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”Opening” Pandora’s Box: The Status of the Diplomatic Bag in International Relations

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Christine M. Nelson

Abstract

This Note argues that article 27 [of the Vienna Convention on Diplomatic Relations] provides for the absolute inviolability of the diplomatic bag. Part I discusses the history of the Vienna Convention and its provisions concerning the diplomatic bag. Part II sets forth instances of abuse of the diplomatic bag, proposed remedies, and the arguments in favor of such remedies. Part III suggests that the proper construction of article 27 of the Vienna Convention is that the diplomatic bag is absolutely inviolable and, thus, immune from nonintrusive examinations. This Note concludes that the status of the bag should be reconsidered in order to enable governments to curb its abuses.

"OPENING" PANDORA'S BOX: THE STATUS OF THE DIPLOMATIC BAG IN INTERNATIONAL RELATIONS

INTRODUCTION

For centuries, governments and their envoys stationed abroad have used diplomatic bags.¹ The diplomatic bag, which is usually a canvas sack, is intended for the confidential conveyance of documents between a government and its missions abroad.² Eventually, diplomats used the bag to convey articles as well as documents; thus, the bag became the smuggling diplomat's perfect means by which to transport contraband as valuable as jewels and as lethal as machine guns across international borders.³ At first glance, subjecting the bag to metal detectors, electronic scanning, or canine sniffing without opening or detaining the bag⁴ would appear to be a simple solution to the worldwide problem of abuses of the diplomatic bag. Proposals to implement these nonintrusive examinations, however, have given rise to a dispute⁵ as to whether such examina-

1. *Thorny Issue: Peeking into a Privileged Pouch*, N.Y. Times, Aug. 1, 1988, at B6, col. 3 [hereinafter *Thorny Issue*].

2. C. ASHMAN & P. TRESKOTT, *DIPLOMATIC CRIME* 190 (1987). A diplomatic mission is defined as the

diplomatic presence of one state (the sending state) in the territory of another (the receiving state) for which special treatment is accorded by the latter state. The diplomatic mission is the official representation of the sending state to the receiving state and is permanently housed in the capital of that state, for which it receives the protection of that state and full diplomatic privileges and immunities.

THE INTERNATIONAL LAW DICTIONARY 95 (1987).

3. See C. ASHMAN & P. TRESKOTT, *supra* note 2, at 193; *Thorny Issue*, *supra* note 1.

4. Some regard electronic scanning as "constructive opening." See Higgins, *The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience*, 79 AM. J. INT'L L. 641, 647 (1985).

5. See, e.g., C. ASHMAN & P. TRESKOTT, *supra* note 2, at 215-19 (setting forth United Kingdom's position as to electronic scanning of diplomatic bags); E. DENZA, *DIPLOMATIC LAW* 4 (1976) (scientific methods of detection without opening diplomatic bag are not prohibited by the Vienna Convention); C. LEWIS, *STATE AND DIPLOMATIC IMMUNITY* 191-92 (1985) (expressing position of United Kingdom that Vienna Convention does not preclude nonintrusive examinations); Cameron, *First Report of the Foreign Affairs Committee of the House of Commons*, 34 INT'L & COMP. L.Q. 610, 615-18 (1985) (inviolability of diplomatic bag not contingent on its contents); Goldberg, *The Shoot-Out at the Libyan Self-Styled People's Bureau: A Case of State-Supported International Terrorism*, 30 S.D.L. REV. 1, 4 (1984) (diplomatic bag is not absolutely inviolable); Note, *Insuring Against Abuse of Diplomatic Immunity*, 38 STAN. L. REV. 1517, 1534-35 (1986) (Vienna Convention does not preclude nonintrusive examinations); U.S.

tions are permitted under article 27 of the Vienna Convention on Diplomatic Relations (the "Vienna Convention" or the "Convention"),⁶ which provides that "[t]he diplomatic bag shall not be opened or detained."⁷

This Note argues that article 27 provides for the absolute inviolability of the diplomatic bag. Part I discusses the history of the Vienna Convention and its provisions concerning the diplomatic bag. Part II sets forth instances of abuse of the diplomatic bag, proposed remedies, and the arguments in favor of such remedies. Part III suggests that the proper construction of article 27 of the Vienna Convention is that the diplomatic bag is absolutely inviolable and, thus, immune from nonintrusive examinations. This Note concludes that the status of the bag should be reconsidered in order to enable governments to curb its abuses.

DEPT OF STATE, STUDY AND REPORT CONCERNING THE STATUS OF INDIVIDUALS WITH DIPLOMATIC IMMUNITY IN THE UNITED STATES 55 (1988) (bag is absolutely inviolable under current regime).

6. Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 [hereinafter Vienna Convention].

7. *Id.* art. 27(3), 23 U.S.T. at 3239, T.I.A.S. No. 7502, at 13, 500 U.N.T.S. at 110.

Section 466 of the *Restatement of the Law Third, Restatement of the Foreign Relations Law of the United States*, provides that "[t]he . . . communications of an accredited diplomatic mission or consular post are inviolable, and are immune from any exercise of jurisdiction by the receiving state that would interfere with their official use." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 466 (1987) [hereinafter RESTATEMENT THIRD]. The position of the *Restatement Third* is that a diplomatic bag may be opened in the presence of the sending state's authorities or may be returned to the sending state if the receiving state has "serious reason to believe" that the bag contains something other than correspondence, documents, or articles intended for official use. *Id.* comment f. The Vienna Convention does not provide for such action. See Vienna Convention, *supra* note 6, art. 27, 23 U.S.T. at 3239, T.I.A.S. No. 7502, at 13, 500 U.N.T.S. at 108, 110; see also *infra* notes 56-58 and accompanying text.

The *Restatement Third's* position on this issue is derived from draft articles on the Status of the Diplomatic Courier and the Diplomatic Bag Not Accompanied by Diplomatic Courier, which the International Law Commission provisionally adopted in 1986. RESTATEMENT THIRD, *supra*, reporters' note 6. The draft articles providing for the status of the diplomatic bag generally track the language of article 35(3) of the Vienna Convention on Consular Relations. See *infra* note 58. However, it has yet to be decided whether the rule it espouses will apply to the diplomatic bag. See *Report of the International Law Commission on the Work of its Thirty-Eighth Session*, 41 U.N. GAOR Supp. (No. 10) at 72, U.N. Doc. A/41/10 (1986) [hereinafter *Report of the Commission's Thirty-Eighth Session*]. For further discussion of the draft articles that the International Law Commission provisionally adopted in 1986, see *infra* notes 107-110 and accompanying text.

I. THE VIENNA CONVENTION AND THE STATUS OF THE DIPLOMATIC BAG

A. The Vienna Convention on Diplomatic Relations

1. History

In 1953, the United Nations requested the International Law Commission (the "Commission")⁸ to reexamine the subject of diplomatic intercourse and immunities with the intent to codify this area of international law.⁹ The General Assembly considered codification of the customary international law¹⁰ on this subject to be a necessary factor in the improvement of relations between states.¹¹ Experience had shown that tranquil and efficient relations between states depended largely on the existence of established rules of diplomatic relations.¹²

8. The International Law Commission (the "Commission") was established by the General Assembly of the United Nations to implement article 13 of the United Nations Charter, which provides that one of the principle functions of the General Assembly was to encourage "the progressive development of international law and its codification." U.N. CHARTER art. 13, para. 1(a). In its first session, the Commission compiled a provisional list of topics of international law selected for codification, including the topic of "Diplomatic intercourse and immunities." See *Report of the International Law Commission Covering its First Session*, 4 U.N. GAOR Supp. (No. 10) at 3, U.N. Doc. A/925 (1949).

9. See G.A. Res. 685, 7 U.N. GAOR Supp. (No. 20) at 62, U.N. Doc. A/2361 (1952) [hereinafter G.A. Res. 685]; see also Do Nascimento E Silva, *Vienna Convention on Diplomatic Relations (1961)*, in 9 *ENCYCLOPEDIA OF PUB. INT'L L.* 393, 394 (1986).

Earlier attempts at international codification are embodied in the New York Regulation of the Institut de Droit International, *ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL: SESSION DE NEW-YORK 307 (1929)* (amending the Cambridge Regulation of 1895); in the Sixth International American Conference, Feb. 20, 1928, 155 L.N.T.S. 259; and in the Harvard Research Draft Convention of 1932, *Research in International Law* 19 (1932). *Research in International Law* See generally Denza, *Diplomatic Agents and Missions, Privileges and Immunities*, in 9 *ENCYCLOPEDIA OF PUB. INT'L L.* 94, 95 (1986); *Research in International Law*, 26 *AM. J. INT'L L.* 1, 19-187 (Supp. 1932). The Harvard Research Draft Convention of 1932 greatly influenced the International Law Commission's work on codifying diplomatic law. See Denza, *supra*, at 95. In addition, the Vienna Convention is considered to be a sequel to the seventeenth annex to the Final Act of the Congress of Vienna, Mar. 19, 1815, 2 *Martens Nouveau Recueil* (ser. 2), 449, which contained the regulation on the classification of diplomatic agents. See *United Nations Conference on Diplomatic Intercourse and Immunities: Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole*, at 2 U.N. Doc. A/Conf.20/14 (1961) [hereinafter *United Nations Conference*].

