

INTERNATIONAL LAW ASSOCIATION
COMPARATIVE DIPLOMATIC AND CONSULAR IMMUNITIES, PRIVILEGES
AND INVIOBABILITIES

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PRELIMINARY REPORT: THEORETICAL AND CONCEPTUAL FRAMEWORK*

* This preliminary report has been prepared by the Rapporteur on the basis of Committee members' responses to a questionnaire which had previously been prepared by the Chair and the Rapporteur and approved by the Committee. The list of Committee members who took part in the questionnaire and contributed to the preparation of this report is attached.

I. INTRODUCTION

1. This preliminary report addresses theoretical and conceptual issues related to diplomatic and consular immunities and privileges. At its inaugural meeting during the 81st ILA Biennial Conference in Athens in 2024, the Committee adopted its work plan, methods, and methodologies for carrying out its mandate. In particular, the Committee decided to begin by discussing the theoretical and conceptual issues that would serve as a background and frame of reference for the rest of its work. It is indeed important to ascertain the foundations that will guide the analysis of the respective provisions of the Vienna Convention on Diplomatic Relations (VCDR) and the Vienna Convention on Consular Relations (VCCR). The aim of this preliminary report, which is devoted to exploratory questions, is primarily to synthesise the members' general reflections and thoughts on the subject of diplomatic and consular immunities and privileges, as well as the grey areas of the CVRD and CVRC that require clarification, and to define the Committee's working framework.

2. In this respect, a questionnaire prepared for this purpose allowed Committee members to share their views on the historical background, some terminological issues, the theoretical background, methodological issues, as well as the national and regional legal frameworks relating to immunities, which must constitute central elements of the comparative analysis that is at the heart of the Committee's mandate. These points form the backbone of this report, which addresses them in turn. The Committee also continued the reflection begun in Athens on the research points, in particular the identification of the specific issues of the VCDR and VCCR that need clarification, as well as how this work should be carried out, in accordance with its mandate. The provisional conclusions on these points are also presented in the last two sections of this report.

3. The research plan focuses on identifying ambiguous provisions and legal gaps in the VCDR and the VCCR pertaining to diplomatic agents and consular officers' immunities, privileges, and inviolabilities. Subsequently, the Committee will examine State practice that addresses these ambiguities and gaps. Through a systematic compilation and analysis of interpretative approaches across national legal systems worldwide, the Committee aims to provide greater clarity and coherence in the application of these international conventions. In this context, particular attention will be paid to the decisions of national courts (particularly those of higher courts/courts of last instance), legislation, and other relevant officials. The Committee has set out to achieve specific objectives, including, but not limited to, enhancing understanding of the personal inviolability of diplomatic and consular agents and their immunity from criminal jurisdiction. It will also investigate the immunity of these agents concerning civil and labour jurisdictions, examine the tax exemptions available to them, and discuss and potentially clarify terms used in conventions, such as "premises of the mission", "inviolability", or "diplomatic functions."

4. It is understood that the Committee may not be able to address in full all the aspects surveyed in this preliminary report over the course of its mandate. It may have to decide which aspects are to be covered, and the preliminary report seeks to serve as a basis for discussion and to gradually illustrate the progress towards such a decision.

II. HISTORICAL BACKGROUND

5. A historical overview of diplomatic and consular history, along with the sources of diplomatic and consular law, is essential, even if succinct, for understanding the rules governing diplomatic and consular relations and each of these institutions. It is indeed important to analyse the origins and evolution of diplomatic and consular rules, not only to understand the context in which diplomatic and consular law has evolved, and thus the process that led to the formulation of the current rules, but also to discuss their current legitimacy and possible reforms and adjustments. Hence, practically all textbooks and treatises on the subject begin with a historical account of the process of emergence and the dynamics of secular continuity, rupture, and innovation of these institutions and the norms that govern them.

6. In this respect, while a large part of this historical presentation still focuses mainly on “the western tradition because the establishment of resident envoys is exclusively a Western development”,¹ it is now accepted and emphasised that the practice of diplomatic relations, i.e. official and institutional relations, between communities through their monarchs/governments is more ancient and common to practically all the peoples of the world. The Committee does not consider it necessary to depart from the historiography presented in most international law manuals on the subject, some of which are cited in the footnotes of this preliminary report. This part of the report will, therefore, confine itself to a brief historical overview of what is presented in the manuals and studies to which it refers.

7. It is important to stress at the outset that, while diplomatic and consular relations are linked, they are, in principle, two quite distinct modes of inter-state relations, as highlighted in Articles 2(2) and 2(3) of the VCCR. The severance of diplomatic relations does not necessarily entail the severance of consular relations. Two States can establish or maintain consular relations with each other even when they do not maintain or no longer maintain diplomatic relations. The historical development of these institutions illustrates the distinction, as each responds to a particular need and pursues a distinct objective.

8. Diplomatic relations have been the subject of stipulations in international treaties and conventions mainly since the 19th century. Still, the institution of diplomacy itself goes back further than that, and its history is intertwined with that of peoples. It has been explained that it corresponds to a fundamental sociological need of political communities that have to regulate their mutual relations. Political communities very quickly realised that no negotiation could reach a satisfactory conclusion if the emissaries were put to death as soon as they arrived: this is why, historically, one of the first firmly established principles was that of diplomatic immunity;² “rooted in necessity, immunity was buttressed by religion, sanctioned by custom, and fortified by necessity”.³ Emissaries and envoys were very quickly considered both necessary and holy. As Lassa Oppenheim explains,

“Legation, as an institution for the purpose of negotiating between different States, is as old as history, whose records are full of examples of legations sent and received by the oldest nations. And it is remarkable that even in antiquity, where no such law as the modern international law was known, ambassadors everywhere enjoyed a special protection and certain privileges, although not by law but by religion ambassadors being looked upon as sacrosanct”.⁴

¹ Linda S. Frey, Marsha L. Frey, *The history of diplomatic immunity*, Ohio, Ohio State university, 1998, p.5.

² Jean Salmon, *Manuel de droit diplomatique*, Bruylant, 1994, p. 19.

³ Frey and Frey op cit., note 2.

⁴ Lassa Oppenheim, *International law- A treatise, Vol. I, Peace, 7th edn, ed. Hersch Lauterpacht, New York, Longmans, 1948, pp. 687-688.*

9. The need for special protection and inviolability of emissaries and envoys was recognised by the Indigenous peoples of Australia, who comprise hundreds of internal “nations”, each with a distinct language and identity, and who have long practised early forms of diplomatic customs in the interactions among these nations. It appears in the laws of Manu, a treatise on the Hindu tradition of dharma dating from the 2nd century CE⁵, and appears in the epics of Homer, in ancient Greece, as an undisputed principle.⁶ The Code of Manu referred to the institution of *Rajduts*, i.e., sending of ambassadors or envoys for *ad hoc* work or a short sojourn in the courts of other states, even if the modern concept of permanent embassies was not known then.⁷

10. In the Greek cities, an envoy was not subject to local jurisdiction even if he had committed an offence. Thebes declared war on Thessaly because its ambassadors had been arrested and imprisoned, thereby violating the law of nations, despite evidence that Thebes’ envoys had been rightly accused of plotting against the Thessalian government.⁸

11. In China’s academic discussion, the historical origins of diplomatic privileges and immunities can be traced back to ancient societies. For example, in ancient China, there was a saying that “when two States exchange troops, envoys should not be beheaded (两国交战，不斩来使)”, indicating that even during times of war, envoys should be protected.

12. Similar rules are found in the practice of pre-colonial African kingdoms. References are often made to the Bini Kingdom of West Africa. There is evidence of the practice of resident ambassadors dating back to 1691 and of general diplomatic practices as far as 1539 involving the Oba (King) of Benin and the Benin Kingdom. It was firmly recognised in those days as part of the laws of the Benis that the Oba would go to war over the mistreatment of his envoy.⁹

13. The inviolability of the envoy was recognised as much in the Middle Ages as in antiquity. Totila, king of the Ostrogoths of the Italian peninsula in the 6th century, declared that the Goths recognised as strongly as the Romans the duty to show respect for the office of the legate. The Salic law and the laws of the Alamanni and Saxons required a *wergeld* or indemnity for the murder of an ambassador.¹⁰ The International Court of Justice (I.C.J.) has emphasised the “substantial contribution” of “traditions of Islam” to the development of the rule of inviolability in diplomatic law.¹¹ This inviolability is also enshrined in Islamic law.¹² Ahmed Rechid, for example, explained that:

“In Arabia, the person of the ambassador had always been regarded as sacred. Muhammad consecrated this inviolability. Never were ambassadors to Muhammad or to his successors molested. One day, the envoy of a foreign nation, at an audience granted to him by the Prophet, was so bold as to use insulting language. Muhammad said to him: ‘If you were not an envoy I would have you put to death.’ The author of

⁵ “common (or current) era”

⁶ Salmon op. cit., note 3, p.19.

