

DRAFT ARTICLES ON THE STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER

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Historical Context

In the late nineteen-eighties there was – at least among developed countries – great public concern over the abuse of diplomatic privileges and immunities, and in particular, abuse of the protection from scrutiny given by international law to the diplomatic bag. Concern over use of the bag for smuggling drugs and prohibited goods was long-standing but was greatly increased by notorious incidents where the bag was used to transfer weapons (London, in 1984, following the shooting of a policewoman from the Libyan diplomatic mission), a suspected spy (Rome, in 1964, where a drugged suspect spy was discovered by opening an Egyptian bag) and an ex-Minister suspected of corruption (London Stansted Airport, 1984, where a crate considered not to be a diplomatic bag, as it lacked official seals but was about to be loaded onto a government plane bound for Nigeria, was discovered to contain the kidnapped and drugged ex-Minister wanted for trial in Lagos). Article 27.4 of the Vienna Convention on Diplomatic Relations (hereinafter “VCDR”) provides that the diplomatic bag may contain only “diplomatic documents or articles intended for official use”, but compliance cannot be verified since article 27.3 provides that the bag “shall not be opened or detained” – and the order of the two paragraphs was deliberately designed to avoid any suggestion that the protection given to the bag was conditional on compliance as to its contents.

The 1987 Conference on Drug Abuse and Illicit Trafficking drew the attention of the International Law Commission (hereinafter “ILC”) to the danger of abuse of the diplomatic bag for carriage of illegal drugs (*Yearbook of the International Law Commission, 1988*, vol. II (Part Two), p. 91). The United Nations General Assembly had already requested the ILC to draw up a Protocol to supplement the provisions of the VCDR as regards the diplomatic courier and diplomatic bag (General Assembly resolution 31/76 of 13 December 1976). Draft articles were adopted by the ILC in 1989 and the ILC recommended to the General Assembly that it should convene an international conference with a view to the conclusion of a convention (*Yearbook of the International Law Commission, 1989*, vol. II (Part Two), p. 13). But no such conference has ever been convened, due to the strong reluctance of certain Member States, and the draft articles have remained in limbo. Most States have been content with the rules set out in the relevant Conventions which vary according to the perceived need for protection for diplomatic, consular and international organization communications, and some aspects – in particular the possibility of scanning or supervised opening of a suspect bag – have been clarified by later State practice.

Negotiating History

In 1980, Mr. Yankov from Bulgaria was appointed as Special Rapporteur on the topic of bags and couriers, and in 1980, he submitted a preliminary report to the ILC. He argued that the increasing frequency of violations of diplomatic law required comprehensive regulation of all types of official couriers and bags so as to confer the same degree of international protection on all kinds of official communications (*Yearbook of the International Law Commission, 1980*, vol. II (Part One), p. 245). The limited results of this codification exercise may be traced back to the failure of the ILC either in 1980 or subsequently in the light of consistent criticism from States to determine whether this proposition was correct. Instead, Mr. Yankov was authorized to submit draft articles to the ILC, and the articles submitted by him standardized treatment of couriers and bags giving a

* The author expresses her appreciation to Sir Michael Wood, Member of the United Nations International Law Commission, for his assistance in the preparation of this note.

high degree of protection regardless of whether they were diplomatic, consular or sent to or from special missions or international organizations. Whereas the many successful enterprises begun by the ILC have resulted from faithful reflection of State practice and constructive dialogue with United Nations Member States, this was not the case with the draft articles on couriers and bags. Western Governments, such as Canada, France, Federal Republic of Germany, Italy, The Netherlands and the United States, argued in comments to the ILC that the existing regime set out in the VCDR well reflected State practice and struck the right balance between the interests of sending and receiving States in protecting sensitive communications and minimizing abuse. The different standards applied to consular bags by the Vienna Convention on Consular Relations (hereinafter “VCCR”), by the New York Convention on Special Missions and by various instruments giving privileges and immunities to international organizations were a conscious attempt to reflect the likelihood of a less sensitive character in the communications and items carried, and it was undesirable to standardize them in the interests of uniformity (*Yearbook of the International Law Commission, 1988*, vol. I, p. 178; *Yearbook of the International Law Commission, 1988*, vol. II (Part One), p. 131, 133, 138, 140, 144, 145, 146).

