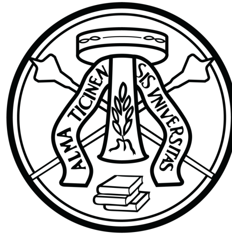

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The Protection of Diplomatic Premises and Personnel Under the Vienna Convention on Diplomatic Relations 1961

La Protezione delle Sedi e del Personale Diplomatico alla Luce della Convenzione di Vienna sulle Relazioni Diplomatiche del 1961

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To Mum. For you have always been there.

To Dad. I just hope you would have been proud of my achievements.

To my Sister, Ludovica. I know you are there for me, and I will always be there for you.

To all of my friends.

Without your constant support, I wouldn't have been able to reach my goals.

You helped me become the person that I am today, and I will always be thankful for this.

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Abstract (Italiano).

La presente tesi ha come obiettivo l'analisi della disciplina dell'inviolabilità diplomatica, riferita sia alle sedi delle missioni diplomatiche sia al personale ivi impiegato, e dei doveri di protezione che la Convenzione di Vienna sulle Relazioni diplomatiche del 1961 impone in capo agli Stati ospitanti.
Il Capitolo 1 illustra l'evoluzione storica dell'istituto, dall'antichità sino alla codificazione dei principi base nella Convenzione di Vienna. Il capitolo 2 analizza le diverse teorie dottrinali che si sono succedute nel tempo per giustificare l'esistenza dell'inviolabilità diplomatica, fino ad illustrare la giustificazione teorica così come traposta nel Preambolo della Convenzione. Il Capitolo 3 ed il Capitolo 4 sono rispettivamente dedicati all'inviolabilità ed al dovere di protezione delle sedi diplomatiche, ed all'inviolabilità ed al dovere di protezione del personale ivi operante, attraverso un'analisi approfondita degli Articoli 22 e 29 della Convenzione.

Introduction.

The present work aims at presenting the duties imposed upon states which accept to host a foreign diplomatic mission inside their territory, and that consequently shall accord foreign envoys a certain degree of protection that is greater than that normally enjoyed by aliens in a foreign country. Diplomatic protection, both in the sense of the necessity to hold the personnel and the premises of diplomatic missions as inviolable, and in the sense of according to those an active layer of safekeeping, has been one of the pillars of international law since the ancient times, and has evolved through the ages in order to expand the privileges and prerogatives that are accorded to diplomatic agents. As of today, the matter is regulated by the Vienna Convention on Diplomatic Relations, signed in 1961 and entered into force in 1964, which is one of the most successful international instruments, due to the large number of states parties to it. After sixty years from its entry into force, the Convention on Diplomatic Relations seems to be still the right instrument upon which states could base their practice.

In Chapter 1, the focus will be placed upon the historical evolution of the institution of diplomatic inviolability. From the attribute of sacrosanctity that envoys enjoyed in ancient times to the birth of an international *corpus* of customary rules dealing with the necessity of diplomatic relations, and thus of the protection of diplomatic personnel and premises, we will analyze various stages of the historical background from which the Vienna Convention on Diplomatic Relations stemmed. The aim of this Chapter shall be to put the emphasis on two different aspects. On one hand, across the centuries it will be seen that there was a consolidation and stratification of principles and rules that came to form the general clause of inviolability. On the other hand, at every consolidation of a principle it corresponded the emergence of new issues, that needed time to be resolved unanimously across all states: the focus of this Chapter will thus be to introduce some of those issues, and to analyze how those have been dealt with in the successive centuries. Lastly, it will be presented the

process that brought to the codification of centuries-old customary rules into the Vienna Convention on Diplomatic Relations.

Chapter 2 will present the various theories that emerged within scholars regarding the justification of the very existence of diplomatic inviolability and the duty of protection imposed upon receiving states. In particular, the three most accredited theories – that of personal representation, that of extraterritoriality and that of functional necessity – will be analyzed singularly, with insight both on the words of scholars and on those of national courts that adhered to each of those theories. Lastly, it will be presented the modern approach followed by the Vienna Conference on Diplomatic Intercourse and Immunities, as transposed in the preamble of the Vienna Convention on Diplomatic Relations.

Chapter 3 will then focus on the positive duties encompassed in Article 22 of the Vienna Convention on Diplomatic Relations, that provides for the inviolability and the so-called duty of protection of foreign mission premises based in the territory of the receiving state. A number of issues will be analyzed in order to specify what are the negative and positive actions that receiving states must put in place in order to let foreign embassies be safeguarded and protected against any intrusion – both by agents of the state or by private persons – that may hinder the peace of the mission. A brief digression will then be presented regarding the possible actions that sending states may take to cooperate with the hosting ones, with the aim of ensuring a better level of protection for their own embassies.

Lastly, in Chapter 4 the analysis will be concentrated on Article 29 of the Vienna Convention on Diplomatic Relations that, symmetrically to Article 22, provides for the inviolability of diplomatic personnel and for the positive duty of the hosting state to prevent any attack on the person of diplomatic agents. With the aim to present a broader insight on the legal framework put in place by the international community to protect diplomats, some other international instruments, that complement and specify the duties imposed upon states by the Vienna Convention on Diplomatic Relations, will be analyzed in this Chapter.

The approach followed in the present work aims at analyzing not only the words of scholars and commentaries on the Convention. Indeed, a number of

other sources will be used, namely decisions of the International Courts of Justice and other international courts, judgments of national courts, and opinions expressed by various Ministries of Foreign Affairs and Departments of State on the correct practices that are in place within the diplomatic community and that are seen as in compliance with the international obligations laid down by the Vienna Convention on Diplomatic Relations.

Chapter 1 – History and development of diplomatic inviolability.

As the International Court of Justice (ICJ) laid out in its first order while dealing with the judgment regarding the seizure of the U.S. embassy in Teheran, 'there is no more fundamental prerequisite for the conduct of relations between states that the inviolability of diplomatic envoys and embassies'.[1] The ICJ emphasized how 'throughout history nations of all creeds and cultures have observed reciprocal obligations'[2] in order to safeguard envoys and their missions, and to grant them the fullest grade of inviolability possible. The personal safety of diplomats is one of the oldest pillars of international law: the roots of the duty of protection placed upon host states can be traced back to ancient history, and 'has withstood the test of centuries'.[3]

1. The Antiquity.

The development of diplomatic immunities and privileges as known in the current age started during the ancient time. The first signs of diplomatic intercourse between nations can be tracked down to the Greek civilization, in the age of city-states, where the exchange of envoys was regarded as necessary, since the essential role they played was of high interest: they were seen as a vital instrument of communication between peoples, particularly in periods of war, and when it was needed to bring peace.[4]

Emissaries throughout ancient civilizations – whether European or not – were considered inviolable. This was particularly true for the Greeks, for the first forms of envoys they used between each other were heralds: since these officials were considered 'as the descendants of Hermes',[5] thus sacrosanct, the natural consequence was the necessity to protect them and to prevent any harm on their

[1] *United States Diplomatic and Consular Staff in Teheran (United States of America v Iran)* (Order of 15 December 1979), ICJ Rep 1979, para 38.
[2] ibid.
[3] ibid para 39.
[4] Linda S Frey and Marsha L Frey, *The History of Diplomatic Immunity* (Ohio State University Press 1999) 13.
[5] ibid 14.

person or dignity. Holiness was the first justification for the envoys immunity, since Greek society relied heavily on religion and thought that violations of the herald sacrosanctity would result in divine sanctions for the entirety of the nation. Even in epic poems, such as the *Iliad*, it can be seen that the practice of sending herald to bring messages was common between the Greeks, and the inviolability of their person was unchallenged: in Homer it can be read that Achilles, enraged with Agamemnon, still received his heralds, Talthybus and Eurybates, with great honor and considered them as messengers of Zeus and of mortals, thus emphasizing their holiness – and their inviolability.[6]

Heralds enjoyed this first form of immunity, that is inviolability of their person and dignity, not only in epic tales, but 'with all of society'.[7] Even though at that time there was no legal obligation to grant envoys this kind of privilege, as 'the basis for this inviolability was purely religious',[8] violations were rare, and the consequences harsh enough to encourage states to uphold the protection of envoys. Heralds were protected also if they came from non-Greek civilizations: when the Athenians and Spartans attacked Darius' heralds in 491 B.C., Greeks thought that 'this impious act caused the subsequent calamities that befell both Athens and Sparta',[9] thus showing support to the theory that the sacrosanctity of emissaries was to be regarded as inviolable – and that any act against them had terrible divine consequences.

Heralds carried out many tasks, and it was for the importance of those assignments that they enjoyed such a vast degree of inviolability; otherwise, it would have been difficult to accomplish their mandate. Heralds were usually sent in order to deliver formal messages, announcements, or requests; they were exchanged when war broke out – even to the point that the mere presence of a herald could signify a state of hostility between nations – and they were used to obtain safe-conducts for envoys dispatched to negotiate peace, a truce, or even

[6] ibid 16.
[7] ibid.
[8] Eileen Young, 'The Development of the Law of Diplomatic Relations' (1964) 40 BYIL 141, 142.
[9] Frey and Frey (n 4) 16.

to get permission to enter the battlefield for recovering wounded soldiers and corpses.[10]

For the importance of their role, heralds used to carry distinguishable objects that could symbolize their authority and holiness. They bore a staff that served as an insignia for their office and as a symbol of their connection with Hermes, the messenger of the gods; it emphasized that the power of the herald derived directly from the will of Zeus, thus underlining the impiety of any act directed against them. The ceremonial status of their symbols granted heralds a visual representation of their power, and served as a remainder for others that harming them was not without consequence, for the gods '[did] not forget'.[11] Reprisals for such actions perpetrated against heralds took place directly because those acts constituted a sacrilege that needed to be avenged.[12]

In ancient Greece, different was the position of proper envoys, that is *ad hoc* emissaries dispatched to perform more of a political role that a ceremonial one, unlike heralds. Envoys were the proper negotiators, and often were selected between politicians, orators, actors; they were chosen for their capacity of presenting their case with eloquence, pragmatism, and because of their ability to influence other and to persuade them.[13] Envoys were sent only when the need for them arose, since no permanent embassy would be suitable for ancient civilizations: Greeks and other people were too suspicious of foreigners to allow them to remain within their state borders for more than what was strictly necessary.

For this reason, envoys didn't enjoy the same privileges of heralds, and thus were not considered inviolable intrinsically. They had to be issued with a safe-conduct – usually obtained by heralds – in order to enter foreign territories, that granted them the right to be heard and to conduct negotiations, but they nonetheless enjoyed no sacred inviolability. They were speaking on behalf of states, not gods, therefore they were not regarded as religious figures; in addition,

[10] ibid 17.
[11] ibid 16.
[12] Young (n 8) 142.
[13] Frey and Frey (n 4) 18; Young (n 8) 141.

there wasn't either a principle of law implying that they should be considered inviolable, so envoys couldn't even hope on the law to protect them.[14]

Still, guided by expediency, Greeks civilizations usually avoided to attack envoys, for the principle of reciprocity – one the oldest pillars of international law – suggested that any act against an emissary of a foreign nation would lead to retaliation.[15] Cases of abduction, murder or mistreatment of envoys were rare, but still happened; envoys were often seen as spies in the eyes of their enemies, that treated them without the respect they would have granted to heralds.[16]

During the ancient times, third parties were not under any moral nor legal obligation for safeguarding emissaries exchanged between others, and they typically did not respect their inviolability.[17] Third states usually required for the envoy to request a safe-conduct in order to travel through their land while reaching for their final destination, and they did not hesitate to intercept, detain, or imprison them, or worse. Usually, states even interpreted as an insult the refusal by the receiving state to grant an escort for the envoys while they returned after their mission,[18] since other third parties, even non-statal – such as robbers, brigands, and pirates – usually didn't restrain themselves from harming them.

2. The Roman tradition.

In Rome, traditions on diplomatic immunities started parallel to those of the Greek city-states, justifying the inviolability of envoys with their sanctity and their particular connection with gods. The first Roman ambassadors were part of the college of fetials, a 'semipolitical priestly board'[19] whose duty was both religious and mundane: they were the custodians of treaties between Rome and its allies – or foes – and played a crucial role in the 'ceremonies associated with war and peace'.[20] As ambassadors, the fetials were sent out to negotiate

[14] Frey and Frey (n 4) 18.
[15] ibid 19.
[16] ibid.
[17] ibid 29.
[18] ibid 30.
[19] ibid 39.
[20] ibid.

treaties and to enforce them, handling also questions regarding the proper dealing of foreign envoys in Rome. Their symbolic and religious role granted them the personal inviolability that heralds enjoyed in Greece, and usually the dispatch of a delegation from Rome was contoured with a good number of ceremonies and allegorical acts that enforced their sacrosanctity before the representatives of other nations. Since Latin nations around Rome shared a common religious sentiment and similar gods, the fetials were granted without much effort the immunity they needed to carry out their tasks.[21]

As Rome continued to expand its dominion beyond the Latin communities, and the ceremonial part of the negotiations held by the fetials became more arduous to enact, the Roman tradition of dealing with envoys began to change. Fetials started to be accompanied – if not completely replaced – more often by senatorial legates, making the dispatch of emissaries a secularized practice: however, 'the practice of observing the inviolability of envoys was preserved',[22] for Romans alleged that kind of immunity was 'sacred and of universal application'.[23] The security of Roman ambassadors, were they sent by the Senate or part of the fetial college, had to be granted notwithstanding their priestly nature: it was seen as a part of the common heritage of nations that envoys needed to enjoy inviolability.

Even more than that, when the custom of appointing *ad hoc* envoys directly by the Senate became widespread, their personal immunity and inviolability started to be incorporated into law. Thus, the role of *fas*, the sacred law, became that of underlaying and reinforce the *ius*, the secular law; religious sentiment was no more the only justification for the necessity of protecting foreign envoys – and was not seen by Rome as the sole reason why their envoys should be respected by the states to which they were sent. With the expansion of the dominion of Rome through the known world, ambassadors started to be protected not only because they were held sacred, but also because it was a principle of the law.

[21] ibid 42.
[22] ibid 43.
[23] Montell Ogdon, 'The Growth of Purpose in the Law of Diplomatic Immunity' (1937) 31 AJIL 449, 451.

At that period, although Rome possessed no notion of international law as defined today, the term *ius gentium* was used in order to refer both to the rules that every state recognized and to the law that applied to non-Romans living in Rome.[24] 'Any assault on an ambassador' – even enemy ones – 'was deemed an offence against the *ius gentium*'.[25] As the *ius gentium* started being recognized and incorporated into Roman *ius civile*, it was constantly affirmed that the inviolability of ambassadors was a principle of the law of nations, thus every state must refrain from harming an envoy.[26] Even if emissaries kept their sacrosanct aura, an assault on them was regarded as an assault on the civil state.

Rome often dispatched military contingents with its envoys due to the intrinsic dangers that they were expected to encounter during their mission.[27] The safeguard of ambassadors was a crucial point in an age where not every state recognized the inviolability of emissaries, especially in times of war, and banditry was a recurrence. The problem of protecting ambassadors during their travel arose also for at that time envoys were still sent solely on *ad hoc* missions. Their task was 'to handle specific problems',[28] and because foreigners – even those contoured by a sacred and inviolable veil – were seen with suspicion the duration of embassies was as short as possible, lasting just enough to deal with the specific mission assigned to the envoys.[29] As a consequence, emissaries had to travel often, and needed to be safeguarded during the whole duration of their legation. The dangers of sending an embassy were well known to Rome, therefore more than one envoy was sent on each mission: illnesses, ambushes, and other menaces had to be contrasted by dispatching enough ambassadors to be sure that at least one of them could reach the final destination.

Since envoys were also recognized as the personification of the sovereignty of the state and reflected 'the majesty of Rome',[30] they should had been respected in foreign nations. The treatment reserved to Roman legates by

[24] Frey and Frey (n 4) 44.
[25] Ogdon (n 23) 452.
[26] Frey and Frey (n 4) 45.
[27] ibid 47.
[28] ibid.
[29] ibid.
[30] ibid 53.

allied nations was generally reflective of the sacrosanctity that envoys emanated, being the corporal representation of the dignity, magnificence, and authority of their state. Consequently, the idea of the absolute inviolability of an envoy, which attached both to its person and to its honor, led the Romans to consider violations of that rule as one of the most disgraceful acts a state could do to the magnificence of the empire. Thus, not only the murder of an envoy, but even a mere insult, a threat, or an alleged attack, 'could mean war':[31] as previously stated, Rome considered any infringement of the inviolability of ambassadors as a breach of the *ius gentium*, and war was considered one – if not the principal – justified measure to punish the wrongdoers. But war was not automatic. Rome sometimes, when expediency dictated so, accepted other forms of reparations when one of its envoys was harmed: 'if the Senate hoped to avoid hostilities',[32] gifts, formal apologies brought by *ad hoc* embassies, and additional types of repayment could be enough to satisfy the empire's pride.

Romans usually acted firmly against states who breached the sacred inviolability of envoys because they themselves treated ambassadors sent to Rome with all due respect. Reciprocity was expected even in that age, and since emissaries stayed at Rome as 'guest of the Senate'[33] and enjoyed all the 'privileges that entailed',[34] it was natural for them to look forward to the same treatment for their own legates. Roman respect for inviolability went as far as incorporating it into the legal code, with the *lex Julia de vi publica*, considering illegal any offence towards the immunity of an envoy:[35] both private citizens and public official couldn't attack, harm, insult, or harass an ambassador without consequence. This attitude denotes how that early in the development of diplomatic immunities, the concept of inviolability rested primarily upon the need to protect and safeguard envoys from acts carried out by the receiving state public powers and by citizens of said state, and on the need for punishment in case the immunity was breached. Even when wars broke out, the Senate granted foe envoys the same immunity they enjoyed before, keeping them safeguarded.

[31] ibid.
[32] ibid 56.
[33] ibid 57.
[34] ibid.
[35] ibid 45.

As the empire continued to grow, the rare and exceptional violations of inviolability that happened by the hand of Rome – especially during the Republican age – became more frequent,[36] due to the attitude change in their "foreign policy". More and more nations became subjected to Roman strength, and many of those states were quickly incorporated into the empire: since only sovereign powers could send legitimate envoys, provincial legates and ambassadors sent by subjugated people didn't enjoy the same immunities of their "sovereign" counterparts.[37] In addition, also barbarians – that is, by definition, inferior peoples – didn't enjoy those privileges that Rome used to respect while dealing with others' envoy.

Deviating from Greek custom – and later Medieval practice – during the Roman age envoys, even if legally they enjoyed no privilege when passing through a third state, were held inviolable also by the governments of those. Solely ambassadors from enemy states 'had to seek permission to pass through another's lands'.[38] Romans were so powerful during their golden age that their protection of envoys inviolability went beyond their borders, so that ambassadors sent to Rome were usually protected by third states when travelling.[39]

3. The Middle Ages.

In the Middle Ages, sovereigns could look up either to Byzantine practice or to papal custom in order to understand which types of immunities they should have granted to envoys.

The Byzantine Empire created 'the first example of what might be considered professional diplomacy'.[40] By forming a department of state which dealt solely with external relations,[41] the government of Constantinople further developed the ceremonial aspect of diplomacy that Romans created through the college of fetials, fabricating a system that was unchallenged at that time for its

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[36] ibid 59.
[37] ibid 60.
[38] ibid 59.
[39] ibid.
[40] J Craig Barker, *The Protection of Diplomatic Personnel* (Ashgate 2006) 31.
[41] ibid 32.

magnificence and pompousness.[42] The Byzantines constantly exchanged envoys with other states and their department of state dealt with 'the organization and dispatch of embassies',[43] fabricating a dense protocol for the reception of ambassadors sent to Constantinople.

Although its government followed Roman traditions regarding the grant of immunities, namely personal inviolability, being 'meticulous in their observance of the sanctity'[44] of ambassadors, Byzantium developed the idea that envoys were to be considered spies. Thus, keeping them 'under constant surveillance' and arriving even to 'sequestering them in a special place'[45] was considered justified. Envoys were met at the frontier of the empire and escorted throughout the country via a 'circuitous route' to reach the capital; once in Constantinople, they were kept in a 'special fortress' and had to endure 'endless military review'.[46] This type of action emphasized how Byzantines feared envoys as they were seen as unfriendly, even if they came from friendly states, since their role was thought to be versed more to espionage rather than diplomacy itself. However, 'immuring' ambassadors in a palace and keeping them segregated for the duration of their embassy was seen as a practice put in place to guarantee 'their security',[47] that is their inviolability.

The papacy, on the other hand, implemented a different type of diplomacy, especially regarding the inviolability of papal envoys. Those sent by the Pope were called *apocrisarii* at first, and then went on to be called *legati a latere*, *legati missi*, or *nuncii* – based on the role they had and their position in the hierarchical order.[48] All of them however enjoyed the same privileges and immunities, as they needed to be safeguarded through the duration of their embassy.

Personal inviolability of papal envoys was based on the idea that Europe was the cradle of the '*societas christiana*'[49] and therefore those sent by the pope,

[42] Frey and Frey (n 4) 77.
[43] ibid.
[44] Barker (n 40) 32.
[45] Frey and Frey (n 4) 77.
[46] Young (n 8) 144-145.
[47] ibid.
[48] Frey and Frey (n 4) 79.
[49] ibid 78.

representing its person and the papacy in its entirety, needed to be protected while performing their embassy. 'To counter the hazards of traveling',[50] papal legates were usually sent in embassies consisting of more than one person – as it was traditional to do even in Greek and Roman times. Usually the envoys were chosen between clerics of great eminence, for their position in the society fortified 'their claim to inviolability'.[51] Popes also developed the habit of making all officers of the church swear to protect envoys sent by the papacy, and usually stressed the importance of the duty of protection for their representatives, arguing that it was an obligation placed upon the entire Christian society, that is also upon layman and not only binding on clerics.[52] The duty went as far as consenting papal legates to ask secular and ecclesiastical authorities they encountered to provide them with an armed escort. In addition, the papacy could also count on an elaborate system of messengers, entitled almost to the same protection and inviolability of envoys, as they also were personal representative of the pope itself.[53]

Even if it was embodied in canon law, thus "secularized" and rendered into writing, the principle on which the inviolability was based was solely religious. Since European sovereigns were part of Christianity, they had to respect the obligations placed upon them by religious postulates that laid out the personal immunity of envoys. Violations of such rule were not forgiven by the pope, that has many tools in its hands to bring back wrongdoer sovereigns into legality. Aside from the reliance the pope could pose on its diplomatic connections with other princes and kings, and the use of fiscal tools, 'the most powerful weapon … remained the spiritual glove': ecclesiastic remedies such as 'excommunication, anathema, and interdicts'[54] were the most used by the papacy when punishing offences brought against envoys.

During the Middle Ages, states resorted heavily on the diplomatic practice of the papacy in order to conduct embassies between them. Secular envoys enjoyed the same inviolability as papal legates – and even a grade of

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[50] ibid 79.
[51] ibid.
[52] ibid.
[53] ibid 80.
[54] ibid.

protection that princes couldn't rely on. The custom of sending envoys to negotiate became more and more widespread for sovereigns didn't have any type of safeguard outside the borders of their state.[55]

Ambassadors could use either religion, custom, or the law as a base to take for granted their personal inviolability.[56]

As for religion, the already explained theory that Europe, as the cradle of Christianity, should have been a safe place for envoys, because canon law and the principles of the church dictated their immunity and the obligation to protect them was placed upon the entirety of the *societas christiana*, is not sufficient. Since states had relations also with Muslim countries, the sole idea that Christian principles could protect envoys sent abroad can't justify the practice shown in that age. Even while dealing with "infidels" – Christians called Muslims that way, and the other way around – and notwithstanding that 'they remained wary of each other',[57] both religions shared an equal idea of the sacrosanctity of envoys. Consequently, ambassadors coming from states of different religious beliefs still had been granted immunity and could seek in religions the ideological base for it.

While the practice of sending envoys widened between secular entities – such as states and the papacy in its secular capacity – religious principles couldn't continue to be the unique base for inviolability. Emissaries were no more predominantly coming from an ecclesiastical background and the primary source of ambassadors became the nobility; thus, their non-clerical status couldn't grant them enough protection while going on embassies. For this reason, sovereigns had to enrich the parameters to which they looked after in order to concede ambassadors their immunities and privileges. Monarchs affirmed that envoys were protected also by states' custom: it recognized the importance of envoys and 'dictated' that they 'should be respected',[58] thus protected. This rule was not based purely on religious principles, but was

[55] ibid 83.
[56] ibid 85.
[57] ibid 86.
[58] ibid 90.

consecrated by the evolving practice of states, to which every sovereign expediently conformed.

Additionally, rulers could rely on written law to find a legal basis for the inviolability of emissaries. The law of Rome, although in its 'medieval perception',[59] was of great influence for the creation of a number of national laws providing for the safeguard of ambassadors. The legacy of the Roman *Digest*, studied by italian scholars such as Bartolus and Baldus,[60] tangled with barbarian law, creating a system of sacrosanctity and immunities for envoys. Barbarian codes, 'often called tariffs of composition',[61] provided rules that clearly stated the seriousness of crimes perpetrated against ambassadors: since every free man worthed a certain price, and the '*guidrigild*'[62] of an envoy was almost as high as that of monarchs, it can be easily demonstrated that their importance in the society was very well regarded. As law evolved, and monarchies across Europe became more powerful in their own territory, crimes committed against envoys became attracted into the area of acts that disrupted the peace of the king; sovereigns protected ambassadors sent to them, and punished those who perpetrated assaults on envoys, because such actions 'harmed the public weal',[63] thus the law.

Being it based on religion, custom, or the law, personal inviolability of emissaries was respected across nations, and assaults done by direct order of the receiving sovereign were rare. However, embassies were still not safe in that age: envoys had to defend themselves against criminals and bandits, and against third states. Regressing from Roman practice, third parties were not held responsible for the protection of ambassadors that passed through their land and had no obligation – aside from the religious one – that imposed to respect their immunity.[64] Envoys could be delayed, seized, robbed, or murdered while traveling, and consequently had to take all the necessary precautions in order to safeguard themselves. Monarchs often sent heralds or messengers – that were

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[59] ibid.
[60] ibid.
[61] ibid 91.
[62] ibid.
[63] ibid 92.
[64] ibid 93.

still regarded as sacred and could travel through states in certain occasions – to obtain safe-conducts for their ambassadors from the receiving state, and more importantly from third parties: with those patent letters, kings ‘assured the envoys explicitly of safe and secure passage’,[65] and consequently sending monarchs could be guaranteed that any act against their embassies would be regarded as an act of lese-majesty. Even more practically, sovereigns resorted to dispatching armed escorts with their envoys[66] and to taking hostages that ‘served as surety for the return of envoys’.[67] Lastly, expediency dictated that one of the most powerful tools in the hands of monarchs to ensure the protection of their embassies was the threat of reprisals:[68] in times were war and violence were considered as the norm in international relations, the risk of retaliation convinced monarchs to grant ambassadors the inviolability they needed to perform their duty safely.

4. The Renaissance.

Although the practice of sending ambassadors was well developed during the Middle Ages, until the Renaissance envoys were still sent only on *ad hoc* missions, and embassies were usually meant to deal with specific tasks – normally negotiations between sovereigns – but had to return to their sending state as soon as the mission was accomplished.

However, during the Renaissance, italian practice developed differently than that of other states, because the peninsula was made of a constellation of small states in need of constant contacts between each other. Consequently, it was regarded as more convenient to stop sending envoys each time it was needed, and to start creating permanent embassies.[69] These permanent missions allowed for the role of the ambassador to change: while until the Middle Ages envoys were sent to negotiate with other states, in the fourteenth century their

[65] ibid 94.
[66] ibid 97.
[67] ibid 99.
[68] ibid.
[69] ibid 121.

main role of was to gather information[70] and to transfer them to their sending sovereign.

While the implementation of permanent embassies was quite easy in the smaller states of Italy, it was much more perilous for other powers of that time: because envoys were still seen as unfriendly – even between allied – and since espionage became part of their duties, some sovereigns found it difficult to accept permanent ambassadors. For example, the papacy stated that any ambassador would be regarded as such – thus protected and granted its immunities and privileges – only for the duration of its embassy; and the mission was to be considered finished after the envoy has resided in Rome for six months.[71] However, the rising number of permanent ambassadors in the city underlines how not even the pope could go against the conveniency of sending a resident envoy to other states.

When sovereigns could no longer remove permanent embassies, they had to resort to other strategies in order to prevent ambassadors from espionage: their access to information was limited, and they were even accompanied 'in order to limit their activities'.[72] States practice shows how another effective method of limiting the number of resident ambassadors was to limit the right to send an embassy – the so-called *droit d'ambassade*. Monarchs started to accept envoys only from independent states, also as a way to consolidate the idea of territorial sovereignty, thus limiting the right to send embassies of other powers – such as singular cities, vassals, and rebels – and reducing the number of ambassadors they had to accept at their court.[73] This may have also been because if sovereigns had to gran inviolability and other immunities to a large number of envoys, they had to limit their own sovereignty over people who still resided in their territory.

To send a permanent embassy came with great costs, and usually relations and negotiations between the receiving state and the permanent ambassador of another state got lengthy and unrushed, since receptions developed rigid protocols among European courts. For this reason, monarchs

[70] ibid 123.
[71] ibid 125.
[72] ibid.
[73] ibid 126.

who tried ‘to conclude an agreement quickly, to save money, or to negotiate in some secrecy’[74] started to send unofficial envoys, that is representatives not admitted as such by the receiving power. Although this practice was convenient, unofficial ambassadors were not granted inviolability, and their safeguard relied only on them – since states were not keen to protect disguised envoys.

During the Renaissance, the importance of safe-conduct became even more pregnant, for ambassadors who were found without one while passing through third states were not held inviolable and could be legally assaulted or imprisoned.[75] Envoys usually had to seek a safe-conduct before their depart also from the state in which they served, in order to be assured that third states' monarchs would recognize their role and their immunity.

State practice however shows how violations of diplomatic inviolability were rare: even if ambassadors faced great dangers since they could be imprisoned from time to time, or even assaulted, and they had to confront the perils of travel, only a few breaches occurred. Most of those violations took place when hostilities between the sending and the receiving states broke out, but it was common practice to recall ambassadors before a war started in order to safeguard them.[76] In times of hostilities, ambassadors sometimes could be arrested and held hostages in order to be exchanged with their counterparts in the sending state: it was a precaution that, even if seen as ‘inhuman’,[77] states had to put in practice to protect their own envoys.

Nonetheless, the threat of reprisal from the sending state – and the receiving state if actions against an ambassador were committed for example by rebels or bandits – was more than enough to put pressure on monarchs to grant envoys the fullest grade possible of inviolability and personal protection. Even when such protection was ineffective, states resorted to ‘particularly cruel penalties’[78] for those who violated an ambassador's privilege, and principals of the attacked ambassador often requested some type of compensation in those cases. Since in those times a great number of envoys were sent by and to the

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[74] ibid 131.
[75] ibid 134.
[76] ibid 136.
[77] ibid 145.
[78] ibid 139.

papacy, religious sanctions were also enacted against wrongdoers that assaulted or insulted ambassadors going to or coming from Rome,[79] showing that a certain aura of sanctity still surrounded those figures.

The development of permanent embassies in the Renaissance let two other problems arise, the first being the question of whether or not embassy grounds were to be held inviolable as the ambassador's person, and the second being the question of espionage. Embassy grounds were in fact considered inviolable as the ambassador itself, often because they were identified with the envoy's residence: sovereigns argued that retaliations could be made not only for attacks on the person of the ambassador, but also for infringements and violations brought out against embassy premises.[80] More controversial was the positions of envoys if suspected of acts of espionage. At that time, personal inviolability was granted to ambassadors mainly in order to show respect for their principal, and because it was seen as necessary so that they could carry out their duties. However, inviolability did not mean that an ambassador could remain unpunished in case he committed a serious crime while performing its duties. Since espionage was seen as a major offence for it impeded the normal relations between powers,[81] ambassadors caught in the act of spying were often imprisoned. Nonetheless, it was said in that time that the role of an envoy was predominantly of gathering information of the state to which he was appointed: Machiavelli argued that the task of an ambassador was to regularly inform its principal about the conditions of the state he was serving, about its government, the principal incidents occurred in the state, and to collect as much data as possible from local intermediaries.[82] States resorted to that theory while sending envoys abroad but were reluctant when they needed to concede inviolability to ambassadors sent to them: expediency and the principle of reciprocity, more than the law, made possible for embassies to still perform their mission.

[79] ibid.
[80] ibid 145.
[81] ibid 147-148.
[82] Jean-Jacques Marchand, 'Istruzione d'uno che vada imbasciatore', *Enciclopedia Machiavelliana* (2014) <https://www.treccani.it/enciclopedia/instruzione-d-uno-che-vada-imbasciadore_(Enciclopedia-machiavelliana)/> accessed 11 March 2024.

The personal inviolability of the ambassador and the problem of espionage let another question regarding diplomatic immunities arise, since the envoy and the premises of the embassy was held immune from the public powers of the receiving state, monarchs often found themselves dealing with the possibility of seizing diplomatic documents. Espionage usually was discovered only by reading the letters sent and received by ambassadors, thus state practice was slow in extending full inviolability also to those documents: in fact, it was not unusual for state officials to intercept diplomatic correspondence in order to gain information on the conduct of ambassadors.

5. The Reformation.

As the Christian world divided since the Reformation erupted, states found themselves in difficulty while dealing with ambassadors sent by monarchs that professed a different religious belief. Europe was split between Catholics and Protestants, and religious wars and hostilities were common throughout the continent; as at that point states were well versed in the practice of sending resident embassies to other countries, ambassadors often found themselves living in 'an alien and hostile land'.[83]

The division brought out the question of whether ambassadors practicing a different religion than the one of the state they resided should have been still regarded as inviolable, and what was the extent of that principle. In particular, questions arose about the possibility for states to arrest ambassadors when they acted against the sovereign to whom they have been sent, partaking in conspirations, usually intended to replace monarchs with others of the "right" faith. One of the most famous cases regarding similar actions was the Mendoza one: Don Bernardino de Mendoza, Spanish ambassador to England, took part in a conspiracy 'to overthrow the Elizabethan regime'[84] and to substitute it with a new Roman Catholic government. Uncovered before the ploy could be concluded, Mendoza was expelled from England by order of the Protestant government.[85]

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[83] Frey and Frey (n 4) 167.
[84] ibid 168.
[85] ibid.

In order to get a theoretical support for their decision, the privy council asked two eminent scholars of international law – Gentili and Hotman – whether they made the right choice, by sending Mendoza back to Spain, or if they should have imprisoned him for conspiracy.