⁷ Nagendra Singh, *India and International Law, Volume 1, Part A, Ancient and Medieval*, S. Chand & Co. (Pvt.) Ltd (1973), p. 17.

⁸ Graham Stuart, “Le droit et la pratique diplomatiques et consulaires”, *Recueil des cours*, vol.48, 1934, p.465.

⁹ Femi Adegbulu, “Pre-Colonial West African Diplomacy: Its Nature and Impact”, *The Journal of International Social Research*, vol.4, issue 18, 2011, pp.170-182.

¹⁰ See Frey and Frey op cit., note 2, pp.36-74.

¹¹ *United States Diplomatic and Consular Staff in Tehran*, Judgment, I.C.J. Reports 1980, p.40, para.86.

¹² See Ahmad Abu al-Wafa, *Kitāb al-I’lām bi-Qawā’id al-Qānūn al-Duwalī wa-l-‘Alāqāt al-Duwalīyya fī Shari’at al-Islām – Part Four: al-Qānūn al-Diblūmāsī al-Islāmī*, Dar al-Nahda al-‘Arabiyya, First Edition, 2001.

the ‘Siyer’ which relates this incident draws from it the conclusion that there is an obligation to respect the person of ambassadors”.¹³

14. In the modern era, in the historical sense of the term, it was the Italian duchies and republics that played the leading role in establishing diplomatic practices, especially Venice, followed by Genoa, Florence, and Milan. The Holy See’s influence should also be highlighted in this nascent movement. As early as the first third of the 15th century, the first apostolic nunciatures, papal diplomatic posts, appeared in the major Catholic powers of the time. The cities of Italy, for their part, were the first secular states to engage in the practice of permanent representation to a foreign sovereign. This movement can be explained by the need to create a new instrument of action to maintain permanent contact with current allies or future enemies.¹⁴

15. The Italian republics also introduced the use of letters of credence or *littera di credenza*, instructions, which were contained in the *commissio* (Venice) or in the ‘credentials’ (Florence), the principle of ambassadorial mobility, the dispatch of information, the customs of courtesy, the main functions of the ambassador, etc. Many of the principles and techniques of contemporary diplomacy were born during this period.¹⁵

16. After the Peace of Westphalia in 1648, which affirmed the equal sovereignty of States, at least among European States, the establishment of permanent diplomatic missions gradually became common practice. Regular relations were established, and it became necessary to reach an agreement on universally binding rules governing the rights and privileges of foreign diplomats. The first consensual rules adopted concerned the rank of diplomats and their precedence, which were often the subject of disputes and incidents between European powers. This was the purpose of the Regulation of Vienna of 19 March 1815 (Annex XVII of the Acts of the Congress of Vienna), which established the categories and ranks of diplomatic agents. The Vienna Regulation was later supplemented by the Protocol of the Aix-la-Chapelle Conference of 21 November 1818.¹⁶

17. Efforts to clarify and codify the rules governing diplomatic relations, which until then had been essentially customary, have continued unabated both bilaterally and multilaterally, as well as through private and public initiatives. This section will confine itself to mentioning only initiatives in the context of the development of multilateral instruments.

18. One of the first initiatives took place under the aegis of the League of Nations. The Assembly of the League set up a Committee of Experts to determine which subjects were likely to have reached a sufficient degree of normative maturity and consensus to authorise their codification. At its eighth session on 27 September 1927, the Assembly decided not to keep the subject of diplomatic privileges and immunities on its agenda for codification. It endorsed the Council’s view that the conclusion of a universal agreement on the subject seemed somewhat difficult and was not “important enough to warrant insertion in the agenda of the proposed Conference”.¹⁷

¹³ Ahmed Rechid, “L’Islam et le droit des gens”, *Recueil des cours*, vol 60, 1937-II, p. 421.

¹⁴ See Jean-Paul Pancraccio, *Droit et institutions diplomatiques*, Paris, Pedone, 2007, pp.78-79 ; Frey and Frey op cit., note 2, pp.36-158.

¹⁵ Pancraccio op. cit., note 13, pp.78-79.

¹⁶ See for a detailed account of this history, “Codification of the international law relating to diplomatic intercourse and immunities. Memorandum prepared by the Secretariat”, *Yearbook of the International Law Commission*, 1956, vol. II, pp.132-134, paras.17-25. Unless otherwise indicated, the historical background on diplomatic immunities presented in this report is based on the Memorandum.

¹⁷ League of Nations publications, document A.105.1927.V, p.2. For more details, see Memorandum prepared by the Secretariat op. cit., note 4, pp.136-147, paras.42-112.

19. The first multilateral instrument on the subject, the Convention on Asylum, was adopted at the Sixth Inter-American Conference, and signed between Latin American states on 20 February 1928 in Havana (Cuba). Regional in scope, it takes into account both the “universal” (colonial) customs to which these States were subject when they gained independence, and the more specific practices established between them.

20. Another regional convention, the Caracas Convention on Diplomatic Asylum, was adopted within the framework of the Organisation of American States (OAS) on 28 March 1954. It primarily concerns the practice of diplomatic asylum and seeks to regulate its operation in the region.

21. Within the framework of the United Nations, the first conventions on privileges and immunities initially concerned those of the Organisation and its staff. Prompted by the need to implement Article 105 of the Charter, the General Convention on the Privileges and Immunities of the United Nations was adopted by the United Nations General Assembly on 13 February 1946. It covers the organisation itself, its officials, experts on mission, and representatives of Member States. The General Convention was followed on 21 November 1947 by the Convention on the Privileges and Immunities of the Specialised Agencies. With regard to diplomatic relations between States, two conventions have been adopted: the Vienna Convention on Diplomatic Relations between States of 18 April 1961 (entered into force on 24 April 1964), and the United Nations Convention on Special Missions of 8 December 1969 (entered into force on 21 June 1985).

22. Consulates, for their part, have a more varied history than diplomatic missions.¹⁸ Indeed, trade relations among peoples have given rise to institutions considered forerunners of modern consular institutions. These early manifestations of the consular institution were linked to the protection of trade and related to judicial functions. Some nations allowed foreign traders domiciled in their country to choose magistrates to judge their disputes under their particular national laws. Six centuries before our era, according to Herodotus, the Egyptians allowed Greek settlers at Naucratis to select a magistrate, also called a *prostates*, who administered Greek law to them. During the same period, some peoples of India had special judges for foreigners.

23. The need of the Greek city-states to protect their trade and their citizens in other cities gave rise to the institution of *proxeny*, which is very similar to the modern system of honorary consuls. A *Proxeno* was chosen from among the citizens of the foreign city whose protection was sought, their main duty being to protect citizens of the city they represented, act for them in assemblies, witness their wills, arrange the succession of foreigners who died without heirs, and see to the sale of cargoes. In a war between their city-state and the foreign city-state they represented, their persons and property were respected. They had the right to import and export all goods and were exempt from certain taxes. The coat of arms of the town they represented could be engraved on the pediment of their door.

24. The Roman institution of the *patronate* bears some resemblance to the Greek system of *proxeny*. But the main measure to meet the need to administer justice to foreign merchants in accordance with legal principles less formalistic than those of Roman civil law, hence better suited than the ancient Roman law to trade requirements, was the creation of the office of the *praetor peregrinus* in 242 BCE, a magistrate who judged disputes between foreigners (*peregrini*) or between foreigners and Roman citizens.¹⁹

¹⁸ See Jaroslav Zourek, “Report on Consular intercourse and immunities”, *Yearbook of the International Law Commission*, 1957, vol.II, p.73, para.2. This historical background on consulates is largely based on this report.

¹⁹ *Ibid.*, p.73, para.4.

25. In Constantinople and other cities and towns of the Byzantine Empire, merchants from the same town or country lived in the same district, setting up independent communities (brotherhoods, colonies) and building their warehouses, administrative offices, and churches, while remaining subject to their own national laws. Based on the principle of the personality of laws, which was widely recognized in feudal times, these communities soon acquired a degree of autonomy, and in particular, the right to have special magistrates, who began to be called “consuls” in the twelfth century.²⁰ After the Arab conquest of much of the former Roman Empire in the seventh century, the Muslim States granted merchants from cities of western Europe a system of protection, on which the capitulations were later based. The same kind of international trading requirements that had given rise to the institution of independent communities with their own magistrates in the Byzantine Empire and the Muslim States led to the establishment of warehouses or trading posts in the various Christian principalities during the crusades.²¹

26. As Zourek underlined, consulates originated in the institution of special magistrates whose function was to settle disputes between merchants. These judges appeared where international trade arose: in Europe, Byzantium, China (eighth century), India, and the Arab countries (ninth century).²²

