.

Article 46

A sending State may with the prior consent of a receiving State, and at the request of a third State not represented in the receiving State, undertake the temporary protection of the interests of the third State and of its nationals.

Article 47

1. In the application of the provisions of the present Convention, the receiving State shall not discriminate as between States.
2. However, discrimination shall not be regarded as taking place:
   (a) where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State;
   (b) where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.

Article 48

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or Parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention, as follows: until 31 October 1961 at the Federal Ministry for Foreign Affairs of Austria and subsequently, until 31 March 1962, at the United Nations Headquarters in New York.

Article 49

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 50

The present Convention shall remain open for accession by any State belonging to any of the four categories mentioned in Article 48. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 51

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.
2. For each State ratifying or acceding to the Convention after the deposit of the twenty-second instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 52

The Secretary-General of the United Nations shall inform all States belonging to any of the four categories mentioned in Article 48:

(a) of signatures to the present Convention and of the deposit of instruments of ratification or accession, in accordance with Articles 48, 49 and 50;
(b) of the date on which the present Convention will enter into force, in accordance with Article 51.

Article 53

The original of the present Convention, of which the Chinese, English, French, Russian, and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States belonging to any of the four categories mentioned in Article 48.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at Vienna, this eighteenth day of April one thousand nine hundred and sixty-one.

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