Gentili argued that ambassadorial inviolability arose not from 'any quasi-religious character'[86] of the role of the envoys and its tasks, but from the principle that ambassadors were the personal representation of their sovereign in the court of another monarch: their sacrosanctity, thus the obligation to keep them protected, was the same as the one that would be granted to their principal. For Gentili, the world was a community of states, regardless of the religion professed by the head of the state. As a consequence, personal inviolability of envoys should be considered part of the natural law that governed relations between men and nations. However, ambassadors were not to be considered unpunishable for every offence they committed. Although the duty to protect the embassy and to avoid hampering the ambassadorial function was construed as being part of natural law, if an envoy abused of its role and its immunity, he became unworthy of the protection provided by the receiving state.[87] For Gentili, state practice across the ages indicated that the punishability of an envoy rested on the seriousness of its crime; thus, he still praised the choice made by Her Majesty's government to expel the Spanish ambassador without injuring or imprisoning him, since he considered that a mere attempt to conspire against the receiving sovereign did not require a more severe punishment that expulsion.[88]

Hotman, on the other hand, concluded that Mendoza should have been arrested, since he was not entitled anymore to its immunities. Having taken part in such a heinous crime, even if it was only attempted, he forfeited the benefits that international law granted him: its inviolability had to be taken away since he chose to go against 'the public faith'.[89] Although states sometimes had just expelled diplomats who went against the laws of the country in which they resided, Hotman argued that it had been done only as a 'mere courtesy':[90]

[86] ibid 171.
[87] ibid.
[88] ibid 172.
[89] ibid 174.
[90] ibid 173.

consequently, the English government should have placed Mendoza under arrest and tried him for conspiracy.

Theoretically, it emerged that the ambassadorial privilege of having his person held as inviolable was at this point taken for granted; nobody argued that envoys had to be protected, especially from attacks committed by common people. Still, scholars and states were not convinced neither on the extension of this immunity, nor on the consequences that ambassadors should face when they relinquished their privileges due to crimes they committed.

The division of Christendom implied other questions regarding diplomatic immunities, and in particular it led to the emergence of the right of chapel.[91] Since usually monarchs of a certain faith constrained their population from exercising other creeds, it was inevitable that the question of whether or not ambassadors should have been able to perform the rites of its religion freely appeared. Because the residence of the ambassador was regarded as inviolable, monarchs refrained themselves from enforcing the prohibition of certain religions on embassy grounds; however, the ambassador – and that part of his entourage that had been granted the same immunities – could only count on that courtesy for itself. Common people that attended prohibited rites inside embassy grounds were surely not held inviolable, and consequently they could be apprehended while leaving the ceremony; this was enforced particularly in England, where in some instances some 'zealous officials'[92] even invaded protected grounds to arrest Catholics.

The problem of the right of chapel as a new element of diplomatic immunity raised another concern among states and scholars. It was ambiguous if, since the ambassador and his suite had a right of exercising their own faith on embassy grounds, there were some types of privileges also for embassy chaplains. For example, in England the government outlawed for their nationals to be priests of the Catholic church, and consequently embassies were advised that although their right of chapel was not going to be hampered, they should not employ English, Scottish and Irish as their priests.[93] Problems could even arise

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[91] ibid 177.
[92] ibid 179.
[93] ibid 180

if the priest employed in the embassy was a foreigner. Sometimes they were arrested; however, even if claims for their immunity were dismissed, the government usually freed them out of expediency.[94]

As a consequence of the uncertainty that surrounded the right of chapel and the immunities that chaplains enjoyed while working for embassies, scholars started to explore more often the issue of what privileges should be granted to the ambassador's suite. State practice was still very inconsistent, leading to cases where inviolability was considered as a right also for the servants of the ambassadors, and cases where such immunity was considered as non-existent.[95]

6. The Age of Absolutism.

During the sixteenth and seventeenth Centuries, personal inviolability of ambassadors was recognized across all Europe, and violations were so rare that were loathed by any sovereign state. The creation of absolute courts entailed that envoys were often chosen between nobles; those ambassadors were so close together, due to their common upbringing and their blood relations, that the entire diplomatic corp of European states began to think of itself as a singular entity, especially when it was needed to perpetrate the immunities that they enjoyed. The development of an international society 'reinforced ambassadorial privileges'[96] and created a dense structure of ceremonial rites that was useful to let ambassadors became an elite, a group of figures oftentimes above the law. In addition, the progressive practice of tolerating other religions – thus distinguishing between matters of state and matters of faith – blurred one of the most controversial issues emerged during the Reformation, that is the right of chapel.[97]

Infringements of an ambassador's inviolability, for they became very rare, usually entailed strong reprisals from the sending state; as a consequence, sovereigns tried to pacify other monarchs in cases where envoys had been harmed or hampered. For example, the Matveev case highlights how the English

[94] ibid 181.
[95] ibid 181-184.
[96] ibid 212.
[97] ibid 215.

monarch, Queen Anne, tried to reconcile with the Russian Czar when Matveev, the Russian envoy in London, was imprisoned by court officials after his creditors had a warrant issued for his arrest. The offence was of great importance, since the officials 'assaulted his footmen … cudgeled the ambassador … took away [his] sword, cane, and hat, tore his clothes, thrust him into a hackney coach, and drove him to the house of the bailey'.[98] In order to prevent the Czar to take retaliatory actions against England, or the English ambassador in Russia, Queen Anne proposed a bill to the Parliament, known as the Diplomatic Privileges Act 1708, in order to discontinue every proceeding against Matveev or other ambassadors, and to impede any successive suit against an envoy.[99] The Diplomatic Privileges Act 1708 emphasize how vital it was for sovereigns to respect and protect the personal inviolability of an ambassador and its dignity, for any action against them was considered 'in contempt of the protection granted' by the English government, against 'the law of nations', and 'in prejudice of the rights and privileges which ambassadors … have at all times been thereby possessed of'.[100] The need for inviolability was by then indisputable: even if it still was not spelled out in clear terms, and its extent was not univocal, 'a special duty of protection existed'.[101]

Even in times of hostilities and war, ambassadors were protected by the receiving state. Although it was usual to suspend relations between powers before the formal declaration of war and to consequently recall envoys from their posts, they were still considered inviolable if they were in the hostile nation when war broke out: a formal exchange was usually put in place in order to ensure the reciprocal safety of ministers.[102] The fear of reprisal clearly helped to made into custom the rule of safeguarding diplomats even in times of war.

Apart from the emergence of questions relating to other types of immunities and problems that pertained to the diplomatic corp – such as asylum – the real issue raised during those centuries, that related to the inviolability and protection of diplomats, was the so-called *droit du quartier*, or *franchise du*

[98] ibid 228.
[99] ibid.
[100] Diplomatic Privileges Act 1708, s 1.
[101] Barker (n 40) 46.
[102] Frey and Frey (n 4) 242.

quartier. States commenced to use their territorial sovereignty to address the problematic topic of the inviolability of the embassy premises, for current practice showed that such a privilege was often abused by diplomats. As a matter of fact, what was born as a limited territorial immunity that corresponded to the personal inviolability of the ambassador, and that was limited only to embassy grounds – or better, to the ambassador residence – became with time an enormous privilege, that entailed exploitation. Ambassadors asked receiving states to consider not only their residence, but also the buildings in which their servants and other parts of the entourage stayed as inviolable; and more, they demanded that even the streets that boarded those houses should be held immune from the state powers.[103]

Even though the practice of effectively granting the *ius quartierorum* was not extended thoroughly through Europe, some cities became packed with streets and entire neighborhoods that were considered inviolable; it is said that in Rome an entire third of the city was under some ambassadorial privilege.[104] The *franchise du quartier* was exploited in order to grant local citizens a shield against the powers of states, because municipal authorities couldn't even enter the districts in which embassies and other "diplomatic" buildings were. 'Gamblers and smugglers'[105] found a convenient shelter in the streets around ambassadors' houses, that became a receptacle for outlaws and bandits: local police couldn't do much in order to reestablish the order. It can be paradoxically argued that, even if some of the ambassadorial staff could have exploited the areas in order to shelter outlaws and employ them in the smuggling businnes, the so-called *droit du quartier* was in fact hampering the protection to which envoys were entitled.[106]

For this reason, states started to emphasize their territorial authority over cities – with an exception made for the grounds of the ambassadors' houses – and tried to eliminate the practice of conceding the right of *quartier*. The solution was found in the practice of withholding the ambassador's formal recognition as

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[103] ibid 223.
[104] ibid 225.
[105] ibid 223.
[106] Barker (n 40) 44.

long as he didn't expressly renounce the privilege.[107] Although practical, this idea that envoys were "voluntarily" rejecting an immunity underlined how the inviolability of embassy premises and the streets that surrounded them was in fact a right that envoys enjoyed. By the end of the seventeenth century the inviolability of the entire ambassadorial neighborhoods had been abolished across almost all of Europe, with the exception of Rome and Madrid.[108]

Another issue that was still not resolved in a single manner by all states was that of the extension of the envoy inviolability, immunities, and privileges to the entire ambassadorial entourage.[109] State practice was too wide and different to infer a customary rule out of it because sovereigns were reluctant to extend the diplomatic inviolability to those that performed no official duty in the embassy. However, ambassadors usually argued that their servants and the other members of their mission were to be protected and held inviolable in the receiving state. This argument was not always respected, especially when criminal proceedings were established against members of the ambassadorial retinue: since it was still unclear at that time if ambassadors themselves could be tried if they committed serious crimes that went against the law of nations – such as murder – it was even more difficult to conclude whether or not their servants or family members were to be held inviolable. Some scholars argued that 'in the strict sense of law'[110] inviolability was limited to the envoy only, thus other persons that went on embassies with him could not be shielded in case of wrongdoing; but in practice 'the privilege had been extended to the ambassador's entourage'.[111] Consequently, they inferred from state practice that servants or family members had to be protected as much as their principal. However, other intellectuals sustained the opposite: since for some of them even envoys could 'be indicted for capital offenses that violate the peace of the realm'[112] it was a natural consequence that members of the staff of the embassy and of the ambassador could be tried and imprisoned.

[107] Frey and Frey (n 4) 224.
[108] ibid.
[109] ibid 230.
[110] ibid 236.
[111] ibid.
[112] ibid 237.

7. The French Revolution.

As far as international law and the diplomatic system is concerned, the French revolutionaries altered a number of well-established practices, trying to impose their new view of the international system to other countries, especially those were the *ancien régime* was still perfectly functioning. Prompted by the Enlightenment's ideas, the new French government argued that diplomatic immunities just masqueraded the privileges that a certain social class, that is nobility, enjoyed across all Europe. Inviolability meant nothing more that impunity for a restrict number of persons, and it was just a construct of international law, that was rejected in its entirety by revolutionaries.[113] Attacks on ambassadors and ambassadorial privileges were just 'part of a larger assault on the international system'[114] as whole, for it was seen as something produced by a tradition of the old monarchies that was no longer justified. The international community had to be based on natural law, that dictated the essential equality between peoples and nations; on the other hand, the enjoyment by envoys of their immunities and privileges led them to be seen as different from the citizens of the state they were received by, thus reinforcing the old principles of inequality.[115]

However, practice demonstrated how the idea of the revolutionaries were undermined by their own actions, and symmetrically that violations of the old principle of diplomatic inviolability were more common when perpetrated against French envoys rather than those of the *ancien régime* states.

Revolutionary envoys, oftentimes chosen between those who supported the subversive ideas of the revolution, found themselves in great peril while stationed in foreign countries. Conservative states, 'so determined to preserve the old regime and all that it entailed',[116] did not respect the principles that they applied before while dealing with the inviolability of ambassadors, for they usually did not even recognize revolutionary ministers as the legitimate

[113] ibid 293.
[114] ibid 298.
[115] ibid.
[116] ibid.

ambassadors from France. Thus, they undermined the old rules on diplomacy that granted ambassadors and embassies protection against harming, because they saw French envoys just as agitators that were sent by their government solely for the purpose of overthrowing foreign regimes. The newly appointed French ambassadors used to instigate peoples against their monarchs, they rejected the formalism that surrounded diplomatic practice across Europe, and discredited receiving powers in the eyes of their own citizens. Consequently, states didn't grant them the full protection they should have enjoyed because of their ambassadorial status: violations of French diplomatic inviolability were frequent, and revolutionary envoys were often kidnapped, killed, or had their embassies and residences stormed by crowds. The most serious case of breach of diplomatic inviolability was the one that happened in 1799 in Germany, at the congress in Rastatt, where an attack on the three French plenipotentiary envoys resulted in the murder of two of them.[117]

Contrarily, even if infringements of the old rule that dictated the need to protect and safeguard envoys happened sometimes in France during the years of the Revolution, necessity and expediency led the French to respect as much as possible the privileges they in theory loathed. Since their ambassadors were in great danger in foreign lands, they needed to persuade other states in order to obtain protection for them: the only method they found to do so was to abide by the old principle of diplomatic inviolability in their own territory.[118]

In conclusion, revolutionaries in principle preached for a change in the way international relations were conducted, thus advocating for the abolishment of the practice of sending envoys between nations. But, for the sake of their own ambassadors, they realized how much needed it was to respect at least the inviolability of foreign ministers: although the old system was maintained merely 'out of necessity',[119] it still survived, underlining how much the protection of envoys went beyond political beliefs. As justified as it could have been to censure the abuse of ambassadorial privileges by the European diplomatic corp, the most basic principle of international law – that is

[117] Barker (n 40) 47-48; Frey and Frey (n 4) 303-312.
[118] Frey and Frey (n 4) 312-318.
[119] Barker (n 40) 48.

safeguarding ministers as they are vital for relations between states – had to be held as “sacred” and vital even by the most fervid revolutionaries.

8. The nineteenth century.

During the nineteenth century personal inviolability of envoys and the duty to protect them against harassment, attacks, or impairments of their freedom and dignity was undeniably recognized by almost all states in Europe and by those that respected occidental culture and traditions. Although states started to dive deeper into the issue of abuse by diplomatic personnel of their immunities and privileges – augmented due to the rise in number of the diplomatic corp[120] – the need to safeguard ambassadors was considered one of the most important tenets of international law. As a consequence, cases of violations became more and more infrequent, and were regarded as serious infringements of the law of nations: states, having incorporated international law into their domestic law, usually indicted wrongdoers due to the seriousness of their crimes and the fact that they infringed one of the most basic principle of the law of nations, even if a mere insult had been made upon the dignity of an envoy.

An example of this rigorous tendency can be seen in *Respublica v. De Longchamp* (1784),[121] where the defendant was found guilty of ‘an atrocious violation of the law of nations’[122] for having verbally insulted inside the house of the French ambassador the secretary of the legation, and for having harmed the same diplomat two days later in a public street. McKean CJ, after stating that ‘the person of a public minister is sacred and inviolable’[123] because international law – as deduced by state practice and scholars’ writings – dictated so, clearly declared that it was ‘the interest as well as the duty of the government, to animadvert upon [De Longchamp] with a becoming severity’.[124] The severity of the punishment adopted was justified because the state needed to ‘preserve [its] honor, and maintain peace with … [its allies], and the whole world’.[125] De

[120] Frey and Frey (n 4) 371.
[121] *Respublica v De Longchamp*, 1 US (1 Dall) 111 (Pa O & T 1784).
[122] ibid 117.
[123] ibid 116.
[124] ibid 117.
[125] ibid.

Longchamp was consequently sentenced to two years of imprisonment, and had to pay a hefty fine.

However, the renewed affirmation of the need to protect diplomats was not the most important achievement of that period. In fact, other issues that raised some questions during the previous centuries started to be resolved by state practice.

The attitude of extending immunity also by third countries while envoys passed through them to reach their post or to return from it was still theoretically controversial.[126] Some scholars argued that diplomatic privileges should have been granted only by the state in which the ambassador was sent and accredited, thus third countries should not treat them differently because of their diplomatic status, that needed to be recognized only by the sending and the receiving state. Other jurists, however, thought that harming an ambassador – even if he was sent to another country – had to be perceived as a crime and an insult against the sending state no matter who was the receiving power. Third countries had to abide by the rule that dictated the need to safeguard all envoys, even those who were just travelling to or from their accredited post. An additional group of scholars stated that extending personal inviolability was just a matter of politeness between governments, and that such practice should not be inferred as legally conferring full immunity to diplomats as they are entitled to enjoy in their assigned post.

Despite the doctrinal quarrel, state practice showed that in the nineteenth century diplomats began to enjoy their privileges even while passing through the territory of third countries, and consequently started to be safeguarded also during their travel to or from the state they were appointed to. An example of this tendency can be found in *Holbrook, Nelson & Co. v. Henderson* (1839),[127] where a court in New York had to rule on the lawfulness of an arrest for debts made upon Henderson, the representative for the Republic of Texas accredited to France and England, when he was in New York while returning to its country, with a treaty signed in France. In the words of Oakley J, the justification for

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[126] Frey and Frey (n 4) 350.

[127] *Holbrook, Nelson and Co. v Henderson*, 6 NY Super Ct (4 Sandf) 619 (NY Super Ct 1839).

extending such privileges even to third states' diplomats lays in the fact that 'a sovereign attempting to hinder another from sending or receiving a minister, does him an injury and offends against the law of nations'; and that would have been 'an insult which may justly be resented, and thus the peace of nations may be endangered'.[128] Insults, arrests, or other acts perpetrated against an envoy from another state that is just passing through the lands of a third nation, shall have been considered as 'hurting the right of embassy'.[129] Thus, the court stated that it was needed 'to extend … the established rules … which … secures the inviolability of a resident ambassador'[130] also to those envoys that were just in transit within a third state's frontiers. Consequently, the defendant was discharged by the court and set free.

To conclude the examination of the attitude of third countries in relation to the passage of foreign envoys into and out of their land, it has to be noted that the '*ius transitus innoxii*'[131] was, self-evidently, granted only when two circumstances occurred. Firstly, the envoy needed to come from a friendly country; secondly, he had to travel "innocently", that is not in incognito, and not with the intent of acting hostilely towards the country that was granting him its privileges.

A second issue regarding the personal inviolability of envoys that started to be resolved by state practice was the treatment of ambassadors in war times. The discussion focused mainly on the position of neutral states' envoys in war zones. States argued that although neutral ambassadors could freely choose to still reside in countries at war – and even in capitals under siege, such as Paris during the 1870 Franco-Prussian War – they had to endure the hurdles of being there on their own will. Receiving states were solely under the obligation of granting them the inviolability they needed to perform their duties, and to protect them against any major harm that might have occurred, for 'military imperatives would necessarily limit'[132] other privileges. Regarding the issue of granting

[128] ibid 628-629.
[129] ibid 630.
[130] ibid 631.
[131] Frey and Frey (n 4) 350.
[132] ibid 352.

inviolability to envoys of belligerent powers, states were still uncertain on the extension of that privilege.[133]

In addition, a theme that abruptly emerged during the nineteenth century was that of the incorporation in the international system of states that were not part of the occidental civilization, and that consequently followed practices regarding diplomatic envoys that largely differed from the accepted custom in Europe and North America.

For instance, the Ottoman empire used to send *ad hoc* envoys until the late eighteenth century, thus their practice of employing resident ambassadors to other countries – namely those in Europe – was still a novelty.[134] They still regarded envoys sent to them as spies and enemies, and they continued the Byzantine practice of holding ambassadors hostage in their capital; diplomats could be interned, isolated, and had to suffer other types of mistreatment in the Ottoman court.[135] Shortly, the practice that emerged in the Ottoman empire emphasized how ambassadorial inviolability was not effectively granted across the whole spectrum of civilizations. However, the Ottoman *modus operandi* while dealing with foreign envoys showed a great deviation from what Muslim law theoretically dictated. The sources of Islamic law, that is the Koran and the Sunna, provided for diplomatic privileges and immunities as the euro-centrical international law did: in fact, 'throughout these sources … diplomats [were] entitled to immunity … freedom … and proper care and treatment'.[136] The Koran itself established the protection of diplomatic agents – even non-Muslim ones – for it was said that diplomats benefited of the *Aman*, a safe-conduct that imposed on the receiving state the duty to safeguard and protect the beneficiary from any assault, harm, or insult it may have occurred while he'd be performing his duties.[137] Islamic law was also precise in defining a second obligation that laid upon states: in addition to the protection that had to be granted under the terms

[133] ibid 353.
[134] Barker (n 40) 57; Frey and Frey (n 4) 393-403.
[135] ibid.
[136] M Cherif Biassiouni, 'Protection of Diplomats Under Islamic Law' (1980) 74 AJIL 609, 609-610.
[137] ibid 610.

of the *Aman*, no country could resort to other means of punishment for wrongdoer diplomats than expulsion.[138]

Another great example that underlines how the inviolability of envoys was a tenet of international law well respected solely among European countries until the late nineteenth century is the Chinese Empire. Their view of international relations was based on the idea that other states were just populated of barbarians, thus diplomatic intercourses were seen as avoidable, or rather, as completely worthless.[139] The hegemony they had across their area of influence made envoys sent by other civilization useless, because barbarians where not seen as deserving to negotiate with their Chinese counterparts. As soon as the European states began to expand their influence over Asia, they imposed – with some kind of military power – the presence of their ambassadors in Beijing. At that point, Chinese ethnocentrism was 'inflamed'[140] and the only response against what was seen as a barbarian burden was attacking foreign envoys. During the Boxer rebellion in 1899, 'the German minister and the Japanese chancellor were killed by Chinese troops and the foreign legation besieged':[141] this was seen as one of the most serious instances of attacks against envoys in the nineteenth century and showed how little Chinese cared about international principles. In Europe, the assaults caused great discomfort within states, mainly because it was ordered by a legitimate government and carried out by regular soldiers.[142] However, reparations were asked – or better imposed – and the incessant threat of a military intervention in China allowed European states to keep their embassies in Beijing once the rebellion was sedated. In conclusion, this underlined how even those civilizations that were against diplomatic inviolability and immunities, because those rights were not part of their cultural and legal heritage, had to surrender to the power of those western states that were expanding themselves across the globe and that dealt with each other only through envoys.

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[138] ibid 610-611.
[139] Barker (n 40) 58; Frey and Frey (n 4) 403.
[140] Frey and Frey (n 4) 406.
[141] Ernest Satow, *A Guide to Diplomatic Practice* (Nevile Bland ed, 4th edn, Longmans Green and Co 1957) 177 para 312.
[142] Frey and Frey (n 4) 408.

9. The twentieth century.

The twentieth century opened an age of great deterioration of the international order for many reasons: the two World Wars, the birth of revolutionary regimes, decolonization, only to name a few of them. Regarding diplomatic intercourse and specifically envoys' inviolability, the century presented three central issues that needs to be analyzed in order to understand the problems that states face today while dealing with the protection of diplomatic personnel and premises.

Firstly, the century began with a series of events that undermined the vast recognition that was granted to diplomatic inviolability in the previous ages. While the rest of diplomatic immunities where already questioned by many states, inviolability, as seen above, was held as one of the fundamental pillars of the law of nations; this idea was destined to change as soon as the First World War broke out. Diplomats became the target of a mass of peoples across all Europe, for they were seen as the ones that allowed the war to erupt: the tendential secrecy of diplomatic exchanges between nations began to be seen as an obstacle to friendly relations.[143] As a consequence, envoys were seen as suspect and states in some instances couldn't grant them the full inviolability they would have enjoyed in the previous century.

In addition, the birth of a large number of revolutionary regimes, such as in Italy, Germany, and Russia, entailed the infringement of old diplomatic norms, particularly those concerning immunities and privileges for the diplomatic corp. The new communist government in Russia was the first to abandon the old obligations of safeguarding embassies and their personnel, for example by posting soldiers around diplomatic premises 'to screen and restrict visitors'.[144] As the years passed, the soviets understood the need to grant at least a minimum protection for ambassadors and their staff, thus accepting to make reparations in cases of murder; once, Lenin in person went to the German embassy in Moscow 'to express its regrets'[145] about the killing of Mirbach-Harff, the German

[143] ibid 426.
[144] ibid 427.
[145] ibid 428.

ambassador to Russia. Notwithstanding their aversion for the old international system, Russian communists had to adhere at least to the oldest and most important rule of diplomacy, that is the inviolability of emissaries. They tried to limit the need to abide by the old obligations by restricting the number of personnel that could be stationed in Russia by one state – namely, they controlled the number of U.S. and other western countries diplomats – but they couldn't totally challenge and overthrow their inviolability.

To complicate things even more, diplomats had to fear for their life during the Second World War, for many belligerent states started to disregard the old rules and to ignore their obligation of safeguarding embassies and their personnel.[146]

The second major factor that marked the development of diplomatic inviolability during the twentieth century was the codification of international law providing for the immunities and privileges of the diplomatic corp, and the rules that governed diplomatic relations. A convention that set out all the existing customary rules, defined the limits of the privileges entailed with the diplomatic rank, and helped reach an agreement between different civilizations was seen as crucially necessary. Yet, the said convention entered into force only in 1961, after a long period of standstill.

The International Law Commission (ILC) at the very beginning of its existence considered the matter of diplomatic immunities and intercourse as one of the topics mature enough to be codified into law. The discussion during the sixth meeting of the first session of the ILC, held in 1949, was brief: it was just noted that, differently from what was reported in the preparatory memorandum provided by the Secretary-General of the United Nations,[147] the Commission should have dealt not only with the question of immunities but also to diplomatic intercourse as a whole.[148] However, while retaining the subject, the ILC decided

[146] ibid 433.
[147] ILC, 'Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of article 18, paragraph 1, of the International Law Commission - Memorandum submitted by the Secretary-General', UN Doc A/CN.4/1/Rev.1, 53-54.
[148] ILC, 'Summary record of the 6th meeting', UN Doc A/CN.4/SR.6, 49.

to assign no priority to it.[149] It wasn't until 1952 that the codification of diplomatic customs became again a crucial matter, at least for the Yugoslavian minister to the United Nations that presented a proposal to the Sixth Committee of the U.N. General Assembly in order to expedite the process in the ILC. The General Assembly requested that the ILC gave priority to the codification of the said topic,[150] but it was not until its sixth session in 1954 that the Commission acknowledged the resolution and appointed a Special Rapporteur[151] as requested by Article 16 of the Statute of the ILC.[152] The *projet de codification* of diplomatic immunities and intercourse was presented by the Special Rapporteur in 1955;[153] however the ILC 'because of lack time'[154] did not consider the matter until 1957, finally producing a set of draft articles with a brief commentary that was sent to the Secretary-General for the purpose of receiving comments from interested governments.[155] The draft was consequently amended by the ILC in its successive session, and the Commission recommended the General Assembly to stimulate members states of the U.N. in order to conclude a convention.[156] The Sixth Committee of the General Assembly was then thrusted with the task of examining the draft and the comments presented by member states, and to find a suitable procedure to conclude the said convention. The discussion that was held – and then reported to the UNGA – was not definitive, since members of the Committee expressed divergent ideas: some argued that the convention had to be the result of an international conference of plenipotentiaries designated specifically to deal with that matter; others preferred to negotiate the final text of the convention in the Committee itself. The General Assembly deferred the procedural question to the following year,[157] and finally decided in 1959 to

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[149] ibid.
[150] UNGA, Res 685 (VII) (5 December 1952), UN Doc A/RES/685(VII).
[151] ILC, 'Report of the International Law Commission Covering the Work of its Sixth Session' (3-28 July 1954), UN Doc A/CN.4/88, 162.
[152] ILC (n 147) 4.
[153] ILC, 'Diplomatic Intercourse and Immunities, Report by Mr. A.E.F. Sandstrom, Special', UN Doc A/CN.4/91, 10-12.
[154] ILC, 'Report of the International Law Commission Covering the Work of its Ninth Session' (23 April - 28 June 1957), UN Doc A/CN.4/110, 132.
[155] ibid 133-143.
[156] ILC, 'Report of the International Law Commission Covering the Work of its Tenth Session' (28 April - 4 July 1958), UN Doc A/CN.4/117, 89-105.
[157] UNGA, Res 1288 (XIII) (5 December 1958), UN Doc A/RES/1288(XIII).

convoke an international conference in Vienna in order to discuss on the topic of diplomatic immunities and intercourse, and 'to embody the results of its work in an international convention'.[158]

The United Nations Conference on Diplomatic Intercourse and Immunities held its session in Vienna from 2 March to 14 April 1961. The Final Act,[159] adopted on 18 April 1961, contained the Vienna Convention on Diplomatic Relations[160] and two Optional Protocols; the Convention remained open to signature until 31 March 1962, firstly at the Minister for Foreign Affairs of Austria and then at the U.N. Headquarters, but it's still open for accession at any time. It entered into force on 24 April 1964.

It has to be noted that the International Law Commission, while drafting its work on diplomatic immunities and intercourse, referred to other codification attempts that were tried in the same century. Namely, the ILC took inspiration from the project proposed by the Harvard Law School,[161] and the Convention Regarding Diplomatic Officers adopted by the Sixth International American Conference at Havana (1928).[162]

The third issue that permeated the second part of the twentieth century, after the Vienna Convention on Diplomatic Relations entered into force, was the fact that infringements of diplomatic inviolability, as at that point codified and ratified by a great number of states, continued to exist. The first great violation of the provision of the VCDR occurred in 1965, when the U.S. Embassy in Saigon was attacked, and three employees lost their life.[163] Murders and kidnappings of ambassadors and other persons that were entitled to the protection that the VCDR granted continued to happen across all the globe, but during the 70s and the 80s those infringements occurred more frequently in Latin

[158] UNGA, Res 1450 (XIV) (7 December 1959), UN Doc A/RES/1450(XIV).
[159] UN Conference on Diplomatic Intercourse and Immunities, 'Final Act of the United Nations Conference on Diplomatic Intercourse and Immunities' (18 April 1961), UN Doc A/CONF.20/10.
[160] Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95 (hereinafter VCDR).
[161] Harvard Law School, 'Diplomatic Privileges and Immunities' (1932) 26 supp AJIL 15.
[162] Convention Regarding Diplomatic Officers adopted by the Sixth International American Conference at Havana (signed 20 February 1928) 155 LNTS 261 (hereinafter 1928 Havana Convention)
[163] Barker (n 40) 3.

America. A notorious example is the attack that was perpetrated against Count von Spreti, the West German ambassador to Guatemala, abducted by a terrorist group that aimed to put pressure on the local government to overthrown it.[164] The numbers of assaults executed against diplomats are impressive: 'from January 1968 to December 1980, approximately 2,688 attacks against diplomats occurred'.[165] Despite the fact that the Vienna Convention on Diplomatic Relations aimed only to make a recognition of the already well established international law that governed diplomatic immunities – and namely the inviolability of envoys –, and thus the duty of protection should have been formerly respected across the globe, terrorists targeted diplomats precisely because of their nature and their "aura". Terroristic threats were made against entire cultures and civilizations, and harming diplomats caused a great distress across ancient nations and helped to create a sense of fear in the old continents. In additions, political groups that used terrorism as a way to undermine their government authority and prestige, understood that kidnapping ambassadors could have been 'a highly effective weapon in their war against usually superior military and police forces'.[166] Since sending states habitually imposed a great pressure upon receiving nations where abductions occurred in order to make them surrender to the requests of the kidnappers, terrorists and revolutionary groups resorted to this kind of attacks in order to obtain "objects" to exchange in return for the 'release of political prisoners' or for 'financial ransom'.[167]

The most serious accident however occurred in the Middle East, where the number of violations of diplomatic inviolability arose from the 80s. The attack on the U.S. Embassy in Teheran and other consular premises in 1979 by Iranian students, as well as the internment of U.S. diplomatic personnel in the Iranian Ministry for Foreign Affairs, has since been considered as the most dramatic incident regarding the violation of diplomatic inviolability, specifically for the active involvement of the local government. The harassments of diplomats that occurred in Latin America mostly came from rebel groups and

[164] ibid 4.
[165] Frey and Frey (n 4) 510.
[166] Ira Stechel, 'Terrorist Kidnapping of Diplomatic Personnel' (1972) 5 CILJ 189, 203.
[167] ibid 204.

minority parties that wished to gain some kind of political influence; the hostage-taking in Teheran instead was backed by the very state on which obligations of protection and care were imposed by its accession to the VCDR. The significancy of this incident laid not in the intrusion on the embassy's grounds itself, but rather in the 'active collusion' of the Iranian regime and its 'subsequent official sanction'[168] of the seizure.

Since 1979 and coming up to the current times, violations of the basic principle of envoys and premises' inviolability as laid out in the VCDR became less numerous in Latin America, while rising in the Middle East, Africa, and Asia. Examples can be found in the bombings of the U.S. embassies in Dar es Salaam, Tanzania, and Nairobi, Kenya, on 7 August 1988;[169] the attack on the U.S. consulate in Calcutta, on 22 January 2002;[170] the truck bomb that struck the U.N. headquarters in Baghdad and killed 22 people on 19 August 2003;[171] and lastly, among many other incidents, the ambush organized by a terrorist group in which it was killed the Italian ambassador to the Democratic Republic of Congo, on 22 February 2021.[172]

In conclusion, the codification in the Vienna Convention on Diplomatic Relations of what were thought as undeniable principles of international law, such as the inviolability of embassy premises and diplomatic personnel, haven't halted the violations of such basic tenets of the law of nations even in the twenty-first century. Apart from those blatant violations of international law, the so-called special duty of protection laid out in the VCDR, although being recognized since the birth of the international community and well respected throughout the ages, raised some relevant issues, still not uniformly resolved by state practice.

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[168] Frey and Frey (n 4) 515.
[169] Barker (n 40) 13.
[170] Sonali Huria and D Suba Chandran, 'War by Other Means: Attacks on Embassies and Foreign Nationals' (2008) 71 IPCS, 1.
[171] ibid.
[172] Italian Ministry for Foreign Affairs and International Cooperation, 'Dichiarazione del Ministro Luigi di Maio' (press release of 22 February 2021) <https://www.esteri.it/it/sala_stampa/archivionotizie/comunicati/2021/02/dichiarazione-del-ministro-luigi-di-maio/> accessed 19 March 2024.

Chapter 2 – Theoretical justification for diplomatic inviolability.

As soon as envoys were not seen as inviolable solely because some religious tenet dictated so – as had happened from the ancient time through the Middle Ages – scholars found themselves divided when trying to construct the legal basis on which inviolability rested. The quarrel between jurists was firstly based on the differences between the positive law school and the natural law school. However, independently from what was seen as the juridical substrate from which international law – and consequently diplomatic inviolability – arose, academics from either schools developed the same theories that explained what the justification for the very existence of diplomatic immunities and privileges was. Chronologically, the “personal representation” theory came first, and tangled itself with the soon to be developed “extraterritoriality” theory. The “functional necessity” theory emerged almost contemporarily but was seen initially as less important in the definition of the basis from which inviolability stemmed; however, it soon came to supersede – at least partially – the other two.

1. The debate over the legal base of inviolability: natural law school *versus* positive law school.

Beginning from the Renaissance, scholars found themselves uncertain about the legal basis of diplomatic inviolability, or better, about where to find the rules that provided for the obligation of states to held ambassadors safeguarded.