27. The role of consuls gradually evolved in line with political dynamics. Originally limited mainly to acting as judge between foreign merchants in a given region, as has just been pointed out, the role of consul evolved in the sixteenth century, when diplomatic missions were still infrequent, to become that of a representative of the State. In order to enable consuls to better protect their commercial interests, States considered that consuls should be invested with public authority and therefore asserted their authority to appoint consuls themselves. This enabled them to exercise certain diplomatic functions and enjoy certain privileges and immunities. However, with the gradual assertion of national sovereignty, the exercise of civil and penal jurisdiction by consuls became incompatible with the sovereignty of the territorial State. Everywhere in Europe, this consular power was transferred to the State. The abolition of the system of capitulations and the emergence of independent states enabled this transfer of power to the State to spread worldwide. In addition, with the spread of permanent diplomatic missions – which first appeared in Europe during the sixteenth and seventeenth centuries – consuls gradually lost their diplomatic powers and missions. Owing to these developments, the consul’s functions underwent a radical change. Their diplomatic and judicial duties, on which most of their powers had previously been based, were replaced by the task of looking after the interests of the State and its citizens, particularly in trade, industry, and shipping.²³

28. The first attempts to codify the rules of international law governing consuls were prompted by the growth of consular relations and the extraordinary increase in the number of consulates during the nineteenth century. They were all due to private effort and learned societies, such as the International Law Association (ILA).²⁴ As with diplomatic relations, it is in Latin America that the first efforts were made to codify the rules governing consular relations within a multilateral framework. The Agreement respecting the Peace of the Americas and the Bolivian Congresses between Bolivia, Colombia, Ecuador, Peru, and Venezuela was signed at Caracas on 18 July 1911. It is constituted by a set of agreements covering a variety of topics, including extradition and consular matters. On 20 February 1928, based on a draft prepared by the Inter-American Commission of Jurists, the Sixth International Conference of American States

²⁰ Ibid., para. 6.

²¹ Ibid., para. 8-9.

²² Ibid., p.74, para. 14.

²³ Ibid., pp. 74-77, para. 15-51.

²⁴ See for, an overview of these various initiatives, Zourek op. cit., note 12, pp.77-78, para.53-59.

adopted at Havana the Convention Regarding the Consular Agents. The convention regulates the appointment and functions of consuls, their rights, and the suspension and termination of their functions.

29. The legal status and functions of consuls were also discussed at the League of Nations. However, it did not produce any concrete results, as the last decision of the League Assembly was to take note of the decisions of the Committee of Experts to include the question of the “Legal position and function of consuls” in the list of subjects, the regulation of which seemed to be most desirable and realizable.

30. In 1949, the United Nations International Law Commission considered including consular intercourse and immunities as part of its future codification work. At its twelfth session held from 25 April to 1 July 1960, the Commission provisionally adopted the draft articles on consular relations and commentaries. It also recommended that the United Nations General Assembly convene an international conference of plenipotentiaries in March 1963 to adopt a convention on the subject. The United Nations Conference on Consular Relations was held in Vienna (Austria) from 4 March to 22 April 1963. On 24 April 1963, the Conference adopted and opened for signature the Vienna Convention on Consular Relations, the Optional Protocol concerning Acquisition of Nationality, and the Optional Protocol concerning the Compulsory Settlement of Disputes. The Convention and both Optional Protocols came into force on 19 March 1967.

III. TERMINOLOGY

31. Definition is necessary for any intellectual endeavour, in law as in any other social science discipline. It is difficult to have a constructive debate on legal institutions such as immunities and privileges, and their legal framework, if there is no agreement on the very subject of the debate. It is not entirely illogical to think that one of the main reasons for the difficulties in defining the regime of privileges and immunities in international law is the imprecise terminology surrounding these concepts. Indeed, there is a notable divergence and confusion in scholarship on the distinction between immunities and privileges in international law. The two notions are often used interchangeably in practice and in legal doctrine, leading some to contend that they are merely an expression of the ‘imprecise terminology that abounds in international law and diplomatic notarial practice’.²⁵

32. There are, however, numerous proposals in specialist legal literature for making such a distinction. It has been suggested, for example, that privileges should be identified with the “honour” or “prestige” side of the special status accorded to certain persons (diplomats, heads of state, etc.). At the same time, immunities should be reserved for the “guarantee” or protection side of individuals in certain positions.²⁶ Sompong Sucharitkul proposes a distinction based on the nature of the obligations:

“immunity can therefore be viewed as a right which is positive in form, but negative in substance. It is negative since it denotes « no power » or « non-use of authority » by the correlative partner. The term « privileges », although often used together with

²⁵ Olivier Beaud « L’immunité du Chef de l’Etat en droit constitutionnel et en droit comparé », in Joe Verhoeven (dir.) *Le droit international des immunités : contestation ou consolidation*, Bruxelles, Larcier, Bibliothèque de l’Institut des Hautes Etudes de Paris, 2004, p.153.

²⁶ See for a detailed presentation of these distinctions, some of the analysis is reproduced here, Apollin Koagne Zouapet, *Les immunités dans l’ordre Juridique international. Le prisme de la constance*, Paris, Pedone, 2020.

« immunities », contains a more positive connotation. « Privileges » presuppose the availability of positive or substantive advantages, whereas « immunities » imply the absence of power or abstention from its exercise. The term « privilege » is closer to « power » which is correlated to « liability », but the expression is not accountable in jural terminology. Privileges are matters of courtesies subject to reciprocity and not enforceable as legal rights unless specifically confirmed by mutual agreement”²⁷

33. According to the distinction proposed by Fauchille, privileges vary “according to the goodwill of the various States, some granting them more broadly, others more narrowly”.²⁸ Thus, privileges refer to special protection and special advantages that can be the subject of transactions in terms of their quantitative level and periodicity, whereas immunities are beyond transactions because they are the very heart of the derogatory regime granted to their beneficiaries.

34. Another proposed distinction is based on the normative content of privileges and immunities:

“in general a privilege denotes some substantive exemption from laws and regulations such as those relating to taxation or social security, whereas an immunity does not confer any exemption from substantive law but rather a procedural protection from the enforcement processes in the receiving State.”²⁹

35. Under the VCDR and VCCR, privileges may be understood in terms of exemptions from the law of the receiving state,³⁰ whilst immunities do not exempt members of a diplomatic mission from that law and rather constitute a procedural bar.³¹ At the same time, it should be noted that privileges encompass a heterogeneous variety of entitlements to special protection or special advantages that cannot all be explained in terms of exemptions from substantive law, such as freedom of movement.³²

36. It is important to highlight that privileges and immunities are firmly grounded in the VCDR and VCCR, and both may be granted in excess of what is required under these bodies of law.³³ States, for example, may extend privileges and immunities in bilateral agreements or may also unilaterally decide to grant additional privileges and immunities through domestic legislation. This is notwithstanding that, in practice, privileges may be far more often granted unilaterally and/or on the basis of considerations of comity.

37. Diplomatic and consular immunities must be distinguished from other immunities under international law, in particular State immunities, immunities of State officials, immunities of international organizations, and immunities of staff of international organizations. In the course of its work and whenever it is deemed relevant, the Committee will therefore make comparisons in order to indicate, where appropriate, whether the regime of diplomatic or consular immunities is similar to or different from that of other immunities under international law on a specific point. In this preliminary introductory report, only a few general remarks will be made.

38. Diplomatic and consular immunities and privileges apply to agents and property of the State in the context of an official function, which consists of assuming its official representation, to

²⁷ Sompong Sucharitkul « Immunities of foreign states before national authorities », *Recueil des cours*, vol.149, 1976-1, p.95.

²⁸ Quoted in Nguyen Quoc Dinh, P. Daillier, A. Pellet *Droit international public*, Paris, LGDJ, 7^{ème} édition, p.748

²⁹ Eileen Denza, ‘Privileges and Immunities of Diplomatic Agents Purchased’ in Ivor Roberts (ed), *Satow’s Diplomatic Practice*, Oxford, OUP, 8th edn, 2023, p. 231, para 13.1.

³⁰ See for example. articles 23, 28, 33-36 VCDR and 32, 39.2, 46-50, 52 VCCR.

³¹ See articles 41.1 VCDR and 55.1 VCCR.

³² See for example article 26 VCDR.

³³ See articles 47.2.b VCDR and 72.2.b VCCR.

varying degrees, to other States. The “dignity of the State” has sometimes been put forward as the basis for diplomatic immunities: by protecting diplomatic property and personnel, the dignity of the State or of the monarch represented, as the case may be, is maintained and preserved.³⁴ Yet, as the following section will explain, this basis is now contested and may be considered outdated.

39. State immunities apply to the State as such, including to officials of the State acting in their representative character, as well as to its organs and entities exercising elements of governmental authority. Diplomatic and consular immunities and privileges are, for their part, endowed with a strong autonomy and particularity that make each of them a specific normative block within the vast body of State immunities. Both diplomatic and consular privileges and immunities constitute a special body of rules protecting diplomatic or consular agents, property, and communications, as the case may be. They are therefore not to be confused, either in status or in the system of protection, with the beneficiaries of State immunity or the immunities of State officials. Diplomatic immunities, consular immunities, immunities of State officials, and State immunities are distinct institutions of international law, each with its own rules and rationale, so that changes in the regime of one do not automatically affect the others. Thus, for example, although it may undoubtedly enrich reflection on the restrictions on diplomatic and consular immunities, the recognition of certain exceptions to the immunities of State officials and State immunities is not, in itself, sufficient to affirm the existence of such exceptions in the field of diplomatic and consular immunities.