10. For a discussion of the general development of customary international law, see *infra* note 52 and accompanying text.

11. G.A. Res. 685, *supra* note 9, at 62.

12. See *United Nations Conference*, *supra* note 9, at 1. In opening the Conference,

In its ninth session, the Commission began its debate on a draft document¹³ relating to diplomatic intercourse and immunities.¹⁴ At the end of the ninth session, an amended draft was distributed among the member states of the United Nations for comments and observations.¹⁵ During the Commission's tenth session, a new draft was completed and forwarded to the General Assembly of the United Nations.¹⁶ The General Assembly convened an international conference to consider the question of diplomatic intercourse and immunities¹⁷ and requested that the conference use the results of the work of the Commission's tenth session as the basis for its consideration.¹⁸ The United Nations Conference on Diplomatic Intercourse and Immunities (the "Vienna Conference" or the "Conference") met in Vienna in 1961 and, relying on the work of the Commission, created and adopted the Vienna Convention on Diplomatic Relations.¹⁹

2. Theoretical Justifications for Diplomatic Immunity

Since diplomatic immunity was first discussed in legal

the acting president stated that the topic of diplomatic intercourse and immunities "by its very nature permeated relations between States, for it was vitally important that they should be conducted with the minimum of friction and the maximum of goodwill and facility." *Id.*

13. See *Diplomatic Intercourse and Immunities: Report Submitted by A.E.F. Sandström, Special Rapporteur*, U.N. Doc. A/CN.4/91 (1955).

14. See *Summary Records of the 383rd Meeting*, [1957] 1 Y.B. INT'L L. COMM'N 2, U.N. Doc. A/CN.4/SER.A/1957.

15. See Do Nascimento E Silva, *supra* note 9, at 394.

16. See *Report of the International Law Commission Covering the Work of its Tenth Session*, 13 U.N. GAOR Supp. (No. 9), U.N. Doc. A/3859 (1958) [hereinafter *Report of the Commission's Tenth Session*]; see also Do Nascimento E Silva, *supra* note 9, at 394.

17. See G.A. Res. 1450, 14 U.N. GAOR Supp. (No. 16) at 56, ¶ 1, U.N. Doc. A/4354 (1959).

18. *Id.* at ¶ 7.

19. Vienna Convention, *supra* note 6, 23 U.S.T. at 3227, T.I.A.S. No. 7502, 500 U.N.T.S. at 95; see E. DENZA, *supra* note 5, at 2. The Vienna Convention was not open to all states, but only to member states of the United Nations, to any of the United Nations specialized agencies or parties to the Statute of the International Court of Justice, and to any other states invited by the United Nations General Assembly to become a party to the Convention. Vienna Convention, *supra* note 6, art. 48, 23 U.S.T. at 3249, T.I.A.S. No. 7502, at 23, 500 U.N.T.S. at 124; see also Do Nascimento E Silva, *supra* note 9, at 394. Eighty-one states participated in the Conference. See *United Nations Conference*, *supra* note 9, at x-xviii; see also E. DENZA, *supra* note 5, at 2. As of January 1988, 153 states have ratified the Convention. See MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, STATUS AS AT 31 DEC. 1987, at 52-53 U.N. Doc. ST/LEG/SER.E/6 (1988).

literature, scholars have set forth various overlapping theories to justify immunity.²⁰ The theories, however, can be separated into the categories of "extritoriality,"²¹ "representative character,"²² and "functional necessity."²³

The theory of extritoriality gained ascendancy during the sixteenth century, when resident ambassadors replaced ad hoc diplomats as the favored means of conducting relations between states.²⁴ Under the theory of extritoriality, the diplomat and his "suite"²⁵ resided entirely beyond the territory of the receiving state.²⁶ Therefore, neither the diplomat nor his suite could be subjected to the criminal and civil jurisdiction of the receiving state.²⁷ Legal scholars began criticizing the the-

20. See, e.g., E. ADAIR, *THE EXTRATERRITORIALITY OF AMBASSADORS IN THE SIXTEENTH AND SEVENTEENTH CENTURIES* (1929) (setting forth theoretical justifications for various diplomatic immunities); H. GROTIUS, *RIGHTS OF WAR AND PEACE* 210-16 (W. Whewell trans. 1853) (discussing need and theoretical justifications for diplomatic immunity); M. OGDON, *JURIDICAL BASES OF DIPLOMATIC IMMUNITY* 3 (1936) (general discussion of theoretical bases of diplomatic immunity); Hurst, *Diplomatic Immunities—Modern Developments*, 10 BRIT. Y.B. INT'L L. 1 (1929) (discussing development of theories that justify diplomatic immunity).

21. "Exterritoriality" should not be confused with "extraterritoriality," which is the application of laws to acts occurring outside the geographical boundaries of the enacting state's jurisdiction. See BLACK'S LAW DICTIONARY 528 (5th ed. 1979). Until recently, scholars often used these terms interchangeably and confused the distinction between the two concepts. See also M. OGDON, *supra* note 20, at 4; see, e.g., E. ADAIR, *supra* note 20 (using word "extraterritoriality" in discussing theory of extritoriality).

22. "Representative character," was often confused with the theory of extritoriality. See M. OGDON, *supra* note 20, at 78, 106-07. It has, however, been recognized as a separate and independent theory. See *id.* at 109; H. REIFF, *DIPLOMATIC AND CONSULAR PRIVILEGES, IMMUNITIES, AND PRACTICE* 25 (1954).

23. See H. REIFF, *supra* note 22, at 24-27 (discussing the three theories used to justify diplomatic immunities); see also Garretson, *The Immunities of Representatives of Foreign States*, 41 N.Y.U. L. REV. 67, 70 (1966) (discussing theories in context of Vienna Convention); Note, *Insuring Against Abuse of Diplomatic Immunity*, 38 STAN. L. REV. 1517, 1520-21 (1986) (generally discussing three theories used to justify diplomatic immunities).

24. See E. ADAIR, *supra* note 20, at 9; Young, *The Development of the Law of Diplomatic Relations*, 40 BRIT. Y.B. INT'L L. 141, 152 (1964).

25. The "suite" included the diplomat's family, servants, administrative personnel, diplomat's residence, personal property, and the embassy premises. No distinction between these categories had been made when extritoriality was the dominant theory by which to justify diplomatic privileges and immunities. See E. ADAIR, *supra* note 20, at 115-17.

26. See M. OGDON, *supra* note 20, at 78; H. REIFF, *supra* note 22, at 24; see also Hurst, *supra* note 20, at 4.

27. See M. OGDON, *supra* note 20, at 78. Grotius succinctly expressed extritoriality as follows:

ory of extritoriality at the end of the nineteenth century, asserting that a literal application of extritoriality created situations undesirable to the receiving state and led to absurd results if carried to the extreme.²⁸ Therefore, present-day efforts to justify privileges and immunities have not relied on the theory of extritoriality.²⁹

The representative-character theory bases diplomatic immunity on the characterization of diplomatic personnel as the monarch's "alter ego"³⁰ or, more accurately, identifies the sending state with the organs through which it functions internationally.³¹ The consent of a state to receive a diplomat implies consent that the diplomat will receive the privileges that are essential to the dignity of his sovereign.³² The representative-character theory, however, has been criticized as unsatis-

[T]he common rule, that he who is in a foreign territory is subject to that territory, does, by the common consent of nations, suffer an exception in the case of ambassadors; they being, by a certain fiction, in the place of those who send them . . . and thus, are not bound by the Civil Law of the People among whom they live.

GROTIUS, *supra* note 20, at 213.

28. See, e.g., M. OGDON, *supra* note 20, at 84 (setting forth opinions of Dr. Ernst Beling and Franz von Liszt that extritoriality does not exempt ambassadors from all obligations of local law); Lyons, *Immunities Other than Jurisdictional of the Property of Diplomatic Envoys*, 30 BRIT. Y.B. INT'L L. 116, 150 (1953) (diplomatic immunity should not be based on principle that embassy or mission is "foreign soil," but on principle of diplomatic functions). By the mid-eighteenth century, the problems with a literal application of the extritoriality theory became apparent when local common criminals would flee to diplomatic missions or claim attachment to a diplomatic suite, thereby eluding prosecution. See Young, *supra* note 24, at 156.