At first, scholars looked to natural law in order to justify the existence of a corpus of rules that composed international law, and that comprised diplomatic immunities in it. International law, or *ius gentium* as it was called at that time, was defined by Francisco de Vitoria as ‘the law established by natural reason among all nations’.[1] Even more clearly, Hugo Grotius argued that international law could not be construed solely on the base of states’ practice and precedents,

[1] Linda S Frey and Marsha L Frey, *The History of Diplomatic Immunity* (Ohio State University Press 1999) 150.

but had to be seen as a body of rules that stemmed also from the opinion of jurists and other scholars that 'would know the rules of natural law'.[2] Despite the fact that he argued that the laws of nature could be inferred by the works of eminent academics, it's clear that he thought the principal base of the international law was not the doctrinal authorities themselves, but rather the common cluster of principles, rules and experiences from which the thoughts of those scholars stemmed. The practice of states that applied international law was not seen as the juridical foundation providing for diplomatic inviolability; it was merely explicatory of those natural rules that steered the actions of governments throughout Europe.

The natural law school became greatly appealing during the late seventeenth century, tangling itself with the philosophical and intellectual currencies of that time.[3] Natural law was seen as that corpus of rules and principles that deviated less from the common sense of mankind and from those tenets that were respected by man even when they were in the first state-of-nature. In the works of Jean Barbeyrac, it emerged the view that it did not existed an international law separated and distinct from natural law: thus, the tenets of *ius gentium* could be used to deduce those of international law.[4] Samuel von Pufendorf was even more radical in his natural law theory, arguing that international relations were governed only by the laws of nature, and he strictly avoided to recognize any other source of law – such as custom and treaties between states – for they were seen as arbitrary. Pufendorf contended that nor voluntary nor positive rules could apply in the field of international law: this was because the firsts – that is custom – were merely constituted by tacit agreement between states that could not be construed as universal and durable, since they would be rendered void if states decided to change their practice; and because the seconds – that is treaties and other agreements between states – were equally instable and not universal, since they traced back only to the will of a restrict group of states that could also be withdrawn at any given time.[5] Again, for

[2] ibid 187.
[3] ibid 265.
[4] ibid.
[5] ibid 268.

Emerich de Vattel natural law was the principal source of international obligations and rights, and consequently the principles that dictated the inviolability of ambassadors had to be construed from those tenets recognized as part of the moral standards and reason of the international community.[6] Natural law was seen as a suitable source for those privileges since it was regarded as immutable and eternal: the moral values encompassed in the laws of nature were considered universal among all mankind, thus befitting for the purpose of granting ambassadors the inviolability they needed to perform their duties.

However, the natural law school was not the only one to consider the question of what the base of *ius gentium* was, since in the seventeenth and eighteenth centuries also those academic that were part of the positivist school began to develop their ideas.

The positivists rejected the theory that international law was based purely on principles that stemmed from the general reason of mankind and argued that naturalist scholars didn't pay enough attention to custom and written law. Alberico Gentili, seen as one of the first exponent of the positive school, asserted that nations could be internationally bound only by nations themselves, either by conventions expressly signed and ratified between states or by custom, that still embodied in itself a tacit agreement.[7] Consent had been regarded by positivists, such as Cornelius van Bynkershoek, as the only source that could pose obligations upon states, thus mere tenets that were not transposed into positive rules – either written or customary – could not form the juridical base for ambassadorial inviolability.[8] Johann Jakob Moser agreed that governments could not consider abstract principles while dealing with international matters of such importance as the immunities of envoys – since they had a cardinal role that was undisputed at that time – because it would slow down their relations between each other.[9] This was also because Moser thought that natural law principles, if they in fact existed, were in any case controversial: since they did not reflect the consent of states, scholars could quarrel with themselves in order to conclude if

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[6] ibid 272.
[7] ibid 170.
[8] ibid 276-278.
[9] ibid 278.

a tenet existed or not; but secular governments could not wait for the dispute to be over before acting.

It has to be noted that the positive law school theories rested heavily on the examination of past examples, found mostly in jurisprudential precedents. Since single treaties were usually binding upon very few states, they could be regarded as the base for international law only to a limited extent; however, courts across Europe relied almost on the same set of customary rules, thus jurisprudence became the first source of analysis in order to search for what was the common agreement between states.[10]

The greatest problem that the natural law scholars found in the positivists' theories was the fact that, since they had to depend deeply on past precedents, they construed from jurisprudential cases rules that were always representative of formerly laws, that could and oftentimes would be superseded by the evolution of tenets of the laws of nature and by state practice. In addition, although cases were clear in providing examples from which it was possible to infer customary rules, scholars found themselves still uncertain on the extension of those principles of international law: academics could usually discover precedents endorsing both sides of the question, for examples equally providing for the existence of a certain type of immunity, or its nonexistence.

The result of this uncertainty and difficulty on ascertaining the positive law that effectively governed international relations led scholars to resort for a long period to the natural law theory.[11] Even some theorists that sided with the positive law doctrine struggled to find a difference between positive law – customary or written in treaties – and natural law with regards to ambassadorial inviolability and immunities: despite the fact that some rules could be found even in ancient Roman texts, precedents showed that states often relied on the principles of reason, morality, and expediency to overturn those positive rules.[12] Reason, morality, and the pillar of international law that is expediency in

[10] ibid 275.
[11] Montell Ogdon, 'The Growth of Purpose in the Law of Diplomatic Immunity' (1937) 31 AJIL 449, 464.
[12] ibid.

relations between states showed that, in fact, natural law prevailed in the matter of ambassadorial privileges.

An additional reason for the prevalence of natural law as compared to positive law can be found in the type of protection that both of them granted to ambassadors, and especially in the extension of the immunities that they enjoyed. The theorists of the positive school traced back the tradition from which they inferred custom even to Roman times, thus strengthening the authority of the local sovereign over envoys sent to his territory, and consequentially limiting immunities of embassies. On the other hand, the natural law scholars argued for a more incisive limitation of the state's sovereignty over ambassadors. This latter theory became popular among European nations, because, while certainly it posed more limits upon them than those forecasted by positivists, it was accepted as a necessity in order for them to 'reciprocally gain from the greater security and advantage'[13] that stemmed from the general and universal acceptance of the natural law tenets.

Until the nineteenth century, the natural law school was the most accredited one; however, the new century saw the sudden reemergence of the positivists theories. The idea of universal principles accepted across all nations and peoples was supplanted by the theory that only local values and rules could reflect the extension on ambassadorial immunities.[14] International law was quickly regarded as scientific analysis of state practice and jurisprudential precedents, that increased during the year until they could be used effectively to show the existence of customary rules regarding the ambassadors inviolability and privileges. The emergence of a predominant need in the international community, that is the necessity of codifying the rules providing for an envoy's immunities, deeply underlines how the positive school definitively superseded natural law theories. The fact that the doctrinal dispute shifted on the extent of immunities, and the need to realize international codes became undisputed, clearly emphasized how natural law theories were abandoned by the realization that international law was in fact not universal, since civilizations were different,

[13] ibid 465.
[14] Frey and Frey (n 1) 368.

and consequently mere principles of morality or “reason” could not continue to regulate the matter.

2. The “personal representation” theory.

Whichever was the source identified as the base of international law – natural tenets or positive rules – jurists found themselves in agreement when defining theories on what was the reason for the very existence of diplomatic immunities, and namely ambassadorial inviolability as the logical substrate on which the other privileges of envoys rested. While it’s convenient to examine each theory alone before exploring what the more recent views are – that is those encompassed in the Vienna Convention on Diplomatic Relations 1961 – it’s important to notice that usually scholars and courts did not advocate exclusively for just one of them: each of these theories tangled itself with the others in order to fully explain why diplomatic inviolability was a necessity in international relations.[15]

The first of this theories was that of the representative character of the envoy. It was the most accredited explanation of the need for diplomatic protection – at that time especially regarding any harm or harassment brought out against envoys by receiving states – as soon as the practice of establishing permanent embassies became the norm.

The precondition for the emergence of this theory was the acknowledgement that sovereigns could not negotiate with each other personally since it would be inconvenient and it would impair their dignity.[16] In addition, the principle of the equal sovereignty of states imposed on monarch to avoid claiming any type of superiority compared to the others. As a consequence, sovereigns had been forced to rely on envoys in order to conduct their international businesses: that being said, almost all jurists came to the conclusion that envoys were ‘the representative of an independent sovereign or sovereign body’.[17] Monarchs chose to employ persons as their ambassadors that could be

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[15] J Craig Barker, *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* (Darthmouth 1996) 35.
[16] Ogdon (n 11) 458.
[17] Barker (n 15) 35.

representative of themselves, that could act in the name of their principals by virtue of a representative mandate. Since ambassadors were personal representatives of their sovereign, the natural conclusion for jurists was to consider them inviolable for receiving states needed to respect the very person of the sending monarch: the same level of protection from harassment, harm, and insults that would have been provided to princes due to their equal status between one another had to be granted to their envoys, as they were fictionally seen as their principal itself.

According to Hugo Grotius, the noncontroversial principle of territorial sovereignty over foreigners admitted an exception, namely the inviolability of ambassadors, since 'by a kind of fiction [they] are considered to represent those who sent them'.[18] Emerich de Vattel was of the same advice, stating that 'every minister, in some measure, represent his master … in their rights … in their dignity, their greatness, and their pre-eminence.'[19] De Vattel clearly emphasized how the representative character of an envoy stemmed directly from the person of the sovereign, not solely from the territorial or statal sovereignty it emanated: 'the respect which is due to sovereigns should redound to their representatives … as representing their master's person in the first degree'.[20] Consequently, personal inviolability of ambassadors had to be granted in order to avoid any harm or impairment of their dignity, for assaulting an envoy injured 'the sovereign whom that minister represent[ed]'.[21] The personal representation theory was well accepted also by Abraham Wicquefort, whom in his works concluded that international law provided for the inviolability of an ambassador and for his immunities 'because he represents a sovereign, over whom another sovereign has no superiority'.[22]

The theory of personal representation was regarded as a solid justification for granting ambassadors a wide range of immunities and for keeping them

[18] Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres* (Francis W Kelsey tr, Clarendon Press 1925) bk II ch XVIII, 443.
[19] Emerich de Vattel, *Le Droit des Gens* (Joseph Chitty ed, T & JW Johnson 1852) bk IV ch VI para 70.
[20] ibid bk IV ch VII para 80.
[21] ibid bk IV ch VII para 81.
[22] Abraham Wicquefort, *L'ambassadeur et Ses Fonctions* (John Digby tr, Crofs-Keys 1716) bk I ch XXVII, 250.

safeguarded while performing their duty not only by scholars, but also by courts across Europe and the U.S.

In *The Schooner Exchange v. M'Faddon* (1812),[23] Marshall CJ prefaced that:

> [The] perfect equality and absolute independence of sovereigns, and [the] common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to wave the exercise of a part of [their sovereignty], which has been stated to be the attribute of every nation.[24]

The first case in which it may have happened was the one of a foreign sovereign travelling to another country: in this instance, granting him a certain level of inviolability – that is respect, protection, and privileges – in fact would have corresponded to a limitation of the powers of the receiving sovereign over someone that entered in its territory. The court continued by stating that 'the same principles' on which rested the protection granted to monarchs were used by state practice in order to concede 'the immunity which all civilized nations allow to foreign ministers'.[25] The personal representation theory was laid out by Marshall CJ very clearly in the following statement:

> The assent of the sovereign to the … exemptions from [its sovereignty] which are admitted to attach to foreign ministers, is implied from the consideration that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission … and, therefore, a consent to receive him, implies a consent that he shall possess those privileges … which are essential to the dignity of his sovereign, and to the duties he is bound to perform.[26]

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[23] *The Schooner Exchange v M'Faddon*, 11 US (7 Cranch) 116 (US 1812).
[24] ibid 137.
[25] ibid 138.
[26] ibid 138-139.

With an equal clarity, Brett LJ in *The Parlement Belge* (1878)[27] concluded that:

> The immunity of an ambassador … is based upon his being the representative of the independent sovereign or state which sends him, and which sends him upon the faith of his being admitted to be clothed with the same independence … and superiority … as the sovereign authority whom he represents would be.[28]

Even at the beginning of the twentieth century, scholars still looked to the representative character of envoys as the justification for conceding ambassadors inviolability: the immunities granted to them were considered solely as a reflection of those privileges that their sovereign enjoyed.[29]

3. The "extraterritoriality" theory.

As see in the paragraph above, Grotius – one of the firsts to introduce the theory of personal representation – argued that the ambassador had to be considered as if he personified his sovereign itself; however, he stated that this idea rested on a fiction. The ambassador was fictitiously embodying his principal.

The second theory that emerged contemporarily depend on the second legal fiction that Grotius himself developed in his work, that is the idea of extraterritoriality. According to the concept of extraterritoriality, 'ambassadors were held to be outside of the limits of the country to which they were accredited' ('*ita etiam ftictione simili constituerentur quasi extra territorium*').[30] Although this was used by Grotius just as a descriptive expedient in order to reinforce his conception of ambassadors as personal representative of their sovereign, other academics misrepresented his words and used the theory of extraterritoriality as the primary source of justification for granting ambassadorial inviolability.

The logical prerequisite for this theory to emerge was the development of the international tenet that provided for states' sovereignty across all parts of

[27] *The Parlement Belge*, 5 PD 197 (CA 1878).
[28] ibid 207-208.
[29] Clyde Eagleton, 'The Responsibility of the State for the Protection of Foreign Officials' (1925) 19 AJIL 293, 296.
[30] Grotius (n 18) bk IV ch XVIII, 443.

their territory: again, as for the representative character theory, it was undisputed that monarchs had a right to impose their rules and their jurisdiction over any foreigner that resided in their country, since they came under their “shield” and in their state.

However, exceptions existed. The theory of extraterritoriality stated that envoys were inviolable because they were seen, even if by matter of fiction only, as they were still residing in their sending state, and not in the state that received them and in which they performed their mission. Ambassadors enjoyed inviolability because they were still under the full control of their principal; they fictitiously resided in another state, thus the monarch that received them could not impose his territorial power against them. Pierre Ayrault was one of the first to argue that public ministers needed to be legally considered as absent in the territory in which they resided for the performance of their embassy, and as present in their own state.[31] Cornelius van Bynkershoek agreed with the view of Ayrault, stating that ‘ambassadors are thought of as being outside the territory of him to whom they are sent … and as being still subjects of the prince who sent them’.[32] He underlined the theory in another passage, asserting that ambassadors were ‘regarded … as absent’ because of a ‘legal fiction which the practice of nations has introduced’.[33]

The theory in discussion, as the personal representation one, was equally upheld by jurisprudential precedents across the seventeenth and eighteenth centuries. In *Taylor v. Best* (1854)[34] the defendant, while claiming diplomatic immunity, summed the doctrinal views of many jurists, arguing that:

> The custom of nations … which subjects to the jurisdiction of a state every one who is found within its territory, provides an exception in the case of ambassadors, who by one fiction … are taken not to be within the territory of the state in which they are sent to reside, and consequently not to be subject of its laws.[35]

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[31] Barker (n 15) 40; Frey and Frey (n 1) 193; Ogdon (n 11) 455.
[32] Cornelius van Bynkershoek, *De Foro Legatorum Liber Singularis* (Gordon J Laing tr, Clarendon Press 1946) ch V, 27.
[33] ibid ch XVI, 80.
[34] *Taylor v Best*, 14 CB 487 (CB 1854).
[35] ibid 497.

Jervis CJ agreed with the view expressed by the defendant, clearly stating that 'the foundation of [diplomatic privileges] is that the ambassador is supposed to be in the country of his master … –assume that he is abroad'.[36]

In another case, *Magdalena Steam Navigation Company v. Martin* (1859),[37] the Attorney General maintained that 'the ambassador, in fact, is supposed, to all intents and purposes, to be residing in his own country'.[38] The court supported that view and asserted, in the words of Campbell CJ that the ambassador 'is not supposed even to live within the territory of the Sovereign to whom he is accredited, and … he is for all juridical purposes supposed still to be in his own country'.[39]

It could at this point be affirmed that the extraterritoriality theory developed its importance by misconstruing what was born as a simple fiction in order to further explain how the representative character theory worked in state practice, but became one of the most important basis on which diplomatic inviolability rested. By being seen as residing outside the state where they were posted, ambassadors could further their enjoyment of privileges and immunities since nobody could "touch" them abroad.

Although used mostly to explain the inviolability of ambassadors, the theory of extraterritoriality provided 'a striking image'[40] to emphasize the need to also protect embassies premises against any attack. Embassies grounds began to be seen as objects that had to be protected due to the obligation posed upon states to safeguard diplomatic missions as a whole. However, since a doctrine that provided for the protection of diplomatic premises for their own good was at that point still not developed enough, the fiction of extraterritoriality provided a perfect justification for the duty of protection of embassies' buildings. In fact, the concept of envoys being outside of the territory of their receiving state carried with it the necessity of considering their houses and the premises of their missions as being part of the territory of another state, that is the sending one: those grounds were seen as an "enclave" within a foreign territory. The practice

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[36] ibid 517.
[37] *Magdalena Steam Navigation Company v Martin*, 2 El & El 94 (KB 1859).
[38] ibid 107-108.
[39] ibid 111.
[40] H L Dickstein, 'Territorial Status of Consular and Diplomatic Premises' (1973) 32 CLJ 46, 48.

of granting the so-called *franchise du quartier* was one of the most blatant result of the application of the extraterritoriality theory.[41]

4. The "functional necessity" theory.

A third valid thesis that emerged since the first works on the juridical justification for the existence of diplomatic inviolability was the functional necessity theory. While certainly the fictions of representation and extraterritoriality helped scholars in defining the need for protection, the functional approach remained in the background of the doctrinal thinking until the nineteenth century.

The functional necessity approach saw diplomatic immunities and privileges as a requisite *sine qua non* the normal practice of sending envoys in order to entertain relations between states would not be possible. The need to protect ambassadors and to grant them some type of immunities stemmed from the consideration that in the absence of those it would be unfeasible for them to fulfill their duties: if they felt that they could be imprisoned, attacked, or insulted without any kind of protection for their public role, ministers would be absolutely impaired in the accomplishment of their tasks.[42]

Even if, as seen, Grotius relied heavily on the personal representative character of the envoy to base its justification for the presence of diplomatic inviolability, he was one of the firsts to lightly introduce the functionalism philosophy and the concept of functional necessity. While discussing the immunities that pertained to the goods of the ambassador, he stated that 'an ambassador ought to be free from all compulsion – such compulsion as affects things of which he has *need* … – in order that he may have full security':[43] thus, even if the functional necessity path was taken only to explain why ambassadorial properties had to be held as immune from the jurisdiction of the receiving state, it is possible to see the theory beginning its existence in his words. Similarly, Bynkershoek, even if he leaned towards the theory of

[41] Barker (n 15) 45.
[42] Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law. Volume 1, Peace: parts 2 to 4* (9th edn, Longman 1992) 1091.
[43] Grotius (n 18) bk II ch XVIII, 448 (emphasis added).

extraterritoriality, argued in favor of a functional attitude while explaining the immunity from the criminal jurisdiction in case of wrongdoers ambassadors: if envoys were to be punished by the receiving sovereign, 'then with the fall of the delinquent ambassador down [came] also the whole good of the embassy'.[44] The conservation of the diplomatic mission and of the embassy, for the tasks it accomplished were of great importance, was seen by Bynkershoek as a superior good that had to be preserved even when limitations of the sovereign power over the ambassador would be morally unjustified. Furthermore, Wicquefort, that agreed on the representative character thesis as Grotius, maintained with clarity that 'the necessity of embassies makes the security of [a]mbassadors'.[45] He also added that there could be no sovereign that could extend its jurisdiction – that is, in this case, its power as a whole – over ambassadors, and that they had to be held safeguarded, for otherwise he would impair embassies 'the Freedom whereof is founded on indispensable Necessity', and 'would deprive Mankind of the Means of maintaining Society'.[46]

However, it needs to be pointed out that all these jurists used the functional approach as a way to merely strengthen their reflections on the need to protect embassies and ambassadors but did not regard to the functional necessity theory as the principal and sole base for diplomatic inviolability. Instead, the scholar who placed the greatest emphasis on the necessity to let envoys perform their duties freely and without hampering was de Vattel. Firstly, he claimed that 'it is necessary that nations should treat and hold intercourse together, in order to promote their interests, – to avoid injuring each other, – and to adjust and terminate their disputes':[47] thus, the importance of embassies was undeniable since, to maintain relations between states, sovereigns could not act by themselves but had to resort to envoys and other kind of public ministers. Having explained that ambassadors were a prerequisite in order to let the civilization as a whole to partake conversations and relations between nations, de Vattel laid out the functional necessity theory in clear words:

[44] Bynkershoek (n 32) ch XVII, 93.
[45] Wicquefort (n 22) bk I ch XXVII, 246.
[46] ibid.
[47] De Vattel (n 19) bk IV ch V para 55.

> Now, ambassadors, and other public ministers, are necessary instruments for the maintenance of that general society, of that mutual correspondence between nations. But their ministry cannot effect the intended purpose, unless it be invested with all the prerogatives which are capable of insuring its legitimate success, and of enabling the minister freely and faithfully to discharge his duty in perfect security. The law of nations, therefore, while it obliges us to grant admission to foreign ministers, does also evidently oblige us to receive those ministers in full possession of all the rights which necessarily attach to their character – all the privileges requisite *for the due performance of their functions*.[48]

Consequently, diplomatic inviolability and all the other immunities and privileges that ministers enjoyed stemmed directly from their own need to benefit of them. It would have been impossible otherwise for them to cover their tasks and perform their duties lightheartedly.

Functionalism triumphed over the other theories in the works of scholars from the nineteenth century, an age where – as seen in Chapter 1 – states were mostly concerned with the limitation of diplomatic immunities rather than with the extension of them. Personal inviolability of ambassadors was regarded as the principal, if not the sole, privilege that envoys should have really enjoyed, since it was the minimum base for them to perform their duties: public ministers could benefit only of those immunities that were needed to accomplish their task.[49] Academics like Pasquale Fiore argued that the doctrinal works produced in the previous centuries did not pinpoint directly to the correct justification for the existence of diplomatic inviolability, lounging across theories that merely consisted in fictions. The most important prerogative of a public minister was his personal inviolability, not only because he represented a sovereign state abroad, but in fact on the embassy's necessity to have its agents secured and protected.[50] Fiore argued that previously scholars confused inviolability and

[48] ibid bk IV ch VII para 92 (emphasis added).
[49] Frey and Frey (n 1) 337.
[50] Pasquale Fiore, *Trattato di Diritto Internazionale Pubblico* (4th edn, Unione Tipografico-Editrice Torino 1905) vol II sp part bk IV sec I ch V para 1168-1169.

immunities and stated that for this reason they tended to expand the limits of the privileges that ambassadors benefitted from. However, since diplomats in his view could only enjoy inviolability as a necessary element for the performance of their duties, Fiore maintained that limitations had to be made regarding the immunity from the local jurisdiction of the receiving sovereign, for it was not seen as necessary for the embassy itself.[51]

The theory of functional necessity was well received also by national courts across Europe and the U.S., for some of them regarded to functionalism as the main justification for inviolability to exist. In *Holbrook, Nelson & Co. v. Henderson* (1839),[52] Oakley J while delivering the decision of the court found that authorities across the ages regarded the reason for diplomatic inviolability as the necessity for states to carry out their relations and communication by empowering public agents with such a task, thus they needed to be held immune and safeguarded when they are accomplishing their mission. Similarly, in *Barbuit's case* (1737)[53] the Lord Chancellor argued that inviolability of an envoy stemmed 'from the *necessity of the thing*, that nations may have intercourse with one another … by agents':[54] that is, the necessity to send and receive embassies without hindering them in any way. Even clearer was the opinion of the court in *Hopkins v. De Robeck* (1789)[55] where it was argued that 'it would be impossible to carry on state negotiations, unless [ambassadors] were protected':[56] only the mere necessity to let states have intercourses between themselves was the correct justification for granting the ambassadors' inviolability.

5. The modern approach on legal theories providing a justification for ambassadorial immunities as transposed into the Vienna Convention on Diplomatic Relations 1961.

During the twentieth century it became clear that the three theories aforementioned did not have the same authority and could not explicate with

[51] ibid para 1171, 441.
[52] *Holbrook, Nelson and Co. v Henderson*, 6 NY Super Ct (4 Sandf) 619 (NY Super Ct 1839).
[53] *Barbuit's case*, Cases T Talbot 281 (Chancery 1737).
[54] ibid 281 (emphasis added).
[55] *Hopkins v De Robeck*, 3 TR 79 (Chancery 1789).
[56] ibid 80.

equal clearness the reason from which stemmed the undeniable necessity of providing diplomats with protection against any harm. Jurists and states that undertook the codification of international law regarding diplomatic intercourse and immunities could not avoid to also provide a theoretical background to the rules encompassed in the Vienna Convention on Diplomatic Relations 1961. Even if the VCDR was conceived to be a practical instrument that should have mainly laid out operational principles in order to substantiate customary rules that newer states could abide by, it was impossible to abstain from specifying which theories were kept in mind while drafting the Convention.

The first question that was tackled by scholars and states' plenipotentiaries at the Vienna Conference was that of extraterritoriality. As seen above, the term was born as a 'picturesque'[57] way of explaining ambassadorial immunities, but rapidly became seen as a legal theory *per se*, 'an independent source of legal rule'.[58] In the earliest decades of the twentieth century the principle of extraterritoriality was uniformly rejected across all jurists, and was not regarded as a considerable legal source in the various codification processes that took place before the drafting of the VCDR. Across academics, Paul Fauchille, *e.g.*, was clear in maintaining that the fiction of extraterritoriality '*est inutile, vague, fausse et partant dangereuse'*.[59] He considered it useless for it made envoys regarded as they were still residing in their sending state; vague since across various scholars the term hadn't had the same meaning; untruthful because if the theory was accepted it would bear consequences '*inacceptables et inacceptées*'[60] even by those who advocated for the concept of extraterritoriality themselves. William Edward Hall agreed with this view, and argued that in his works diplomatic immunities and privileges would be examined putting aside the idea of extraterritoriality.[61]

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[57] William Edward Hall, *A Treatise on International Law* (A Pearce Higgins ed, 8th edn, Clarendon Press 1924) part II ch IV para 48.
[58] ibid.
[59] Paul Fauchille, *Traité de Droit International Public* (Henry Bonfils ed, 8th edn, Libraire Arthur Rousseau 1926) tome I part III bk I ch III para 686.
[60] ibid.
[61] Hall (n 57) part II ch IV para 48.

The same rejection of the aforementioned theory could be seen in the works that were considered in order to draft the VCDR. During the attempt made by the League of Nations to codify international law regarding diplomatic relations and immunities, the Committee of Experts proposed a draft convention; in the preamble of the said work, it was strongly underlined how 'the Committee [did] not consider that the conception of exterritoriality, whether regarded as a fiction or given a literal interpretation, furnishe[d] a satisfactory basis for practical conclusions',[62] thus avoiding any theoretical reference to it in the drafted articles. The League of Nations could not, however, conclude the said convention, thus their work remained at that time only provisional. One of the others projects used by the International Law Commission in order to prepare their draft, as they were asked by the U.N. General Assembly, was the text drawn up by the Harvard Law School, in which, as part of the introductory comment, it was stated that 'he theory of exterritoriality [was not] used in formulating the present draft convention'.[63] Another great example of the rejection made upon that theory was encompassed in the report made before the ILC by the Special Rapporteur tasked with the creation of a blueprint for the Commission to work on. Mr. Sandstrom found out that:

> The theory of exterritoriality has been strongly criticized, one reproach levelled against it being that it explains nothing. The term, it is maintained, has been used rather in a figurative sense; thus implicitly rejecting the theory that the residence of the agent is outside the territory in which it is situated. Nor, according to another argument, does the theory bear any relation to the facts. Taken literally, the theory enjoys little support nowadays …[64]

The Secretary-General of the ILC shared the view of the Special Rapporteur, and in a study that examined past attempts to codify international law regarding the topic of immunities, and the most recent academics views at that time, concluded that:

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[62] League of Nations Committee of Experts for the Progressive Codification of International Law, 'Diplomatic Privileges and Immunities' (1926) 20 supp AJIL 148, 149.

[63] Harvard Law School, 'Diplomatic Privileges and Immunities' (1932) 26 supp AJIL 15, 26.

[64] ILC, 'Diplomatic Intercourse and Immunities, Report by Mr. A.E.F. Sandstrom, Special', UN Doc A/CN.4/91, 12.

> It is common knowledge that most modern authorities … believe that the so-called principle of exterritoriality cannot serve as a theoretical basis for the immunities which diplomatic agents enjoy. … The fiction of exterritoriality is nowadays strongly criticized. It fails to provide an adequate basis for a sound appreciation of the facts, or at least of all the relevant facts, and the scope of exemption which it would allow is never accepted in actual practice.[65]

Having put aside the theory of extraterritoriality, the Vienna Conference had to undertake an examination of the other two most relevant legal thesis that were brought up in the precedent centuries, in order to provide a strong theoretical support for the VCDR.

Scholars in the twentieth century continued to rely mostly on the functional necessity theory. Hall maintained that ambassadorial immunities 'have been concede to [envoys] by considerations partly of courtesy and partly of convenience so great as to be almost equivalent to *necessity*',[66] and Fauchille argued that '*l'inviolabilité des agents diplomatiques est une conséquence* nécessaire *des droits fondamentaux d'indépendance, de souveraineté et de représentent*'.[67]

States' plenipotentiaries however found more difficulties in laying down what was the correct theoretical framework from which stemmed the customary rules that were to be codified in the VCDR. Previous works provided contrasting opinions on the subject. The League of Nations Committee of Experts used both the functional necessity and the representative character theories:

> In its opinion, the one solid basis for dealing with the subject is the necessity of permitting free and unhampered exercise of the diplomatic function and of maintaining the dignity of the diplomatic representative and the State which he represents and the respect properly due to secular traditions.[68]

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[65] ILC, 'Codification of the International Law Relating to Diplomatic Intercourse and Immunities, Memorandum prepared by the Secretariat', UN Doc A/CN.4/98, para 53 and 211.
[66] Hall (n 57) part II ch IV para 48 (emphasis added).
[67] Fauchille (n 59) tome I part III bk I ch III para 687.
[68] Committee of Experts (n 62) 149.

Of a similar advice was the 1928 Havana Convention, that in its preamble laid down the principle upon which 'diplomatic officers represent their respective States and should not claim immunities which are not essential to the discharge of their official duties'.[69] However, the Harvard draft, by saying that 'Diplomatic intercourse is a normal function of states in the international community. … [D]iplomatic privileges and immunities are the accepted means by which such normal functioning is assured',[70] seemed to depend more on the functional necessity thesis, since ambassadorial inviolability was granted not in order to respect merely the sovereign which sent the envoys, but for it was seen as needed to grant them the necessary freedom to perform their duties.

Since he had to deal with such a level of uncertainty, the Special Rapporteur to the ILC found that both the personal representation and the functional necessity theories were not completely uncriticized across the centuries. They '[did] not provide an entirely satisfactory explanation of the phenomenon' and '[could] scarcely be said to explain the extension of the privilege'.[71] The study took on by the Secretary-General was just a little more conclusive: after explaining what the two thesis were, it seemed that the representative character of the public minister was 'less and less frequently invoked' by state practice and that the said theory was 'frequently inapplicable';[72] however, 'the argument which seeks to justify immunities on the ground of "functional necessity" appears hardly more satisfactory'.[73] Although the Secretariat expressed concerns upon both of these theoretical justification, it still contended that the theory of functional necessity might have been a sufficient base 'for an international codification designed to lay down the irreducible minimum of immunities which diplomatic representative must enjoy'.[74]

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[69] Convention Regarding Diplomatic Officers adopted by the Sixth International American Conference at Havana (signed 20 February 1928) 155 LNTS 261 (1928 Havana Convention), 261.

[70] Harvard Law School (n 63) 26.

[71] ILC (n 64) 12.

[72] ILC (n 65) para 224 and 226.

[73] ibid para 228.

[74] ibid para 230.

The theoretical framework on which diplomatic immunities rested was thus also duly considered by the Vienna Conference in the discussion that pertained the preamble of the Vienna Convention on Diplomatic Relations 1961.

States' delegations took note of the difficulties that scholars and the ILC had in choosing a suitable theoretical approach to the question, and the practical arguments that were made during the works of the Committee of the Whole at the Conference reflected those contrasting views. In particular, the quarrel took place between those who regarded as unnecessary to include a theoretical statement in the preamble, that would constrict the interpretation of the subsequent provisions; those who saw the functional necessity approach the only correct justification for diplomatic immunities and thus wanted to include it in the text of the VCDR; and lastly those who favored a multi-sided approach and that wanted to include a reference also to the personal representation theory. For example, the Hungarian delegation argued that 'the rules that the Conference was going to adopt were not theoretical',[75] and consequently pushed a proposal for a preamble[76] that did not contain any specification upon which theory was considered in order to lay out the rules contained in the VCDR. On the other hand, both the so-called twelve-Powers proposal[77] and the so-called five-Powers proposal[78] – the only one that remained to be voted at the end of the discussion – introduced the functional necessity theory as the legal base on which ambassadorial privileges rested. Finally, while discussing upon the only remaining

[75] UN Conference on Diplomatic Intercourse and Immunities, 'Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole' (2 March – 14 April 1961), UN Doc A/CONF.20/14, 227 para 13.

[76] UN Conference on Diplomatic Intercourse and Immunities, 'Hungary: Proposed preamble to the convention on diplomatic intercourse and immunities' (14 March 1961) UN Doc A/CONF.20/C.1/L.148.

[77] UN Conference on Diplomatic Intercourse and Immunities, 'Brazil, Colombia, Japan, Mexico, Nigeria, Norway, Pakistan, Senegal, Spain, Turkey, United Kingdom and United States of America: proposed text for a preamble to the Convention on Diplomatic Intercourse and Immunities' (29 March 1961), UN Doc A/CONF.20/C.1/L.318.

[78] UN Conference on Diplomatic Intercourse and Immunities, 'Burma, Ceylon, India, Indonesia and the United Arab Republic: proposed text for a preamble to the Convention on Diplomatic Intercourse and Immunities' (30 March 1961), UN Doc A/CONF.20/C.1/L.329.

proposal – after others were not pressed to a vote by their own proponents – the third approach emerged clearly: the Soviet delegation recalled that the ILC had not totally abandoned the personal representation theory, thus they formally proposed to amend the draft preamble in order to insert a reference to the importance that the representative character of envoys held in justifying their immunities.[79]

After the amended proposal was put to votes, and since the Vienna Convention on Diplomatic Relations 1961 came into force, the preamble provided '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'.[80] Consequently, states seemed to agree that diplomatic immunities, and inviolability as the basic requisite for other privileges to be enjoyed, were granted both because embassies are a necessary mean of communication between nations and cannot be impeded in any way, and because envoys still embody in them the greatness and the dignity of their sending state, thus no one – a private party or a sovereign country – could hamper that "majesty".

[79] UN Conference on Diplomatic Intercourse and Immunities (n 75) 229 para 40.
[80] VCDR preamble para 4.

Chapter 3 – The protection of diplomatic premises.

1. The law providing for the inviolability of diplomatic premises and for the special duty of protection: Article 22 VCDR.

