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Carry on Excellencies!

(The Screening of the Diplomatic Bag in the light of Recent EU Legislation)

Introduction

The latest piece of EU legislation on air transport security seems at first sight to contradict a well-established principle of diplomatic law, the freedom of diplomatic communication. Contrary to its predecessor, the new regulation does not provide for a specific exemption from the screening of the diplomatic bag. As there is no uniform practice in that regard within the Union, Member States are trying to square the circle in the Council's International Law Working Party by exploring various ways of implementation. The unquestionable right of States to have the contents of their diplomatic communications protected and a more recent but obviously valid concern over the security of air transport are apparently in conflict with each other. How to mitigate such collision by way of a dynamic interpretation of the half-century old Vienna Convention on Diplomatic Relations? This article is an analysis of the relevant international legal instruments and the existing practice with a view to putting possible solutions on the table.

The idea of the 'Founding Fathers'

During the preparatory works of the Vienna Convention on Diplomatic Relations[2] (Vienna Convention), the members of the International Law Commission (ILC) held a lengthy debate on the inviolability of the diplomatic bag.[3] In order to reduce the likelihood of abuse the ILC explored whether the opening of the diplomatic bag, under carefully circumscribed conditions,

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2 Signed in Vienna, 18 April 1961, full text available here.

3 See the Summary record of the 399th meeting of the International Law Commission (doc. A/CN.4/SR.399)

might be justifiable. Following a roundabout reasoning the ILC finally concluded that the absolute character of this particular immunity should remain unchanged, as any sort of deviation from the general rule would have implied the opening of a Pandora's box, and therefore considered this as a hypersensitive issue. Through the codification of the above principle the Vienna Convention reasserted the long-standing rule of the inviolability of the diplomatic bag in customary international law.[4]

According to Article 27.3 of the Vienna Convention *"[t]he diplomatic bag shall not be opened or detained."* In addition, the ILC made it clear in its Commentaries[5] that the more general rule in Article 27.2 codifying the inviolability of official correspondence equally applies to the content of diplomatic bags. Consequently the legal safeguard in these cases is twofold, since both articles may be invoked against a violation of the confidentiality of the documents contained in the bag. It should be noted however, as the ILC in its commentaries recognized, that the diplomatic bag occasionally, in exceptional circumstances where there were serious grounds to suspect that the diplomatic bag was being used in an inappropriate manner, has been opened with the permission of the Ministry of Foreign Affairs of the receiving State and in the presence of a representative of the diplomatic mission concerned.[6]

It would be difficult to deny that there have been serious attempts to misuse the inviolability of the diplomatic bag. The main reason why the International Law Commission considered possible exceptions to the general rule of inviolability was that *"diplomatic bags were regularly used for extremely undesirable purposes, illicit traffic in diamonds or in foreign currency, for instance."*[7] Some of the ILC members seemed to know that *"traffic in dangerous drugs was blatantly conducted under cover of the diplomatic bag"*. Concerns arose that even the fiction of smuggling vital parts of atomic bombs might eventually become an actual fact. [8]

Having said that, the ILC nevertheless emphasised the overriding importance which it attached to the principle of the inviolability of the diplomatic bag. After the adoption by a slight majority in

4 Endre Ustor: Diplomáciai kapcsolatok joga, KJK, 1965, Budapest, pp. 287; Jean Salmon is of the same opinion in: Manuel de droit diplomatique, § 355 pp. 248, Editions Delta, Bruxelles 1996.

5 Draft Articles on Diplomatic Intercourse and Immunities with commentaries, 1958. Text available: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_1_1958.pdf

6 See paragraph (5) of ILC commentaries to draft article 25 of the Vienna Convention.

7 Sir Gerald Fitzmaurice's intervention in the ILC's 398th meeting (ILC Yearbook 1957 Vol. I. pp. 78, para 92).

8 Mr. Scelle's intervention in the ILC's 399th meeting (ILC Yearbook 1957 Vol. I. pp. 79, para 8).

the ILC of the above commentary recognizing differences in understanding the precise content of customary international law in that regard, the Brazilian representative, *"Mr Amado expressed the opinion that by its vote the Commission had just buried the principle of the inviolability of the diplomatic bag."*[9]

Reservations made by a number of Arab States[10] upon ratification or accession to the Vienna Convention show clearly that controversy over the interpretation of Article 27 continued to exist after its adoption.[11] These reservations 'opted for' the so-called 'challenge and return' system which would allow for the opening of the diplomatic bag in case of serious grounds to believe that it contained forbidden items or, if refused, the returning of the bag to its place of origin. These reservations provoked a number of objections from European States and the Soviet Union. Thus the inherent problem of dual interpretation, which will be discussed in more detail below, did not come to an end.