40. Similar considerations also apply to the privileges and immunities of international organisations and their staff. Unlike diplomatic and consular privileges and immunities, which initially developed as customary international law, those of international organisations and their staff have a conventional basis. They respond to a logic and a need that are not necessarily similar to those that led to the adoption of the VCDR and VCCR. However, as with the immunities of the State and its officials, the dynamics affecting the immunities of international organisations and their staff are an important element to consider when discussing the scope of diplomatic and consular immunities and any exceptions or restrictions that may have developed.

41. Finally, concerning the relationship between the VCDR and the VCCR, the two instruments are legally distinct and independent, and their provisions must be interpreted in their specific context and in light of their respective objects and purposes. However, there is no doubt that the VCCR was drawn up and adopted after the VCDR, and this fact is not without consequence. Similar provisions and expressions can be found in these conventions, and there is no doubt on this basis that the two instruments are not totally impermeable to each other. Thus, States, in their practice, may generally seek to interpret and apply similar expressions and provisions of the two Conventions similarly, except where they consider that the particularities of each Convention justify this.

IV. THEORETICAL BACKGROUND

42. The foundation on which diplomatic and consular privileges and immunities are granted undoubtedly affects the immunity regime in each case. This foundation should therefore be determined before analysing the provisions of the VCDR and the VCCR. The Committee also examines the nature of these immunities.

³⁴ See W.G.F. Phillimore, « Droits et devoirs fondamentaux des États », *RCADI*, 1923-1, p.52 ; Memorandum prepared by the Secretariat op. cit., note 5, p. 159, paras. 219-223.

A. Foundation of diplomatic and consular immunities in international law

43. Scholars have put forward several foundations, none of which is unanimously accepted or sufficient to justify and explain all diplomatic and consular immunities. Some of these foundations, which relate generally to State immunities and could be invoked by those who link diplomatic and consular immunities to State immunities, will not be addressed here.³⁵ This section will only discuss the principles presented as directly underpinning diplomatic and consular immunities in international law.

44. One of the oldest grounds for justifying immunities is territoriality or extraterritoriality.³⁶ According to this theory, developed amongst others by Grotius, the persons who benefit from privileges and immunities and the buildings occupied by them are not, from the legal point of view, in the receiving country but remain, as it were, surrounded by a sphere which they have taken with them from their own country. It is therefore a legal fiction, dictated in some way by the distinctive position occupied by the beneficiaries of diplomatic and consular immunities, who are thus considered not to have left the territory of their State and must therefore escape the jurisdiction of the country where they are and remain exclusively subject to the laws of their own country.

45. This theory, which has never gathered a majority in doctrine, has been criticised, particularly since the 19th century and the emergence of the concept of sovereignty.³⁷ Indeed, the sovereignty of the State and the exclusive jurisdiction it exercises over its territory do not sit well with this fiction. For example, the alleged extraterritoriality of diplomatic and consular premises does not explain certain powers that the accrediting State exercises, particularly in matters of security or policing. Nor does the fiction explain the immunities granted to diplomatic agents and their families, particularly when they are away from the mission's premises. Furthermore, it is now established that the laws of the receiving State apply throughout its territory, including diplomatic premises. It is for this reason that the beneficiaries of immunities have the duty to respect the laws and regulations of the receiving State (see, for example, article 41(1) of the VCDR).

46. The theory of representative character is another basis put forward to justify diplomatic and consular privileges and immunities. Implicit in Grotius' writings, this theory was clearly formulated by Montesquieu: the diplomat is the word of the Prince who sends them, and this word must be free, with no obstacle preventing them from acting.³⁸ Several ideas have been put forward on this basis to explain immunity, the oldest being based on the dignity of *majestas* of the State or prince whom the agent represents. Another idea is that immunity is linked to the right of legation, which only sovereign states have; consequently, respect for the agent's complete independence is equivalent to respect for the sovereignty of the sending State. This theory is one of the two, alongside the theory of the interest of the function, invoked by the

³⁵ The foundation of State immunity is the principle *par in parem non habet jurisdictionem (or imperium)*. It is the principle of equality between States that justifies immunity: "an equal cannot have jurisdiction over an equal"; all national rights are not enforceable against the organ of the foreign State; no sovereign entity can, in law, subject any other sovereign State to its authority.

³⁶ Some authors use the two expressions interchangeably, while others consider that there is a difference between the two expressions and have a preference for one or the other with regard to immunities. However, there is no unanimity on this issue.

³⁷ See for a general presentation of the doctrine and its main criticisms, Memorandum prepared by the Secretariat op. cit., note 5, pp.157-158, paras. 209-217.

³⁸ Collected works of Montesquieu: *De l'esprit des lois*, Book XXVI, chap. XXI, translated by Thomas Nugent, New York, Haffner, 1949, Vol. II, p.7.

I.C.J. in the *Diplomatic and Consular Staff in Tehran* case as the foundation of diplomatic immunities.³⁹

47. While this theory may explain certain aspects, notably diplomatic ceremonial, it does not satisfactorily explain all diplomatic and consular privileges and immunities. For instance, it does not explain why, when two sovereignties are in contact, that of the sending State and that of the receiving State, it is the sovereignty of the receiving state that must yield to the sovereignty of the sending State. Furthermore, this theory only sufficiently explains the privileges and immunities of the diplomatic mission and its head, but not those of other diplomatic agents and their dependents, nor consular privileges and immunities.

48. The most commonly supported theory today, the theory of the interest of the function, is built on the idea that immunities are based solely on the necessities of the independent exercise of the diplomatic function. According to Emer De Vattel,

“ambassadors and other public ministers are necessary instruments in the maintenance of that general society of Nations and of that mutual intercourse between them. But they can not accomplish the object of their appointment unless they are endowed with all the prerogatives necessary to perform the duties of their charge safely, freely, faithfully, and successfully. Consequently, the same Law of Nations which obliges Nations to receive foreign ministers likewise clearly obliges them, in receiving those ministers, to accord them all the rights they require and all the privileges necessary for the performance of their duties”.⁴⁰

49. Thus, it is the principles of *ne impediatur legatio* and *ne impediatur officium* that justify, respectively, the granting of diplomatic and consular privileges and immunities. Privileges and immunities are granted to enable diplomatic agents and consular officers to carry out their assigned functions with complete independence. This criterion was enshrined in the VCDR while combining it with the rationale of the representative character. The preamble of the Convention states 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”. A similar formulation, without the criteria of representation, is also found in the preamble of the VCCR. It is the other foundation invoked by the I.C.J. in the *Diplomatic and Consular Staff in Tehran* case.⁴¹

50. Although this theory best explains diplomatic immunities and privileges, it does not account for them all. It fails to explain the privileges and immunities granted to diplomats and consular agents, which are not strictly necessary for the performance of their duties, and which are undoubtedly linked to the history of diplomatic and consular institutions.

51. Reciprocity is undoubtedly an important element to be taken into account in the context of diplomatic and consular privileges and immunities. Diplomatic and consular relations are, first of all, particular relations between two States, which in this respect are therefore based on bilateralism and reciprocity. Reciprocity conditions all diplomatic and consular relations between two states. As explained in Satow’s *Guide to Diplomatic Practice*, “[t]hese immunities are founded on common usage and tacit consent; they are essential to the conduct of the

³⁹ United States Diplomatic and Consular Staff in Tehran, provisional measures, order of 15 December 1979, I.C.J. Reports 1979, p.19, para.38. See also *Spentech Engineering v. United Arab Emirates*, ICSID Case No. ARB/24/16, Award, 28 July 2025, paras. 227, 229.

⁴⁰ Emer de Vattel, *The Law of Nations or the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, vol III (transl of the ed of 1758 by Charles G Fenwick, Carnegie Institution of Washington 1916) p. 376.

⁴¹ United States Diplomatic and Consular Staff in Tehran, provisional measures, order of 15 December 1979, I.C.J. Reports 1979, p.19, para.38.

relations between independent sovereign states; they are given on the understanding that they will be reciprocally accorded, and their infringement a state (...) would prejudicially affect its own representation abroad”.⁴²

B. Nature of diplomatic and consular immunities

52. The question of the nature of immunities is an important issue that has an impact on the immunity regime. For example, the relationship between immunities and other norms, such as the right of access to a judge, the fight against impunity, or peremptory norms of international law, depends largely on the nature of immunities. Are they simply a procedural barrier that does not in itself affect the substantive norms and obligations incumbent on the beneficiary, or are they, directly or through their effect, a means of exempting or preventing the application of certain rules to the beneficiary?

