



**HAL**  
open science

# The Renewal of Early-Modern Scholarship on the Ambassador: Pierre Ayrault on Diplomatic Immunity

Dante Fedele

► **To cite this version:**

Dante Fedele. The Renewal of Early-Modern Scholarship on the Ambassador: Pierre Ayrault on Diplomatic Immunity. *Journal of the History of International Law / Revue d'histoire du droit international*, 2016, 18 (4), pp.449-468. 10.1163/15718050-12340069 . hal-01952053

**HAL Id: hal-01952053**

**<https://hal.science/hal-01952053v1>**

Submitted on 12 Dec 2023

**HAL** is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

## The renewal of early-modern scholarship on the ambassador Pierre Ayrault on diplomatic immunity

### Introduction

The second half of the 16<sup>th</sup> century saw a profound change in the scholarship on the ambassador, which led to its becoming a very significant line of thought within early-modern scholarship on *ius gentium*. This change took many forms. In quantitative terms, the number of publications on the subject showed a striking increase, which became particularly evident during the 17<sup>th</sup> century. In terms of methodology, on the one hand, the legal humanism and the *usus modernus Pandectarum*, and, on the other, the doctrine of “reason of State”, differentiated the new treatises from those before, which had been nourished by the method of *mos italicus* or consisted of short manuals, collecting precepts of behaviour, to be consulted by the ambassadors. Lastly, thematically, many arguments were introduced for the first time into the literature on the ambassador, or were dealt with from a new, fresh perspective. In fact, the very foundations of diplomacy and, more generally, of political power were being radically transformed in this period, as is immediately clear when we consider factors like the increasing length of diplomatic missions (usually identified as the development of the “resident diplomacy”), the rise of the modern state and of the absolutist theory, and the explosion of religious conflicts<sup>1</sup>.

Within this context, which clearly cannot be reconstructed here, the jurist and humanist Pierre Ayrault appears to occupy a particularly interesting position. Although he wrote no monographs on the ambassador, he did devote specific sections of his erudite works *Decretorum libri* (later republished as *Rerum ab omni antiquitate*

---

<sup>1</sup> For a catalogue of the texts on the ambassador written between the 15<sup>th</sup> and 17<sup>th</sup> centuries, see Vladimir Émmanuilovich Hrabar (ed), *De legatis et legationibus tractatus varii*, (Dorpat: C. Mattiesen 1906); Id. (ed), *De legatorum jure tractatum catalogus completus ab anno MDCXXV usque ad annum MDCC*, (Dorpat Livonorum (Jurjev): Typis Mattiesenianis 1918); and Daniela Frigo, ‘Political Thought and Diplomacy: Towards an Index of Works (1560-1680)’, available at: <http://www.enbach.eu/content/political-thought-and-diplomacy-towards-index-works-1560-1680>. For a discussion of the problems connected with the definition of this body of texts, see Jean-Claude Waquet, ‘Les écrits relatifs à l’ambassadeur et à l’art de négocier: «un genre di riconoscibile omogeneità»?’, in Stefano Andretta/Stéphane Péquignot/Jean-Claude Waquet (eds), *De l’ambassadeur. Les écrits relatifs à l’ambassadeur et à l’art de négocier du Moyen Âge au début du XIX<sup>e</sup> siècle* (Rome: École française de Rome 2015), 9-31. More generally, on these texts see also Alain Wijffels, ‘Le statut juridique des ambassadeurs d’après la doctrine du XVI<sup>e</sup> siècle’, *Publication du Centre européen d’Études bourguignonnes (XIV<sup>e</sup> - XVI<sup>e</sup> siècles)* 32 (1992), 127-142; Id., ‘Early-modern scholarship on international law’, in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Cheltenham: Edward Elgar Publishing 2011), 23-60; and Maurizio Bazzoli, ‘Ragion di stato e interessi degli stati. La trattatistica sull’ambasciatore dal XV secolo al XVIII secolo’, *Nuova rivista storica* 86 (2002), 283-328. Lastly see Dante Fedele, *Naissance de la diplomatie moderne. L’ambassadeur au croisement du droit, de l’éthique et de la politique*, PhD dissertation, ENS de Lyon, december 2014 (awaiting publication), in which I studied the characteristics and the evolution of the scholarship on the ambassador in central and western Europe from the 13<sup>th</sup> to the 17<sup>th</sup> centuries.

*judicatarum Pandectae*) and *De l'ordre et instruction iudiciaire*<sup>2</sup> to the subject. Ayrault's work offers a vivid example of the depth of the change occurring at the time, particularly in its treatment of diplomatic immunity from criminal prosecution: these are the observations that we intend to focus on in this paper. However, since diplomatic immunity had already been the subject of legal reflection for some time, we will begin by outlining the debate from the end of the Middle Ages to the middle of the 16<sup>th</sup> century and then focus on Ayrault's thought, in order to reveal the originality of many of its elements.

### **Diplomatic immunity from the late Middle Ages to the mid-16<sup>th</sup> century**

The scholarship on the ambassador which developed out of late-medieval *ius commune* was rooted in the *de legationibus* sections of the *Digest* and the *Codex* – although in these collections «*legatus*» referred more to an internal agent whose task it was to connect the cities or provinces of the empire with its centre, rather than an inter-state ambassador<sup>3</sup>. Over time, jurists extended to the ambassador, through frequent recourse to analogical reasoning, a number of rules established in various areas of private law (e.g. mandate, society, guardianship, marriage and succession)<sup>4</sup>. The range of actors entitled to send and receive ambassadors was not clearly defined, as was typical of Medieval legal pluralism: vassals and even private citizens could do so, either on public or private business. According to the *Digest*, jurists defined the ambassador as «*sanctus*» and therefore considered him inviolable even in times of war, invoking, where violation occurred, the punishment of being handed over to the enemy or, on the basis of canon law, excommunication<sup>5</sup>. In principle this privilege was held to protect the

---

<sup>2</sup> See Petrus Aerodius, *Decretorum, rerumve apud diversos populos ab omni antiquitate iudicatarum, libri duo* (Parisiis: apud Martinum Iuvenem 1567), liber II, tit. 34 («De Legationibus»), 412-416; second edition *Decretorum libri VI. Itemque liber singularis de Origine & auctoritate Rerum Iudicatarum* (Parisiis: apud Martinum Iuvenem 1573), liber VI, tit. 16 («De Legationibus»), 701-709; third edition *Rerum ab omni antiquitate iudicatarum Pandectae* (Parisiis: apud Michaellem Sonnum 1588), liber X, tit. 15 («De Legationibus»), 445r-452r. See also Pierre Ayrault, *De l'ordre et instruction iudiciaire* (Paris: chez Jaques du Puy 1576), 51r s.; revised edition *L'ordre, formalité et instruction iudiciaire* (Paris: chez Michel Sonnius 1588); «édition seconde» (but in fact it is a third edition), with the same title (Paris: chez Laurens Sonnius 1598); «édition troisieme» (but fourth edition), with the same title (Paris: chez Michel Sonnius 1604).

