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FEDERAL REPUBLIC OF NIGERIA

Diplomatic Immunity:

OFFICIAL
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DIPLOMATIC
PASSPORT



an exemption from screening?

*The concept of diplomatic immunity is enshrined in international law, yet also poses a challenge for those whose responsibility it is to protect the aviation industry. Whilst many diplomats understand the exemptions the law affords them, others expect a more blanket immunity from screening. **Diana M. Stancu** looks at the Vienna Convention on Diplomatic Relations and clarifies just what the industry can and cannot do to diplomats, their personal baggage and diplomatic pouches at international airports.*

I. Diplomatic immunity – legal base

Diplomatic immunity is a principle of international law whereby certain foreign State officials are not subject to the jurisdiction of local courts and other authorities. The modern concept dates back to the 17th Century when European diplomats realised that protection from prosecution was essential to performing their jobs; a set of rules evolved guaranteeing the rights of diplomats. These were confined only to Western Europe and were closely tied to prerogatives of nobility. This system was, however, disrupted by a series of events, including the French Revolution. In the 19th Century the Congress of Vienna reasserted the rights of diplomats and they have been largely respected ever since. Nowadays, diplomatic immunity, along with diplomatic relations as a whole, is governed internationally by the Vienna Convention on Diplomatic Relations signed in 1961. There are currently 179 States party to this Convention.

The Vienna Convention on Diplomatic Relations provides immunity to persons

according to their rank in a diplomatic mission and to the need for immunity in the performance of their duties. As an example, diplomatic agents and their families are immune from all criminal prosecution and almost all civil law suits (Articles 29-36) whereas administrative and technical staff members of embassies have a lower level of immunity in respect of acts performed in the course of their duties. It is worth mentioning that even though diplomatic agents are exempt from criminal, civil and administrative jurisdiction of the receiving State, this exemption may be waived by the sending State. Furthermore, this diplomatic immunity does not exempt him/her from the jurisdiction of the sending State.

The persons covered by the Vienna Convention on Diplomatic Relations are the diplomatic agents and members of the diplomatic staff having diplomatic rank as well as the diplomatic courier.

The personal inviolability of the diplomatic courier is very close in scope and legal implications to that of a diplomatic agent. This is because of the nature of the courier's function with regard

to the custody, transportation and delivery of the diplomatic bag and the legal protection of the confidential character of official correspondence. For the performance of this task, the diplomatic courier is provided with a special document indicating his status as such and bearing key personal data, such as his name and, where appropriate, his official position or rank, as well as the number of packages constituting the bag, together with additional bag data such as their serial numbers and destination. The document is issued by the competent authorities of the sending State or its diplomatic or other official missions abroad. The form of the document, its formal particulars and its denomination are entirely within the jurisdiction and discretion of the sending State in accordance with its laws, regulations and established practice.

The admission of the diplomatic courier into the territory of the receiving State is an indispensable condition for him to perform his functions. It is obvious that if a diplomatic courier is refused entry into the territory of the receiving State, he is prevented from

performing his functions. For this reason, the obligation of States to permit the entry into their territory of diplomatic couriers has become well established in State practice as an essential element of the principle of communication for official purposes, realised through diplomatic couriers and diplomatic bags.

Article 25 of the Vienna Convention on Diplomatic Relations states that, “*The receiving State shall accord full facilities for the performance of the functions of the mission*”. The main purpose of these facilities is to ensure the unimpeded and expeditious passage through the immigration and aviation security inspection/screening process at the frontier of the receiving State.

II. The Diplomatic Bag/Pouch

The diplomatic bag, or pouch as the Americans call it, is more of a legal notion and concept than a physical object. Actually it represents any means by which governments and their diplomatic personnel can send items to one another without fear of detention or inspection by foreign States. The principle of

freedom of communication has been universally recognised as constituting the legal foundation of modern diplomacy law and it must also be considered as the core of the legal regime of diplomatic bags and diplomatic couriers. The safe, unimpeded and expeditious delivery of the diplomatic message and the inviolability of its confidential character constitute the most important practical aspect of this principle. It provides the legal basis for the protection of the diplomatic bag, placing upon the receiving State, whenever the courier or the bag enters its jurisdiction, the obligation to grant certain facilities, privileges and immunities so as to ensure adequate compliance with the above-stated ends.

The Vienna Convention on Diplomatic Relations states that, “*the diplomatic bag shall not be opened or detained*” and that, “*the packages constituting the diplomatic bag must bear visible external marks of*

their character and may contain only diplomatic documents or articles intended for the official use”.