29. See H. REIFF, *supra* note 22, at 25; Preuss, *Capacity for Legation and the Theoretical Basis of Diplomatic Immunities*, 10 N.Y.U. L.Q. REV. 170, 178 (1932).

30. *Bergman v. DeSieyes*, 71 F. Supp. 334, 341 (S.D.N.Y. 1946), *aff'd*, 170 F.2d 360 (2d Cir. 1948). Montesquieu assimilated the ambassador's independence to that of his sovereign by linking the person of the ambassador with the eighteenth-century concept of an absolutely independent and sovereign state. See M. OGDON, *supra* note 20, at 107.

31. See H. REIFF, *supra* note 22, at 25; Preuss, *supra* note 29, at 178.

32. See *Schooner Exchange v. McFaddon*, 11 U.S. 74, 87, 7 Cranch 116, 138 (1812). In writing the opinion in this case, Chief Justice Marshall stated that

[t]he assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations, that, without such exemption, every sovereign would hazard his own dignity, by employing a public minister abroad. . . . [A] consent to receive [a public minister] implies a consent that he shall possess . . . privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

Id.

factory in several respects. First, the principles that the "King can do no wrong" or that "the Sovereign is above the law since he creates the law" have been criticized as too broad and too fictitious for conducting international relations.³³ Second, the representative-character theory is too narrow, in that it does not offer a basis for granting immunity for unofficial acts.³⁴ Third, the representative-character theory has been criticized as incompatible with the modern conception of the nation-state where sovereignty is derived from the people governed, not from the person of a monarch.³⁵

The third theory that has developed to justify diplomatic immunity is the functional-necessity theory. The term "functional necessity" was first mentioned in scholarly writings in the late nineteenth century and early twentieth century, when the functions of the diplomat were increasing in importance.³⁶ The theory recognizes immunities only to the degree necessary to permit the efficient functioning of the diplomatic process.³⁷ Accordingly, functional necessity does not require immunity for acts that are not essential to the diplomatic process.³⁸ The

33. See H. REIFF, *supra* note 22, at 25-26.

34. See *id.* at 26. As Professor Preuss puts it, "[the representative-character theory] explains only those exemptions concerning official acts which diplomatic agents enjoy in common with other state officials, such as consuls. It fails, moreover, in that it leaves unexplained those immunities which they possess with reference to acts performed in a private capacity." Preuss, *supra* note 29, at 180 (footnote omitted).

35. See M. OGDON, *supra* note 20, at 144-50. For example, although article II, section 2, paragraph 2 of the U.S. Constitution authorizes the sending of ambassadors, this privilege was not exercised until the late nineteenth century. *Id.* at 144. The view was that ambassadors, as personal representatives of monarchs, did not adequately represent the social democracy of the United States. *Id.*

36. See, e.g., Hurst, *supra* note 20, at 6. Articulation of the underpinnings of functional necessity dates back to at least the writings of Grotius in the seventeenth century. See GROTIUS, *supra* note 20, at 212. In discussing the opposing interests in granting immunity to the person of the ambassador, Grotius states that "on the one side stands the utility of punishment against grave delinquents, [even if they be ambassadors,] and on the other, the utility of ambassadors, the sending of whom is facilitated by their having all possible security." *Id.* (brackets in original).

In the early part of the twentieth century, Sir Cecil B. Hurst stated that [t]he extraterritoriality or non-subjection to the local jurisdiction enjoyed by a member of a foreign diplomatic mission is . . . due, not to the fact that he is engaged on the business of a foreign Government, but to the fact that he is part of the machine for maintaining relations between the two Governments.

Hurst, *supra* note 20, at 4.

37. See Preuss, *supra* note 29, at 181.

38. See Hurst, *supra* note 20, at 13.

functional-necessity theory, however, is broad in its application, in that it justifies immunities not by whether a particular act is public or private, but by whether exercising jurisdiction over the diplomat would interfere with the performance of his "official functions."³⁹

3. Theoretical Bases of the Vienna Convention

The theoretical bases of the Vienna Convention are expressed in the preamble.⁴⁰ The Vienna Conference, in drafting the preamble, looked to the intent that the Commission expressed in its commentary.⁴¹

The Commission, in its commentary on the draft articles, recognized that the extritoriality and representative-character theories had influenced the development of diplomatic privileges and immunities.⁴² Moreover, the Commission recognized the emergence of the functional-necessity theory as a justification for privileges and immunities necessary to enable the mission to perform its functions.⁴³ In the commentary, however, the Commission expressed its intent to rely solely on the representative-character and functional-necessity theories.⁴⁴

By using this commentary as the basis for writing the preamble, the Conference incorporated the representative-character and functional-necessity theories as the bases for the privileges and immunities afforded by the Convention.⁴⁵ The pre-

[T]he purpose for which these immunities are recognized is to enable the members of a foreign mission to act effectively as the representatives of their own sovereign in the maintenance of relations with the sovereign to whom they are accredited, not to enable them to fulfil tasks lying outside that primary function.

Id.

39. See M. OGDON, *supra* note 20, at 180.

40. Vienna Convention, *supra* note 6, preamble, 23 U.S.T. at 3230, T.I.A.S. No. 7502, at 4, 500 U.N.T.S. at 96. The preamble provides in pertinent part that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States . . ." *Id.*

41. See *United Nations Conference*, *supra* note 9, at 227.

42. *Report of the Commission's Tenth Session*, *supra* note 16, at 16-17.

43. *Id.* at 17.

44. See *id.*; Garretson, *supra* note 23, at 70.

45. See *United Nations Conference*, *supra* note 9, at 227. Although many delegates to the Vienna Conference wanted the preamble to express the functional-necessity theory as the unequivocal justification for diplomatic privileges and immunities, Mr.

amble to the Vienna Convention states that the purpose of the privileges and immunities is to provide for the efficient performance of diplomatic functions by the missions in their representative capacity.⁴⁶

B. *The Diplomatic Bag*

The diplomatic bag is the means by which nations and their missions abroad convey official documents and articles.⁴⁷ Most diplomatic bags are large canvas sacks⁴⁸ bearing external marks of their character.⁴⁹ The bags are intended for the safe and confidential conveyance of articles for use by a mission,⁵⁰ such as classified documents, vital communiqués, encoding and decoding equipment, passports, and government seals.⁵¹

Before the Vienna Convention, the accepted international custom⁵² was that a receiving state could challenge the legality

Tunkin of the U.S.S.R. reminded the Convention that such was not the intent of the Commission. *See id.*; *see also* Garretson, *supra* note 23, at 70.

46. Vienna Convention, *supra* note 6, preamble, 23 U.S.T. at 3230, T.I.A.S. No. 7502, at 4, 500 U.N.T.S. at 96; *see supra* note 40.

47. *See* C. ASHMAN & P. TRECOTT, *supra* note 2, at 190. While the British refer to it as the diplomatic bag, it is known as the diplomatic pouch in the United States and as *la valise diplomatique* in France. *Id.*

48. *See id.* The size or weight of a diplomatic bag is not limited. *Id.* at 219. Currently, a bag cannot be rejected for size or weight alone. *Id.* However, the Soviet Union did, in one instance, cross the line of what can and cannot be considered a "diplomatic bag." *See infra* notes 78-80 and accompanying text.

49. C. ASHMAN & P. TRECOTT, *supra* note 2, at 190. There is no requirement that the identifying marks on the bag be the official seal of the mission or sending state, but some countries require the official seal as a matter of administration. *See* E. DENZA, *supra* note 5, at 128.

50. C. ASHMAN & P. TRECOTT, *supra* note 2, at 190.

51. *Id.*

52. International custom is a procedure for the creation of norms of general international law. *See* H.W.A. THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION* 46 (1972); Kunz, *The Nature of Customary International Law*, 47 *AM. J. INT'L L.* 662, 665 (1953). Before custom creates valid norms of general international law, two conditions must be fulfilled. *See* Kunz, *supra*. The first condition is "usage," which requires a continuous and repeated practice within the domain of international relations. *Id.* at 666. The practice need not be universal or unanimous, but "general"; however, a mere majority of states is not enough. *Id.* The second condition is "*opinio juris*," which requires that the practice have been applied with the conviction that it is legally binding. *Id.* at 667; *see* H.W.A. THIRLWAY, *supra*, at 47. In addition, this conviction must not have been challenged by other states. *See* Kunz, *supra*, at 667.