<sup>3</sup> See Fergus Millar, *The Emperor in the Roman World (31 BC – AD 337)* (London: Duckworth 1977), chap. 7; Anthony Bash, *Ambassadors for Christ. An Exploration of Ambassadorial Language in the New Testament* (Tübingen: J.C.B. Mohr (Paul Siebeck) 1997), 9 and 71; and Andrew Gillett, *Envoys and Political Communication in the Late Antique West, 41-533* (Cambridge: Cambridge University Press 2003), 6, 9-10, 22-23. One exception can be found in D. 50.7.18(17), concerning diplomatic immunities granted to «*legat[i] hostium*».

<sup>4</sup> For a more detailed discussion, see Fedele, *Naissance* 2014 (n. 1), 61-284, 656-672. See also Donald E. Queller, *The Office of the Ambassador in the Middle Ages* (Princeton: Princeton University Press 1967).

<sup>5</sup> See *Dig.* 1.8.8 and *Dig.* 50.7.18(17), which are cited from at least the end of the 12<sup>th</sup> century, as the *de legationibus* section of Pillius de Medicina's *Summa Trium Librorum* proves: the text is quoted by Rolandus de Lucca in his own *Summa* and can be read in Emanuele Conte/Sara Menzinger, *La Summa*

ambassador wherever he was, in other words not just in the country to which he was going but also in those through which he had to travel<sup>6</sup>. Bartolus de Sassoferrato and Baldus de Ubaldis numbered such violations among the offences that made up the crime of *laesa majestas*<sup>7</sup> and, with Giovanni da Legnano, they exempted the ambassador, his possessions and the members of his suite from reprisals<sup>8</sup>. As for immunities, jurists established that (1) the ambassador was not obliged to pay taxes in the country in which he was carrying out his function, with regard to all goods connected with the fulfilment of his mission<sup>9</sup>; (2) he enjoyed the privilege of full restitution (*restitutio in integrum*) provided by Roman law in favour of all those who were away from home on public service (*rei publicae causa*); and (3) during the mission he could neither be accused of, nor punished for, any crime committed before he took office, nor could he be obliged to repay any debts incurred at that time<sup>10</sup>. They did, however, place certain limits on immunities, holding the ambassador to be liable for debts incurred and offences committed during his mission<sup>11</sup> and determining that his privileges were lost if he deceitfully prolonged his stay in the mission country, thus delaying his return to his

---

Trium Librorum di Rolando da Lucca (1195-1234). *Fisco, politica, scientia iuris* (Roma: Viella 2012), 236-237. Regarding canon law, see c. 9, d. 1 (on the «legatorum non violandorum religio») with the gloss *legatorum*, which refers to c. 2, d. 94, to c. 23, C. 24, q. 3 and to *Dig.* 50.7.18(17) itself (I use the edition *Decretum Gratiani cum Glossis domini Johannis Theutonici [...] et annotationibus Bartholomei Brixiensis [...]*, (Basileae: Frobenius 1512), 3vA).

<sup>6</sup> See the gloss *destinati* on *Dig.* 5.1.2.3 (I use the edition *Corpus iuris civilis*, 5 vol. (Lyon: Hugues de la Porte 1558-1560), vol. I, col. 527) and the passage from Bartolus's *Tractatus repraesaliarum* quoted *infra*, n. 8.

<sup>7</sup> See Bartolus a Saxoferrato, *Omnia, quae extant, opera*, 10 tomes (Venetiis: apud Iuntas 1590), t. VI, 153vA, n° 2 (on *Dig.* 48.4.1), and 164rB, n° 1 (on *Dig.* 48.8.3.6). See also Baldus Ubaldi, *In Decretalium volumen Commentaria* (Venetiis: apud Iuntas 1595 [reprint Torino: Bottega d'Erasmus, Torino 1971]), 101rB-101vA, n° 1, 8-9 (on c. 1, X 1.29).

<sup>8</sup> See Bartolus a Saxoferrato, *Omnia, quae extant, opera* 1590 (n. 7), t. I, 151rA, n° 1-2 (on *Dig.* 5.1.2.3), as well as Id., *Tractatus repraesaliarum, ibidem*, t. X, quaestio VII, ad septimum, 123vA, n° 11. See also Giovanni da Legnano, *De Bello, De Repraesaliis et De Duello*, ed. by T.E. Holland (Oxford: Oxford University Press 1917), 165, and Baldus de Ubaldis, *Lectura super Infortiato*, (Venetiis: [n.p.] 1494), unpagged (on *Dig.* 27.1.41(44).2).

<sup>9</sup> See Bartholomaeus de Saliceto, *Lectura super toto Codice* (Lugduni: [n.p.] 1485), unpagged (on *Cod.* 4.61.8).

<sup>10</sup> Jurists based this argument on *Cod.* 2.53.1 and *Dig.* 29.2.30.pr. (for the *restitutio in integrum* and the absence *rei publicae causa*), and on *Dig.* 5.1.2.3-5 (for the *ius revocandi domum*). See Fedele, *Naissance* 2014 (n. 1), 262-284.

<sup>11</sup> This principle, established for crimes by *Dig.* 5.1.24.1, is cited by Gondissalvus de Villadiego, 'Tractatus de Legato' [1485], in *Tractatus de Universi Iuris*, 18 tomes (Venetiis: Società dell'Aquila che si rinnova 1584), t. XIII, pars II, q.5, 280vA, n° 3. Previously, without referring explicitly to the *Digest*, Bernard de Rosier had emphasised this point: see Bernardus de Roserio, 'Ambaxiatorum Brevilogus' [1435-1436], in Hrabar (ed), *De legatis* 1906 (n. 1), cap. 21, 21-22, and cap. 23, 23. The same principle is established for debts in *Dig.* 5.1.2.4 and *Dig.* 5.1.25.

native country<sup>12</sup>. Two reasons were given as the grounds for these privileges: first, the ambassador represents the person who has sent him, so any offence suffered by the former is suffered also by the latter<sup>13</sup>; he is, moreover, an official who through his actions is promoting the «*communis utilitas*», thus providing a universal benefit, one which goes beyond any particular advantages that may be derived by any one community<sup>14</sup>.

Towards the middle of the 16<sup>th</sup> century the literature on the ambassador began to develop in its methodology. These changes involved a significant widening of the range of sources used and a growing emphasis on the importance of argument based on historical erudition; however, they did not initially lead to any substantial innovations in the way in which immunity was understood. An early example of this phase is found in the *De immunitate legatorum*, by the French humanist and printer Étienne Dolet, published in Lyon in 1541 in a volume which also included his *De officio legati*. While the latter is more concerned with diplomatic praxis, and is really meant as a handbook of practical advice for ambassadors, in the *De immunitate legatorum* Dolet clearly expresses his intention to speak not of immunities in his own time, but of those established by the Greek and Roman law<sup>15</sup>. To this end, he makes wide use of two types of source: for legal principles he turns to the *Digest*, for the *exempla* to the ancient writers (Thucydides, Caesar, Livy, Plutarch, Polybius, Cassius Dio, Dionysius of Halicarnassus, and Cicero) – usually, incidentally, without citing anything. So, other than illustrating the rules already stated by the *ius commune* jurists – embellished with examples from classical antiquity – this text brings nothing new to the consideration of diplomatic immunity.

The same can be said of another text, published a few years later, the *De legationibus libri quinque* by the German jurist Konrad Braun, although it draws upon, and cites, not only Justinian and classical texts, but also those of the medieval jurists<sup>16</sup>.

---

<sup>12</sup> See the commentaries of Albericus de Rosciate, Bartolus, Baldus and Bartolomeus de Saliceto on *Cod.* 4.63.4.

