THE INVIOLABILITY OF DIPLOMATIC BAG IN INTERNATIONAL LAW: ISSUES AND CHALLENGES

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Abstract

This study presents a critical analysis of the diplomatic bag within the framework of international law, with particular emphasis on its enduring relevance and emerging challenges. Anchored on the foundational principles of inviolability and diplomatic immunity, the diplomatic bag remains a vital mechanism for secure communication and transmission of official materials between States and their diplomatic missions. However, the evolving global security environment and technological advancements have exposed significant vulnerabilities and interpretative ambiguities in its application. This research examines the regulatory architecture governing diplomatic bags, with specific reference to the Vienna Convention on Diplomatic Relations (1961) and relevant national legal frameworks. Adopting a doctrinal and analytical methodology, the study explores the tension between diplomatic immunity and national security imperatives, highlighting documented instances of misuse, including illicit trafficking and abuse of privileges. It further traces the historical evolution of the diplomatic bag's legal status and critically evaluates its codification and interpretation under international law. Key issues identified include the potential exploitation of diplomatic privileges for unlawful activities, as well as the inherent conflict between state sovereignty and the need for enhanced global security. The study assesses the adequacy of existing legal mechanisms in addressing these concerns and identifies critical gaps in enforcement and regulation. The research concludes with strategic recommendations, including the urgent need to amend the Vienna Convention on Diplomatic Relations (1961) to redefine the scope of the diplomatic bag, limiting its contents strictly to official documents and excluding unauthorized materials such as weapons or contraband. Additionally, the study proposes the establishment of a permanent International Diplomatic Criminal Court to adjudicate offenses arising from diplomatic abuses.

Keywords

Diplomatic Bag; Diplomatic Immunity; International Law; Vienna Convention 1961; State Sovereignty; Security Concerns; Illicit Trafficking; Diplomatic Abuse; Global Governance

TABLE OF CONTENTS

Title page		i
Declaration		ii
Certification		iii
Dedication		iv
Acknowledgement		v
Table of Contents		vi
Table of Cases		x
Table of Statutes		xi
List of Abbreviations		xii
Abstract		xiii

CHAPTER ONE INTRODUCTION

1.1	Background to the Study	1
1.2	Statement of the Problem	2
1.3	Aim and Objectives of the Study	3
1.4	Scope of the Study	4
1.5	Significance of the Study	4
1.6	Research Methodology	5
1.7	Limitations of the Study	5

CHAPTER TWO LITERATURE REVIEW

2.1	Theoretical Framework	6
2.1.1	Natural Law Theory	6
2.1.2	Positivist Theory of Law	10
2.1.3	Sociological Law Theory	13

2.2 Conceptual Framework 16

2.2.1 Diplomacy 16

2.2.2 Diplomat 23

2.2.3 Diplomatic Agent 25

2.2.4 Diplomatic Mission 28

2.2.5 Ambassadors 33

2.2.6 Diplomatic Bag 33

2.2.7 Right 34

2.2.8 Human Right 34

2.2.9 State 34

2.2.10 Consuls 34

2.2.11 Consulate 35

2.3 Summary of Review 36

2.4 Gap in Knowledge 37

2.5 Historical Evolution 38

CHAPTER THREE LEGAL AND INSTITUTIONAL FRAMEWORK

3.1 Legal Framework 40

3.1.1 Constitution of the Federal Republic of Nigeria 1999 (as amended) 40

3. 1.2 Vienna Convention on Consular Relations 1961 41

3.1.3 Vienna Convention on Consular Relations 1963 41

3.1.4 Convention on Special Missions 1969 42

3.1.5 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents 1973 43

3.1.6 Draft Articles on the Diplomatic Courier and Diplomatic Bag, 1989 43

3.1.7 Vienna Convention on the Representation of States in their Relation

with International Organizations of a Universal Character 1975 45

3.1.8 Diplomatic Immunities and Privileges Act 1962 46

3.1.9 Diplomatic Privileges Amendment Act 37 of 2001, South Africa 46

3.1.10 Diplomatic Privileges Act 1961, United Kingdom 47

3.2 Institutional Framework 48

3.2.1 Constitutive Act of African Union of 11th July, 2000 48

3.2.2 International Court of Justice (Chapter XIV and Article 92 of the United Nations charter 1945) 53

3.2.3 Rome Statute of the International Criminal Court, 2002 55

3.2.4 Criminal Injuries Compensation Act 21 of 1999 (The Criminal Injuries Compensation Board) 91

CHAPTER FOUR INVIOLABILITY OF DIPLOMATIC BAGS IN INTERNATIONAL LAW: ISSUES. CHALLENGES AND PROSPECTS

4.1 Issues 95

4.1.1 Issues on Abuse of Diplomatic Bag 101

4.1.2 Issues of Inviolability 103

4.1.3 Issues on Misconception and Content of the Diplomatic Bag 105

4.1.4 Issues on Inviolability of Diplomatic Property 108

4.1.5 Issues on the Inviolability of the Person of the Diplomat 109

4.2 Challenges 111

4.2.1 Violation of Local Laws by family members of Diplomats 111

4.2.2 Espionage 115

4.2.3 Diplomatic Communication and Trust 116

4.2.4 Declaration of *Persona Non Grata* 117

4.2.5 International Comity and Respect for Sovereignty 121

4.3 Prospects 121

4.3.1 Balancing Security and inviolability 121

4.3.2 Adaptation to Technological changes 122

4.3.3 Diplomatic cooperation 122

CHAPTER FIVE SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 Summary 123

5.2 Findings 126

5.3 Conclusion 127

5.4 Recommendations 127

Bibliography 129

TABLE OF CASES

Alcom Ltd v Republic of Columbia (1984) 2 ALL ER 6 (HL) 108

Boos v Barry (1988) 121 IR, 499 (SC) 110

Dickson v Del Solar (1930) IKB 376 110

House of Lords in Alcom Ltd v Republic of Colombia (1984) 2 All ER 6 (HL) 108

Portugal v Goncalves 82 IR 111

Third Ave. Assoc v Permanent Mission of Zaire to the United Kingdom 787 supp. 389,394 (SDNY 1992) 112

United State v Tabatabai CR 05-00744 MMN 42

United States v Devyani Khobragade (2013) 14 Cr. 008 (SAS) 112

TABLE OF STATUTES

Nigerian Statutes

Constitution of the Federal Republic of Nigeria 1999 (as amended) Cap C23, 40
Section 308 40

Laws of the Federation of Nigeria (LFN) 2010 46

Diplomatic Immunities and Privileged Act (1962) Cap D9, Laws of the Federation of Nigeria 2010 46

Foreign Statutes

Diplomatic Privileges Amendment Act 37 of 2001, South Africa 46

Diplomatic Privileges Act 1961, United Kingdom 47

International Conventions

Convention on Special Missions, 1969 98

Convention on the Prevention and Punishment of Crimes against International Protected Persons including Diplomatic Agents 65

Draft Articles on the Diplomatic Courier and the Diplomatic Bag, 1989 43

Vienna Convention on the Representation of States in their Relations with International Organization of a Universal Character, 1975 42

Vienna Convention on Consular Relations, 1963 5, 31, 35,41, 98, 113, 114

Vienna Convention on Diplomatic Relations 1961 3, 4, 6, 10, 13, 31, 33, 36, 37, 41, 98, 99, 110

LIST OF ABBREVIATIONS

Ed	Editor / Edition
et al.	et alii (and others)
etc	Et cetera
ICC	International Criminal Court
ICJ	International Court of Justice
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund
J	Judge
J.	Journal
Law of Treaties Convention	Vienna Convention on the Law of Treaties
OAS	Organization of American State
Optional Protocol	Optional Protocol to the Vienna Convention on Diplomatic Relations
NATO	North Atlantic Treaty Organization
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
U.S	United States of America
USSR	Union of Soviet Socialist Republic
VOL.	Volume
Vienna Convention	Vienna Convention on Diplomatic Relation

CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

The Diplomatic Bag often referred to as the diplomatic pouch, has long been an essential tool in the realm of International Law, ensuring secure and confidentiality in Communication between Sovereign States and their diplomatic Missions. The root of Diplomatic Bag can be traced back to ancient civilization, where messengers bearing symbols of protection were entrusted with delivering sensitive information[1]. Over time, these practices evolved, leading to the establishment of more formalized methods for securing diplomatic correspondence. The Vienna Convention on Diplomatic Relations (VCDR) of 1996 marked a significant milestone in codifying the principles governing Diplomatic practices. Precisely, *Article 27* of the VCDR explicitly states that the Diplomatic Bag shall not be opened or detained, and must bear visible external marks indicate its character[2]. This provision underscores the Principles of Inviolability and immunity which are critical for maintaining the confidentiality and integrity of diplomatic communications.

However, the landscape of diplomacy has changed considerably in recent decades due to globalization, technological advancements, and evolving security threats. These developments have also introduced new challenges and vulnerabilities to the traditional concept of Diplomatic Bag[3]. One of the primary challenges is the misuse of the Diplomatic Bag for illicit purposes such as smuggling contrabands and engaging in other illegal activities. These have raised concerns about the adequacy of existing

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[1] MN Brown, *Historical Developments in Diplomatic Practices*. (Oxford University, Press 2018), 128.
[2] Vienna Convention on Diplomatic Relations, 1961.
[3] K Smith, *Globalization and its Impact on Diplomatic Practices*. (Princeton University, Press 2020), 429.

legal safeguards[4]. There is the need for critical examination of the diplomatic bag's role and the efficacy of the current legal mechanisms. In recent years, the use of diplomatic bags has become increasingly scrutinized, particularly in the context of global security threats and the need for enhanced transparency and accountability.

1.2 Statement of the Problem

Diplomatic bag is a container used to transport official documents, correspondence and other materials between diplomatic missions, government and international organizations. There is a concern if diplomatic bag is immunity or privilege? Going by the provisions of A*rticle 27(3)* and *Article 27(4)* elevated diplomatic bag status of inviolability as the diplomatic bag shall not be opened or detained. These diplomats are accorded certain privileges and immunities in order to allow them perform their functions without interference, intimidation or molestation. It is on this note that the VCDR 1961[5] lays emphasis on the functional necessity theory of diplomatic privilege and immunity for effective conduct of foreign policies of countries. The principles of inviolability of diplomatic bag enshrined in the Vienna Convention on diplomatic Relation (VCDR) of 1961 are challenged by these developments. This is increasingly vulnerable to exploitation due to Globalization, Technological Advancement and emerging security threats. The Principles of Inviolability and Immunity enshrined in the Vienna Convention on Diplomatic Relation (VCDR) of 1961 are challenged by these developments. It is rather call to question: To what extent does the contemporary use of the Diplomatic bag present opportunities for abuse, particularly in the context of illicit trafficking of contraband and what are the legal and practical challenges in mitigating these risks? The potential for misuse in illicit trafficking, the

[4] J Doe, *Challenges and Misuses of Diplomatic Immunities*. (Cambridge University, Press 2019), 164.
[5] Hereinafter abbreviated as VCDR, 1961.

tension between State Sovereignty and International security and the impact of digital communication technologies raised complex legal and ethical issues. This study aims to critically analyze these challenges, evaluate the efficacy of current legal mechanisms, and propose recommendations to enhance transparency, accountability and regulatory oversight, thereby preserving the essential functions of the diplomatic Bag in modern diplomacy.

Research on the inviolability of diplomatic bags in International Law often revolves around several key questions considering the issues and challenges involved.

1. What are the limits and definitions of the diplomatic bag's inviolability under international law?
2. How can countries balance their security concerns with the need to respect the inviolability of diplomatic bags to maintain effective diplomatic relations?
3. How does the inviolability of diplomatic bags impact diplomatic relations between states, considering aspects like trust, cooperation, and potential for disputes?
4. How can existing legal framework governing diplomatic bags be improved?.

1.3 Aim and Objectives of the Study

The aim of the study is to conduct a critical legal analysis of the Diplomatic Bag within the framework of International Law, examining its contemporary issues and challenges and to propose recommendations for enhancing its legal framework and practical application in modern diplomacy.

The Objectives of the study include the following:

1. To analyze the foundational legal principles governing the Diplomatic Bag, as enshrined in the Vienna Convention on Diplomatic Relations (1961);

2. To identify and critically evaluate the contemporary challenges associated with the Diplomatic Bag, including its potential for abuse in illicit trafficking, State Sovereignty and Security concerns;
3. To access the impact of technological advancement on the traditional role and necessity of the diplomatic bag;
4. To examine the efficacy of existing legal mechanisms and diplomatic practices in addressing the identified challenges.

1.4 Scope of the Study

This study focuses on the legal analysis of the Diplomatic bag within the framework of International Law, specifically examining its contemporary issues and challenges. The scope of the research is deliberately confined to legal foundations of the diplomatic bag as codified in the Vienna Convention on Diplomatic Relations (VCDR) of 1961. It will also consider relevant customary International Law and subsequent state practice that has shaped the interpretation and application of the VCDR. The research will also investigate present day challenges related to the diplomatic bag.

1.5 Significance of the Study

This research holds significant value for several key reasons, contributing to both academic discourse and practical applications in International Law and Diplomacy. It contributes to the understanding of diplomatic bags in international Law, a topic that has received limited attention in recent years.

This study will contribute to the existing body of scholarly work by providing a nuanced and in-depth analysis to the diplomatic bag. It engages with current debates on States Sovereignty, Security and Technological change, offering fresh perspective and insights.

The dissertation strengthens International legal framework by identifying ambiguities and gaps in the existing legal framework especially as it affects Vienna Convention of Diplomatic Immunity (VCDR) of 1961.

The research findings can be used by policy makers, Diplomats, and legal professional to inform decisions related to Diplomatic Privileges and Immunities, security protocols, and International cooperation.

1.6 Research Methodology

The research methodology used in this dissertation is doctrinal research method. Primary sources such as statutes, case laws and conventions will be fully utilized as bulk of this research work is based on the Vienna Convention of Diplomatic Relation (VCDR) 1961 and Vienna Convention on Consular Relations (VCCR) 1963. Secondary sources such as textbooks, journal articles of learned authors and internet materials will also be utilized. This work is anchored on Natural Law Theory that emphasize that reason can discern principles of Justice and the common good.

1.7 Limitations to the Study

The limitation that inhibited this study includes unavailability of domestic judicial pronouncement in form of decided cases on issues of diplomatic bags. More so, lack of local materials, books and journals on diplomatic bag posed a big challenge. The researcher was left with no option than to seek refuge majorly on the foreign judicial authorities, foreign authors and Journals. Irrespective of the limitations, the dissertation was able to achieve its aims and objectives.

CHAPTER TWO

LITERATURE REVIEW

2.1 Theoretical Framework

2.1.1 Natural Law Theory

Natural Law Theory, with its emphasis on inherent moral principles and universal justice, offers a valuable perspective on the legal and ethical dimensions of the diplomatic bag. This theory posits that certain laws are grounded in human nature and are discoverable through reason, independent of positive legal enactments.[1] In the context of the diplomatic bag, Natural Law Theory can illuminate the fundamental values that underlie the principles of inviolability and immunity.

Natural Law theorists argue that the concept of diplomatic immunity, including the inviolability of the diplomatic bag, is rooted in the inherent dignity of human beings and the necessity for states to engage in peaceful and cooperative relations[2]. Secure and confidential state communication is crucial for maintaining international order and promoting the common good. From a Natural Law perspective, the diplomatic bag is not just a legal technicality but a tool that serves these fundamental human values.

The Vienna Convention on Diplomatic Relations (1961) enshrines the principle of inviolability of the diplomatic bag, reflecting the Natural Law view that certain legal protections are essential for the common good and international cooperation (Vienna Convention on Diplomatic Relations, 1961). This convention underscores the

[1] J Finnis, *Natural Law and Natural Rights*. (Oxford University, Press 2011), 211.
[2] H Grotius, *The rights of War and Peace Liberty Fund*, (2005).

importance of diplomatic immunity as a means to ensure that diplomats can perform their functions without fear of interference or coercion[3].

Central to Natural Law Theory is the belief that reason can discern principles of justice and the common good[4]. In the context of the diplomatic bag, reason dictates that states must balance their security interests with the need to uphold diplomatic privileges and immunities. While states have the right to protect themselves from threats, they also have a duty to respect principles that facilitate international cooperation. Natural Law Theory suggests that any deviation from the inviolability of the diplomatic bag must be justified by compelling reasons and must not undermine the overall purpose of diplomatic immunity[5].

For instance, the inviolability of the diplomatic bag is essential for the protection of confidential communications between states, which is necessary for maintaining international peace and security[6]. However, reason also dictates that states must address legitimate security concerns, such as the potential misuse of the diplomatic bag for smuggling contraband or other illicit activities[7].

Natural Law Theory emphasizes the moral obligations of states and individuals to act according to universal principles of justice. This perspective highlights the ethical dimensions of the diplomatic bag, especially regarding its potential misuse for illicit trafficking[8]. Natural Law suggests that states have a moral duty to prevent the abuse of diplomatic privileges and ensure that the diplomatic bag is used for legitimate

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[3] J Finnis, *Natural law and Rights*. (Oxford University, Press 2011) 48.
[4] T Aquinas, *Summa Theologica*. Christian Classics (1998) 143.
[5] *Ibid.*
[6] H Grotius, *The rights of war and peace*. Liberty Fund (2005), 78.
[7] APD Entreves, *Natural law: an introduction to legal philosophy*. (Hutchinson University Library 1970) 119.
[8] *Ibid.*

purposes. This duty transcends positive legal requirements and is rooted in inherent moral order[9].

From an ethical standpoint, the misuse of the diplomatic bag undermines the trust and cooperation that are essential for effective diplomacy. States have a responsibility to prevent such misuse and to take measures to ensure that diplomatic privileges are not exploited for unlawful purposes[10]. This may involve enhancing transparency and accountability in the use of the diplomatic bag while respecting its inviolability[11].

Natural Law Theory provides a framework for balancing competing values, such as state sovereignty and security, with the need to uphold diplomatic immunity. It suggests that these values are not mutually exclusive but can be reconciled through reason and a commitment to the common good[12]. In the context of the diplomatic bag, Natural Law Theory calls for a nuanced approach that respects inviolability principles while addressing legitimate security concerns. This approach requires states to engage in dialogue and cooperation to develop guidelines and best practices that promote both security and diplomatic efficiency[13].

For example, states could collaborate on developing international standards and best practices for the handling and inspection of diplomatic bags in a manner that respects their inviolability while mitigating security risks[14]. This collaborative approach would

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[9] T Aquinas, *op.cit.,* 110.
[10] H Grotius, *The Rights of War and Peace* (1988*).* 82.
[11] D Hovell, 'The Elements of International Legal Positivism'. *Current Legal Problems*, (2022) 75(1), 71–109.
[12] *Ibid.*
[13] AP D'Entreves, *Natural Law: An Introduction to Legal Philosophy*. (Hutchinson University Library, 1970), 259.
[14] D Hovell, 'The Elements of International Legal Positivism'. *Current Legal Problems*, (2022) 75(1), 71–109.

align with the Natural Law principle of pursuing the common good through reasoned deliberation and mutual cooperation[15].

Natural Law Theory can contribute to understanding how international norms evolve in response to changing circumstances. The principles of diplomatic immunity and the inviolability of the diplomatic bag have been codified and refined over time through customary law and treaty law[16]. As new challenges, such as cyber espionage and transnational crime, emerge, the legal framework governing the diplomatic bag may need to evolve to address these issues effectively[17].

Recent developments in international law reflect the dynamic nature of Natural Law Theory. For example, the increasing use of digital communication and the threat of cyber espionage pose new challenges to the traditional concepts of diplomatic immunity and inviolability[18]. Natural Law Theory provides a framework for adapting existing norms to address these contemporary issues, ensuring that the legal protection of the diplomatic bag remains relevant and effective.

Furthermore, Natural Law Theory suggests that the evolution of international norms should be guided by a commitment to universal principles of justice and the common good[19]. This perspective encourages states to continually evaluate and refine legal norms to address emerging challenges while upholding fundamental values[20].

Natural Law Theory, with its emphasis on inherent moral principles and universal justice, offers a valuable perspective on the legal and ethical dimensions of the

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15 J Finnis, *Natural Law and Natural Rights*. (Oxford University Press, 2011) 167.
16 *Ibid.*
17 *Ibid.*
18 J Gallego, 'Legal Positivism's Internal Morality'. *Oxford Journal of Legal Studies*, (2023), 43(2), 456–474.
19. *Ibid.*
20. *Ibid.*

diplomatic bag. This theory posits that certain laws are grounded in human nature and are discoverable through reason, independent of positive legal enactments[21]. In the context of the diplomatic bag, Natural Law Theory can illuminate the fundamental values that underlie the principles of inviolability and immunity.

2.1.2 Positivist Theory of Law

Positivist Theory of Law, also known as Legal Positivism, emphasizes the separation of law and morality. It asserts that the existence and content of law depend on social facts and not on its merits[22]. This theory provides a framework for understanding the legal status and challenges associated with the diplomatic bag in international law.

Legal Positivism asserts that laws are rules made by human beings, and their validity is determined by their sources rather than their moral correctness[23]. In the context of the diplomatic bag, this means that the inviolability and immunity of the diplomatic bag are grounded in international treaties and conventions, such as the Vienna Convention on Diplomatic Relations (1961). These legal instruments are created through the consent of sovereign states, reflecting the positivist view that law is a product of human agreement[24].