To determine whether the two conditions of the custom procedure have been fulfilled, evidence can be taken from diplomatic correspondence, municipal laws, court decisions, treaties, negotiations, international decisions, the practice of international organizations, etc. *Id.*

of the contents in cases where it had grounds for suspecting abuse of the bag.⁵³ The sending state might then have the bag returned or allow it to be examined by the authorities of the receiving state in the presence of a member of its own mission.⁵⁴ The bag could, thus, be stopped and returned but could not be examined without the permission of the sending state.⁵⁵

Paragraphs 3 and 4 of article 27 of the Vienna Convention provide for the present status of the diplomatic bag.⁵⁶ Under paragraph 3, the diplomatic bag may not be "opened or detained."⁵⁷ Paragraph 4 provides that the diplomatic bag may be used for the transport of only official diplomatic documents or articles.⁵⁸

In drafting these paragraphs, the delegates to the Commission and the Conference attempted to balance the opposing interests in, on the one hand, protection for diplomatic communications and, on the other hand, safeguards against possible abuse of the diplomatic bag.⁵⁹ For example, during

53. See E. DENZA, *supra* note 5, at 125.

54. See *id.* at 125-26.

55. See *id.*

56. See Vienna Convention, *supra* note 6, art. 27(3)-(4), 23 U.S.T. at 3239, T.I.A.S. No. 7502, at 13, 500 U.N.T.S. at 110.

57. *Id.* art. 27(3), 23 U.S.T. at 3239, T.I.A.S. No. 7502, at 13, 500 U.N.T.S. at 110. In its entirety, paragraph 3 provides as follows: "The diplomatic bag shall not be opened or detained." *Id.*

58. *Id.* art. 27(4), 23 U.S.T. at 3239, T.I.A.S. No. 7502, at 13, 500 U.N.T.S. at 110. In its entirety, paragraph 4 provides as follows: "The 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." *Id.*

Article 35(3) of the Vienna Convention on Consular Relations provides for the immunity of the consular bag:

The consular bag shall be neither opened nor detained. Nevertheless, if the competent authorities of the receiving State have serious reason to believe that the bag contains something other than [official correspondence and documents or articles intended exclusively for official use], 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.

Vienna Convention on Consular Relations, Apr. 24, 1963, art. 35(3), 21 U.S.T. 77, 99, T.I.A.S. No. 6820, at 23, 596 U.N.T.S. 261, 290. The consular bag serves the same purpose as the diplomatic bag, but protects the confidentiality of conveyances between a state and its consular posts abroad. See Kussbach, *Vienna Convention on Consular Relations (1963)*, in 9 ENCYCLOPEDIA OF PUB. INT'L L. 388, 391 (1986).

59. See *United Nations Conference, supra* note 9, at 155, 161-62, 179; *Summary Records of the 457th Meeting*, [1958] 1 Y.B. INT'L L. COMM'N 138-39, U.N. Doc.

the debate in the Vienna Conference, there were two proposed amendments to the Commission's draft articles that would provide for a method by which the receiving state could reject a bag in case of reasonable suspicion of misuse of the particular bag.⁶⁰ Both amendments, however, were rejected.⁶¹ One argument asserted in opposition to the amendments was that if the diplomatic bag was not provided with absolute inviolability, the value of the bag as a means of free communication for the sending state would be greatly diminished, if not destroyed.⁶²

In addition, the summary records of the debates of the

A/CN.4/SER.A/1958 [hereinafter *Records of the 457th Meeting*]; *Summary Records of the 399th Meeting*, [1957] 1 Y.B. INT'L L. COMM'N 78-83, U.N. Doc. A/CN.4/SER.A/1957 [hereinafter *Records of the 399th Meeting*]; *Summary Records of the 398th Meeting*, [1957] 1 Y.B. INT'L L. COMM'N 78, U.N. Doc. A/CN.4/SER.A/1957 [hereinafter *Records of the 398th Meeting*]; see also E. DENZA, *supra* note 5, at 125.

For the purpose of clarification, it must be noted that during the debates of the ninth session of the Commission, what is now article 27 of the Convention was numbered article 16. See *Records of the 398th Meeting, supra*, at 74. Similarly, during the tenth session of the Commission, article 27 was numbered article 21. See *Records of the 457th Meeting, supra*, at 138. Finally, during the debates in the Vienna Convention, article 27 was numbered article 25. See *United Nations Conference, supra* note 9, at 154.

60. See *Ghana: Amendment to Article 25*, U.N. Doc. A/Conf.20/C.1/L.294 (1961), reprinted in *United Nations Conference on Diplomatic Intercourse and Immunities: Official Records*, at 42, U.N. Doc. A/Conf.20/14/Add.1 (1961) [hereinafter *Official Records*]. Ghana recommended that paragraph 3 of article 27 provide as follows: "In case of reasonable suspicion of misuse of any particular bag, the sending State shall have the right to withdraw such bag unopened." *Id.* The United Arab Republic proposed an amendment, one that it later withdrew and was resubmitted by the United Kingdom, which recommended that paragraph 3 of article 27 read as follows: "The diplomatic bag shall be exempt from inspection. However, if in an exceptional case the receiving State has serious grounds for suspecting that the diplomatic bag contains articles other than those mentioned in paragraph 4, the sending State may be required to withdraw the said bag." See *United Arab Republic: Amendments to Article 25*, U.N. Doc. A/Conf.20/C.1/L.151/Rev.2 (1961), reprinted in *Official Records, supra*, at 22.

61. See *United Nations Conference, supra* note 9, at 180-81. The amendment proposed by Ghana was rejected by 43 votes to 8, with 14 abstentions. *Id.* at 180. The amendment proposed by the United Arab Republic, and later resubmitted by the United Kingdom, was rejected by 37 votes to 22, with 6 abstentions. *Id.* at 180-81.

62. *Id.* at 179. The argument was advanced by Mr. G.I. Tunkin, chairman of the delegation from the U.S.S.R. *Id.* Mr. Tunkin stressed that "[i]f either [inviolability or freedom of transport] was not fulfilled, the value of the diplomatic bag as a means of free communication for the sending State would be greatly diminished, if not destroyed." *Id.* In direct response to the amendment proposed by the United Arab Republic, Mr. Tunkin noted that "[t]he granting of such discretionary power to the receiving State took away the guarantee of freedom of transport for the diplomatic bag and might at any moment be used to block the channel of communication for genuine or invented motives." *Id.*

Commission indicate that various attempts were made to limit the permissible contents of the diplomatic bag before the bag could enjoy inviolability.⁶³ One such proposal would have placed the paragraph providing for the contents of the bag before the provision regarding its inviolability.⁶⁴ The argument in favor of this structure was that defining the permissible contents of the bag before providing for its immunity would make the inviolability of the bag contingent on its contents.⁶⁵ The proposal, however, was withdrawn after the Commission decided that the provisions of the Convention should express the absolute inviolability of the diplomatic bag.⁶⁶ Furthermore, the proposal was rejected because it combined the inviolability provision and the contents provision into one paragraph.⁶⁷ The drafters thought it better that, because the provisions for immunity and for limiting the bag's contents represent two distinct concepts, they should be expressed in two distinct paragraphs.⁶⁸

63. See E. DENZA, *supra* note 5, at 127.

64. This structure had been proposed by A.E.F. Sandström, the Special Rapporteur to the Commission on the subject of diplomatic intercourse and immunities. *Id.* The proposal read as follows: "The diplomatic bag, which may contain only diplomatic documents or articles of a confidential nature intended for official use, shall be furnished with the sender's seal and bear a visible indication of its character. The diplomatic bag may not be opened or detained." *Diplomatic Intercourse and Immunities, Revised Draft Articles Proposed by Special Rapporteur*, at 5, U.N. Doc. A/CN.4/116/Add.1 (1958).

65. See *Records of the 457th Meeting*, *supra* note 59, at 139; see also E. DENZA, *supra* note 5, at 126.

66. See *Records of the 457th Meeting*, *supra* note 59, at 139.

67. *Id.*

68. *Id.* Mr. Ricardo J. Alfaro of Panama reminded the Commission that the proposed paragraph covered the principle of inviolability as well as the obligation not to place improper material in the bag. This amalgamation, he said, violated the rule that each paragraph of an instrument should deal with only one main idea. *Id.* In addition, the Commission had previously agreed that the inviolability of the diplomatic bag was to be stated in unequivocal terms as an obligation on the receiving state and the duty to use the bag only for official purposes as a duty on the sending state. See *Records of the 399th Meeting*, *supra* note 59, at 79-80. The amalgamated form of the two provisions did not distinguish them as separate obligations, as Mr. Tunkin expressed in his statement against the proposal:

It had been agreed that the principle of inviolability was absolute . . . and that in no case was it permissible to open or detain the bags. On the other hand, there was an obligation of the sending State so far as the contents of the bag were concerned, though it was very difficult to ascertain whether that obligation was being carried out.

Records of the 457th Meeting, *supra* note 59, at 139.