53. The ILC’s first *Special Rapporteur* on the Immunity of State officials from foreign criminal jurisdiction pointed out that although some authors defend the idea of “substantive or material immunity, whereby a person enjoying immunity may not be subject to the laws and thus to the legislative jurisdiction of a State”, this view is not shared by the majority of authors.⁴³ Indeed, for most authors, immunities are mainly immunities from jurisdiction or from the exercise of local power or territorial authority, and not immunities from substantive rules of law or from essential legal provisions. They are immunities that prevent the application of procedural laws or, at best, the institution of legal proceedings or trials, but not immunities that exempt their beneficiaries from domestic legislation. The person enjoying immunity is not exempt from the law of the host State, i.e., from the rules of substantive law regulating, governing, prohibiting, or sanctioning a particular conduct. This also applies to any substantive rules of international law that may be applicable, for example, to crimes under international law. Immunity thus has a defensive character for its beneficiary, protecting against the organs of another State, especially in court procedures. In this respect, it is useful to point out, as already emphasised above, that VCDR and VCCR, while granting to a specific category of individuals immunity from the jurisdiction of the host State, at the same time establish the obligation of such individuals to respect the laws of that State.

54. Thus, as all other immunities in international law, diplomatic and consular immunities fall “within the area of procedural and not substantive law and is procedural in nature”.⁴⁴ Accordingly, the person enjoying immunity is, in principle, not exonerated from substantive obligations and/or responsibility as underlined by the I.C.J.:

“Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility”.⁴⁵

⁴² Neville bland (ed.), *Satow’s guide to diplomatic practice*, 4th edition, London, Longmans, 1964, p.175.

⁴³ Preliminary report on immunity of State officials from foreign criminal jurisdiction, by Roman Anatolevich Kolodkin, Special Rapporteur, documents of the Sixtieth session of the ILC, p.174, para. 65.

⁴⁴ Ibid., p.175, para. 66.

⁴⁵ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p.25, para.60.

55. The procedural nature of immunity also makes it “a preliminary issue to be expeditiously decided *in limine litis*”.⁴⁶ Whether, despite this procedural nature, diplomatic and consular immunities have an impact on specifically protected rights, or particular obligations, and therefore justify exceptions or restrictions, is a different question which will be addressed in subsequent reports of the Committee.

V. METHODOLOGICAL ISSUES

56. As per its approved mandate, the Committee aims to conduct a comprehensive study utilizing the methodology of Comparative Law. This research will focus on identifying ambiguous provisions and legal gaps within the VCDR and the VCCR pertaining to diplomatic and consular agents’ immunities, privileges, and inviolabilities (see section V below).

57. The analysis will focus on the decisions of national courts that address these ambiguities and gaps. Through a systematic compilation and analysis of varying interpretative approaches from domestic judicial practices across the globe, greater clarity and coherence in applying these international conventions can be provided. Indeed, the decisions of national courts may be relevant as State practice and/or *opinio juris* for purposes of determining customary international law,⁴⁷ or subsequent practice.⁴⁸ These considerations also apply to any conduct of a party in application of the VCDR or the VCCR, whether the exercise of its executive, legislative, or other functions.⁴⁹

58. With regard specifically to legislation, in virtually every country in the world, there are provisions in various laws that deal with the issue of privileges and immunities in a specific area covered by the law. For example, there may be a few articles in the criminal code, the law on road traffic, customs and tax laws, etc. These specific provisions will be identified and addressed where appropriate by dealing with the specific provisions of the VCDR and VCCR that deal with these issues. Next to that, some States have passed laws on immunities and privileges, without necessarily referring to or limiting their scope to diplomatic and consular privileges and immunities. These national legislative acts will be taken into account and examined to determine whether they express a national practice and interpretation of the VCDR and the VCCR. It is important to highlight that the value of the national legislation would largely depend on the type of incorporation it ensures. National legislation may simply refer to international rules; as such, the latter would apply as interpreted and as applicable under international law. National legislation may supplement international law; in that case, it is to be seen whether the additional rules are consistent with international law. Finally, national legislation may omit international rules, and a similar issue of consistency may be entailed. The following States have been identified as having national legislation dealing with various types

⁴⁶ Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, advisory opinion of 20 April 1999, I.C.J. Reports 1999, p.88, para.63.

⁴⁷ See conclusions 5 and 10, ILC Conclusions on identification of customary international law.

⁴⁸ See conclusion 5, paragraph 1, ILC Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties

⁴⁹ Ibid.

of immunities: Argentina,⁵⁰ Australia,⁵¹ Austria,⁵² Canada,⁵³ China,⁵⁴ Germany,⁵⁵ India,⁵⁶ Nigeria,⁵⁷ Norway,⁵⁸ Pakistan,⁵⁹ Peru,⁶⁰ South Africa,⁶¹ Singapore,⁶² Spain,⁶³ Switzerland,⁶⁴ the United Kingdom,⁶⁵ the United States of America,⁶⁶ and Venezuela.⁶⁷

59. The research will focus on judicial decisions, giving priority to judgments of courts of last instance across different States, where available and relevant. Such decisions are more likely to guide domestic harmonization, contribute to the development of international law, and are generally more accessible. The VCDR and VCCR have universal character, and a considerable number of states are parties to both treaties. Therefore, it is necessary to comprehensively select jurisdictions to effectively identify convergences and divergences in interpreting immunities, privileges, and inviolabilities on diplomatic and consular relations by domestic courts. As far as the lower courts are concerned, they will be relevant where they are sufficiently important and significant, in the absence of decisions by the highest courts of the State concerned, to be considered as reflecting a practice of that State.

60. The research will focus not only on the judicial decisions of domestic courts of the States, but also, where necessary, on the decisions and acts of State organs of the executive branch, where the latter purport to reflect the interpretation and implementation by these States of the provisions of the VCDR or the VCCR. In addition to the legislation mentioned above, in some countries, the ministry in charge of foreign affairs issues a guide or guidelines indicating how the State intends to interpret or apply diplomatic privileges and immunities on its territory. This

⁵⁰ Ley N° 24.488, Inmunidad de Jurisdicción de los Estados Extranjeros ante los Tribunales Argentinos (Law No. 24.488 of 31 May 1995 on jurisdictional immunity of foreign states before Argentine courts, 1995)

⁵¹ Foreign State Immunity Act (1978); Diplomatic Privileges and Immunities Act (1967); Consular Privileges and Immunities Act (1972); Diplomatic and Consular Missions Act (1978).

⁵² Consular Law (Konsulargesetz – KonsG), Federal Law Gazette I No 40/2019.

⁵³ State Immunity Act (1985).

⁵⁴ Regulation of the People's Republic of China Concerning Diplomatic Privileges and Immunities (1986); Law of the People's Republic of China on Diplomatic Personnel Stationed Abroad (2010); Foreign State Immunity Law of the People's Republic of China (2023); The Law on Foreign Relations of the People's Republic of China (2023)

⁵⁵ Gaststaatgesetz (Host State Act, 2019)

⁵⁶ Diplomatic Relations (Vienna Convention) Act (1972).

⁵⁷ Diplomatic immunities and privileges Act (2004).

⁵⁸ LOV 1947-06-19 nr 05: Lov om immunitet og privilegier for internasjonale organisasjoner m.v (Law on immunities and privileges of international organizations, 1947)

⁵⁹ Diplomatic and Consular Privileges Act, 1972.

⁶⁰ Decreto supremo no. 0007-82-RE, Aprueban reglamento sobre inmunidades y privilegios diplomáticos, 07 Jul 1982 (Supreme Decree n° 007-82-RE approving the Regulation on Diplomatic Privileges and Immunities); Decreto Supremo N.° 032-2023-RE Aprobación del nuevo Reglamento Consular del Perú (Supreme Decree n° 0032-2023RE approving the Consular regulations of Peru)

⁶¹ Foreign States Immunities Act (1981); Diplomatic Immunities and Privileges Act (2001).

⁶² State Immunity Act (1979).

⁶³ Law No. 16/2015 on privileges and immunities of foreign States, international organizations with headquarters or offices in Spain and international conferences and meetings held in Spain (2015)

⁶⁴ Gaststaatgesetz (Host State Act, 2007).

⁶⁵ State Immunity Act (1978).

⁶⁶ International Organizations Immunity Act (1945); Foreign Sovereign Immunities Act (1976); Diplomatic Relations Act (1978).

⁶⁷ Ley de Inmunidades y Prerrogativas de los Funcionarios Diplomáticos Extranjeros (Law on Immunities and Privileges of foreign Diplomatic officials, 1945).

is the case, for example, in Australia,⁶⁸ Austria,⁶⁹ Czechia,⁷⁰ China,⁷¹ Italy,⁷² Germany,⁷³ Korea,⁷⁴ the Netherlands,⁷⁵ and the United States of America.⁷⁶

61. As numerous treaty instruments have been concluded by States in the field of privileges and immunities, these will have to be considered to clarify the meaning that States have intended to give to certain expressions, or how they have been interpreted or understood. It is also conceivable that the development of exceptions or restrictions in other conventions may be the sign of an evolution in international law that must be considered in the interpretation of the VCDR and the VCCR. In this respect, the following conventions, which are specifically linked to the issue of immunities, should be taken into account.