The Vienna Convention on Diplomatic Relations 1961 provides for the safekeeping of diplomatic premises in Article 22, which reads as follows:

> 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 22 can be divided into two sections: the first, consisting of paragraphs 1 and 3, lays down the concept of inviolability of the mission premises, imposing a negative duty upon the receiving state to avoid the performance of a great number of actions that can all be included in the category of "sovereign powers"; on the other hand the second section, encompassing paragraph 2, introduces the so-called special duty of protection, prescribing for a positive obligation upon receiving states to keep the mission safeguarded.

Although the wording of Article 22 seems to provide for a clear and problem-free norm, it has to be noted that since the VCDR entered into force a number of not entirely insignificant questions arose, resulting in misconstructions and practical issues not uniformly resolved across all nations. The solemn affirmation of customary principles of the international community and classical diplomatic intercourse proved to be difficult to be construed without resorting to state practice and interpretations that went beyond the text of the provision. In particular, there are some elements of Article 22 that are not completely definite: what buildings could be considered as mission premises;

what is the extension of inviolability; what are the practical implications of the special duty of protection; whether or not, in extreme situations, the mission's inviolability could be breached by the receiving state without violating the Convention; if it could be construed the existence of a duty of punishment against those who commits crimes against diplomatic premises; what is the extent of the liability of the receiving state; and lastly, what are the steps that sending states are required to – or consented to – make in order to contribute to the protection of their own embassies. Across this Chapter those problems will be deeply analyzed, in order to explain what is the actual scope of Article 22, especially in the light of some of the twenty-first century's complications that concerned diplomatic relations and the development of the international community.

2. Definition of diplomatic premises.

To understand what are the buildings that falls under the protection given by the VCDR due to the fact that they host foreign embassies or other diplomatic facilities in the receiving state, Article 22 must be read in accordance with Article 1, which provides a list of definitions that are to be used for the purpose of the Convention itself. In particular, Article 1 subparagraph (i) lays down a description of the expression 'premises of the mission', and consequently underlines which buildings and other immovable goods could acquire the diplomatic status that is necessary for them to enjoy the due protection that the Convention provides. In particular, it is stipulated that:

> (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.

This definition gives rise to two interpretative issues: firstly, it must be explained how in practice ownership of the premises does not affect their diplomatic status; secondly, it has to be understood what buildings can effectively become part of a diplomatic facility and thus be protected by the receiving state.

As duly specified by Article 1(i), ownership of the buildings and other facilities that host a foreign mission should not be considered when deciding whether those premises possess or not the diplomatic status necessary to enjoy the rights conferred by Article 22. Thus, sending states could decide freely and without constrictions – if the national legislation of the receiving state does not dictate otherwise, as will be seen in the next paragraph – how to acquire the premises into which it would be suitable to establish its embassy. As a consequence, states could use premises that they already own in their *iure privatorum* capacity, or they could choose to acquire the property of new buildings precisely because they intend to install in them their mission; equally, states could also enter into rental agreements with private or public third parties in order to gain the possess of a suitable building.[1] The specification was introduced due to the presence of states that, because of their internal legislation, prohibited to foreign nations to hold title over immovable properties based in their national territory. If the VCDR didn't provide a clear definition of mission premises that ignores the fact that the sending states holds or not the ownership of the buildings, states could freely decide – by implementing a legal ban on the acquisition of properties by foreign countries – whether or not to cover facilities that host embassies with the protective "shield" that Article 22 grants.[2] However, since it was stipulated that even rented properties fall under the definition used for the purpose of the Convention, a similar ban could not be used as an objection by the receiving state to refrain from abiding by the binding obligations provided under Article 22. In addition, the provision permits to attach the diplomatic status to building whose ownership is controversial: for example, a civil action about property ownership or correction of the land register does not provide grounds for the receiving state to withdraw the recognition of the immovable goods as mission premises.[3]

[1] Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th ed, Oxford University Press 2016) 16; Niklas Wagner, Holger Raasch and Thomas Pröpstl, *Vienna Convention on Diplomatic Relations of 18 April 1961: Commentaries on Practical Application* (Christian Oelfke ed, Berliner Wissenschafts-Verlag 2018) 52-53.
[2] Wagner, Raasch and Pröpstl (n 1) 53.
[3] ibid 133.

Additionally, the wording of Article 1(i) does not provide any information whether the facilities occupied by the diplomatic mission have to be at least rented for a long-term period or if, since ownership of the premises is not determinant, even locations rented for one-off events held by the diplomatic mission have to be regarded as fully included in the definition.[4] It may be safe to say that, if they completely fall under the description furnished by Article 1(i) – thus being rented to perform a recognized task of the mission itself, as will be seen later in this Paragraph – even those kind of facilities are to be considered as deserving to be protected under the obligations laid down in Article 22.

Being it established that states could host their diplomatic missions in buildings owned by anyone, thus in any building they desire, it has to be explained how the definition provided in Article 1(i) practically limits foreign nations in their claims for inviolability if those are made for an excessive number of premises, or for facilities that do not serve the regular and widely recognized tasks of the mission. Even if states could locate their embassy services across different buildings, and even if also ancillary lands could claim to be inviolable under Article 22 due to the fact that they are encompassed by the definition of mission premises, the limitation is provided by the expression 'used for the purpose of the mission'.

The meaning of what are the purposes of the mission is not univocal. If construed more broadly, the purposes of the mission could include any aspect of the life of the mission that the embassy itself considers to fall under its tasks: thus, every facility that host a service of the diplomatic post that is considered to fall within its scope would need to be protected by the receiving state.[5]

In contrast to this view, a majority of scholars developed the idea that the purposes of the diplomatic mission should be construed in the light of, and could not be separated from, the list of functions that embassies could perform as provided by Article 3, paragraph 1, which dictates that:

The functions of the diplomatic mission consist, inter alia, in:

(a) Representing the sending State in the receiving State;

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[4] ibid

[5] ibid.

(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 scientifical relations.

Since states agreed to name all those functions of the diplomatic post, scholars argues that only those are the purposes for which the mission facilities should be used. If, on the contrary, sending states could freely decide what to consider as adequate purposes for their embassies, going beyond the range of functions outlined by Article 3(1), they could single-handedly impose on the receiving state an excessive burden when dealing with diplomatic premises protection. Consequently, the purposes of the mission should be linked only with the fulfillments of the functions associated with the mission itself.[6]

As a natural consequence of the aforementioned theory, facilities used by the sending state 'as information centers, as tourist offices, as cultural centres, libraries, embassy schools',[7] being used for purposes outside the scope of Article 3(1), may not be legally regarded as diplomatic premises under the definition of Article 1(i). The same reasoning could be used to avoid referring to buildings occupied by intermediary organizations – that is, organizations that are tasked with specific assignments in relation to bilateral or multilateral relations – that are still linked with the diplomatic mission as having a diplomatic status, thus enjoying inviolability. The main problem that arise from this argument, however, lays in the fact that the premises used by intermediary organizations would not enjoy inviolability if physically detached by the embassy itself, but it would nonetheless be impossible for the receiving state to enforce the non-inviolability

[6] ibid 134.
[7] Denza (n 1) 17.

if those offices are located within areas that legally hold the status of mission premises.[8]

Notwithstanding this restrictive view on the definition of diplomatic premises, receiving states could still grant to a broader range of buildings some kind of protection, even to the same level enjoyed by proper mission premises, since it is laid out in Article 47 the principle of the more favorable treatment.[9] States could reach an agreement in order to extend inviolability even to those premises that are not operated for the very purposes of the mission; however, that is done only by a matter of courtesy or expediency and could not constitute a legal extension of the scope of Article 1(i), and consequently of the rights and duties strictly conferred by Article 22.

On the other hand, those who advocate for a broader interpretation of the definition laid down in Article 1(i) base their reasoning on a more letteral view of the Convention, which uses two very different terms – 'purposes' and 'functions' – when referring to diplomatic premises and diplomatic functions as a whole.[10] In addition, Article 3(1) states that the functions enumerated in subparagraphs (a) to (e) provide only a list of examples of what diplomatic missions could do in foreign countries, thus the use of the expression 'inter alia'. Denza, while advocating for the more restrictive theory that associate the purposes of the mission with its functions, still leaves the door open for doubt, stating that 'Article 3 *may* be relevant in this context'.[11]

Lastly, Article 1(i) affirms – after an amendment proposal submitted by Japan during the Committee of the Whole at the Vienna Convention added those last words –[12] that by definition the residence of the head of the mission have to be considered as being part of the mission premises. This is because the official residence of the head of the mission is often used as a location where proper diplomatic functions are frequently performed; thus, the doctrine of functional necessity imposed upon states to consider the need to grant those premises the

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[8] Wagner, Raasch and Pröpstl (n 1) 134.
[9] Denza (n 1) 17.
[10] Wagner, Raasch and Pröpstl (n 1) 133.
[11] Denza (n 1) 17 (emphasis added).
[12] UN Conference on Diplomatic Intercourse and Immunities 'Japan: amendment to article 1' (27 March 1961), UN Doc A/CONF.20/C.1/L.305.

same protection that embassies enjoy under Article 22. By encompassing the head of the mission's official residence in the category of 'mission premises', the Convention underlines how oftentimes it would be impractical to distinguish between the rights conferred to the embassy itself and the residence of the diplomat charged with acting in the capacity of the sending state. In addition, it also emphasize how the protection of the official residence is granted in order to safeguard the proper functioning of the missions, and not the singular person of the head of the delegation.

This can be clearly construed when reading Article 1(i) and Article 22 in comparison to Article 30: the latter affirms that 'the private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission', but the equivalence is put in place only in terms of results. The residences of diplomats have to be protected – with the same level of protection granted to embassies – but the theoretical justification for this affirmations lays in the need to protect the person and the dignity of the members of the diplomatic staff, not the diplomatic mission itself. The residence of the head of the mission, instead, is protected because it is legally considered to be part of the mission premises themselves, not for it hosts the head diplomat.

In any case, Article 30 needs to be considered because it offers an extension to the concept of diplomatic premises that include the single residences of the members of the mission. In conclusion, for the purpose of this Chapter, the expression diplomatic grounds will refer indistinctively to embassies, head of mission's residences and private residences of diplomats.

2.1. Choice and acquisition of suitable premises to establish diplomatic missions.

An issue of practical importance that arise from the definition laid down in Article 1(i), and the other relevant provisions of the Convention with regards to diplomatic premises, lays in the choice of suitable buildings into which sending states could establish their missions. The VCDR does not provide any clear guidance for sending states, and only deals with the obligations of receiving

states in Article 21; thus, state practice varies when considering the pragmatic question of whether a certain building can be used as a diplomatic facility or not.

By interpreting the definition of mission premises together with the provision laid down in Article 10, that requires a notification to the receiving state when certain members of the staff of the mission are appointed, and about their movements – as will be seen in Chapter 4 – it can be easily construed that, since a prior notification of the intent to establish an embassy in a certain building is not required, sending states are free to exercise their right of legation by appointing whichever facility they want as their diplomatically protected premises.[13] Nothing in the VCDR can be used to argue that states party to the Convention are internationally bound to seek permission by the receiving state in order to install their legation in certain premises, or even to notify their intent prior to the effective establishment of the embassy therein. The opening of new embassies due to the choice of establishing diplomatic relations between states that previously were not in contact, or even the choice to move an embassy from one building to another, could be done without any kind of notification to the receiving state; and the latter would still be bound by Article 22 to protect those premises by recognizing their diplomatic status, as long as they are used for the purposes of the mission. In addition, states should be free also in the choice of the particular title on which their possess of the buildings is based: as seen in Paragraph 2, mission premises fall under the shield provided by the special duty of protection regardless of their ownership status. Thus, states should be considered as conventionally autonomous when deciding whether they want to purchase the property of the land in which their missions are established, or if they want to enter into a rental agreement.

However, since it is not laid down in clear terms in the Convention, this freedom can be legally restrained or limited by the national legislation of receiving states. Indeed, since the VCDR does not provide either for an obligation upon receiving states to refrain from using their national sovereignty in order to regulate the matter, state practice sometimes shows that national authorities has decided to create certain requirements in order to grant mission

[13] Denza (n 1) 16.

premises the diplomatic status they need to be protected under Article 22. In particular the most used instrument, in order to limit sending states from establishing their mission in places that the receiving state deems to be not suitable for the fulfillments of the duties of the mission, is the duty imposed upon sending states to seek a prior consent with the relevant authorities in the receiving country.

U.S. legislation, as encompassed in the Foreign Missions Act 1982,[14] impose a duty upon sending states to notify the Secretary of State 'prior to any proposed acquisition, or any proposed sale or other disposition, of any real property'.[15] Consequently, the foreign mission could not proceed with the acquisition or disposition of the premises within a '60-day period beginning on the date of such notification'; during that time the Secretary of State could grant his consent or disapprove the use – or termination of use – of the buildings chosen as mission premises.[16] In addition, U.S. practice shows a meticulous approach even in the choosing of the location in which diplomatic missions could establish themselves within the District of Columbia: the Foreign Missions Act 1982 provides for a number of guidelines and regulations about the areas in which missions could acquire premises and their zoning.[17] Similarly, U.K. legislation dictate that 'where a State desires that land shall be diplomatic or consular premises, it shall apply to the Secretary of State for his consent to the land being such premises'.[18] Unless the express consent by the relevant authority is given, the premises used by diplomatic missions could not be regarded as having the diplomatic status that would grant them the inviolability and the protection enshrined in Article 22. Analogous requirements can be found in German practice, where the need for consent given by the Federal Foreign Office, although not encompassed in general legislation, is essential prior to the establishment of embassies into the facilities that the sending state would want to use.[19] Also the Australian Government has established in their Protocol

[14] Foreign Mission Act 1982, 22 USC 4301-4316.
[15] ibid s 4305(a).
[16] ibid.
[17] ibid s 4306.
[18] Diplomatic and Consular Premises Act 1987 s 1(1).
[19] Wagner, Raasch and Pröpstl (n 1) 131.

Guidelines that ‘once a mission […] has identified a specific location to relocate or establish [their premises] they must seek formal approval of the location from the Chief of Protocol’;[20] and if the said approval is not granted, the Government argues that they would not treat the diplomatic post as having the relevant diplomatic status under the VCDR.

The practice of requiring states to seek for approval before they establish their missions abroad in certain facilities is not solely permitted under the Convention, and consequently broadly accepted by states that chose not to deeply regulate the matter, but on the other hand can be seen as a practical way to comply with the obligations laid down in Article 22. In fact, if receiving states are under a special duty to protect the premises of the missions in their territories, it is certainly not unreasonable for them to try to influence the location of embassies in areas that they can easily guard. Practical arguments and territorial considerations could be safely used by receiving states to better implement their capacity to respect their duties, and should not be regarded as ways for them to effectively limit foreign missions in their freedom.

Lastly, the matter related to the effective choice of the land in which to locate embassies and diplomatic residences is influenced also by Article 21, paragraph 1, which lays down an obligation incumbent on the receiving state to ‘facilitate the acquisition, in accordance with its laws, by the sending State of premises necessary for its mission’ or to ‘assist the latter in obtaining accommodations in some other way’. Regardless of the potential need for a consent by the receiving state, nations could expect their counterparts to provide some kind of aidance when scouting for locations in which it would be possible to institute diplomatic missions. Customarily, that kind of help rested on international agreements stipulated between the two interested states: examples can be found in the agreements signed between the U.S. and the Soviet Union ‘providing for long-term leases, free of charge for a period of eighty-five years, of land for construction of complexes of embassy buildings in Moscow and in

[20] Australian Department of Foreign Affairs and Trade, ‘Protocol Guidelines: Diplomatic Missions: build, buy or rent’ <https://www.dfat.gov.au/about-us/publications/corporate/protocol-guidelines> accessed 15 April 2024.

Washington',[21] or between the U.S. and the U.K. regarding the location of the U.S. embassy in London.[22]

2.2. Commencement and termination of the diplomatic status of mission premises.

The definition contained in Article 1(i) does not contain either any precise indication on the duration of the diplomatic status of the mission's premises. Thus, different interests have to be balanced in order to set out a number of principles regarding the commencement and the termination of such status, and consequently of the duty of protection as encompassed in Article 22. Indeed, the states involved in a certain mission, although they share a common interest in the establishment of diplomatic relations between themselves, have opposite concerns. The sending state will usually want the facilities it has chosen to host its diplomatic mission to be considered inviolable as early as possible. On the contrary, the receiving state would prefer to protect those locations from a reasonable point in time, since abiding by the duties imposed by Article 22 can be costly, and a premature commencement of the diplomatic status would mean that early violations, even if the location is not yet used for the purposed of the mission – for example if it's still under construction – would already be regarded as breaches of the VCDR.[23]

To balance those two counterposed interests, scholars and state practice tried to lay down a number of principles that states could apply when deciding on the commencement of the diplomatic status of some premises. Firstly, it has to be duly noted that the acquisition of the facilities – by purchase or rental agreement – is an essential prerequisite for the beginning of the diplomatic status: mere intentions of acquiring a certain location could not be regarded as a legal basis from which inviolability arise.[24]

Still, the acquisition itself cannot be used to infer that the special duty of protection has already started. As seen in Paragraph 2.1., there is a number of

[21] Denza (n 1) 108.
[22] ibid.
[23] Wagner, Raasch and Pröpstl (n 1) 136.
[24] ibid.

states that require a prior notification of the intention of establishing the diplomatic mission in certain premises; and the legislation of those states usually provides that if the consent is not granted – or if it is withdrawn – the state is not bound to consider the location as having commenced to enjoy diplomatic status. This practice can be seen in the U.S., where the Foreign Mission Act 1982 authorizes the Secretary of State to impose, upon missions that have not abided by the duty of seeking the said consent, an obligation to 'divest' or 'forgo the use of' any building that had not been granted the diplomatic status.[25] Even more clearly, the U.K. legislation as encompassed in the Diplomatic and Consular Premises Act 1987 dictate that 'in no case is land to be regarded as a State's diplomatic […] premises […] unless it has been so accepted or the Secretary of State has given that State consent'.[26] From this practice scholars inferred that the duty of protection cannot be imposed upon states if they do not have a full knowledge of the intention of the sending state to establish its mission in a certain location. Thus, even if national legislation does not require the express approval by the receiving authorities, states are considered to be bound to notify the intention to use certain facilities as mission premises. Indeed, states cannot be made accountable for things they did not know: if sending states do not communicate in any way the acquisition of land or buildings and their intent to establish therein their diplomatic missions, receiving states are under no obligation to protect those premises since they cannot be responsible for something they had no knowledge of.[27] Thus, for some jurists it is clear that, both in states where the notification is required by law and in states where there's no legal obligation to seek approval, only after the consent of the receiving states is obtained the protection of the mission premises could commence.

However, other scholars, such as Denza, maintained that the opinions of the members of the ILC and the analysis of the Convention did not provide for the duty of notification as a clear and universal requirement. Indeed, the ILC was divided between the theory, as evidenced by some states' practice, that advocated for the beginning of the protection from the moment the notification of the

[25] Foreign Missions Act 1982, 22 USC 4301-4316, s 4305(b).
[26] Diplomatic and Consular Premises Act 1987, s 1(3).
[27] Wagner, Raasch and Pröpstl (n 1) 137.

intention of establishing diplomatic missions in certain premises was received by the relevant authorities in the receiving state, and the suggestion that inviolability should commence from the moment that those premises are made available for the use of the sending state.[28]

Nevertheless, whether or not the notification can be regarded as the moment from which inviolability arise, there is another great prerequisite without which the diplomatic status could not begin: as shown in Paragraph 2, to be considered as mission premises, the buildings should be used by the mission for the purposes of the legation. In the states where a prior consent is required by law, that consent can be regarded as the basis for a presumption of proper use of the facilities, since while determining if the permission could be given or not the relevant authorities should have already considered that the facilities chosen are suitable for the performance of the functions of the mission, and they should feel satisfied that the sending state would use those locations exactly for that purposes. [29] However, where that consent in not required, sending states should demonstrate that they intend to use the facilities in manners that are compatible with the purposes of the mission, when requesting receiving states to begin considering those facilities as having diplomatic status. To demonstrate that the premises are being used in order to fulfill the diplomatic functions that the mission should perform, 'a *note verbale* and the statements of the ambassador', in which he assert that the premises are used for diplomatic purposes, 'satisfy the requirements regarding the content and form of a proper assurance in order to establish *prima facie* the sovereign purpose of the use of the premises'.[30]

Another issue that concern the duration of inviolability lays in the fact that the necessity for the sending state to have the intent of using the premises for diplomatic purposes requires that relations between the receiving state and the sending state exist, or that there is an intent to reestablish or restore diplomatic relations when those were previously severed. Moreover, the buildings should be suitable for hosting a diplomatic mission that has to fulfill

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[28] Denza (n 1) 146.
[29] Wagner, Raasch and Pröpstl (n 1) 137-138.
[30] *Kenyan Diplomatic Residence Case*, 128 ILR 632 (BGH 2003) 638.

its purposes, thus it should be located in areas where diplomatic relations could be entertained, and should be physically capable of hosting a legation. Consequently, if inviolability had already begun due to the correct establishment of relations between states and the effective institution of mission premises in suitable buildings, nations could claim that the duties under Article 22 continue to be binding upon receiving states even in cases when those premises are vacated. However, in order to do so, they need to demonstrate that – even if relations broke off, or if other situations required for the premises to be abandoned temporarily – they have an intention to continue to have diplomatic intercourse between each other, and that the use of the previous premises for the fulfillment of diplomatic functions is still possible. This view can be seen in a group of similar cases discussed before the Supreme Restitution Court for Berlin in the Federal Republic of Germany, with regards to facilities previously owned by legations in Germany and later discontinued in their use due to their destruction or to the absence of diplomatic relations with West Germany. It was indeed stated that the diplomatic status of mission premises could not attach to buildings that 'are not used for the function of transacting diplomatic business with the local sovereign, and cannot so be used whether because they are substantially and unreasonably remote from the local capital, or for any other reason'.[31] In the considered cases, the interested facilities were 'located in West Berlin, where no diplomatic activities take place in the sense of relations between sending and receiving States through diplomatic envoys'.[32] In addition, the properties object of the litigation were 'vacant land, the buildings on it having been destroyed in the course of the last war'.[33] Therefore, only the actual and possible use for diplomatic purposes can be seen as the legal basic from which inviolability begins. Since 'the termination of their use for diplomatic purposes was not merely temporary',[34] those buildings could not continue to claim the inviolability provided by international law. It has to be noted that temporary

[31] *Tietz et al v People's Republic of Bulgaria*, 28 ILR 369 (Sup Rest Ct Berlin 1959) 382.
[32] ibid.
[33] ibid.
[34] *Weinmann v Republic of Latvia*, 28 ILR 385 (Sup Rest Ct Berlin 1959) 389.

termination could rise in cases of war, or when a mission is temporarily recalled or if relations.

Since mere temporary disuse of diplomatic premises does not forfeit the rights that the mission enjoys under Article 22, problems arise when considering the moment from which states could be relieved of their protection duties. A first case in which the duty of protection terminates can be found in the practice of those states where a prior consent is required by national legislation in order to establish a diplomatic mission in certain premises. Since that permissions can be withdrawn by the relevant authorities for various "internal" reasons, for example 'the safety of the public', or 'national security', or 'town and country planning',[35] states could consider the moment when the withdrawal is notified to the concerned legations the point in time from which they are no more obliged under the VCDR.

Another case when facilities lose their diplomatic status concerns those situations where the premises are no more used for the purposes of the mission, either because it has become impossible to do so – as explained before in this Paragraph in the West Germany cases – or simply because legations decide to move their offices from one location to another. It is self-evident that when a location is vacated by the mission, those buildings terminate to enjoy the protection and inviolability given by Article 22. In some instances, states would still be obliged to notify the receiving country of their intention to cease the usage of lands as diplomatic premises, as could be seen in U.K. and U.S. legislation.[36]

The most important case where the diplomatic status of mission premises could cease, however, happens in situations where relations between states are broken off and the foreign mission is forced to be closed. Article 45 provides that in cases such as the withdrawal of a mission, 'the receiving state must […] respect and protect the premises of the mission': this, however, does not entail that those premises are still to be considered as inviolable under Article 22. Thus, states officials could enter those premises, but have to reasonably protect the

[35] Diplomatic and Consular Premises Act 1987, ss 5(a), 5(b) and 5(c).
[36] Diplomatic and Consular Premises Act 1987, s 7; Foreign Missions Act 1982, 22 USC 4301-4316, s 4305(a).

buildings, 'even in case of armed conflict',[37] from external interference: in this case, the protection that is due to the premises is mostly intended in order to preserve the possibility of diplomatic relations to be reestablished, but inviolability is no longer granted. U.K. practice in a particular instance can be useful to better understand when mission premises should stop being considered as diplomatic grounds: that is, the case concerning the killing of a Woman Police Constable outside the Libyan People's Bureau – the Libyan embassy in London – on 17 April 1984. During an 'orderly demonstration' outside the embassy, 'shots were fired from the windows of the Bureau, killing Woman Police Constable Fletcher, who was on duty in the square' opposite to the embassy.[38] The case will be analyzed throughout this Chapter deeply; for the purpose of this Paragraph, it is sufficient to consider that the U.K. authorities did not enter the premises of the mission until relations were broken off with Libya – which happened on 22 April. After the rupture of the diplomatic intercourse between the two states, the English authorities imposed to the Libyans to evacuate their mission within seven days. Under the VCDR, for the U.K. authorities it would have been possible to enter immediately the former diplomatic premises in order to seize evidence of the shooting; however, they waited until the full seven-days period expired before entering the embassy, thus considering the building inviolable even after the formal termination of the mission.[39] From this practice it can be inferred that the duration of the diplomatic status of the mission premises, and consequently of their inviolability under Article 22, should continue for a determined period of time, that can be long enough to enable the staff of the mission to vacate the facilities and depart from their posting state. After that period, the premises shall not be considered as encompassed in the definition provided by Article 1(i), thus their inviolability can be infringed without breaching the VCDR.

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[37] Article 45(a) VCDR.

[38] Rosalyn Higgins, 'The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience' (1985) 79 AJIL 641, 643.

[39] ibid 644.

3. Inviolability: the negative duty of abstention from exercising sovereign powers.

First of all inviolability, as specified by Article 22, paragraphs 1 and 3, means that the receiving state is bound to refrain from performing a great number of actions, all falling under the category of sovereign powers, against mission premises. Since the emergence of embassies' inviolability, the expression was mostly used to signify that states could not under any circumstances violate the diplomatic grounds by entering them, or by performing certain actions that would impair the freedom and dignity of the mission. Inviolability can be seen as the negative side of the general right to protection that diplomatic posts enjoy. The receiving state's duty to respect inviolability is an obligation not to do, that can be fulfilled simply by refraining from exercising determined powers against the mission premises. No positive action is legally required in order to abide by the provision of Article 22(1) and 22(3): if receiving states merely renounce to their right of performing sovereign activities inside or against diplomatic facilities, they cannot be held responsible for any violation of the VCDR.

Article 22(1) provides the first and most evident form in which the abstention of the receiving state can be duly performed: 'the agents of the receiving state may not enter' the mission premises, unless they obtain first the permission of the sending state – represented by the head of the mission. Thus, states should restrain their agents – police officers, but also court officers, tax officers, etc. – from entering embassies or diplomatic residences in order to perform those duties that the national legislation impose upon them. In addition, the duty to respect inviolability could also be interpreted as being predominant in relation to the positive obligation encompassed in Article 22(2): thus, it is not possible for receiving states to justify any infringements of the mission compound's inviolability by invoking their duty to protect those premises provided in the VCDR.

A clear example of the obligation to respect inviolability can be found in the actions taken by the English government after the murder of Woman Police Constable Fletcher in 1984. After shots were fired from inside the Libyan embassy that PC Fletcher was guarding, the Libyan government and their

minister in London did not provide their consent for U.K. police forces to enter the premises in order to enforce the national law – that is, in order to search for evidence and to imprison the alleged murderer.[40] The U.K. government and the relevant police authorities – against the public opinion and the widespread outrage that condemned the events –[41] argued that they could not breach the inviolability of the Libyan People's Bureau, at that time still under the protection offered by Article 22, and decided to avoid the enforcement of their sovereign powers until the moment after when the facilities ceased to fall under the definition of Article 1(i), and consequently were no more inviolable. The House of Commons Committee for Foreign Affairs, asked after the shooting to conduct an inquiry about the actions of the government and the correct implementation of the VCDR in the U.K., concluded that there were actually no legal grounds for the government – and the police – to forcibly enter the premises of the Libyan embassy.[42]

The only moment when the entry of agents of the receiving state in diplomatic premises can be regarded as lawful and permitted is when the consent or the request by the head of the mission is obtained. States need to refrain themselves from entering embassies' facilities unless the representative of a foreign state needs the agents of the hosting nation to do so. It is self-evident that the VCDR provides for inviolability as long as the sending state wants to enjoy it, but it cannot be upheld against the will of the very subject in favor of which it is laid down.

Again, state's practice can be helpful to understand how the waiver granted by the head of the mission could be regarded as a solid legal justification in order to disregard the inviolability of diplomatic premises, and consequently for the agents of the receiving state to enter those. After a number of Iranian students entered the embassy of Iran in Washington D.C. in 1963, to 'deliver a petition', the local police was expressly asked in writing by ministers of the Iranian mission 'to enter the embassy, eject the students from the premises and arrest them because […] they had refused to leave upon demand' of the ministers

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[40] Denza (n 1) 121.
[41] Higgins (n 38) 644.
[42] Denza (n 1) 122.

lawfully in charge.[43] The students argued before the court that 'the District of Columbia police had no authority to enter the Iranian Embassy and arrest Iranian nationals for a crime committed within the confines of the Embassy'.[44] However, that opinion was dismissed since the court:

> [did] not think it unreasonable to hold that a police captain can enter the Iranian embassy and make an arrest for a misdemeanor committed in his presence when he has been called by one who purports to be the Minister of the embassy and is given a letter on official Iranian stationery asking the local police to disregard, for this one instance, the diplomatic rule of inviolability of the embassy and to lend aid in the ejection of violators.[45]

Consequently, as Article 22(1) clearly provides, states could not affirm that a breach of the VCDR has occurred if their head of the mission consented the entry of local agents within the premises of the mission.

Issues relating to the consent of the head of the mission can arise in two occasions. The first regards the possibility for the head of the mission to delegate his power to consent the breach of inviolability by agents of the receiving states. In this case, practice and expediency dictates that the delegation should be duly demonstrated 'to the outside world' in order for the relevant authorities of the receiving state to be sure that the consent received should be regarded as lawful, for example by notifying the effects of the delegation to the protective services tasked with the protection of the mission premises.[46] The second problem emerge in cases where the head of the mission is incapacitated or unable to give his consent to the entering of local agents in the embassy compound.[47] This may happens in times when the head of the mission is held hostage inside the mission premises, or in any other facility where it's impossible for the receiving state to obtain his permission – even if that permission, in such cases, would self-evidently be granted. Two solutions can be suitable in those situations. The first requires the receiving state to seek the approval directly from the sending state,

[43] *Fatemi v United States*, 192 A.2d 525 (DC CA 1963) 526-527.
[44] ibid 527.
[45] ibid 528.
[46] Wagner, Raasch and Pröpstl (n 1) 154.
[47] ibid.

for example by contacting its Ministry for Foreign Affairs or other relevant governmental departments that could grant that consent. The second option available is to consider the permission to enter the premises as presumed, since the very existence of an incapacity of the head of the mission and the possible risk for human life – such as in the case of hostage-taking – would imply and implicit consent by the sending state to enter its diplomatic buildings. Still, it remains ambiguous what the correct approach would be for states that wish to abide by the VCDR.[48]

From the inviolability provided by Article 22(1) stems the other immunities that mission premises enjoys, namely those encompassed in Article 22(3), which completes the former to create the framework of the duty of abstention from enforcing sovereign powers. Article 22(3) dictate that upon items listed in the first part of the provision it's prohibited to exercise any 'search, requisition, attachment or execution'. The list of protected objects contains not only mission premises as defined by Article 1(i), but also 'their furnishing and other property thereon and the means of transport of the mission': this consent to diplomatic missions to enjoy immunity from a great number of administrative enforcement measures to be performed against items that are necessary for the free exercise of the mission functions.

The immunity provided by Article 22(3) does not constitute a general immunity from the jurisdiction of the receiving state for the objects protected, but an exemption from compulsory seizure – whichever is the modality adopted, or the name of the legal instrument used by national legislations.[49] Indeed, although the list of prohibited action tend to reflect states' custom in designing their legal enforcement measures, it should be interpreted broadly, in order to proportionally meet the regulatory scope of Article 22(3). Every measure that can produce effects similar to those caused by searches, requisitions, attachments and executions should be considered as unlawful.

An example of measures that would constitute a breach of Article 22(3) is the seizure of embassies' bank accounts. There seems to be a generally

[48] ibid.
[49] ibid 163.

accepted rule of international law that considers them to fall under the shield provided by the VCDR even if they are not physically – as it is self-evident – located inside the premises of the mission that owns them. This practice is founded on the need to protect the means that the diplomatic mission have to perform their duties and functions: since bank accounts are usually employed for the cost management of the mission, they need to not be impaired by the receiving state. Even if it cannot be demonstrated that the account is used solely for the purposes of the mission, the general practice across a great number of states seems to understand the importance of granting a strong level of protection to embassies' money. The leading case from which this view can be inferred is the *Philippine Embassy Bank Account Case* (1977).[50] The court argued that under Article 22(3):

> Claims against a general current bank account of the embassy of a foreign State which exists in the [receiving State] and the purposes of which is to cover the embassy's costs and expenses are not subject to forced execution by the [receiving] State.[51]

Moreover, enquiries by the receiving state in order to determine if the bank account is used solely for the purposes of the mission, or also for matters that would not fall under the category of costs and revenues related to the diplomatic mission, should be considered as breaches of the VCDR since they would constitute an 'intrusion into the internal sphere of operation of the diplomatic mission […] that is prohibited'.[52] The Supreme Court of Austria concurred with this opinion, maintaining that, since it would be extremely difficult to prove that an embassy's account is used solely for private purposes and is totally not related to the fulfillments of the mission functions, 'general bank accounts […] are not subject to execution'.[53] The Italian Court of Cassation similarly held that 'the prevailing international tendency is to grant complete immunity for bank

[50] *Philippine Embassy Bank Account Case*, 65 ILR 146 (BVerfG 1977).
[51] ibid 150.
[52] ibid 189.
[53] *Embassy of "A" Bank Account Case*, 77 ILR 489 (Sup Ct A), 494.

deposits held in the name of foreign embassies'.[54] Other relevant confirmations of this practice can be found across other states' decisions.[55]

Missions' means of transport are strictly protected under Article 22(3), thus limiting almost every enforcement action that could be taken against them. Stopping, searching, towing away, or clamping diplomatic cars, for example, can constitute breaches of the VCDR since they impair the functions of the mission. However, the abuse of this type of diplomatic immunities led state practice to be more permissive when enforcing actions against diplomatic cars. If searching or clamping them is still regarded as a violation of the duty of the receiving state to refrain from exercising its sovereign powers, other measures that are less coercive or impairing can be taken. For example, cars can be towed away if they are parked in a way that limit or obstruct the traffic circulation.[56]

3.1. Listening devices and bugging of mission premises as a violation of premises' inviolability.

Breaches of the inviolability of mission premises provided by Article 22(1) can also consist in the bugging or installation of listening devices inside foreign embassies by agents of the receiving state, or with its complicity. Even though this practice is prohibited mainly under Article 27, that protect the freedom of missions' communications, thus falling outside the scope of the present Chapter, it could still be useful to touch upon the question.