The Vienna Convention changed the status of the diplomatic bag as recognized by customary international law.⁶⁹ There is no express provision in the Convention that provides for a course of action in the event of a suspicious bag,⁷⁰ while previous international practice allowed the receiving state to stop a suspicious bag and return it or examine it in the presence of a representative from the sending state.⁷¹ In fact, two proposals to provide for this method of contesting the diplomatic bag were rejected.⁷² Moreover, states have reserved the right to practice customary international law with regard to the diplomatic bag,⁷³ implying that article 27 itself does not pro-

69. See E. DENZA, *supra* note 5, at 125.

70. See Vienna Convention, *supra* note 6, art. 27, 23 U.S.T. at 3239, T.I.A.S. No. 7502, at 13, 500 U.N.T.S. at 108, 110.

71. See *supra* notes 52-55 and accompanying text.

72. See *supra* notes 60-62 and accompanying text.

73. See C. LEWIS, *supra* note 5, at 192. The right of a state to make a reservation to a treaty has been codified in article 19 of the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 19, 155 U.N.T.S. 331, 336-37 [hereinafter Vienna Convention on Treaties]. Article 19 provides:

A state may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) The reservation is prohibited by the treaty;
- (b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Id.

In acceding to the Vienna Convention in 1969, Kuwait stated:

If the State of Kuwait has reason to believe that the diplomatic pouch contains something which may not be sent by pouch under paragraph 4 of article 27 of the Convention, it considers that it has the right to request that the pouch be opened in the presence of the representative of the diplomatic mission (concerned). If this request is refused by the authorities of the sending State, the diplomatic pouch shall be returned to its place of origin.

See *Multilateral Treaties*, *supra* note 19, at 55. Similar reservations were made by Libya (1977), Saudi Arabia (1981), Qatar (1986), and Yemen (1986). See *id.* at 55-57.

In acceding to the Convention in 1971, Bahrain stated that "[w]ith respect to paragraph 3 of article 27, relating to the 'Diplomatic Bag', the Government of the State of Bahrain reserves its right to *open* the diplomatic bag if there are serious grounds for presuming that it contains articles the import or export of which is prohibited by law." *Id.* at 53 (emphasis added). The following states have objected to the reservation as being in clear contravention of the principle of the inviolability of the bag established in article 27: Australia, Belgium, Bulgaria, Canada, the Federal Republic of Germany, Haiti, Hungary, Japan, Mongolia, Netherlands, Poland, Thailand, Ukraine Soviet Socialist Republic, Union of Soviet Socialist Republics, the United Kingdom and the United States. *Id.* at 57-64. See generally E. DENZA, *supra* note 5, at 128.

vide for the same course of action as did the customary rule. Other states reject the possibility of such a reservation for fear that, based on the principle of reciprocity, their bags will be subject to the same treatment abroad.⁷⁴

II. JUSTIFICATIONS FOR NONINTRUSIVE EXAMINATIONS

A. Guns, Bodies, and Drugs: Abuses of the Diplomatic Bag

Because of its protected status under the Vienna Convention, the diplomatic bag has become the ideal container for the international transport of contraband and weaponry.⁷⁵ Several instances stand out as the most notorious uses of the bag.

On April 17, 1984, an unknown assassin fired a machine gun from the Libyan People's Bureau into a crowd of demonstrators in London's St. James's Square, killing a policewoman.⁷⁶ British intelligence officials believe that the rifle linked to the murder was smuggled out of the United Kingdom in a diplomatic bag, thus removing evidence crucial to any possible trial.⁷⁷

74. See THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, COMM. ON INTERNATIONAL LAW, REPORT TO SUBCOMM. ON INTERNATIONAL OPERATIONS OF COMM. ON FOREIGN AFFAIRS OF U.S. HOUSE OF REPRESENTATIVES ON BILL H.R. 3036, REVISION OF DIPLOMATIC PRIVILEGES AND IMMUNITIES ACT, 100th Cong., 1st Sess. 21 n.26 (1988) [hereinafter REPORT TO SUBCOMM. ON INTERNATIONAL OPERATIONS]; Higgins, *supra* note 4, at 648; *Thorny Issue*, *supra* note 1, at col. 3; see also *infra* notes 120-24 and accompanying text. The principle of reciprocity means that if a receiving state reserves the right to stop, return, or open diplomatic bags, that state may expect its bags to receive the same treatment abroad. See Higgins, *supra* note 4, at 648.

75. See C. ASHMAN & P. TRECOTT, *supra* note 2, at 190-223; *Thorny Issue*, *supra* note 1, col. 4.

76. See Higgins, *supra* note 4, at 643. The demonstration had been held to protest Colonel Qaddafi's government. *Id.* Both the Foreign Office in London and the British Ambassador in Tripoli had been warned the day before the incident that if the demonstration went ahead, Libya "would not be responsible for its consequences." *Id.* The officer killed was Woman Police Constable Fletcher, who had been on duty in the square. *Id.*

77. See C. ASHMAN & P. TRECOTT, *supra* note 2, at 157-58. On April 27, 1984, the Bureau was evacuated. See Higgins, *supra* note 4, at 644 (quoting H.C. *Foreign Affairs Comm., First Report, The Abuse of Diplomatic Immunities and Privileges, Report with an Annex; Together with the Proceedings of the Committee; Minutes of Evidence Taken on 20 June and 2 and 18 July in the Last Session of Parliament, and Appendices, First Report*, ¶ 77, (Dec. 12, 1984)). Those leaving were questioned and electronically searched. *Id.* Diplomatic bags that left the Bureau, however, were not searched or scanned. *Id.* The decision not to search the diplomatic bags was generally assumed to be part of the United Kingdom's obligation under the Vienna Convention. See *id.* at 648. The Legal Adviser to the Foreign and Commonwealth office stated that the decision not

The Soviet Union attempted to expand the definition of the diplomatic bag by trying to send a sealed, nine-ton truck into Switzerland, claiming the entire vehicle as a diplomatic bag.⁷⁸ Swiss authorities refused to acknowledge the truck as a diplomatic bag and would not allow the truck to be unloaded.⁷⁹ The truck was sent back to Moscow through Bonn, where, at the Soviet embassy, more than 200 crates were unloaded from the truck and stamped as individual bags.⁸⁰

One of the most notorious attempts to abuse the diplomatic bag occurred shortly after a coup in Nigeria in December of 1983.⁸¹ Umaru Dikko, the minister of transportation under the old regime, fled to London to escape trial under Nigeria's newly-established government.⁸² Dikko was kidnapped from his home in London and was drugged, blindfolded, and bound.⁸³ The kidnappers placed Dikko in a crate and sent it to Stansted Airport in England as "extra cargo" for an aircraft bound for Nigeria, claiming it as a diplomatic bag.⁸⁴ Customs officials at the airport noticed a medicinal smell coming from the crate.⁸⁵ The officials opened the crate after determining that it was not a diplomatic bag (as claimed), because it had no

to search the bags was political, in that Libya, in acceding to the Convention, reserved the right to search diplomatic bags, thus increasing the possibility of reciprocal treatment of bags from the United Kingdom to Libya. *Id.* For a detailed discussion of the St. James's Square incident, see C. ASHMAN & P. TRECOTT, *supra* note 2, at 128-64.

78. See C. ASHMAN & P. TRECOTT, *supra* note 2, at 191.

79. *Id.* at 192. The Vienna Convention does not specify any size or weight limitation for a diplomatic bag, but the Swiss officials considered 450 pounds to be the maximum allowable size. *Id.* at 191-92. The Swiss officials sealed the truck, but allowed it to continue to Geneva. *Id.* In Geneva, the Soviets refused to reveal the contents of the truck, and the Swiss would not unseal it. *Id.* at 192. The stalemate forced the Russians to return the truck to Moscow. *Id.*

80. *Id.* at 192-93. The Germans had refused to accept the truck as a diplomatic bag not because of its size, but because it was a motorized vehicle, capable of its own free movement. *Id.* at 192. The inspection of the truck eventually took place on Soviet embassy property in Bonn. *Id.* After the inspection, the truck was allowed to proceed on its way back to the Soviet Union. *Id.* at 193.

81. *Id.* at 204.

82. *Id.* at 204-05. Dikko was the brother-in-law of deposed Nigerian President Shagari, who had been overthrown in the military coup in December of 1983. *Id.* at 204. Dikko was alleged to have helped lead Nigeria to a condition of near-bankruptcy and was, therefore, on a "most wanted" list as an "economic saboteur." *Id.*

83. *Id.* at 205, 207.

84. *Id.* at 207-09.