Subsequent practice – the 'moaning bag'

In principle, as was re-established by the Vienna Convention, diplomatic bags were exempted from any sort of examination, inspection or baggage check, provided that they fully complied with the requirements of the Vienna Convention.

At the same time the phenomenon of abuses of diplomatic bags did not cease to exist. In 1964 Italian customs authorities at Rome airport, in the course of passing a diplomatic bag destined for Cairo through detector devices designed to show the presence of explosives, metal or drugs[12], found out that the bag was emitting moans. On opening the bag, they found a drugged Israeli who had been kidnapped.[13]

A similar incident took place at London's Stansted airport in 1984 when customs officers discovered a former Nigerian minister in an unconscious state packed in a large crate together with a doctor supposed to take care of him during the undesirable journey. The Nigerian

9 See the Minutes of the meeting referred to under footnote 3, paragraph 57.

10 For all the reservations, objections and declarations see the United Nations Treaty Collection Database.

11 Denza: Diplomatic Law, 2nd edition, Clarendon Press, Oxford, 1998, pp. 187.

12 It's important to note that Italy was not a party to the Vienna Convention at the time of this incident and therefore was not formally bound by its provisions.

13 Sir Ivor Roberts: Satow's Diplomatic Practice, Sixth Edition, Oxford University Press, 2011, § 8.38.

diplomatic service hoped to circumvent British extradition procedures by that means but it failed to furnish the crate with the visible external marks of its diplomatic character as required by the Vienna Convention[14]. After the airport authorities became suspicious about the content of the crate, they consulted the Foreign Office which gave the advice that in the absence of lead or wax seals the crate could not be considered as a diplomatic bag and, as a consequence, it could be opened and subjected to a more thorough inspection.[15]

As was demonstrated above, concerns over abuses of the immunity of the diplomatic bag somehow took over the wish to protect its confidentiality. Despite the concept adopted by the Vienna Conference on the absolute immunity of the diplomatic bag, subsequent practice proved to be more permissible, allowing for certain deviations in exceptional circumstances. As we will see nonetheless, the development of technology (e.g. screening and detection devices) forced some of the State parties to change their respective policies and, as a consequence, their way of interpreting of the rules of the Vienna Convention.

Certainly at the time of the Vienna Conference delegates were not in a position to consider the issue of screening as such technology did not exist. And that's where the problem lies, because the adopted text of the Vienna Convention gives rise to at least two interpretations.

When baggage screening became widespread in the 1970s some academics argued that *"as a matter of construction of Article 27, scanning did not involve opening or detaining the bag and was not prohibited in law."*[16] The textual interpretation of this article of the Vienna Convention led to the conclusion that an examination of the bag by X-ray equipment or even sniffer dogs is legal. Thus Mr Amado's comments quoted above became a reality within a decade. As a matter of fact, the most developed States, which established the above 'out-of-the-context' argumentation at the outset, changed their minds relatively quickly and started to argue the other way around, suddenly attaching utmost importance to the principle that the content of the diplomatic communication –

14 Article 27.4 stipulates that *"[t]he packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use."*

15 For further detail on the so-called Umaru Dikko case, see Sir Ivor Roberts: Satow's Diplomatic Practice, Sixth Edition, Oxford University Press, 2011, § 8.39 and Eileen Denza: Diplomatic Law, 2nd edition, Clarendon Press, Oxford, 1998, pp. 190.

16 Eileen Denza: Diplomatic Law, 2nd edition, Clarendon Press, Oxford, 1998, pp. 195; Jean Salmon: Manuel de droit diplomatique, § 355 pp. 248, Editions Delta, Bruxelles 1996; Sir Ivor Roberts changed his position in the Sixth Edition of Satow's Diplomatic Practice, Oxford University Press, 2011, § 8.41 compared to previews edition § 14.30.

wherever located – cannot be revealed.[17] They certainly realized that the golden rule of reciprocity may backfire and the content of their own diplomatic pouches may be compromised as well. The interest in protecting the content of their own diplomatic bags turned out to be stronger than the interest in checking the content of the bags of other States. But what could be the more specific reasons behind this U-turn?

'Inviolability light'?

