

GENERAL ARTICLES

AN ANALYSIS OF THE DIPLOMATIC CRISIS BETWEEN TURKEY AND THE NETHERLANDS IN LIGHT OF THE EXISTING INTERNATIONAL LEGAL FRAMEWORK GOVERNING DIPLOMATIC AND CONSULAR RELATIONS

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Some of the most heated events related to the 2017 Turkish referendum, which significantly amended the country's constitution, did not take place in Turkey but in several European countries where a large number of Turkish citizens reside. The tension escalated when the Netherlands barred a plane carrying the Turkish Minister for Foreign Affairs from landing on Dutch soil and then prevented the Turkish Family and Social Policies Minister from accessing the Turkish Consulate in Rotterdam. This triggered what has been described as an unprecedented diplomatic crisis between two NATO allies. Turkey vigorously claimed that the Netherlands' behaviour breached the law of diplomatic and consular relations. The Netherlands, in turn, defended its actions, stating that they did not amount to a violation of international law. The present article will first provide an overview of these events and introduce the claims that were made by each side. Secondly, this article will briefly analyse the relevant treaty provisions and customary rules to ascertain whether Foreign Ministers enjoy a special status while visiting a third country and whether consular premises can legitimately be used to carry out political activities, ultimately challenging Turkey's claims that the Netherlands violated international law.

Keywords: Vienna Convention on Diplomatic Relations, Vienna Convention on Consular Relations, customary international law, diplomatic immunities and privileges

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TABLE OF CONTENTS

I. INTRODUCTION	62
II. AN OVERVIEW OF THE LEGAL CLAIMS BROUGHT FORWARD BY TURKEY AND THE NETHERLANDS	66
1. <i>The Alleged Violations of International Law Claimed by Turkey</i>	68
2. <i>The Counter-Arguments Advanced by the Netherlands</i>	69
III. AN ANALYSIS OF THE CLAIMS AGAINST THE BACKDROP OF THE CURRENT INTERNATIONAL LEGAL FRAMEWORK.....	72
1. <i>The Immunities and Privileges Enjoyed by Foreign Ministries in a Third Country</i>	72
2. <i>The Legal Status of Diplomatic and Consular Premises</i>	77
IV. CONCLUDING REMARKS	78

I. INTRODUCTION

The Turkish constitutional referendum, which took place on the 16th of April 2017, has not been treated merely as a matter of internal affairs. The referendum was a source of escalating tensions between Turkey and several European Union ('EU') Member States, including Germany, Austria, Belgium and the Netherlands. Relations between Turkey and the EU deteriorated last year when the Member States harshly criticised Turkish President Recep Tayyip Erdoğan for a mass crackdown on political opponents in the wake of a failed coup. The referendum to change the Turkish Constitution from a parliamentary to a presidential system further exacerbated the divide between Turkey and its historical Western allies, because the proposed constitutional amendments were likely to result in 'the excessive concentration of powers in one office, with serious effects on the necessary checks and balances and on the independence of the judiciary'.¹ Now that the constitutional changes have been approved, they will allow President Recep Tayyip Erdoğan to run for the redefined office of President

¹ European Commission, Joint Statement by High Representative/Vice-President Federica Mogherini and Commissioner Johannes Hahn on the Venice Commission's Opinion on the amendments to the Constitution of Turkey and recent events (2017) Statement/17/588.

for another two terms in the next Turkish elections in 2019, meaning that he could hold power until 2029.

Even though it was contrary to Turkey's own domestic legislation,² ahead of the referendum, Turkey dispatched high-level politicians, particularly Government Ministers, to a number of European countries. To campaign for the 'Yes' vote, Turkey sought to organise rallies in European cities and towns that had large populations of Turkish expatriates.³ It is estimated that the number of Turkish nationals living abroad exceeds 5.5 million, around 4.6 million of which live in Western European countries⁴ such as Germany and the Netherlands. The campaign in these countries was thus crucial for gaining the vote of the 'diaspora' community.⁵ In the end, the diaspora's vote indeed played a decisive role in the outcome of the referendum, showing greater support for the constitutional reform than the home vote.⁶

² Art 94/A of Turkish electoral law explicitly bans campaigning abroad or in foreign diplomatic missions: Law No 298 of 1961 on Basic Provisions on Elections and Voter Registers, 4.t. Register, vol I – 2553.

³ See Betigül E Argun, *Turkey in Germany: The Transnational Sphere of Deutschkei* (Routledge 2003); Rainer Bauböck, 'Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting' (2007) 75 *Fordham Law Review* 2939; as explained by the author, the term 'expatriates' refers to citizens who live permanently or temporarily outside their country of citizenship.