The Vienna Convention on Diplomatic Relations establishes the legal framework for diplomatic immunity, including the inviolability of the diplomatic bag. *Article 27* of the Convention states that the diplomatic bag must not be opened or detained, highlighting the legal basis for its protection (Vienna Convention on Diplomatic

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[21] J Gallego, *Legal Positivism's Internal Morality*. (Oxford Journal of Legal Studies, 2023), 43(2), 456–474.
[22] HLA Hart, *The Concept of Law (2nd edn.)*. (Oxford: Clarendon Press, 1994) 44.
[23] *Ibid.*
[24] D Hovell, 'The Elements of International Legal Positivism', *Current Legal Problems*, (2022), 109.

Relations, 1961). This legal protection is rooted in the principle of state sovereignty, which is a fundamental concept in Positivist Theory[25].

One of the core tenets of Positivist Theory is the strict separation between law and morality[26]. This perspective is particularly relevant to the diplomatic bag, as it underscores that the legal protections afforded to the diplomatic bag are based on international agreements rather than moral considerations. This separation allows for a more objective analysis of the legal challenges associated with the diplomatic bag, such as its potential misuse for illicit activities[27].

The diplomatic bag has been used in some instances for smuggling and other illicit activities, posing a challenge to the inviolability principle. The Positivist approach focuses on the need for clear legal rules and enforcement mechanisms to address such issues, rather than relying on moral judgments about the actions of states or individuals[28]. This approach helps maintain the integrity of the legal framework while addressing the practical challenges posed by the misuse of the diplomatic bag.

H.L.A. Hart's concept of the "rule of recognition" is a social practice by which a society identifies its valid legal norms[29]. In international law, the rule of recognition can be seen in the widespread acceptance and adherence to the Vienna Convention on Diplomatic Relations. This convention provides the legal basis for the inviolability of the diplomatic bag, and its acceptance by the international community reflects the positivist view that legal validity is determined by social facts and consensus[30].

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[25] D Hovell, 'The Elements of International Legal Positivism', *Current Legal Problems*, (2022), 109.
[26] HLA Hart, 'The Concept of Law' (2nd edn). *Oxford Journal of Legal Studies*, (2023) 574.
[27] J Gallego, 'Legal Positivism's Internal Morality', *Oxford Journal of Legal Studies*, (2023) 456.
[28] MG Rovira, 'What is Positivism Today?' *American Journal of International Law*, (2020) 114.
[29] HLA Hart, *The Concept of Law* (2nd edn. Oxford Clarendon Press, 1994) 107 – 109.
[30] *Ibid*.

The rule of recognition also highlights the importance of customary international law in shaping the legal status of the diplomatic bag. Customary international law, which consists of practices that are accepted as legally binding by states, plays a crucial role in reinforcing the principles established by treaties[31]. The interaction between treaty law and customary international law demonstrates the dynamic nature of legal positivism in the international context.

Legal Positivism has faced criticism for its perceived detachment from moral considerations, which can lead to the validation of unjust laws[32]. In the context of the diplomatic bag, this criticism is relevant when considering the potential for abuse, such as the use of the diplomatic bag for smuggling or other illicit activities. While Legal Positivism emphasizes the importance of adhering to established legal norms, it also highlights the need for continuous evaluation and adaptation of these norms to address emerging challenges[33].

One significant challenge is balancing the need for security with the principle of inviolability. States must find ways to prevent the misuse of the diplomatic bag without undermining the legal protections it affords. This requires international cooperation and the development of guidelines and best practices to address security concerns while upholding diplomatic immunity[34].

Positivist Theory can contribute to understanding how international norms evolve in response to changing circumstances. The principles of diplomatic immunity and the inviolability of the diplomatic bag have been codified and refined over time through

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[31] *Ibid*.
[32] R Dworkin, *Taking Rights Seriously*. (Cambridge University, Harvard University Press 1977) 289.
[33] MG Rovira, *'What is Positivism Today?' American Journal of International Law*, (2020) 245.
[34] *Ibid.*

customary law and treaty law[35]. As new challenges, such as cyber espionage and transnational crime, emerge, the legal framework governing the diplomatic bag may need to evolve to address these issues effectively[36].

Recent developments in international law reflect the dynamic nature of legal positivism. For example, the increasing use of digital communication and the threat of cyber espionage pose new challenges to the traditional concepts of diplomatic immunity and inviolability[37]. Legal Positivism provides a framework for adapting existing norms to address these contemporary issues, ensuring that the legal protection of the diplomatic bag remains relevant and effective.

2.1.3 Sociological Law Theory

Sociological Law Theory emphasizes the interaction between law and society, providing a crucial framework for understanding the practical application and challenges surrounding the diplomatic bag. This approach underscores that law is not merely a set of abstract rules but a dynamic instrument that reflects and shapes social realities[38].

Sociological Law Theory views law as a social institution that operates within a complex web of social, economic, and political factors[39]. In the context of the diplomatic bag, this perspective highlights that the legal framework established by the Vienna Convention on Diplomatic Relations (VCDR) 1961 is influenced by and influences social practices. The actual use of the diplomatic bag is shaped by diplomatic customs, security concerns, and the evolving nature of international

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[35] J Finnis, *Natural Law and Natural Rights*. (Oxford University Press 2011) 342.
[36] D Hovell, 'The Elements of International Legal Positivism'. *Current Legal Problems*, (2022) 109.
[37] J Gallego, 'Legal Positivism's Internal Morality' *Oxford Journal of Legal Studies,* (2023) 474.
[38] R Pound, *The Scope and Purpose of Sociological Jurisprudence*', *Harvard Law Review*, (1911) 619.
[39] P. Selznick, *Law, society, and Industrial Justice.* (Russell Sage Foundation 1969) 59.

relations. This theory allows us to see how the "law in action" may differ from the "law in the books"[40]. For instance, while the Vienna Convention provides the legal basis for the inviolability of the diplomatic bag, its practical application may vary depending on the specific context and circumstances of international relations.

Roscoe Pound's concept of "social engineering" is particularly relevant to the diplomatic bag[41]. Pound argued that law should be used to balance competing social interests. In this context, the inviolability of the diplomatic bag represents the interest of states in maintaining secure communication, while security concerns represent the interest of states in protecting themselves from threats. Sociological Law Theory suggests that the legal framework should strive to balance these interests in a way that promotes social harmony and efficiency. This framework helps analyze how states adjust their practices to balance security concerns with diplomatic needs. For example, states might implement measures such as non-intrusive scanning technologies to ensure the diplomatic bag's security without violating its inviolability[42].

Sociological Law Theory emphasizes that law is not static but evolves in response to social change[43]. The challenges facing the diplomatic bag, such as illicit trafficking and the impact of digital technology reflect broader social transformations. This theory helps us understand how the legal framework of the diplomatic bag must adapt to these changes. For example, the increasing use of digital communication may necessitate new legal norms and practices to protect sensitive information transmitted electronically. The evolving nature of international crime, including cyber threats,

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[40] E Ehrlich, *Fundamental Principles of the Sociology of law*. (Transaction Publishers, 1936) 77.
[41] R Pound, *An Introduction to the Philosophy of Law*. (Yale University Press, 1922) 66.
[42] G Gurvitch, *Sociology of Law*. (Philosophical Library 1942) 178.
[43] *Ibid.*

also requires a dynamic legal framework that can address these new challenges while maintaining the integrity of diplomatic privileges[44].

Sociological Law Theory stresses the importance of empirical analysis and the consideration of social facts in legal research[45]. In the context of the diplomatic bag, this means examining real-world practices, such as the use of screening technologies, the incidence of abuse, and the impact of security regulations. This approach helps to ground legal analysis in concrete social realities and to identify the practical challenges of implementing legal norms. For instance, empirical studies could investigate how often diplomatic bags are subjected to unauthorized inspection and the consequences of such actions for diplomatic relations.[46]

Sociological Law Theory also recognizes that law is shaped by power dynamics within society[47]. In the international context, this means that the legal framework of the diplomatic bag is influenced by the relative power of states. Powerful states may have greater influence in shaping legal norms and practices, while weaker states may have less influence. This perspective highlights the need to consider the potential for inequality and abuse in the application of diplomatic privileges and immunities. For example, more powerful states might exert pressure on smaller states to allow inspections of diplomatic bags under the guise of security, potentially undermining the principle of inviolability.[48]

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[44] J Habermas, *Between Facts and Norms: Contributions to a discourse Theory of Law and Democracy*. (MIT Press 1996).

[45] M Weber, *Economy and Society and Industrial Justice.* (Russel Sage University of California Press).

[46] P Selznick,. *Law, society, and Industrial Justice*. (Russell Sage Foundation 1969).

[47] *Ibid*.

[48] M Weber, *Economy and Society: an outline of Interpretive Sociology*. (University of California Press 1978) 211.

Sociological Law Theory also considers law as a tool for social control. The rules surrounding the diplomatic bag are a way that international society attempts to control the flow of information and goods between states. Understanding how these rules are applied and the effects they have is crucial. For instance, the diplomatic bag allows states to communicate securely and confidentially, which is essential for maintaining diplomatic relations and international order. However, the potential misuse of the diplomatic bag for illegal activities poses significant challenges that require careful regulation and oversight[49].

2.2 Conceptual Framework

The conceptual framework for analyzing the diplomatic bag in International Law encompasses the legal principles and practical challenges associated with its use. This framework aims to provide a comprehensive understanding of the diplomatic bag's role, the legal protection it enjoys, the issues that arise in its application, and the potential solutions to address these challenges. The concept of diplomacy, diplomatic bag, privileges and immunities of diplomatic agents touching on this dissertation will be fully discussed and analyzed.

2.2.1 Diplomacy

There is no single definition of Diplomacy. Diplomacy is perceived as a peaceful political process between nation states seeks to structure, shape and manage over time, a system of international relationship[50]. It secures a nation's utilized in the pursuit of many kinds of objectives, political, economic, national, trade, aid, human rights, arms control, scientific, cultural and academic enrichment. Diplomacy is both a peace building and peacemaking activities. This dissertation aligns with Ian Brownlie who

[49] E Ehrlich, *Fundamental Principles of the Sociology of Law.* (Transaction Publishers 1936) 102.
[50] I Brownlie, *Principles of Public International Law*. (Oxford University Press, 2019).

defines diplomacy as "any means which states establish or maintain mutual relations, communicate with each other or carry out policies and legal transactions in each case through their authorized agents"[51].

Types of Diplomacy

i. Permanent Traditional Diplomacy

Permanent Traditional diplomacy is when permanent traditional structures are used in diplomatic discussions that is, all diplomatic discussions must involve the state's Ministry of Foreign Affairs through its Minister, Ambassadors *charge de affairs* protocol, Information Attaches, etcetera. The head of government would normally allow the Foreign Affairs Minister make all the pronouncements, on behalf of the state whenever Head of Government wants to make such pronouncements. The Minister or the Legislature must also have an input.

ii. Conference Diplomacy

Under conference diplomacy discussions are carried out through various conferences. This is particularly over issues that go beyond the power of individual states Organizations such as the Economic Community of West African States[52], African Union[53], United Nations Organization[54], Non-Allied Movement[55], European Union[56], the Commonwealth of Nations, Arab League, World Trade organization[57] and many more international organizations hold their annual summits and extra-ordinary

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[51] I Brownlie, *Principles of Public International Law*. (Oxford University Press, 2019).
[52] Hereinafter abbreviated as *ECOWAS.*
[53] Hereinafter abbreviated as *AU.*
[54] Hereinafter abbreviated as *UNO.*
[55] Hereinafter abbreviated as *NAM.*
[56] Hereinafter abbreviated as *EU.*
[57] Hereinafter abbreviated as *WTO.*

summits on general or specific issues conceding World Peace and Security. Consequently in summits like these, conference diplomacy is usually explored.

iii. Parliamentary Conference Diplomacy

Each state constitution recognizes the importance of establishing committees on foreign affairs. It normally debates foreign affairs issues and pass them on to the whole Assembly or Congress as the case may be for general debate. As it is normal, parliament must satisfy treaties signed by the Head of Government. For instance the inability of the Nigeria's Supreme Military Council to ratify the cessation of the *Bakassi Pennisula* to Cameroun by General Gowon led to the protracted case between Nigeria and Cameroun until the ratification of the World Court judgment by the 6th senate July, 2008.

iv. Ad Hoc Conference Diplomacy

This is a temporary diplomatic setting whereby immediately the purpose for which the conference was set up is accomplished. The conference will be disbanded for example the defunct Organization of African Unity[58] in 1988 was disbanded in 1994 as Committee on Apartheid co-chaired by Chief Obasanjo was disbanded soon as apartheid was crushed in South Africa.

v. Personal Diplomacy

This is a diplomatic style where the Head of State or the Foreign Affairs Minister side-tracks the permanent traditional structure for personal initiative. This entails diplomatic shuttle and allies, traveling from one country to another for image laundering and other matters. Although journeys are usually in the company of state of relevant ministries, the promises by the envoy are made out his volition. General

[58] Hereinafter abbreviated as OAU.

Gowon and Chief Obasanjo are the best example of personal diplomacy in Nigeria during one the diplomatic shuttle Gowon promise to pay the salaries of Grenada Civil Servant for six months.

vi. Economic Diplomacy

Ikedinma et al are of the view that "This is the means by which government influences and controls certain productive arms of government in concert with the private sector interest in the economies of other countries for her domestic benefits which are economic and political The concept dates back 1580 when the policy of technical assistance was in vogue for the objective of promoting export markets. There is offensive economic diplomacy where a country in pursuit of its international relations, with its buoyant economy is not only ready to change the course of events and situations but also has the capacity to strike first at any instance when its national economic interest is at stake"[59]

This may entail extension or denial of financial benefits, petroleum products, food supplies, the granting or denial or withdrawal of trade concessions the establishment or disinvestment of foreign investment. For example the Arab state placed embargo on supplying oil to the western World in 1973 which led to the regime of energy transition in America and United Kingdom.

Greeks Contribution to Diplomacy

The ancient proto-diplomatic systems involved no permanent institutions but rather ad hoc missions, taking place as circumstances arose. The patterns of diplomatic representation, communication and negotiation developed by ancient states were

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[59] *B*.A Ikedinma et al. History and Practice of Diplomacy Course Guide National Open University of Nigeria <www.nouedu.ng> accessed on 15th December, 2024.

largely influenced by the perceived levels of power asymmetry. Among the small but independent Greek City-States, no single city was not powerful enough to rule over the others, nor were the city-states overwhelmed from outside. The cities thus diplomatically engaged with each other as equals.[60]

According to historical account on diplomacy, "the tradition that ultimately inspired the birth of modern diplomacy in Post-Renaissance Europe led to the present world system of international relations in ancient Greece. The earliest evidence of Greek diplomacy can be found in its literature, notably in *Homer's Illiad* and Odyssey. Otherwise, the first traces of interstate relations concern the Olympic Games of 776BC. In the 6th century BC, the amphictyonic leagues maintained interstate assemblies with extraterritorial rights and permanent secretariats. Sparta was actively forming alliances in the mid-6th century BC and by 500 BC it had created the Peloponnesian League. In the 5th century BC, Athens led the *Delian* League during the Greco-Persian Wars"[61].

The Roman Contribution to Diplomacy

According to History of Diplomacy obtained from the internet "Rome inherited what the Greeks devised and adapted it to the task of imperial administration. As Rome expanded, it often negotiated with representatives of conquered areas, to which it granted partial self-government by way of a treaty. Treaties were made with other states under Greek international law. During the Roman Republic the Senate conducted foreign policy, though a department for foreign affairs was established. Later, under the Empire, the Emperor was the ultimate decision maker in foreign affairs, Envoys were received with ceremony and magnificence, and they and their

[60] *Ibid.*
[61] *Ibid.*

aides were granted immunity".[62] 'Roman envoys were sent abroad with written instructions from their government. Sometimes a messenger, or nuncios, was sent, usually to towns. For larger responsibilities a *legatio* (embassy) of 10 or 12 *legati*, (ambassadors) were organized under a president.

The Byzantium Contribution to Diplomacy

According to the History of Diplomacy, Byzantium produced the first professional diplomats. They were issued written instructions and were enjoined to be polite, to entertain as lavishly as funds permitted, and to sell Byzantium wares to lower their costs and encourage trade.

From "the 12th Century their role as gatherers of information about conditions in their host states became increasingly vital to the survival of the Byzantine State. As its strength waned, timely intelligence from Byzantine diplomats enabled the emperors to play foreign nations off against each other. Byzantium's use of diplomats as licensed spies and its employment of the information they gathered to devise skillful and subtle policies to compensate for a lack of real power inspired neighboring peoples (for example, Arabs, Persians and Turks) as well as others farther away in Rome and the Italian City-States. After the Byzantine Empires, a major element its diplomatic tradition lived on in the Ottoman Empire and in Renaissance Italy".[63]

The French Contribution to Diplomacy

France is notable for its effective diplomacy the world over. As one of the great western powers and a big European player, the foreign services of other nations revere the French for it. France is considered the most prolific of nations in pushing its interest overseas. Quality diplomacy abroad has long been a part of French foreign

[62] *Ibid.*
[63] *Ibid.*

policy. Mr. Simon Fraser, Head of the British Diplomatic service, said that "French diplomacy is very good at a single-minded pursuit of a perception of the national interest".[64]

France has maintained its position as one of the wealthiest nations since the depths of the world wars. It has the second-largest exclusive economic zone in the world and wields an enormous military and cultural influence in Europe and across the globe.

African Contribution to Diplomacy

African contribution to the development of diplomacy could be traced to ancient Egypt which contributed much to the evolution of diplomacy in antiquity. This could also be linked to the fact that the African continent and particularly sub-Saharan Africa had an extremely large period of prehistory.

The fact notwithstanding that Africa had a large period of human prehistoric activities, the argument still holds that a continent that had evolved one of the earliest forms of literacy in the world, that is the Egyptian hieroglyphics 300 B.C. might have been involved in some form of diplomatic relations from antiquity.

From available records Egypt had contacts with the Mediterranean, Arab states, Babylon and India even before the 4th century B.C., therefore it would not be uncommon for Egypt to have sent as well as received trade delegations from these states with which she had contact with.[65]

From about 3100 to 1085 B.C, Egypt concluded many trade agreements with foreign countries and held foreigners in very high esteem and there were special laws that protected interest of foreigners. For instance, in Egypt there is a policy that the

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[64] *Ibid.*

[65] World History Timeline <http://\vw\v.timemaps.com/civilisation/ancient-egypt> accessed 25lh April, 2024.

property of any foreigner who dies in Egypt should be kept safely for the wife and children of the deceased.

2.2.2 Diplomat

Diplomat, from ancient Greek is a person appointed by a state, intergovernmental, or non-governmental institution to conduct diplomacy with one or more other states or international organizations.

Appointment of Diplomats

Diplomatic relations amongst states usually take place through mutual consent and not by conquest.[66]*Article 13* of the VCDR 1961 provides that "the head of the mission is considered as having taken up his functions in the receiving state either when he has presented his credentials or when he has notified his arrival and a true copy of credentials has been presented to the Ministry of Foreign Affairs of the receiving state or such other ministry as may be agreed in accordance with the practice prevailing in the receiving state which shall be applied in a uniform manner".[67]

A diplomat is appointed when the President gives a person so appointed the letters of credence which serve as the authority or mandate given to the appointee to represent the sending country in the host country. "Therefore, every person entitled to privileges and immunities shall enjoy them from the moment he/she enters the territory of the receiving State, he will start to enjoy privileges and immunities from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed."[68]

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[66] *Article 2,* Vienna Convention on Diplomatic Relation, 1961.
[67] *Article 13, ibid.*
[68] *Article 39 (1) ibid.*

Qualities of a Good Diplomat

In third world countries like ours diplomatic personnel are appointed without necessarily passing through some rigorous scrutiny in terms of competence, qualification, integrity and skills required of a diplomat, in the opinion of the researcher a diplomat is expected to possess the following qualifications.

i. **Eloquence**: This is the quality expected of a diplomat whereby he can communicate with people fluently and demonstrate to people the oratory skill he possesses. If a diplomat can freely communicate with his audience, his audience would always be attentive whenever he speaks to them on burning national issues concerning his own country. The skill of eloquence will make him to gain access to qualitative information about the host state that will help in improving the foreign policy of his country.[69]

ii. **Intelligence:** it is expected of a diplomatic personnel to possess high level of intelligence which will always enable him to "think out of the box" by proffering solutions that will promote the foreign policies of the country. If a diplomat is intellectually sound, he will be able to analyze information he has gathered and give accurate report to his country back home.[70]

iii. **Multilingual**: A good diplomatic agent is expected to be fluent in at least more than one internationally recognized language. If a Diplomat is proficient in two or more international languages, citizens of the receiving state can easily understand him; likewise he will also find his

[69] BA Ikedinma *et al.* History and Practice of Diplomacy Course Guide National Open University of Nigeria. <www.nouedu.ng> accessed on 15th December 2024.
[70] *Ibid.*

job easy because he understands the language of the host country. For example a diplomat who is fluent in English and French languages will find his job easier than his counterpart who may understand only one intentional language. This may compel him to speak through an interpreter who may likely distort the communication link.[71]

iv. **Decency**: it is expected of diplomats to live a decent life devoid of any imputation of bad behavior. He should appear neat and smart at all times and what he does should be in simplicity and moderation. He is also expected to exhibit high level of modesty and to be of good conduct at all times.

v. **Moral Rectitude**: A diplomat must be of a high moral standard so that people can rely on his words. He must be a man of his words and he must be a person who means what he says at every point in time.