In 1975 the United Nations General Assembly perceived the need to adjust the then existing practice.[18] It explored instances when the relevant provisions of the Vienna Convention had not been fully respected and therefore tasked the International Law Commission to start working on a new piece of codification specifying the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.[19] Although the draft articles produced by the ILC never came into force, they constitute, in the opinion of the author at least, an important reference to the development of State practices and therefore worthy of examination. The main reason why no agreement was reached on the draft articles is the divergence in views in particular concerning the inviolability of the diplomatic bag.[20]

After having collected the various inputs from member States and realizing the differences between interpretations and follow-up practices, the ILC decided to reaffirm, as a compromise solution, the absolute immunity of the diplomatic bag from opening and detention. As part of the

17 The UK Government in its 1985 review of the Vienna Convention noted the alternative view that "any method for finding out the contents of the bag is tantamount to opening it, which is illegal" (Denza: Diplomatic Law, pp. 195). *"[t]he New Zealand Government is based on its acknowledgment of the fact that electronic screening could, in certain circumstances, result in the violation of the confidentiality of the documents contained in a diplomatic bag"* stated that in their view electronic screening was not permitted under the Vienna Convention (ILC Yearbook 1988 Vol. II. Part One pp. 147). The US State Department also took the view that *"any provision which would allow scanning of the bag risks compromising the confidentiality of sensitive communications equipment"* (Study and Report Concerning the Status of Individuals with Diplomatic Immunity in the US, prepared in pursuance of Foreign Relations Act, presented to Congress 18 March 1988, pp. 55.)

18 See in that respect Res. 3501 of UNGA during its 30th Session, 2441st plenary meeting, 15 December 1975, as regards the tasking of the ILC see para. 4 of Res. 31/76 of UNGA at its 97th plenary meeting, 13 December 1976.

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

20 See Res. 44/36 of UNGA at its 72nd plenary meeting, 4 December 1989.

compromise package, however, it re-asserted the relative immunity of the consular bag as well. This led to the proposal to maintain two parallel regimes where the full inviolability of the diplomatic bag was strengthened while the consular bag remained under an 'inviolability light' clause.[21]

On the one hand, according to the draft articles, the concept of the immunity of the diplomatic bag would become stronger because of an important clarification regarding the examination of the bag through electronic or other technical devices, as the text expressly prohibits such examination without any exception. In its commentaries the ILC explained that *"...the inclusion of this phrase was necessary as the evolution of technology had created very sophisticated 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."*[22]

On the other hand, the consular bag would continue to fall within the somewhat softer regime which allows the opening or returning of the bag by the competent authorities of the receiving or transit State if there are serious grounds to believe that the bag contains illicit items. The opening of the bag is only possible with the permission of the sending State and in the presence of one of its authorized representatives.

It is interesting to see that in its commentaries the ILC suggested the possibility of using sniffer dogs, as a 'non-intrusive' means of examination, in order to filter out the traffic of narcotic drugs. Even if dogs are usually not so well-educated as to be able to read the contents of a bag[23], the distinction made between 'intrusive' (e.g. X-ray) and 'non-intrusive' (e.g. sniffer dogs) ways of examination in the commentaries to operative paragraph 28 seems to be a bit forced and appears like a bad compromise.

As one group of States wished to have the softer regime applicable to both diplomatic and consular bags but the other group of States, on the contrary, wished to see the stricter regime applied to both, the 'double track approach' did not seem to be a workable compromise, as it

21 See Article 28 of the Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag Not Accompanied by Diplomatic Courier.

22 See paragraph (6) of the commentaries of the ILC to Article 28 of the Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag Not Accompanied by Diplomatic Courier.

23 Mr. Yankov observed to the International Law Commission at its 40th session that *"[s]niffer dogs are unlikely to be so well educated that they could read the contents of a diplomatic bag."* (ILC Yearbook 1988 Vol I pp. 232).

made both sides equally unhappy. Informal consultations were held from 1990 to 1995 in the framework of the Sixth Committee but, despite various proposals made, no agreement was reached.[24] Finally the General Assembly brought the draft articles together with follow-up observations for the attention of the member States through the Sixth Committee with a view to possible codification at an 'appropriate time in the future'.[25]

The new challenge: aviation security

In the past decade a new aspect came into play and reframed the discussion, putting it into a particularly new context. The new aspect is called 'air transport security'.[26] It would be difficult to deny that the tragic events of 9/11 played a significant role in that regard. The US-sponsored 'fight against terrorism' should have given a new impetus for major players in the deadlock described above. But it has not yet happened.