⁴ Françoise de Bel-Air, 'Migration Profile: Turkey' (2016) Policy Brief, Robert Schuman Centre for Advanced Studies 9 <www.cadmus.eui.eu/bitstream/handle/1814/45145/MPC_PB_2016_09.pdf?sequence=1> accessed 20 June 2017.

⁵ On the external voting rights of foreign citizens residing abroad, see generally Jean-Michel Lafleur, *Transnational Politics and the State: The External Voting Rights of Diasporas* (Routledge 2013); Francesco Ragazzi, 'A Comparative Analysis of Diaspora Policies' (2014) 41 *Political Geography* 74; Sybil Rhodes and Arus Harutyunyan, 'Extending Citizenship to Emigrants: Democratic Contestation and a New Global Norm' (2010) 31 *International Political Science Review* 470, 475-480; Jose Itzigsohn, 'Immigration and the Boundaries of Citizenship: The Institutions of Immigrants' Political Transnationalism' (2000) 34 *International Migration Review* 1126.

⁶ The highest level of support was seen among Turks in Germany, Belgium, Austria and the Netherlands, with some 63, 75, 73 and 71 percent respectively being in favour of the proposed reforms. In contrast, in Turkey, the 'Yes' vote had about 51.3 percent, as compared to 48.7 percent for the 'No' vote. The close referendum

The tension between Turkey and the EU countries began in Germany, on the 2nd of March 2017, when the Turkish Justice Minister, Bekir Bozdağ, was expected to speak at a public rally organised by the Turkish community in the German town Gaggenau. The event was cancelled following the municipality's declaration that the hall allocated for the rally had been withdrawn due to concerns about parking space. Over the next couple of days, municipalities all over Germany cancelled several rallies in support of the Turkish referendum due to security concerns and/or technical issues. For example, the city of Hamburg banned a planned appearance of the Turkish Minister for Foreign Affairs, Mevlüt Çavuşoğlu, on the pretext that fire protection measures were insufficient. In a speech delivered in Istanbul on the 5th of March 2017, President Erdoğan called the German actions 'fascist' and claimed that 'they demonstrated that Germany has not moved on from its Nazi past'.⁷

Later in March, while the row continued to escalate between Germany and Turkey, the Netherlands significantly worsened existing tensions. The Dutch government, first, barred a plane carrying the Turkish Foreign Affairs Minister from landing on Dutch soil. Furthermore, the Turkish Family and Social Policies Minister, Fatma Betül Sayan Kaya, who had reached the Netherlands from Germany by car, was prevented from visiting her country's consulate in Rotterdam. Fearing a serious disturbance of public order, the Mayor of Rotterdam issued an emergency order for the area outside of the Turkish Consulate General, and a police cordon was placed around it. The Dutch government explained that it considered the visits undesirable and that it 'could not cooperate in the public political campaigning of Turkish

result prompted a reaction on the part of the European Commission, which called on the Turkish authorities to seek the broadest possible national consensus in the implementation of the constitutional amendments: see European Commission, Statement by President Juncker, High Representative/Vice-President Mogherini and Commissioner Hahn on the referendum in Turkey (2017) Statement/17/981.

⁷ Presidency of the Republic of Turkey, 'I Believe All Citizens will Unite at 'Yes' for the Future of Turkey' (5 March 2017) <<https://www.tccb.gov.tr/en/news/542/72226/turkiyenin-istikbali-icin-tum-vatandaslarin-evette-birlesecegine-inaniyorum.html>> accessed 7 May 2017.

Ministers in the Netherlands'.⁸ Turkey, in return, claimed that the Netherlands' actions violated international law, making explicit reference to the Vienna Convention on Diplomatic Relations ('VCDR'),⁹ the Vienna Convention on Consular Relations ('VCCR')¹⁰ and international human rights law ('IHRL'). Moreover, Turkey threatened to impose sanctions against the Netherlands and take the case before the European Court of Human Rights ('ECtHR').¹¹

Leaving aside political considerations and motivations, which have certainly played a major role in shaping these events, especially since the Dutch parliamentary elections took place just a few days after the 'diplomatic incident' with Turkey,¹² the present article will analyse the feud from a legal point of view, which has not been adopted thus far. The article will first provide an overview of the key international legal claims and counter-claims that were raised by the parties involved in this unprecedented and much debated diplomatic dispute. Secondly, the article challenges the allegations vehemently brought forward by Turkey, that the Netherlands' actions amounted to a violation of the law of diplomatic and consular relations. The article will demonstrate that Turkey, to foster the engagement of Turkish nationals residing abroad in the upcoming referendum, took actions that required the expressed consent of the receiving State. In fact, Turkey wrongly assumed that its Ministers enjoyed a special status in a third country

⁸ The Netherlands Government statement concerning Turkish Minister Kaya's escorted departure (12 March 2017), <<https://www.government.nl/latest/news/2017/03/12/government-statement-concerning-turkish-minister-kaya-s-escorted-departure>> accessed 7 May 2017.