2.2.3 Diplomatic Agent

Diplomatic agents refer to public offers who have been commissioned according to law, to superintend and transact the affairs of the government which has employed them, in a foreign country. These agents are of divers' orders and are known by different denominations. Those of the first order are almost the perfect representatives of the government by which they are commissioned, they are legates, nuncios, inter nuncios, ambassadors, ministers, plenipotentiaries while those of the second order do not so fully represent their government: they are envoys, residents, ministers, charges d' affairs and consuls".[72]

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[71] *Ibid.*

[72] J Bouvier, A., Law Dictionary Adapted to the Constitution and Laws of the United States, 1856. <http://legal-dictionary.freedictionary.com/Diplomatic+Agents> accessed 12th December, 2024.

A diplomatic agent is a national representative of his country in a foreign land.

Originally, diplomatic agents helped to work out certain negotiations between nations but now a diplomatic agent acts as an intermediary of a foreign nation and the nation which employed the diplomatic agent. Diplomatic agents also represent their nation in protecting the interests and welfare of its citizens in the jurisdiction of another nation.[73] Whereas the *Vienna Convention on Diplomatic Relations* provides that a diplomatic agent is the head of the mission or a member of the diplomatic staff or mission.[74]

Diplomatic agents can be any one from the four categories

1. Ambassadors
2. Envoys and ministers plenipotentiary
3. Ministers resident accredited to the sovereign
4. *Charges d' affairs* accredited to the minister of foreign affairs.[75]

In international law, the term diplomatic agent is a general name for all classes of persons charged with the negotiation, transaction or superintendence of the diplomatic business of one nation in the country of another.[76] At this juncture it is important to note that the term diplomatic agent is not limited to only ambassadors, envoys, nuncios, ministers plenipotentiary and charge d' affairs as written by some authors.

In a broader sense, diplomatic agents are government representatives who are sent by one country to live and work in another country in order to serve as intermediaries, between the two countries. Flowing from the above proposition it therefore means that diplomatic agents include both ambassadors and consuls because they both are

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[73] Diplomatic Agent Law & Legal Definition <http://definitions. legal.com/d/diplomatic-agent> accessed 15th December, 2024.

[74] *Article 1(e)* Vienna Convention on Diplomatic Relation, 1961.

[75] BA Garner, *Blacks Law Dictionary* (7thedn, West Group Publishing Co. 1990) 64.

[76] The Law Dictionary <http://the law dictionary.org/diplomatic agent> accessed 10th December, 2024.

representative of the sending state in the receiving state by protecting the interest and welfare of its citizen in the jurisdiction of the host state but unfortunately, the term diplomatic agent is ascribed to only ambassadors, nuncios and charge d' affaires technically excluding the consuls who do almost the work of ambassadors.

For the fact that diplomatic agent are government representative who are sent by one country to another country to serve as intermediaries between the two countries, it can be suggested that from the provision of diplomatic immunities and privileges Act 1962,[77] the following group of persons can be classified as diplomatic agent.

i. Every foreign envoy.
ii. Every foreign consular officer.
iii. Members of the families of the foreign envoy.
iv. Members of the families of the foreign consular officers.
v. Member of the official or domestic staff of foreign envoys.
vi. A Chief Representative of a Commonwealth Country and members of his family.
vii. Members of the official or domestic staff or Chief representative of a Commonwealth Country.
viii. Representative of Commonwealth Countries and members of their staff attending conference held in Nigeria.
ix. Honorary consuls or trade commissioners.
x. Judge and registers of the International Court of Justice (ICJ).

[77] Cap D9 Laws of the Federation of Nigeria (LFN) 2004.

2.2.4 Diplomatic Mission

A diplomatic mission is a group of people from one state or an international inter-governmental organization such as the United Nations present in another state to represent the sending state/organization officially in the host state. In practice, a diplomatic mission means the resident mission, namely the office of the country's diplomatic representatives in the capital city, as well as being a diplomatic mission to the country in which it is situated; it may also be a non-resident permanent mission to one or more other countries. There are thus resident and non-resident embassies.

A permanent diplomatic mission is typically known as an embassy and the head of the mission is known as an ambassador or high commissioner. The term "embassy" is commonly used also as a section of a building in which the work of the diplomatic mission is carried out, but, strictly speaking, it is the diplomatic delegation itself that is the embassy, while the office space and the diplomatic work done is called the Chancery. Therefore, the Embassy is the Chancery.[78]

The members of a diplomatic mission can reside within or outside the building that holds the mission's chancery and their private residences enjoy the same rights as the premises of the mission as regards inviolability and protection.

All missions to the United Nations are known as permanent missions, while EU Member State' missions to the European Union are known as permanent representatives. For instance, Prof. Ugwu is the Nigerian Permanent Representative to the United Nations. Some countries have more particular naming for their missions and staff; a Vatican mission is headed by a nuncio and consequently known as an apostolic nomenclature. Under the rule of Late Muammar Gaddafi, Libya's missions

[78] Merriam Webster <http://beta.merriam-webster.com/dictionary/ambassador> accessed 10th December, 2024.

used the name "people's bureau" and the head of the mission was a secretary. Mission between Commonwealth Countries are known as high commissions and their heads are known as high commissioners. This is because ambassadors are exchange between foreign countries but since the beginning of the Commonwealth, member's Countries, have normally maintained that they are not foreign to one another. The Commonwealth Countries are former British colonies.

The establishment of diplomatic mission is through mutual consent and understanding of the function that will be undertaken by the mission and its representatives. Diplomatic missions consist of diplomatic representatives from the sending state to the receiving state together with the staff. The functions of the missions are consistent with the functional approach theory as stated in the 1961 Convention[79]. The first time that had been published in a formal legal instrument was in *Article 3*[80] in the listing of the functions by agreeing to establish permanent diplomatic missions, a state implicitly accept certain obligations, namely, to provide facilities and immunities that will enable the mission to function satisfactorily and for those working in the mission to have personal privileges to carry out their functions.

Diplomatic missions are situated in the capital of the state and additional offices may only be established in other parts of the country with permission. For instance in South Africa, the Republic of Finland has embassy offices in both Pretoria and Johannesburg, while the embassy of France is situated in both Pretoria and Cape Town[81]. *Article 11*[82] provides that without a specific agreement between states, the receiving state may require that the size of mission be kept within reasonable limits.

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[79] Vienna Convention on Diplomatic Relations, 1961.
[80] Ibid.
[81] Department of Foreign Affairs in South Africa <http.www.dfa.gov.za/foreign/forrep/forfhtm> accessed 25th December, 2024.
[82] Vienna Convention on Diplomatic Relations, 1961.

The text is not an objective one but simply the opinion of the receiving state. Limiting the size of a mission could possibly aid in reducing abuses of diplomatic immunities.

Termination of Diplomatic and Consular Functions

The functions of a diplomatic agent comes to an end the notification by the sending State to the receiving state that the function of the diplomatic agent has come to an end or on the notification by accordance with paragraph 2 of *Article 28* of the Vienna Convention on Diplomatic Relations, the receiving state has refused to recognize the diplomatic agent as a member of the mission.

Article 9(2)[83] provides that if the sending state refuses or fail within a reasonable period carry out its obligation, the receiving state may refuse to recognize the person concerned as a member of the mission.

It is also provided that when the functions of a person enjoying privileges immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country or on expiry of a reasonable period in which to do so, but shall subsist until that time even in case of armed conflict. However with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.[84]

The functions of a member of a consular post shall come to an end, inter alia:

(a) On notification by the sending state to the receiving state that his functions have come to an end:

(b) On withdrawal of the exequatur";

[83] *Article 39 (2)* Vienna Convention on Consular Relations, 1961.
[84] *Ibid.*

(c) On notification by the receiving state to the sending state that the receiving state has ceased to consider him as a member of the consular staff.[85]

Evaluation of Diplomatic and Consular Privileges and Immunities

From the research carried out so far, all the privileges and immunities enjoyed by diplomatic agent and that of consular officers are virtually the same, save the following differences:

i. **On the Diplomatic Bag:** It is expressly provided that the diplomatic bag shall not be opened or detained.[86] The inviolability of the diplomatic bag is absolute, while it is also provide that the consular bag shall be neither opened or detained, there is a proviso that says, if the competent authorities of the receiving state have serious reasons to believed that the bag contains something other than the official correspondence documents or article of the consular post, they may request that the bag be opened in their presence by an authorized representative of the sending state and if this request is refused by the authorities of the sending state, the bag shall be returned to its place of origin.[87] The immunity accorded the consular bag falls within a qualified immunity and not absolute like that of the diplomatic bag.

ii. **On Immunity from Criminal Jurisdiction**: It is expressly provided that a diplomatic agent enjoys absolute immunity from the criminal jurisdiction of the receiving State[88]. Consular officers are not also liable to arrest or detention pending trial, except in the case of a grave crime

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[85] *Article 25* of the Vienna Convention on Consular Relations, 1963.
[86] *Article 27 (3)* in Vienna Convention on Consular Relations, 1961.
[87] *Article 35 (3)* Vienna Convention on Consular Relations, 1963.
[88] *Article 31* of the Vienna Convention on Consular Relations, 1961.

and pursuant to a decision by the competent judicial authority.[89] What this means is that a consular officer is amenable to arrest, detention and prosecution in the receiving State if he commits grave and serious crime. Therefore what consular officers enjoy concerning the criminal jurisdiction of the receiving State is a qualified immunity.

iii. **On Liability to Give Evidence**: It is expressly provided that a diplomatic agent is not obliged to give evidence as a witness.[90] This privilege is an absolute privilege, whereas members of a consular post may be called upon to attend as witnesses in the course of judicial or administrative proceedings but if a consular officer should decline to do so, no coercive measure or penalty may be applied to him.[91]

The authority requiring the evidence of a consular officer shall avoid interference with the performance of his functions. It may, when possible, take such evidence at his residence or at the consular post or accept a statement from him in writing. It is pertinent to note that consular officer's liability to give evidence in the receiving State is not absolute like that of a diplomatic agent but rather qualified privilege as we can see that if a consular officer refuses to give evidence, he cannot be coerced to do so.

However, members of a consular post are under no obligation to give evidence concerning matters connected with the exercise of their functions or to produce official correspondence and documents relating thereto. They are also entitled to decline to give evidence as expert witnesses with regard to the law of the sending State.[92]

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[89] *Article 4, Ibid.*
[90] *Article 31 (2)* of the Vienna Convention on Diplomatic Relations, 1961.
[91] *Article 44 (1)* of the Vienna Convention on Consular Relations, 1963.
[92] *Ibid, article 44 (3).*

2.2.5 Ambassadors

An ambassador is an official envoy, especially a highest ranking diplomat who represents a State and is usually accredited to another sovereign state or to an international organization as the resident representative of their own government or sovereign or appointed for a special and often temporary diplomatic assignment. Simply put, an ambassador is the highest-ranking person who represents his or her own government while living in another country.

Put in a broader sense, an ambassador is a diplomatic officer of the highest rank, usually designed by a government at its resident representative in a foreign state. Ambassadors represent the sovereign as well as the nation and enjoy many privileges while abroad in their official capacity including immunity. Ambassadors are also generally distinguished from certain legates who have only ecclesiastical authority but the *papal nuncio* bears the rank of ambassador[93].

2.2.6 Diplomatic Bag

Diplomatic Bags are packages or parcels that contain official correspondence, documents and other materials used in Diplomatic communications between states[94]. They are used to ensure the safe and secured transfer of sensitive information and essential documents between the diplomatic missions and their home countries. At the international level, the legal framework governing the use of Diplomatic Bag is primarily based on the Vienna Convention on Diplomatic Relations VCDR 1961[95]. According to *Article* 27 of VCDR, Diplomatic Bags shall not be subject to any form of inspection and their contents may be seized or detained. However, despite the legal protections provided by International Law there are several issues and challenges

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[93] B AGarner, *Black's Law Dictionary* (7thedn, West Group Publishing Co. 1990) 79.
[94] Mc Clanahan Diplomatic Immunity 32.
[95] Maginnis *Brooklyn Journal of International Law* (2002 - 2003) 28: 996.

associated with the use of Diplomatic Bags. These challenges require International cooperation, adherence to the principles of VCDR and dialogue between States as to ensure effective and secure use of Diplomatic Bags.

2.2.7 Right

As a result of their title, diplomats are exempted from being prosecuted by the state in open court when they are suspected to be guilt of a crime. Not only are these agents free from the criminal jurisdiction of the state, they were also immune from administrative and civil jurisdiction.

2.2.8 Human Right

Human Rights are rights inherent to all human being regardless of race, sex, nationality, ethnicity, language, religion, or any other status, Human rights includes the right to life and liberty, freedom from slavery and torture freedom of opinion and expression, the right to work and education, and many more.

2.2.9 State

A state is a political division of a body of people that occupies a territory. The State is sovereign in its territory (also referred to as jurisdiction) and has the authority to enforce a system of rules over the people living inside it.

2.2.10 Consuls

Consuls are officials appointed by the government of one country to look after its commercial interests and the welfare of its citizens in another country.

A consul is a diplomat appointed to live in a foreign country to protect both her country's interests and citizens living abroad. For instance, if you are an American

living in Poland, take your troubles to the American Consul[96]. A consul generally is a diplomat appointed by a government to protect it commercial interests and help its citizens in a foreign country.

The Black's Law Dictionary defines consuls as a governmental representative living in a foreign Country to oversee commercial and other markets involving the representative's home country and its citizens in that foreign country[97]. However B.A. Garner is of the view that because consuls are not diplomatic agents, they are subject to local law and jurisdiction. With due respect, this dissertation disagrees with the position that consuls are not diplomatic agents in the sense that since consuls are governmental representatives living in a foreign country for the purpose of protecting the individual interests of traders, travelers and marines belonging to the state which employs them, they are equally performing diplomatic functions for which they should also be regarded as diplomatic agents.

2.2.11 Consulate

A consulate is similar to but not the same as a diplomatic office but with focus on dealing with individual persons and businesses as defined by the VCCR.[98]A consulate or consulate general is generally a representative of the embassy in locales outside of the capital city. For instance, the United Kingdom has its Embassy in the U.S in Washington, D.C but also maintains seven consulates-general and four consulates elsewhere in the United States. The person in charge of a consulate or consulate-general is known as consul or consul-general respectively.

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[96] <http://www. vocabulary.com/dictionary/consul> accessed I5th December, 2024.
[97] BA Gamer, *op.cit, 310.*
[98] Vienna Convention on Consular Relations, 1963.

2.3 Summary of Review

The diplomatic bag is an essential component of International diplomatic practice, ensuring secure communication between states and their diplomatic missions. It is predominantly derived from the Vienna Convention on Diplomatic Relations (VCDR) of 1961, which enshrines the principles of inviolability and immunity, preventing the receiving state from opening or detaining diplomatic bags[99].Despite these protections, the use of the diplomatic bag has been subject to various debates, particularly concerning its misuse for illicit activities and its role in modern digital communication.

The United Nations office on Drugs and Crime (UNODC)[100] reported in 2020 that there have been documented instances where diplomatic pouches have been exploited for smuggling contraband such as drugs, weapons and classified information. Such incidents highlight the limitations of International legal frameworks in addressing abuse while maintaining the principle of inviolability[101]. A notable example includes the 1984 case of the Nigerian government's attempted abduction of Umaru Dikko in the United Kingdom. The perpetrators sought to transport him in a diplomatic crate under the assumption that it would be protected by the VCDR's provisions. This incident sparked International debate on whether diplomatic immunity should have limits in cases involving Human rights violations or transnational crime[102].

Murphy denotes that the increasing security concerns faced by states particularly in the post – 9/11 era, have raised questions about whether host States should have the right to inspect diplomatic pouches under exceptional circumstances. The VCDR

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[99] E Denza, *Diplomatic Law Commentary on the Vienna Convention on Diplomatic Relations.*(Oxford University Press 2016) 149.

[100] United Nations office on Drugs and Crime (UNODC). (2020). *World Drug report*. United Nations.

[101] J Crowford, *Brownlie's Principles of Public International Law*. (Oxford University Press, 2012) 128.

[102] PR Williams, *Transnational Criminal Law*. (Oxford University Press, 2018) 179.

prohibits routine inspections, but some scholars argue that States may have a right to intervene in cases of compelling security threats.[103]

The digital revolution has transformed the landscape of diplomatic Communication, reducing the reliance on physical diplomatic pouches.[104] Murphy posited that digital encryption and electronic transmission offer secure alternatives, yet they also introduce new challenges such as cyber espionage and data breaches[105]. Thus, cyber security threats pose significant risks to modern diplomatic communication. It is therefore imperative to note that a comparative analysis of State practices reveals significant variations in the application of VCDR provisions. Some States, such as the United Kingdom, have implemented stricter regulations and monitoring mechanisms to prevent abuse[106]. Others, particularly in regions with weaker governance structures, have experienced challenges in enforcing compliance with diplomatic laws[107]. Hence, it is trite that Diplomatic incidents involving the misuse of diplomatic bags have led to legal disputes and calls for reform.

2.4 Gap in Knowledge

While there are substantial literature on the Diplomatic bag and its legal framework as established by the Vienna Convention on Diplomatic Relations VCDR of 1961, several areas remain under explored. First, there is a lack of comprehensive analysis on how contemporary security threats and technological advancements have impacted the efficacy of the diplomatic bag. Existing studies often focus on traditional practices, without adequately addressing the challenges posed by digital communication technologies and the increasing prevalence of cyber threats.

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[103] SD Murphy, *Principles of International Law*. (West Academic Publishing, 2017) 208.

[104] MN Schmitt, *Tallinn manual 2.0 on the International Law applicable to Cyber Operations*. (Cambridge University Press, 2019) 176.

[105] MN Shaw, *International Law*. (Cambridge University, Press 2017) 133.

[106] FL Bordin, *International Law in the long nineteen century*. (Oxford University Press 2015) 78.

[107] PR Williams, *Transnational Criminal Law*. (Oxford University Press, 2018) 144.

More so, there is limited research on the variations of State practices and interpretations of the VCDR. Although some studies provide insights into specific state practices, a systematic comparative analysis across different jurisdictions is largely absent. This gap hinders the development of a cohesive understanding of how diplomatic bag is applied and regulated globally.

Furthermore, the potential for misuse of diplomatic bag in illicit trafficking and other illegal activities is an area that has not been sufficiently scrutinized. While anecdotal evidence and isolated case studies exist, there is a need for a more rigorous examination of the mechanisms that facilitate such abuses and the legal and policy responses required to mitigate these risks.

Finally, the balance between preserving the inviolability and immunity of the diplomatic bag and addressing security concerns requires further exploration.

2.5 Historical Evolution

The Diplomatic bag, also known as the diplomatic pouch has a long and interesting history that dates back to the origins of diplomacy itself. Its evolution is closely tied to the development of International relations and the need for secure communication between states and their representatives abroad. The concept of secure communication can be traced back to ancient civilizations in Egypt, Persia and Greece, where messengers were entrusted with delivering important documents and messages. These messengers often carried symbols of protection to ensure their safe passage[108]. In Medieval Europe, the use of envoys and diplomatic couriers became more formalized, with kings and Rulers relying on trusted emissaries to convey sensitive

[108] K Smith, *Globalization and its impact on Diplomatic Practices*. (Princeton University, Press 2020) 129.

information[109].The renaissance and the age of exploration bought significant changes to diplomacy. The establishment of permanent diplomatic missions in the 15th and 16th centuries necessitated reliable means of communication between the home country and its envoys abroad. During this period, diplomatic couriers often carried sealed letters and documents, which were protected by the custom of inviolability[110].

Then came the codification in International Law. The principles governing the inviolability of diplomatic correspondence were gradually codified in International Law. The Vienna Convention on Diplomatic Relation (VCDR) of 1961 was a landmark treaty that provided a comprehensive legal framework for diplomatic relations. *Article 27* of the VCDR specifically addresses the diplomatic bag, stating that it shall not be opened or detained and must bear visible marks indicate its character.[111] This codification reinforced the principle of inviolability and established clear guidelines for the use of the diplomatic bag.

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[109] *Ibid*

[110] P Jones, and R Taylor, *The Impact of Technology on Diplomatic Practices*. (Princeton University, Press 2021) 99.

[111] Vienna Convention on Diplomatic Relations, 1961.

CHAPTER THREE

LEGAL AND INSTITUTIONAL FRAMEWORK

3.1 The Legal Framework

The Legal instrument governing diplomatic immunities and privileges on the précised scope on the Vienna Convention of diplomatic bag are well enunciated under this chapter. The Rules, Rights and Obligations of Companies, Governments and Citizens are set forth in system of legal documents called a Legal Framework. Documents in the legal framework include a Country's constitutions, legislation, policy, regulation and contracts.

3.1.1 Constitution of the Federal Republic of Nigeria 1999 (As amended)

As have been noted earlier in this research work. The special privileges and immunities related to diplomatic personnel of various kinds grew up partly as a consequence of sovereign immunity. Therefore since diplomatic agents represent their States in various ways, they thus benefit from the legal principle of State sovereignty. It can be suggested that diplomatic immunity is derived from sovereign immunity.

Section 308 of the Nigerian Constitution 1999 as amended provides thus;

> i. Notwithstanding anything to the contrary in this constitution, but subject to subsection (2) of this section.
> a. No civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;
> b. A person to whom this section applies shall not be arrested or imprisoned during that period either on pursuance of the process of any court or otherwise; and
> c. No process of any court requiring or compelling the appearance of a person to whom this section applies shall be applied for or issued.[1]

The section quoted above relates to a person holding the office of President or Vice President, Governor or Deputy Governor, and the reference in this section to "period

[1] *Section 308* of the Constitution of the Federal Republic of Nigeria, 1999 (As Amended).

of office" is a reference to the period during which the person holding such office is required to perform the functions of the office.