The United States, a superpower which, beyond doubt, possesses the most sophisticated technology capable even of reading the content of bags put inside a security scanner without leaving any trace or causing any damage. Even so, the Transport Security Administration manual (2008) exempts diplomatic pouches from any form of security screening after careful identification of the courier and the pouch itself.[27]

The Canadian Department of Foreign Affairs and International Trade *"considers that x-ray or any other form of electronic scanning of diplomatic bags constitutes a constructive opening of the bag"* and therefore *"impair the inviolability of the bag*". While Canada made it clear that any method of screening of diplomatic bags is, in principle, regarded as an *"unacceptable breach"* of the Vienna Convention, it introduced the possibility of 'challenge and return' to Canadian practice due to *"public safety and civil aviation security considerations and the need to safeguard against abuses"* in case of serious suspicions.[28]

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24 See Res. 45/43 of UNGA at its 48th plenary meeting, 28 November 1990 and Res. 46/57 of UNGA at its 67th plenary meeting, 9 December 1991.

25 Extracts from the Work of the International Law Commission, 7th edition, Vol. I.

26 See Diana Stancu: Diplomatic Immunity: an exemption from screening? In: Aviation Security International October 2008. Also on compliance with ICAO guidelines.

27 See: http://www.wired.com/threatlevel/2009/12/tsa-leak/

28 See Circular Note NO. XDC-0144 of January 28, 2011.

Australia continues to facilitate, in an unconditional manner, the *"expeditious movement of diplomatic couriers and bags"* which, for that very reason, are not subjected to normal security screening.[29]

The European practices seem to be quite disparate as well. While for instance at airports in the United Kingdom[30] and Belgium[31] diplomatic bags do not undergo security scanning, Austria[32] maintains its interpretation that x-raying does not constitute a 'constructive opening' and therefore screens all diplomatic bags for security reasons on a non-discriminatory basis. Austria rightly observed that there is no obligation in Article 27.3 of the Vienna Convention to transport diplomatic bags on board an aircraft if they constitute a risk to aviation security. France[33] does not screen diplomatic bags in principle but reserves the right to operate a 'challenge and return' system with reference to Article 35.3 of the Vienna Convention on Consular Relations[34] (the VCCR). By doing so France seems to expand the scope of the VCCR's provision on the consular bag to the diplomatic bag as well in its national practice.

In connection with the European practices it is worth examining the recent legislative work of the European Union in the field of civil aviation security with special regard to regulations which may conflict with the international obligations of the Member States under the Vienna Convention.

One step forward, two steps back

29 See paragraph 5.4.1 (Couriers and Diplomatic Bags) of the Protocol Guidelines of the Australian Governments' Department of Foreign Affairs and Trade

30 Eileen Denza: Diplomatic Law, 2nd edition, Clarendon Press, Oxford, 1998, pp. 196.

31 Jean Salmon: Manuel de droit diplomatique, § 355. pp. 248, Editions Delta, Bruxelles 1996.

32 Circulars printed in ILC Yearbook 1982 Vol. II Part One pp. 233.

33 Voir la section Les valises diplomatiques de la Guide pour les diplomates étrangers sur le site internet de Ministère des Affaires Etrangères de la France.

34 Article 35.3 of the Vienna Convention on Consular Relations provides that *"[t]he consular bag shall be neither opened or detained. Nevertheless, if the competent authorities of the receiving State have serious reason to believe that the bag contains something other than the correspondence, documents or articles referred to in paragraph 4 of this article, they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin."*

Regulation (EC) No 2320/2002 establishing common rules in the field of civil aviation security devoted a full paragraph to 'the screening of diplomats'.[35] It expressly exempted diplomatic bags from compulsory screening and made it the responsibility of air carrier staff to double-check if diplomatic bags have, in fact, been sent by duly appointed officials of the missions concerned. However it also made clear that diplomats and other privileged persons (e.g. diplomatic couriers) themselves and their personal baggage should be subject to security screening. As regards the screening of diplomatic bags the regulation left it for Member States to interpret the relevant provisions of the Vienna Convention according to their respective practices, by making an express reference to the Convention.

The successor Regulation (EC) No 300/2008[36] does not regulate the status of the diplomatic bag at all. On the contrary, it establishes a general regime of security screening to all kinds of cabin baggage and passengers with no exception whatsoever regarding diplomatic belongings or carry-on items. It seems that aviation security as a governing principle was an absolute priority for the legislature. The security of the aircraft apparently became so important that international legal obligations and established practices going back for centuries were forgotten within a few years. Was it simply an omission? That is not likely.