⁹ Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95 (VCDR).

¹⁰ Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261 (VCCR).

¹¹ Tuvan Gumrukcu and Tulay Karadeniz, 'Turkey Targets Dutch with Diplomatic Sanctions as 'Nazi' Row Escalates' *Reuters* (Ankara, 14 March 2017) <<http://www.reuters.com/article/us-turkey-referendum-netherlandsidUSKBN16J0IU>> accessed 7 May 2017.

¹² Tim Boersma, 'The Netherlands' Complicated Election Result, Explained' (Brookings Institute, 20 March 2017) <<https://www.brookings.edu/blog/order-from-chaos/2017/03/20/the-netherlands-complicated-election-result-explained/>> accessed 12 May 2017.

and autonomously decided to use consular premises to carry out political activities, taking for granted the compatibility of this behaviour with the correct exercise of consular functions.¹³

Since the focus of this analysis is limited to the law of diplomatic and consular relations, the present article will not discuss the other major question triggered by this row, i.e. whether the 'external' (or 'out-of-country') voting rights of third country citizens residing abroad are embedded in the current IHRL framework and to what extent such rights must be implemented and/or can be legitimately limited.¹⁴

II. AN OVERVIEW OF THE LEGAL CLAIMS BROUGHT FORWARD BY TURKEY AND THE NETHERLANDS

Prior to diving into the legal issues that emerged during this diplomatic feud, a few caveats are necessary. In a nutshell, diplomatic relations entail 'the exercise by the sending government of state functions on the territory of the receiving state by licence of the latter'.¹⁵ Once the receiving State has agreed to the establishment of diplomatic relations, which in the case of the Netherlands and Turkey occurred in 1612,¹⁶ it must enable the sending State to benefit from the content of the licence. This obligation results, *inter alia*,

¹³ Art 5 VCCR (n 10).

¹⁴ See on this point, Richard Lappin, 'The Right to Vote for non-Resident Citizens in Europe', (2016) 65 *International & Comparative Law Quarterly* 859, 861-63; Michael Collyer, 'A Geography of Extra-Territorial Citizenship: Explanations of External Voting' (2014) 2(1) *Migration Studies* 55, 67; Ruth Rubio-Marin, 'Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants' (2006) 81 *New York University Law Review* 117; Frédéric Mégret and Raphaël Girard, 'Diasporas, Extraterritorial Representation and the Right to Vote' (2014) 52 *Canadian Yearbook of International Law* 189.

¹⁵ See Alan James, 'Diplomatic Relations and Contacts' (1992) 62 (1) *British Yearbook of International Law* 347, 354-57; James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2013) 397.

¹⁶ As reported by the Dutch Government, 'Relations between the Netherlands and Turkey', <<https://www.government.nl/topics/international-relations/overview-countries-and-regions/turkey>> accessed 20 June 2017.

in a body of privileges and immunities,¹⁷ in the observance of legal duties by the receiving State,¹⁸ and in the mission's inviolability.¹⁹

Formally speaking, consular relations are distinct from diplomatic relations,²⁰ meaning that two States may have consular relations but not diplomatic relations, and vice versa. In part, this distinction is derived from the fact that historically, the functions of a consul were quite different from those of a diplomat, with the former being regarded as an agent 'deprived of representative character'.²¹ This difference ultimately led to the codification of two separate Conventions, i.e. the VCDR and VCCR, both of which are relevant to the present analysis and form the core of diplomatic and consular law.²² While the VCDR codifies the customary rules regarding bilateral diplomatic relations between States and its provisions have largely become part of general international law, the VCCR embodies a general framework of minimum standards for consular relations.²³ Furthermore, both

¹⁷ Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th edn, Oxford University Press 2016) 232; Ivor Roberts, *Satow's Diplomatic Practice* (6th edn, Oxford University Press 2009) 97; Bhagevatula Murty, *The International Law of Diplomacy: The Diplomatic Instrument and World Public Order* (Springer 1989) 5; Jonathan Brown, 'Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations' (1988) 37 *International & Comparative Law Quarterly* 53.

¹⁸ See *United States Diplomatic and Consular Staff in Tehran (Hostages Case) (United States of America v Iran)* (Merits) [1980] ICJ Rep, para 62. The Court highlighted that such obligations concerning the inviolability of the members of a diplomatic mission and of the premises, property and archives of the mission continued even in cases of armed conflict or the breach of diplomatic relations. See Kazimierz Gryzbowski, 'The Regime of Diplomacy and the Tehran Hostages' (1981) 30 *International & Comparative Law Quarterly* 42.

¹⁹ Crawford (n 15) 402.

²⁰ James (n 15) 356.

²¹ John R Wood and Jean Serres, *Diplomatic Ceremonial and Protocol, Principles, Procedures, and Practices* (Macmillan 1970) 64.