85. *Id.* at 208-09.

official seal and was not marked "diplomatic."⁸⁶ If the crate had been properly marked, the officials at the airport could not have opened it without violating the Vienna Convention.⁸⁷

The most wide-spread abuse of the diplomatic bag occurs in drug trafficking.⁸⁸ One incident involved Ludovicus Vastenavondt, chancellor at the Belgian embassy in New Delhi, India.⁸⁹ On May 25, 1985, Vastenavondt arrived at Kennedy Airport in New York carrying a diplomatic bag.⁹⁰ He proceeded to a hotel and gave the bag to a man awaiting him.⁹¹ The bag contained twenty-two pounds of heroin valued in excess of US\$40 million.⁹² Vastenavondt, upon returning to the same hotel the following night to collect his courier fee, was arrested.⁹³ The man to whom Vastenavondt had delivered the heroin turned out to be an agent of the U.S. Drug Enforcement Administration.⁹⁴

The above examples represent the various ways the diplomatic bag has been abused. In addition, diplomats often import goods for personal profit.⁹⁵ U.S. customs officials estimate that, after drugs, art treasures are the single most lucrative illegal import via the diplomatic bag.⁹⁶ In the United

86. *Id.* In addition, paragraph 5 of article 27 provides that a diplomatic courier accompanying a diplomatic bag must have "an official document indicating his status." Vienna Convention, *supra* note 6, art. 27(5), 23 U.S.T. at 3239, T.I.A.S. No. 7502, at 13, 500 U.N.T.S. at 110. The crate that contained Mr. Dikko was accompanied by an attaché, not a courier, and the attaché could produce no credentials to prove that the crate was a diplomatic bag. C. ASHMAN & P. TRESKOTT, *supra* note 2, at 209. Naturally, Dikko was grateful for his rescue, later saying that if his kidnappers had been successful, he would have faced "torture, a show trial, and possibly a firing squad." *Id.* at 211.

87. See Vienna Convention, *supra* note 6, art. 27, 23 U.S.T. at 3239, T.I.A.S. No. 7502, at 13, 500 U.N.T.S. at 108, 110.

88. C. ASHMAN & P. TRESKOTT, *supra* note 2, at 199.

89. *Id.* at 165.

90. *Id.*

91. *Id.*

92. *Id.* at 166.

93. *Id.* After his arrest, Vastenavondt attempted to claim diplomatic immunity. *Id.* However, he was not entitled to protection on U.S. soil because he was not part of an accredited diplomatic mission to the United States. *Id.*

94. *Id.* U.S. Attorney Raymond J. Dearie, who prosecuted Vastenavondt, stated in a press conference that "[t]he world should know that there is a kind of certified way of entry for illicit drugs through the violation of diplomatic privileges If it's a diplomatic pouch, it cannot be touched." *Id.* at 167.

95. C. ASHMAN & P. TRESKOTT, *supra* note 2, at 193.

96. *Id.* at 199.

Kingdom, there have been several cases of illegal possession by diplomats of firearms that were imported in diplomatic bags.⁹⁷ Because of the nature of the confidentiality of the diplomatic bag, however, it is difficult, if not impossible, to determine the extent to which diplomatic bags are used for illegal purposes.⁹⁸

*B. Proposals and Legal Rationale in Support of
Nonintrusive Examinations*

Instances of international smuggling and other crimes have provoked proposals to remedy the abuses of the privileged bag. Among the most frequently proposed remedies are x-ray machines and dogs trained to detect narcotics.⁹⁹ Legislators in the United States have introduced legislation to restrict the privilege afforded the diplomatic bag.¹⁰⁰ For example, a bill currently sponsored by Congressman Stephen J. Solarz in the U.S. House of Representatives would direct the President to adopt a measure to prevent misuse of the diplomatic bag, with special consideration toward curbing terrorism and drug trafficking.¹⁰¹ Such a measure would presumably allow for

97. *Id.* at 215.

98. *Id.* at 199.

99. *Thorny Issue*, *supra* note 1, col. 6.

100. *Id.* col. 3.

101. *See* H.R. 3036, 100th Cong., 1st Sess. (1987). The proposed legislation is part of a bill sponsored by Representative Solarz that would hold diplomats and their governments more accountable for their activities in the United States. *See id.*; *Thorny Issue*, *supra* note 1. Section 10 of the bill provides:

The President shall—

(1) review the treatment accorded to diplomatic pouches under the Vienna Convention on Diplomatic Relations . . . in order to preclude the use of diplomatic pouches for the transportation of unauthorized materials, particularly those used to foster terrorism; and

(2) seek in every appropriate forum the adoption of measures which will ensure that diplomatic pouches are not used to smuggle illicit narcotics, explosives, weapons, and any material used to foster terrorism.

H.R. 3036, 100th Cong., 1st Sess., § 10 (1987).

Section 10 of the bill is new subject-matter for U.S. legislation. Other sections of the bill would amend current legislation as follows: § 2 (Compensation for Victims of Crimes Committed by Diplomats) would amend § 1403(b) of the Victims of Crime Act, 42 U.S.C. § 10602(b) (1982 & Supp. IV 1986); § 3 (Crimes Committed by Diplomats) would amend § 204 of the Foreign Missions Act, 22 U.S.C. § 4304 (1982 & Supp. IV 1986); § 4 (Registration and Departure Procedures for Individuals with Diplomatic Immunity) would amend § 210 of the State Department Basic Authorities Act, 22 U.S.C. § 4310 (1982 & Supp. IV 1986); § 5 (Waiver of Diplomatic Immunity

nonintrusive examinations, such as electronic scanning and examination by dogs, of diplomatic bags entering the United States.¹⁰²

The legal adviser to the United Kingdom's Foreign and Commonwealth Office has expressed his government's view that remote examinations by equipment or dogs would be lawful under the Convention.¹⁰³ This conclusion is drawn from the fact that article 27 requires only that the bag not be "opened or detained" and is, thus, not completely inviolable.¹⁰⁴ The United Kingdom, however, has not implemented such measures to attempt to curb abuses of the diplomatic bag.¹⁰⁵ In fact, in mid-1984, when the government of Kuwait started scanning bags, the United Kingdom led the international protest against the practice.¹⁰⁶

In 1977, the International Law Commission included on the agenda of its twenty-ninth session consideration of proposals on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.¹⁰⁷ During the de-

when Charged with a Serious Crime) would amend § 212(a) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a) (1982 & Supp. IV 1986); and § 8 (Minimum Insurance Coverage) and § 9 (Liability Insurance to be Carried by Diplomatic Missions) would amend §§ 6(b) and 6 of the Diplomatic Relations Act, 22 U.S.C. §§ 254c(b), 254(c) (1982).

Congressman Solarz plans to reintroduce the bill in the 101st session of Congress. Telephone interview with the Office of the International Operations Subcommittee of the House Foreign Affairs Committee (Feb. 21, 1989).

102. See *Thorny Issue*, *supra* note 1, cols. 3, 6. The position of the U.S. Department of State is that any provision that would allow scanning of the bag risks compromising the confidentiality of sensitive communications equipment and other contents of the bag. See U.S. DEP'T OF STATE REPORT, *supra* note 5, at 55. As such, the inviolability of the bag must be maintained. *Id.*

103. See C. LEWIS, *supra* note 5, at 192; Higgins, *supra* note 4, at 647.

104. See C. LEWIS, *supra* note 5, at 192; Higgins, *supra* note 4, at 647.

105. See Higgins, *supra* note 4, at 647; see also Cameron, *supra* note 5, at 617.

106. See C. ASHMAN & P. TRESPOTT, *supra* note 2, at 217-18. Kuwait's implementation of scanning was provoked by a series of bombings blamed on Iranian extremists. *Id.*

107. See *Summary Records of the 1415th Meeting*, [1977] 1 Y.B. INT'L L. COMM'N 3, U.N. Doc. A/CN.4/SER.A/1977; see also THE WORK OF THE INTERNATIONAL LAW COMMISSION at 106, U.N. Sales No. E.88.V.1 (1988) [hereinafter WORK OF THE COMMISSION]. In 1975, the General Assembly expressed the need for strict implementation by states of the Vienna Convention. G.A. Res. 3501, 30 U.N. GAOR Supp. (No. 34) at 154, U.N. Doc. A/10034 (1975). In 1976, the General Assembly, still concerned by continuing instances of violations of the rules of diplomatic law, requested the Commission to begin work on a protocol concerning the status of the diplomatic

bate on the status of the diplomatic bag,¹⁰⁸ several members of the Commission suggested that the implementation of electronic devices to examine diplomatic bags would provide the best compromise between protecting the confidentiality of diplomatic communications and curbing abuses of the bag.¹⁰⁹ The final draft of the article relating to the status of the diplomatic bag, however, indicates that a majority of the Commission delegates did not favor the electronic examination of the bag.¹¹⁰

Proponents of nonintrusive examinations argue that paragraphs 3 and 4 of article 27 of the Vienna Convention do not provide the diplomatic bag with absolute inviolability.¹¹¹ Paragraph 3 of article 27, if construed literally, would only pre-

courier and bag. G.A. Res. 31/76, 31 U.N. GAOR Supp. (No. 39) at 181, U.N. Doc. A/31/39 (1976).