As already seen, agents of the receiving states are banned from entering the premises of foreign legations. By interpreting broadly the concept of entrance, it could be argued that using listening devices in order to intercept sensible information, coming from inside the buildings used for the purposes of the missions, constitute a way of forcible entry inside the premises. Consequently, this practice would imply a breach also of Article 22(1). Moreover, bugging foreign embassies can also be construed as an unlawful way

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[54] *Banamar-Capizzi v Embassy of the Popular Democratic Republic of Algeria*, 87 ILR 56 (Cass IT 1989), 60.
[55] *In the Matter of the Application of Liberian Eastern Timber Corporation v The Government of the Republic of Liberia*, 89 ILR 360 (Dis Ct DC 1987); *MK v State Secretary for Justice*, 94 ILR 357 (CoS NL 1986).
[56] Denza (n 1) 132.

of performing a search, that is prohibited under Article 22(3) if conducted against mission premises – or against items that pertain to them.[57]

Although prohibited, bugging mission premises became a problem of great concern especially during the year of the Cold War, when on numerous occasions receiving states failed to comply with their duty to abstain from violating legation premises, since they actively undertook surveillance actions against diplomatic communications happening inside embassies.[58] Since embassies usually deal with sensible information, that have to remain confidential between the sending state and their representatives, the installation of microphones and wiretap constitute a subtle and devious violation of the VCDR. Contrary to blatant breaches of inviolability that occurs, for example, when forces of the receiving state forcibly enter foreign legations, the practice of bugging diplomatic buildings is oftentimes carried out discreetly, in ways that wouldn't let missions' staff know that they are being intercepted.

The issue of such violations of the Convention constitute a problem also with regard to the construction, or renovation, of diplomatic premises. If states have to rely on local contractors to build their embassies, they need to carefully consider the possibility for the receiving state to infiltrate its agents in the workforce in order to install microphones directly in the premises of the mission. For example, this was the case of the new U.S. embassy in Moscow commissioned in the Eighties: in 1985 the construction was halted due to the suspicion that agents of the Soviet Union implanted listening devices all throughout the building. After the end of the Cold War, the new head of the Russian secret services confirmed the suspicions, providing the U.S. ambassador in Moscow with the relevant evidence to show how the bugging of the embassy was conducted.[59] The problem of building embassies in order to enhance their security, however, will be analyzed later in this Chapter.

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[57] ibid 145;
[58] ibid 184-185.
[59] ibid.

4. The special duty of protection: the positive obligation to protect the premises of the mission.

Article 22, paragraph 2, lays down a duty that is at the same time contrary and complementary to the inviolability of premises discussed above: that is, the special duty of protection, a positive obligation that imposes on receiving states to take the appropriate actions to protect mission premises. If to abide by the duty of respecting inviolability states merely have to refrain themselves from exercising sovereign powers, in order to fulfill the obligation laid down in Article 22(2) they have to put an active effort in the protection of embassies and diplomats residences.

The first part of Article 22(2) requires all states that receive a foreign legation to 'take all appropriate steps to protect the premises of the mission against any intrusion or damage', thus laying down an obligation that is undetermined in its scope and that is affected by contingencies and the practical situation of every state. The protection required in order to prevent or put an end to intrusions on embassy grounds, and to prevent damages to its buildings, is not uniform across the globe and should be shaped around actual situations in the host country. The VCDR, by dictating that states have to take all appropriate steps does not lay down what those steps are, or how states should implement their protective policies in order to abide by their international duties: 'the Convention leaves what "steps" are "appropriate" to the discretion of the host state', thus 'the method for achieving the specified standard of care is left' to the assessment of the receiving country and its relevant security authorities.[60] Consequently, the duty provided by Article 22(2) is not absolute and should depend mainly on a number of contingent factors. Firstly, the level of threat that the mission is subjected varies greatly, depending on the international position of the sending state, the quality of the diplomatic relations between the latter and the receiving state, the geopolitical location of the mission, the internal context of the receiving state, etc. Secondly, receiving states have different protective capacities, since some of them need to deal with several internal problems – tumults, wars, and other critical events – that could affect their capacity to protect

[60] *Ignatiev v United States of America*, 238 F.3d 464 (CA DC 2001).

foreign missions, and others enjoys a relative local quiet that could lower the risks that missions face. Thirdly, the duty of protection is mainly carried out by laying down a cordon of physical security that is costly and requires several efforts from the security authorities of the receiving states, that sometimes could not accomplish their mission due to their lack of skills, infrastructures or training.

State practice varies deeply, depending on the conditions of the host country and its ability to provide effective measures of security. Usually, however, states that could provide a higher level of protection for diplomatic premises based in their territory are the ones that would require it less; on the contrary, states where contingent circumstances impose a higher threat level usually cannot furnish embassies with the required level of protection. Richer states usually accept an increased level of responsibility under Article 22(2) on themselves since they could afford to pay, train and provide a great number of security services for foreign legation. For example, in the U.S. a branch of the Department of State, the Diplomatic Security Service, is tasked with the protection of all diplomatic missions based in the American soil: the legislation provides that the 'security responsibilities [of the Secretary of State] shall include protection of foreign missions […] in the United States, as authorized by law'.[61] 'Under such regulations as the Secretary of State may prescribe, special agents of the Department of State […] may […] protect and perform protective functions directly related to maintaining the security and safety of […] foreign missions'.[62] In the U.K. the Parliamentary and Diplomatic Protection Command, a special unit of the London's Metropolitan Police Service, has the duty of protecting diplomatic posts such as embassies and diplomatic residences.[63] In Canada, the Royal Canadian Mounted Police 'is the agency responsible for discharging Canada's obligations for the protection of foreign […] missions'.[64]

[61] 22 USC 4802.
[62] 22 USC 2709.
[63] Metropolitan Police Service, 'Parliamentary and Diplomatic Protection' < https://web.archive.org/web/20170126165745/http://content.met.police.uk/Site/diplomaticprotectiongroup> accessed 18 April 2024.
[64] Canadian Department of Foreign Affairs, Trade and Development, 'Property: acquisition, disposition and development of real property in Canada' in *Policies, Guidelines and Key*

Providing a higher level of security services means that the receiving state accepts to be responsible under the VCDR to a higher level than those other states whose practice is based on a more restrict interpretation of the appropriate steps to take in order to ensure that embassies are protected.

The special duty is said to be limitless,[65] but the wording of Article 22(2) should be construed as to prevent states to be held responsible when attacks on embassies, intrusions or damages occur, if they undertook all the measures that they were capable of providing – even if those are limited by the local conditions of those states. In order to avoid being held responsible, states should take measures that are appropriate, necessary and adequate;[66] in addition, states should also rely on information provided by foreign missions themselves in order to better evaluate the risk level and to provide the adequate measures to every legation. Indeed, the duty imposed upon states by the VCDR is an obligation of means: this signifies that states are not bound to effectively impede any action that could impair the security of foreign missions – that would constitute an obligation of results – but they are "merely" obliged to enact every possible measure to protect those premises. If violations still occur, but the receiving state has implemented all the actions that it could have been taken, the duty has to be considered as respected.

The last consequence of the ambiguous wording of Article 22(2) lays in the fact that in the present matter, almost self-evidently, the tenet of reciprocity – a basic principle of international law – should not apply. The protection due to the Pakistani mission in Rome, *e.g.*, should not be compared with the protection that the Italian embassy should enjoy in Islamabad: the threat level and the local security problems should be the base for a different degree of measures put in place to abide by the duty imposed by the VCDR, regardless of reciprocity.

The special duty of protection requires states to impede every kind of intrusion on the mission premises, and more broadly it can be construed that the provision is laid down in order to protect diplomatic compounds from every

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Information, <https://www.international.gc.ca/protocol-protocole/policies-politiques/property-guide_lignes-directrices-immobiliers.aspx?lang=eng> accessed 24 April 2024.

[65] Wagner, Raasch and Pröpstl (n 1) 156.

[66] ibid 160.

external action or interference that can influence its peace and the capacity of performing its functions. The problem of demonstrations or actions, different from intrusion, that could pose a threat to the peace and the dignity of the mission will be analyzed in Paragraph 4.2. Here it is essential to better understand what are the steps that are customarily regarded as necessary in cases where intrusions – completed or solely attempted – happen.

The first step that national authorities are required to take is to prevent any attack that could lead to a breach in diplomatic grounds: protection from intrusion means firstly that such violations should be avoided and stopped before perpetrators could reach the inside of embassies. State practice usually provides that receiving states use their police or military forces in order to safeguard the outside of protected premises, patrolling the surrounding of the buildings in order to halt every attempt to enter foreign missions without cause, or consent, and with the intention to intrude the facilities. In addition, preventing intrusions means that when the security risk increase – due to uprisings, mobs, or other threats – the hosting state is bound to deploy additional forces: for example, implementing their special duty of protection, the U.S. legislation mandates that the Secretary of State can 'provide extraordinary services for foreign missions directly, by contract, or through State or local authority to the extent deemed necessary'.[67]

If the receiving state is not able to prevent intrusions in foreign mission premises – for they were unforeseeable, or simply impossible to prevent and halt before they were perpetrated – then the special duty of protection needs to be carried out in different ways, in order to not incur in international responsibility, or to limit its extent. Whenever intruders are already located in the premises of the mission, local authorities are bound to remove those persons from embassies or diplomatic residences, and to reinstate the correct possess of the buildings, thus giving them back to the legation representatives. In doing so, receiving states should consider that, since to remove occupants they would need to entry the facilities, they need to seek for the approval of the head of the mission, or a representative that was delegated to give the consent required by Article 22(1),

[67] Foreign Missions Act, 22 USC 4301-4316, s 4314.

or the sending state's government. Thus, in carrying out actions that could be construed as an abidance to Article 22(2), the supreme interest of protecting the mission's inviolability should prevail. The practice of requesting the prior consent in order to take action against intruders that occupy mission grounds can be seen in the case concerning the intrusion and hostage-taking inside the Iranian embassy in London in 1979. Before authorizing the forcible entrance of military forces inside the embassy in order to regain control of the building, the U.K. government sought the consent of the Iranian regime – since the head of their mission was held hostage inside the premises – and only after they were authorized to do so the intervention of the Special Air Service took place.[68]

4.1. Case study: the Teheran hostage crisis 1979.

Although embassies have been oftentimes targeted by political activists and terrorists, thus implying that a number of actions had to be undertook by receiving nations to impede or contrast occupations, practice shows that states normally accept their responsibility and their duties under the Convention. Usually they abide by the international rule that impose to prevent attacks on embassies, and if those attacks occur states try to do everything they are capable of to reinstate the peace and security of the diplomatic missions. However, the events that took place against the U.S. embassy in Teheran in 1979 showed that sometimes, state-backed assaults could happen. The illegal occupation and hostage-taking by Iranian nationals, later recognized by the Iranian government as their agents, can be regarded as the leading case in which the duty of protection was interpreted and substantiated by the International Court of Justice, showing how the responsibility of Iran arose particularly due to their noncompliance with the duty imposed by Article 22(2).

The sequence of events that led to the occupation of the U.S. embassy is essentially the following. As early as February 1979, an armed mob already entered the premises of the American compound, taking some hostages; the government of Iran, even if they had not been able to prevent the attack, quickly intervened and sent a number of officials, together with police and military

[68] Denza (n 1) 134.

forces, to quell the disturbance.[69] Formal apologies were sent to the American ambassador by the Iranian Prime Minister, and assurances that any other attack would have been prevented were given to the U.S. mission.[70] In October, since the political tension between the two states was increasing, requests were made by the American legation in order to be assured that possible storming of their embassy would have been promptly prevented and sedated by the local authorities; those promises were in fact given, and it was said that the police was instructed to fully safeguard the compound.[71] On 1 November, demonstrations began before the U.S. embassy, but the already present contingent of police and military forces was able to protect the mission premises without difficulties.[72] On 4 November 1979 a large crowd stormed the American compound, seizing the premises of the legation and taking as hostages all the members of the mission; 'the Iranian security personnel are reported to have simply disappeared from the scene' and all the calls for help made from the embassy and officials from the U.S. were disregarded by local authorities.[73] From that moment, the Iranian government didn't try in any way to remove the occupants from the mission or to rescue the diplomats and the other persons that were taken as hostages.[74]

The ICJ found that Iran had incurred in international responsibility under Article 22(2) by breaching the rule in two different ways. Indeed, the events can be divided into two phases: the first one taking place when the demonstrators entered the premises; the second one commencing when the Iranian authorities avoided any intervention after the U.S. embassy was totally occupied.

In the first phase, the duty of protection that Iranians should have abided by mandated that police or military forces, present at the scene, should have dealt with the mob as they did on multiple occasions before, protecting the compound from any intrusion. In its findings, the ICJ clearly maintained that the Iranian

[69] *United States Diplomatic and Consular Staff in Teheran* (United States of America v Iran) (Judgment of 24 May 1980), ICJ Rep 1980, para 14.
[70] ibid.
[71] ibid para 15.
[72] ibid para 16.
[73] ibid para 17-18.
[74] ibid para 21.

government was aware of its duties under Article 22 of the VCDR, as well as of the immediate need for intervention at the U.S. embassy.[75] At the same time, Iran did not comply with its obligations, even if it had the means of intervening promptly and decisively – since it had already done so in previous occasions.[76] By letting the mob took over the embassy's premises, and taking diplomats as hostages, Iranians failed to follow their duties by remaining inactive in a moment when Article 22(2) would have required them to prevent – in any way possible – occupants from reaching the inside of the U.S. facility.

During the second phase, the most blatant violation of the VCDR occurred because of the unlawful behavior of the Iranian government. After the occupation of the embassy was completed, Article 22(2) still provided for the receiving state to take all the necessary actions to bring it to a halt, thus removing all the intruders from the premises of the embassy and letting U.S. diplomats regain the possess of their facilities. The ICJ argued that on Iran fell on a 'plain duty […] to make every effort, and to take every appropriate step, to bring these flagrant infringements of the inviolability of the premises […] of the United States Embassy to a speedy end'.[77] However, the Iranian regime remained completely inactive; on the contrary, it breached again the special duty of protection by claiming as its own the actions perpetrated by the intruders. Giving the 'seal of official government approval' to the mob that occupied the embassy, Iran showed no respect to its international obligations under the VCDR.

4.2. Protection against demonstrations.

Article 22(2) provides not only for the duty to physically protect embassies in cases of attempts of intrusion or others attacks directed towards the buildings themselves, but also dictates that receiving states are under a special duty 'to prevent any disturbance of the peace of the mission, or impairment of its dignity'. Essentially, the provision put states in a difficult position when dealing with actions – such as mobs, demonstrations, or picketing– that could be construed as impairing the dignity of the mission, or disturbing the peaceful

[75] ibid para 68.
[76] ibid.
[77] ibid para 69.

conduct of functions inside mission premises, but that would nonetheless constitute a free exercise of the political freedom of speech if not directed towards embassies buildings. In fact, diplomatic facilities are easily targeted by political demonstrations when the public wants to protest the policies of sending states;[78] however, the increased sensibility towards political rights and freedom of speech put receiving states' officials in a difficult position. On one hand, they are under an international duty to prevent any damage to the dignity of foreign missions, thus they should act in order to promptly stop any congregation that has the intent to demonstrate in areas located within mission facilities. On the other hand, it could be argued that if demonstrations are not directly assaulting embassies, and they do not prevent foreign diplomats from conducting their businesses, officials of the receiving state should avoid to disperse the crowd, allowing them to peacefully express their opinions, since it is part of their constitutional rights – as also recognized by the international community.

U.S. practice in dealing with the difficult balance between international obligations and constitutional rights can be used in order to provide an example on the complications that states face when interacting with the matter of demonstrations outside foreign legations. In addition, the solution finally upheld by U.S. authorities shall be regarded as a solid practice upon which other states could abide by in order to consider their policies on interventions against mobs within the scope of Article 22(2), thus not in breach of any international obligation.

The relevant national legislation in the U.S. was firstly adopted by a Joint Resolution of the U.S. Senate and the U.S. House of Representatives in 1938, that made unlawful:

> To display any flag, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government, […] or to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government, […] or to intimidate, coerce, harass, or bring into public disrepute any […] diplomatic […] representatives […], or to interfere with

[78] Denza (n 1) 140.

> the free and safe pursuit of the duties of any diplomatic […] representatives […], within five hundred feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative or representatives as an embassy, legation, […] or for other official purposes.[79]

In addition, it was also made unlawful:

> To congregate within five hundred feet of any such building or premises, and refuse to disperse after having been ordered so to do by the police authorities of the said District.[80]

The Resolution was upheld as constitutional by the Court of Appeal of the District of Columbia,[81] since it determined and specified in clear terms how the duty of protecting mission premises – at that time provided only by international custom – had to be implemented into U.S. practice, creating a safe perimeter around foreign legations in order to grant them the peace and dignity they needed to perform their function. The court argued that it was expedient for the government to implement such a regulation, since it provided mission premises located in the U.S. with a level of protection that could grant American diplomats abroad to enjoy a similar peace and quiet around their premises, due to the principle of reciprocity. In addition, the court maintained that everybody had a constitutional right to express their feelings and opinions on foreign governments and policies – the case specifically concerned demonstrations before the German embassy at the dawning of Second World War – but 'they had not the constitutional right […] to make an offensive demonstration in front of an embassy or in front of a legation, the residence of a diplomat'.[82] Freedom of speech was thus seen as it could be lawfully limited in cases where the protection of international interests of the U.S. had to be upheld, and the restrictions provided by the regulation were regarded as reasonably imposed.

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[79] Joint Resolution to Protect Foreign Diplomatic and Consular Officers and the Buildings and Premises Occupied by Them in the District of Columbia 1938, reported in 32 supp AJIL 100.
[80] ibid.
[81] *Frend et al v United States*, 100 F.2d 691 (DC CA 1939).
[82] ibid 693.

In 1981, after the entry into force of the VCDR, the Resolution of 1938 was transposed into a statute of the District of Columbia,[83] and questions of its adherence to the U.S. Constitution were again brought up. In the case of *Finzer et al. v. Barry* (1986)[84] the same Court of Appeal of D.C. maintained that the statute served the purpose of enacting the duties encompassed under Article 22(2) of the VCDR, thus emphasizing how the obligation to prevent any disturbance of the peace and dignity of foreign missions could have been duly respected by prohibiting both the display of signs that could disrupt the integrity of foreign missions' peace and the congregation of people in proximity of protected facilities. By maintaining that 'there are unique obstacles to providing adequate security to foreign embassies',[85] in particular those posed by the inability for the receiving state to maintain a police presence inside the facilities, the court held that the regulation was one of the only ways that the U.S. could abide by their international duties under the Convention. And, it was held, it was also a constitutionally valid way of executing those obligations.[86] Indeed the court, analyzing the balance of interests set out by the D.C. statute, argued that the limitation to political freedoms therein was of a 'very minimal extent'.[87], and in conclusion, it upheld the constitutionality of the interested norm since:

> It does not eliminate any point of view from [the] political discourse, but sets aside the space immediately surrounding foreign embassies as an area free from hostile protest. The unique restrictions imposed are justified by the unique interests that are at stake.[88]

Still, regarding the ban on congregations that formed in the protected area, the court stated that it could be upheld only if interpreted in a way that would make it consistent with the Constitution. Since the statute had the purpose to protect mission premises from any interference on their peace, dignity, and functions,

[83] 22 DC Code 1115.
[84] *Finzer et al v Barry*, 798 F.2d 1450 (DC CA 1986).
[85] ibid 1461.
[86] Lee B Madinger, 'Free Speech in Public Places: Application of the *Perry* analysis in picketing cases' (1989) 11 WLR 267, 275.
[87] *Finzer et al v. Barry* 1459.
[88] ibid 1477.

congregations could have been ordered to disperse only when 'the police reasonably believe that a threat to the security or peace of the embassy is present'.[89]

The arguments provided by the court could have been used to infer that states, in order to abide to the special duty of protection encompassed in Article 22(2) of the VCDR with regard to the safekeeping of the missions' peace and dignity, should have set out regulations in order to prevent the gathering of violent crowds nearby protected places, and the display of any sign that showed antagonism to foreign governments in the vicinity of legations.

However, the interests that had to be balanced, namely those of providing security for foreign missions and upholding the right to free speech, were of such importance that the matter was brought before the U.S. Supreme Court. In the judgment in *Boos et al. v. Barry* (1988)[90] the court divided the provision encompassed in the D.C. regulation in two parts: the first one, called 'the "display" clause',[91] prohibited the display of any sign criticizing foreign governments within a 500-foot zone that surrounds protected premises; the second part, called 'the "congregation" clause'[92], banned any assemblage of more than three people in the same area as the previous one, and granted the police the authority to order their dispersion. As the Court of Appeal held in the appellate ruling, the "congregation" clause was considered constitutionally valid if construed as to 'not prohibit peaceful congregations', and if 'its reach is limited to groups posing a security threat'.[93] The "display" clause, however, was considered as an infringement of the Constitution since it prohibited only a certain category of speeches and actions, namely those critical of foreign governments. Thus, by limiting only the display of a limited amount of signs, the statute did not fulfill the purpose of protecting diplomatic missions' dignity as a whole. Indeed, if the regulation was created to prevent *any* type of display of signs to be executed in the protected area, it could have been rightfully used to avoid 'congestion, […] interference with ingress or egress, […] visual clutter'

[89] ibid 1471.
[90] *Boos et al v Barry*, 485 US 312 (US 1988)
[91] ibid 316.
[92] ibid.
[93] ibid 331.

within embassy premises.[94] However, since it aimed to shield embassies *only* from critical speeches, it was not seen as targeted to completely fulfill the international obligations under the VCDR. On the contrary, it aimed to limit a certain category of displays, thus unlawfully limiting the freedom of speech of U.S. citizens. The court held that it could have been argued that the showing of favorable signs within the sign-free zone would have similarly impaired the dignity and the right to peace of foreign missions; but by permitting those displays the regulation showed that it was promulgated only to limit the freedom of speech of citizens antagonists to foreign governments' policies and not for the protection of embassies dignity.

The U.S. Supreme Court concluded that a narrower approach should have been taken by the D.C. government in order to let the U.S. abide by their duties under Article 22(2) of the VCDR. To summarize the suggestion of the court, only those displays of signs that would impair the security of the mission, or that are intimidating, coercive, threatening, or harassing could be banned; any other prohibition would constitute an unlawful and useless limit to the freedom of speech and the freedom of assembly. Nevertheless, the difficulties that were encountered in the U.S. when dealing with the need to balance an international obligation with a right recognized in the Constitution show the issues that the interpretation of the VCDR pose.

As briefly said above, other states' practice shows that the road taken by the American courts and government is considered as completely adhering to the duties encompassed in the Vienna Convention. Consequently, states could avoid incurring in international responsibility if they limit themselves to protect diplomatic premises from actions that would disturb the peace and dignity of the mission solely if those demonstrations constitute a risk for the security of the mission or its members, or if the signs displayed are intended to intimidate, coerce, or threat the latter. If demonstration are held peacefully and they do not pose an issue for the very security of the mission, sending states have no rights to require the receiving state to limit the freedoms of their citizens. An example of other states practice could be that of Australia: its national legislation provides

[94] ibid 321.

that an assembly can be ordered to disperse by police authorities, if it is located nearby diplomatic building, only if it involves 'unlawful physical violence [...] or unlawful damage', or if it is aimed to assault, harass, offend, or obstruct the peace and dignity of the mission.[95] Any other demonstration have to be considered as lawful and states that let people express their opinions peacefully cannot incur in international responsibility.

5. Extraordinary situations: fire, terrorist attacks, misuse of the diplomatic premises, etc.

Despite the attempts made by some delegations during the codification process in the Vienna Conference to limit its scope, Article 22 is an absolute one. It provides for mission premises inviolability and protection without any safeguarding clause for receiving states to invoke if they feel the absolute need of breaching their international obligations – in order to protect other, more relevant interests, namely those of safeguarding the life of people. In fact, some states tried to force into the VCDR a clause that would bound heads of missions to 'co-operate with the local authorities in case of fire, epidemic or other extreme emergency',[96] or a clause that served to construe that Article 22 'shall not prevent the receiving State from taking such measures as are essential for the protection of life and property in exceptional circumstances of public emergency or danger'.[97] However, these attempts were unsuccessful, since the principle of inviolability of mission premises was considered as having such a great importance that it could not be limited in any way, not even in extraordinary situations that would pose a threat to human life or the very preservation of the receiving state itself.

Still, the interpretation of the Convention let some issues arise in cases where such emergencies occur. Leaving aside the situations where, under Article 22(1), the consent of the head of the mission or of the sending state itself is granted in order to enter mission premises, states oftentimes questioned whether

[95] Public Order (Protection of Persons and Property) Act 1971, s 17, 18 and 20.
[96] UN Conference on Diplomatic Intercourse and Immunities, 'Mexico amendment to article 20' (13 March 1961), UN Doc A/CONF.20/C.1/L.129.
[97] UN Conference on Diplomatic Intercourse and Immunities, 'Ireland and Japan: amendment to article 20' (14 March 1961), UN Doc A/CONF.20/C.1/L.163.

there exist a right to violate embassies grounds during serious and extraordinary emergencies, or if they should always restrain themselves from entering those facilities even if life-threatening events are taking place. Such event could be exemplified by fires inside or around foreign missions buildings, the occurrence of other natural calamities in the receiving state, the spreading of diseases or epidemies, terrorist attacks inside the premises – all falling under the idea of *force majeure* emergencies. In addition, even the misuse of embassies grounds by the diplomatic staff of the mission, amounting to criminal activities inside protected compounds, had been considered as falling within the idea of extraordinary situations.

In any of those occasions, states face a legal dilemma when deciding if they are justified to violate Article 22, or if they need to abide by the principle of inviolability to the greatest extent possible – that is, until the concerned buildings fall within the concept of mission premises laid down in Article 1(i), they must be considered absolutely inviolable. Consequently, the question concerns a crucial point in the interpretation of the entire VCDR: scholars, judges and state practice are not unequivocally certain if the basic tenet of international law, that is the right to self-defense, should apply. As already saw in the previous Paragraph, since the inviolability of mission premises is considered absolute, states oftentimes must determine if their international obligations can override the protection of national interests and rights, or if they can disregard Article 22 for the sake of protecting public safety.[98]

Self defence would allow receiving states, without the explicit consent of the head of the mission, to enter foreign legation premises whenever their local authorities feel that an extraordinary emergency situation arose. For some scholars, 'the doctrine of self-defense', even if not encompassed in the VCDR, 'remains […] a legitimate exception to the general principle of diplomatic inviolability'.[99] Thus, in cases where there is a need to prevent any harm to persons that could occur during the emergency event, states can lawfully breach

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[98] Yinan Bao, 'The Protection of Public Safety and Human Life vs the inviolability of Mission Premises: a Dilemma Faced by the Receiving State', in Paul Behrens (ed), *Diplomatic Law in a New Millennium* (Oxford University Press 2017) 149.

[99] John S Beaumont, 'Self-Defence as a Justification for Disregarding Diplomatic Immunity' (1991) 29 CYIL 391, 398.

their international obligation under Article 22.[100] The doctrine of self-defense was also advocated by some states in order to justify their forcible entry into mission premises to safeguard their internal security, maintaining that inside the stormed embassies there had been serious violations of the purposes of the missions or even criminal activities. Examples can be found in the actions taken by the Pakistani police in 1973 against the embassy of Iraq in Islamabad, justified by the government since they were searching for illegal guns,[101] or in the seizure of the U.S. embassy in Teheran in 1979, endorsed by the Iranian government because it was said that the compound was used as a spy center by the Americans in order to intrude into the national affairs of Iran.

However, the prevailing opinion advocate for the opposite solution, thus prohibiting receiving states from exercising their right to self-defense in occasion where they would need to breach Article 22. There are a number of arguments against invoking justifications such as self-defense in order to enter the premises of foreign missions: some of them are relevant due to expediency and the need for states to protect their interests; others are drawn from the text of the VCDR and the nature of the debate that was held during the Vienna Conference; still others are encompassed in some judicial arguments, of which the most authoritative is again provided by the ICJ in its judgment about the seizure of the American embassy in Iran.

Firstly, expediency impose upon sending states to duly evaluate whether they intend to consent to the entry of local agents inside the premises of embassies. By invoking self-defense as a way to enter without permission, receiving states breach the right of the head of the mission to authorize local agents to set foot inside embassies. And a number of cases showed that granting local authorities to enter, even in cases where life-threatening situations occurred such as fires inside the legation buildings, was not always the best option for the sending state. Examples can be found in the intrusion perpetrated by agents of the Soviet security agency (the KGB), disguised as firefighters, during the breakout of fires inside the U.S. embassy in Moscow in 1977 and 1991: in both

[100] ibid.
[101] Wagner, Raasch and Pröpstl (n 1) 147.

cases sensible information were pulled out of the mission premises.[102] It has consequently been maintained that state practice across the years 'has confirmed that in the extremity of fire or riot, missions will struggle to protect or to destroy their archives [and their premises] rather than call on local emergency services'.[103] Thus, giving the receiving state the power to breach the inviolability provided by Article 22 in the name of self-defense or the safeguard of human life is considered a problem across many states. Governments, consequently, find expedient to avoid giving credit to the opinion that finds in self-defense a legal justification for the violation of international obligations as provided by the VCDR.

The second reason that was adduced in order to limit the use of self-defense has already been introduced at the beginning of this Paragraph. As said, Article 22 provides for the absolute inviolability of mission premises, and the works of the Vienna Conference underlines the opinions upon which states advocated for when refusing to implement the proposals of Mexico, Ireland, and Japan. In the words of the Soviet delegate, 'the danger of allowing the receiving State to judge whether exceptional circumstances permitted it to enter the mission premises without the consent of the head of the mission was still more serious'[104] that the concern about the possible abuse of diplomatic inviolability if exceptional circumstances were not encompassed in Article 22. Since states could not reach an agreement on what may had been the correct explicit formula to provide for those situations in which the duty to respect inviolability could be lawfully breached, it can be argued that they also struck out the possibility for implicit exceptions to the immunity provided by Article 22, thus eliminating the possibility to resort to self-defense. In addition, the same opinion can be maintained in the light of the paired Vienna Convention on Consular Relations 1963,[105] where in Article 31 it is laid out that 'the consent of the head of the

[102] Bao (n 98) 154.
[103] Denza (n 1) 119.
[104] UN Conference on Diplomatic Intercourse and Immunities, 'Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole' (2 March – 14 April 1961), UN Doc A/CONF.20/14, 137.
[105] Vienna Convention on Consular Relations (adopted 24 March 1963, entered into force 19 March 1967) 596 UNTS 261 (hereinafter VCCR).

consular post [to enter the consular premises] may, however, be assumed in case of fire or other disaster requiring prompt protective action'. Consequently, if states parties to the VCDR – that are almost the same as those parties to the VCCR – expressly avoided to insert a similar provision in the text of the Convention, it is self-evident that justifications found only in general international custom, not relating to the practice of diplomatic intercourse, cannot be used to breach Article 22.

However, the most comprehensive argument against the use of any external clause to justify the violation of the international duty to respect the inviolability of mission premises is found in the judgment of the ICJ in the Teheran case, as mentioned before. Indeed, even if those justifications were not brought to the attention of the court in manners compatible with the rules of procedure of the ICJ, Iran sought to defend their endorsement of the seizure of the American diplomatic compound by arguing that criminal activities, including espionage and subversive actions, took place therein, thus authorizing the occupation of the U.S. embassy.[106] The court maintained that, even if Iran had proved that similar criminal activities took place within protected grounds, it would have been unable to regard at those 'as constituting a justification of Iran's conduct'.[107] The ICJ stated that the VCDR provided enough instruments that receiving states could use at their discretion if alleged crimes had been committed inside embassies – those will be discussed in Chapter 4 since they mostly involve the issue of protecting diplomats and not diplomatic premises. Consequently:

> The rules of diplomatic law, in short, constitute a self-contained régime 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, foresees their possible abuse by members of the mission and specifies the

[106] *United States Diplomatic and Consular Staff in Teheran* (judgment of 24 May 1980) para 80-82

[107] ibid para 83.

means at the disposa1of the receiving State to counter any such abuse.[108]

Given that the Iranian government had not resorted to the instruments that the VCDR provided if they felt that the U.S. diplomatic presence in Iran became unwelcomed, unwanted, or even criminal, they could have not expected the ICJ to justify their backing of the assault perpetrated against the premises of the American embassy. Iran had no legal right to invoke self-defense of their national interests even in an extraordinary case – that is, if they feared that criminal activities took place within the protected buildings.

Of the same advice was the arbitral commission that examined the case of *Eritrea v. Ethiopia*.[109] Ethiopia argued that its sealing off of the Eritrean embassy residence was justified because 'it had "credible internal intelligence and national security reports" that Eritrea was using the Residence for illegal purposes', namely 'to stockpile weapons and to counterfeit money'.[110] Thus, in the eyes of the respondent state, it had a right to self-defense in order to protect their national interests and to safekeep their internal order. The arbitral commission, however, maintained that 'even if the Respondent had presented evidence supporting the reasonableness of its suspicion […] there would still be no legal defense for Ethiopia's admitted "sealing off" of the Residence';[111] this because the inviolability provided by Article 22 is absolute and knows no exception, not even in cases of extreme situations.

6. Punishment of crimes committed against diplomatic premises.

The VCDR does not oblige states to implement or modify their national legislation in order to punish crimes committed against diplomatic premises. The duties encompassed in Article 22, especially the special duty of protection provided in paragraph 2, constitute the only action to which states could be bound, and which may let their direct responsibility arise. Article 22(2), as seen, request states to take all the appropriate measures to physically prevent, or put a

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[108] ibid para 86.
[109] *Diplomatic Claim—Eritrea's Claim 20 (Eritrea v Ethiopia)* (Partial Award of 19 December 2005) 26 RIAA 381.
[110] ibid para 45.
[111] ibid para 46.

halt to, any kind of intrusion or assault that is perpetrated against diplomatic compounds. If states could prove that they did everything that they could have done to prevent assaults, without being successful, and if they comply with their obligation to reinstate the previous situation by removing violators from the premises, they do not incur in international responsibility. This is because they are only indirectly responsible for acts of individuals that are not considered states' agents.