²² Jan Wouters, Sanderijn Duquet and Katrien Meuwissen, 'The Vienna Conventions on Diplomatic and Consular Relations' in Andrew F Cooper, Jorge Heine and Ramesh Thakur (eds), *The Oxford Handbook of Modern Diplomacy* (Oxford University Press 2013) 510-543.

²³ Luke T Lee and John B Quigley, *Consular Law and Practice* (3rd edn, Oxford University Press 2008) 107.

Conventions affirm the inviolability of the mission's premises, which are defined as the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used exclusively for the purposes of the consular post or the diplomatic mission.²⁴ The consular and diplomatic premises cannot be accessed by the agents of the receiving State without the expressed consent of the head of the mission, and 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.²⁵

This brief overview of the law of diplomatic and consular relations is essential in framing the issues brought forward by Turkey and the Netherlands' response. In light of the existing legal framework, it is possible to identify the main claims advanced in the dispute, which can be summarised in two points. The first concerns the immunities and privileges enjoyed by Foreign Ministries in a third country, while the second pertains to the legal status of diplomatic and consular premises.

1. The Alleged Violations of International Law Claimed by Turkey

Following the events briefly presented in the introduction, the Turkish government was not shy in voicing its disappointment with and anger towards the Netherlands. President Erdoğan accused the Dutch government's behaviour as violating 'diplomacy and international law'.²⁶ With regard to the status of the two Turkish Ministries involved in the row, the Turkish' President initially only protested the denial of landing permits to the Minister for Foreign Affairs and denounced it as 'a scandal in every way'. Later he also affirmed that 'a woman minister of Turkey does not need any permission to meet with her citizens inside her own country's

²⁴ Art 1 VCCR (n 10) and Art 1 VCDR (n 9). In the case of the VCDR, the premises of the mission also include the residence of the head of the mission.

²⁵ Art 22 VCDR (n 9) and Art 31 VCCR (n 10). It shall be noted that Art 31 para 3 of the VCCR provides for an explicit exception to the inviolability principle because it states that 'the consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.'

²⁶ Presidency of the Republic of Turkey, 'I Call on All International Organizations to Impose Sanctions on the Netherlands', 12 March 2017, <<https://www.tccb.gov.tr/en/search/?s=the%20Netherlands>> accessed 20 June 2017.

consulate'.²⁷ Furthermore, President Erdoğan asserted that '[a]ccording to international law, embassies and consulates *are territories of the States they represent*. In other words, both the Embassy and the Consulate in the Netherlands are our territory'.²⁸ He also openly condemned the municipality of Rotterdam's declaration of a state of emergency for the area surrounding the Turkish Consulate-General. According to him, this declaration breached the obligation to respect the inviolability of the consular premises, solely in order to prevent the Minister from leaving her car and to halt the 'peaceful demonstration' of the Turkish citizens who had gathered outside the building to protest against the Netherlands government's actions.²⁹

In response to the Dutch government's conduct, Turkey retaliated by barring planes carrying Dutch diplomats or envoys from landing in Turkey or using Turkish airspace. Moreover, based on the assumption that the Netherlands' actions gave rise to breaches of international law, Turkey called on international organizations to implement sanctions against the Netherlands and ultimately submitted an official note to the UN Secretary-General to complain about violations of the VCDR and the VCCR.³⁰

2. The Counter-Arguments Advanced by the Netherlands

In response to Turkey's accusations, the Dutch government made its counter-claims public. With regard to the denial of landing rights to the Turkish Minister of Foreign Affairs, the Netherlands reported that discussions with the Turkish authorities were underway regarding the Minister's visit. According to a statement published by the Dutch government, the two parties had talked about possibly 'moving the meeting to a Turkish consulate or embassy, closing it to the public and organising it

²⁷ Presidency on Turkey (n 26).

²⁸ Ibid (emphasis added).

²⁹ Presidency of the Republic of Turkey, 'The Whole Europe Has Got Mobilized for 'No' in April 16 Referendum', 15 March 2017, <<https://www.tccb.gov.tr/en/search/?s=the%20Netherlands>> accessed 15 May 2017.