108. See *Summary Records of the Meetings of the 38th Session*, [1986] 1 Y.B. INT'L L. COMM'N 36-56, U.N. Doc. A/CN.4/SER.A/1986; *Summary Records of the Meetings of the 37th Session*, [1985] 1 Y.B. INT'L L. COMM'N 164-208, 222-27, U.N. Doc. A/CN.4/SER.A/1985; *Summary Records of the Meetings of the 36th Session*, [1984] 1 Y.B. INT'L L. COMM'N 177-98, U.N. Doc. A/CN.4/SER.A/1984.

109. See *Summary Records of the 1949th Meeting*, [1986] 1 Y.B. INT'L L. COMM'N 42, U.N. Doc. A/CN.4/SER.A/1986. Mr. Chafic Malik expressed the opinion that "[s]ince electronic and mechanical devices were proving quite effective in preventing acts of sabotage against civil aircraft, examination of the diplomatic bag . . . by such means should be permitted. *Id.*

110. *Report of the Commission's Thirty-Eighth Session*, *supra* note 7, at 68. The final draft article submitted by the Commission to the United Nations member states for comments and observations provided for the protection of the diplomatic bag as follows: "The diplomatic bag 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]." *Id.* The bracketed portions of the article reflect the several areas of disagreement that the Commission could not resolve. *Id.*

Several members of the Commission believed that the diplomatic bag should not be electronically scanned. Mr. El Rashed Mohamed Ashmed of the Sudan argued that scanning constituted a form of inspection and, thus, should be carried out only with the consent of the sending state and in the presence of its authorized agent. See *Summary Records of the 1907th Meeting*, [1985] 1 Y.B. INT'L L. COMM'N 186, U.N. Doc. A/CN.4/SER.A/1985. Messrs. Lacleta Muñoz of Spain and Barboza of Argentina both expressed the fear that, in light of the rapid growth of technology, electronic scanning could soon be used to read the documents contained in diplomatic bags. *Id.* at 180, 183. Finally, Mr. Balanda of Zaire expressed the view that the use of electronic scanning, if authorized, would place developing countries at a disadvantage, because they would often be unable to afford such devices to use by way of reciprocity. *Id.* at 186.

111. See E. DENZA, *supra* note 5, at 4; C. LEWIS, *supra* note 5, at 192. Black's Law Dictionary defines "inviolability" as "the attribute of being secured against violation," BLACK'S LAW DICTIONARY, *supra* note 21, at 741, and "absolute" as "complete; perfect; final; without any condition or incumbrance." *Id.* at 9.

clude the opening or detaining of a diplomatic bag,¹¹² but would seemingly allow for examinations that do not physically penetrate the bag itself.¹¹³ In addition, paragraph 4 of article 27 limits the contents of the diplomatic bag to "diplomatic documents or articles intended for official use."¹¹⁴ If the bag is used for nondiplomatic purposes, it is no longer protected by the immunity provided in paragraph 3 and can, at the very least, be nonintrusively examined or inspected.¹¹⁵

Proponents of nonintrusive examinations also find support for remedial proposals in the theories and principles that serve as the foundation for the entire Convention. One argument is that because one of the theoretical bases of the Convention is the functional-necessity theory,¹¹⁶ any use of the diplomatic bag for nondiplomatic purposes waives the privileges and immunities that are afforded by the Convention.¹¹⁷ In such a situation, the bag would no longer be inviolable and could be subject to inspection.¹¹⁸ In addition, from a policy point of view, those in favor of permitting nonintrusive inspections of the diplomatic bag argue that, in light of abuses of the diplomatic bag, the interest in providing for confidential diplomatic communications should be subservient to the domestic interest a receiving state may have in preventing terrorism, smuggling, and other international crimes.¹¹⁹

Although the abuse of the diplomatic bag is a widely recognized problem, states have not implemented remedial measures or retained customary international law, because the Vienna Convention is based on the principle of reciprocity.¹²⁰ In

112. See Vienna Convention, *supra* note 6, art. 27(3); 23 U.S.T. at 3239, T.I.A.S. No. 7502, at 13, 500 U.N.T.S. at 110.

113. See *Summary Records of the 1906th Meeting*, [1985] 1 Y.B. INT'L. L. COMM'N 178-79, U.N. Doc. A/CN.4/SER.A/1985 [hereinafter *Records of the 1906th Meeting*]; see also Higgins, *supra* note 4, at 647.

114. See Vienna Convention, *supra* note 6, art. 27(4), 23 U.S.T. at 3239, T.I.A.S. No. 7502, at 13, 500 U.N.T.S. at 110.

115. See Goldberg, *supra* note 5, at 4.

116. See *supra* notes 36-39, 45 and accompanying text.

117. See Goldberg, *supra* note 5, at 4; Higgins, *supra* note 4, at 647.

118. See Higgins, *supra* note 4, at 647.

119. See *Records of the 1906th Meeting*, *supra* note 113, at 180-81.

120. See, e.g., Higgins, *supra* note 4, at 648 (United Kingdom's decision not to search diplomatic bags of Libyans partly because of fear of reciprocity); DEP'T OF STATE REPORT, *supra* note 5, at 54 (U.S. Department of State opposes remedial measures because of United States's interests as a *sender* of diplomatic bags); see also Thorny

other words, if state A subjects incoming diplomatic bags from state B to nonintrusive examinations, state A may expect its diplomatic bags to receive the same treatment in state B, a very disagreeable result for states with a large diplomatic network. For example, the proposed bill in the U.S. House of Representatives¹²¹ is opposed by the State Department because bags of the United States would be subject abroad to any remedial measures implemented by the United States.¹²² In addition, although the government of the United Kingdom takes the position that scanning or other examinations by equipment or dogs do not contravene the Vienna Convention,¹²³ fear of adverse reciprocal consequences has prevented the implementation of remedial measures by the United Kingdom.¹²⁴

III. *THE PROPRIETY OF NONINTRUSIVE EXAMINATIONS UNDER THE VIENNA CONVENTION*

The propriety of nonintrusive examinations or inspections of the diplomatic bag necessarily depends on the construction of the Vienna Convention, in general, and of article 27, in particular.¹²⁵ The theories upon which the Convention's privi-

Issue, supra note 1. The concept of reciprocity is provided for in article 47(2)(a). Article 47 states in its entirety as follows:

1. In the application of the provisions of the present Convention, the receiving State shall not discriminate as between States.
2. However, discrimination shall not be regarded as taking place:
 - (a) where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State;
 - (b) where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.

Vienna Convention, *supra* note 6, art. 47, 23 U.S.T. at 3248-49, T.I.A.S. No. 7502, at 22-23, 500 U.N.T.S. at 122, 124; *see also supra* note 74 and accompanying text.

121. *See supra* notes 100-02 and accompanying text.

122. *See* DEP'T OF STATE REPORT, *supra* note 5, at 54; *Thorny Issue, supra* note 1. The United States is the largest sender of diplomatic bags. *Id.* From April to December of 1987, the State Department's Bureau of Diplomatic Security, which oversees the flow of U.S. diplomatic bags, received 52,914 from missions abroad and dispatched 42,446. *Id.*

123. *See supra* note 103 and accompanying text.

124. *See supra* notes 105-06 and accompanying text.

125. *See* E.S. YAMBRUSIC, *TREATY INTERPRETATION* 10 (1987). The scholarly writings on the subject of treaty interpretation can be separated into the three categories of "clear sense," the intention of parties, and the concept of contextuality. *Id.* at 9.

The notion of "clear sense" expresses the view that words in a legal instrument

leges and immunities are based¹²⁶ support the argument that the diplomatic bag, if used illicitly, may be subject to nonintrusive examinations. The preamble to the Vienna Convention conveys the intent of the Commission and the Conference delegates to base the privileges and immunities provided by the Convention on both the functional-necessity and representative-character theories.¹²⁷ If a diplomatic bag is used to convey illegal articles, the bag is theoretically inviolable. The functional-necessity theory justifies an immunity only if such immunity is necessary for the efficient functioning of the diplomatic

such as a treaty have meaning in themselves. *Id.* If the meaning is logical and rational, there is a legal obligation to abide by that meaning. *Id.* This principle has been criticized for ignoring the need for interpretation in the application of international agreements. *Id.* at 10.

The "intention of the parties" school of thought stresses the probative character of interpretation. *Id.* at 12. The two-tier test that is applied first requires that the intentions of the parties be ascertained and, then, that the text of the treaty be interpreted in light of those intentions. *Id.* This method has been criticized as "fictional" and artificial. *Id.*

The weight of authority has supported the concept of contextuality. *Id.* at 10. This view suggests that a text constitutes the authentic interpretation by establishing the "ordinary" and "natural" meaning of words in the context in which they are used. *Id.* Nevertheless, there is still controversy depending on who is doing the interpreting, as well as on the degree of emphasis and the general understanding of the context. *Id.*

Article 31 of the Vienna Convention on Treaties provides for the general rule of treaty interpretation:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
- (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

- (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Vienna Convention on Treaties, *supra* note 73, art. 31, 1155 U.N.T.S. at 340.