<sup>13</sup> See the passage from Baldus de Ubaldis cit. *supra*, n. 7, according to which the offence caused to any ambassador is punishable as an act of lese majesty. See also Lucas de Penna, *Commentaria in tres posteriores libros Codicis Iustiniani* (Lugduni: apud Ioannam Iacobi Iuntae F. 1582), 320B, n<sup>os</sup> 33-34, who refers to the fact that in canon law priests are seen as Christ's ambassadors and also considers a war begun to revenge an offence suffered by an ambassador to be just.

<sup>14</sup> See Bernardus de Rosergio, 'Ambaxiatorum Brevilogus' 1435-1436 (n. 11), cap. 6, 8; cap. 23, 23; cap. 26, 26; cap. 27, 26.

<sup>15</sup> See Étienne Dolet, 'De immunitate legatorum', in Id., *De officio legati. De immunitate legatorum. De legationibus Ioannis Langiachi Episcopi Lemovicensis*, texte établi, traduit, introduit et commenté par D. Amherdt (Genève: Droz 2010), 88-90: «Legati officio descripto, non abs re facere videbimur, si quaedam de legatorum immunitate annotemus. Levioris tamen conatus id ipsum est quam ut me dignum censeam. [...] Quare quae mox de legatorum immunitate sequentur, non ad nostrum tempus (nisi ut minimum) referantur, sed ad Graecorum Romanorumque leges, id est maiorum nostrorum, non posteriorum aetatem». On Dolet's life and personality, see Michèle Clément (éd.), *Étienne Dolet: 1509-2009* (Genève: Droz 2012).

<sup>16</sup> See Conradus Brunus, 'De legationibus libri quinque', in Id., *Opera tria [...] De legationibus libri quinque [...] De caeremoniis libri sex [...] De imaginibus liber unus* (Monguntiae apud S. Victorem: Ex

Braun justifies diplomatic immunity on the grounds that the office of ambassador is an essential one for the administration of the *res publica*, and the fact that its fulfilment is obligatory for those upon which it is imposed, so that it cannot be allowed to be detrimental to them<sup>17</sup>. He then mentions the ambassador's inviolability and the principles established by the medieval jurists regarding reprisals, taxes and privileges in civil affairs, as well as the punishment provided for in civil and in canon law for anyone who offends against an ambassador<sup>18</sup>, stressing the identification of the ambassador with his principal and the legitimacy of a war undertaken in retaliation for an offence suffered by an ambassador<sup>19</sup>. Braun's remarks on contemporary practice are particularly interesting: under no illusions about rulers' respect for the *ius gentium*, he laments that «this right, sacred as it may be, is today violated with impunity by many people, above all by powerful men»<sup>20</sup>. This is why he warns the ambassador to pay more attention to the power and customs of those to whom he is going to be sent than to the precepts of the law. He goes further, even adding that an ambassador who fears that his immunities are going to be violated is authorized to refuse his appointment and not to take part in that particular mission<sup>21</sup>. Yet, notwithstanding this last observation and the detail of the argument put forward, Braun's treatise, too, follows the tradition of previous scholarship and offers no particularly original elements concerning the themes that have already been developed.

Everything, however, is about to change, thanks to Ayrault's contribution over the course of the 1570's.

---

officina Francisci Behem 1548). There is a French translation of this text: Conrad Braun, *Les cinq livres sur les ambassades: à destination de ceux qui sont totalement appliqués à la chose publique, ou très utiles à ceux qui remplissent une quelconque magistrature, et agréables à la lecture*, traduction, introduction et notes de D. Gaurier (Limoges: PULIM 2008). On Braun's life and work see Maria Barbara Röbner, *Konrad Braun (ca. 1495-1563). Ein katholischer Jurist, Politiker, Kontroverstheologe und Kirchenreformer im konfessionellen Zeitalter* (Münster: Aschendorff 1991), and Guido Braun, '«Les Cinq livres sur les ambassades» de Conrad Braun', in Andretta/Péquignot/Waquet, *De l'ambassadeur* 2015 (n. 1), 269-290..

<sup>17</sup> See Brunus, 'De legationibus' 1548 (n. 16), IV.1, 150: «Quoniam autem Legatorum non solum magna apud omnes gentes & honorabilis dignitas est, sed usque adeo etiam in omni Reipublicae necessarium officium: ut nulla rerum administrandarum sine Legationibus perfecta ratio constare possit. Unde & in muneribus publicis numeratur Legatio, quam inviti etiam publicae necessitatis causa subire coguntur».

<sup>18</sup> See *ibidem*, IV.1, 150-151; IV.2, 153-154; and IV.5, 162-164.

<sup>19</sup> See *ibidem*, IV.3, 158.

<sup>20</sup> See *ibidem*, IV.1, 151: «Quanquam videmus hoc ius quantumlibet sacrum, hodie tamen a multis praesertim Potentioribus, impune prophanari. Quippe a quibus Legati eorum quibus infensi sunt, nulla Iurisgentium habita ratione, violantur».

<sup>21</sup> See *ibidem*, IV.1, 152: «Proinde si me audis, quisquis es, qui Legationem obiturus es, consulo, ut primum omnium, non tam ad Iusgentium de non violandis Legatis, quam ad eorum, ad quos mittendus es, potentiam et mores respicias: Sicque non temere, sed bono cum iudicio, Legationem vel suscipias vel refuses».



### **Pierre Ayrault on diplomatic immunity**

We don't know much about Ayrault's life. He was born in 1536 in Angers, and began to study the humanities and philosophy at the University of Paris, then moving to Toulouse and afterwards to Bourges, where he studied law, listening to lectures by celebrated jurists like François Duaren, Hugues Doneau and Jacques Cujas. Between 1558 and 1568 he practiced as a barrister in the parliament in Paris, before being appointed to the post of *lieutenant criminel* in the city of his birth. He was a Royalist and a Gallican, categorically opposing the rebellions of the Catholic League, promoting the privileges of the French church against the papacy and defending the principle of religious freedom<sup>22</sup>. All through his life, Ayrault succeeded in combining work in the courts of justice with scholarly historical research. The texts which we examine here are probably the most accomplished examples of his interests, both practical and erudite, as their titles suggest: the first edition of the *Decretorum libri* was actually called *Decretorum, rerumve apud diversos populos ab omni antiquitate iudicatarum, libri duo: qui ad formam Digestorum & Codicis Iustiniani redacti sunt, Item usui forensi ac moribus Gallicis accomodati*; and the full title of *De l'ordre* is *De l'ordre et instruction iudiciaire, dont les Anciens Grecs & Romains ont usé en accusations publiques. Conferé à l'usage de nostre France*. Although the two works differ in their content in that the first, recalling many sections of the *Digest* and the *Code*, is encyclopaedic in character, while the second focuses on the procedures and stages of criminal proceedings, they nevertheless share method and objective, since both try to clarify, through the use of numerous – often classical – examples, many of the questions still held to be actual and pressing, in order to give the discourse a practical value.