- **Universal treaties:**

- Convention on the Privileges and Immunities of the United Nations, 13 February 1946
- Convention on the Privileges and Immunities of the Specialized Agencies, 21 November 1947
- Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality, 18 April 1961
- Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes, 18 April 1961
- Optional Protocol to the Vienna Convention on Consular Relations concerning Acquisition of Nationality, 24 April 1963
- Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 24 April 1963
- Convention on Special Missions, 8 December 1969
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973
- Convention on the Representation of States in their Relations with International Organizations of a Universal Character, 14 March 1975
- Convention on Succession of States in Respect of State Property, Archives and Debts, 8 April 1983
- United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004

⁶⁸ Protocol Guidelines (online)

⁶⁹ Guide on Protocol and Diplomatic Privileges and Immunities (2016).

⁷⁰ Diplomatic Protocol Handbook I, Privileges and Immunities (2015).

⁷¹ Protocol Guidelines for Diplomatic Missions in China (2020).

⁷² Guideline on Employment in Diplomatic Missions (2023-2025); Manual on the treatment of foreign diplomatic agents the minister of Foreign Affairs (2017)

⁷³ Zur Behandlung von Diplomaten und anderen bevorrechtigten Personen in der Bundesrepublik Deutschland (Office Circular on the treatment of diplomatic agents and consular officers of 2015); Gesetz über die Konsularbeamten, ihre Aufgaben und Befugnisse (BGBl 1974 I 2317).

⁷⁴ Guide for Foreign Missions in Korea (2024).

⁷⁵ Protocol Guide for Diplomatic Missions and Consular Posts (online); Manual on immunities (2021).

⁷⁶ Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities, U.S. Dept of State, 2018, [2018-DipConImm_v5_Web.pdf](https://www.state.gov/wp-content/uploads/2019/07/2018-DipConImm_v5_Web.pdf), https://www.state.gov/wp-content/uploads/2019/07/2018-DipConImm_v5_Web.pdf

- **Regional instruments:**

- Protocole de conférence concernant les ministres résidents, agents diplomatiques, 21 November 1818 (Procès-Verbal of Conference between Austria, France, Great Britain, Prussia and Russia, signed at Aix-la-Chapelle, 9(21) November 1818)
- Règlement sur le rang entre les agents diplomatiques, 19 March 1815 (appended to the Act of the Congress of Vienna of 9 June 1815)
- Convention regarding Diplomatic Officers, 20 February 1928 (America)
- Convention on Diplomatic Asylum, 28 March 1954 (America)
- European Convention on Consular Functions, 11 December 1967
- European Convention on State Immunity, 16 May 1972.

62. Mention should also be made of the existence of a number of bilateral agreements between States aimed at specifying privileges and immunities in their diplomatic and consular relations. This is the case, for example, of the Agreement on Consular Relations between Australia and the People's Republic of China. In the same logic, India and Pakistan have concluded a "Code of Conduct for Treatment of Diplomatic/Consular Personnel in India and Pakistan".⁷⁷ The document is "without detracting from their rights and obligations (...) under international law" and is intended to serve as "additional appropriate measures to ensure compliance with the Laws and Conventions".⁷⁸ The two States have also concluded a 2008 Agreement on Consular Access, which is aimed at "furthering the objective of humane treatment of nationals of either country arrested, detained or imprisoned in the other country". In the *Jadhav* case, the ICJ found this 2008 Agreement to be a subsequent agreement intended to "confirm, supplement, extend or amplify" the Vienna Convention, as envisioned under Article 73(2) of the VCCR.⁷⁹

63. As underlined by the ILC, decisions of international courts and tribunals, in particular of the ICJ, are particularly relevant for the determination of the existence and the content of rules of customary international law. The analysis will therefore consider decisions of the ICJ., other international courts, including arbitral tribunals and other dispute settlement mechanisms, as well as decisions of regional courts insofar as they may specify the obligations of States in implementing the VCDR and the VCCR. The Committee has identified the following cases as relevant so far.

- **International Court of Justice:**

- *Asylum Case (Colombia/Peru)*, I.C.J. Reports 1950, p. 266.
- *Haya de la Torre Case (Colombia/Peru)* I.C.J. Reports 1951, p.71
- *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* I.C.J. Reports 1980, p.3.
- *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, p. 466
- *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) I.C.J. Reports 2002, p.3.

⁷⁷ Code of Conduct for Treatment of Diplomatic/Consular Personnel in India and Pakistan (undated), available at-
<https://www.mea.gov.in/Portal/LegalTreatiesDoc/PAB1225.pdf>

⁷⁸ *Ibid*, Second Preambular Paragraph.

⁷⁹ *Jadhav (India v. Pakistan)*, Judgment, I.C.J. Reports 2019, para. 97.

- *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, p. 12
- *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* I.C.J. Reports 2005, 168.
- *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 177.
- *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment of 5 December 2011, I.C.J. Reports 2011, p. 644.
- *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Judgment, I.C.J. Reports 2020, p. 300.
- *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Reparations, Judgment, I.C.J. Reports 2022, p. 13.
- *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)*, pending.
- *Embassy of Mexico in Quito (Mexico v. Ecuador)*, pending.
- *Glas Espinel (Ecuador v. Mexico)* pending.
- **Other international courts and tribunals, and other international dispute settlement mechanisms:**
 - ICTY, *Lasva Valley, Prosecutor v. Blaškić (Tihomir)*, Decision on the Objection of the Republic of Croatia to the Issuance of Subpoena Duces Tecum, Case No IT-95-14-T, ICL 41, 18th July 1997.
 - Eritrea Ethiopia Claims Commission, *Diplomatic Claim: Eritrea's Claim 8 (State of Eritrea v. Federal Republic of Ethiopia)*, Partial Award, 19 December 2005.
 - Eritrea Ethiopia Claims Commission, *Diplomatic Claim: Eritrea's Claim 20 (State of Eritrea v. Federal Republic of Ethiopia)*, Partial Award, 19 December 2005.
 - ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-397-Corr, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019.
 - *The 'Enrica Lexie' incident (Italy v. India)*, PCA case n° 2015-28, award, 21 May 2020 (PCA)
- **Regional courts and tribunals:**
 - *Waite and Kennedy v. Germany*, (Application no. 26083/94), judgment, 18 February 1999 (ECtHR)
 - *McElhinney v. Ireland* (Application no. 31253/96), judgment, 21 November 2001 (ECtHR)
 - *Al-Adsani v. The United Kingdom* (Application no. 35763/97), judgment, 21 November 2001 (ECtHR)
 - *Goiburú et al. v. Paraguay*, Merits, Reparations and Costs, judgment of 22 September 2006 (IACtHR).
 - *Cudak v. Lithuania*, (Application no. 15869/02), Grand Chamber, judgment 23 March 2010 (ECtHR)

- *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, (Preliminary Objections, Merits, Reparations, and Costs, judgment of 24 November 2010 (IACtHR)
- *Sabeh El Leil v France*, Merits and just satisfaction, (Application no 34869/05) judgment, 29th June 2011 (ECtHR)
- *Hungary v Slovakia and European Commission (intervening)*, Judgment, Case C-364/10, ECLI:EU: C:2012:630, 16th October 2012 (CJEU)
- *Garcia Lucero et al. v. Chile*, Preliminary objection, merits and reparations, judgment of 28 August 2013 (IACtHR).
- *Jones and others v. The United Kingdom*, (Applications nos. 34356/06 and 40528/06), judgment, 14 January 2014 (ECtHR)
- *Rochac Hernandez et al. v. El Salvador*, Merits, Reparations and Costs, judgment of 14 October 2014 (IACtHR).
- *Raad van bestuur van de Sociale verzekeringsbank v. Evans*, Judgment, C-179/13, ILEC 078 (CJEU 2015), 15th January 2015.
- *Ramirez Escobar et al. v. Guatemala*, Merits, reparations and costs, judgment of 9 March 2018 (IACtHR).
- *Advisory opinion OC-25/18 of 30 May 2018 requested by the Republic of Ecuador; The institution of asylum and its recognition as a human right in the inter-American system of protection* (IACtHR)
- *MN v Belgium*, (Application n° 3599/18), judgment 5th May 2020, ECtHR
- *Alex Nain Saab Moran v Cabo Verde* ECW/CCJ/JUD/07/2021
- *Benkharbouche and Janah v. The United Kingdom*, (Applications nos. 19059/18 and 19725/18), judgment, 5 April 2022 (ECtHR)
- *Aydin Sefa Akay v. Turkey*, (Application no. 59/17), judgment, 23 April 2024 (ECtHR)

64. The issue of immunities has been the subject of various attempts to codify, systematise, or analyse it, both at the universal level within the framework of the United Nations and at the regional level. These efforts will be taken into account by the Committee. These include:

- ILC Articles on Diplomatic Intercourse and Immunities with commentaries (1958)
- ILC Articles on Consular Relations with commentaries (1961)
- ILC Articles on Special Missions with commentaries (1967)
- ILC Articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons with commentaries (1972)
- ILC Articles on the Status of the Diplomatic Courier and the Diplomatic Bag not accompanied by Diplomatic Courier and Optional Protocols thereto with commentaries (1989)
- ILC Articles on Jurisdictional Immunities of States and Their Property, with commentaries (1991)
- Immunity of State officials from foreign criminal jurisdiction (ILC, ongoing)
- Status, privileges and immunities of international organizations, their officials, experts, etc (ILC, discontinued)

- Asian-African Legal Consultative Organization: Final Report of the Committee on Functions, Privileges and Immunities of Diplomatic Envoys or Agents, 1958
- African Union Commission on International Law (AUCIL) Study on the Immunities of State Officials before international criminal courts (ongoing)
- Inter-American Juridical Committee, Declaration on the Inviolability of Diplomatic Premises As a Principle of International Relations and Its Relation to the Concept of Diplomatic Asylum, document CJI/doc. 03 (CI-O/22) corr.1 (2022)
- Inter-American Juridical Committee, Resolution on immunities of International Organizations, CJI/RES. 241 (XCIII-O/18), 2018.
- Inter-American Juridical Committee, Practical Application Guide on the Jurisdictional Immunities of International Organizations (2018).