Consequently, diplomatic agents, particularly Ambassadors are representatives of their sovereign countries in a foreign land. Therefore it is rational and legal that these diplomatic agents should enjoy some levels of privileges and immunities.

3.1.2 Vienna Convention on Diplomatic Relations 1961

This is one of the multilateral Conventions of the United Nations which was done at Vienna, Austria on the 18th day of April 1961 and was entered into force on the 24th day of April, 1964.

This Convention believes that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems[2].

Therefore, the privileges and immunities accorded diplomatic agents are provided from *Articles* 20 to 40 of the Convention[3].

3.1.3 Vienna Convention on Consular Relation 1963

This is the supreme international instrument regulating Consular Relations. The convention was done at Vienna on the 24th day of April 1963 and came into force on the 19th day of March 1967.

From the preamble of the VCCR 1963, one can clearly see that an international instrument on consular relations, privileges and immunities would also contribute to the smooth running of friendly relations among nations, irrespective of their different constitutional and social system.

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[2] See the preamble to the Vienna Convention on Diplomatic Relations, 1961.
[3] *Ibid*.

The preamble of the VCCR provides that 'the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular privileges and immunities as well as consular functions are provided from *Articles 27 to 44* of the Convention.[4]

3.1.4 Convention on Special Mission, 1969

In many cases, states will send out special or ad hoc mission to particular countries to deal with some defined issues in addition to relying upon the permanent staff of the diplomatic and consular missions. In such circumstance, these missions, whether purely technical, political or ceremonial in nature, may rely on certain immunities which are basically derived from the *Vienna Conventions on Diplomatic and Consular Relations* by analogy with appropriate modifications.

By *Article 8*[5] the sending State must let the receiving State know of the size and composition of the mission which *Article 17*[6] provides that the mission must be sited in a place agreed by the States concerned or in the Foreign Ministry of the receiving State. By *Article 31*,[7] member of special missions have no immunity with respect to claims arising from an accident caused by a vehicle used outside the official functions of the person involved. Also *Article 27*[8] provides for freedom of movement and travel such as is necessary only for the performance of the functions of the special mission.

The question of special missions was discussed in the case of *United State v Tabatabai*[9] case before a series of German Court. The Federal Supreme Court in Germany noted that the Convention had not yet come into force and that there were

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[4] *Ibid.*
[5] Vienna Convention on Consular Relations, 1963.
[6] *Convention on special mission.*
[7] *Ibid.*
[8] *Ibid.*
[9] *CR 05-00744 MMN.*

conflicting as to the extent to which it reflected existing customary law. However, it was clear that there was a customary rule of international law which provided that an ad hoc envoy, charged with a special political mission by the sending State may be granted immunity by individual agreement with the host State for that mission and its associated status and that such envoys could be placed at par with members of the permanent missions of States. The concept of immunity is not to protect the diplomat as a person but rather the mission to be carried out by that person on behalf of the sending State.

3.1.5 Convention on the Prevention and Punishment of Crimes against Internally Protected Persons Including Diplomatic Agents

This convention came into force in 1977. It seeks to protect heads of state or government, foreign ministers abroad, state representatives and officials of international organizations from the offences of murder, kidnapping or other attack upon their person or liberty.

3.1.6 Draft Articles on the Diplomatic Courier and Diplomatic Bag, 1989

Article 27 of the VCDR 1961 provides that "the receiving state shall permit and protect free communication on behalf of the mission for all official purpose. Such official communication is inviolable and may include the use of diplomatic couriers and message in code and in cipher, although the consent of the receiving State is required for a wireless transmitter.[10]

Article 27 (3) and (4) VCDR 1961 deal with the diplomatic bag, and provides that the diplomatic bag "shall not be opened or detained and that the packages constituting the diplomatic bag must be visible external marks of their character and may contain only

[10] *Article 25(1)* of the Vienna Convention on Diplomatic Relations.

diplomatic document or articles intended for official use". However, in certain situations, the inviolability of the diplomatic bag has been abused. For instance, on the 5th of July 1984, a former Nigerian minister of Agriculture, Alhaji Umaru Dikko was kidnapped in London and placed in a crate to be flown to Nigeria. The crate was opened at Stansted Airport, although accompanied by a person claiming diplomatic status. The crate did not contain an official seal and was thus clearly not a diplomatic bag.[11]

Also, in March, 2000, diplomatic baggage destined for the British High Commission in Harare was detained and opened by the Zimbabwe authorities; the United Kingdom government protested vigorously and announced the withdrawal of its High Commissioner for consultations.[12]

In view of suspicions of abuse, the question has arisen as to whether electronic screening, not involving opening or detention of the diplomatic bag is legitimate. The United Kingdom appears to take the view that electronic screening of this kind would be permissible but other states do not accept this. The issue of the diplomatic bag has been considered by the international Law Commission, in the context of *Article 27*[13] and analogous provisions in the Vienna Convention on Consular Relations,[14] the Convention on Special Missions[15] and the convention on the Representation of states in their Relation with International Organization.[16] The Draft Article on the Diplomatic Courier and Diplomatic Bag[17] which has been adopted by the International Law Commission on 1989 provides that the diplomatic bag shall be inviolable

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[11] *A Akinsanya.*
[12] MN Shaw*, International Law* (*5th edn,* Cambridge University Press 2004) 668.
[13] *Ibid.*
[14] *Ibid.*
[15] *Ibid.*
[16] Vienna Convention Diplomatic Relations, 1961.
[17] Draft Article on the Diplomatic Courier and the Diplomatic Bag, 1989.

wherever it may be. It is not to be opened or detained and shall be exempted from examination directly or through electronic or other technical device.[18]

As far as the diplomatic courier is concerned, that is, a person accompanying a diplomatic bag also enjoys immunity, the Draft Article[19] provide for a regime of privileges, immunities and inviolability that is akin to that governing diplomats. It is to enjoy personal inviolability and is not liable to any form of arrest or distention,[20] his temporary accommodation is also inviolable, and he will benefit from immunity from the criminal and civil jurisdiction of the receiving or transmit State in respect of all acts performed in the exercise of his functions.[21]

3.1.7 Vienna Convention on Representation of States in their Relations with International Organizations of a Universal Character, 1975

This treaty applies with respect to the representation of states in any international organization of a universal character, irrespective of whether or not there are diplomatic relations between the sending and the receiving States.

There are many similarities between this Convention and the 1916 Vienna Convention. By *Article 30*, for example, diplomatic staff enjoys complete immunity from criminal jurisdiction and immunity from civil and administrative jurisdiction in all cases, save for the same exception.

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[18] *Article 10* of the Draft Article on the Diplomatic Courier and the Diplomatic Bag adopted by the by the International Law Commission, 1989.

[19] *Ibid*.

[20] *Article 28* VCDR, 1961.

[21] *Article 10* of the Draft Article on the Diplomatic Courier and the Diplomatic Bag adopted by the by the International Law Commission, 1989.

3.1.8 Diplomatic Immunities and Privileges Act 1962, Nigeria[22]

This law regulates diplomatic activities in Nigeria and grants privileges and immunities to the following persons.

This laws grants varying levels of privileges and immunities to the following persons.

i. Every foreign envoy
ii. Every foreign consular officer
iii. Members of the families of the foreign envoys
iv. Members of the families of foreign consular officers
v. Members of the official or domestic staff of foreign envoys
vi. A Chief Representative of a Commonwealth country and members of his family
vii. Members of the official or domestic staff of Chief Representative of a commonwealth country.
viii. Representatives of Commonwealth countries and members of their staff attending conference held in Nigeria.
ix. Honorary consuls or trade commissioners
x. Judges and registrars of the Intentional Court of Justice (ICT)

Indeed the list of persons enjoying diplomatic privileges and immunities under this law is quite extensive which even goes beyond the provisions of the Vienna Convention on Diplomatic Relation and Vienna Convention on consular Relations.

3.1.9 Diplomatic Privileges Amendment Act 37 of 2001, South Africa

This Act makes provision regarding the immunities and privileges of diplomatic missions and consular post and their members, of Heads of State, specials envoys and certain representatives, of the United Nations and its specialized agencies and other

[22] Cap D9 Laws of the Federation of Nigeria (LFN) 2010.

International Organization and certain other persons to make Provision regarding Immunities and privileges pertaining to International conference and meetings; to enact into law certain convention and to provide for matters connected therewith.

3.1.10 Diplomatic Privileges Act 1961, United Kingdom

The general purpose of this brief Act is that of extending to representative of Common wealth countries and of the Government of the Republic of Ireland, meeting together in this Country in conference with the Government of Her Majesty in the United Kingdom, those same immunities from the jurisdiction of the courts as are accorded to the accredited representatives of foreign states, No attempt is made to define the term conference "the Immunities is also accorded to members of the official staffs of the representatives, provision is made for the publication in the various official Gazettes of lists containing the names of persons to whom the secretary of state wishes the provisions of the Act to extend and for additions and alterations to and deletions from such list.[23]

Diplomatic privileges are enjoyed by resident foreign diplomats under the common law and the Diplomatic Privileges Act, 1708[24] (amended by the Diplomatic Immunities (Restriction Act, 1955)[25] and by resident representatives of the Common Wealth Countries and of the Irish Republic under the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952.[26]

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[23] *Section 1(2)* Diplomatic Privileges Act, 1961.
[24] 7 Anne, C. 12.
[25] 4 Eliz. 2, C. 21.
[26] 15 & 16 Geo 6 & 1 Eliz. 2, C. 18.

3.2. Institutional Framework

3.2.1 Constitutive Act of African Union of 11th July, 2000

The African Union[27] is a continental body consisting of the 55 member states that make up the countries of the African Continent. It was officially launched in 2002 as a successor to the Organization of African Unity[28] (OAU, 1963-1999). In May 1963, 32 Heads of independent African States met in Addis Ababa Ethiopia to sign the Charter creating Africa's first post-independence continental institution, The Organization of African Unity. The OAU was the manifestation of the pan-African vision for an Africa that was united, free and in control of its own destiny and this was solemnized in the OAU Charter in which the founding fathers recognized that freedom, equality, justice and dignity were essential objectives for the achievement of the legitimate aspirations of the African peoples and that there was a need to promote understanding among Africa's peoples and foster cooperation among African states in response to the aspirations of Africans for brother-hood and solidarity, in a larger unity transcending ethnic and national Differences. The guiding philosophy was that of Pan-Africanism which centered on African socialism and promoted African unity, the communal characteristic and practices of African communities, and a drive to embrace Africa's culture and common heritage.

The main objectives of the OAU were to rid the continent of the remaining vestiges of colonization and apartheid; to promote unity and solidarity amongst African States; to coordinate and intensify cooperation for development; to safeguard the sovereignty and territorial integrity of Member States and to promote international cooperation. The OAU Charter spelled out the purpose of the Organization namely:

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[27] Hereinafter abbreviated as AU.
[28] Hereinafter abbreviated as OAU.

i. To promote the unity and solidarity of the African States;
ii. To coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa;
iii. To defend their sovereignty, their territorial integrity and independence;
iv. To eradicate all forms of colonialism from Africa; and
v. To promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.

Through the OAU Coordinating Committee for the Liberation of Africa, the Continent worked and spoke as one with undivided determination in forging an international consensus in support of the liberation struggle and the fight against apartheid. The OAU had provided an effective forum that enabled all Member States to adopt coordinated positions on matters of common concern to the continent in international for and defend the interests of Africa effectively. On 9.9.1999, the Heads of State and Government of the Organization of African Unity issued the State Declaration calling for the establishment of an African Union, with a view, to accelerating the process of integration in the continent to enable Africa to play its rightful role in the global economy while addressing multifaceted social, economic and political problems compounded as they were by certain negative aspects of globalization. The African Union was officially launched in July 2002 in Durban, South Africa, following a decision in September 1999 by its predecessor, the OAU to create a new continental organization to build on its work. The decision to re-launch Africa's pan-African organization was the outcome of a consensus by African leaders that in order to realize Africa's potential, there was a need to refocus attention from the fight for decolonization and ridding the continent of apartheid, which had been the

focus of the OAU, towards increased cooperation and integration of African states to drive Africa's growth and economic development.

The AU is guided by its vision of "An Integrated, Prosperous and Peaceful Africa, driven by its own citizens and representing a dynamic force in the global arena."

The Constitutive Act of the African Union and the Protocol on Amendments to the Constitutive Act of the African Union lay out the aims of the AU which are:

Aims

1. Achieve greater unity and solidarity between African countries and their people;
2. Defend the sovereignty, territorial integrity and independence of its Member States;
3. Accelerate the political and socio-economic integration of the continent;
4. Promote and defend African common positions on issues of interest to the continent and its peoples;
5. Encourage international cooperation;
6. Promote peace, security, and stability on the continent;
7. Promote democratic principles and institutions, popular participation and good governance;
8. Promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments;

9. Establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations;

10. Promote sustainable development at the economic, social and cultural levels as well as the integration of African economies;

11. Promote cooperation in all fields of human activity to raise the living standards of African peoples;

12. Coordinate and harmonize the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union;

13. Advance the development of the continent by promoting research in all fields, in particular in science and technology;

14. Work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent;

15. Ensure the effective participation of women in decision-making, particularly in the political, economic and socio-cultural areas;

16. Develop and promote common policies on trade, defense and foreign relations to ensure the defense of the Continent and the strengthening of its negotiating positions;

17. Invite and encourage the full participation of the African Diaspora as an important part of our Continent, in the building of the African Union.

Organs

The work of the AU is implemented through several principal decision making organs:- The Assembly of Heads of State and Government, the Executive Council, the Permanent Representatives Committee[29], Specialized Technical Committees[30], the Peace and Security Council and The African Union Commission. The AU structure promotes participation of African citizens and civil society through the Pan-African Parliament and the Economic, Social & Cultural Council.[31]

Judiciary Organs

Organs that handle judicial and legal matters as well as human rights issues include:- African Commission on Human and Peoples' Rights[32], African Court on Human and Peoples' Rights[33], AU Commission on International Law[34], AU Advisory Board on Corruption[35] and the African Committee of Experts on the Rights and Welfare of the Child. The AU is also working towards the establishment of continental financial institutions (The African Central Bank, The African Investment Bank and the African Monetary Fund). The Regional Economic Communities[36] and the African Peer Review Mechanism are also key bodies that constitute the structure of the African Union. To ensure the realization of its objectives and the attainment of the Pan African Vision of an integrated, prosperous and peaceful Africa, Agenda 2063 was developed as a strategic framework for Africa's long term socio-economic and integrative transformation. Agenda 2063 calls for greater collaboration and support

[29] Hereinafter abbreviated as PRC.
[30] Hereinafter abbreviated as STCs.
[31] Hereinafter abbreviated as ECOSOCC.
[32] Hereinafter abbreviated as ACHPR.
[33] Hereinafter abbreviated as AFCHPR.
[34] Hereinafter abbreviated as AUCIL.
[35] Hereinafter abbreviated as AUABC.
[36] Hereinafter abbreviated as RECs.

for African led initiatives to ensure the achievement of the aspirations of African people.

3.2.2 International Court of Justice (Chapter XIV and Article 92 of the United Nations charter 1945).

The International Court of Justice[37] was established by the charter of United Nations signed in San Francisco in 1945.[38] Its statute is an integral part of the UN charter.[39] *Article 92* of the UN Charter designates the ICJ as the principal judicial organ of the United Nations.[40] The court began its operations in 1946 succeeding the Permanent Court of International Justice[41], which was established under the league of Nations in 1920[42]. The PCIJ played a significant role in adjudicating dispute between states during the interwar period[43]. The experience gained from the PCIJ's operation informed the drafting of the ICJ's statute.

The International Court of Justice, the Principal organ of the United Nations played a crucial role in the peaceful settlement of dispute s between states and the development of International Law.[44] This section examines the background, establishment and duties of the ICJ, highlighting its significance in the contemporary International legal Order.[45]

The ICJ aimed to provide a permanent and impartial forum for the peaceful settlement of disputes between States, contributing to the maintenance of International peace and

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[37] Hereinafter abbreviated as ICT.
[38] United Nations Charter of the United Nations. United Nations, 1945.
[39] ICJ. Statute of the International Court of Justice. United Nations, 1946.
[40] *Ibid.*
[41] Hereinafter abbreviated as PCIJ.
[42] M Shahabudeen, *Precedent in the World Court.* (Cambridge University, Press 1996) 144.
[43] H Thirlway, 'The law and Practice of the International Court of Justice. Fifty years of Jurisprudence'. *British Institute of International and Comparative Law*. (2019).
[44] J Crawford, *Brownlie's Principles of Public International Law*. (Oxford University, Press 2012)115.
[45] ICJ Statute of the International Court of Justice. United Nations, 1946.

security. It also aimed to promote the development and codification of International Law, through its judgments and advisory opinions.

The ICJ contentious jurisdiction allows it to adjudicate disputes between States that have consented to its jurisdiction[46]. States can consent to the ICJ's jurisdiction through various means, including special agreements, treaty provisions, and declarations under *Article 36(2)* of the ICJ statutes (the "optional clause")[47]. The court's judgments in contentious cases are binding on the parties to the dispute while the court only has jurisdiction over states, and individuals[48].

On Advisory Jurisdiction, *Article 96* of the U.N Charter authorizes the UN general Assembly and Security Council to request Advisory opinions from the ICJ on legal questions[49].

Article 38(1) of the ICJ statutes specifies the sources of law that the Court applies: International Conventions (treaties)[50], International custom, General Principles of Law recognized by civilized nations[51], and judicial decisions and the teachings of the most highly qualified Publists[52].

The ICJ continues to play a critical role in the peaceful settlement of dispute between states, contributing to the maintenance of International peace and security[53]. ICJ also faces challenges related to jurisdiction, as states must consent to the authority. Enforcement of court's judgment can also be challenging, as the ICJ lacks its own

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46 ICJ. Statute of the International Court of Justice. United Nations, 1946.
47 *Ibid.*
48 *Ibid.*
49 *Ibid.*
50 United Nations Charter of the United Nations. United Nations, 1945.
51 *Ibid.*
52 *Ibid.*
53 S Rosenne, *The Law and Practice of International Court, 1920 – 2005*. Brill.

enforcement mechanism.[54] One thing that is very clear is that despite these challenges, the ICJ remains a vital institution for the development and application of International Law, contributing to the stability and predictability of the International legal order.

3.2.3 Rome Statute of the International Criminal Court, 2002

The Rome statute of the International Criminal Court was adopted on July 17, 1998 in Rome, Italy, following extensive negotiation. The statute entered into force on July 1, 2002 after the required number of ratification[55]. The International Criminal Court[56] was established as an independent, permanent judicial institution with jurisdiction to persecute individuals for genocide, crimes against humanity, war crimes, and the crime of aggression.[57] Its purpose is to end impunity for the perpetrators of these heinous crimes and to contribute to the prevention of their recurrence. The ICC was established to persecute individuals for the most serious crimes of International concern, represents a significance development in International Criminal law. The idea of an International Criminal court emerged after World War II, with the Nuremberg and Tokyo tribunals. The cold war prevented its immediate realization. The *adhoc* tribunals for the formal Yugoslavia (ICTY) and Rwanda (ICTR) in the 1990's revived the momentum for a permanent International Criminal Court[58]. The ICC can exercise jurisdiction in the three situations:

i. When a State party refers a situation to the prosecutor.

ii. When the UN Security Council refers a situation to the prosecutor.

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[54] S Rosenne, *The Law and Practice of International Court, 1920 – 2005*. Brill

[55] ICC. Annual Report. International Criminal Court, 2023.

[56] Hereinafter abbreviated as ICC

[57] ICC. Rome Statute of the International Criminal Court. International Criminal Court, 2023

[58] A Casese, P. Gaeta and J. D. Ohlin, (Eds.), *Cassese's International Criminal Law*. (Oxford University Press2018).

iii. When the prosecutor initiates an investigation propriomotu (on their own initiative), subjects to judicial authorization[59].

The principle of complementarity is a corner stone of the ICC jurisdiction. The court only intervenes when national courts are unwilling or genuinely unable to prosecute.[60] The admissibility criteria ensure that the ICC only prosecutes cases that are sufficiently grave and that national proceedings have not been conducted fairly.

Operation

The ICC began operations on 1 July 2002, upon the entry into force of the Rome Statute, a multilateral treaty that serves as the court's charter and governing document. States which become party to the Rome Statute become members of the ICC, serving on the Assembly of States Parties, which administers the court. As of November 2023, there are 124 ICC Member States; 41 States have neither signed nor become parties to the Rome Statute[61].

Intended to serve as the "court of last resort", the ICC complements existing national judicial systems and may exercise its jurisdiction only when national courts are unwilling or unable to prosecute criminals[62]. It lacks universal territorial jurisdiction and may only investigate and prosecute crimes committed within member states, crimes committed by nationals of member states, or crimes in situations referred to the Court by the United Nations Security Council[63].

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[59] R Crier, H Firman, D Robinson, and E Vasiliev, *An Introduction to International Criminal Law and Procedure*. (Cambridge University, Press 2019) 145.
[60] WA Schabas, *Introduction to Criminal Law.* (Oxford University Press 2020) 125.
[61] Deutsch, Anthony; Sterling, Toby (17 March 2023).
[62] International Criminal Court. 17 March 2023.
[63] Armstrong, Kathryn; Radford, Antoinette; Gardner, Frank (18 March 2023).