In 1989, the ILC completed its draft articles and recommended to the General Assembly that they should be adopted as a separate “convention constituting a distinct legal instrument... keeping an appropriate legal relationship with the codification conventions” (*Yearbook of the International Law Commission, 1989*, vol. II (Part Two), p. 13). Diplomatic and consular bags and couriers were covered by the main set of draft articles, and there were two optional protocols to cover couriers and bags of special missions and couriers and bags of international organizations of a universal character. However, when these draft articles were considered by the Sixth Committee of the General Assembly, only a few States favoured the option of a convention largely standardizing the treatment of bags and couriers at the higher diplomatic level. Because of deadlock in 1992, the item was adjourned for three years, and in 1995, the United Nations General Assembly concluded its consideration of the item and drew the attention of Member States to the draft articles as “a field of international law that may be subject to codification at an appropriate time in the future” (General Assembly decision 50/416 of 11 December 1995). There has never been the necessary support for the convening of an international conference to prepare such a convention or indeed for any other action on the matter. It follows that the principal value of the ILC exercise lay in the evidence it supplied of State practice on a number of controversial issues. Most important among these are the identification of diplomatic bags and the legality of scanning them or otherwise seeking to identify unauthorized items within them.

Key Provisions

The draft articles are best considered in the light of article 27 of the VCDR and article 35 of the VCCR – provisions applied among virtually all States for over 50 years. The VCDR requires that the bag shall not be opened or detained and specifies that it shall contain only documents or articles intended for official use. Such articles may include bulky items, such as cipher machines or photocopiers. Regulations of the sending State define which items may be classed as “intended for official use”, and these should have regard to the laws of the relevant State and in particular, those on import or export. The bag must bear visible external marks of its character – under general international practice these are labels showing origin and destination and official seals or locks. Diplomatic couriers must be provided with official documents showing their status and the number of packages constituting the diplomatic bag, and they are entitled to personal inviolability. Diplomatic couriers ad hoc may be appointed, and they are entitled to similar immunity until delivery of the bag. If a diplomatic bag is entrusted to the captain of a commercial aircraft, he must also be provided with a document showing the number of packages constituting the bag but shall not be considered to be a diplomatic courier. The mission may send one of its members to collect the bag directly and freely from the captain. For consular bags, article 35 of the VCCR is in substantially the same terms except that, first, it also permits the bag to be entrusted to the captain of a ship (a provision generally regarded as a clarification and also applied to diplomatic bags). Secondly, in case of suspicion as to the contents of the bag, the authorities of the receiving State may request that it be opened in their presence by an authorized representative of the sending State, and if the request is refused, the bag must be returned to its place of origin.

For the most part, the ILC draft articles reflect these provisions of the VCDR and VCCR. As to couriers, however, additional provisions place restrictions on their nationality (article 9) and allow them to be declared *persona non grata* (article 12). Their temporary accommodation is to be inviolable (article 17) subject to rather complex exceptions, and they are given limited immunity from jurisdiction and exemption from customs duties and baggage inspection. Given the short time generally spent by couriers in the receiving State before returning in charge of new bags, these additional privileges and immunities were seen by the States most concerned as unnecessary and burdensome.

As to the more important question of bags, the draft articles, for the most part, also reflect the provisions of the VCDR and VCCR. The key draft article 28, however, gives a higher level of protection to a diplomatic (but not a consular) bag, providing that it “shall be inviolable wherever it may be; it shall not be opened or detained and shall be exempt from examination directly or through electronic or other technical devices.” The ILC commentary correctly pointed out that “the evolution of technology had created means of examination which might result in the violation of the confidentiality of the bag, means which furthermore were at the disposal of only the most developed States.” The commentary also made clear that the high level of protection does not rule out non-intrusive means of examination, such as sniffer dogs, in case of suspicion that a bag carries narcotic drugs. Draft article 28, with its commentary, correctly reflected State practice as it had evolved since the entry into force of the VCDR (*Yearbook of the International Law Commission, 1989*, vol. II (Part 2), pp. 42- 43).