The most common visible external feature of the packages constituting a diplomatic bag is a tag or a stick-on label with an inscription such as “diplomatic correspondence” or “official correspondence”. The diplomatic bag must be sealed by the competent authority of the sending State by means of the official stamp imprinted with wax or lead seals, or in other ways which may be agreed upon between the sending and receiving States. The use of seals serves to assist the receiving State, on the one hand, to ascertain the *bona fide* character and authenticity of the diplomatic bag and on the other hand, to provide the receiving State with evidence to refute possible accusations of having tampered with the bag.

The diplomatic bag may contain official letters, reports, instructions, information and other official documents, official materials, medals, books, pictures, films and art objects which could be used to promote cultural relations. The large numbers of abuses on the content of the diplomatic bag (e.g. in 1964 an Israeli was found bound and drugged in a crate marked “diplomatic mail” at Rome airport; Trinidadian authorities found cocaine in diplomatic bags addressed to Trinidad’s consulates in New York), caused concern that reliance on “diplomatic immunity principles” could provide an avenue to smuggle weapons or bombs onto aircraft or into countries. Indeed, Article 27(4) states that the diplomatic bag “*may only contain diplomatic documents or articles intended for official use*”, the word “only” emphasising the official character of the permissible items in question in view of the abuses committed with regard to its contents.

But this presents us with a real difficulty as the Vienna Convention on Diplomatic Relations has, so far, not offered a viable solution to the problem of verifiability in respect of the legally admissible contents of the diplomatic bag. The increasing number of abuses has given particular importance to this issue, with certain political, economic and other implications. Some signatory States have entered a reservation to the Convention in this respect and claim the right to open or return diplomatic bags. This means that the receiving State would request permission to open and inspect a bag in the presence of an official representative of the sending State. If permission is denied, the receiving State can then return the bag to the sending State. It is noteworthy that consular bags are subject to this treatment under the Vienna Convention on Consular Relations of 1963, Article 35(3).

Some States are opposed to such restrictions because of fear of consequences of other States seizing and searching their own diplomatic bags.

The Vienna Convention on Diplomatic Relations states that “*the diplomatic bag shall not be opened or detained*”, a principle characterised as the “inviolability” of the diplomatic bag. The principle that the diplomatic bag is inviolable wherever it may be, and therefore shall not be opened or detained, constitutes the most important aspect of this means of communication and has been endorsed as a recognised rule. The immunity of the bag from search is considered to be a reflection of the basic principle of the inviolability of diplomatic correspondence, generally recognised by customary international law.

However, this author is of the view that Article 27 (3) of the Vienna Convention on Diplomatic Relations does not extend to an external non-physically invasive examination (by X-Ray or any other surveillance method) of the diplomatic bag and of its visible marks or indications of its character as such, to the extent that such an external examination is conducted for identification purposes only and with the purpose that a certain container claimed to be a diplomatic bag actually has such a character.

It is worth mentioning as well that the Vienna Convention on Diplomatic Relations provides no limitations on the size or the shape of the diplomatic bag. Therefore, one could conclude that any container could be a diplomatic bag, as was demonstrated by the Soviet Union in 1984 when it claimed that a nine-ton tractor trailer was a diplomatic bag (see “*Diplomatic Crime*”, Chuck Ashman and Pamela Trescott).

III. AVSEC Applicable Measures

Diplomatic agents and diplomatic couriers enjoy diplomatic immunity and personal inviolability, yet according to the provisions of ICAO Annex 17 on Aviation Security and ICAO Doc. 8973, Aviation Security Manual (sixth edition, 2002), they and their personal baggage shall always be subject to routine pre-boarding inspection/screening as it applies to civil aviation security; the Vienna Convention on Diplomatic Relations offers no exemption. However, sealed diplomatic bags/pouches in their possession must not be subjected to manual search. All their carry-on items shall be processed in the normal manner. Nonetheless, if it is the desire of a State to exempt or to make special security



screening arrangements for them, the State will need to include these exemptions or special screening procedures as part of its national civil aviation security plan.

Some States argue that while the aforementioned exemption on diplomatic bags/pouches from manual search is in accordance with the Vienna Convention on Diplomatic Immunity, Article 27(3), these provisions do not preclude such items from examination by screening by X-Ray equipment or other non-invasive methods.