However, states oftentimes implement in their national regulations provisions that prosecute and punish wrongdoers if they commit acts that put their state in the inconvenient position of having to take actions in order to fully respect their duty of protection under the VCRD. Prosecution of crimes against diplomatic premises, consequently, has become frequent, because sending states usually regards the punishment of individuals as a satisfactory way to fulfill the duties provided by Article 22 and to avoid incurring in responsibility.[112] That opinion applies only provided that the receiving state has successfully prevented, or promptly halted the crime, and that public agents of the said state are not actively involved in the perpetration of the attacks against embassies and other diplomatic posts.

Again, the reference point to analyze the practice of punishing crimes against protected buildings is the practice of the U.S. After the Supreme Court stated that the restrictive regulations of the District of Columbia were unconstitutional, as seen in Paragraph 4.2, the relevant legislation that remains is the one provided by the federal authorities. In particular, the U.S. Code makes unlawful to make, or attempt to make, 'a violent attack' against the 'official premises, private accommodation or means of transport' of foreign missions.[113] In addition, it has to be prosecuted whoever, 'within the United States and within one hundred feet of any building or premises in whole or in part owned, used, or occupied for official business or for diplomatic […] purposes', 'congregates with two or more other persons with intent to violate any other provision' contained in the same section, that provides for the punishment of crimes committed

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[112] Clyde Eagleton, 'The Responsibility of the State for the Protection of Foreign Officials' (1925) 19 AJIL 293, 296.
[113] 18 USC 112(a).

against protected persons and buildings.[114] Additional charges could be brought against 'whoever willfully injures, damages, or destroys, or attempts to [do so against] any property utilized or occupied by any foreign government'; and against those who trespass on diplomatic premises.[115]

Another example of the practice of establishing the punishment of crimes committed against diplomatic facilities can be seen in Australian regulations. In Australia it is made unlawful to carry out assemblies within protected premises 'in a manner involving unlawful physical violence to persons or unlawful damage to property'.[116] In addition, 'a person who trespasses on protected premises commits an offence', and the same does whoever 'engages in unreasonable obstruction in relation to the passage of persons or vehicles into, out of or on protected premises', as well as whoever 'while trespassing on protected premises, behaves in an offensive or disorderly manner; or being in or on protected premises, refuses or neglects to leave those premises'.[117]

By prosecuting those crimes, after they have been attempted and successfully prevented, or after they have been carried to conclusion or halted during their execution by local authorities, the receiving state usually avoid to incur in international responsibility.

7. Receiving state's liability of compensation in cases of violations of Article 22 VCDR.

The special duty to protect the premises of the mission against any damage that may occur during protests, attacks or other political events imply that receiving states are responsible for any of those damages that they failed to prevent. Thus, they are liable to make reparations to the sending government if they are found in breach of Article 22(2). As the ICJ maintained, after finding that Iran 'has incurred responsibility towards the United States' for its breaches of the VCDR, the said responsibility 'entails an obligation on the part of the

[114] 18 USC 112(b).
[115] 18 USC 970.
[116] Public Order (Protection of Persons and Property) Act 1971, s 15.
[117] ibid s 20.

Iranian State to make reparation for the injury thereby caused to the United States'.[118]

The responsibility that arise from violations of the Convention is of no special character: the general tenets of international law regarding the scope of that liability apply without variations. The legal consequence if the state is found liable of having breached its duty of protection is an obligation to pay compensations, as a principle of general international customary law.

However, problems arise when the damages occurred to the properties of foreign legations, namely to their buildings and the other objects protected under Article 22, are caused by private third parties, not affiliated with the receiving state. In such cases, if the state itself has not incurred in international liability because it was impossible to reasonably prevent the damages, and that any adequate step has been take, state practice shows that it is customary to make *ex gratia* payments to the offended sending state.[119] *Ex gratia* compensations are paid without any kind of recognition of a legal obligation to pay by the receiving state, since they are made when violations of the duties under the VCDR have not been committed. They objectively imply that the state in which the damages to the properties of the missions occurred has not violated the duty of protection, and that payments are made only out of international courtesy and expediency.

German practice, for example, shows that *ex gratia* payments are granted only if some preconditions are met: the damages have to be the result of a violent intervention against mission premises, an application for compensation has to be made by the foreign mission's government, and the latter has to present a 'warrant of reciprocity' to the German government.[120] In addition, if the third party that caused the damages is known, Germany claims compensation to the latter in the amount that the Federal Republic has paid to the aggrieved sending state.[121] If those conditions are met, reparations are granted out of courtesy and the government does not recognize in any way that it is under a legal duty to pay. Similar conditions are required by Canadian authorities in order to make *ex*

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[118] *United States Diplomatic and Consular Staff in Teheran* (judgment of 24 May 1980) para 90.
[119] Denza (n 1) 138; Wagner, Raasch and Pröpstl (n 1) 165-166.
[120] Wagner, Raasch and Pröpstl (n 1) 166.
[121] ibid.

gratia payments: in 1968 they advised foreign missions in their territory that 'in Canada, the policy is to make such compensation when damages are not covered by insurance, when caused for political reasons, and if there is clear understanding that payment is made on the basis of reciprocity'.[122] A note of the Foreign and Commonwealth Office of the U.K. similarly argued that, since 'HMG deploys a special force [the Parliamentary and Diplomatic Protection Command] to ensure that diplomatic premises receive adequate protection', thus abiding by the duty of Article 22(2), the government did not 'consider itself under any legal obligation to pay compensation for damages resulting from attacks […] although it may do so on an *ex gratia* basis'.[123] However, as in Canada, the U.K. 'expects all diplomatic missions […] to insure their buildings and their contents comprehensively against damage'.[124] If those requirements are met, English authorities usually pay full compensation for damages, even if they still avoid to recognize any legal duty to pay.

8. The intervention of the sending state in the protection of its own embassies.

Although the Convention specifies a great number of obligations that receiving states should respect in order to safeguard foreign mission premises, it does not in any way prohibit the intervention of the sending state to ensure that the protection enjoyed by its embassies and diplomatic posts is at the fullest level possible. Indeed, as saw above, the duty of protection can be practically limited by the physical capacity of the receiving state of protecting the interests of mission compounds in its territory, and has to be compared with the specific contingencies that affect the hosting country. Thus, nothing impose on sending states to entrust the burden of safekeeping of their embassy solely on the receiving state: they are free to agree on a case-by-case basis that their own national security forces could be used to augment the protection of mission premises. The primary responsibility continues to lay upon hosting countries;

[122] Canadian Department of External Affairs, 'Advice on the Duty to Protect Premises of Foreign Missions. Vienna Convention on Diplomatic Relations' (1968) 6 CYIL 257.
[123] U.K. Foreign and Commonwealth Office, 'Note of 3 November 1994' (1994) 65 BYIL 617.
[124] ibid.

however, no legal impediment is set out in the VCDR to the extent of banning governments to provide additional security to their own legations.[125]

The most important issue that arise from the deployment of national forces – usually, military contingents specifically tasked and trained to provide security for embassies – is that of consent. Receiving state are free to determine whether or not foreign security personnel could be stationed inside or around protected facilities: the permission should be always sought – by means of international agreements – before sending state could provide additional security for the mission. It is self-evident that hosting nations have to deeply consider the question, and balance the interests at stake: on one hand, granting entry into their territory to foreign military personnel could pose a risk on the internal security; on the other hand, knowing that the sending state is providing an additional level of safekeeping can be seen as a way to better implement the required level of protection that has to be granted under Article 22(2). It goes beyond saying that the forces of the sending government are bound to respect the law of the nation to which they are dispatched, and that every protective action they personally undertake has to be agreed with the local authorities.

The first example of a state that send its own personnel in order to protect the premises of their embassies and other diplomatic facilities is that of the U.S. Since a large number of cases concerning breaches of Article 22 had been perpetrated against American diplomatic buildings, the U.S. provides a security detail to every one of their embassies, both through federal agencies – namely, the Diplomatic Security Service that is part of the Department of State – and the military. The U.S. Code impose on the Secretary of State the task of protecting American missions abroad,[126] and since 1948 the Marine Corps had created a special unit – the Marine Security Guards – endorsed with the protection of the most threatened American embassies, consulates and diplomatic residences across the globe.[127] France deploys members of the *Police nationale* or of the *Gendarmerie nationale* abroad, charging them with the assignment of protecting

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[125] Denza (n 1) 139.
[126] 22 USC 4802.
[127] U.S. Department of State, 'Marine Security Guard' <https://www.state.gov/marine-security-guards/> accessed 24 April 2024.

French embassies.[128] Similarly, the Italian legislation provides that the military police shall assure the security services for diplomatic missions outside of national borders (‘*l'Arma dei carabinieri assicura i servizi di sicurezza delle rappresentanze diplomatiche*’)[129] and for this reason it had been created a specialized department which functionally depends upon the Ministry for Foreign Affairs and International Cooperation. In addition, whereas security reasons impose the presence of more personnel, elements from the special units, namely the 2nd Mobile Brigade, are dispatched (‘*concorre, inoltre, ad affrontare particolari situazioni di emergenza […] che dovessero mettere in pericolo la sicurezza delle […] rappresentanze, assicurando la disponibilità di personale appartenente a reparti speciali*’).[130]

The deployment of foreign security forces poses a problem for the receiving state also when it has to deal with the issue of granting those forces the right to bear arms for the execution of their assignments. States practice broadly impose upon foreign military and police officers to register their guns within the receiving state’s authorities, through the Protocol Office of the Ministry for Foreign Affairs or via other governmental departments. In France for example security forces protecting the mission should seek for a permit to carry guns before they could lawfully use those in the fulfillment of their service: foreign legations have no right to be granted an exception from national legislation on the right to carry weapons (‘*le port d’armes sur le territoire français est assujetti à la réglementation en vigueur*’).[131]

A deviation from this practice can be seen in Australia, where foreign security personnel could not, on any occasion, exercise the right to bear firearms while performing their duties of protecting the premises of their national legation. Indeed, the Australian government has been very clear in maintaining

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[128] French Ministry of Interiors, ‘Garde de sécurité diplomatique’ <https://www.police-nationale.interieur.gouv.fr/nous-rejoindre/nos-metiers/garde-de-securite-diplomatique”> accessed 24 April 2024.

[129] Italian Legislative Decree n. 66 of 15 March 2010, Article 158(1).

[130] ibid Article 158(2).

[131] French State Protocol and Diplomatic Events Direction, ‘Privilèges et immunités diplomatiques et consulaires’ <https://www.diplomatie.gouv.fr/IMG/pdf/les_privileges_et_immunites_diplomatiques_et_consulaires_cle4b7c93.pdf> accessed 24 April 2024.

that 'there are no circumstances in which a mission or post would require firearms for its own protection'.[132] Clearly, this prohibition has to be regarded in correlation to the level of responsibility that the host state is willing to undertake in relation to the protection of foreign embassies in its territory. If forces of the sending state, legally stationed abroad for the safeguard of embassies, are not permitted to protect their own premises to the fullest extent possible – that is, without the possibility to discharge firearms in extreme situations where it would be required – the receiving country is implicitly stating that it is taking the responsibility for granting those premises with an augmented level of protection. By arguing that 'the Australian Government will ensure that appropriate protection is provided',[133] the policies of Australia regarding the use of firearms by foreign forces can be implicitly construed as to voluntarily bound the state to a greater degree of respect of the duty encompassed in Article 22.

Sending states' forces can be used not solely to provide physical protection to their own legation premises, but also to train local forces in order to enhance the capacity of the receiving state to abide by its international duties. States that are not capable of deploying adequate resources in order to protect the premises of missions located in their territory can accept the intervention of some sending states – namely, those which already dispatch their national security personnel – in order to train local authorities for the performance of their protective duties. For example, in its authority to implement foreign assistance programs,[134] the President of the U.S. 'should use [the authority] to improve perimeter security of United States diplomatic missions abroad'.[135] That provision is implemented by Department of State's policies and programs, such as the Special Program for Embassy Augmentation Response, which 'enhances the security of U.S. diplomatic posts in high-threat, high-risk environments by

[132] Australian Department of Foreign Affairs and Trade, 'Protocol Guidelines: Diplomatic Missions: Firearms' <https://www.dfat.gov.au/about-us/publications/corporate/protocol-guidelines> accessed 24 April 2024.
[133] ibid.
[134] 22 USC 2349aa.
[135] 22 USC 4858.

training law enforcement and security personnel in host nations to better respond to emergencies at U.S. diplomatic facilities'.[136]

In conclusion, strictly speaking the responsibility for ensuring that diplomatic premises are protected continues to lay within the authorities of the country in which the facilities are located. However, state practice evolved under the aegis of the VCDR and showed that collaboration between sending and receiving governments could be an efficient way to enhance the security of diplomatic posts, threatened by terrorism and political mobs in unstable countries. If such collaboration is in place, and both local and foreign forces work together to prevent, impede or put a halt to any action that may constitute a breach of Article 22, it should be construed that international responsibility of the receiving state may arise only in exceptional situations.

8.1. The problem of outsourcing embassies protection.

Due to the increased extent of the threats made to embassies and diplomatic posts in conflict or unstable areas, sending states that face a higher security problem oftentimes cannot cope with the protection of their own premises merely by dispatching their own military or security personnel. The only other way at their disposal to implement the protection that has to be granted under Article 22 by the receiving state is to resort to private security companies (PSCs), in order to provide perimetral and internal protection to embassies and residences. Indeed, 'the outsourcing of diplomatic security is a growing phenomenon that has important implications for international security',[137] since issues could arise regarding the professionality of contractors, their ability and willingness to abide by local regulations in the hosting state, and the accountability of PSCs whenever in providing diplomatic security they incur in breaches of international or national law.

The second and third issues fall beyond the scope of the present Chapter, that is to provide an insight on how the special duty of protection is construed

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[136] U.S. Department of State, 'Special Program for Embassy Augmentation Response (SPEAR) <https://www.state.gov/SPEAR> accessed 24 April 2024.

[137] Eugenio Cusumano, 'Diplomatic Security for Hire: The Causes and Implications of Outsourcing Embassy Protection' (2017) 12 HJD 27, 29.

across the globe in states' practice, but it can be useful to touch upon the question. The employment of private contractors to provide security for diplomatic posts imply that the hired personnel can be of any nationality: states could freely choose between local PSCs, or international ones that employ third states' citizens. The use of local contractors is preferred since it is less costly, it provides for a clearer legal background, and it does not require any agreement between the sending and the hosting state on the status of those working for the mission.[138] Local citizens self-evidently have to abide by national laws and regulations even if they work for foreign missions, and they could be tried in the courts of their own state in case of misconduct during their employment. However, issues arise when hiring local guards, since – as will be seen later in this Paragraph – the level of protection they grant could be inadequate for the purposes of protecting foreign missions.[139] On the other hand, the employment of PSCs that hire nationals of the sending state or third countries citizens, if it could be beneficial since they may be more trained, implies that an agreement between the mission and the hosting state has to be put forward, in order to regulate the legal status of the contractor's personnel. Oftentimes, since guards are armed and tasked with a service that may require them to use the force, a Status of Forces Agreement is required.[140] Nevertheless, this means that usually non-local contractors would enjoy a certain level of immunity, that can be seen as an instrument to avoid following local policies and legislation during the performance of their duties since they could not be prosecuted by the hosting state's authorities. Indeed, a great number of violations occurred in high-risk countries where sending states, namely the U.S., agreed to use PSCs.[141] On such occasions, difficulties arose in keeping private contractors accountable for their actions, even by courts of the nation that employed them.

Nevertheless, the main problem that the use of PSCs implies with regards to the interpretation and fulfillment of the duties dictated by the VCDR is the professionality of the personnel employed by such companies. As seen in

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[138] ibid 39.
[139] ibid.
[140] ibid 40.
[141] ibid 41-43.

Paragraph 8, sending states usually resort to sending their own forces to protect mission premises when the receiving state is not capable of providing an adequate level of safekeeping; but the first responsibility under Article 22(2) still remains within the latter. By consenting to the deployment of foreign forces inside its territory, and by agreeing with them the appropriate steps to ensure embassies' protection, the receiving state can still consider itself in abidance with its international obligations. And usually, if highly-trained, highly-skilled personnel is deployed – such as in the Italian practice, where the professionality in international theatres of the Carabinieri is recognized across the globe –[142] the receiving state can be assured that the protection enjoyed by the foreign mission is suitable enough. The task of protecting embassies become less burdensome if professional forces are present.

But the resort to PSCs had proved ineffective in providing diplomatic posts with an adequate level of protection, as clearly maintained in the Inman Report[143] that was redacted after the bombing occurred outside the U.S. embassy in Beirut, Lebanon, in 1983. It was argued that 'there is no consistency in the quality of the local guard force programs from post to post, even within the same country'.[144] Even if local posts should supervise the quality and professionality of the local guards, 'illiteracy, lack of standardized equipment, and inadequate training'[145] can jeopardize the security of foreign missions, thus compromising the reliance that the receiving state put in the actions of the sending government to protect their own posts. Indeed, if PSCs are employed, the hosting state should be able to trust that the mission is already protecting itself to the greatest extent possible. Thus, they could argue that their required actions to augment the protection are lesser than those they may need to perform if the foreign legation did not personally provide for its safety. But international responsibility

[142] Lorenzo Cladi, 'Diplomatic Security in Times of Austerity: The Case of Italy' in Eugenio Cusumano and Cristopher Kinsey (eds), *Diplomatic Security: A comparative Analysis* (Stanford University Press 2019), 132.
[143] U.S. Department of State, 'The Inman Report: Report of the Secretary of State's Advisory Panel on Overseas Security' (1985) <https://1997-2001.state.gov/www/publications/1985inman_report/inman1.html> accessed 25 April 2024 (hereinafter the Inman Report).
[144] ibid.
[145] ibid.

problems arise consequently, if those PSCs are not efficient in carrying out their safeguarding tasks, and if the receiving state find itself liable to offer an increased level of protection without any prior planning. If private contractors fails to protect embassies, receiving states are at risk of incurring international responsibility in the eyes of the sending country, even if they trusted that the hiring of local PSCs could be construed as a way to decrease the numbers of 'appropriate steps' they need to take under Article 22.

Consequently, even if the practice of outsourcing embassy protection is regarded as a necessary measure for some states – for example the U.S., the U.K., Australia, and Canada –[146] it can be misleading in the interpretation of the duties laid down by the VCDR. By letting PSCs provide standing security for their embassies, sending states create a sense of confidence in receiving countries, that sometimes result in the rise of international responsibility for security breaches that occurred without the necessary knowledge and foreseeability by the latter.

8.3 States' approach in designing embassies to enhance security.

One of the many approaches that states could undertake when trying to enhance the security of their diplomatic missions abroad is designing compounds in ways that could augment the security provided to the buildings and can facilitate the work of the receiving state when acting under Article 22(2). Indeed, if embassy premises are designed in a way that it is more difficult to actively target them by mobs, demonstrations, or armed assaults, the sending state can actively consider their missions more secure, and the hosting state responsibility decrease since damages to the facilities become less frequent and incisive. In addition, a great number of breaches of inviolability – even those committed by receiving states' authorities – can be prevented by implementing constructions programs that put the interest to security before any other relevant concern. Cooperation between states is essential in the matter of diplomatic premises security, and the steps taken by the sending states should always be put forward in order to make the receiving state able to better abide by its obligations.

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[146] Cusumano (n 136) 35.

Once again, U.S. practice shows a great number of policies that states could regard as being in compliance with the VCDR, and that can effectively and efficiently help receiving states to respect their international obligations under Article 22.

As already stated above, in Paragraph 3.1, one of the many ways the inviolability of mission premises can be breached is by implanting listening devices inside the diplomatic buildings; a practice that was oftentimes performed during the Cold War. The problem arose particularly due to the employment of local constructors when embassies needed to be relocated in new buildings, or the existent ones underwent major renovations, as in the case concerning the U.S. embassy in Moscow. For this exact reason, American legislation provides for a preference of U.S. contractors when building projects mission premises: '[…] only United States persons and qualified United States joint venture persons may bid on a diplomatic construction or design project' which value exceed a certain amount, and '[…] only United States persons and qualified United States joint venture persons may bid on a diplomatic construction or design project which involves technical security'.[147] This means that usually only U.S. controlled constructors could "lay down bricks" inside embassies premises, thus limiting the potential interference with the inviolability of the mission by receiving states that may infiltrate their agents within the work force. State Secretary's regulations shall guarantee that those national contractor are in compliance with the security clearances that may need to be obtained in order to gain access to the blueprints of the facilities.[148]

After the bombing of 1983, the Inman Report also provided for recommendations to the Department of States in order to ensure that new embassies where designed in accordance with some basic, physical principles that could ensure an increased level of security. The general conclusions that the Advisory Panel found could be summarized as follows: the U.S. must have a full and singular control over the premises, meaning that no un-related parties to the mission could use the buildings in which embassies are located; the facilities

[147] 22 USC 4852.
[148] 22 USC 4853 and 4863.

must be located in areas where there are no other building in their close proximity; adequate funding in order to renovate or rebuild existent mission premises should be supplied by the government.[149] 'The new Inman standards stipulated a minimum set-back of 100 feet from surrounding streets' – as now dictated by U.S. national legislation –[150] 'and blast-proof construction'.[151] 'Other new requirements included perimeter walls, electronic vehicle arrest barriers, electronic locks, cameras, and monitors'.[152] Embassies became thus more protected, being designed almost as medieval citadels in high-risk states, in compounds that supply diplomats and other persons living there with every facility they need, so that they can stay within the bomb-proof perimetral walls unless it's absolutely necessary.

This approach taken by a number of countries when building new diplomatic premises can again be construed as a lawful and desirable intervention of the sending state in order to collaborate with the hosting authorities to enhance the security of the posts and the abidance to the duties of Article 22(2). By helping states to acquire and choose the suitable location for the establishment of new and more secure compounds, hosting governments could be regarded as taking all the appropriate steps to protect the physical integrity of embassies. In addition, almost-impenetrable buildings ease the effort that receiving states have to put up in order to guarantee their safety, thus limiting the situations in which a possible international responsibility for violations of the VCDR could arise.

[149] Inman Report (n 141).
[150] 22 USC 4865(a)(3).
[151] Jane C Loeffler, *The Architecture of Diplomacy: Building America's Embassies* (Princeton Architectural Press 1998) 246.
[152] ibid.

Chapter 4 – The protection of diplomatic personnel.

1. The law providing for the inviolability of diplomatic personnel and for the special duty of protection: Article 29 VCDR.

The protection of diplomatic agents has been encompassed in Article 29 of the Vienna Convention on Diplomatic Relations which, similarly to Article 22, provides that:

> 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.

Equally as for the safekeeping of mission premises, Article 29 can be divided into two parts, one complementary of the other. The first part, consisting of the first two periods, provide for the personal inviolability of a diplomat, thus imposing a negative duty upon the receiving state to refrain from exercising any act that can be regarded as being in breach of the person of a diplomatic agent. The second part, contained in the last period, symmetrically provide for the active obligation to keep diplomats safe and protected against any harm that they may suffer.

Although at first sight the provision can be argued to be straightforward in providing the necessary protection to diplomatic agents, important issues arise when interpreting the obligations herein laid out. Firstly, it has to be discussed which persons are entitled to the protection provided by Article 29, and what are the legal extensions of inviolability provided by the VCDR itself; in addition, it has to be considered the problem of expanding the protection to agents that fall beyond the scope of the Convention, but that may still enjoy the rights conferred by it. Then, as for the safekeeping of mission premises, it has to be noted that the extent of inviolability and the special duty of protection is controversial, thus it will be examined what are the necessary steps to implement the obligations of the receiving state. As for mission premises, the question of the possible existence of implicit exceptions to inviolability arise, and it will have to be considered. In addition, to complement the overall protection of diplomatic

agents, other legal instruments has been put forward by the international community to enhance the security of diplomatic agents in an era of terrorism and civil unrests; this Chapter will examine those in the light of the duties provided by the VCDR. Lastly, since the ICJ argued that the Convention is a self-contained treaty, the analysis will briefly focus on what are the legal instruments in the hand of the receiving state to deal with the abuse of diplomatic inviolability.

2. Persons entitled to diplomatic inviolability and protection under the VCDR: diplomatic agents.

Article 29 of the VCDR limits the subjective scope of its protection to 'diplomatic agents', thus dictating that only a specified group of persons forming part of the staff of a foreign mission shall enjoy inviolability. For the purposes of the Convention, Article 1(e) defines diplomatic agents as 'the head of the mission or a member of the diplomatic staff of the mission'. Furtherly, it is stated in subparagraph (a) that the head of the mission 'is the person charged by the sending State with the duty of acting in that capacity', and in subparagraph (d) that the members of the diplomatic staff 'are the members of the staff of the mission having diplomatic rank'. Consequently, Article 29 provides *prima facie* inviolability for the head diplomat of a foreign mission, and the other members of the mission that serve for the fulfillment of diplomatic purposes.

The head of the mission, being the person that the sending state tasks with the important duty of representing its government in a foreign nation, has to be regarded as the most important diplomatic agent of the mission. Indeed, smaller legations can consist only in one diplomat, and that person is appointed as head of the mission. For the importance of the role that the head diplomat performs, the Convention laid down a special requirement in order to let that qualification arise. Article 4(1) dictates that 'the sending State must make certain that the *agrément* of the receiving State has been given for the person it proposes to accredit' to the said position, and in case the receiving state refuses to accept the proposed person as the head of the mission, it 'is not obliged to give reasons' for its denial.

Other diplomatic agents than the head of the mission are all the members of the legation that own a diplomatic rank. Sending states are in principle free to determine who may form part of their missions, and who may perform diplomatic functions. However, in order to have their agents classified as members of the diplomatic staff, sending states are bound to respect certain provisions of the VCDR that practically limit their choice. In particular, Article 8(1) dictates that diplomatic agents 'should in principle be of the nationality of the sending state'. In Article 8(2) it is provided that diplomats 'may not be appointed from among persons having the nationality of the receiving State' if the latter refuses to give its consent. Lastly, Article 8(3) let receiving states refuse to accept third-countries citizens – that are not nationals of the sending state nor of the receiving state – as representative of the sending government. Keeping in mind the principles and limitations provided by Article 8, sending states are still vastly free to determine the designations of their diplomatic agents.

To be considered as diplomatic agents, thus inviolable, the members of the diplomatic staff have to be registered in specific list at the Ministry for Foreign Affairs of the receiving state. Indeed, sending states' issued diplomatic passports, or diplomatic IDs granted by the national authorities of the hosting country are not considered as definitive proofs of the diplomatic status held by a foreign minister.[1] Those documents constitute only a *prima facie* evidence of the possible diplomatic status of a foreign agent; however, the registration in the specific list is the essential requisite for diplomats to be regarded as fully falling within the definition of Article 1(e) of the Convention, and consequently as enjoying the personal inviolability provided by Article 29.

Given that the mission is not made only by diplomatic agents, but also by other categories of staff, states need to find a way to classify the members of the mission into their relevant category, in order to distinguish between proper diplomats and those members of the mission that falls under different definitions in Article 1. The purpose of this distinction is to provide the adequate level of inviolability and other immunities to different staff members. The classification

[1] Niklas Wagner, Holger Raasch and Thomas Pröpstl, *Vienna Convention on Diplomatic Relations of 18 April 1961: Commentaries on Practical Application* (Christian Oelfke ed, Berliner Wissenschafts-Verlag 2018) 49.

of missions' personnel is usually carried out by accepting the position took by the sending state in good faith.[2] This is due to the idea that interference of the receiving states in the organization of a foreign mission would impair its freedom to act without any intrusion by the hosting authorities. Thus, the distinction between those members of the mission that actively carry out diplomatic functions, and that are consequently notified as diplomatic agents, is routinely provided by the sending government, and is usually not contested by hosting nations. In addition, the idea that states enjoy a certain degree of freedom to classify their personnel can be construed by looking at Article 7: by dictating that in principle states are free to appoint the members of the mission, it can be argued that the Convention grants an equal freedom to choose in which class of personnel those appointees fall within.[3] Thus, in principle, 'receiving states simply receive';[4] they do not accord the diplomatic status, because that is done by the sending state under Article 7. Possible abuses can be contrasted by the receiving state with the instruments that will be discussed in Paragraph 7.

Still, in more recent years, some states – namely the U.S. and the U.K. – argued that it's within the powers of the receiving state to regulate the matter of classification of missions personnel. To consider someone working for a foreign mission as a member of the diplomatic staff – thus being a diplomatic agent for the purpose of Article 29 – they require the sending state to provide a detailed explanation of the functions performed by the latter, on which the justification for the claim to consider him as a diplomatic agent is based. After considering the request by the sending government, the Department of State shall assign the member of the mission to the correct and appropriate category.[5] In the U.S. it is practice to grant diplomatic agents appointed as such by the sending state the correct classification if they perform 'traditional and accepted diplomatic functions'.[6] 'Any other pursuit inconsistent'[7] with the functions above

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[2] Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th ed, Oxford University Press 2016) 15.
[3] ibid 55.
[4] Jonathan Brown, 'Diplomatic Immunity: State Practice Under the Vienna Convention on Diplomatic Relations' (1988) 37 ICLQ 53, 55.
[5] Denza (n 2) 56.
[6] U.S. Department of State, 'Circular Note of 17 June 1977' [1978] DUSPIL 536-537.
[7] ibid.

mentioned – that can be referred to those encompassed in Article 3 of the VCDR – is seen as a base for the U.S. authorities to terminate the accreditation as a diplomatic agent.

2.1. Commencement and termination of the protection related to diplomatic agents.

Contrarily to the abstention that the text of the VCDR provided regarding the commencement and termination of the diplomatic status of the mission premises, the Convention contains an indication on the duration of the privileges enjoyed by diplomatic agents, and consequently on the duration of their inviolability while they perform their duties in the hosting nation.

Firstly, the VCDR requires that the sending state shall notify the Ministry for Foreign Affairs of the hosting state whenever members of the mission, including diplomatic agents, are appointed.[8] In addition, it is requested that the communication should take place also upon 'their arrival and their final departure or the termination of their functions the mission'[9] and, whenever it's possible for the sending state, a 'prior notification of arrival and final departure'[10] should also be given to the receiving state. The expediency of the practice of notification is evidently set out in a Circular Note of the U.S. Department of State, which remained head of missions that:

> Since the enjoyment of rights, privileges and immunities to which members of mission in the United States may be entitled by virtue of the Vienna Convention or domestic law and practice depends upon the Department's *timely* receipt of complete and accurate information needed for its record system, the advantages to the missions, as well as to their personnel, of supplying this information will of course be obvious.[11]

In addition to the requirement of notification, the Convention clearly dictates the moment in time from where the enjoyment of inviolability – and

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[8] Article 10(1)(a) VCDR.
[9] ibid.
[10] Article 10(2).
[11] U.S. Department of State, 'Circular Note of 2 October 1978' [1978] DUSPIL 532-536 (emphasis added).

other immunities – begins, and the moment from which the duties to afford protection and to respect the inviolability of a diplomatic agent can be regarded as terminated.

Article 39(1) provides for two separate points in time upon which inviolability arise: one for diplomatic agents that are appointed when they are still outside the territory of their posting state, and one for ministers whose appointment is notified after they had already entered the host country. For the previous it is dictated that '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'. For the latter, it is provided that 'if [he's] already in its territory [that is, of the hosting state]' inviolability arise 'from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed'.

Symmetrically, Article 39(2) states that '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'. Thus, even if the receiving state is notified of the termination of functions by the sending state – for whichever reason it may happen – it is its duty to still respect the inviolability of the diplomatic agent and to protect him until he has left its national borders. However, since the time between the termination of functions and the moment when the agent leaves the country can be arbitrarily or abusively long, the VCDR provides an exception to the aforementioned principle. Indeed, receiving states can consider their duties as ceased 'on expiry of a reasonable period in which to do so', that is to leave the hosting state's territory. Until that period of time, that can be longer or shorter depending on the particular circumstances of the case, diplomatic agents are still shielded by the protection granted by Article 29. An example of a span of time that shall be considered reasonable can be seen in the case of the killing of a Woman Police Constable in London in 1984: as already seen in Chapter 3, the U.K. authorities granted a seven-day period to the staff of the Libyan embassy to vacate the premises and to exit the country.

2.2. Extensions under the VCDR: family members, technical and administrative staff.

Article 29's subjective scope is referred only to diplomatic agents, as defined in Article 1(e). However, the Convention itself extend the same level of protection offered by Article 29 to two other categories of persons: those extensions need to be analyzed since they provide for an expansion of the figures that thorough this Chapter will be considered as falling under the expression "diplomatic agents" or similar terms, since they are accorded the same inviolability of those diplomats as defined in the Paragraphs above.

The first category of person to which inviolability is extended to is provided by Article 37(2), which reads as follows:

> Members of the administrative and technical staff of the mission […] 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 […].

For the purpose of the present work, still, the only relevant privilege that is going to be considered is that encompassed in Article 29, that is applied to the members of the personnel of the mission that have a technical or administrative role without any exception being provided. The category of administrative and technical personnel is defined in Article 1(f), that maintain that those 'are the members of the staff of the mission employed in the administrative and techincal service of the mission'.

This extension imply that within the persons that work for a foreign mission, even if a distinction between diplomatic agents performing diplomatic functions and other staffers that perform a number of tasks auxiliary to the performance of those functions exist, the personnel is regarded as having the same right to be held inviolable and to be protected against any attack on their person or dignity. Whether or not they possess a diplomatic rank, if the task of the members concerned is directly related to the very existence of the mission, and to the correct fulfillments of the functions encompassed in Article 3, they have a right to be shielded by Article 29.

Consequently, the difficulty in interpreting the VCDR lays in the necessary distinction between those members that are part of the administrative or technical personnel, from those persons that serve the mission 'in the domestic service' and that falls under the category of 'members of the service staff'.[12] If the distinction between diplomatic agents and technical and administrative personnel is not practically relevant when discussing the protection to be afforded under the obligations provided by Article 29, the difference between the latter category and the members of the service staff is essential. Indeed, those that perform domestic service tasks are by no means entitled to inviolability; thus, distinguishing between missions' non-diplomatic personnel has important consequences.

Since sending states are free to determine the qualification of every member employed by their missions, a similar argument than that proposed in Paragraph 2 can be put forward. Thus, staff members that do not hold a diplomatic rank can be freely allocated within the category defined in Article 1(f) or in Article 1(g); however, the receiving state is conversely free to object the incorrect qualification if that abuse is blatant and undeniable. State practice shows that routinely under the category of service members fall embassies' drivers, cooks, gardeners, gatekeepers, cleaners, etc.; that is, all those who perform a task that is not related to the correct existence of diplomatic intercourse between the sending and the receiving state.[13] Every other non-diplomatic members of the personnel can consequently be qualified as being part of the administrative and technical staff. As a consequence, administrative and technical members of the mission can be construed as being those that perform tasks that are related to 'interpretation, secretarial, clerical, social, financial, security, and communications services'.[14]

The members of the personnel that fall under the definition of Article 1(f) are provided with inviolability under Article 29 given that they are not citizens of the receiving state, or that they are not permanently residing within its territory. The reason for this exception can be seen in the absence of any

[12] Article 1(g) VCDR.
[13] Wagner, Raasch and Pröpstl (n 1) 50-51.
[14] Denza (n 2) 15.

justification for the need to hold as inviolable and to specially protect someone that has the nationality of the receiving state, and that consequently has to naturally abide by its regulations and cannot enjoy immunities and privileges conferred to foreigners if they are employed by a foreign legation. Similarly, those that are permanent residents of the receiving country cannot hold against the latter any defence for claiming inviolability. The Convention does not provide any precise definition of who is to consider as a permanent resident of the hosting country. However, it could be argued that under that category should be encompassed those appointed as members of the technical and administrative staff of the mission that, at the time of the appointment, were already residing in the country where the mission is located.[15]

The second extension is again encompassed in Article 37, both in paragraphs (1) and (2). Article 37(1) maintain that:

> 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.