#### **a) immunity when crimes are committed during a mission**

It must immediately be pointed out that the evaluation of Ayrault's observations on diplomatic immunity while on a mission is problematic: in fact, the 1573 edition of the *Decretorum libri* and *De l'ordre et instruction iudiciaire*, published in 1576, offer two different – and even conflicting – solutions to the question, without giving us an adequate explanation for this change of opinion<sup>23</sup>. Indeed, in the *Decretorum libri*, after asserting the inviolability of the ambassador, Ayrault asks if he

---

<sup>22</sup> See *Mémoires pour servir à l'histoire des hommes illustres dans la République des lettres*, tome XVII (Paris: chez Briasson 1732), 327-336; and Céline Saphore, 'Ayrault, Pierre', in Patrick Arabeyre/Jean-Louis Halpérin/Jacques Krynen (éd.), *Dictionnaire historique des juristes français, XII<sup>e</sup>-XX<sup>e</sup> siècle* (Paris: PUF 2007), 30-31.

<sup>23</sup> This problem is even more difficult to resolve because there are no detailed studies of these works which could clarify, even at a general level, the reasons for the evolution of Ayrault's thought. While the originality of *De l'ordre et instruction iudiciaire* has been, briefly, noted ever since the pioneering studies by Ernest Nys, *Les origines de la diplomatie et le droit d'ambassade jusqu'à Grotius* (Bruxelles: Librairie Européenne C. Muquardt 1884), 41-42, and Id., *Les origines du droit international* (Bruxelles-Paris: Alfred Castaigne-Thorin & Fils 1894), 347-348, the clear difference between the opinions expressed here and in the *Decretorum libri* has never been highlighted. On the doctrine set forth in *De l'ordre et instruction iudiciaire*, see also Kenneth R. Simmonds, «Pierre Ayrault et le droit d'ambassade», *Revue générale de droit international public*, 64, 1960, p. 753-761.

should be punished for crimes committed during a mission<sup>24</sup>. In considering this question he quotes a «memorable passage» from the *De bello Gothorum* by Procopius in which the king of the Goths, Theodatus, having been reprimanded by envoys from Justinian, warns them that ambassadors only benefit from inviolability if they stay within the bounds of their office: «for men – he explains to them – have sanctioned as just the killing of an envoy whenever he is either found to have insulted a sovereign or has had knowledge of a woman who is the wife of another»<sup>25</sup>. Based on the fact that, according to Procopius, the Roman envoys responded not by claiming immunity, but simply by denying having committed the crimes of which Theodatus accused them, Ayrault concludes that ambassadors are definitely punishable for any crime committed while on a mission, thus upholding the decision previously reached by *ius commune* jurists<sup>26</sup>.

Just three years after the publication of the *Decretorum libri VI*, in *De l'ordre et instruction iudiciaire* Ayrault put forward a contrary thesis to the one just examined. He comes to talk about the ambassador after having discussed the limits of jurisdiction over crimes committed by foreigners in general<sup>27</sup>. Right from the start he declares that in his discourse he is going to refer not to the Roman «*legati provincialium*», who «were subjects and citizens like the rest», but to the «*legati hostium*», that is the foreign envoys, «those called *Heraux d'armes* or *Ambassadeurs* in France»<sup>28</sup>. For the first time in the literature on the ambassador, Ayrault here historicizes the language of Justinian's texts and thereby reveals them to be inadequate for the elaboration of the modern figure of the ambassador. In so doing, he argues differently to the medieval jurists, who confined themselves to establishing, either implicitly or explicitly, an equivalence between the *legatus* of these texts and the *ambasiator* of their time<sup>29</sup>. With this distinction, moreover, Ayrault also makes explicit the proximity, in terms of genus to species relationship, between foreigner and ambassador. This proximity, however, is

---

<sup>24</sup> See Aerodius, *Decretorum* 1573 (n. 2), liber VI, tit. XVI, cap. 7, p. 706: «Sed quid si Legatus deliquerit apud hostes, an nunquam iure in eum animadverti potest?» (this question is not raised in the 1567 edition: see Id., *Decretorum* 1567 (n. 2), lib. II, tit. 34, cap. 3, 413-415).

<sup>25</sup> See Procopius, 'The Gothic War', in Id., *History of the Wars*, ed. by H.B. Dewing (London-Cambridge (Mass.): William Heinemann LTD-Harvard University Press 1968), I.7, 61-63. Procopius says that after the king of the Goths had suggested an accord with Justinian to end the war with Byzantium, the emperor sent ambassadors to him, charged with agreeing the peace deal. But then in the meantime the outcome of a battle rekindled the hopes of victory of the Goths and Theodatus went back on his word: it was for this that the Roman ambassadors reproached him.

<sup>26</sup> See Aerodius, *Decretorum* 1573 (n. 2), liber VI, tit. XVI, cap. 7, 706-707: «Est locus memorabilis apud Procopium libro primo de bello Gothorum, ex causa adulterii Legatum puniri & occidi posse, nam cum id Theodatus obiiceret Petro et aliis Legatis Justiniani Imperatoris, non recusant quin ex ea causa in eos iure animadverti posset, sed falsum criminem esse dicunt quod obiiciebatur».

<sup>27</sup> See Ayrault, *De l'ordre* 1576 (n. 2), 51r: «Venons maintenant à considerer l'étranger qui porte nom d'Ambassadeur & de personne publique [...]».

<sup>28</sup> See *ibidem*.

<sup>29</sup> See Fedele, *Naissance* 2014 (n. 1), 541-542 for some references.



soon destined to vanish: while with regard to the foreigner Ayrault had referred to the maxim «*actor sequitur forum rei, quod vel domicilio, vel delicto contrahitur*», denying the right of a political authority to claim jurisdiction over him *unless* he has acquired domicile or committed a crime in its land<sup>30</sup>, with regard to the ambassador he instead asks himself whether this last enjoys the privilege according to which *ratione delicti* he does not acquire domicile in the country where he is and cannot therefore be subject to that country's jurisdiction<sup>31</sup>. How does he answer this question? The «safest» opinion and that «most consistent with the doctrines and the traditions of the Ancients» is, he believes, that the «usefulness and need for» ambassadors in «human society» are so great that «they cannot be punished, or even have a hand laid upon them and be imprisoned, whatever crime they commit while in office»<sup>32</sup>. Stating that an ambassador is only inviolable for as long as he «stays within the bounds of his office» (and, consequently, allowing that he be punished «like any other ordinary foreigner» if he should «break the law or do anything that transgresses his office») now means to Ayrault to make «the Ambassador a private man, and his privilege vain and profane». Moreover, a man don't have to be an ambassador, he points out, to expect not to be offended against as long as he offend against no one<sup>33</sup>.