The Vienna Convention on Diplomatic Relations prohibits the inspection of personal baggage belonging to diplomatic agents and their family members or belonging to the diplomatic courier. Nonetheless, this exemption is applied only to customs inspections and only if the personal baggage contains articles for the official use of the mission or for the personal use of the diplomatic agent or members of his/her family. For the purpose of civil aviation security, personal baggage, which includes both carry-on and checked baggage belonging to diplomatic agents and their family members or belonging to the diplomatic courier, is subject to the same screening requirements as are applied to the baggage of non-diplomatic passengers.

States extend specific exemptions from the inspection/screening process to visiting Heads of State and Royalty when they are travelling on official business. Such exemption does not apply when the persons concerned are travelling as private individuals without official baggage or personal security being provided, unless official arrangements have been agreed in advance by the appropriate authorities. The exemption is based upon the accepted fact that both the person and their baggage are afforded such a high degree of security by escorting police and other services that the risk of a weapon and/or explosive device being introduced into baggage or onboard by this means is negated. However, prior notification of the travel arrangements of such person must be provided in order that the police and the security services in the receiving State may make the necessary arrangements.

While on the airport premises, all persons enjoying diplomatic immunity must follow local aviation security screening procedures and justify to the appropriate authorities the need for possible exemptions. One of the most widespread reason for demanding exemptions is the "meeting and greeting" functions both on the arrival and departure of persons with high importance for Embassies or the need for diplomats to have access to

aircraft and baggage facilities. The procedure most applied by the appropriate authorities is the issuance of a photo Identity Card in limited number and with limited validity, which gives limited access to nominated members of the diplomatic missions to airport security restricted areas. Actual practice, however, illustrates that some States have been issued blank IDs which has resulted in abuse and diplomats using them for personal purposes. Some airport authorities offer Protocol Lounges to be used for the "meeting and greeting" of high level officials or similar spaces with private screening facilities.

The Vienna Convention on Diplomatic immunity was concluded before the provisions on Aviation Security and X-Ray inspections gained importance and when States were only inspecting diplomatic bags externally and were not opening them. With the progress in technology, an X-Ray or other non-invasive inspection provides a good indication of the content of the diplomatic bags/pouches (but this does still pose a problem of confidentiality), but there is a risk that these methods could cause damage to some sensitive material which were supposed to be transported secretly. One other issue which arises is the interpretation of its provisions left by ICAO to the individual States and the lack of harmonisation on aviation security legislation.

The AVSEC Panel has discussed these issues during several meetings over the years and in 2007 new guidelines were finally proposed in order to harmonise the applicable aviation security screening methods of diplomatic bags/pouches by Contracting States. The text was sent via State Letter to all ICAO Contracting States and should be included in the next edition of the ICAO Doc. 8973, Aviation Security Manual. This new edition is not yet published and even when it is published, guidance materials are not standards and, therefore, are not directly enforceable. Some States will continue to apply the procedures advocated by ICAO for many years (inspection of diplomatic bags/pouches is acceptable) and others will argue that diplomatic bags/pouches should not be inspected according to the new guidelines because of their legal nature. Therefore, the diplomatic bags/pouches will either be accepted by the departing State (and not inspected at all), or they will be refused.

It is interesting to note that diplomatic bags/pouches could also be transported by means other than commercial flight operations; private, military and other governmental aircraft are a definite option. Why should X-Ray inspection be eliminated for all States and all diplomatic bags travelling on

civil aviation aircraft, when major States have alternative options to transport sensitive documents or material to their outbound facilities? Why should the global aviation security system be downgraded for diplomatic bags when history shows the potential risk?

Nevertheless, in the event that a receiving State, or a State through which a diplomatic bag/pouch is transiting or transferring, has specific information that the bag/pouch intended for air transportation poses a threat to the security of the aircraft or its passengers, the receiving/transiting/transferring State might refuse the boarding of the diplomatic bag/pouch after a decision is taken at the appropriate level. Under no circumstances should the bag be opened or detained and the Embassy of the sending State should be informed immediately, through the usual diplomatic channels, of the refusal.

At an operational level, some questions still remain open. How should diplomatic bags/pouches be treated during transit/transfer? Should they be removed from transit conveyors to avoid automatic hand-baggage X-Ray inspection?

With regard to these issues, ICAO needs to develop new standards in order to fill the current gaps in aviation security legislation and be more firm on the harmonisation of present and upcoming legislation. By then, States should develop special security screening procedures to cover existing breaches and include them as part of their national civil aviation security programme, procedures which should be clear and unquestionable for all actors involved.

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