³⁰ The original text of the note has not been made public, but the news has been reported by several news agencies. See Canberk Yüksel, Turkey Notifies UN of Dutch Government's International Law Breaches, Anadolu Agency, 16 March 2017, <<http://aa.com.tr/en/americas/turkey-notifies-un-of-dutch-govts-intl-law-breaches/772544>> accessed 15 May 2017.

on a smaller scale'.³¹ The Dutch government had indicated that in any case, Turkey's Minister of Foreign Affairs would 'not be welcome in his official capacity, but that arrangements could be made for a visit by him as a private individual'.³² While discussions were still in progress regarding the details (with a view to maintaining public order) of the Minister's visit as a private individual, Mr. Çavuşoğlu appeared on CNN Turk on the morning of Saturday, the 11th of March 2017, and threatened the Netherlands with economic and political sanctions, should his aircraft be prevented from landing.³³ These threats made the quest for a reasonable compromise impossible and led to the Dutch government's decision to deny landing rights.³⁴ The Dutch government also explained that in principle, it had no objections to hosting meetings to inform the Turkish citizens residing on its territory about the referendum; however, such meetings had to comply with the Netherlands' 'justified concerns regarding public order'.³⁵

In relation to the Turkish Minister of Family and Social Policies, the Dutch government stressed that the decision to organise the visit was made unilaterally. The Turkish authorities did not agree to share information about the Minister's travel plans, and deliberate efforts were made to mislead the Dutch authorities so as to ensure that Ms. Kaya could travel to Rotterdam without hindrance.³⁶ According to the Netherlands, Ms. Kaya did not enjoy any special status in the Netherlands, because:

³¹ Government statement on the denial of Turkish landing rights, 11 March 2017, <<https://www.government.nl/latest/news/2017/03/11/government-statement-on-the-denial-of-turkish-landing-rights>> accessed 15 May 2017.

³² Letter of 10 April 2017 from the Prime Minister, the Minister of Social Affairs and Employment and the Minister of Foreign Affairs, in conjunction with the Minister of Security and Justice and the Minister of the Interior and Kingdom Relations, to the House of Representatives on attempted campaign appearances by Turkish ministers (Letter to the House of Representatives), 10 April 2017, <<https://www.government.nl/documents/parliamentary-documents/2017/04/13/letter-to-the-house-of-representatives-on-campaign-appearances-by-turkish-ministers>> accessed 15 May 2017.

³³ Ibid.

³⁴ Government statement on the denial of Turkish landing rights (n 31).

³⁵ Letter to the House of Representatives (n 32).

³⁶ Ibid.

International law grants a special status only to (1) heads of State, heads of Government and foreign ministers, (2) diplomatic and consular staff who have been accredited or whose appointment has been notified to the Netherlands, and (3) foreign officials on official missions, for which an invitation from the Netherlands is required. Ms. Kaya did not fall within any of these categories.³⁷

In other words, the Dutch government reached the conclusion that even though Ms. Kaya was a foreign government official, she did not enjoy the privileges and immunities given to specific officials under the current international legal framework. Furthermore, the Dutch government underlined that a foreign government official does not have the right to enter the Netherlands in order to carry out political activities. Once present in the Netherlands, a foreign government official has the right to freedom of expression, but 'restrictions can be applied if there are sufficient grounds.'³⁸ This is consistent with the European Convention on Human Rights ('ECHR'),³⁹ in particular, with the provision enshrined in Article 16, according to which 'nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens'.⁴⁰

With regard to the emergency order issued for the area surrounding the Turkish Consulate in Rotterdam, the Dutch government did not provide any legal justification and simply reiterated that the decision was made to avoid 'a serious public order disturbance'.⁴¹

³⁷ Letter to the House of Representatives (n 32).

³⁸ Ibid.

³⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

⁴⁰ The European Court of Human Rights' jurisprudence concerning Art 16 is very limited. See, for instance, *Piermont v France* (1995) 20 EHRR 301.

⁴¹ Letter to the House of Representatives (n 32). See also Government statement concerning Turkish Minister Kaya's escorted departure, 12 March 2017, <<https://www.government.nl/latest/news/2017/03/12/government-statement-concerning-turkish-minister-kaya-s-escorted-departure>> accessed 18 May 2017.

III. AN ANALYSIS OF THE CLAIMS AGAINST THE BACKDROP OF THE CURRENT INTERNATIONAL LEGAL FRAMEWORK

The following section addresses the two main claims brought forward by Turkey and assesses their legitimacy or lack thereof, in light of the existing legal framework governing diplomatic and consular relations between States. By expanding and deepening the counter-arguments already presented by the Dutch government (outlined in the section above), the following section will provide a detailed overview of the international treaty provisions and customary rules that are most relevant to the present analysis.

1. The Immunities and Privileges Enjoyed by Foreign Ministries in a Third Country

The first question to address concerns the status enjoyed by foreign ministers abroad – more specifically, whether the denial of landing rights to the Turkish Minister of Foreign Affairs and the lack of recognition of any privileges pertaining to the Turkish Minister of Family and Social Policies amount to violations of the law of diplomatic and consular relations. With regard to the dispute over the alleged violations committed against Mr. Çavuşoğlu, it is worth noting that the status of a Minister of Foreign Affairs is not fully outlined in the existing treaty law.⁴² However, in the *Arrest Warrant* case, the International Court of Justice ('ICJ') provided a brief analysis of the nature of the functions attached to this role:

There is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State [...] In the performance of these functions, *he or she is frequently required to travel*

⁴² Art 21, para 2 Convention on Special Missions (adopted 8 December 1996, entered into force 21 June 1985) 1400 UNTS 231, which states that '[t]he Head of the Government, the Minister of Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law'. See Art 7, para 2(a) Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, according to which 'In virtue of their functions and without having to produce full powers, the following are considered as representing their State: (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty [...]'.