Sudanese president Omar al-Bashir and Russian president Vladimir Putin in November 2017.

The ICC held its first hearing in 2006, concerning war crimes charges against Thomas LubangaDyilo, a Congolese warlord accused of recruiting child soldiers; his subsequent conviction in 2012 was the first in the court's history. The Office of the Prosecutor has opened twelve official investigations and is conducting an additional nine preliminary examinations.

Dozens of individuals have been indicted in the ICC, including Ugandan rebel leader Joseph Kony, former President Omar Al-Bashir of Sudan, President Uhuru Kenyatta of Kenya, Libyan Head of State Muammar Gaddafi, President Laurent Gbagbo of Ivory coast and former Vice President Jean-Pierre Bemba of the Democratic Republic of the Congo.

On 17 March 2023, ICC judges issued arrest warrants for Russian leader Vladimir Putin and the Presidential Commissioner for Children's Rights in Russia Maria Lvova-Belova[64] for child abductions in the 2022 Russian invasion of Ukraine[65]. Putin became the first Head of State of a U.N. Security Council Permanent Member to be the subject of an ICC arrest warrant[66]. Although Russia withdrew its signature from the Rome Statute in 2016, and is thus not a participant in the ICC not under its jurisdiction, Putin can be charged for actions against Ukraine, which is not a party but has accepted jurisdiction of the court since 2014. Should Putin travel to a State party,

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64 Armstrong, Kathryn; Radford, Antoinette; Gardner, Frank (18 March 2023).
65 Hindustan Times, 25 September, 2023.
66 *Ibid.*

he can be arrested by local authorities[67]. Later in 2023 Russia's ministry of internal affairs retaliated by placing several ICC officials on its wanted list[68].

Structure

The ICC is governed by the Assembly of States Parties, which is made up of the States that are party to the Rome Statute.[69] The Assembly elects officials of the Court, approves its budget, and adopts amendments to the Rome Statute. The Court itself has four organs: the Presidency, the Judicial Divisions, the Office of the Prosecutor, and the Registry[70]

State parties

As of November 2019, 123 states[71] are parties to the Statute of the Court, including all the countries of South America, nearly all of Europe, most of Oceania and roughly half of Africa.[72] Burundi and the Philippines were member states, but later withdrew effective 27 October 201773 and 17 March 2019, respectively. A further of 31 countries have signed but not ratified the Rome Statute. The law of treaties obliges these states to refrain from "acts which would defeat the object and purpose" of the treaty until they declare they do not intend to become a party to the treaty. Four signatory states Israel in 2002, the United States on 6 May 2002, Sudan on 26 August 2008, and Russia on 30 November 2016 have informed the UN Secretary General that

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67 Hindustan Times, 25 September, 2023.
68 United Nations, 28 October, 2016.
69 International Criminal Court, 8 September, 2015.
70 *Article 112*, Rome Statute.
71 *Ibid.*
72 *Ibid.*
73 *Ibid.*

they no longer intend to become states parties and, as such, have no legal obligations arising from their signature of the Statute[74].

Forty-one additional states have neither signed nor acceded to the Rome Statute. Some of them, including China and India, are critical of the Court. Ukraine, a non-ratifying signatory, has accepted the Court's jurisdiction for a period starting in 2013.[75]

Assembly

The Court's management oversight and legislative body, the Assembly of States Parties, consists of one representative from each state party[76]. Each state party has one vote and "every effort" has to be made to reach decisions by consensus[77]. If consensus cannot be reached, decisions are made by vote[78]. The Assembly is presided over by a president and two vice-presidents, who are elected by the members to three-year terms.

The Assembly meets in full session once a year, alternating between New York and The Hague, and may also hold special sessions where circumstances require.[79] Sessions are open to observer states and non-governmental organizations[80].

The Assembly elects the judges and prosecutors, decides the Court's budget, adopts important texts (such as the Rules of Procedure and Evidence), and provides management oversight to the other organs of the Court.[81] *Article 46* of the Rome Statute allows the Assembly to remove from office a judge or prosecutor who "is

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[74] *Article 112*, Rome Statute.
[75] *Article 46 Rome Statute.*
[76] *Ibid.*
[77] *Ibid.*
[78] *Article 38 (Rome Statute).*
[79] *Ibid.*
[80] *Article 36* (Rome Statute).
[81] *Ibid.*

found to have committed serious misconduct or a serious breach of his or her duties" or "is unable to exercise the functions required by this Statute"[82].

The states parties cannot interfere with the judicial functions of the Court. Disputes concerning individual cases are settled by the Judicial Divisions.

In 2010, Kampala, Uganda hosted the Assembly's Rome Statute Review Conference.

Organs

The Court has four organs: the Presidency, the Judicial Division, the Office of the Prosecutor, and the Registry.

Presidency

Song Sang-hyun was President of the Court from 2009 to 2015.

The Presidency is responsible for the proper administration of the Court (apart from the Office of the Prosecutor)[83]. It comprises the President and the First and Second Vice-Presidents—three judges of the Court who are elected to the Presidency by their fellow judges for a maximum of two three-year terms84.

As of March 2021, the President is PiotrHofmański from Poland, who took office on 11 March 2021, succeeding Chile Eboe-Osuji. His first term will expire in 2024.

Judicial Division

The Judicial Divisions consist of the 18 judges of the Court, organized into three chambers; the Pre-Trial Chamber, Trial Chamber and Appeals Chamber, which carry out the judicial functions of the Court. Judges are elected to the Court by the Assembly of States Parties. They serve nine-year terms and are not generally eligible for re-election. All judges must be nationals of states parties to the Rome Statute, and

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[82] *Article 46* (Rome Statute).
[83] The Presidency, 27 July, 2014.
[84] *Article 38* (Rome Statute).

no two judges may be nationals of the same state. They must be "persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices".

The Prosecutor or any person being investigated or prosecuted may request the disqualification of a judge from "any case in which his or her impartiality might reasonably be doubted on any ground." Any request for the disqualification of a judge from a particular case is decided by an absolute majority of the other judges. Judges may be removed from office if "found to have committed serious misconduct or a serious breach of his or her duties" or is unable to exercise his or her functions. The removal of a judge requires both a two-thirds majority of the other judges and a two-thirds majority of the States parties.

Office of the Prosecutor

The Office of the Prosecutor (OTP) is responsible for conducting investigations and prosecutions. It is headed by the Prosecutor of the International Criminal Court, who is assisted by one or more Deputy Prosecutors. The Rome Statute provides that the Office of the Prosecutor shall act independently; as such, no member of the Office may seek or act on instructions from any external source, such as States, international organizations, non-governmental organizations or individuals.

The Prosecutor may open an investigation under three circumstances:

i. when a situation is referred by a State party;
ii. when a situation is referred by the United Nations Security Council, acting to address a threat to international peace and security; or

iii. when the Pre-trial Chamber authorizes the prosecutor to open an investigation on the basis of information received from other sources, such as individuals or non-governmental organizations.

Any person being investigated or prosecuted may request the disqualification of a prosecutor from any case "in which their impartiality might reasonably be doubted on any ground". *Article 42,* requests for the disqualification of prosecutors is decided by the Appeals Chamber[85]. A prosecutor may be removed from office by an absolute majority of the States parties through a finding "to have committed serious misconduct or a serious breach of his or her duties" or is unable to exercise his or her functions.[86] Article 46, one critic said there are "insufficient checks and balances on the authority of the ICC prosecutor and judges" and "insufficient protection against politicized prosecutions or other abuses". Luis Moreno-Ocampo, chief ICC prosecutor, stressed in 2011 the importance of politics in prosecutions: "You cannot say Al-Bashir is in London, arrest him. You need a political agreement." Henry Kissinger says the checks and balances are so weak that the prosecutor "has virtually unlimited discretion in practice".

Lead prosecutor Luis Moreno Ocampo of Argentina, in office from 2003 to 2012, was succeeded in the role by Fatou Bensouda of Gambia, who served from 16th June 2012 to 16thJune 2021(she was elected to the nine-year term on 12th December 2011).

On 12thFebruary 2021, British barrister Karim Khan was selected in a secret ballot against three other candidates to serve as lead prosecutor as of 16 June 2021. As British barrister, Khan had headed the United Nations' special investigative team

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[85] *Article 42* (Rome Statute).
[86] *Article 46* (Rome Statute).

when it looked into Islamic State crimes in Iraq. At the ICC, he had been lead defense counsel on cases from Kenya, Sudan and Libya.

Policy Paper

A Policy Paper is a document occasionally published by the Office of the Prosecutor which puts forth the considerations given to the topics the office focuses on, and often the criteria for case selection. While a policy paper does not give the Court jurisdiction over a new category of crimes, it promises what the Office of Prosecutor will consider when selecting cases in the upcoming term of service. OTP's policy papers are subject to revision.

The five following Policy Papers have been published since the start of the ICC:

1. 1st September 2007: Policy Paper on the Interest of Justice
2. 12th April 2010: Policy Paper on Victims' Participation
3. 1st November 2013: Policy Paper on Preliminary Examinations
4. 20th June 2014: Policy Paper on Sexual and Gender-Based Crimes
5. 15th September 2016: Policy paper on case selection and prioritization
6. 15th November 2016: Policy on Children[87]

Environmental Crimes

The Policy Paper published in September 2016 announced that the ICC will focus on environmental crimes when selecting the cases. According to this document, the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, "*inter alia*, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land".

[87] 'Policy on Children' <icc-cpi.int>. accessed 19 February 2024.

This has been interpreted as a major shift in environmental lawand a move with significant effects[88].

Registry

The Registry is responsible for the non-judicial aspects of the administration and servicing of the Court. This includes, among other things, "the administration of legal aid matters, court management, victims and witnesses' matters, defense counsel, detention unit, and the traditional services provided by administrations in international organizations, such as finance, translation, building management, procurement and personnel"[89]. The Registry is headed by the Registrar, who is elected by the judges to a five-year term. As of April 2023 the Registrar is Osvaldo Zavala Giler.

Process

The process to establish the Court's jurisdiction may be "triggered" by any one of three possible sources: (1) a State party, (2) the Security Council or (3) a Prosecutor. It is then up to the Prosecutor acting ex propriomotu ("of his own motion" so to speak) to initiate an investigation under the requirements of *Article 15*[90] of the Rome Statute. The procedure is slightly different when referred by a State Party or the Security Council, in which cases the Prosecutor does not need authorization of the Pre-Trial Chamber to initiate the investigation. Where there is a reasonable basis to proceed, it is mandatory for the Prosecutor to initiate an investigation. The factors listed in Article[91] 53 considered for reasonable basis include whether the case would be admissible, and whether there are substantial reasons to believe that an investigation

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88 Environmental destruction a crime against humanity.
89 International Criminal Court, 21 July 2007.
90 *Ibid.*
91 *Article 53* (Rome Statute).

would not serve the interests of justice (the latter stipulates balancing against the gravity of the crime and the interests of the victims)[92].

Crimes for which Individuals can be Prosecuted

The Court's subject-matter jurisdiction means the crimes for which individuals can be prosecuted. Individuals can only be prosecuted for crimes that are listed in the Statute. The primary crimes are listed in *Article 5* of the Statute and defined in later articles: genocide (defined in *Article 6*), crimes against humanity (defined in *Article 7*), war crimes (defined in *Article 8*), and crimes of aggression (defined in Article 8 bis) (since 2018). *Article 5*[93], in addition, *Article 70* defines offences against the administration of justice, which is a fifth category of crime for which individuals can be prosecuted.

Genocide

Article 6 defines the crime of genocide as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. Article 6, there are five such acts which constitute crimes of genocide under Article 6, Articles 6(a)–6(e)

1. Killing members of a group
2. Causing serious bodily or mental harm to members of the group
3. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction
4. Imposing measures intended to prevent births within the group
5. Forcibly transferring children of the group to another group

The definition of these crimes is identical to those contained within the Convention on the Prevention and Punishment of the Crime of Genocide of 1948.

[92] *Article 5* (Rome Statute).
[93] *Article 6* (Rome Statute).

Crimes against Humanity

Article 7[94] defines crimes against humanity as acts "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". *Article 7*, the article lists 16 such as individual crimes:

1. Murder
2. Extermination
3. Enslavement
4. Deportation or forcible transfer of population
5. Imprisonment or other severe deprivation of physical liberty
6. Torture
7. Rape
8. Sexual slavery
9. Enforced prostitution
10. Forced pregnancy
11. Enforced sterilization
12. Sexual violence
13. Persecution
14. Enforced disappearance of persons
15. Apartheid
16. Other inhumane acts

War Crimes

Article 8[95] defines war crimes depending on whether an armed conflict is either international (which generally means it is fought between States) or non-international (which generally means that it is fought between non-state actors, such as rebel

[94] *Article 7* (Rome Statute)
[95] *Ibid*

groups, or between a state and such non-state actors). In total there are 74 war crimes listed in article 8. The most serious crimes constitute either grave breaches of the Geneva Conventions of 1949, which only apply to international conflicts, and serious violations of article 3 common to the Geneva Conventions of 1949, which apply to non-international conflicts *Article 8(2) and (c)*.

Eleven crimes constitute grave breaches of the Geneva Conventions and apply only to international armed conflicts:

1. Willful killing
2. Torture
3. Inhumane treatment
4. Biological experiments
5. Willfully causing great suffering
6. Destruction and appropriation of property
7. Compelling service in hostile forces
8. Denying a fair trial
9. Unlawful deportation and transfer
10. Unlawful confinement
11. Taking hostages

Seven crimes constitute serious violations of Article 3 common to the Geneva Conventions and apply only to non-international armed conflicts:

1. Murder
2. Mutilation
3. Cruel treatment
4. Torture
5. Outrages upon personal dignity

6. Taking hostages
7. Sentencing or execution without due process

Another 56 crimes defined by *Article 8*[96] *and 35* apply to international armed conflicts and 21 to non-international armed conflicts. Such crimes include attacking civilians or civilian objects, attacking peacekeepers, causing excessive incidental death or damage, transferring populations into occupied territories, treacherously killing or wounding, denying quarter, pillaging, employing poison, using expanding bullets, rape and other forms of sexual violence, and conscripting or using child soldiers *Article 8.*

Crimes of Aggression

Article 8 defines crimes of aggression. The Statute originally provided that the Court could not exercise its jurisdiction over the crime of aggression until such time as the states parties agreed on a definition of the crime and set out the conditions under which it could be prosecuted: *Article 5* such an amendment was adopted at the first review conference of the ICC in Kampala, Uganda, in June 2010. This amendment specified that the ICC would not be allowed to exercise jurisdiction of the crime of aggression until two further conditions had been satisfied: (1) the amendment has entered into force for 30 states parties and (2) on or after 1st January 2017, the Assembly of States Parties has voted in favor of allowing the Court to exercise jurisdiction. On 26 June 2016 the first condition was satisfied and the State parties voted in favor of allowing the Court to exercise jurisdiction on 14th December 2017. The Court's jurisdiction to prosecute crimes of aggression was accordingly activated on 17th July 2018[97].

The Statute, as amended, defines the crime of aggression as "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or

[96] *Article 8* (Rome Statute).
[97] Crime of Aggression – Amendments Ratification, 20 March 2020.

to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations." *Article 8*[98] the Statute defines an "act of aggression" as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations," *Article 8(2).* The article also contains a list of seven acts of aggression, which are identical to those in United Nations General Assembly Resolution 3314 of 1974 and include the following acts when committed by one state against another state:

1. Invasion or attack by armed forces against territory
2. Military occupation of territory
3. Annexation of territory
4. Bombardment against territory
5. Use of any weapons against territory
6. Blockade of ports or coasts
7. Attack on the land, sea, or air forces or marine and air fleets
8. The use of armed forces which are within the territory of another state by agreement, but in contravention of the conditions of the agreement
9. Allowing territory to be used by another state to perpetrate an act of aggression against a third state
10. Sending armed bands, groups, irregulars, or mercenaries to carry out acts of armed force.

Trial

[98] Crime of Aggression – Amendments Ratification, 20 March 2020.

Trials are conducted under a hybrid common law and civil law judicial system, but it has been argued the procedural orientation and character of the court is still evolving. A majority of the three judges present, as triers of fact in a bench trial, may reach a decision, which must include a full and reasoned statement. Trials are supposed to be public, but proceedings are often closed, and such exceptions to a public trial have not been enumerated in detail. In camera proceedings are allowed for protection of witnesses or defendants as well as for confidential or sensitive evidence. Hearsay and other indirect evidence are not generally prohibited, but it has been argued the court is guided by hearsay exceptions which are prominent in common law systems. There is no subpoena or other means to compel witnesses to come before the court, although the court has some power to compel testimony of those who chose to come before it, such as fines.

Rights of the Accused

The Rome Statute provides that all persons are presumed innocent until proven guilty beyond reasonable doubt, *Article 66*[99] and establishes certain rights of the accused and persons during investigations. These include the right to be fully informed of the charges against them; the right to have a lawyer appointed, free of charge; the right to a speedy trial; and the right to examine the witnesses against them. To ensure "equality of arms" between defense and prosecution teams, the ICC has established an independent Office of Public Counsel for the Defense[100] to provide logistical support, advice and information to defendants and their counsel. The OPCD also helps to safeguard the rights of the accused during the initial stages of an investigation.

[99] *Article 66 (Rome statute).*
[100] Hereinafter abbreviated as OPCD.

Thomas Lubanga's defense team said they were given a smaller budget than the Prosecutor and that evidence and witness statements were slow to arrive.

Victim Participation

One of the great innovations of the Statute of the International Criminal Court and its Rules of Procedure and Evidence is the series of rights granted to victims. For the first time in the history of international criminal justice, victims have the possibility under the Statute to present their views and observations before the Court. Participation before the Court may occur at various stages of proceedings and may take different forms, although it will be up to the judges to give directions as to the timing and manner of participation. Participation in the Court's proceedings will in most cases take place through a legal representative and will be conducted "in a manner which is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial". The victim-based provisions within the Rome Statute provide victims with the opportunity to have their voices heard and to obtain, where appropriate, some form of reparation for their suffering. It is the aim of this attempted balance between retributive and restorative justice that, it is hoped, will enable the ICC to not only bring criminals to justice but also help the victims themselves obtain some form of justice. Justice for victims before the ICC comprises both procedural and substantive justice, by allowing them to participate and present their views and interests, so that they can help to shape truth, justice and reparations outcomes of the Court.

Article 43(6)[101] establishes a Victims and Witnesses Unit to provide "protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account

[101] *Article 43* (Rome Statute).

of testimony given by such witnesses, *Article 43(6)*. *Article 68* sets out procedures for the "Protection of the victims and witnesses and their participation in the proceedings, *Article 68*.[102] The Court has also established an Office of Public Counsel for Victims, to provide support and assistance to victims and their legal representatives.

Reparations

Victims before the International Criminal Court can also claim reparations under Article 75[103] of the Rome Statute. Reparations can only be claimed when a defendant is convicted and at the discretion of the Court's judges. So far the Court has ordered reparations against Thomas Lubanga. Reparations can include compensation, restitution and rehabilitation, but other forms of reparations may be appropriate for individual, collective or community victims. Article 79[104] of the Rome Statute establishes a Trust Fund to provide assistance before a reparation order to victims in a situation or to support reparations to victims and their families if the convicted person has no money.

Cooperation by states not party to Rome Statute

One of the principles of international law is that a treaty does not create either obligations or rights for third states without their consent, and this is also enshrined in the 1969 Vienna Convention on the Law of Treaties. The cooperation of the non-party states with the ICC is envisioned by the Rome Statute of the International Criminal Court to be of voluntary nature, *Article 87*(5)(a)[105] States not acceded to the Rome Statute might still be subject to an obligation to cooperate with ICC in certain cases. When a case is referred to the ICC by the UN Security Council all UN member states

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[102] *Article 68* (Rome Statute).
[103] *Article 75* (Rome Statute) .
[104] *Article 87,* 5(a) (Rome Statute).
[105] *Article 99* (Rome Statute).

are obliged to cooperate, since its decisions are binding for all of them. Also, there is an obligation to respect and ensure respect for international humanitarian law, which stems from the Geneva Conventions and Additional Protocol I, which reflects the absolute nature of international humanitarian law. In relation to cooperation in investigation and evidence gathering, it is implied from the Rome Statute, article 99[106] that the consent of a non-party State is a prerequisite for ICC Prosecutor to conduct an investigation within its territory, and it seems that it is even more necessary for him to observe any reasonable conditions raised by that State, since such restrictions exist for states party to the Statute. Taking into account the experience of the International Criminal Tribunal for the former Yugoslavia (which worked with the principle of the primacy, instead of complementarily) in relation to cooperation, some scholars have expressed their pessimism as to the possibility of ICC to obtain cooperation of non-party states. As for the actions that ICC can take toward non-party states that do not cooperate, the Rome Statute stipulates that the Court may inform the Assembly of States Parties or Security Council, when the matter was referred by it, when non-party state refuses to cooperate after it has entered into an ad hoc arrangement or an agreement with the Court, *Article 87(5)*[107].