Ayrault presents three arguments to support his reconsidered opinion. The first is not new in the debate about ambassadorial immunity, although in the past it was used to ensure their inviolability and not to exempt them from punishment for crimes committed while on a mission. It is based on the need for an ambassador to guarantee international intercourse and on the «public status» that he derives «from the person who sends him», from the person «to whom he is sent» and from the «sort of business on which he is engaged»<sup>34</sup>. Without ambassadors, asks Ayrault, who would negotiate between one nation and another, between enemies, between neighbours, between allies? The «universal, public interest» which is obtained when peace is reached between adversaries cannot be sacrificed in order to punish an «individual's crime»; furthermore,

---

<sup>30</sup> See Ayrault, *De l'ordre* 1576 (n. 2), 50r-50v: «Mais certes où l'estranger n'a contracté domicile avec nous, ne delinqué sus noz terres: c'est contre tout droict, contre le droict des Gens, contre la raison naturelle que nous puissions rien entreprendre par dessus luy comme ses Iuges. Bien le pouvons nous prendre au corps & le renvoyer en bonne & seure garde par devant son Seigneur, & deputer vers luy messagers ou Ambassadeurs pour le requerir de nous en faire la Iustice. Et s'il en estoit refusant, seroit iuste occasion de luy denoncer la guerre, ou d'entrer en un droict de Repesailles pour se saisir de ses aultres subiects les premiers venus, iusques à ce qu'il nous eust rendu la Iustice, ou delivré l'accusé [...]. Mais aultrement c'est une maxime generale entre toutes nations [...] que *Actor sequitur forum rei, quod vel domicilio, vel delicto contrahitur*». For the history of the maxim, see Jochen Schröder, *Internationale Zuständigkeit: Entwurf eines Systems von Zuständigkeitsinteressen im zwischenstaatlichen Privatverfahrensrecht aufgrund rechtshistorischer, rechtsvergleichender und rechtspolitischer Betrachtungen* (Opladen: Westdeutscher Verlag 1971), 229-232.

<sup>31</sup> See Ayrault, *De l'ordre* 1576 (n. 2), 51r-51v: «Voyons [...] s'ils [*sc.* the ambassadors] ont celà de privilege que *ratione delicti* ils ne contractent point de domicile & de demeure».

<sup>32</sup> See *ibidem*, 51v.

<sup>33</sup> See *ibidem*, 52r-52v.

<sup>34</sup> See *ibidem*, 52v.

to allow for ambassadors to be punishable would open the door to all kinds of possible abuse<sup>35</sup>.

The second – also traditional – argument alludes to the ambassador's representative function: it is because he «represents the person of the ruler» that he cannot be in any way offended against without the offence immediately being suffered also by his principal. In this case too, however, Ayrault takes his argument in a new direction, that of the theory of sovereignty, when he explains that the ambassador does not only enjoy inviolability, but cannot even be punished for his crimes. Precisely because he is a representative, explains Ayrault, punishing him means punishing the ruler who has sent him; but the latter «*est solutus legibus*» and can't be called before any judge other than himself, since to be a «judge in his own cause» is one of the prerogatives of sovereignty<sup>36</sup>.

Ayrault's third argument, finally, is where the originality of his thought on diplomatic immunity is really demonstrated. After commenting – albeit implicitly – on the principles of the *Digest* and the *Decretum* on the punishment provided for anyone who offends an ambassador, Ayrault uses the concept of legal fiction to introduce the argument that the ambassador is held never to have left his country and, consequently, the jurisdiction of his ruler: «*les fictions en Droit se conforment & reglent comme la verité. Or est-il que l'Ambassadeur pour la franchise et liberté où il doit estre, est pour tel tenu & estimé que s'il estoit personnellement entre ses concitoyens & amys*»<sup>37</sup>. Although the term does not appear here, this passage is the first in which the principle of the ambassador's «extraterritoriality» is formulated, explicitly conceived as a fiction which can exempt the ambassador from the jurisdiction of the authority of the country to which his mission has brought him<sup>38</sup>. Note that, in the terms in which it is defined by Ayrault, this is not a real privilege, accorded to the dwelling of the ambassador – a

---

<sup>35</sup> See *ibidem*, 53v and 55r-55v.

<sup>36</sup> See *ibidem*, 53r: «Les Papes, les Evesques, les Roys sont honnorez pour celuy duquel ils sont la vraye image: les Iuges, les Officiers, pour ceux dont ils tienent les places: le serviteur fust-il mauvais, pour le maistre qui luy commande. Ainsi est-il de l'Ambassadeur: puisqu'il représente la personne du Prince, qui est sacrée, & dont le crime commis en son Estat s'appelle bien Perduellion, & lése-maiesté, mais commis en sa personne reçoit encore un aultre nom qui est de Sacrilege, comme si Dieu & la Religion mesmes avoyent esté blecez & offencez quand on le blece: il s'ensuyt bien que tant que l'Ambassadeur est en cest estat, il fault non pour l'honneur de luy, mais de son Prince, dissimuler & ne voir point les faultes qu'en son particulier il auroit faictes. Le punissant, vous puniriez aucunement le Prince en la personne de son Legat, qui de son chef n'a toutefois point delinqué, & lequel, qui plus est, où il auroit aucunement failly, faisant ou commandant, *est solutus legibus*, & ne peult estre puny pour estre traicté & convenu par devant Iuge quelconque si ce n'est luy. Car les Roys ont celà de maiesté qu'ils sont Iuges en leur propre cause».

<sup>37</sup> See *ibidem*, 55r. In the 1588 edition, Ayrault reformulates this passage as follows: «Car l'Ambassadeur vient sous la foy publique: sous assurance qu'il ne sera offecé de fait ny de parole: vient sous ceste loy commune, & privilege que tous octroient, qu'encores qu'il soit en pays d'ennemy, il y sera tenu pour absent, et pour present en son pays: qui est à dire, s'il est Ambassadeur par-devers nous, qu'il ne sera astraint ny subiect à nos loix» (Ayrault, *L'ordre* 1588 (n. 2), 53r).

<sup>38</sup> See Edward A. Adair, *The Extraterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries* (London: Longmans Green 1929), and Montell Ogdon, *Juridical Bases of Diplomatic Immunity. A Study in the Origin, Growth and Purpose of the Law* (Washington D.C.: John Byrne & Co. 1936).

privilege which caused huge debate, as soon as ambassadors began frequently to claim a right of asylum within their embassies – but rather a personal privilege, limited to the person of the ambassador. Even though he is abroad, explains Ayrault, he can make a will as if he were in his homeland; if war breaks out he preserves his liberty and, returning to his country, he does so as a free man, not due to the *ius postliminii*; similarly, if he commits a crime during his mission, it is considered to have been committed in his homeland, not wherever he actually is, so that it will be the magistrates of his native country who will judge him<sup>39</sup>.

In the subsequent pages Ayrault does not develop this theory any further, but he does give some examples, of which one can be seen as particularly significant. It is that of the Roman ambassadors to the court of Theodatus included in the *De bello Gothorum*, which Ayrault now interprets very differently from the reading he gave in the *Decretorum libri*. After recalling the two reasons for which, according to the Theodatus, it would be possible to punish the ambassadors – either insulting a king or committing adultery – he now says that Procopius had clearly shown that the argument used by the king of the Goths was no more than a «trick and a cavillation» found «to assert, with some reason, so it seemed to him, that he had not violated the law of nations»<sup>40</sup>. And the reply given by the ambassadors, in which they said that they had not committed any crime, is interpreted by Ayrault as «a figure the rhetoricians call a concessive clause and supposition», which does not imply, in fact, that they did not consider themselves to be protected by the *ius gentium*. The law undoubtedly allows for the killing of an adulterer, and of a nocturnal thief too; moreover, the law of nature gives the power to «repel violence with violence», says Ayrault. But the ambassador, subject to such legal principles, would not enjoy any more security or liberty than the most humble subject of the land<sup>41</sup>.