*internationally, and thus must be in a position freely to do so whenever the need should arise.*⁴³

In sum, according to the ICJ, under international law, a Minister of Foreign Affairs is recognised as the representative of the State solely by virtue of his or her office. He or she must be in a position to travel and communicate freely in the performance of this function.⁴⁴ A Minister of Foreign Affairs thus enjoys all privileges and immunities granted by the VCDR.

However, as stated in the Convention, 'it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. *They also have a duty not to interfere in the internal affairs of that State.*'⁴⁵ Furthermore, according to the VCDR, '[a]ll official business with the receiving State entrusted to the mission by the sending State *shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed.*'⁴⁶ The Dutch government explained that it had no intention of welcoming the Turkish Minister of Foreign Affairs in his official capacity. First, the Netherlands could not be used as a political campaign area for other countries and the rallies would have the potential to create divisions within the Dutch Turkish minority, which had both pro- and anti-referendum camps.⁴⁷ Therefore, it seems reasonable to conclude that the Dutch government denied landing rights and access to its territory to the Turkish Minister of Foreign Affairs as a form of retorsion following his public threats.⁴⁸

⁴³ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3, paras 53-54 (emphasis added).

⁴⁴ Neil Boister, 'The ICJ in the Belgian Arrest Warrant Case: Arresting the Development of International Criminal Law' (2002) 7(2) *Journal of Conflict and Security Law* 293, 298.

⁴⁵ Art 41, para 1 VCDR (n 9) (emphasis added).

⁴⁶ Art 41, para 2 VCDR (n 9) (emphasis added).

⁴⁷ Letter to the House of Representatives (n 32).

⁴⁸ Measures of retorsion amount to unfriendly acts at most, i.e. acts that are wrong not in the legal sense but only in the political or moral sense, or a simple discourtesy. Moreover, acts of retorsion may include the prohibition of or placing of limitations upon normal diplomatic relations or other contacts, embargoes of various kinds or the withdrawal of voluntary aid programmes. See ILC, 'Report of the International Law Commission on the work of its 53rd Session' (23 April – 1 June and 2 July – 10

With regard to the Minister's threats, two further considerations can be made. Firstly, calling on international organizations to impose sanctions against the Netherlands highlights Turkey's firm and *de facto* unjustified notion of itself as the victim of conduct that is contrary to international obligations.⁴⁹ Secondly, it could be argued that even though the Netherlands did not raise this claim, these threats amounted to a breach of international customary law, according to which 'no State may use or encourage the use of economic, political or any other type of measures *to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind*.'⁵⁰

In relation to the Turkish Minister of Family and Social Policies, the main argument advanced by Turkey was that she – like the Minister of Foreign Affairs – also enjoyed a special status, whereas the Netherlands claimed that she did not. As stressed by international law expert, Ivor Roberts, 'the conduct of business with other States is no longer confined to the Minister

August 2001) UN Doc A/56/10, 128. See also Christian Tomuschat, 'Repressalie und Retorsion: Zu einigen Aspekten ihrer innerstaatlichen Durchführung' (1973) 33 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 179; Thomas Giegerich, 'Retorsions' in *Max Planck Encyclopedia of Public International Law* <<http://opil.ouplaw.com/home/EPIL>> accessed 18 May 2017; Richard B Lillich, 'Requiem for Hickenlooper' (1975) 69(1) *American Journal of International Law* 97; Chittharanjan Amerasinghe, 'The Ceylon Oil Expropriations' (1964) 58 *American Journal of International Law* 445.

⁴⁹ On the imposition of international sanctions for acts of wrongdoing, see Roberto Ago, 'Le Délit International' (1939–II) 69 *Recueil des cours* 430–40; Kim R Nossal, 'International Sanctions as International Punishment' (1989) 43 (2) *International Organization* 301, 305.