VI. RESEARCH POINTS

65. The Committee has set out to achieve specific objectives, which include, but are not limited to, enhancing the understanding of specific terms and expressions in the VCDR and the VCCR, which are not sufficiently precise and/or are subject to differing interpretations. This preliminary report identifies the expressions and articles on which the Committee’s clarification work will focus. The list was drawn up following an exchange between Committee members on expressions in the two conventions which, in their view and/or based on State practice, may be or are a source of disputes or divergent interpretations between States. This constitutes the very core of the Committee’s mandate and the reasons for its creation: “to examine if and to what extent the judicial practice of States has contributed to clarifying [the generic terms deliberately adopted by the ILC when drafting these Conventions], and even if a subsequent practice in the sense of Article 31(3) of the 1969 Vienna Convention on the Law of Treaties has been developed”.⁸⁰ The Committee’s future work, and in particular its next reports, will examine the reality of the confusion surrounding these terms or articles, and the divergence in State practice, before possibly drawing up recommendations for States and practitioners (see paragraph 68 below).

- **VCDR:**
 - Article 3
 - (3)(a) “within the limits permitted by international law”
 - (3)(b) “Government of the receiving State.”
 - (3)(d) “ascertaining by all lawful means conditions and developments⁸¹ in the receiving State”
 - Article 4
 - Article 5
 - (1) “due notification”

⁸⁰ See the para. 3 of the document on the mandate of the Committee available on the website of ILA: https://www.ila-hq.org/en_GB/committees/comparative-diplomatic-and-consular-immunities-privileges-and-inviolabilities

⁸¹ Expressions or words requiring clarification are underlined.

- Article 7
 - “military, naval or air attachés”
- Article 8
- Article 9
 - (2) “within a reasonable period”
- Article 10
 - (2) “Where possible”
- Article 11
 - (1) “within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission”
 - (2) “equally, within similar bounds and on a non-discriminatory basis”
- Article 12
 - “offices forming part of the mission”
- Article 19
 - (1) “the head of the mission is unable to perform his functions”
 - (2) “the current administrative affairs of the mission.”
- Article 20
- Article 21
 - (1) “facilitate the acquisition on its territory”; “premises necessary for its mission”; “assist the latter in obtaining accommodation in some other way”
 - (2) “assist missions in obtaining suitable accommodation for their members”
- Article 22
 - (1) “The premises of the mission shall be inviolable.”
 - (2) “prevent any disturbance of the peace of the mission or impairment of its dignity”
- Article 23
 - (1) “all national, regional or municipal dues and taxes”; “other than such as represent payment for specific services rendered.”
- Article 24
 - “The archives and documents of the mission shall be inviolable”; “wherever they may be”
- Article 25
 - “accord full facilities for the performance of the functions of the mission.”
- Article 26
 - “zones entry into which is prohibited or regulated for reasons of national security”

- Article 27
 - (1) “protect free communication”; “or all official purposes”; “all appropriate means”; “wireless transmitter”
 - (2) “the official correspondence of the mission shall be inviolable”
 - (3) “diplomatic bag”
 - (4) “diplomatic documents or articles intended for official use.”
 - (5) “diplomatic courier”; “person inviolability”
- Article 28
 - “fees and charges levied by the mission in the course of its official duties”
- Article 29
 - “the person of a diplomatic agent shall be inviolable.”; “treat him with due respect and shall take all appropriate steps”
- Article 30
 - (1) “private residence”; “same inviolability and protection as the premises of the mission.”
- Article 31
 - (1) (c) “any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions”
 - (2) “give evidence as a witness.”
 - (3) “No measures of execution”; “measures concerned can be taken without infringing the inviolability of his person or of his residence”
 - (4) “jurisdiction of the sending State.”
- Article 32
 - (2) “Waiver must always be express.”
 - (3) “initiation of proceedings”; “any counterclaim directly connected with the principal claim”
 - (4) “jurisdiction in respect of civil or administrative proceedings”
- Article 33
 - (1) “services rendered for the sending State”; “social security provisions”
 - (2) (a) “permanently resident in the receiving State”
- Article 34
 - “all dues and taxes”
 - (a) “Indirect taxes”
 - (b) “Dues and taxes on private immovable property”
 - (c) “Estate, succession or inheritance duties”
 - (d) “Dues and taxes on private income having its source in the receiving State”; “capital taxes on investments made in commercial undertakings in the receiving State”

- (e) “Charges levied for specific services rendered”
- Article 35
 - “all personal services”; “from all public service of any kind whatsoever”; “military obligations”
- Article 36
 - “all customs duties, taxes, and related charges other than charges for storage, cartage, and similar services”
 - (a) “Articles for the official use of the mission”
 - (b) “Articles for the personal use”; “family forming part of his household”.
 - (2) “there are serious grounds for presuming that”
- Article 37
 - (1) “The members of the family of a diplomatic agent forming part of his household”
 - (2) “together with members of their families forming part of their respective households”; “permanently resident in the receiving State”; “acts performed outside the course of their duties.”; “time of first installation.”
 - (3) “acts performed in the course of their duties”; “emoluments they receive by reason of their employment”.
 - (4) “exercise its jurisdiction over those persons”; “in such a manner as not to interfere unduly with the performance of the functions of the mission”.
- Article 38
 - (1) “additional privileges and immunities”; “in respect of official acts performed in the exercise of his functions”
 - (2) “permanently resident in the receiving State”; “in such a manner as not to interfere unduly with the performance of the functions of the mission”.
- Article 39
 - (1) “from the moment he enters the territory of the receiving State on proceeding to take up his post”; “from the moment when his appointment is notified”
 - (2) “have come to an end”; “on expiry of a reasonable period in which to do so”; “acts performed by such a person in the exercise of his functions as a member of the mission”
 - (3) “the members of his family”; “until the expiry of a reasonable period in which to leave the country”
 - (4) “permanently resident in the receiving State”; “member of his family forming part of his household”; “movable property”; “Estate, succession and inheritance duties”; “on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as a member of the mission or as a member of the family of a member of the mission”.
- Article 40

- (3) “official correspondence and other official communications in transit”; “the same freedom and protection as is accorded by the receiving State”; “diplomatic bags in transit”; “the same inviolability and protection as the receiving State is bound to accord”
 - (4) “whose presence in the territory of the third State is due to force majeure”
- Article 41
 - (1) “duty not to interfere in the internal affairs”
 - (2) “official business”; “entrusted to the mission by the sending State”
 - (3) “not be used in any manner incompatible with the functions of the mission”; “other rules of general international law”
- Article 42
 - “practise for personal profit any professional or commercial activity.”
- Article 43
 - “On notification”
- Article 44
 - “grant facilities”
- Article 45
 - (b) “entrust the custody of the premises of the mission, together with its property and archives”; “third State acceptable to the receiving State.”
 - (c) “entrust the protection of its interests”
- Article 46
 - “undertake the temporary protection of the interests of the third State and of its nationals”.
- Article 47
 - “discrimination”
- **VCCR:**
 - Preamble
 - Article 1
 - (3) “permanent residents of the receiving State”
 - Article 4
 - (5) “office forming part of an existing consular post”
 - Article 5
 - (a) “the interests of the sending State and of its nationals”; “within the limits permitted by international law”
 - (c) “ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State”
 - Article 14