126. *See supra* notes 40-46 and accompanying text.

127. *Id.*

process.¹²⁸ In addition, the representative-character theory identifies the diplomatic acts as acts of the sending state¹²⁹ and, thus, does not offer a basis for granting immunity for unofficial acts.¹³⁰

Interpreting article 27 to permit nonintrusive examinations because the above-stated theories do not provide for immunity in the event of a misused bag, however, ignores a practical problem. In order to determine if a bag is being used illegally and, thus, is arguably not inviolable, the bag must first be inspected or examined.¹³¹ This would result in the examination of bags that are being used for official purposes and, as such, are inviolable. An analysis of the debates of paragraphs 3 and 4 of article 27 indicates that the drafters of the Convention did not intend the inviolability of the diplomatic bag to be contingent on its contents, thus, rendering any means by which to determine the contents contrary to the bag's inviolability.¹³²

Several attempts were made to limit the permissible contents of the bag while the members of the Commission were discussing the immunity to be afforded the diplomatic bag.¹³³ For example, it was proposed that the paragraph providing for the contents of the bag be placed before the provision regarding its inviolability.¹³⁴ The majority of the delegates rejected the proposal, fearing that this structure would imply that the inviolability of the bag depended on the observance of the contents-limitation provision.¹³⁵ The rejection of this proposal conveys that a majority of the Commission intended the diplomatic bag to be absolutely inviolable, even in the face of possible abuse. A nonintrusive examination that could reveal the nature of the contents of a bag would violate the status of the bag as intended by the drafters.

Furthermore, the above proposal consolidated the inviolability provision and the content limitation provision into one

128. See *supra* note 37 and accompanying text.

129. See *supra* note 31 and accompanying text.

130. See *supra* note 34 and accompanying text.

131. See Higgins, *supra* note 4, at 647.

132. See *Records of the 457th Meeting*, *supra* note 59, at 139; Cameron, *supra* note 5, at 617.

133. See E. DENZA, *supra* note 5, at 127.

134. See *supra* note 64 and accompanying text.

135. See *Records of the 457th Mtg.*, *supra* note 59, at 139.

paragraph.¹³⁶ The Commission adopted the structure of the text with these two provisions as separate paragraphs instead of the combined form, following the Commission's general rule that distinct issues should be placed in separate paragraphs.¹³⁷ Thus, the delegates intended the inviolability paragraph to be a duty on the receiving state and the content limitations paragraph to be a duty on the sending state.¹³⁸ The duty of the receiving state to abide by the principle of inviolability is not dependent on whether the sending state abides by the restriction placed on the permissible contents of the diplomatic bag.¹³⁹ Nonintrusive examinations would violate the drafters' intent to keep the principle of the inviolability of the bag separate from the nature of the contents of the bag.

Finally, the Vienna Convention should be interpreted within the context of the overall policy that the drafters of the Convention desired paragraphs 3 and 4 of article 27 to convey. In the summary records of the debate of article 27, many delegates discuss policy concerns that the abuses provoked by the inviolable status of the diplomatic bag must be curbed.¹⁴⁰ The Commission did not ignore these concerns. In the Commentary to the draft articles that it presented to the United Nations, the Commission recognized the fact that the immunity of the diplomatic bag was often abused but reminded the signatories that the bag was meant to protect the confidentiality of diplomatic conveyances.¹⁴¹ Nevertheless, article 27, although drafted with complete awareness of the abuses associated with

136. *See id.*

137. *See supra* note 68 and accompanying text.

138. *Id.*

139. *See Cameron, supra* note 5, at 617; *see also* E. DENZA, *supra* note 5, at 126-27.

140. *See supra* notes 59-68 and accompanying text.

141. *See Report of the Commission's Tenth Session, supra* note 16, at 19. The Commentary states that

[t]he Commission has noted that the diplomatic bag has on occasion been opened with the permission of the Ministry for Foreign Affairs of the receiving State, and in the presence of a representative of the mission concerned. While recognizing that States have been led to take such measures in exceptional cases where there were serious grounds for suspecting that the diplomatic bag was being used in a manner contrary to paragraph 4 of the article, and with detriment to the interests of the receiving State, the Commission wishes nevertheless to emphasize the overriding importance which it attaches to the observance of the principle of the inviolability of the diplomatic bag.

Id.

the diplomatic bag, in no way qualifies or limits the inviolability of the bag.¹⁴² In fact, article 27 expands the immunity of the diplomatic bag as recognized by customary international law.¹⁴³ The drafters intended article 27 to cloak the diplomatic bag with absolute inviolability, even in the face of possible abuse. Nonintrusive examinations violate this intent.

Although the Vienna Convention precludes nonintrusive examinations, the reality of the abuses of the diplomatic bag cannot be ignored. Because the bag has become a means by which to accomplish illegal and often dangerous ends, the regime controlling the inviolability of the bag warrants reconsideration. There is no doubt that the confidentiality of diplomatic conveyances must be protected. However, in light of the severity and multitude of abuses, receiving states should have some way to at least challenge a bag about which suspicions have arisen.

The International Law Commission has provisionally adopted draft articles concerning the status of the diplomatic bag.¹⁴⁴ Paragraph 1 of article 28 of the draft articles, if adopted by the United Nations as written, would expressly prohibit examinations of the diplomatic bag through electronic or other technical devices.¹⁴⁵ Paragraph 2 of article 28 would allow states to electronically examine consular bags that the sending state seriously believes to contain illicit articles. In addition, paragraph 2 provides that if such examination does not satisfy the receiving state, the consular bag may be opened in the presence of a member of the sending state or may be returned to the sending state.¹⁴⁶

142. Vienna Convention, *supra* note 6, art. 27, 23 U.S.T. at 3239, T.I.A.S. No. 7502, at 13, 500 U.N.T.S. at 108, 110.

143. *See supra* notes 53-55, 69-72.

144. *See WORK OF THE COMMISSION, supra* note 107, at 109; *see also supra* notes 107-10 and accompanying text.

145. *See supra* note 110 and accompanying text.

146. *See Report of the Commission's Thirty-Eighth Session, supra* note 7, at 68. Paragraph 2 of article 28 provides as follows:

Nevertheless, if the competent authorities of the receiving [or the transit] State have serious reasons to believe that the [consular] bag contains something other than the correspondence, documents or articles referred to in article 25, they may request [that the bag be subjected to examination through electronic or other technical devices. If such examination does not satisfy the competent authorities of the receiving [or the transit] State, they may further request] that the bag be opened in their presence by an author-

The undisputed part of paragraph 2 is derived from the second and third sentences of article 35, paragraph 3, of the Vienna Convention on Consular Relations.¹⁴⁷ During the Commission's debates of paragraph 2, various delegates urged that the regime providing for the status of the consular bag be extended to the diplomatic bag.¹⁴⁸ Such an extension would create a balance between protecting confidential diplomatic conveyances and securing the receiving state against abuses of the bag.¹⁴⁹ In addition, it is an acceptable compromise because it allows sending states, as opposed to the receiving states, to confront a diplomat who has abused a bag, by consenting to the opening of the bag or having the bag returned.

CONCLUSION

Diplomats are accused of using the diplomatic bag for the import or export of currency, narcotic drugs, weaponry, and even human beings. Although these practices violate the permissible use of the diplomatic bag and threaten the security of the receiving state, the implementation of remedial measures such as nonintrusive examinations violates article 27 of the Vienna Convention. Prudence requires that the interests of the receiving state be a consideration in determining the appropriate status of the diplomatic bag.

The latest results of the International Law Commission reflect the need to achieve a more equitable balance than that

ized representative of the sending State. If [either] [this] request is refused by the authorities of the sending State, the competent authorities of the receiving [or transit] State may require that the bag be returned to its place of origin.

Id. (brackets in original). The bracketed portions of the article reflect the several areas of disagreement that the Commission could not resolve. *Id.* at 69.

147. *Id.*; see *supra* note 7 and accompanying text. If paragraph 2 of the draft article were adopted by the United Nations without the bracketed parts, it would provide for the diplomatic bag as follows:

Nevertheless, if the competent authorities of the receiving State have serious reasons to believe that the bag contains something other than the correspondence, documents or articles referred to in article 25, 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 competent authorities of the receiving State may require that the bag be returned to its place of origin.

Report of the Commission's Thirty-Eighth Session, supra note 7, at 68.

148. *Id.* at 72.

149. *Id.*

provided by the Vienna Convention on Diplomatic Relations. The reimplementation of what was the customary international practice with regard to the diplomatic bag introduces the most appropriate balance between the opposing interests of the sending and receiving states. In addition, it augments the sending and receiving states' common interest in tranquil and efficient foreign relations.

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