⁵⁰ See UNGA 'Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States' UN GAOR 25th Session Supp No 18 UN Doc A/8018 (1970) (emphasis added). See also Helen Keller, 'Friendly Relations Declaration (1970)' in *Max Planck Encyclopedia of Public International Law* <<http://opil.ouplaw.com/home/EPIL>> accessed 19 May 2017; Ian M Sinclair, 'The Significance of the Friendly Relations Declaration' in Vaughan Lowe and Colin Warbrick (eds), *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst* (Routledge 1994) 1–32; Robert Rosenstock, 'The Declaration of Principles of International Law Concerning Friendly Relations: A Survey' (1971) 65 *American Journal of International Law* 713, 715.

for Foreign Affairs.⁵¹ This position is shared by the ICJ, which in regard to the authority of a Minister other than the Minister of Foreign Affairs to bind the State in matters of international relations, noted that:

[...] with increasing frequency in modern international relations other persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations, and even of certain officials.⁵²

It can also be assumed that the Turkish Minister of Family and Social Policies was sent to the Netherlands in her capacity as an official visitor within the framework of so-called 'special missions', also known as '*ad hoc* diplomacy'.⁵³ Official visitors who are members of a special mission and represent the sending State in its bilateral or multilateral relations enjoy, for the duration of the visit, the same inviolability of the person and immunity from criminal jurisdiction as persons of equivalent rank accredited to a permanent diplomatic mission. This includes the receiving State's obligation to treat them with due respect and to take all appropriate steps to prevent any attack on their persons, freedom or dignity.⁵⁴

The legal status of such missions, which pre-dates the creation of the current system of permanent diplomatic missions, has begun to draw greater attention in recent years.⁵⁵ The Convention on Special Missions seeks to set

⁵¹ Roberts (n 17) 31.

⁵² *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6, para 47.

⁵³ See Crawford (n 15) 413-414; Michael Wood, 'The Immunity of Official Visitors' (2012) 16 *Max Planck Yearbook of United Nations Law* 35; Michael Bothe, 'Die strafrechtliche Immunität fremder Staatsorgane', (1971) 31 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 246; Adolfo Maresca, *Le Missioni Speciali* (Giuffrè 1975); Murty (n 17) 262-66, Chanaka Wickremasinghe, 'Immunities Enjoyed by Officials of States and International Organizations' in Malcom D Evans, *International Law* (4th edn, Oxford University Press 2014) 379-411.

⁵⁴ Wood (n 53) 71.

⁵⁵ Wickremasinghe (n 53) 389.

out the rules governing the conduct of *ad hoc* diplomacy. This Convention defines a 'special mission' as 'a temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task'.⁵⁶ However, this Convention has attracted limited participation, and neither the Netherlands nor Turkey is party to it. It is therefore challenging to ascertain the extent to which persons occupying high-ranking offices are entitled to 'special mission status' and, thus, enjoy absolute immunity from criminal jurisdiction or inviolability *ratione personae* while on an official visit to a third country.

Nonetheless, the relevant State practice and the broad outlines of customary law confirm that two key requirements must be met: i) that the official visitor represents the sending State and ii) that the receiving State has consented to the visit as a visit attracting immunity.⁵⁷ Concerning the latter key requirement, it should be noted that the receiving State's consent entails the following:

[...] at a minimum, that the receiving State has agreed with the sending State that the sending State shall send the person to the receiving State as an official visitor entitled to immunity. It is not normally sufficient, to establish 'consent', that the immigration authorities have permitted the person to enter, or that a visa has been issued.⁵⁸

The Netherlands did not consent to the Minister's visit, nor could the necessary consent be implied from the surrounding circumstances, because the Dutch authorities had clearly expressed their unwillingness to host political rallies organised by the Turkish Government.⁵⁹ It follows that the Netherlands did not violate international law by denying special status to the Turkish Minister of Family and Social Policies.

⁵⁶ Art 1, para (a) Convention on Special Missions (n 42).

⁵⁷ Klaus Bockslaff and Michael Koch, 'The Tabatabai Case: The Immunity of Special Envoys and the Limits of Judicial Review' (1982) 25 German Yearbook of International Law 539.

⁵⁸ Wood (n 53) 66.

⁵⁹ Letter to the House of Representatives (n 32), '[the Turkish authorities] were also informed that no Turkish government minister would be welcome in the Netherlands to campaign on the referendum in the run-up to 16 April'.

2. *The Legal Status of Diplomatic and Consular Premises*

The second main point raised in the dispute between the Netherlands and Turkey concerns the status of diplomatic and consular premises. Turkey's claim that embassies and consulates are territories of the States they represent is ill-founded and ultimately wrong. The inviolability of the diplomatic and consular premises,⁶⁰ in fact, must not be confused with extraterritoriality, because such premises do not constitute part of the territory of the sending State.⁶¹ The maintenance of public order remains a prerogative of the receiving State, and therefore, the emergency order issued by the Netherlands outside the premises of the Turkish Consulate in Rotterdam did not breach any of the obligations of the receiving State. Pushing this argument further, it could even be argued that the emergency order was a measure taken to fulfil the receiving State's duty to prevent the disturbance of the peace of the mission or the impairment of its dignity.⁶²

Whereas the Netherlands' actions do not appear to be in violation of the law of consular relations, it should be stressed that Turkey's intention to use the consular premises to host a political rally may have been contrary to the VCCR. The Convention states that '[t]he consular premises shall not be used in any manner *incompatible with the exercise of consular functions*.'⁶³ Political activities are not excluded *tout court*, because non-enumerated consular

⁶⁰ The inclusion of an exception to the principle of inviolability was the issue that caused the greatest controversy during the formulation of Art 22 of the VCDR and Art 31 of the VCCR. See *Diplomatic Intercourse and Immunities*, Yearbook of the International Law Commission, vol I, Summary records of the tenth session (28 April – 4 July 1958) UN Doc A/CN.4/114; Report of the International Commission covering the Work of its thirteenth session, Yearbook of the International Law Commission, vol II, Documents of the thirteenth session including the report of the Commission to the General Assembly (1961) 110.