The ambassador therefore benefits from broad immunity, which appears to protect him whatever crime he commits during a mission. What, then, can the ruler of the host country do in such situations? Given these premises, there is only one possible solution: an ambassador cannot be imprisoned, but «someone should be sent to ask his principal for justice». The principal will then be expected to return his agent and hand him over to the ruler whom he has wronged. Although this is not made explicit in the text, it seems clear that decision can only be made by the principal and his refusal cannot be countered; such a refusal may possibly, it can be imagined, lead to a

---

<sup>39</sup> See Ayrault, *De l'ordre* 1576 (n. 2), 55r: «À ceste occasion il peult tester, à ceste occasion si (pour exemple) dict le Iurisconsulte, pendant qu'il est à Rome la guerre est denoncée, il demeure en liberté, retournant en son pays, il n'y r'entre point *iure postliminij* [see *Dig.* 26.1.15 and *Dig.* 49.15.12]. Aussi pouvons nous dire que ores qu'il eust delinqué à Rome, où le Romain delinqué en son endroit que tout celà se prenoit comme s'il fust avenu en son pays, non point à Rome, si bien que ny en l'un ne en l'autre cas les Romains n'en estoient Iuges».

<sup>40</sup> See *ibidem*, 57v-58r.

<sup>41</sup> See *ibidem*, 58r.

legitimate act of war against him<sup>42</sup>. There is only one exception to this procedure, and Ayrault identifies it after having acknowledged the existence of a new custom in the diplomacy of his time: the continuous presence of «ordinary [i.e. resident] ambassadors» in European courts. Indeed, he accepts that a resident ambassador be deprived of his liberty for the time necessary to write to his principal to inform him of the crime that has been committed and to wait for the arrival of a new ambassador, who will have to be present at the intended trial of his predecessor. If the ambassador is condemned, the records will be communicated to his principal who will decide whether to recall him in order to inflict his punishment personally (but if the principal does not punish his ambassador, Ayrault makes explicit here, war may be declared against him) or to consent to his being punished by the authorities of the host country<sup>43</sup>. However this solution, which somehow shows how little the role of the resident ambassador was appreciated in the literature on the ambassador<sup>44</sup>, is toned down in the next edition of *De l'ordre*, published in 1588. Here Ayrault adds a short passage in which he says that «when there is doubt [...] it is better to act with greater dignity and caution, rather than to forgo them too readily»<sup>45</sup>.

Ayrault's discussion is noteworthy not only for its richness but also for its originality, both in terms of the argumentation and of the solution identified, in redefining the limits of diplomatic immunity when a crime is committed during a mission. After the publication of *De l'ordre et instruction iudiciaire* this question was brought to general attention and was, for more than a century, the subject of great debate within the literature on the ambassador. While on the one hand diplomatic practice bore witness to the existence of a very wide ranging immunity for ambassadors, on the other, diplomatic theory, at least initially, revealed broad diversity of opinion, ranging from the extreme of declaring an ambassador fully responsible for crimes committed while on a mission (as asserted in an anonymous text entitled *Quaestio*

---

<sup>42</sup> See *ibidem*, 58v: «Il fault [...] en envoyer demander Iustice à son Seigneur. & quant à luy son devoir est de le renvoyer & delivrer à ceux contre lesquels il a failly». The possibility of retaliating for an offence by declaring war is explicitly stated soon afterwards in the case of a resident ambassador: see the passage quoted in the following footnote.

<sup>43</sup> See *ibidem*, 58v-59r: «Toutefois pour le iourd'huy que les Princes ont leurs Ambassadeurs ordinaires les uns pres les autres, on se peult assurer de leur personne, puis escrire à leur Prince: leur envoyer autant des charges & informations: lesquels cela fait depecheront un autre Ambassadeur, en la presence duquel sera fait & parfait le proces à l'accusé, & iceluy proces derechef envoyé à leur Seigneur. S'ils mandent qu'on le punisse, faire se pourra: s'ils insistent qu'on le leur envoie, il me semble qu'on le doit faire & le leur envoyer en bonne & seure garde. Que s'ils n'en faisoient punition, il y auroit occasion de leur denoncer la guerre».

<sup>44</sup> See Garrett Mattingly, *Renaissance Diplomacy* (Baltimore: Penguin Books 1964 [1<sup>st</sup> ed. 1955]), 206 and 235, and Fedele, *Naissance* 2014 (n. 1), 591-602 for some references.

<sup>45</sup> See Ayrault, *L'ordre* 1588 (n. 2), livre I<sup>er</sup>, 56r [but 58r] where, after stating that «à l'endroit de tels Legats, plus honorables que necessaires, il n'y auroit pas lieu de tant de formalité & de respect» so that it would be possible to arrest them, Ayrault writes: «Toutesfois en chose douteuse, & dont il peut facilement reüssir de l'inconvenient: il vaut mieux y apporter plus de solennité & de scrupule, que de s'en dispenser trop aisement».

*vetus, et nova* in 1606)<sup>46</sup> to a concept of extraterritoriality proposed in terms similar to those of Ayrault (by Hugo Grotius, for example)<sup>47</sup>. Although this latter thesis only very gradually gained traction – and in varied forms – from the end of the 17<sup>th</sup> century, Ayrault deserves credit for having been the first to give it clear expression<sup>48</sup>.

### **b) objective conditions which lead to immunities being lost**

Having dealt with the question of diplomatic immunity for crimes committed during a mission, we can now mention another original element introduced by Ayrault to the debate about diplomatic immunity – i.e. the evaluation of the consequences for immunity not of ambassadorial behaviour but of certain objective conditions over which he has no control. Ayrault examines these issues in the pages on the ambassador in his *Rerum ab omni antiquitate judicatarum Pandectae* (1588), where two conditions in particular can be considered especially relevant to our topic.

As for the first condition, Ayrault begins by asking whether ambassadors are only inviolable in the country to which they have been sent, or whether in fact that inviolability applies wherever they are, and therefore also in the countries through which they travel. On this point he has no hesitation in turning the *ius commune* jurists' opinion on its head: according to him ambassadors are not entitled to universal inviolability<sup>49</sup>. His argument is based, for once, on an example drawn from recent history and, in fact, destined still to be the subject of heated debate in the literature on the ambassador. It regards the case of Antonio Rincón and Cesare Fregoso, the agents of Francis I who, possibly on the orders of Charles V, were killed on the 3<sup>rd</sup> of July 1541 near Pavia while on their way to Venice, where Fregoso was supposed to negotiate

---

<sup>46</sup> See *Questio vetus, et nova: An Legatum adversus Principem vel Rempublicam ad quam missus est, delinquentem salvo Juregentium capere, retinere, ac punire liceat?*, (Argentorati: sumptibus Lazari Zatzneri Bibliopolae 1606) (in the same year another edition was published in Paris). The pamphlet concludes with these words: «Quae cum ita sint, concludimus Legatum delinquentem (ac multo magis comitem ejus) citra jurisgentium injuriam contemptumve licenter capi, retineri, ac puniri ab ejus Principis magistratu cujus Majestatem Imperiumve laesit» (*ibidem*, 62).

<sup>47</sup> See Hugo Grotius, *De iure belli ac pacis libri tres* (Parisiis: apud Nicolamum Buon 1625), II.18.4, 371: «[...] omnino ita censeo, placuisse gentibus ut communis mos qui quemvis in alieno territorio existentem eius loci territorio subiicit, exceptionem pateretur in legatis, ut qui sicut fictione quadam habentur pro personis mittentium [...] ita etiam fictione simili constituerentur quasi extra territorium».