- “necessary measures are taken to enable the head of a consular post to carry out the duties of his office”
- Article 15
 - (3) “The competent authorities of the receiving State shall afford assistance and protection to the acting head of post”
- Article 17
 - (1) “diplomatic acts.”
- Article 20
 - “the size of the staff be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the consular district and to the needs of the particular consular post”
- Article 23
 - (2) “within a reasonable time”
 - (3) “before entering on his duties with the consular post.”
- Article 24
 - (1)(a) “any other changes affecting their status that may occur in the course of their service with the consular post”
 - (1)(b) “a person belonging to the family of a member of a consular post forming part of his household”; “the fact that a person becomes or ceases to be such a member of the family”
 - (1)(c) “members of the private staff”
 - (1)(d) “persons resident in the receiving State”
- Article 27
 - (1)(a) “respect and protect the consular premises, together with the property of the consular post and the consular archives”
 - (1)(b) “the custody of the consular premises, together with the property contained therein and the consular archives”; “a third State acceptable to the receiving State”
- Article 28
 - “full facilities for the performance of the functions of the consular post”
- Article 29
 - (2) “official business”
- Article 30
 - (1) “facilitate the acquisition on its territory”; “premises necessary for its consular post”; “assist the latter in obtaining accommodation in some other way”
 - (2) “assist the consular post in obtaining suitable accommodation for its members”
- Article 31

- (1) “Consular premises shall be inviolable to the extent provided in this article”
- (2) “used exclusively for the purpose of the work of the consular post”; “other disaster requiring prompt protective action”
- (3) “a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage”; “prevent any disturbance of the peace of the consular post or impairment of its dignity”
- (4) “all possible steps shall be taken to avoid impeding the performance of consular functions”; “prompt, adequate and effective compensation”.
- Article 32
 - (1) “Consular premises”; “national, regional or municipal dues and taxes whatsoever”; “payment for specific services rendered”
- Article 33
 - “The consular archives and documents shall be inviolable”
- Article 34
 - “zones entry into which is prohibited or regulated for reasons of national security”
- Article 35
 - (1) “freedom of communication”; “all appropriate means”; “diplomatic or consular couriers”; “diplomatic or consular bags”
 - (2) “The official correspondence of the consular post shall be inviolable.”
 - (3) “consular bag”
 - (4) “official correspondence and documents or articles intended exclusively for official use”
 - (5) “performance of his functions”; “personal inviolability”
- Article 36
 - (1)(b) “without delay”
 - (1)(c) “expressly opposes”
- Article 37
 - (1)(a) “without delay”
- Article 41
 - (1) “grave crime”; “decision by the competent judicial authority.”
 - (2) “judicial decision of final effect.”
 - (3) “a manner which will hamper the exercise of consular functions as little as possible.”; “with the minimum of delay.”
- Article 42
 - “diplomatic channel”
- Article 43

- (1) “jurisdiction of the judicial or administrative authorities of the receiving State”; “acts performed in the exercise of consular functions
- (2)(a) “contract expressly or impliedly as an agent of the sending State”
- Article 44
 - (1) “coercive measure or penalty”
 - (2) “interference with the performance of his function”
 - (3) “matters connected with the exercise of their functions”; “expert witnesses with regard to the law of the sending State”
- Article 45
 - (2) “The waiver shall in all cases be express”
 - (3) “initiation of proceedings”; “any counterclaim directly connected with the principal claim”
 - (4) “civil or administrative proceedings”
- Article 46
 - (1) “members of their families forming part of their households”
 - (2) “permanent employee of the sending State”; “private gainful occupation”
- Article 47
 - (1) “services rendered for the sending State”
 - (2) “private staff of consular officers and of consular employees”
- Article 48
 - (1) “services rendered by them for the sending State”; “members of their families forming part of their household”; “social security provisions”
 - (4) “voluntary participation”; “social security system”
- Article 49
 - (1) “members of their families forming part of their households”; “all dues and taxes, personal or real, national, regional or municipal”
 - (e) “charges levied for specific services rendered”
 - “dues and taxes on the wages which they receive for their services”
- Article 50
 - (1) “all customs duties, taxes, and related charges other than charges for storage, cartage and similar services”
 - (a) “articles for the official use of the consular post”
 - (b) “articles for the personal use”; “articles intended for his establishment”; “articles intended for consumption”; “quantities necessary for direct utilization”
 - (3) “Personal baggage”; “serious reason to believe that it contains articles”
- Article 51
 - (a) “movable property of the deceased”

- (b) “movable property the presence of which in the receiving State was due solely to the presence in that State of the deceased”
- Article 52
 - “all personal services”; “all public service of any kind whatsoever”; “military obligations”
- Article 53
 - (1) “from the moment when he enters on his duties”
 - (3) “within a reasonable period thereafter”
 - (4) “acts performed by a consular officer or a consular employee in the exercise of his functions”
 - (5) “until the expiry of a reasonable period enabling them to do so”
- Article 54
 - (3) “official correspondence and to other official communications in transit”; “consular couriers”; “consular bags in transit”.
 - (4) “presence in the territory of the third State is due to force majeure”
- Article 57
 - (1) “personal profit”; “any professional or commercial activity”
 - (2) (a) “any private gainful occupation”
- Article 61
 - “private correspondence of the head of a consular post and of any person working with him”; “materials, books or documents relating to their profession or trade”
- Article 62
 - “all customs duties, taxes, and related charges other than charges for storage, cartage and similar services”; “official use”
- Article 63
 - “criminal proceedings”; “in a manner which will hamper the exercise of consular functions as little as possible”
- Article 72
 - (2) “discrimination”

66. In addition to these provisions, the Committee also plans to examine some of the emerging cross-cutting issues relating to diplomatic and consular privileges and immunities. At this stage, the Committee has not taken a final decision on the subjects it might address, some of which could even require a study group or a specific committee. The list below is a consensus list resulting from proposals on points where Committee members consider that an update or clarification of the relevant provisions of the VCDR and VCCR would be useful. The final decision on whether the Committee needs to specifically address some of these issues will depend on the analysis of practice following the methodology outlined at the beginning of this report.

67. Thus, possible research topics include:

- Opposability of status-based immunities to third States
- Freedom of expression and protection of the dignity of missions and diplomatic and consular agents
- Crimes of international law and diplomatic/consular immunities
- National security, diplomatic, and consular privileges and immunities
- Abuse of diplomatic and consular immunities and privileges
- Protection of diplomatic and consular premises during armed conflicts
- Cybersecurity, digital communications, and diplomatic and consular immunities and privileges
- Reservations to the VCDR and the VCCR
- Diplomatic and consular premises
- Inspection of diplomatic and consular agents and diplomatic and consular bags, with especial consideration of new technologies.
- Exceptions and restrictions to diplomatic and consular immunities
- Waiver of diplomatic and consular immunities
- VCDR and VCCR as self-contained regimes: what role for the general rules on State responsibility?
- Legal consequences of violations of the VCDR and VCCR
- Criminal jurisdiction for crimes committed inside diplomatic and consular premises
- Circumstances precluding wrongfulness and diplomatic and consular immunities
- Customary law rules in relation to diplomatic and consular immunities and privileges
- Tension between Diplomatic and Consular Immunity and Fundamental Rights of Individuals

VII. FUTURE DIRECTIONS

68. The Committee's main objective is to produce an ILA practical guide to diplomatic and consular privileges and immunities. It will serve as a guide for States and practitioners on the interpretation and application of the VCDR and VCCR. This guide will be submitted to the ILA for discussion and adoption at the end of the Committee's mandate.

69. Alongside the production of the above-mentioned draft guide, it is also planned to draft and publish an edited book on diplomatic and consular privileges and immunities. The planned book will contain both an article-by-article commentary on the VCDR and the VCCR as well as thematic chapters. The reference book on the subject remains Eileen Denza's *Commentary*, the fifth edition of which was published in 2025.⁸² However, as the author herself points out in a previous edition, "[i]t is impossible for a single commentator to cover state practice in relation to the Convention in a comprehensive way, and this *Commentary* is inevitably weighted in

⁸² Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic relations*, 5th edition, Oxford, Oxford university Press, 2025.

favour of UK and US practice”.⁸³ Based on the comparative method that underpins the Committee’s mandate, the book it intends to publish will provide a plurality of views, drawing on diverse and contrasting practices from around the world. The ambition is to present a practice that is representative of that of the majority, if not most, of the world’s States. To this end, the Committee proposes not only to draw on the practices of the national groups and nationalities represented within the Committee (see annex to this report), but also to invite members of other ILA national groups, and even external groups, which are not represented within the Committee, to participate in this project.

70. In addition, the book will not be limited solely to the VCDR but also cover the VCCR.

71. Finally, the Committee will continue to produce and submit reports on its work and progress. In addition to this preliminary report and the final report, which will be submitted at the end of the Committee’s work, at the same time as the draft guide, two thematic reports will be produced. The first report will deal with the privileges and immunities of diplomatic and consular premises and property, and the second with the privileges and immunities of diplomatic and consular agents.

⁸³ Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic relations*, 4th edition, Oxford, Oxford university Press, 2016, p.9.

Annex: List of Committee members who took part in the questionnaire and contributed to the preparation of the report

Names	Branches (contribution on a specific country)
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Janina Barkholdt	Germany
Yateesh Begoore	The Netherlands (India)
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Dieter Fleck	Germany
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