Influence of the Draft Articles on the Diplomatic Courier and Bag

Generally speaking, the ILC in considering a topic give continuous and careful thought to the final form their work might take, and they are receptive to the formal comments submitted by Governments. In this particular case, the ILC fell short of its usual standards in both these respects, and it followed that the draft articles have had only limited influence on subsequent practice regarding the diplomatic courier and diplomatic and consular bags. The information submitted by Governments has been of value in providing authoritative evidence of State practice. Article 28, in providing that diplomatic bags should be exempt from electronic scanning, resolved a question which caused controversy and practical difficulties in the early years of the VCDR and has been a helpful guide which clarified emerging customary practice. In recent years, there has been less emphasis on the security of diplomatic bags, because increasing use of electronic communications by Governments and their overseas missions has meant that fewer sensitive messages are sent by bags. Concern over interception or covert opening of bags has been replaced by increasing concern over interception and leaking of electronic messages.

This Introductory Note was written in October 2020.

Related Materials

A. Legal Instruments

Vienna Convention on Diplomatic Relations, Vienna, 18 April 1961, United Nations, *Treaty Series*, vol. 500, p. 95.

Vienna Convention on Consular Relations, Vienna, 24 April 1963, United Nations, *Treaty Series*, vol. 596, p. 261.

Convention on Special Missions, New York, 8 December 1969, United Nations, *Treaty Series*, vol. 1400, p. 231.

B. Documents

General Assembly resolution 31/76 of 13 December 1976 (Implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961).

Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag Not Accompanied by Diplomatic Courier and Draft Optional Protocols, 1989.

General Assembly decision 50/416 of 11 December 1995.

C. Doctrine

The Work of the International Law Commission, 9th ed., United Nations, 2017, pp. 185-190.

J. K. Cogan, “The Changing Form of the International Law Commission’s Work”, Chapter 10, in *Evolutions in the Law of International Organizations*, Brill/Nijhoff, 2015.

E. Denza, *Diplomatic Law*, 4th ed, Oxford University Press, Oxford, 2016, pp. 191-211.

E. Denza, “Diplomatic and Consular Immunities: Trends and Challenges”, Chapter 22, in *The Cambridge Handbook of Immunities and International Law*, Cambridge University Press, Cambridge, 2019, pp. 447-448.

P.G. Labat and N. Burke, “The Protection of Diplomatic Correspondence in the Digital Age”, Chapter 13 in Behrens (ed.), *Diplomatic Law in a New Millennium*, Oxford University Press, Oxford, 2017, pp. 203-230.

L. T. Lee and John B. Quigley, *Consular Law and Practice*, 3rd ed., Oxford University Press, Oxford and New York, 2008, pp. 406-413.

C. Nelson, “‘Opening Pandora’s Box’: The Status of the Diplomatic Bag in International Relations”, *Fordham International Law Journal*, 1988, vol. 12, issue 3.

S. Sud, “The Diplomatic Duffle Disparity – A Third World Perspective”, Chapter 14, in P. Behrens (ed.), *Diplomatic Law in a New Millennium*, Oxford University Press, Oxford, 2017, pp. 231-244.

I. Sinclair, *The International Law Commission*, Grotius, 1987, pp. 99-103, 157-164.

A. Watts, “Diplomatic Couriers”, Chapter 20, in *The International Law Commission 1949 – 1998*, vol. III, Oxford University Press, Oxford, 1999, pp. 1917-1922.

M. Wood, “The General Assembly and the International Law Commission: What Happens to the Commission’s Work and Why?”, in *International Law Revision, Universalism and Fragmentation; Festschrift in Honour of Gerhard Hafner*, Nijhoff, Leiden, 2008, pp. 373-388.