<sup>48</sup> A more detailed discussion can be found in Adair, *The Extraterritoriality* 1929 (n. 38), chap. 1 and 2; Linda Frey/Marsha Frey, *The History of Diplomatic Immunity* (Columbus: Ohio State University Press 1999), chap. 5 and 6; Giuseppina De Giudici, 'Sullo statuto dell'ambasciatore', *Teoria e storia del diritto privato* 5 (2012), 1-32; and in Fedele, *Naissance* 2014 (n. 1), p. 296-319.

<sup>49</sup> See Aerodius, *Rerum* 1588 (n. 2), liber X, tit. XV, cap. 18, 449v-450r: «An aliis etiam omnibus quam ad quos missi sunt Legati, sint inviolabiles, quaestio est non negligenda. [...] Quid dicemus? an causam religionis separari a prophana? & Deorum immortalium Legatos [...] ab Gentium, hominumque? nam qui ad Deum mittitur, quocunque mitti: & religionis causam communem esse». By these words, actually concerning Greek θεωροί (on which see Costas M. Constantinou, *On the Way to Diplomacy* (Minneapolis: University of Minnesota Press 1996, p. 51-53, and Bash, *Ambassadors* 1997 (n. 3), *ad indicem*), Ayrault is maybe referring to papal legates and to ambassadors sent to the pope, as later Albericus Gentilis, *De legationibus libri tres* (Londini: excudebat Thomas Vautrollenrius 1585), I.3, 6.



a league with the *Serenissima* against the Emperor and Rincón was intending to continue on to the Sublime Porte. The Imperials had immediately justified the murder by denying that the two men were actually ambassadors, portraying them instead as rebels and spies in the pay of the French king who had been rightfully punished for their attempt to arrange for infidel attacks against Christendom. Francis I, in turn, denouncing the episode as an unprecedented crime, used it as an excuse to restart the war against the Emperor that had halted three years earlier, after a truce signed in Nice<sup>50</sup>. Although he sides with his own king, Ayrault explains that this case is not a violation of *ius gentium*, since the ambassadors' enjoyment of their status and its privileges is not absolute, but operates only in relation to the receiver of their mission. In his opinion it is actually the breaking of the truce which, not having been salvaged by the handing over to the French king of the guilty parties, entitled Francis I to go back to war with Charles V<sup>51</sup>. The above case demonstrates that Ayrault's tendency is not always to widen the scope of ambassadorial immunity beyond that of medieval scholarship, but also, on occasion, to narrow it. In this passage from the medieval *sanctitas*, valid *erga omnes*, to modern inviolability, one may recognize the effects of both the crisis of medieval universalism and the incipient state territorialisation, as well as the clear weakening of the idea that the ambassador is an agent whose duty it is to realize the *publica utilitas* over and above the interests of individual rulers or states: in this context, the ambassador becomes more like the agent of a ruler whose interests he has been charged with defending at the court of another<sup>52</sup>.

As for the second condition, Ayrault asks whether, if there were an internal revolt, the envoys of the different factions and of the rebels should be considered as genuine ambassadors and should therefore enjoy ambassadorial privileges: this was undoubtedly a burning question in the France of the late 1580s, plunged deep in civil war. In his 1573 edition Ayrault had confined himself to writing to the effect that subjects and rebels can send envoys, but these are not «ambassadors» and do not enjoy

---

<sup>50</sup> On this episode, see Jean Zeller, *La diplomatie française vers le milieu du XVI<sup>e</sup> siècle d'après la correspondance de Guillaume Pellicier évêque de Montpellier ambassadeur de François I<sup>er</sup> à Venise (1539-1542)* (Paris: Hachette 1880), 239-266. For the discussion of this episode in the literature on the ambassador, see Fedele, *Naissance* 2014 (n. 1), *ad indicem*.

<sup>51</sup> See Aerodius, *Rerum ab omni antiquitate judicatarum Pandectae*, cit., liber X, tit. XV, cap. 18, f. 450r: «Ergo Fregosio & Rinconeo, Legatis Francisci I Principis nostri, ad Venetios, & ad Turcarum Imperatorem, occisis sub ditione Caroli V non tam videtur ius Gentium violatum, quam ruptas inducias, sicariis nec deditis, nec punitis suis legibus, itaque iustam occasionem belli Carolum praestitisse».

<sup>52</sup> This is the reason why Ayrault emphasizes the obligation for the ambassador to follow his mandate to the letter; see Ayrault, *Decretorum* 1573 (n. 2), liber VI, tit. XVI, cap. 1, 701: «Legatorum hoc praecipuum munus, ne mandata egrediantur». See also Ayrault, *Rerum* 1588 (n. 2), liber X, tit. XV, cap. 4, 446r: «Legatus vice est Principis, vice Reipublicae».



inviolability<sup>53</sup>. Fifteen years later, his position has changed: in fact he clearly affirms that when there is such discord in a state that only violence seems to be listened to, there's no doubt that ambassadors are necessary and that they should therefore be inviolable<sup>54</sup>. On the other hand, when dealing with «subjects», who cannot actually be called «enemies» or «faction leaders», just «brigands» or «rebels», sending them ambassadors is not legitimate and their envoys do not enjoy the protection of *ius gentium*: the only possible choice they can make is to give up their weapons and sue for peace, or put their trust in victory rather than negotiation<sup>55</sup>. In this discussion a distinction becomes evident: as long as the institutional foundations of the state and the political and ideological ties on which the unity of the population are based are not irredeemably compromised, there is no alterity which would allow for abandoning the rule of *ius civile* and entering that of *ius gentium*. Only when this alterity exists are the rebel factions warranted to send ambassadors enjoying all the diplomatic privileges in *ius gentium*. We see therefore that *ius gentium* is on the way to becoming no longer a body of legal institutions common to all peoples, but a specific area of law which regulates the relations between states: a *ius inter gentes*, as Richard Zouche will call it in the title of his famous book<sup>56</sup>. At the same time, diplomacy is establishing itself as a field of activity focused exclusively on foreign lands, and as a prerogative of sovereign states – actually one of their most important prerogatives<sup>57</sup>. This distinction between *ius*

---

<sup>53</sup> See Ayrault, *Decretorum* 1573 (n. 2), liber VI, tit. XVI, cap. 8, 707-709: «[...] quaeritur, [...] an subditi & rebelles ius legationis habeant, hoc est, an mittere legatos, & ad eos mitti possint. Profecto quidem mitti possunt, sed dubitatio est an sint Legati, & sacrosancti atque inviolabiles». From the examples (all from antiquity) which he offers in the following lines, it seems clear that for Ayrault these envoys do not qualify as ambassadors and do not enjoy inviolability.

<sup>54</sup> See Aerodius, *Rerum* 1588 (n. 2), liber X, tit. XV, cap. 23, 451r: «Cum in Republica eo progressa dissensio est, ut arma emineant: quin eo etiam casu Legati sint valde necessarij, & quin inviolabiles debeant esse, nulla profecto dubitatio est».

<sup>55</sup> See *ibidem*: «At si ij sunt subditi, ut nondum vel hostes, vel Partium Duces possint appellari: sed duntaxat aut latrones aut rebelles: neque ad eos Legati mittendi sunt, neque missi ab iis, iure Gentium utuntur. Subditi (inquit Cicero ad Plancum) aut positis armis pacem petere debent: aut si pugnantes eam postulent, victoria pax, non pactione parienda est».