Equally, Article 37(2) extend inviolability to the family of an administrative or technical member of the mission, again with the same exceptions provided for those that are nationals or permanent residents of the hosting country.

Interpreting the provision of Article 37(1) proved difficult over the time, since at the Vienna Conference any attempt to define in Article 1 who formed the family of a diplomatic agent was rejected due to cultural differences between states. The most accredited proposal was that of the U.S., which defined the members of the family as:

> the spouse of a member of the mission, any minor child or any other unmarried child who is a fulltime student and such other members of the immediate family of a member of the mission residing with him as may be agreed upon between the receiving and the sending States.[16]

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[15] Wagner, Raasch and Pröpstl (n 1) 291.

[16] UN Conference on Diplomatic Intercourse and Immunities, ‘United States of America: amendments to article 1’ (6 March 1961) UN Doc A/CONF.20/C.1/L.17.

However, the different views that stemmed from different concepts of family across cultures and states made impossible to insert such provision in the Convention. The U.S. proposal was rejected also because it failed to specify whether the law of the sending state or of the hosting country should have been applied when interpreting the terms of the definition.[17]

Still, state practice shows that the approach taken by the U.S. had been accepted as a general principle, thus the most strict and basic definition of who are the members of the family of a diplomat that enjoys inviolability under Article 29 encompasses his spouse and any minor children. Consequently, Article 37(1) has been read as providing its protective shield only to those that fall under the categories just mentioned; any other person that may be entitled to the same protection provided by Article 29 can enjoy it only if the receiving state has accepted its status as a member of a diplomat's family.[18] However, problems arise both when defining who can be considered as the spouse of a diplomatic agent, and who are his minor children. One of the reasons of such difficulties is the absence of any indication of what rules should be considered when dealing with the interpretation of the terms involved: it is uncertain if the legislation of the sending or the receiving state should apply.

A strict interpretation of the term spouse should include only the opposite-sex, married partner of a diplomatic agent. However, the internal practice of a great number of states shows that since same-sex marriages began to be permitted and regulated, those life partners of a diplomat started to seek recognition; in addition, a number of non-married domestic partners, both of the same sex or of the opposite sex of the diplomat, sought inviolability under Article 37(1). Practice shows that usually states seek in their internal legislation a justification for extending the scope of the expression 'members of the family': thus, in countries where same-sex marriages are accepted, such as the U.K., it is consented to register as a diplomat's spouse a person who is of the same sex of the agent.[19] Equally, German practice evolved in order to consider same-sex partners as entitled to the protection granted by the VCDR, if the partnership

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[17] Denza (n 2) 320.
[18] Wagner, Raasch and Pröpstl (n 1) 284.
[19] Denza (n 2) 321.

itself meets the criteria that Germany set out in its internal legal system to recognize those.[20] However, since German legislation does not recognize heterosexual non-formalized partnerships, Germany does not recognize any non-married opposite-sex partner of a diplomat as entitled to be protected.[21] Difficulties arise also when considering polygamous partnerships of a diplomatic agent: Germany and the U.K. for example ban the recognition of more than one partner,[22] whereas the U.S. would accept more than one spouse of a polygamous diplomatic agent.[23]

In conclusion, it is up to every single state to decide if they want to go beyond the traditional interpretation of the term spouse and grant to a broader group of persons the protection accorded under Article 37(1), and a univocal practice has not yet evolved.

Minor children are also entitled to protection; however, again, state practice and internal legislations let different solutions arise. To consider a child as being under the legal age, hosting states usually resort to their internal regulations. In addition, some states consistently grant inviolability also to children that are of full legal age under different circumstances: for example, if they are still part of the household of the diplomat and they are economically dependent on the agent, if they are still studying, etc.[24] Still, practice varies too much to see an evolution of the interpretation of Article 37(1) that can be accepted across all states parties to the VCDR.

Persons that are not the spouse or the child of a diplomat are not entitled to enjoy the inviolability and protection granted by Article 29, and receiving states are under no international obligation, neither conventional nor customary, to consider them as part of the family of a foreign agent. However, since the VCDR does not impose on states to refrain themselves from laying out privileges and immunities beyond the literal scope of the Convention, more favorable arrangements could be made on a case-by-case base, in order to shield other family members with the cloak of inviolability. Sending states should seek to

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[20] Wagner, Raasch and Pröpstl (n 1) 286.
[21] ibid.
[22] Denza (n 2) 321-322; Wagner, Raasch and Pröpstl (n 1) 287.
[23] Denza (n 2) 323.
[24] Denza (n 2) 320-323; Wagner, Raasch and Pröpstl (n 1) 284.

negotiate those arrangements when notifying the arrival of family members of a diplomatic agent, in order to let the government of the hosting country take all the appropriate and necessary steps.

Those negotiations shall indeed take place every time the admission of a diplomat's family member is controversial since the concerned person does not fall under the customary category of spouses and minor children. State practice in fact shows that 'unusual cases are settled in negotiation at the time of notification rather than left to any kind of arbitration or adjudication in the context of legal proceedings', since it would be beneficial both to the sending and the receiving states.[25] Because the recognition of someone's right to inviolability is a political matter, governments tend to prefer to settle any eventual dispute before it can even arise, thus avoiding to let national courts decide on the status of a diplomatic agent's family member.

As for the members of the technical and the administrative staff of the mission, and for the same reasons, inviolability can be extended to family members only if they are not nationals or permanently residing in the hosting state.

To sum up, any attempt to track the evolution of certain customary regulations that would impose upon states to consider certain persons as part of the family of a diplomat would be useless. A comparative analysis of the internal regulations of different states would indeed demonstrate that under no circumstance there has evolved a customary rule on the interpretation of the terms "family", "spouse" or "minor children". Some scholars attempted to analyze states practice to find a common agreement on the extension of the family of a diplomat,[26] but the cultural differences between the great number of states parties to the VCDR impede any customary rule to arise. Thus, for the scope of this Chapter, it will be sufficient to say that those protected under Article 37 as family members, for they have been recognized as so by the hosting state under its national legislation and have been registered in a specific list, have a

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[25] Denza (n 2) 321.

[26] *E.g.* Simonetta Stirling-Zanda, 'The Privileges and Immunities of the Family of the Diplomatic Agent: The Current Scope of Article 37(1)' in Paul Behrens (ed), *Diplomatic Law in a New Millennium* (Oxford University Press 2017) 98-112.

right to be held as if they were diplomatic agents themselves, for the purposes of extending the rights conferred by Article 29.

2.3. Additional extensions beyond the scope of the VCDR: diplomats of the European Union.

It is beyond any doubt that the VCDR aims to regulate the matter of diplomatic immunities and intercourse between states: those are the unique subjects upon which the obligations laid down in the Convention are aimed, and those are the subjects that can entertain diplomatic relations between each other. Consequently, the provision of Article 29 that dictates the inviolability and the duty of protection of diplomatic agents – and any other person entitled to the same level of protection due to the explicit provisions of Article 37 – cannot be construed, *prima facie*, as also protecting those agents that conduct functions only similar to those performed by proper diplomatic agents. However, the matter of protecting "diplomatic" agents of international organization by using the VCDR as the legal instrument to do so had been at the center of a fervid debate amidst the institutions of the European Union and its members states. Indeed, diplomatic practice evolved and today it can be seen that the E.U. has become an important actor at the international stage. Since the European institutions, thanks to their delegations across the globe, have a significant role in current diplomacy, problems arose when the legal framework for the European External Action Service (EEAS) was built.

Article 48 of the VCDR can be clearly read as limiting the subjects that had the opportunity to sign the Convention before its entry into force, by stating that it was:

> Open for signature by all States Member of the United Nations, or of any of the specialized agencies Parties to the Statute of the International Court of Justice, and by any other States invited by the General Assembly of the United Nations to become a Party to the Convention.

That limitation was subsequently repeated in Article 50, which mandates that the VCDR ‘shall remain open for accession by any State’ which possess the requirements imposed for the initial signature.

Consequently, there is not a way to construe the VCDR *per se* as being open for accession by any international organization, even if it has a particular international legal status as the E.U. However it can be easily argued that, since as of 2024 the VCDR was ratified by 193 states, the level of protection that it grants to diplomatic envoys across the globe is greater than any other bilateral or customary instrument that the E.U. could put forward; thus, the European institutions were eager to find a way to incorporate the provisions of the VCDR into their EEAS legal framework, and to bound states that hosted European delegations to respect the inviolability of European “ambassadors” as if they were sent by a sovereign state.

Indeed, in today’s practice it can be seen that European Union succeeded in the task of letting the members of its “diplomatic” service enjoy the same protection to which states’ ministers are entitled under Article 29 of the VCDR. To understand how this was possible, it can be useful to introduce the legal framework from which the very existence of the EEAS stems. The Treaty on the European Union[27] dictates in Article 27(3) that:

> In fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. The organisation and functioning of the European External Action Service shall be established by a decision of the Council.

That provision shall be integrated with Article 221 of the Treaty on the Functioning of the European Union,[28] which mandates that:

[27] Consolidated Version of the Treaty on the European Union [2016] OJ C 202/1.
[28] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C 202/47.

> 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.

After establishing that the E.U. had to possess a diplomatic service in order to carry out the many tasks it has to perform, the Council has decided to establish the EEAS in 2010.[29]

The EEAS Decision was clear in laying down the obligation of the High Representative of the Union regarding the safety of E.U. agents abroad. While dictating the duties of the High Representative when establishing delegations in foreign states, Article 5(6) imposed that:

> The High Representative shall enter into the necessary arrangements with the host country, the international organisation, or the third country concerned. In particular [he] 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 [VCDR].

The obligation of the High Representative is fulfilled by including in the establishment agreement of a European delegation a clause that impose on the authorities of the receiving state to respect the inviolability of the European agents as if they were part of a national diplomatic mission.[30] Such agreements are necessary in order to host an European mission in the territory of a receiving country, and they shall be considered as international treaties that may lead to responsibility if breached. Thus, it is irrelevant if the respect of the privileges encompassed in Article 29 of the VCDR is construed as stemming directly from a voluntary and subjective extension of the scope of the Convention itself, or if it has to based solely on the extension of the effects that Article 29 impose to

[29] Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service [2010] OJ L 201/30 (hereinafter EEAS Decision).
[30] 'Template of Establishment Agreement' in Jan Wouters and others, *The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor* (3rd edn, Oxford University Press 2021) 42-43.

achieve. That is, the hosting state is bound to protect agents of the E.U. in any case: either for it is mandated by a direct extension of the duties imposed by the VCDR that the state has accepted, or because it is encompassed in an international agreement that impose upon it to provide European diplomats with the same level of protection it would grant to state representatives under the Convention.

It has to be noted that third states, in practice, had accepted those clauses in establishment agreements that impose upon them to act towards European delegations as if they were a state's mission. Indeed, the E.U. has to deeply rely on the willingness of their contracting counterparts to accept the burden of providing EEAS officials with the same protection and inviolability that they would grant under the VCDR. International practice shows that 'third States to date have been willing to provide the EU and its Delegations with diplomatic status […] through the bilateral agreements that have been reached'.[31]

In conclusion, for the purpose of the present Chapter, the definition of personnel that are entitled to the protection granted by Article 29 will also embrace the members of an E.U. delegation, since the measures to protect diplomats that are imposed by the VCDR have to be considered as the adequate steps to also protect European envoys.

3. The position of diplomatic agents in third states.

The duties under Article 29 are directed solely to receiving states with regards to diplomatic agents employed by certain sending states; this means that only within states that maintain diplomatic intercourse between each other – or that have recently severed or broken off relations – the right to inviolability and to protection can be claimed. If states do not maintain diplomatic relations, there would be no need to held as inviolable and to protect an accredited diplomatic agent, merely for it would be impossible for such envoy to be considered as a diplomat under the VCDR. The very existence of diplomatic intercourse is the basis for inviolability to arise.

[31] Graham Butler, 'The European Union and Diplomatic Law: An Emerging Actor in Twenty-First Century Diplomacy' in Paul Behrens (ed), *Diplomatic Law in a New Millennium* (Oxford University Press 2017) 337.

However, the Convention aims to regulate a controversial point in the conduct of diplomatic businesses, that is the moment when a diplomatic agent is travelling to reach its receiving state, or to return back from his posting country. In fact, the VCDR has codified rules that help to understand what was the customary position of diplomatic agents when passing through third states: a matter that, as seen in Chapter 1, was not resolved unanimously across the globe.

The rights of diplomats in third states are enumerated in Article 40(1), which reads as follows:

> If a diplomatic agent passes through or is in the territory of a third States, 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.[32]

This provision has the merit of laying down a precise obligation upon third states when a diplomatic agent is passing through their territory; however, it still left unresolved some interpretative issues. Firstly, and most notably, Article 40(1) codify the principle which mandates that envoys enjoy no right of free passage in third states. Secondly, some problems arise when analyzing which travels could be shielded under the VCDR and which could not be considered as protected. Thirdly, an issue of states' recognition can be seen when analyzing the provision.

Regarding the question of the right of transit, the Convention can be construed as having codified the long-respected principle that impose upon diplomats which need to travel within the borders of a third state to seek for an approval of such transit. Envoys have no right to transit through frontiers that are not those of their sending or receiving state, since the diplomatic intercourse between those two countries does not legally involve any other nation. Even if the basic tenets of international and diplomatic law, such as the need to avoid hindering the conduct of diplomatic intercourse between other states, dictate that third countries shall not impede any foreign minister, there exist no customary

[32] (emphasis added).

rule that mandates the necessity to let those envoy pass through third-national borders. Article 40(1) is clear in maintaining that such a right is nonexistent.[33] That construction can be corroborated by the wording of Article 40(1) when it maintains that the enjoyment of inviolability is available to diplomatic agents in a third state 'which has granted him a passport visa if such visa was necessary': the addition of this words – after a proposal made by Spain –[34] seems to entail that the third state has a right to refuse the transit of diplomatic agents accredited to other nations. Indeed, if the said state requires for a visa to be issued to nationals of the sending state, it can refuse to grant such a visa to a diplomatic agent of the sending state: the third state has a right to impede the passage of every citizen of any other state whenever it wants. By imposing diplomatic agents to seek for a prior consent to travel through the territory of a third state – if a visa is required – the VCDR can be construed as leaving to third countries the right to deny passage to any foreign envoy.[35] In other words, diplomatic agents are not legally entitled to claim a right of free transit through third states.[36]

The decision of granting visas for passing-through diplomats is thus only a matter of expediency and international courtesy. Sending states however could not legally expect their diplomatic agents to be consented to travel within third states borders when going to or returning from their post.

However, if the passage of a diplomat is consented by the third state concerned, the VCDR impose upon the latter an obligation to respect inviolability of the said agent as if it would be required under Article 29. For the purpose of the present Paragraph, 'inviolability' as provided by Article 40(1) shall be construed as referring both to the negative obligation to refrain from exercising any sovereign power against foreign envoys and to the positive obligation to keep them safeguarded and to prevent any attack on their person or dignity.[37]

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[33] Denza (n 2) 369;
[34] UN Conference on Diplomatic Intercourse and Privileges, 'Spain: Amendment to Article 39' (29 March 1961) UN Doc A/CONF.20/C.1/L.319.
[35] Denza (n 2) 369.
[36] Wagner, Raasch and Pröpstl (n 1) 320.
[37] ibid.

The shield provided by the VCDR for diplomats in transit is, however, not unlimited. Since Article 40(1) specifies that inviolability must be respected toward envoys that are travelling 'while proceeding to take up or to return to [their] post, or when returning to [their] own country', in can be upheld that the only travels that are protected are those 'where the beneficiary is in the course of direct passage to the receiving State or to the home State, though it is not essential that the passage should be between these two States'.[38] That is, the diplomat should be in travel for reasons that may be not purely official or related to the performance of his functions in the receiving or the sending state; however, his travel should aim to reach ultimately his posting state, where he would take up or resume his functions, or to return to his home country. Unreasonably lengthy stays in third countries, for touristic or personal reasons, without the intention to undertake the travel in order to reach one of those two states, shall consequently not be covered in the scope of Article 40, and thus the agent cannot be considered as inviolable.[39]

Lastly, the duty of third states to respect the inviolability of a transiting foreign diplomat should be construed as arising even if between the sending or the receiving state and the third state concerned diplomatic relations do not exist. This stems directly from the idea that the VCDR, when making provision regarding third states, aims to impose duties upon all the contracting parties, and not only upon those that maintain diplomatic intercourse between each other. However, states party to the Convention would not be bound to respect the inviolability of a diplomatic agent, recognized as so by the sending state if that country is not recognized as a state. For mere exemplification, if a North Korean envoy shall transit within South Korea – which does not recognize North Korea as a state – to reach its diplomatic post elsewhere in the world, the South Korean authorities would not be bound, under the VCDR, to respect the inviolability of said agent. But, if a state has just ruptured its relations with another, and an agent of the latter seek to transit through its borders in order to reach another posting

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[38] Denza (n 2) 371.
[39] Wagner, Raasch and Pröpstl (n 1) 319.

state, the former would still be bound by Article 40(1), and should thus respect the inviolability of the foreign diplomat.

In conclusion, Article 41(1) extend the same inviolability provided for envoys in third states to their family members, whenever they are ‘accompanying the diplomatic agent, or travelling separately to join him or to return to their country’.

4. Inviolability: the negative duty to refrain from exercising sovereign powers against diplomats.

The first aspect of Article 29 is the right to inviolability, that reflectingly dictates the duty of abstention upon the receiving state and its agents. Inviolability of diplomatic agents is one of the most important pillars of diplomatic relations and has to be regarded as one of the basic tenets upon which the very existence of an international community of diplomats rests. By agreeing to receive an envoy from a sending state, the hosting state has always implicitly acknowledged its duty of abstaining from exercising sovereign powers against the foreign agent: the codification of the principle in the first part of Article 29 can be seen almost as a mere consolidation of an international rule that was already customary and well respected across the globe.

Even if it reflects the practice of states from an ancient time, the principle of inviolability still poses some problems with regards to its interpretation, which are due to the indefiniteness of the formula adopted in the VCDR. Indeed, even if Article 29 dictates that the agent ‘shall not be liable to any form of arrest or detention’, the broader scope of the first part, which simply states that ‘the person of the diplomatic agent shall be inviolable’, leads to different interpretations. In addition, another issue regards the subjective scope of eventual infringements of the rule, since the duty of abstention should be referred only to those that fall under the category of states’ officials, since the VCDR can only bound states and their organs.

Regarding the second issue, scholars oftentimes use different approaches when defining which acts can be ascribed to the hosting states, some more strict than others. The idea that only governmental acts could imply the international

responsibility of the receiving state for infringements of the duty of abstention – construing the government as only the supreme authority of the executive branch – should be abandoned since it is 'too narrow and insufficient to be considered as exhaustive of the entire spectrum of activities of the State'.[40] Indeed, the government have to be certainly included in the plethora of subjects that can, with their acts, imply the international responsibility of their state for breaches of the VCDR; however, the government cannot be construed as the only subject that has to abide by the duty of abstention provided in Article 29. This is because most of the acts that cannot be taken by national authorities in order to respect the inviolability of diplomatic agents are usually not governmental acts: they are, on the contrary, undertaken by local law enforcements officers, or other officials that act on a more subordinate level.

For this reason, personal inviolability of envoys should be respect by all the organs of the receiving state in order to be in compliance with Article 29 VCDR.[41] The government of the hosting state cannot argue that breaches occurred from actions taken by officials of a lesser level of the executive branch do not imply the responsibility of the said state.

Regarding the interpretation of the "inviolability formula" contained in Article 29, scholars are divided when arguing about which acts – committed by states' organs – could be qualified as breaches of the VCDR for they are prejudicial to the correct enjoyment of personal inviolability by diplomatic agents. When trying to analyze the problem, two solutions can be found: the first one consist in enumerating specific acts that shall be considered as infringements of the duty of abstention; the second one, on the other hand, tries to find an open formula that can avoid the hurdle of providing for a closed list of actions that shall sanctioned as unlawful.

The first option usually imply that every enumerated act against a diplomat, or any outrage or constraint, or any other harmful act should be regarded as a breach of Article 29. However, this interpretative approach can be problematic for two reasons. Firstly, since it does not contain an open formula

[40] Franciszek Przetacznik, *Protection of Officials of Foreign States according to International Law* (Martinus Nijhoff Publishers 1983) 33.
[41] ibid 33-34.

that prohibits any act that can theoretically impede the right enjoyment of inviolability, some have argued that the enumeration of a closed group of action cannot rule out the possibility of construing that every other act, not contained in the list, is lawful.[42] That is, the agents of the hosting state must refrain from exercising solely those acts that are contained in the list provided by scholars that endorse this interpretative solution; all other acts, even if they can in practice infringe the personal inviolability of an envoy, should in contrast be considered as legal. Secondly, the exercise of building a list of actions that have to be considered as unlawful for they are harming the inviolability of diplomatic agents is too difficult: there is a vast spectrum of acts that may be worthy of inclusion, but not all of those can be simplistically enumerated.

Thus, the second approach should be regarded as the correct one. The interpretation of the open clause provided by Article 29 cannot be constricted into a closed list of actions that states' agents shall refrain from exercising. On the contrary, the duty of abstention have to be construed as it shall impede all acts that are contrary to the inviolability itself, that are prejudicial of the right to inviolability enjoyed by diplomatic agents and that are, consequently, reprehensible.[43] Any act that can theoretically outrage, offend, or be considered violent or constraining a diplomatic agent have to be included into an open definition of acts that are in violation of Article 29.

Still, it has to be noted, this approach is not in any way limited by the presence of the second phrase of Article 29, that specifically ban hosting states' authorities from arresting or detaining a diplomatic agent. The enumeration by the VCDR of those acts cannot be read as impeding any broader construction of the formula adopted by the first phrase of Article 29 that aims at prohibiting any other action that is in violation of the duty of abstention. The affirmation of the rule upon which any arrest or detention have to be considered as unlawful is only a specification of those acts that are not in compliance with the VCDR, but does not constitute the entire category of prohibited actions. Indeed, there are a number of acts that do not fall under the category of arrest or detention that are

[42] ibid 34.
[43] ibid.

prohibited due to the open formula adopted by Article 29: examples are the imposition of medical treatments and compulsory vaccination, summons before a court of law, service of process, etc.

To sum up, the duty of abstention read as the obligation posed upon hosting states in order to let diplomats enjoy inviolability can be formulated as the duty of the organs of the receiving state to refrain from any activity, expression of sovereign powers within the borders of the said state, infringing upon the inviolability of officials of foreign countries.[44]

4.1. State practice with regards to carriage by air.

A brief excursus should be introduced with regard to state practice regarding the possibility of infringements of inviolability when dealing with the matter or diplomats that has to use air carriage in order to enter their posting state or to leave it – or any other third state that recognizes the diplomatic status of the agent. Indeed, it is self-evident that diplomatic agents have to frequently rely on air transportation in order to reach the country in which they will take up their tasks; equally self-evident is the issue of security checks and screening performed against persons that enjoy the fullest level of personal inviolability under the VCDR. If, on one hand, diplomats are entitled to be held inviolable by every agent of the receiving state – thus including those performing security functions at airports – on the other hand the security of air travel has led states to attenuate the rigor of the duty of abstention in relation to the present matter.

The position taken by most scholars is that diplomatic inviolability cannot be considered as breached if the agent have to submit to security checks and searches conducted by airports' officials.[45] However, it is said that diplomats have in theory the right to refuse to submit themselves to the scrutiny of airports officials: they can request that their inviolability shall be held as "sacred" and thus they can avoid being searched; however, they are practically required to accept being searched, since airlines have a right to refuse to carry them if they are not screened.[46] Thus, it can be argued that, in this matter, searches and

[44] ibid.
[45] Denza (n 2) 222.
[46] ibid.

security checks are not considered as infringements of Article 29 since diplomatic agents can be considered as submitting themselves voluntarily to those screenings.

State practice shows that this position is well accepted across the globe. For example, missions in the U.K. are reminded that 'all passengers departing […] may be searched before boarding an aircraft in order to ensure the safety of all air travellers', and that 'airlines are fully entitled to refuse to carry any passenger who is unwilling to be searched'.[47] In addition, it is requested that foreign missions should cooperate with the U.K. authorities and should comply with the request of searches before boarding any airplane. The same approach has been taken, for example, in Canada[48] and in Germany.[49]

4.2. An exception to inviolability: extraordinary protective measures.

A second category of acts that may be considered as not in conflict with Article 29, thus not in breach of the personal inviolability of envoys, are related to driving offences and extraordinary protective measures. An overlook to state practice emphasize how different approaches can be undertaken when dealing with driving crimes committed by diplomatic agents; in particular it arises the question whether or not stopping, searching and submitting an agent to breath tests or field sobriety tests in order to establish if he committed a drunk-driving offence shall be considered an infringement of the VCDR or not. In addition, it is debated if, when the agent is found impaired and not able to drive further, subsequent actions can be taken in order to ensure the safety of the public and of the envoy, even resorting to physical coercion in order to stop the offender from re-entering the vehicle.

The problem should be analyzed with regard to the two different aspects, the first one being the possibility to stop a diplomat that is allegedly committing a driving infraction and to force him to take a test in order to prove if he's

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[47] U.K. Foreign and Commonwealth Office, 'Note of 24 November 1982' (1983) 54 BYIL 439.
[48] Canadian Department of External Affairs, 'Opinion of the Legal Bureau of 10 December 1970 about Pre-flight Checks of Diplomats' (1971) 9 CYIL 279.
[49] Wagner, Raasch and Pröpstl (n 1) 213.

impaired or not; the second one being the lawfulness of those measures aimed at impeding an impaired diplomat to drive away from the scene.

Regarding the first issue, it can be seen through state practice that asking for a field sobriety test or for a breath sample is considered within the powers that law enforcements officers can exercise against a diplomat without breaching Article 29. Foreign missions are usually asked to remind their agents that they shall cooperate with local authorities and should submit voluntarily to those tests in order to prove that they are not drunk driving. In addition, police officers may seek an express waiver of immunity from the head of the foreign mission in order to conduct the appropriate tests to ensure that the agent is able to drive and is complying with the national driving law. This approach can be seen in the policies set out by Canadian authorities, which mandate that:

> On reasonable suspicion that the driver of a vehicle bearing diplomatic […] licence plates has consumed alcohol or is otherwise impaired, police forces may stop the vehicle and request the driver to present identification. […] *Notwithstanding the privileges and immunities the driver may enjoy*, police forces may initiate an investigation where the attending officer suspects that the driver may be impaired. The resulting investigation may include demands for a breath sample for a roadside screening instrument, or that the driver participate in other field sobriety tests. Persons enjoying diplomatic immunity should be aware that, though they cannot be prosecuted for offences in Canada without an express waiver of immunity from the sending State, a police officer may lay a charge against anyone who refuses to provide a breath sample for roadside screening or at the station upon a formal demand by the officer, as this is a criminal offence in Canada. Persons enjoying diplomatic immunity *may wish to agree* to provide breath or blood sample in order to establish that they are not driving while impaired.[50]

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[50] Canadian Department of Foreign Affairs, Trade and Development, 'Impaired Driving Policy. Circular Note of 14 March 2001' in *Policies, Guidelines and Key Information*

Similarly, in Australia 'police have the authority to stop any motor vehicle and request the driver, including diplomatic agents […], to undertake an alcohol or drug screening test'; indeed, in their view, 'a request to stop and submit to a screening test is consistent with […] the Vienna Convention on Diplomatic Relations'.[51]

However, even if the simple request to take a breath test or a similar medical test is considered in compliance with the international obligations set out by the Convention, it cannot be argued that the authorities of the hosting state also have the power to forcibly impose those test to a diplomatic agent. Indeed, the U.K. government argued that 'a person entitled to diplomatic immunity cannot be force, under Article 29 […] to undergo a breath test or other medical examination'.[52] In the U.S. it is suggested to local law enforcement agencies that 'if appropriate, standardized field sobriety testing should be offered', but 'the taking of these tests may not be compelled'.[53]

Regarding the second issue, it seems that in cases where a diplomatic agent is found or suspected to be impaired – even if he did not consent to submit himself to the test offered – an exception to the principle of inviolability can arise. Indeed, states argue that inviolability cannot stop local authorities from preventing any action that can lead to serious hazards for the public or the diplomatic agent himself, thus they can lawfully constrain him in order to ensure its protection. This approach is evident in the policies of various countries. For example, in Canada it is provided that:

> Once the police officer has established reasonable and probable grounds that the driver is impaired, the officer will take all reasonable measures to prevent the driver from operating the vehicle. Such measures may include removal of the keys and

<https://www.international.gc.ca/protocol-protocole/policies-politiques/circular-note_note-circulaire_xdc-0427.aspx?lang=eng> accessed 28 May 2024 (emphasis added).

[51] Australian Department of Foreign Affairs and Trade, 'Protocol Guidelines: Diplomatic Missions: Driving in Australia' <https://www.dfat.gov.au/about-us/publications/corporate/protocol-guidelines/8-driving-in-australia#8.2.2> accessed 28 May 2024.

[52] U.K. Foreign and Commonwealth Office, 'Witten Answer of the Parliamentary Under-Secretary of State of 7 July 1986' (1986) 57 BYIL 550.

[53] U.S. Department of State, *Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities* (2018) 26.

preventing the driver from re-entering the vehicle. […] The police will not permit a driver, for his or her own safety, to leave the area where the vehicle has been stopped unless that person is in the care of another person willing and able to assume that responsibility.[54]

A similar approach can be found in the U.S. guidelines, in which it is stated that:

> If the officer judges the individual too impaired to drive safely, the officer should not permit the individual to continue to drive (even in the case of diplomatic agents). Depending on the circumstances, there are several options. The officer may, with the individual's permission, take the individual to the police station or other location where he or she may recover sufficiently to drive; the officer may summon, or allow the individual to summon, a friend or relative to drive; or the police officer may call a taxi for the individual.[55]

To sum up, it can be maintained that diplomatic inviolability is an absolute principle and should not be infringed by local authorities, with a particular exception in cases where the very life of a diplomatic agent or the public safety is in danger, or if the agents of hosting state have a clear and actual suspicion that the foreign envoy may commit a crime if not stopped promptly. The ICJ advocated for the same solution when arguing that the need to abide by the duty of abstention to ensure the respect of inviolability 'does not mean that a diplomatic agent caught in the act of committing an assault or other offence may not, on occasion, be briefly arrested'.[56] Those exceptional protective measures taken to ensure that diplomats driving under the influence, or in any way unable to drive, do not risk harming themselves or other road users are thus considered lawful and not in breach of Article 29.

By extension, similar measures aimed at protecting a foreign agent from himself or to restrain him in cases where he may be in the process of committing

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[54] Canadian Department of Foreign Affairs (n 50).

[55] U.S. Department of State (n 53) 26.

[56] *United States Diplomatic and Consular Staff in Teheran* (United States of America v Iran) (Judgment of 24 May 1980), ICJ Rep 1980, para 86.

serious offences other that those related to driving infractions could be seen as lawful.

Consequently, the level of protection granted to the personal inviolability of diplomats by Article 29 can be argued to be of a lesser grade than the level of inviolability afforded to diplomatic premises – see above Paragraph 5 in Chapter 3 – that knows no exception. However, it is essential to note that such an exception is allowed since the interests at stake are very high: on one hand, there's the very life and security of the diplomatic agent concerned, who needs to be safeguarded even against himself; on the other hand, there's the public security and safety of the hosting state at risk, thus justifying the brief intervention of the local authorities in order to put a halt to any possible ill-fated action of the otherwise inviolable envoy.

5. The special duty of protection: the positive obligation to protect diplomatic personnel.

The second duty imposed upon hosting states by Article 29 is the so-called special duty of protection, which mandates that states are bound to take 'all appropriate steps to prevent any attack on his [of the diplomatic agent] person, freedom or dignity'. Contrary to the respect of inviolability, which binds the receiving state to abide by a negative duty - that of abstention from enforcing sovereign powers – the duty of protection requires an active involvement of the hosting state's authorities to prevent any attack against foreign envoys. However, even if the wording of Article 29 can be seen as straightforward in providing that the hosting state is bound to take every appropriate action to afford a special protection to diplomats, there are some interpretative issues that needs to be analyzed. Firstly, there is the problem of defying which are the adequate protective measures that needs to be taken in order to avoid incurring in international responsibility for failure to prevent attacks. Secondly, there is a specific issue whenever diplomatic kidnappings happen in relation to what measures the hosting state could be required to take. Thirdly, the question of reparations arises when an attack effectively happens against a diplomatic envoy.

Regarding the first question, it has to be noted that diplomats are entitled to a greater level of protection than that accorder to foreign citizens in the hosting state.[57] Indeed, they need to be afforded a special protection: this means that, due to their inviolability, diplomatic agents are more protected since the special protection 'exceeds that due to aliens who sejorn in the territory of the receiving state, since such state is under a duty to take all adequate steps to prevent and impede any offense, injury or violence' against them.[58] Given that the protection that needs to be accorded to diplomats is special in nature since it originates from their inviolability, it can be defined as the duty to prevent and impede the occurrence of violations of inviolability caused by acts of private individuals within the territory of the hosting state. Violations can be, *e.g.*, murders, kidnappings, assaults, offences to their dignity, insults, etc. In particular, the receiving state is bound to put in place all the measures that can be seen as adequate – parametrically to the level of threat and risk specific of the hosting country – in order to 'ensure a specific result, i.e., the nonoccurrence of the violation'.[59] However, it is self-evident that the formula adopted in Article 29 cannot be construed as imposing upon states a duty to put in place measures that go beyond the 'appropriate', or adequate, level required by the nature of the mission and the local circumstances that can impair the inviolability of the agent. That is, states are not required to make 'every effort possible'[60] to protect diplomats, but only those that are seen as appropriate. Indeed, the duty imposed by Article 29 can be construed as being an obligation of means, and receiving states shall not incur international responsibility if, notwithstanding their adequate efforts, an attack on the personal inviolability of an envoy ultimately occur.