⁶¹ See Malcolm N Shaw, *International Law* (7th edn, Cambridge University Press 2014) 551; Jordan J Paust, 'Non-Extraterritoriality of 'Special Territorial Jurisdiction' of the United States: Forgotten History and the Errors of Erdos' (1999) 24 *Yale Journal of International Law* 305.

⁶² Art 31, para 3 VCCR (n 10).

⁶³ Art 55, para 2 VCCR (n 10) (emphasis added).

functions are possible under the VCCR.⁶⁴ Such functions, however, must not be prohibited by the laws and regulations of the receiving State *or be openly objected to by the receiving State*. Inasmuch as the Dutch authorities expressed a clear aversion to the possibility that Turkey would carry out an electoral campaign on Dutch territory, these exceptions did not apply in the case at issue.

In conclusion, a diplomatic row that risked the relationship between two historic allies was triggered by Turkey's erroneous assumption that certain types of conduct could be carried out in another State's territory without that State's expressed consent and in compliance with the law of diplomatic and consular relations.

IV. CONCLUDING REMARKS

The diplomatic crisis between Turkey and the Netherlands was predominantly guided by political considerations. Despite – or perhaps because of – the row, in the end, President Erdoğan declared victory in a narrowly divided referendum, and the results of the Dutch parliamentary elections succeeded in halting the advance of resurgent nationalism. The votes of Turkish citizens residing abroad were of crucial importance, because the highest level of support for the referendum was registered in Western European countries. In the aftermath of the referendum, journalists, experts, politicians and academics have questioned why many Turkish voters opted for the authoritarian changes, despite the fact that they had lived in liberal democracies for many years. Furthermore, much consideration has been devoted to understanding the extent to which the tension with several EU countries boosted President Erdoğan's campaign.

Little attention, instead, was paid to the aspects of the diplomatic crisis that concerned the international legal framework. In order to fill this gap, the present article focused on the law of diplomatic and consular relations and showed that the Netherlands' conduct did not violate any of the relevant rules. Furthermore, this article has demonstrated that Turkey's arguments

⁶⁴ Art 5, para (m) of the VCCR (n 10) affirms that the consular post may perform 'any other functions entrusted to a consular post by the sending State'. See Mégret and Girard (n 14) 194.

rested on incorrect legal assumptions, i.e. the alleged enjoyment of a special status by its Ministers while on foreign soil and the claim that embassies and consulates are *de facto* parts of Turkish territory.

Notably, the row between Turkey and the Netherlands has also triggered a number of issues pertaining to the sphere of IHRL, which have not been addressed in this article, given its focus on the law of diplomatic and consular relations. For example, it could be argued that the emergency order issued by the municipality of Rotterdam had an impact on the Minister's freedom of movement and expression, and one could question whether the restrictions implemented were in line with the provision enshrined in Article 16 ECHR.⁶⁵ Those issues could perhaps form the focus of an unlikely inter-State application should Turkey move forward with its threat to lodge a case before the ECtHR.⁶⁶ In conclusion, even though some measure of politics will always guide each and every interaction among States,⁶⁷ it is worth stressing that over the centuries, diplomatic and consular practice has been duly systematised into legal rules. States' subjective needs and desires must be restricted by non-political deliberations, at least in those fields of international law that are sufficiently developed to provide States' representatives with adequate tools to avoid actions and/or reactions that rest on incorrect legal assumptions.

⁶⁵ See Robert E Norris and Paula Desio Reiton, 'The Suspension of Guarantees' (1980) 30 *American University Law Review* 189; Brendan Mangan, 'Protecting Human Rights in National Emergencies: Shortcomings in the European System and a Proposal for Reform' (1988) 10 *Human Rights Quarterly* 372; Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (2nd edn, Cambridge University Press 2014) 339-76. See also Matthew Saul, 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments' (2015) 15 *Human Rights Law Review* 761; Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 *European Law Journal* 118.

⁶⁶ Art 33 ECHR (n 39).

⁶⁷ See generally Martti Koskenniemi, 'The Politics of International Law – 20 Years Later' (2009) 20 *European Journal of International Law* 7.