<sup>56</sup> See Richard Zouche, *Iuris et iudicii fecialis, sive, iuris inter gentes, et quaestionum de eodem explicatio* [1650], ed. T.E. Holland [The Classics of International Law] (Washington: Carnegie Institute 1911). On the notion of «ius inter gentes», see Peter Haggemacher, 'Osservazioni sul concetto di diritto internazionale di Gentili', in *Alberico Gentili nel quarto centenario del De Jure Belli*, [Atti del Convegno Ottava Giornata Gentiliana, San Ginesio-Macerata, 26-27-28 Novembre 1998] (Milano: Giuffrè 2000), 131-143.

We may also remember that, according to Grotius, the right to send and receive ambassadors belongs in principle only to sovereigns («qui summi imperij sunt compotes inter se»); he adds however: «In bellis vero civilibus necessitas interdum locum huic iuri facit, extra regulam, puta cum ita divisus est populus in partes quasi aequales, ut dubium sit ab utra parte stet ius imperij [...]. Nam hoc eventu gens una pro tempore quasi duae gentes habetur» (Grotius, *De iure belli ac pacis* 1625 (n. 47), II.18.2, 367).

<sup>57</sup> See Jean Bodin, *Les six livres de la République* (Paris: chez I. du Puis 1583), I.10, 224: «Mais d'autant que le mot de loy est trop general, le plus expedient est de specifier les droits de souveraineté compris, comme i'ay dit, sous la loy du souverain: comme decerner la guerre, ou traicter la paix, qui est l'un des

*gentium* and *ius civile* is also evident in another passage, in which Ayrault argues that the killing of an ambassador within his own country entails the violation not of *ius gentium*, as would be the case if he were killed abroad, but of *ius civile*<sup>58</sup>.

In this case the fact that Ayrault only uses examples from antiquity does not allow us to appreciate his thinking about contemporary events, although these questions were some of the most hotly debated of the time. One may remember that before him François Hotman had argued in favour of the application of *ius gentium* to the envoys of rebels in his *Quaestionum illustrium liber*, published in the aftermath of the St Bartholomew's Day massacre. Jean Hotman, replying to the criticisms – based on a distinction between mere rebellion and civil war quite like Ayrault's – made of his father by Alberico Gentili, would write that if the state is «divided into two factions», «as has happened recently in France», the very same laws would have to apply to citizens which are applied to foreigners, since «security is guaranteed to their deputies not for their own sake but for the public good» and the «salvation of the state»<sup>59</sup>.

And so we see that Ayrault's observations on the objective conditions which can result in an ambassador's loss of immunity, which were to be picked up and elaborated upon over the course of the following century, have significant implications for the troubled transition from the medieval to the early-modern world.

## Conclusion

This reconstruction of Ayrault's thought on diplomatic immunity, while it could undoubtedly be further developed, nevertheless provides a considerable number of examples of the changes that occurred in the way in which the ambassador was

---

plus grands poincts de la maiesté, d'autant qu'il tire bien souvent apres soy la ruine, ou l'assurance d'un estat».

<sup>58</sup> This principle had already been stated by Aerodius, *Decretorum* 1573 (n. 2), liber VI, tit. XVI, cap. 8, 707, in the context of a discussion on a case taken from the *Declamatio* 366 of the pseudo-Quintilian: «Rever[ten]tem Legatus quidam occidit. [...] Ergo exulem occidisse, sed nec quem Legatum. Nam quod Legatus sacrosanctus est, hoc verum esse apud perduelles, non apud eos qui miserunt. [...] Certe Legatum non videri, quo violato non est violatum Ius Gentium, neque publica deditio competit. Atqui hic non posse dici, Ius Gentium violatum esse. Si quod ius violatum est, violatum est ius civile Romanorum». See also, in the same sense, Aerodius, *Rerum* 1588 (n. 2), liber X, tit. XV, cap. 22, 450v-451r.

<sup>59</sup> See François Hotman, *Quaestionum illustrium liber* ([n.p.]: excudebat Henr. Stephanus 1573), q. 7, 55; Gentilis, *De legationibus* 1585 (n. 49), II.7, 53-54; and Jean Hotman, *L'ambassadeur* ([n.p.]: [n.p.] 1603), chap. 3, 95-97: if the number of «sujets rebelles & seditieux [...] estoit grand, comme dernièrement en France, & que l'Estat se trouve divisé en deux factions & le party formé en une guerre ouverte: puis que par le droit de guerre, mesmes entre les nations estrangeres & barbares, les Heraults & Ambassadeurs sont en sauveuté: certes ceste loy doit valoir aussi bien pour les citoyens divisez que pour les estrangers ennemis d'un Estat. [...] Car l'assurance qu'on donne aux personnes qu'ils deputent n'est pas en leur faveur, mais en la consideration du bien public, & pour les ramener au devoir, afin de faire cesser le trouble de l'Estat. *Quod est necesse turpe non est*, la necessité n'a ny loy ny honte. Et c'est icy aussi que ceste belle & ancienne maxime d'Estat doit avoir lieu *Salus populi, suprema lex*. Le salut de l'estat va dessus par toutes loix & toutes considerations [...] quoy qu'en die Albericus Gentilis en son traité *de legationibus*, contre l'opinion de feu mon pere en ses *Questions illustres*».

conceived in the second half of the 16<sup>th</sup> century. Ayrault does not ignore the institutional changes that affected the figure of the ambassador, as is demonstrated not just by the specific observations about resident ambassadors, who can be kept under arrest for short periods, but also more broadly by the considerable attention which he pays to the conduct of the ambassador and the crimes with which he can tarnish himself during a mission. In this regard, as we have seen, Ayrault understands the need to ensure that diplomats are protected, without, however, foregoing the requirement that their principals punish any crimes they may commit. Moreover, the question of diplomatic immunity goes beyond the legal status of the ambassador and the privileges to which he is entitled, involving far wider political and doctrinal issues: consider the question of the right of legation, which was becoming ever more clearly the prerogative of sovereign states, and the definition of *ius gentium*, which, as the field of law which governed the foreign relations of states, was now increasingly distinguished from *ius civile*. Such issues, like the questions concerning the figure of the ambassador, would spark a debate to which countless words would be devoted during the 17<sup>th</sup> century.

Ayrault therefore reveals himself to be a very significant author within the renewal which the scholarship on the ambassador underwent in the early-modern age. His new perspective results from an explicit distancing from Justinian's texts both in terms of the lexis (with the introduction of a clear distinction between *legatus municipalis* or *provincialis* and *legatus hostium*) and in terms of rules (which are no longer cited, or, as demonstrated by the discussion of crimes committed by the ambassador while on a mission, are actually discarded). The legal reasoning is no longer based on the *Corpus iuris civilis*, but on analysis and discussion of examples from ancient (or, in some rare cases, modern) history. Moreover, it gives rise to the production of far more innovative solutions than those given by previous authors, like Dolet and Braun, despite the fact that they had used relatively similar methods. Indeed, these solutions present a number of points of contact with the theory of sovereignty for which, as is well known, another Angevin jurist was laying the foundations in those years, and which was to play such a large part in the political and legal scholarship of the following centuries.

Dante Fedele, KU Leuven