Amnesty and National Reconciliation Processes

It is unclear to what extent the ICC is compatible with reconciliation processes that grant amnesty to human rights abusers as part of agreements to end conflict. *Article 16* of the Rome Statute allows the Security Council to prevent the Court from investigating or prosecuting a case, *Article 16* and *Article 53* allows the Prosecutor the discretion not to initiate an investigation if he or she believes that "an investigation would not serve the interests of justice", *Article 53* Former ICC

[106] *Ibid*
[107] *Article 3* (Rome Statute)

president Philippe Kirsch has said that "some limited amnesties may be compatible" with a country's obligations genuinely to investigate or prosecute under the Statute. It is sometimes argued that amnesties are necessary to allow the peaceful transfer of power from abusive regimes. By denying states the right to offer amnesty to human rights abusers, the International Criminal Court may make it more difficult to negotiate an end to conflict and a transition to democracy. For example, the outstanding arrest warrants for four leaders of the Lord's Resistance Army are regarded by some as an obstacle to ending the insurgency in Uganda. Czech politician Marek Benda argues that "the ICC as a deterrent will in our view only mean the worst dictators will try to retain power at all costs". The United Nations and the International Committee of the Red Cross maintain that granting amnesty to those accused of war crimes and other serious crimes is a violation of international law.

Facilities

The official seat of the Court is in The Hague, Netherlands, but its proceedings may take place anywhere, *Article 3.* The Court moved into its first permanent premises in The Hague, located at Oude Waalsdorperweg 10, on 14th December 2015, Part of The Hague's International Zone, which also contains the Peace Palace, Europol, Euro just, ICTY, OPCW and The Hague World Forum, the court facilities are situated on the site of the Alexanderkazerne, a former military barracks, adjacent to the dune landscape on the northern edge of the city. The ICC's detention centre is a short distance away.

Development

The land and financing for the new construction were provided by the Netherlands. In addition, the host state organized and financed the architectural design competition which started at the end of 2008.Three architects were chosen by an international jury

from a total of 171 applicants to enter into further negotiations. The Danish firms Schmidt Hammer Lassen were ultimately selected to design the new premises since its design met all the ICC criteria, such as design quality, sustainability, functionality and costs. Demolition of the barracks started in November 2011 and was completed in August 2012. In October 2012 the tendering procedure for the General Contractor was completed and the combination Visser & SmitBouw and Boele & van Eesteren ("Courtys") was selected.

Architecture

The building has a compact footprint and consists of six connected building volumes with a garden motif. The tallest volume with a green façade, placed in the middle of the design, is the Court Tower that accommodates three courtrooms. The rest of the building's volumes accommodate the offices of the different organs of the ICC.

Detention Centre

The ICC's detention centre accommodates both those convicted by the court and serving sentences as well as those suspects detained pending the outcome of their trial. It comprises twelve cells on the premises of the Scheveningen branch of the Haaglanden Penal Institution, The Hague, close to the ICC's headquarters in the Alexander Kazerne.

Suspects held by the former International Criminal Tribunal for the former Yugoslavia were held in the same prison and shared some facilities, like the fitness room, but had no contact with suspects held by the ICC.

Other Offices

The ICC maintains a liaison office in New York and field offices in places where it conducts its activities. As of 18th October 2007, the Court had field offices in Kampala, Kinshasa, Bunia, Abéché and Bangui.

Finance

The ICC is financed by contributions from the states parties. The amount payable by each state party is determined using the same method as the United Nations; each state's contribution is based on the country's capacity to pay, which reflects factors such as a national income and population. The maximum amount a single country can pay in any year is limited to 22% of the Court's budget; Japan paid this amount in 2008.The Court spent €80.5 million in 2007. The Assembly of States Parties approved a budget of €90.4 million for 2008, €101.2 million for 2009, and €141.6 million for 2017. As of April 2017, the ICC's staff consisted of 800 persons from approximately 100 states.

Trial History to Date

The ICC issued an arrest warrant for Omar al-Bashir of Sudan over alleged war crimes in Darfur.

To date, the Prosecutor has opened investigations in fourteen situations: Afghanistan; Burundi; two in the Central African Republic; Côte d'Ivoire; Darfur, Sudan; the Democratic Republic of the Congo; Georgia; Kenya; Libya; Mali; Uganda; Bangladesh/Myanmar, Palestine and Venezuela. Additionally, the Office of the Prosecutor is conducting preliminary examinations in six situations: Colombia; Guinea; Nigeria; the Philippines; Ukraine and Bolivia[108].

[108] "Home".

The Court's Pre-Trial Chambers have publicly indicted 52 people. Proceedings against 20 are ongoing: 15 are at large as fugitives and five are on trial. Proceedings against 32 have been completed: two are serving sentences, seven have finished sentences, four have been acquitted, seven have had the charges against them dismissed, four have had the charges against them withdrawn, and eight have died before the conclusion of the proceedings against them.

Thomas Lubanga,Germain Katanga and Mathieu Ngudjolo Chui were tried by the ICC. Lubanga and Katanga were convicted and sentenced to 14 and 12 years imprisonment, respectively, whereas Chui was acquitted.[109]The judgment of Jean-Pierre Bemba was rendered in March 2016. Bemba was convicted on two counts of crimes against humanity and three counts of war crimes. This marked the first time the ICC convicted someone of sexual violence as they added rape to his conviction. Bemba's convictions were overturned by the Court's Appeal Chamber in June 2018. The Court refused to compensate Bemba for losses suffered by him during his 10 years of imprisonment. It has been argued that this decision raises important questions about the court's present powers[110]. Trials in the Ntaganda case (DR Congo), the Bemba et al. OAJ case and the Laurent Gbagbo-BléGoudé trial in the Côte d'Ivoire situation are ongoing. The Banda trial in the situation of Darfur, Sudan, was scheduled to begin in 2014 but the start date was vacated. Charges against Ugandan Dominic Ongwen and Malian Ahmad al-Faqi al-Mahdi have been confirmed; as of March 2020 both were awaiting their trials. On 6thJuly 2020, two Uyghur activist groups filed a complaint with the ICC calling for it to investigate PRC officials for crimes against Uyghurs, including allegations of genocide. On 31st October 2023, the

[109] "Thomas LubangaDyilo and Germain Katanga transferred to the DRC to serve their sentences of imprisonment". International Criminal Court. 19 December 2015.
[110] "The ICC's rejection of Bemba's compensation claim points to need for reform". The Conversation.

Israeli families of over 34 victims of Hamas attacks of 7thOctober 2023, filed an Article 15[111] communication with the ICC prosecutor's office urging an investigation into the killings and abductions, and the ICC confirmed the receipt of the filing[112] Reporters without Borders also lodged a complaint regarding the deaths of eight Palestinian journalists in the Gaza Strip during Israel's bombardment, as well as an Israeli journalist killed during a surprise attack by Hamas in southern Israel.

Investigations and Preliminary Examinations

Currently, the Office of the Prosecutor has of the International Criminal Court has opened investigations in Afghanistan, the Central African Republic, Côte d'Ivoire, Darfur in Sudan, the Democratic Republic of the Congo, Kenya, Libya, Uganda, Bangladesh/Myanmar, Palestine, the Philippines, and Venezuela. Additionally, the Office of the Prosecutor conducted preliminary examinations in situations in Bolivia, Colombia, Guinea, Iraq / the United Kingdom, Nigeria, Georgia, Honduras, South Korea, Ukraine and Venezuela. Preliminary investigations were closed in Gabon; Honduras; registered vessels of Comoros, Greece, and Cambodia; South Korea; and Colombia on events since 1st July 2002[113].

Relationships

The UN Security Council referred the situation in Darfur to the ICC in 2005, unlike the International Court of Justice; the ICC is legally independent from the United Nations. The Rome Statute grants certain powers to the United Nations Security Council, which limit its functional independence. *Article* 13 allows the Security Council to refer to the Court situations that would not otherwise fall under the Court's jurisdiction (as it did in relation to the situations in Darfur and Libya, which the Court

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111 *Article 15* (Rome Statute).

112 "Israeli victims' families urge ICC to investigate Oct. 7 Hamas attacks", 8 November 2023.

113 ″A media freedom group accuses Israel and Hamas of war crimes and reports deaths of 34 journalists", AP News. 1 November 2023.

could not otherwise have prosecuted as neither Sudan nor Libya are state parties). *Article 16* allows the Security Council to require the Court to defer from investigating a case for a period of twelve months, article 16[114]such a deferral may be renewed indefinitely by the Security Council. This sort of an arrangement gives the ICC some of the advantages inhering in the organs of the United Nations such as using the enforcement powers of the Security Council, but it also creates a risk of being tainted with the political controversies of the Security Council. The Court cooperates with the UN in many different areas, including the exchange of information and logistical support. The Court reports to the UN each year on its activities and some meetings of the Assembly of States Parties are held at UN facilities. The relationship between the Court and the UN is governed by a "Relationship Agreement between the International Criminal Court and the United Nations"[115].

Non-governmental organizations

During the 1970s and 1980s, international human rights and humanitarian Nongovernmental Organizations[116] began to proliferate at exponential rates. Concurrently, the quest to find a way to punish international crimes shifted from being the exclusive responsibility of legal experts to being shared with international human rights activism. NGOs helped birth the ICC through advocacy and championing for the prosecution of perpetrators of crimes against humanity. NGOs closely monitor the organization's declarations and actions, ensuring that the work that is being executed on behalf of the ICC is fulfilling its objectives and responsibilities to civil society. According to Benjamin Schiff, "From the Statute Conference onward, the relationship between the ICC and the NGOs has probably been closer, more

[114] "Preliminary examinations", ICC on 1 March 2022.
[115] *Article 16* (Rome Statute).
[116] Hereinafter abbreviated as NGOs.

consistent, and more vital to the Court than have analogous relations between NGOs and any other international organization."

There are a number of NGOs working on a variety of issues related to the ICC. The NGO Coalition for the International Criminal Court has served as a sort of umbrella for NGOs to coordinate with each other on similar objectives related to the ICC. The CICC has 2,500 member organizations in 150 countries[117]. The original steering committee included representatives from the World Federalist Movement, the International Commission of Jurists, Amnesty International, the Lawyers Committee for Human Rights, Human Rights Watch, Parliamentarians for Global Action, and No Peace Without Justice. Today, many of the NGOs with which the ICC cooperates are members of the CICC. These organizations come from a range of backgrounds, spanning from major international NGOs such as Human Rights Watch and Amnesty International, to smaller, more local organizations focused on peace and justice missions. Many work closely with states, such as the International Criminal Law Network, founded and predominantly funded by the Hague municipality and the Dutch Ministries of Defense and Foreign Affairs. The CICC also claims organizations that are themselves federations, such as the International Federation of Human Rights Leagues (FIDH).

Criticisms and Opposition

African States

In October 2016, after repeated claims that the court was biased against African states, Burundi, South Africa and the Gambia announced their withdrawals from the Rome

[117] "Negotiated Relationship Agreement between the International Criminal Court and the United Nation 16 February 2008.

Statute[118]. Following Gambia's presidential election later that year, which ended the long rule of YahyaJammeh, Gambia rescinded its withdrawal notification[119]. A decision by the High Court of South Africa in early 2017 ruled that the attempted withdrawal was unconstitutional, as it had not been agreed by Parliament, prompting the South African government to inform the UN that it was revoking its decision to withdraw.

African Accusations of Western Imperialism

The ICC has been accused of bias and as being a tool of Western imperialism, only punishing leaders from small, weak states while ignoring crimes committed by richer and more powerful States.[120] This sentiment has been expressed particularly by African leaders due to an alleged disproportionate focus of the Court on Africa, while it claims to have a global mandate. Until January 2016, all nine situations which the ICC had been investigating were in African countries[121].

African critics have suggested the ICC is acting as a neo-colonial force seeking to further empower Western political and extractive interests in Africa."

Scholar Awolallo has described the court's underlying problem that has led to these challenges with Africa as not overt racism, but Euro centrism. Another analysis suggests that African states are motivated by concerns over Africa's place in world order: the problem is the sovereign inequality displayed by the ICC prosecutor's focus[122]. The prosecution of Kenyan Deputy President William Ruto and President Uhuru Kenyatta (both charged before coming into office) led to the Kenyan

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[118] Coalition for the International Criminal Court, 20 May 2011.

[119] Sieff, Kevin "Gambia is the latest African country deciding to pull out of International Criminal Court", 26 October 2016.

[120] Moore, Jina "Burundi Quits International Criminal Court". *The New York Times,* 27 October 2017.

[121] Onishi, Norimitsu "South Africa Reverses Withdrawal from International Criminal Court". *The New York Times* 8 March 2017.

[122] "ICC and Africa – International Criminal Court and African Sovereignty", 11 October 2012.

parliament passing a motion calling for Kenya's withdrawal from the ICC, and the country called on the other 33 African States party to the ICC to withdraw their support, an issue which was discussed at a special African Union (AU) summit in October 2013.Though the ICC has denied the charge of disproportionately targeting African leaders, and claims to stand up for victims wherever they may be, Kenya was not alone in criticizing the ICC. Sudanese President Omar al-Bashir visited Kenya, South Africa, China, Nigeria, Saudi Arabia, United Arab Emirates, Egypt, Ethiopia, Qatar and several other countries despite an outstanding ICC warrant for his arrest but was not arrested; he said that the charges against him are "exaggerated" and that the ICC was a part of a "Western plot" against him. Ivory Coast's government opted not to transfer former first lady Simone Gbagbo to the court but to instead try her at home. Rwanda's ambassador to the African Union, Joseph Nsengimana, argued that "It is not only the case of Kenya. We have seen international justice become more and more a political matter." Ugandan President Yoweri Museveni accused the ICC of "mishandling complex African issues". Ethiopian Prime Minister Hailemariam Desalegn, at the time AU chairman, told the UN General Assembly at the General debate of the sixty-eighth session of the United Nations General Assembly: "The manner in which the ICC has been operating has left a very bad impression in Africa. It is totally unacceptable".[123]

African Union (AU) Withdrawal Proposal

South African President Jacob Zuma said the perceptions of the ICC as "unreasonable" led to the calling of the special AU summit on 13th October 2015. Botswana is a notable supporter of the ICC in Africa. At the summit, the AU did not endorse the proposal for a collective withdrawal from the ICC due to lack of support

[123] Brett, Peter; Gissel, Line Engbo *Africa and the Backlash Against International Courts*. (London: Bloomsbury Publishing 2020).) 34–55.

for the idea. The summit concluded that serving heads of state should not be put on trial and that the Kenyan cases should be deferred. Ethiopian formerly Foreign Minister TedrosAdhanom said: "We have rejected the double standard that the ICC is applying in dispensing international justice." Despite these calls, the ICC went ahead with requiring William Ruto to attend his trial. The UNSC was then asked to consider deferring the trials of Kenyatta and Ruto for a year, but this was rejected. In November, the ICC's Assembly of State Parties responded to Kenya's calls for an exemption for sitting heads of state by agreeing to consider amendments to the Rome Statute to address the concerns.

On 7th October 2016, Burundi announced that it would leave the ICC, after the court began investigating political violence in that nation. In the subsequent two weeks, South Africa and Gambia also announced their intention to leave the court, with Kenya and Namibia reportedly also considering departure. All three nations cited the fact that all 39 people indicted by the court over its history have been African and that the court has made no effort to investigate war crimes tied to the 2003 invasion of Iraq. Following Gambia's presidential election later that year, which ended the long rule of Yahya Jammeh, Gambia rescinded its withdrawal notification. The High Court of South Africa ruled on 2nd February 2017 that the South African government's notice to withdraw was unconstitutional and invalid. On 7th March 2017 the South African government formally revoked its intention to withdraw. The ruling ANC revealed on 5th July 2017 that its intention to withdraw stands[124].

[124] ANC is sticking to its guns on ICC withdrawal", South Africa 4 July 2017.

Philippines

Following the announcement that the ICC would open a preliminary investigation on the Philippines in connection to its escalating drug war, President Rodrigo Duterte announced on 14th March 2018 that the Philippines would start to submit plans to withdraw, completing the process on 17th March 2019. The ICC pointed out that it retained jurisdiction over the Philippines during the period when it was a state party to the Rome Statute, from November 2011 to March 2019.[125]

Russia

In March 2023, Dmitry Peskov announced that Russia did not recognize the Court's decision to issue an arrest warrant for President Vladimir Putin on account of war crimes in Ukraine and noted that Russia, like many other countries, did not recognize the jurisdiction of the ICC saying "And accordingly, any decisions of this kind are null and void for the Russian Federation fromthe point of view of law[126].The Russian parliament speaker Vyacheslav Volodin replied on Telegram "Yankees, hands off Putin!" calling the move evidence of Western "hysteria", "We regard any attacks on the President of the Russian Federation as aggression against our country", he said[127].

South African Foreign Minister Naledi Pandor criticized the ICC for not having what she called an "evenhanded approach" to all leaders responsible for violations of international law[128]. South Africa, which failed in its obligation to arrest visiting Sudanese President Omar al-Bashir in June 2015, invited Vladimir Putin to the 15th BRICS Summit in Durban[129]. On July 19, 2023, South Africa announced that "by mutual agreement" Putin would not attend the summit. Foreign Minister Sergei

[125] Philippines becomes second country to quit ICC.
[126] Patil, Anushka, 17 March 2023.
[127] VOA News, 28 March, 2023.
[128] NBC News, 25 March, 2023.
[129] *Ibid.*

Lavrov will attend in Putin's place. In the months following the arrest warrant for Putin being issued, Russia issued warrants for the arrest of multiple ICC officials, including the court's president Piotr Hofmański and its vice-president Luz del Carmen Ibáñez Carranza.

United States government

President George W. Bush signed the American Service-Members' Protection Act[130], (informally referred to as *The Hague Invasion Act*), to signify the United States' opposition to any possible future jurisdiction of the court or its tribunals. The act gives the President the power to use "all means necessary and appropriate to bring about the release of any U.S. or allied personnel being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court"[131]. During the administration of Barack Obama, U.S. opposition to the ICC evolved to "positive engagement", although no effort was made to ratify the Rome Statute[132].The subsequent Donald Trump administration was considerably more hostile to the Court, similar to the Bush administration threatening prosecution and financial sanctions on ICC judges and staff in U.S. courts as well as imposing visa bans in response to any investigation against American nationals in connection to alleged crimes and atrocities perpetrated by the U.S. in Afghanistan. The threat included sanctions against any of over 120 countries which have ratified the Court for cooperating in the process[133]. In November 2017, Fatou Bensouda advised the court to consider seeking charges for human rights abuses committed during the War in Afghanistan such as alleged rapes and tortures by the U.S. Armed Forces and the Central Intelligence Agency, crime against humanity committed by the Taliban, and war crimes

[130] The American Service –members' Protection Act (ASPA) 2002.
[131] Marquant, Robert, 13 February, 2009.
[132] Luban, David, 2 December, 2023.
[133] Corder, Mike, 20 November 2017.

committed by the Afghan National Security Forces[134]. John Bolton, National Security Advisor of the United States, stated that ICC Court had no jurisdiction over the U.S, which did not ratify the Rome Statute. In 2020, overturning the previous decision not to proceed, senior judges at the ICC authorized an investigation into the alleged war crimes in Afghanistan. In June 2020, the decision to proceed led the Trump administration to empower an economic and legal attack on the court. "The US government has reason to doubt the honesty of the ICC. The Department of Justice has received substantial credible information that raises serious concerns about a long history of financial corruption and malfeasance at the highest levels of the office of the prosecutor", Attorney General William Barr stated. The ICC responded with a statement expressing "profound regret at the announcement of further threats and coercive actions." "These attacks constitute an escalation and an unacceptable attempt to interfere with the rule of law and the Court's judicial proceedings", the statement said. "They are announced with the declared aim of influencing the actions of ICC officials in the context of the court's independent and objective investigations and impartial judicial proceedings".[135]

On 30 September 2020, prominent United States human rights lawyers announced that they would sue Trump and his Administration including Secretary of State Mike Pompeo, Treasury secretary Steven Mnuchin, attorney general William Barr, and OFAC director Andrea Gacki, and the departments they head—on the grounds that Trump's Executive Order 13928 order had gagged them, violating their right to free speech and impeding their work in trying to obtain justice on behalf of victims of war crimes. One of the plaintiffs, Diane Marie Amann, stated that, as a result of

[134] *Ibid.*
[135] Borger, Julian, 1 October 2020.

sanctions against the chief prosecutor at the ICC, she herself risked having her family assets seized if she continued to work for children who are bought and sold by traffickers, killed, tortured, sexually abused and forced to become child soldiers[136].On 4 January 2021, U.S. District Judge Katherine Polk Failla in New York City issued a preliminary injunction against the Trump administration from imposing criminal or civil penalties against ICC personnel and those who support the court's work, including the plaintiffs[137].

U.S. Criticisms

The United States Department of State argues that there are "insufficient checks and balances on the authority of the ICC prosecutor and judges" and "insufficient protection against politicized prosecutions or other abuses". The current law in the United States on the ICC is the American Service-Members' Protection Act[138], 116 Stat. 820. The ASPA authorizes the President of the United States to use "all means necessary and appropriate to bring about the release of any U.S. or allied personnel being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court". This authorization has led the act to be nicknamed the "Hague Invasion Act",[139] because the freeing of U.S. citizens by force might be possible only through military action. On 10 September 2018, John R. Bolton, in his first major address as U.S. National Security Advisor, reiterated that the ICC lacks checks and balances, exercises "jurisdiction over crimes that have disputed and ambiguous definitions", and has failed to "deter and punish atrocity crimes". The ICC, Bolton said, was "superfluous", given that "domestic judicial systems already hold American citizens to the highest legal and ethical standards". He added that the U.S. would do

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136 *Ibid.*
137 Voice of America, 4 January 2021.
138 Hereinafter abbreviated as ASPA.
139 John Sutherland 8 July, 2002.

everything "to protect our citizens" should the ICC attempt to prosecute U.S. servicemen over alleged detainee abuse in Afghanistan. In that event, ICC judges and prosecutors would be barred from entering the U.S., their funds in the U.S. would be sanctioned and the U.S. "will prosecute them in the U.S. criminal system. We will do the same for any company or state that assists an ICC investigation of Americans", Bolton said. He also criticized Palestinian efforts to bring Israel before the ICC over allegations of human rights abuses in the West Bank and Gaza.[140] The ICC responded that it will continue to investigate war crimes undeterred[141]. On 11 June 2020, Mike Pompeo and U.S. President Donald Trump announced sanctions on officials and employees, as well as their families, involved in investigating alleged crimes against humanity committed by U.S. armed forces in Afghanistan[142]. This move was widely criticized by human rights groups. The U.S. ordered sanctions against the ICC prosecutor Fatou Bensouda, and the ICC's head of Jurisdiction, Complementary, and Cooperation Division, Phakiso Mochochok, for an investigation into alleged war crimes by U.S. forces and the Central Intelligence Agency (CIA) in Afghanistan since 2003. The sanctions were subsequently lifted by Antony Blinken in April 2021.[143]

OPCD

Concerning the independent Office of Public Counsel for the Defense[144], Thomas Lubanga's defense team say they were given a smaller budget than the Prosecutor and that evidence and witness statements were slow to arrive[145].