The issue that arise from this interpretation is that the VCDR does not define in any way what are the measures considered as adequate to protect diplomatic agents. State practice varies greatly, since the threat level that every

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[57] Carol Edler Baumann, *The Diplomatic Kidnappings: A Revolutionary Tactic of Urban Terrorism* (1973, Martinus Nijhoff Publishers) 36.
[58] Franciszek Przetacznik, 'International Responsibility of the State for Failure to Afford the Special Protection for Foreign Officials' (1974) 52 RDISDP 310, 311.
[59] Przetacznik (n 40) 49.
[60] Wagner, Raasch and Pröpstl (n 1) 206.

country faces is different, and the local background impose a case-by-case approach, even within the same state. Some missions, and thus some diplomats, can be more targeted than others, since they may be seen as symbols of their sending state. Consequently, some scholars have argued that the specific measures to ensure the safeguard of diplomatic inviolability should be negotiated between the sending and the receiving governments, in order to define 'by mutual consultation what is or is not appropriate'.[61] It is however agreed across the globe that the extent of the duty of protection can require the receiving state to accord armed escorts and guards to endangered diplomats, even though this practice cannot provide with an absolute guarantee of the prevention of any attack.[62] Other examples of measures that are seen as adequate and appropriate, and thus in abidance with Article 29, are 'police screening of the surrounding of offices and living quarters of officials […], their protection when moving about the receiving state, the control of mail deliveries […] up to permitting such officials to carry arms'.[63]

The extent of the measures necessary to prevent and to impede attacks is still controversial when dealing with diplomatic kidnappings. In recent times, the practice of kidnapping representatives of foreign states in order to put forward political instances against the local government has raised, and a great number of cases happened – mostly in Latin America.[64] Usually, kidnappers use the threat of killing the diplomat that they hold captive in order to make specific requests to the local authorities, such as the release of political prisoners, ransom, or other 'excessive, unreasonable, and humiliating demands'.[65] Whenever a kidnapping happens, the security and inviolability of the diplomatic agent has been breached; but Article 29 still requires that the hosting state must restore his safety and shall act in order to put a halt to the violation. However, states deal with kidnappers in different ways, and thus put in place different measures that needs to be analyzed in order to understand if they can be construed as being

[61] ibid; Przetacznik (n 40) 52.
[62] Denza (n 2) 215; Przetacznik (n 40) 52.
[63] Przetacznik (n 40) 52.
[64] For a list of examples see Baumann (n 57).
[65] Przetacznik (n 40) 53.

appropriate and adequate. Otherwise, the hosting state faces international responsibility for violations of the VCDR.

Receiving states can be divided into two groups when dealing with the requests of kidnappers. The first group consists of states which undertake negotiations with terrorists in order to ensure the safe release of the kidnapped diplomat. Usually those states ultimately agree to meet the requests, and thus achieve the objective of obtaining the release of the foreign agent. Nothing in the VCDR prevents states to act as such, and negotiations shall be construed as a valid way to abide by the duty of protection; thus, if also the measures taken before the kidnapping were in compliace with the general parameter of adequacy, and if the negotiations resulted in the release of the agent, international responsibility of the hosting state for an infringement of the duty of protection should not arise.

However, other states maintain that the Convention does not require them to negotiate with kidnappers, given that it may be contrary to their internal legal order – or it may be prohibited by their Constitution. Other reasons that could induce states to avoid negotiations can be seen in the idea that negotiating with criminals should be considered un-honorable – even when acting with the aim of freeing a foreign diplomat – or dangerous for the safety of the hosting country.[66] Indeed, it is true that under international law as codified by the VCDR there is no legal obligation upon states to seek an agreement with kidnappers: scholars are clear in maintaining that position.[67] In addition, it must be noted that state practice shows that sending governments usually do not insist or urge the receiving one to settle with the criminals. On the contrary, the U.K. and the U.S. has taken the opposite position, arguing that surrendering to the kidnappers request would encourage others to target their diplomats even more, and thus they do not urge receiving governments to start negotiating for the release of their envoys.[68] Still, the hosting state is bound by the duty of protection to restore the inviolability of the kidnapped diplomat, and thus has to accept any legal consequence that may arise from its refusal to negotiate with kidnappers.

[66] ibid 56.
[67] Denza (n 2) 215; Przetacznik (n 40) 56; Wagner, Raasch and Pröpstl (n 1) 206-207.
[68] Denza (n 2) 216.

Receiving states shall consequently put in place measures alternative to negotiations that can reach the same result, that is the safe release of the prisoner, and if they fail to do so they must bear international responsibility. It is also maintained that even if the measures other than negotiating are put in place with the consent of the sending states, whenever the abduction result in the killing of the kidnapped agent the consent cannot be construed as exempting the hosting government from their responsibility of failing to provide the adequate level of protection request by Article 29.[69]

The third issue that needs to be analyzed in order to understand the duty or protection is that of the need for restoration whenever an act of a private individual breaches the inviolability of an envoy. A brief digression about state's responsibility shall be made in order to better understand the duty to make reparations. It is evident in international practice that responsibility of states can only arise when an unlawful act has been committed.[70] However, states can only be directly responsible for unlawful actions committed by their organs; still, they can become responsible for acts that are put in place by private citizens whenever the commission of those acts reflects the unlawful neglection by states' organs of an international duty imposed upon them. In fact, the theory of neglected duties affirms that the state is responsible for acts of individuals 'when it has failed in his duties of prevention'.[71] Consequently Article 29, when providing for the duty to take all appropriate measures to prevent attacks against the person or the dignity of a diplomat, implicitly states that whenever a private person succeed to infringe inviolability an unlawful omission of the states had been "committed". Whenever a state fails to take all the measures that would have been adequate, under the principle of due diligence, to protect a diplomatic agent, it must endure the consequences of its omissions. Those consequences imply that the receiving state must provide reparations to the sending government for the loss of life, or for any other damage that was consequential to the action of a private individual that was not successfully prevented by the hosting state. On the contrary, whenever such damages occurred in unpredictable circumstances,

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[69] Przetacznik (n 40) 57.
[70] Przetacznik (n 58) 312.
[71] ibid 321.

and the adequate level of protection had been granted to the envoy concerned, states cannot be bound to bear international responsibility.

6. Additional instruments to protect diplomats: the U.N. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973.

The duty of punishment of crimes against diplomatic agents is considered to be subsequent to the duty of prevention of acts that consist in infringements of diplomatic inviolability as laid down in Article 29. However, the duty of punishment is not encompassed explicitly in the VCDR, that leaves states free to determine what measures could be considered as appropriate to better substantiate the duty of protection. Still, an adequate prosecution and punishment of those persons that succeed in violating diplomatic inviolability, even in cases when an appropriate level of protection has been laid down by the hosting state, is necessary in order to fully avoid incurring in international responsibility. States need to prevent the commission of such crimes against foreign envoys; if the preventive measures taken fell within the parameter of adequacy, but were still inefficient, they need to prosecute the wrongdoing private individual and to punish him accordingly. Even if the Convention is silent with regards to the punishment of crimes against diplomats, scholars have always maintained that diplomatic inviolability, even before its codification in 1961, shall have been construed as imposing upon states to prosecute and punish those crimes.[72]

In an effort to better substantiate the duties incumbent upon states when dealing with crimes that are committed against internationally protected persons, and thus against diplomats as well, the Vienna Convention had not been considered sufficient in the years after its entry into force. Consequently, other international instruments had been drafted and adopted in order to provide diplomats with an additional layer of protection, especially in an era where they had become the target of terroristic threats. For this reason, in 1971 the U.N.

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[72] Carlo Curti Gialdino, *Diritto Diplomatico-Consolare Internazionale ed Europeo* (6th edn, Giappichelli 2022) 348; Ernest Satow, *A Guide to Diplomatic Practice* (Nevile Bland ed, 4th edn, Longmans Green and Co 1957) 178 para 314; Przetacznik (n 40) 65-67.

General Assembly requested the ILC to study 'the question of the protection and inviolability of diplomatic agents […] with a view to preparing a set of draft articles dealing with offences committed against diplomats'.[73] The draft prepared by the ILC was then adopted as the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,[74] in 1973 by the U.N. General Assembly[75] and entered into force in 1977; there are 180 states parties to the Convention.[76]

The Convention on the Punishment of Crimes has a personal scope that intersect that of the VCDR since in its Article 1, subparagraph (1), letter (b) it is provided that the for the purpose of the Convention an 'internationally protected person' is:

> Any representative or official of a State […] who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household.

Thus, the Convention on the Punishment of Crimes, even if its personal scope goes beyond that of the VCDR (since it also protects other officials that shall be considered as 'internationally protected person[s]'), applies to diplomats as defined by the Vienna Convention, the members of their household and any other person entitled to inviolability as already explained in Paragraphs 2, 2.2. and 2.3. of this Chapter.

The Convention on the Punishment of Crimes deals with a number of important issues that shall be considered in order to provide an insight on the additional instruments that are put in place for the protection of diplomats.

The first duty that the Convention impose upon states is that encompassed in Article 2, which provides that they have to make punishable

[73] UNGA, Res 2780 (XXVI) (3 December 1971), UN Doc A/RES/2780(XXVI).
[74] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977) 1035 UNTS 167 (hereinafter Convention on the Punishment of Crimes).
[75] UNGA, Res 3166 (XXVIII) (14 December 1973), UN Doc A/RES/3166(XXVIII).
[76] As of June 2024.

under their national legislation any crime committed against diplomats. The list of acts that states shall considered in their internal law as being criminal in nature is provided in Article 2(1) and consist of:

> (a) A murder, kidnapping or other attack upon the person or liberty of an internationally protected person;
> (b) A violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty;
> (c) A threat to commit any such attack;
> (d) An attempt to commit any such attack; and
> (e) An act constituting participation as an accomplice in any such attack […].

In addition, Article 2(2) impose that 'each State Party shall make these crimes punishable by appropriate penalties which take into account their grave nature'. Scholars have maintained different opinions about how this duty should be construed, since it may entail different solutions. On one hand some suggests that 'it does not require that the penalty should be greater on account of the fact that the victim was an internationally protected person', but merely because of the 'grave nature' that an attack against a diplomat implicate.[77] Thus, states should not be required to pass legislations that increase the penalty because the attack was made against a diplomat, or to impose a special punishment different to the one that would be normally provided whenever such attacks are brought up against every person. On the contrary, Article 2(2) should only impose upon states to punish those attacks with an appropriate penalty given the nature of the act itself, not for the importance of their victim. On the other hand, some scholars have argued that the protection of diplomats and Article 2(2) should be construed as imposing upon states to pass special legislations that provide for increased or special penalties whenever the acts considered in Article 2(1) are committed against diplomats.[78] State practice shows that a number of countries have created special legislations dealing with the matter of those crimes specified in Article

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[77] Denza (n 2) 217.
[78] Przetacznik (n 40) 67-68.

2(1) of the Convention on the Punishment of Crimes. Those laws usually provide for increased punishment whenever the act is directed towards a diplomat, or they impose a specified punishment that is different – and usually greater – than those normally imposed when the act is committed against any other person.[79]

The Convention on the Punishment of Crimes does not only aim to impose upon states to considered as criminal the attacks committed against diplomats, but if goes beyond that and provide for additional duties that are directed towards a greater protection of foreign envoys. Indeed, other key provisions of the Convention are Article 3, Article 7, and Article 8, which read together impose to the state in which the crimes are committed have to abide by the principle *aut dedere, aut iudicare*.[80]

In fact, Article 3(1) impose upon states to 'take such measures as may be necessary to establish its jurisdiction over the crimes set forth in Article 2', whenever the crime was committed in their territory, or if the alleged offender have their nationality, or if the diplomatic agent against which the crime is committed was exercising its functions on their behalf. Article 3(2) and Article 7 provides that states shall establish jurisdiction over the crimes which are committed in another territory by individuals who are present in their territory, if they do not wish to extradite them.

On the other hand, Article 8 provides the legal basis upon which states can choose to extradite the alleged offender whenever he is present in their territory. Article 8(1) deals with those states that have already signed an extradition treaties between themselves: whenever that treaty does not list the offences considered under Article 2(1) as extraditable, the Convention impose that 'they shall be deemed to be included as such therein'. Article 8(2) instead suggest that states which have not an extradition treaty already in existence, but that are parties to the Convention, can use the latter as the legal basis upon which considering the request for extradition in respect to the crimes listed in Article 2(1).

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[79] For a list of examples, Przetacznik (n 40) 68-73.
[80] Curti Gialdino (n 72) 350.

Other provisions of the Convention on the Punishment of Crimes impose upon states a duty to cooperate in order to prevent and to punish any offence committed against diplomats, and Article 2(3) contains a safeguard clause under which the Convention shall not in any way be construed as derogative of the duty to protect diplomatic agents from any other act that may be considered as infringing their inviolability under international law.

Starting from this last provision, it needs to be briefly introduced the problem of coordination between the Convention on the Punishment of Crimes and Article 29 VCDR. Some scholars have suggested that the Convention on the Punishment of Crimes is superfluous since all the principles herein contained could have been construed from Article 29 VCDR; others argued that Article 29 should be considered as the basic standard that have been substantiated by the adoption of the Convention on the Punishment of Crimes.[81] It would however seem appropriate to read the two international instruments as complementary. On one hand, the Vienna Convention explicitly provides for the duty to prevent any crime that may be committed against diplomats, thus acting as the legal basis for every measure taken before the commission of the crime itself. On the other hand, the Convention on the Punishment of Crimes better explains the duty imposed upon the receiving state whenever offences have been committed and there is a need to prosecute and punish the perpetrators; consequently it acts as the base for every measure put in place after the commission of the crime, and implement with positive obligations the "implicit" part of Article 29.[82]

6.1. The U.N. reporting mechanism for breaches of inviolability and the duty of protection.

While discussing the international instruments in the hand of states in order to enhance the protection of diplomatic agents provided by Article 29, it needs to be introduced the U.N. reporting mechanism created in 1980, that was further developed in 2003 and in 2011.

[81] Wagner, Raasch and Pröpstl (n 1) 216.
[82] ibid.

At its thirty-fifth session in 1980, the U.N. General Assembly, concerned with the most blatant breach of diplomatic inviolability since the entry into force of the Vienna Convention, that is the hostage-taking of diplomatic personnel inside the U.S. embassy in Teheran occurred in 1979, maintained that it was '*deeply concerned* at the increasing number of violations of, or failures to observe, the relevant principles and rules of international law pertaining to the inviolability of diplomatic […] missions and representatives'.[83] For this reason, after calling upon states to respect the relevant principles of international law, as codified for the states parties to the Convention in the VCDR, and after urging states that were still not part of the Convention to consider acceding to it, the General Assembly decided to build a reporting mechanism with regard to attacks against diplomats. In its first form, the reporting mechanism '*invite*[*d*]' sending states to report to the U.N. Secretary General breaches of diplomatic inviolability, and upon receiving states to report the measures 'taken to bring to justice the offenders and to prevent a repetition of such violations and eventually to communicate […] the final outcome of the proceedings against the offenders'.[84] On the other hand, it also '*request*[*ed*] the Secretary-General to circulate to all States, upon receipt, the reports received', as a method to keep hosting states accountable for the breaches occurred in its territory.[85]

That instrument, which started as a voluntary report mechanism, was further developed by the General Assembly at its fifty-seventh session in 2003, when the resolution concerning the 'consideration of effective measures to enhance the protection, security and safety of diplomatic and consular missions and representatives'[86] was negotiated again in order to impose upon states an obligation of reporting to the Secretary General all those infringements of Article 29 – for the states parties to the VCDR – or of the customary principle of diplomatic inviolability occurred within any hosting state. Indeed, what was born as an invite became a request. In the words of the General Assembly, all states were '*request*[*ed*]' to report 'as promptly as possible serious violations of the

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[83] UNGA, Res 35/168 (15 December 1980) UN Doc A/RES/35/168.
[84] ibid.
[85] ibid.
[86] UNGA, Res 57/15 (24 January 2003) UN Doc A/RES/75/15.

protection, security and safety of diplomatic […] missions and representatives'.[87] States in which violations occurred were consequently requested to report about the measures taken to bring the offenders to justice. In addition to the invite of 1980, the hosting states concerned with breaches of inviolability in their territory were also requested to report 'on measures adopted with a view to preventing a repetition of such violations'.[88] The obligations of the Secretary General were consequently increased, as he was asked to generally remind states of the request made by the General Assembly about the reports, and thus of their obligation to abide by the reporting mechanism, and to advise states, whenever a violation occurred, of the need to refer to the mandatory reporting procedures.[89]

The reporting mechanism became even more mandatory in 2011, when the General Assembly – in its biannual consideration of the item regarding the measures put in place to protect diplomats and the breaches of inviolability occurred – further emphasized the obligation of states replacing the word '*requests'* with the word '*urges*'.[90] Indeed, in the intricated mechanism of drafting a U.N. resolution, the word '"Urges" is considered to be even stronger',[91] thus underlining the attention that the international community gives to the problem of attacks on diplomats and the need to keep hosting states accountable for the violations of their duties.

It can thus be said today that states have a duty of reporting to the Secretary General every infringement of inviolability – as codified in the Article 29 VCDR, given the number of states that are party to the Convention – in a detailed and expeditious manner. In addition, hosting states in which the violation occurred need to be kept accountable for the breach of inviolability, thus they are also obliged to report about the measures taken to prevent any other attack from happening and to prosecute and punish the alleged offenders. In reporting the occurrence of such offences, states shall communicate to the

[87] ibid.
[88] ibid.
[89] ibid.
[90] UNGA, Res 65/30 (10 January 2011) UN Doc A/RES/65/30.
[91] U.N., 'Drafting Resolutions' in <https://www.un.org/en/model-united-nations/drafting-resolutions> accessed 3 June 2024.

Secretary General a number of important information such as the 'measures taken to apprehend and to bring the alleged offender to justice' and the 'assistance of other States directly concerned in connection with the proceedings brought in respect of the offence(s) committed'.[92]

7. Instruments in the hands of the receiving state in case of abuse of diplomatic inviolability.

As laid down in the present Chapter and in Chapter 3, diplomatic inviolability – being it personal or referred to the premises of the mission – is considered absolute, except for some particular cases where, for a brief period of time and only when the grave nature of the situation requires so, the hosting state can lawfully infringe it. Consequently, states must refrain from breaching Article 29 and Article 22 even in cases when privileged individuals abuse of their position and prerogatives, counting on the shield that that VCDR provides them.

However, the Convention does not leave receiving states without any remedy in cases where diplomats abuse their inviolability and immunities. Being the VCDR a 'self-contained régime',[93] it provides a number of instruments in the hand of the hosting state that can be used to lawfully deal with diplomats who abused their privileges. Thus, even if diplomatic inviolability is absolute in nature, diplomats are not completely above the law of their posting state, since against them the latter may direct a variety of sanctions that are, lawfully, infringing upon their inviolability.

Firstly, it has to be noted that the VCDR impose upon every diplomat who is exercising his functions in a foreign state a duty 'to respect the laws and regulations of the receiving state'.[94] In addition, diplomatic agents must refrain from 'interfer[ing] in the internal affairs of that state'.[95] Diplomats should also abstain from using 'the premises of the mission […] in any manner incompatible

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[92] U.N. Secretary General, 'Guidelines Embodying the Relevant Questions that States May Wish to Consider When Reporting Serious Violations of the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives, as Well as of Missions and Representatives With Diplomatic Status to International Intergovernmental Organizations' Annex to UN Doc A/42/405.
[93] *United States Diplomatic and Consular Staff in Teheran* (judgment of 24 May 1980) para 86.
[94] Article 41(1) VCDR.
[95] ibid.

with the functions of the mission'.[96] This means that diplomats enjoying inviolability are not free to use and abuse it in any manner they want, and shall be protected by the rights conferred by the Vienna Convention only when they are loyally abiding by the duties imposed upon them by the same international rules. The three duties impose by Article 41 are the *quid pro quo* upon which the conferral of inviolability is based. Thus, whenever receiving states feel that a diplomatic agent has abused of its position, for he breached his obligations under Article 41, they have at their disposal a series of measures provided by the VCDR itself in order to deal with them. Any other action taken against an abusing diplomat shall not be considered lawful – as emphasized by the ICJ – since it would be an infringement of the Vienna Convention.

The measures that the VCDR lay down to deal with diplomatic agents who abused of their position that will be analyzed in this Paragraph are the declaration of *persona non grata* and the possibility of obtaining an express waiver of immunity.

The term *persona non grata* indicates an individual that is 'not wanted or welcome in a particular country, because they are unacceptable to its government'.[97] That is, a *persona non grata* is a diplomat who the government of the hosting country has chosen to consider as no more welcomed in the state since it has violated his obligations under Article 41 VCDR and has abused his inviolability in order to be shielded from any action that may have been directed against him if he hadn't a diplomatic status. Article 9 reads that:

> 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 other 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

[96] Article 41(3) VCDR.

[97] Colin McIntosh ed, *Cambridge Advanced Learners Dictionary* (4th edn, Cambridge University Press 2013) 1144. See also John P Grant and J Craig Barker, *Parry and Grant Encyclopedic Dictionary of International Law* (3rd edn, Oxford University Press 2009) 463.

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 9 is a key provision in the protection of the interests of the hosting state, since it is the legal basis for the latter to counterbalance the rights and immunities conferred to diplomats by the VCDR. State practice shows that the declaration of *persona non grata* or not acceptable has been used across the years whenever serious offences had been committed by diplomats, thus when they breached their duty of abiding by the national laws of their hosting country provided by Article 41. When more serious crimes had been committed, or allegedly committed – such as espionage or involvement in terroristic activities –[98] states resorted to the declaration of *persona non grata* without hesitation. State practice shows that an equal declaration shall be made whenever diplomats committed other offences such as being involved 'in violent crime or drug trafficking, […] firearms offences, rape, incest, serious cases of indecent assault and other serious sexual offences, fraud, […]'.[99] In addition, some states resorted to a declaration of *persona non grata* even in cases of driving offences.[100]

Before declaring a diplomat as *persona non grata*, states could resort to other, less invasive, measures which requires some level of cooperation with the sending state. Firstly, it shall be noted that sending states can choose to recall the diplomat who abused of his inviolability whenever the hosting state is considering of declaring him *persona non grata*: since the latter is a measures of great impact upon the relations between the two states, the sending one may wish to avoid the said declaration by recalling the diplomatic agent in question.

Secondly, the recall of a diplomat or the declaration of *persona non grata* can be avoided if the sending state decide to cooperate with the receiving state

[98] Denza (n 2) 64-69.

[99] Scott Davidson and others, 'Treaties, extradition and diplomatic immunity: some recent developments' (1986) 35 ICLQ 425, 434.

[100] ibid.

in order to let the diplomat concerned be tried in the courts of his posting country for the alleged crimes he had committed. Indeed, as seen in Chapter 2, inviolability is granted to diplomatic agents not for their personal benefit, but for they represent their sending state and because they fulfill a necessary function for the correct functioning of international relations. This means that their sending state can decide to waive their immunity whenever it feels that by doing so it may preserve the relations with the receiving state. Article 32 indeed provides that:

> 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.

Sending states may thus waive the immunity enjoyed by their diplomats – stemming from their inviolability – from being prosecuted in the courts of law of their posting country, granting the latter the power to violate the privileges conferred by the VCDR whenever those have been abused by the agents.

To sum up, diplomatic agents may rightly enjoy their inviolability until they abide by the laws and regulations of the country that hosts them, thus respecting the duties imposed by Article 41. Whenever those duties have been breached, the possible abuse of inviolability and immunities in order to escape from justice is balanced by the VCDR with the provision of different instruments that the receiving state could put in place to bring the wrongdoer to justice, or to expel him. Any other breach of inviolability, even when a crime has been committed, should thus be regarded as unlawful for it will go beyond the scope of the VCDR.

Conclusions.

As seen across the present thesis, the principle of inviolability of premises and personnel accorded to diplomatic missions abroad is one of the oldest and most important one in the world of international law and diplomatic relations. That is certainly due to the importance that diplomatic intercourse assumes in today's world: the emergence of a great number of new states since the end of the Second World War, the end of the Cold War and the beginning of an era of globalization imposes upon states to task diplomatic agents with the conduct of businesses and relations between them. Thus, diplomatic intercourse is an essential part of the international community of states, and is needed more than ever in a time where differences across cultures and states threaten to undermine the peace and security of the world order. Without diplomatic agents and missions abroad both allied states and countries in conflict with each other wouldn't be able to communicate, to conduct businesses, and to eventually smooth out divergences.

The very need for diplomatic intercourse impose to grant inviolability to those tasked with diplomatic functions. Without being able to feel safeguarded against any interference by the officials of the hosting state, diplomats wouldn't be able to fulfill their mandate. If they can be arrested, prosecuted, held captive, or threatened in any way by the states that receive them, diplomatic agents wouldn't feel safe enough to criticize the authorities of those states, or to go against their policies, and they couldn't act to protect the interests of their own country. By being inviolable they shall feel sure that every one of their actions would not be the basis for retaliation against them. And by being sure of that, they can perform their functions – as encompassed in Article 3 VCDR – at the maximum level possible.

As seen both in Chapter 3 and Chapter 4, inviolability calls for protection. Inviolability without a specific duty imposed upon hosting states to prevent any attack against diplomatic agents would be almost null and void, for it will miss an important face of the same coin. Practice shows how states usually comply with the duties of abstention imposed by the Vienna Convention on Diplomatic

Relations, with the important exception of the facts occurred at the U.S. embassy in Teheran in 1979; however, since states are not the real "enemy", diplomats fear most to be targeted by private individuals, not acting in an official state's capacity. States have thus to be bound to protect diplomatic agents and to prevent any attack on them since they are representatives of their own state, and consequently being a symbolic target for terrorists. The imposition of a special duty of protection is then complementary of the need to confer inviolability to foreign envoys: there could not be one without the other.

It is clear that the same arguments shall be made in order to explain the necessity to protect and hold as inviolable mission premises. Diplomatic agents could not act safely if their workplace may be endangered without consequences, thus the need to avoid hindering the performance of functions inside embassies naturally comes from the necessity of diplomatic intercourse.

The essential necessity of diplomatic intercourse is emphasized also by the presence in the Vienna Convention on Diplomatic Relations of a number of instruments – as seen in Chapter 4 – that states may resort to in cases where abuses of inviolability arise. Since the VCDR is a self-contained regime, that does not allow states to take actions against diplomats or mission premises outside the scope of the Convention itself, this can be construed as reinforcing the view that diplomatic protection is an absolute need. The duty to respect inviolability and to prevent any attack against protected persons and buildings underlines how those two subjects are necessary for the correct conduct of relations between states, and cannot be unilaterally hindered without a legal base supporting the breach of inviolability. Even more, whenever states resort to those "punitive" measures to bring an abusing diplomat to justice his inviolability still cannot be breached without an explicit consent of his sending state. And in cases when hosting states employ the instrument of declaring a diplomat *persona non grata*, for he has committed a serious offence and violated his duties under Article 41, his inviolability shall not be breached at all: he should be able to leave the country, within a reasonable period of time, without fearing any consequence.

The success of the Vienna Convention on Diplomatic Relations is self-evident: almost every state recognized by the international community agreed to adhere to its principles and impositions. After sixty years from its entry into force, the Convention is still regarded as the most important instrument to overlook when dealing which the protection of diplomatic agents. This is demonstrated by the actions of the European Union, a relatively new subject of international law, that since the beginning of their external action – due to the extension of its competences – has regarded the Convention as the correct legal framework to find the duties and practices that shall protect its delegations. The first factor that lead to the success of the VCDR lays in the very creation of the Convention, that was born from a codification process of customary rules already well respected across civilized nations and that was supported by a number of judgements given by national courts. Since it didn't introduce anything extremely new about diplomatic inviolability and the duty of protection, the accession to the Convention had been easy for a great number of states which already abided by the duties herein encompassed.

The second, most important, factor that influenced the success of the Convention is the openness of its inviolability clauses. Article 22 and Article 29 provides for general duties that are not too restrictive on states, since they almost constitute mere statements of principle. On one hand, the open clauses used by the VCDR, such as 'the person of a diplomatic agent shall be inviolable'[1] and 'the premises of the mission shall be inviolable',[2] constitute a problem since they may cause some interpretative issues, as extensively seen across this work. On the other hand, if states have a relative freedom to construe what are the correct practices to respect the inviolability of diplomatic agents and premises, they may be keener to accede to the Convention. The presence of 193 states parties to the VCDR, even if they may interpret the inviolability clauses and the duty of protection in different ways – regarding some marginal aspects – means that across the globe diplomats can rest assured that they will enjoy a minimal level

[1] Article 29 VCDR.
[2] Article 22 VCDR.

of protection and respect. That minimal level is that provided by the positivization of old customary rules, that nobody can questions today.

This work also had the aim to underline how the protection of diplomats and diplomatic premises is not an easy task, and shall be the object of an effective collaboration and cooperation between the receiving and the sending states. The issue that is more concerning than others regarding the special duty of protection is that of granting an adequate level of security parametrized to the threat level of the hosting country. Since states that have a higher level of security risk usually are those with lesser resources to afford diplomats an adequate protection, and since in those states foreign agents are seen as easy targets for terrorists due to their symbolic nature, the cooperation of the sending state is essential. By sharing information about the security threats received by the mission, by providing for an additional layer of protection with the dispatch of their own national forces, by training local authorities to deal with diplomatic security, and by building embassies and diplomatic compounds in a safer way, sending states can effectively improve the protection enjoyed by their own diplomats. Without cooperation between states it would be impossible to prevent attacks against envoys, and thus – even between states that are hostile with each other – sending and hosting governments shall act closely to ensure and enhance the protection of foreign missions.

Lastly, it shall be remarked that diplomatic relations exist today not only within states. Diplomacy has become an instrument of dialogue used by a greater number of international subjects, such as the European Union, those Governmental Organizations that gravitate toward the U.N. institutions, and also some Non-Governmental Organizations (NGOs). Those subjects have to rely on agents to perform their "diplomatic" functions, and thus discussions should be held to implement mechanism to enhance and assure their protection. The effects that the duties imposed by the Vienna Convention on Diplomatic Relations produce upon states, and the practices that has evolved throughout the decades that are in compliance with the latter should be regarded as a solid base from which the protection of non-statal agents can arise. However, different approaches had been followed in order to implement the duties encompassed in

the VCDR with regards to subjects that could not be included in any way in the categories of subjects directly addressed by the Convention in Articles 29 and 37.

For example, as previously seen in Chapter 4, the European Union requests states that host an E.U. delegation to oblige themselves to grant European agents the same protection that would have been accorded to ordinary diplomats under the VCDR. As a consequence, the scope of the Convention has not been enlarged, but its provisions shall apply directly – or mediated though the international agreements between the hosting state and the E.U. – to all those subjects that are part of the European delegation.

A second approach to reach the same level of protection granted by the Vienna Convention is that followed by the U.N., that has put in place its own particular instruments to protect its personnel. Indeed, the Convention on the Privileges and Immunities of the United Nations[3] and the Convention on the Safety of United Nations and Associated Personnel[4] both aim at providing the U.N. properties and personnel an equal level of inviolability as that mandated by the VCDR, and also impose upon states the respect of a great number of obligations that are specular to the special duty of protection as laid down in the VCDR. For example, the Convention on the Privileges and Immunities of the United Nation states that the premises of the U.N. 'shall be inviolable';[5] it is imposed to respect the inviolability of states' representatives to the U.N.[6] and a certain degree of immunity and privileges is accorded also to U.N. officials.[7] On the other hand, the Convention on the Safety of United Nations and Associated Personnel imposes upon states: the duty to avoid any attacks against U.N. personnel;[8] the necessity of ensuring that all the adequate preventive measures are taken to avoid those attacks;[9] the duty of making criminal any act against

[3] Convention on the Privileges and Immunities of the United Nations (adopted 13 February 1946, entered into force 17 September 1946) 1 UNTS 15.
[4] Convention on the Safety of United Nations and Associated Personnel (adopted 9 December 1994, entered into force 15 January 1999) 2051 UNTS 363.
[5] Article II Convention on the Privileges and Immunities of the United Nations.
[6] Article IV Convention on the Privileges and Immunities of the United Nations.
[7] Articles V and VI Convention on the Privileges and Immunities of the United Nations.
[8] Article 7 Convention on the Safety of United Nations and Associated Personnel.
[9] ibid.

U.N. officials, paired with the duty to establish jurisdiction to prosecute those acts or to extradite the alleged offender.[10] Thus, without referencing the VCDR –also because the first of the Conventions regarding the immunities of the U.N. was adopted before the Vienna Conference on Diplomatic Intercourse and Immunities was held – the U.N. has created an autonomous body of international rules that imposes upon states to respect its officials as if they were diplomats.

However, more difficulties arise when dealing with the protection of NGOs personnel, that are today considered only as private individuals, even if some of them carry out – usually in states with a high security risk – functions that are *quasi*-diplomatic in nature, since they have to deal with local authorities on behalf of an international subject. An eventual extension of states duties to protect NGOs officials shall induce a reflection upon the eventual amendment of the VCDR, or upon the need to create a new, complementary, international instrument that deals with the safeguard of non-statal international officials.

[10] Articles 9, 10, 13 Convention on the Safety of United Nations and Associated Personnel.

Table of abbreviations.

AJIL	American Journal of International Law
A.2d	Atlantic Reporter Second Edition
BGH	Federal Supreme Court of the Federal Republic of Germany
BVerfG	Federal Constitutional Court of the Federal Republic of Germany
BYIL	British Yearbook of International Law
CA	Court of Appeal
Cases T Talbot	Cases temp. Talbot
Cass IT	Court of Cassation of Italy
CB	Common Bench
CYIL	Canadian Yearbook of International Law
CILJ	Cornell International Law Journal
CLJ	Cambridge Law Journal
CoS NL	Council of State of The Netherlands
Dall	Dallas Reports
Dis Ct DC	District Court of the District of Columbia
DUSPIL	Digest of United States Practice in International Law
EEAS	European External Action Service
EEAS Decision	Council Decision 2010/427/EU
El & El	Ellis & Ellis
F.2d	Federal Reporter Second Edition
HJD	The Hague Journal of Diplomacy
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ILC	International Law Commission
ILR	International Law Reports
IPCS	Institute of Peace and Conflicts Studies
KB	King’s Bench

LNTS	League of Nation Treaty Series
NGOs	Non-Governmental Organizations
NY Super Ct	New York Superior Court
OJ	Official Journal of the European Union
Pa O & T	Pennsylvania Oyer and Terminer
PSCs	Private Security Companies
RIAA	Report of International Arbitral Awards
RDISDP	Revue de Droit International de Sciences Diplomatiques et Politiques
Sup Ct A	Supreme Court of Austria
Sup Rest Ct Berlin	Supreme Restitution Court for Berlin
TR	Term Reports
UN Doc	United Nations Document
UNGA	United Nations Treaty Series
UNTS	United Nations General Assembly
US	United States Reports
“	United States Supreme Court
USC	United States Code
VCCR	Vienna Convention on Consular Relations 1963
VCDR	Vienna Convention on Diplomatic Relations 1961
WLR	Whittier Law Review

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