Nevertheless, Member States could still have argued that international legal obligations prevail over EU law and that the relevant provisions of the Vienna Convention are still valid. Within two years the European Commission came up with a solution of sorts to the problem by reintroducing the possibility of exempting diplomatic bags from security screening to EU law, but on a lower level. The legal basis for such an implementing measure is Article 4(3) of the basic legislative act, which delegates power to the Commission to adopt detailed implementing rules on the 'common basic standards' as regards civil aviation security. By creating in the delegated act[37] a 'new' exception to the general rule established by the basic regulation, the Commission might go too far in stretching the limits of its powers. In any case it is not the most suitable way of solving the problem.

35 Regulation (EC) No 2320/2002 of the European Parliament and of the Council of 16 December 2002 establishing common rules in the field of civil aviation security (Annex 4.4)

36 Regulation (EC) No 300/2008 of the European Parliament and of the Council of 11 March 2008 on common rules in the field of civil aviation security and repealing Regulation (EC) No 2320/2002

37 Commission Regulation (EU) 185/2010 of 4 March 2010 laying down detailed measures for the implementation of the common basic standards on aviation security.

Despite such concerns, the provisions are in place, allowing Member States to exempt diplomatic bags from security screenings by way of drawing up specific provisions in their own internal airport security manuals which are mostly restricted documents.[38] Nobody has contested the legality of this solution so far.

Apparently Member States also have difficulties with interpreting the current EU legislation, as the Council's Public International Law Working Party (COJUR) maintained the issue on its agenda for quite some time in 2011.[39] The conclusions of the meetings are not yet public but we can assume that Member States' practices are still far from being harmonized as there is still room for both interpreting Article 27.3 of the Vienna Convention.

Conclusions

As we have seen, the concept of inviolability of the diplomatic bag has never been entirely clear. During the codification of the longstanding customary rules, differences amongst States' interpretations already came to the surface, giving a slight touch of ambiguity to the relevant provisions of the Vienna Convention in the context of its preparatory works.

Subsequent examples show that concerns about the possible misuse of the bag were still valid, or have become even more valid, while the development of technology has increased suspicions that some States might be tempted to compromise the confidentiality of diplomatic communications.

These were the main elements influencing the respective policies of State actors and even pushing some of them to switch their way of interpretation until the new aspect of aviation security came into play, giving a completely new colour to the picture.

The balance is moving somewhat slowly but inevitably towards a relative inviolability regime which would allow the screening of diplomatic bags for aviation security purposes. Surprisingly, airport scanners are more often used by less wealthy States than superpowers. Presumably this is because big players already possess various sophisticated means to discover the contents of

38 See Annex 4.1.2.11 of Commission Regulation (EU) 185/2010.

39 See the agenda of the last COJUR meeting on 13 December 2011 (CM 5883/1/11 REV 1): agenda item 5 dealt with the interpretation of Article 27 of the Vienna Convention.

suspicious packages even well before security checkpoints[40] so they can afford the luxury of not having to screen other States' diplomatic bags and to claim on the basis of reciprocity that their own bags should not be screened.

In the meantime terrorists themselves are also exploring new avenues to hack their ways through modern security systems, thus changing the rules of the game.[41] In the aftermath of the so-called Arab spring some countries discovered clandestine State activities which triggered some understandable reactions. Egypt, for instance, recently began to screen incoming and outgoing diplomatic pouches at Cairo airport in order to stop illegal weapons traffic.[42]

In the author's opinion more States, lacking sufficient technology to reveal the content of diplomatic communications through scanning devices, should subject diplomatic pouches to routine security screening, thus extending vigilance to diplomatic bags. The 'fight against terrorism' could easily underpin such a policy choice, while the ambiguity of the Vienna Convention leaves room for an interpretation that screening does not involve opening or detention. As sensitive data is no longer transmitted via diplomatic mail, reciprocal actions should not cause any damage while the overall aviation security level might also increase. Such an approach could finally strike a new balance in the International Law Commission, leading to a new compromise which might resolve the present deadlock at a later stage.

40 The remotely operating automated 'malevolent intent' detection system, designed to read biological indicators of stress and anxiety has been already tested and demonstrated to government authorities in Israel, the United States and Europe in 2009. For more detail, click here.

41 Insider: $56 Billion Later, Airport Security Is Junk, On: www.wired.com

42 The Egyptian Gazette online: Egypt screens diplomatic bags