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[140] Mickelvey, Tara, 10 September, 2018.
[141] *The Guardian,* 11 September 2018.
[142] Hansler, Jennifer, 11 June 2020.
[143] BBL News, 2 April 2021.
[144] Hereinafter abbreviated as OPCD.
[145] Scharf, Michael 14 April, 2016.

Impartiality

Human Rights Watch (HRW) reported that the ICC's prosecutor team takes no account of the roles played by the government in the conflict of Uganda, Rwanda or Congo. This led to a flawed investigation, because the ICC did not reach the conclusion of its verdict after considering the governments' position and actions in the conflict[146].

Unintentional consequences

Research indicates that prosecutions of leaders who are culpable of international crimes in the ICC makes them less likely to peacefully step down, which can prolong conflicts and incentivize them to make continued use of mass violence[147]. It is also argued that justice is a means to peace: "As a result, the ICC has been used as a means of intervention in ongoing conflicts with the expectation that the indictments, arrests, and trials of elite perpetrators have deterrence and preventive effects for atrocity crimes. Despite these legitimate intentions and great expectations, there is little evidence of the efficacy of justice as a means to peace".

State Cooperation

That the ICC cannot mount successful cases without state cooperation is problematic for several reasons. It means that the ICC acts inconsistently in its selection of cases, is prevented from taking on hard cases and loses legitimacy. It also gives the ICC less deterrent value, as potential perpetrators of war crimes know that they can avoid ICC judgment by taking over government and refusing to cooperate.

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[146] Krcmdric, Daniel (2020).
[147] Schabas, Williams A. (2008).

Principle of complementarities

The fundamental principle of complementarities of the ICC Rome Statute is often taken for granted in the legal analysis of international criminal law and its jurisprudence. Initially the thorny issue of the actual application of the complementarity principle arose in 2008, when William Schabas published his influential paper. No substantive research was made by other scholars on this issue for quite some time. In June 2017, Victor Tsilonis advanced the same criticism which is reinforced by events, practices of the Office of the Prosecutor and ICC cases in the Essays in Honour of Nestor Courak's. His paper essentially argues that the Al - Senussi case arguably is the first instance of the complementarity principle's actual implementation eleven whole years after the ratification of the Rome Statute of the International Criminal Court.

On the other hand, in 2017, Chief Prosecutor Fatou Bensouda invoked the principle of complementarity in the situation between Russia and Georgia in the Ossetia region. Moreover, following the threats of certain African states (initially Burundi, Gambia and South Africa) to withdraw their ratifications, Bensouda again referred to the principle of complementarity as a core principle of ICC's jurisdiction and has more extensively focused on the principle's application on the latest Office of The Prosecutor's Report on Preliminary Examination Activities 2016. Some advocates have suggested that the ICC go "beyond complementarity" and systematically support national capacity for prosecutions[148]. They argue that national prosecutions, where possible, are more cost-effective, preferable to victims and more sustainable.

[148] Concannon, Brian, 1 October 2020.

Jurisdiction over corporations

There is a debate on whether the ICC should have jurisdiction over corporations that violate international law[149]. Supporters argue that corporations can and do commit human rights violations, such as war crimes linked to raw materials in conflict zones. Critics argue that prosecuting corporations would compromise the principle of complementarity, that it would give corporations excessive power under international law, or that it would compromise voluntary initiatives by companies. John Ruggie has argued that jurisdiction of corporations under international law should be limited to international crimes, while Nicolás Carrillo-Santarelli of La Sabana University argues that it should cover all human rights violations.

Despite its lack of jurisdiction, the ICC announced in 2016 that it would prioritize criminal cases linked to land grabbing, illegal resource extraction, or environmental degradation caused by corporate activity[150]. The proposed crime of ecocide would have jurisdiction over corporations as well as governments.Supporters of criminalizing ecocide argue that it would shift the ICC's priorities away from Africa, since most environmental degradation is caused by states and corporations in the Global North.

3.2.4 Criminal Injuries Compensation Act 21 of 1999 (The Criminal Injuries Compensation Board)

The Criminal Injuries Compensation Board[151] was formally established in various jurisdictions to administer compensation schemes. For instance, in the United Kingdom, the Criminal Injuries Compensation Authority[152], which succeeded the

[149] Kyriakakis, Joanna, March, 2017.
[150] Time, 19 February, 2021.
[151] Hereinafter abbreviated as CICB.
[152] Hereinafter abbreviated as CICA.

CICB was created in 1996 to manage compensation claims under a tariff-based system. Similarly, in Ontario, Canada, the CICB was established under the compensation for victims of crime Act to adjudicate claims and provide financial assistance to victims. Generally, the Criminal Injuries Compensation Board (CICB) was established to provide financial compensation to victims of violent crimes or their dependents. The concept originated in the mid – 20th century as governments recognized the need to support individuals who suffered physical or psychological harm due to criminal acts.

In Nigeria, there is not a specific Criminal Injuries Compensation Board like in some other countries, the Administration of Criminal Justice Act (ACJA) 2015 and the Criminal Procedure Code (CPC) provides avenues for victims of crime to seek compensation through court orders, allowing them to receive compensation from the convict. The Criminal Injuries Compensation Board is a remedial body designed to provide aid and assistance to victims of crime in Maryland. Our statutory authority shall be construed in all circumstances to remedy the harm to the victim and in favor of eligibility for the victim or claimant.

Services

Claims examination

a) Efficient processing of claims
b) Emergency and supplemental awards
c) Interpretation services

Victim advocacy

1. Compassionate listening
2. Application assistance

3. Status updates
4. Resource referrals
5. Collaboration between involved parties
6. Hearing notification and accompaniment
7. Community education and outreach

Who is eligible for compensation?

1) Person who suffers physical injury as a result of a crime or delinquent act.
2) Surviving spouse or child of a homicide victim.
3) Person who assumed responsibility for the funeral expenses of a homicide victim.
4) Person who was dependent on the homicide victim for principal support.
5) A child or spouse of a victim of homicide.
6) A parent, child, or spouse of an individual who is incarcerated for abuse as defined in *section 4-501* of the Family Law Article and who, prior to incarceration resided with the parent, child, or spouse; and provided financial support to the parent, child, or spouse.
7) Person who suffers from psychological injury as the result of certain offenses.

What is reimbursable?

i. Medical expenses related to physical injury;
ii. Expenses for psychological injury incurred as the result of certain offenses;
iii. Loss of earnings which are directly related to the victim's inability to work following the crime;
iv. Bereavement leave up to 2 weeks or $2,000;

v. Total or partial, permanent or temporary, disability;

vi. Funeral expense in the case of a homicide;

vii. Loss of support or dependency when a homicide victim was providing support to the claimant;

viii. Up to 30 days in lost wages for a parent or guardian caring for a child injured by crime; and

ix. Other expenses as approved by the Criminal Injuries Compensation Board.

What must a victim do to qualify for compensation?

1. Unless good cause is shown, report the crime to appropriate authorities within 48 hours of the crime occurring; and
2. Have incurred at least $100 in reimbursable expenses or lost wages.

What makes a victim ineligible for compensation?

a. Substantial evidence suggests the victim caused, provoked or contributed to the crime that caused the injury; and

b. Unless good cause is shown, failing to cooperate with authorities law enforcement.

CHAPTER FOUR

INVIOLABILITY OF DIPLOMATIC BAGS IN INTERNATIONAL LAW: ISSUES, CHALLENGES AND PROSPECTS

4.1 Issues

Diplomatic bag is packages that must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use. This is contained in *Article 27(3)* of the Vienna Convention of diplomatic relations 1961. *Article 27(4),* go on to de-scribe just what constitutes the diplomatic bag: "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. Requirements that the diplomatic bag "bear visible external marks" and "contain only diplomatic" seldomly, produce much controversy. The external mark need not even be an official state seal of the mission. What has sparked controversy is the broadly worded phrase "or articles for official use," terminology that can only be defined by reference to actual practice between states. Fortunately, that practice has been fairly consistent and is instrumental in addressing two issues: (1) the size of packages that can be placed in a diplomatic bag, and (2) the types of articles that will qualify "for official use" under *Article 27(4)*[1].

Although traditional customary international law certainly contemplated that the diplomatic bag be of a size which could be hand-carried, most states currently interpret the word "*Article*" to include objects that can only be moved with a forklift. The United States has unquestionably adopted this view,[2] and is the world's leader in the shipment of huge crates, cartons, and boxes in diplomatic bags. By contrast, some

[1] Vienna Convention, *Supra* note 2, Art 27(4).
[2] United States Department of State, 5 Foreign Affairs manual 300 (1993).

states view such practices as incompatible with *Article 27(4)* and have limited size of the package to pre-Vienna Convention concepts. For example, the Communist Chinese limit external size of the diplomatic bag to that of a hand-carried brief case.

There are certain categories of persons and bodies which under international law that are immune from the Jurisdiction of municipal courts. The two categories are foreign states (Sovereign or State immunity) and their diplomatic agents (diplomatic immunity)[3]. In International law State immunity refers to the legal rules and principles determining the conditions under which a foreign state may claim freedom from the jurisdiction (the Legislative, judicial and administrative powers) of another State (often called the 'forum State')[4]. Under both international and domestic law, a state is immune in many situations from the jurisdiction of foreign state. Rules on state immunity from part of customary law and are sometimes incorporated in international treaties like the 1972 European convention on State Immunity[5]. On the national level, a number of states with a common law background have enacted special statuses such as the 1976 Foreign Sovereign Immunities Act[6] of the United States[7], the 1978 State Immunity Act[8] of the United Kingdom[9] or the 1985 foreign state immunity Act of Australia[10]. Diplomatic Immunity therefore is a principle of International law by which certain foreign government officials are not subject to the Jurisdiction of local courts and other authorities for both their official and to a large extent, their personal

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[3] Peter Malanczuk, *Introduction to International Law*. (The Taylor & Francis e- library, 2002), 118.
[4] See Harris CMIL, 286-319; Restatement (Third), vol. 1,390 et seq.
[5] ILM 11(1972), 470. See H. Damian, 'European convention on State Immunity', *EPIL* 11(1995), 197-201.
[6] Hereinafter abbreviated as FSIA.
[7] PL. 94-583 (1976), 90 Stat. 2891, ILM 15 (1976), 1388; amended text in P.L. 100-699 (1988).
[8] Hereinafter abbreviated as SIA.
[9] ILM 17 (1978), 1123. See F.A Mann. The State Immunity Act 1978, BYIL 50 (1979), 43; H.Fox, A '*Commercial Transaction' under the State Immunity Act* 1978, ICLQ 43 (1994).
[10] ILM 25 (1986), 715.

activities[11]. The rules of diplomatic immunity sometimes arouse indignation in ordinary people but are almost always observed by states, because states have a common interest in preserving the rules. A state may be under pressure from its internal public opinion to limit the immunity of foreign diplomats but it usually resists the pressure because, otherwise it would create a precedent which would be used against its own diplomat in foreign countries and receiving states. The principle of diplomatic immunity is one of the oldest elements of foreign relations. Ancient Greek and Roman governments for example accorded special status to envoy, and the basic concept has evolved and endured until the present. Laws and principles related to diplomacy go back thousands of years and are influenced from a broad spectrum of culture and customs[12].The formal sending envoys as representatives of nation States may be traced back to the practice of the Greek cities. The ambassadors sent between the members of the league were not professional diplomats, and their missions were invariably adhoc, but choice for the task was regarded as a high honour and those appointed were selected for their ability to present a case effectively, being by profession usually orators or actors. The instances of breach of the rules were rare and seem always to have been followed by terrible reprisals. The reprisals took place not because any legal rights of the envoy or his sending State was believed to have been violated but because the Act constituted a sacrilege to be avenged[13]. Overtime the practice and customs amongst States developed into what we know today as the law relating to diplomacy and it is within this that the scope of immunities developed[14].

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[11] Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial authorities. United States Department of State, office of Foreign Mission. 2019 <https://www.state.gov/wp-content/uploads/2019/09/19-04499-Dipconlmm v2 web.pdf>. accessed 20th December, 2024.

[12] Ademola Abass, *Complete International Law: Text, Cases, and Materials*, (2nd edn, United States of America, Oxford University Press, 2014) 407.

[13] Eileen Young, 'The Development of the Law of Diplomatic Relations' 40 *BYBIL* (1964) 141.

[14] See Ademola Abass, *complete International Law: Text, cases and Materials*, 2nd edn, the United States of America by Oxford Univeristy Press, 2014 ISBN 978-0-19-967907-2. P.408.

Most of the modern law on diplomatic immunity is contained in the 1961 Vienna Convention on Diplomatic Relations.[15] The entry into force of the Vienna Convention on Diplomatic Relations marks the evolution to maturity of a branch of International law which derives from customs in existence three thousand years ago.[16] This was followed by the 1963 Vienna Convention on Consular Relations and the 1969 UN convention on special missions. The rationale for extending Immunity to diplomats and consular staff is generally accepted to be based upon the functional necessity theory. Immunities are applied for officials and diplomatic and consular missions to function effectively, and prominent of all these immunities, is the use of diplomatic bag (within the context of this work).

Some authors have been away if diplomatic bag is Immunity or a privilege? A privilege can be derived as a benefit or a right to do something that others have not right to do while "humanities" can be defined as the exemption from local jurisdiction[17]. That fact that some privileges established in the Vienna Convention has become analogous to cash cows where diplomats take advantage of the for their personal benefits has cast doubt on why VCDR granted such privileges in the first place. The five privileges established in the VCDR are exemption from social security obligation, from personal and public serves and exemption from giving evidence. This has constantly come under scrutiny when diplomats and their accompanying family members abuse these privileges and when found on the wrong side of the justice system, often claim immunity. Most notable among these privileges is Articles 36 of

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[15] See Hardy. M, Modern Diplomatic law, 1968; Denza E., *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations,* 1976.

[16] Eileen Young, '*The development of the law of diplomatic relations'* (1964) 40 BYBIL 141.

[17] AS Hornby, *Oxford Advanced Learners Dictionary of current English* (65th edn, Oxford University Press, 1995).

VCDR which allows diplomats and all members accorded immunity and privileges to transport goods without any customs regulations or even taxation[18].

The United Nations and development of closer political and business ties among nations, the international community recognized a need to codify immunities and privileges associated with diplomatic relations. Extensive debate was finally resolved in 1961 with the Vienna Convention on diplomatic relations. Many articles in the Vienne convention simply codified customary international practices long associated with international diplomatic intercourse. An important provision was added, however, that accorded the diplomatic bag a "more absolute protection than was given under the previous customary international law[19]. The Vienna convention was based on viewing diplomatic privileges and communities as a means to allow proper day to day function of the diplomatic mission and not as a benefit to any individual. Many original communicators and drafters agreed that inclusion of the shielding language regarding of status of the diplomatic bag strained that analysis, with the bag obtaining a status of near inviolability concern shifted to the vast potential for widespread abuse. It is argued that any misuse that had occurred under the old customary rules would surely be followed by greater abuse under the more privilege status.

Article 27(3) and *article 27(4)* elevated the diplomatic bag's status to near inviolability. While under the customary international law, the receiving state had a right to challenge a bag which is believed to contain unauthorized article but in *article 27(3)* of the Vienna convention states that "The diplomatic bag shall not be opened or detained[20]. Part of this issue of inviolability stems from placement of definitional

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[18] Art 36 VCDR 1961.
[19] Ogden, Jurisdical Basis of Diplomatic Immunity 195.
[20] Ogden, Jurisdical Basis of Diplomatic Immunity 195.

language within the Vienna convention. As reflected in the commentary accompanying *Article 27(4),* the intentional law commission consciously elected to place the definitional description of the bag after the broad statement of privileges status of *Article 27(3),*[21] further stressing the principles of absolute protection regardless of use. All attempts to place the definitional clause before the status clause were rejected.

Majority of the states, in ratifying the Vienna convention readily acceded to the diplomatic bags new status and the notion that it should not be opened or detained.
The United States has taken the position that *Article 27* of the Vienna Convention 1961 does not prohibit electronic scanning or other non-intrusive examinations. Many other countries and various international commentators also agree that nothing in the convention prevents non-intrusive test which can be performed without opening or detaining the diplomatic bag[22].

Despite United State's position as seen above, United States use remote examination on its own materials. Under limited circumstances and consistent with its internal relations, such as when a diplomatic bag is to be transported by aircraft, the United States reserves the right to use electronic scanning, X-ray, and various bomb dictators on outgoing American material[23]. Nevertheless the United State has made it clear that it does not perform such remote examination on diplomatic bags of other states. Officially the United States refuses to engage in scanning because electronic examinations are regarded as threats to the security and confidential of the bags contents. However, motivation for this position probably stems primarily from the

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[21] *Ibid.*
[22] *Ibid.*
[23] United States Department of State, 5 Foreign Affairs Manual 300 (1973).

principles of reciprocity. If the United States initiated scanning proceedings for foreign diplomatic bags, it could reasonably expect a respond in kind which would be unacceptable. Thus to protect its interest as a sender state of diplomatic material via diplomatic bag, the United States as a receiving state does not engage in scanning.[24]

In conclusion, the politics of the diplomatic bag in international Law and diplomacy is obviously selfish with each state aspiring to protect its interest when it's a sending state which has affected having a comprehensive legal frame work in controlling the abuse of the diplomatic immunity:

1. The United Nations should revisit the principles of the Vienna convention on the Diplomatic relations, 1961 with the view to amend it to let diplomats, family, relations, bags or other items attached to them to be searched and restructure immunity to be globally adopted by member countries.
2. The diplomats should be made to face the full wrought of law of the receiving states when they violate any civil or criminal law of receiving states.

4.1.1 Issues on Abuse of Diplomatic Bag

There have been instances where diplomatic bag where diplomatic bag were allegedly used for unauthored or illicit purposes, raising concerns about the limits of inviolability. The diplomatic bag has often been used for importing or exporting illegal articles because of its inviolability. A common practice involves trading drugs, moving out of the country small antiquities or works of art or importing exporting firearms. In the 1970s and in the 1980s there had been various incidents where diplomats were connected in terrorist activities and there had been suspicions that embassies, using their diplomatic inviolability provided weapons to terrorist groups.

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[24]. United States Department of State, 5 Foreign Affairs Manual 300 (1973).

This became known as state sponsored terrorism where certain foreign Governments were abusing their diplomatic immunity to provide cover or asylum to terrorists. One such case of abuse of diplomatic immunity by the sending state occurred on April 1984 when a British policewoman was shot from the window of the Libyan embassy. In some countries, among them is Britain, is illegal for a diplomat to possess a firearm. British police had suspicions that firearms were brought to the embassy through the diplomatic bag. The incident took place when a demonstration was held from opponents of Gaddafi's Government against the revolutionary committee that was in charge of the embassy. Libya's regime had warned the Foreign Office that if the demonstration were to be allowed Libya "would not be responsible for the consequences". After the shot the rapid events led to the severance of diplomatic relations between Britain and Libya. The diplomatic mission of the Libyan People's Bureau (as Libyans used to call their embassy) was allowed to live the country. A search, in the presence of a representative of the Saudi Arabian Embassy, inside the building of the Libya's embassy that followed the events revealed that weapons and forensic evidence were kept. This event demonstrates a clear case where the inviolability of the embassy was abused by keeping weapons inside it, where diplomats behaved in a manner inappropriate with their diplomatic status and where diplomatic immunity prevented the authorities of the receiving state from entering the Bureau and arresting possible suspects.

According to *Article 22* of the VCDR, the receiving state has the obligation to protect a diplomatic mission and the members of the mission from any attack or physical violence. Therefore it is necessary that receiving states provide the appropriate measures such as armed guards or police protection to avoid any "attack against the diplomat's person, freedom or dignity". However, there have been cases where a

Government's inaction abused the inviolability of diplomats. Terrorist groups and revolutionary organizations consider embassies and members of the diplomatic mission as prime targets and by kidnapping a diplomat the extract concessions from Government most of the times by threatening the person's life in other to demand from the Government ransom or exchange of political prisoners. One of the most well-known cases of abuse of diplomatic immunity was the hostage crisis of Tehran when on November 1979 the American embassy in Tehran was attacked and armed students supporting the regime of Khomeini in Iran kept its diplomatic staff hostage. It was the first time that a host Government refused to take action for a long period of time to protect the inviolability of the embassy premises and the diplomatic staff. Even the International Court of Justice decision was that Iran has violated international obligations under the Vienna Convention.

4.1.2 Issues of Inviolability

Two Articles of the Vienna Convention, 27(3) and 27(4), elevate the diplomatic bag's status to near inviolability. While under customary international law the "receiving state had a right to challenge a bag which it believed to contain unauthorized *Articles 27(3),"*[25] of the Vienna Convention states that "the diplomatic bag shall not be opened or detained." Part of this issue of inviolability stems from placement of definitional language within the Vienna Convention. As reflected in the commentary accompanying *Article 27(4),* the International Law Commission consciously elected to place the definitional description of the bag after the broad statement of privileged status in *Article 27(3),* further stressing the principle of absolute protection regardless of use[26]. All attempts to place the definitional clause before the status clause were rejected.

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[25] Satow, *supra* note 8, at 117-18.
[26] *Ibid.*

Recognition of the customary practice of detaining or inspecting suspicious diplomatic bags can be found only in commentary to articles of the Vienna Convention[27]. Even so, a concept of absolute inviolability is not clearly delineated. Initial formal comments of the United States included the observation that personal baggage of a diplomat can be searched upon serious grounds for "presuming that it contained articles not intended for his personal use or ... articles the import or export of which is prohibited by law or, controlled by quarantine regulations of the receiving state[28]. This analysis is not generally extended to the diplomatic bag, but Vienna Convention language did not specifically pinpoint the concept of inviolability.

The majority of states, in ratifying the Vienna Convention, readily acceded to the diplomatic bag's new status and the notion that it should not be opened or detained. A minority position argued that language of *Article 27(3)* did not really mean the bag was "inviolable" because the specific term was not included. Countries espousing this position insisted that, as a result, the language used did not prohibit a receiving state from exercising its security interests should the need arise[29]. Other states, such as Bahrain, rejected the article and the new status entirely, asserting that it was incompatible with customary international law. Bahrain included a specific reservation to *Article 27(3),* retaining the "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[30]. Bahrain felt that protected treatment of the diplomatic bag was not mandatory if reason existed to believe the diplomatic bag contained items either

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[27] Vienna Convention, *Supra* note 2, *Art 27(3).*
[28] C.E. Wilson, *Supra* note 23, at 138.
[29] E. Denza, *Supra* note 7, at 128.
[30] L Dembinski, The law of modern diplomacy 178, n. 8 (1988).

illegal or not for official use[31]. Indeed, this analysis is included in the Convention on Consular Relations. A consular bag (as opposed to a diplomatic bag) may be opened if authorities of the receiving state have serious reason to believe the bag contains prohibited items. The sending state then has the choice either to open the bag or to have it returned. However, authorities argue this option exists only because of specific treaty provisions on consular relations: "bags of other types of missions (such as diplomatic bags) under no circumstances can be opened, or their contents controlled by authorities of the receiving State[32]. The International Law Commission has repeatedly rejected proposals dealing with the diplomatic bag that would permit receiving state authorities to impose any law that the bag be opened or be returned choice on sending states. "While a sending state does owe a duty to transport only those materials consistent with *Article 27(4),* many commentators maintain that even the "non-observance of that duty . . . (does) not create a right to inspect the diplomatic pouch[33]. In actual international practice, states generally treat the bag as inviolable, following the clear meaning and spirit of the Vienna Convention. The limited protections available under customary international practices have thus been supplanted by a much more stringent standard that can be termed functional inviolability.

4.1.3 Issues on Misconception and Content of the Diplomatic Bag

It is important to note that the inviolability status conferred on the diplomatic bag under the VCDR is often misconstrued by the state to score selfish intensions. The diplomatic bag under the VCDR is not subject to the content of the bag. In drafting this provision of the VCDR, proposals to limit the status of inviolability enjoyed by

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[31] Goldberg, *supra* note 1, at 4.
[32] L Dembinski, *supra* note 7, at 126-27.
[33] *Ibid.*

the diplomatic bag to the content of the bag were rejected. One such proposal was to place the paragraph providing for the content of the bag before the provision on immunity. This would have made the inviolability of the bag before the provision on immunity. This would have made the inviolability of the bag conditional upon the content of the bag[34]. Hence, immunity will only be conferred on the bag if is used for the transportation of diplomatic correspondence and nothing more. However, the International Law Commission (ILC) decided that the provisions of the convention should express absolute inviolability of the diplomatic bag due to the highly confidential nature of its content[35]. The inviolable status of the diplomatic bag makes it prone to various forms of abuse such as use for the smuggling of persons, resources, contraband weaponry, drugs and other illegal items[36]. This article focuses on the smuggling of persons and resources. The most notorious attempt to abuse the status of the diplomatic bag occurred in 1983 after a successful military coup in Nigeria[37]. The minister of transportation under the formal regime, Umaru Dikko fled to London in a bid to escape trial under the newly constituted military government. However, Mossad, the Israel intelligence agency was in charge of locating Dikko and ensuring his return to Nigeria for trial[38]. Dikko was kidnapped from his home in London, blindfolded, drugged and bound[39]. He was then placed in a crate labeled as "extra cargo" and transported to Stansted Airport, England, bound for Nigeria and claims that it was a Diplomatic bag. Fortunately, the cargo was not properly marked as

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[34] *Article 27* of the Vienna Convention on Diplomatic Relations (18 April 1961, entered into force 24 April 1964).

[35] Chuck Ashman, Pamela Trescott, *Diplomatic Crime: Drugs, killings, Theft, Rapes, Slavery and other outrageous crimes (*Acropolis Books Inc, 1987) 190.

[36] Draft articles on the status of the Diplomatic courier and the Diplomatic Bag not accompanied by Diplomatic Courier and draft optional protocols thereto with commentaries (adopted in 1989) Art 28(1).

[37] Yearbook of the International Law Commission (1958) volume 1, 138 – 139.

[38] *Ibid.*

[39] Ashman, Trescott (n 2).

required by Article 24 of the VCDR and it authorized the customs officials to open the crate thereby rescuing Dikko[40]. If it had been properly marked, the Customs officials would have been unable to examine its content due to the inviolability of the diplomatic bag. The diplomatic bag has also become notorious for drug dealing. More recently on the 5th July 2020, 30 Nigerians of 24 carat gold being smuggled into India was intercepted by the central board of indirect Taxes and Customs at the Thiruvananthapuram Airport. The bag which bore visible marks of its diplomatic nature from Dubai had been detained by the customs officials who had received an anonymous tip. Upon detention of the bag, the Customs office received a dubious call claiming to be from the secretary of the consulate general of the United Arab Emirates in Thiruvananthapuram. The caller ordered for the immediate release of the bag. However, the diplomatic bag was eventually opened in the presence of a senior officer from the high Commissioner's office and the official to whom the baggage was addressed thereby revealing its content[41]. If the Customs officials had not received the anonymous tip, the bag would have been cleared without any form of search or scan.

The Libyan embassy siege of 1984 is another good example of violation of diplomatic bag. During the Libyan embassy siege in London a British police officer was killed. The weapon used was believed to have been brought into the UK in a diplomatic bag. This case raised serious concerns about the use of diplomatic bags for transporting weapons.[42]

The Kerala Gold smuggling case of 2020 is another violation of diplomatic bag. This involve the interception of a diplomatic consignment addressed to the United Arab

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[40] Max Siollum, 'The Mossad Affair: The kidnap of Umaru Dikko (2)' (I Nigerian.com the – mossad – affair – the – Kidnap – of – Umaru – Dikko – 2/ > accessed 12 October 2024.

[41] Diplomatic Claim – Eritrea's Claim 20 (*The Federal Democratic Republic of Ethopia v The State of Eritrea*) (Partial Award) (2005) PCA ICGJ 358.

[42] Ashaman, Trescott (n 2) 204 – 211.

Emirate consulate in Kerala India, suspected of containing smuggled gold. These case brought to the forefront the tension between the inviolability of diplomatic bag and national security concerns, particularly in the contest of transnational crime[43].

Beyond these high profile incidents, there are numerous reports of diplomatic bag being used to smuggle various contraband, including drugs, weapons and other illegal items. The inviolability of the diplomatic bag as outlined in the Vienna Convention on Diplomatic Relations, is a principle designed to protect diplomatic communications. However, this principle has been tested by instances of its alleged abuse. The misuse of diplomatic privileges for criminal purposes raises questions about whether exceptions to the principle of inviolability are justified.

4.1.4 Issues on Inviolability of Diplomatic Property

Article 22 (3) VCDR provides that "the premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution[44].

It should be noted that the *House of Lords in Alcom Ltd v Republic of Colombia*[45] held "that under the state Immunity Act, 1978 a current account at a commercial bank in the name of a diplomatic mission would be immuned unless the plaintiff could show that it had been earmarked by the foreign state solely for the settlement of liabilities incurred in commercial transactions. An account used to meet the day to day running expenses of a diplomatic mission would therefore be immune". This approach was also based upon the obligation contained in *Article 15* of the Vienna Convention on Diplomatic Relations which provides that the receiving state shall accord full facilities for the performance of the functions of the mission. The House of Lords noted that the

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[43] Australian International Law news 454 (1984) at 5.
[44] *Article 22* VCDR 1961.
[45] (1984) 2 All ER 6 (HL).

negative formulation of this principle meant that neither the executive nor the legal branch of government in the receiving State must act in such a manner as to obstruct the mission in carrying out its functions[46]. It is pertinent to note that the court in the Philippine Embassy case explained that, in the light of customary and treaty law, property used by the sending state for the performance of its diplomatic functions in any event enjoys immunity even if it does not fall within the material or special scope of *Article 22* of the Vienna Convention on Diplomatic Relations[47].

4.1.5 Issues on the Inviolability of the Person of the Diplomat

Article 29 of the VCDR 1961 provides that "the person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity".[48]

The person of a diplomatic agent is inviolable and he may not be detained or arrested. This principle is the most fundamental rule of diplomatic law and is the oldest established rule of diplomatic law[49]. Inviolability of the diplomatic personnel is so important to the extent that any harm done to a diplomatic agent is usually condemned by the whole world. For example the United Nations General Assembly strongly condemned acts of violence against diplomatic and consular missions and representatives, while the Security Council issued a presidential statement condemning the murder of nine Iranian diplomats in Afghanistan[50]. States recognize that the protection of diplomats is a mutual interest founded on functional

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[46] M N Shaw, *International Law* (5 edn, Cambridge University Press 2004) 679.
[47] See UN, Materials, 297 65 ILR, 146.
[48] *Article 29* of the Vienna Convention on Diplomatic Relations, 1961.
[49] E Denza, *Diplomatic Law & Commentary on the Vienna Convention on Diplomatic Relations* (2 edn, Oxford University Press 2004).
[50] See Resolution 53/97 of the United Nations General Assembly, January 1999.

requirements and reciprocity. In *Boos v Barry,*[51] the Supreme Court examined the constitutionality of a provision in the District of Columbia code, which made it unlawful to display signs that could bring a foreign government into public odium or public disrepute within 500 feet of an embassy and to congregates without dispensing when ordered by police. The petitioners wanted to carry signs critical of the Soviet Union and Nicaragua near their embassies and to congregate with others actions prohibited by the statute. The petitioner challenged the statute on first amendment in Federal Court, naming city officials as respondents. The District Court granted summary judgment for the respondents and the US court of Appeals for the District of Columbia circuit affirmed, upholding the constitutionality of both clauses. The petitioner then sought review by the US Supreme Court which granted *Certiorari*o resolve the first amendment surrounding the statute. The US Supreme Court affirms the judgment from the Court of Appeals in part and reverses it in parts, finding the displays clause unconstitutional and the congregation clause constitutional. The Court assumed without deciding that protecting the dignity of foreign diplomats could be a compelling state interest.

The receiving State is under an obligation to take all appropriate steps to prevent any attack on the person, freedom or dignity of diplomatic agents. After a period of kidnappings of diplomatic agents, the United Nations made it mandatory that states parties must make attacks upon such persons a crime in international law with appropriate penalties and take such measures as may be necessary to establish jurisdiction over these crimes[52]. State parties are obliged to either extradite or prosecute perpetrators of crimes against internationally protected persons. The most

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[51] (1988) 121 IR, 499 (SC).

[52] UN Convention on the Protection and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 1978.

blatant example of the breach of the obligation to protect diplomats was the holding of the United States diplomats as hostages in Iran in 1979.[53]

Personal inviolability is a physical privilege in nature and thus it is distinct from the diplomatic immunity from criminal jurisdiction. Thus due to personal inviolability, a diplomatic agent may not be arrested or determined in any circumstances. The police can, of course, arrest such person in good faith but when they learn that the person is entitled to personal inviolability, the police must release him immediately.[54]

4.2 Challenges

The inviolability of Diplomatic Bag in International law faces several challenges in its application and interpretation.

4.2.1 Violation of local laws by family members of diplomats

The existence of *Article 41* of the VCDR should be a "sign" to be obeyed by diplomatic agents as well as members of their families and diplomatic missions in general, but in reality the abuse of privileges and immunities of diplomats often happen. These abuses include espionage, disobedience of traffic laws, smuggling/trafficking of persons and illicit drugs/narcotics, firearms, rape, kidnapping, domestic abuse, sexual abuse, murder, imposition of slavery.

Another form of violation of law by diplomatic agents in the receiving State is a violation of traffic regulations which include driving under the influence of alcohol, parking violation, driving without permits and non-payment of traffic fines. In 1996, the French Government asked the Zaire Government to waive the immunity of its Ambassador in Paris for a traffic accident that killed two boys in southern France. The Ambassador was found to be drunk while driving. The emotions of the local

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[53] The Iran Case, IC Reports, 1980, 3.

[54]. R Vaki. 'Personal inviolability and Diplomatic Immunity in Respect of Serious Crimes <www.juridica international cu> accessed 7th January, 2024.

community were so high and for respecting the France Government, the Zaire Government waived his diplomatic immunity to be sentenced by the French Court. In *Third Ave. Assoc v Permanent mission of Zaire to the United Kingdom*[55]. The action calls into question the rights of a private landlord who has leased premises to a foreign mission to the United Nations each which has concededly defaulted on its rental obligations for over a year and a half. The premises at issue had entire 25th floor of a commercial office building. The judgment was to the plaintiff and the envoy was asked to remove the permanent mission.

In the case of *United States v Devyani Khobragade*[56], the diplomatic agent of India in New York, a domestic servant in 2012 on certain contractual terms. Sangeetha Richard alleged that she was ill- treated and poorly paid by her employer. In the complaint she made to the New York Police, she made allegations of labour exploitation and human trafficking against the Indian officer. After inquiry, the police found out that the officer had knowingly made several false representations and statements to the US authorities in order to extent visa for Richard, thereby giving rise to allegations of visa fraud and giving false information under US law. Even though she was arrested, due to the diplomatic immunity she had, she left US without submitting herself to the legal procedures of US.

In the year 2015, a Saudi Arabian diplomat in India was accused of sexually abusing two domestic servants in his residence.[57] The two Nepali domestic servants were brutally gang raped by the diplomat and his associates. At that point, Indian courts

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[55] 787 F. Supp. 389, 394 (SDNY 1992).
[56] (2013) 14 Cr.008 (SAS).
[57] 13 "Editorial."Saudi Diplomat Accused Of Rape Leaves India (17 September, 2015) <https://www.bbc.com/news/world-asia-india-34270049> accessed on 5 May 2023.

and legal systems were not able to take any action against the diplomat of Saudi Arabia due to the blanket immunity he possessed.

Also in the year 2013, the Diplomatic agent of Bahrain, in Mumbai was accused of molestation of a 49-year-old woman who was working as a manager at a residential society of the diplomat Although he was accused of the crime of molestation, Indian laws were disabled from playing a role in it as the diplomatic agent was enjoying diplomatic immunity.[58]

In May 2011, the Kenya police commissioner formally wrote to the Nigerian government through the Ministry of Foreign affairs asking the Nigerian Government to waive the immunity of the Nigerian ambassador to Kenya and Seychelles, Dr. Chijioke Wilcox Wigwe who came to limelight in Kenya after physically assaulting and brutalizing his wife[59], Tess lyiWigwe, leaving her with injuries that became a subject of investigation by Kenyan police. The Nigerian Minister of foreign affairs instead recalled Dr. Wigwe[60]. He was later sent back to Kenya on 19th October, 2011 by President Goodluck Jonathan to the displeasure of his advisers and the Kenyan Government, after investigations suggested that the allegations were false[61].

Issues arises where diplomatic agents fail to pay their debts to local citizens and small and medium enterprises. With respect to this, most financial organizations decline to loan out to diplomatic officials because they lack the *locus standi* to institute an action,

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[58] Sagar Rajput, Bahrain Diplomat Accused of Abusing Woman Sent Home Mid-Day (Mumbai, 29 December, 2013).

[59] Kenya Police writes Nigerian Government over Wife Beater Ambassador, Sahara Reporters (New York, May 27, 2011) <https.//Kenya-police-writes Nigerian-government-over-wife-beater ambassador/> accessed on 5 May 2024.

[60] .Nigeria recalls Wife Battering Ambassador to Kenya, Sahara Reporters, (New York, May 30, 2011 <https://sabar@sporters.com/2011/05/30/nigeriarecalls-wife-bettering-ambassador-Kenya> accessed 5 May 2023.

[61] Jonathan Sends Wife-Beating Ambassador Back to Kenya', Simon Ateba, (Pmnewsnigeria.com October 19, 2011), <https://pm newsnigeria.com/2011/10/19/jonathan-sends-wife-beating-ambassador-back-to-Kenya/> accessed 5 May 2023.

if the money owed has not been paid by the diplomatic agent. In regards to rent, often times, diplomatic agents decline to clear their debt with respect to their place of living and workplace and their creditors are not allowed to bring an action to recover outstanding debts in their own capacity. This is because they are not authorized to enter the offices and apartments of diplomats to evict them for any offence committed. An instance is stated in the case where diplomatic officials from Zaire refused paying their rent to their landlord with an outstanding debt of $400,000. The landlord brought an action against the diplomats, yet the US state department defended Zairean officials on the bases of diplomatic immunity and the court upheld to the decision. Even though the landlord cut off his services to regain his outstanding payment, still the officials left without paying his complete money[62].

In the case of Mr. Joshua Walde, an American diplomat in Nairobi, Kenya had a crash with a taxi, resulting in the death of a person in July 2013, as well as eight other persons who were left behind as a result of lack of financial assistance to pay for their medical treatment and the expenses incurred at the hospitals. As a result of the incident, the US embassy took the diplomat and his family and fled away from Kenya the next day. In furtherance to the above, government officials in the US were only concerned with the effect the accident would have on the bilateral relation with Kenya. Mr. Joshua was under the umbrella of diplomatic immunity and was not detained or arrested. Accordingly, the injured party was denied of legal attention because the perpetrator of the act is a diplomatic agent who is entitled to the benefits of diplomatic immunities and privileges.

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[62] Ventura, M., 'Escape from Johannesburg? Sudanese President Al-Bashir visits South Africa, and the implicit removal of head of state immunity by the security council in light of Al-Jedda', *Journals of International Criminal Justice* [2015] (13) (5) 995-1025.

In another case, two Italian marines who had fired at a fishing vessel and killed two fishermen while guarding an Italian oil tanker off the coast of south-western Indian state of Kerala in 2012, were found to be immune from prosecution in India by the Permanent Court of Arbitration in Hague, in its decision delivered in 2020. The court however ordered Italy to pay compensation to India "for loss of life, physical injuries, material damage to vessel and moral harm suffered by the commander and crew of the fishing vessel".[63]

4.2.2 Espionage

Article 41 of the VCDR, states that, a diplomat may not take advantage of his diplomatic immunity and interfere in the internal affairs of the receiving state. However, embassies and diplomats are sometimes involved in the practice of espionage. When a diplomatic agent is caught for spying this is considered as a criminal offence but his diplomatic immunity protects him from the jurisdiction of the receiving state. An example occurred in Peking on August 2, 1995, where two Air force officers were expelled from China for invading. The Chinese Foreign Ministry justified the expulsion. This was on the fact that the diplomatic officials came for an official visit in American embassy in Peking to spy upon Chinese military equipment and to make enquiry about their military intelligence through photographing and videotaping. However, the diplomatic officials were shielded by diplomatic immunity with respect to crime committed in the host state. As a result of the espionage activities, the Chinese government expelled the military officers.[64] This now begs the question could the receiving states enforce its jurisdiction over the diplomatic agents who violate the criminal or civil laws of the receiving state?

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[63] British Broadcasting Commission Editorial, Italian marines: India closes criminal case in 2012' <https://www.bbc.com/news/world -asia-india-57479761>, accessed 5 May 2023.

[64] Denza E., *Diplomatic Law: Commentary on Diplomatic Relations*, (4th ed., Oxford University Press, 2008) 14-32

4.2.3 Diplomatic Communications and Trust

With the advent of technology, diplomatic correspondence can now be transmitted digitally[65]. While this may help to significantly reduce the need for physical diplomatic bags, digital diplomatic correspondence comes with its own issues, particularly the risk of unauthorized access to highly confidential documents[66]. In November 2010, the online platform Wikileaks published about 250, 000 confidential diplomatic cables from 274 embassies, missions of the United States and Consulates. These correspondences were leaked by a member of the U.S Army intelligence analyst, Chelsea manning[67]. Documents leaked included the Afghanistan war diary (July 2010) comprising over 91,000 Afghan war documents from January 2004 to December 2009[68] and the Iraq war logs (October 2010), a collection of 391,832 US Army field reports from the Iraq was covering 2004 – 2009[69]. While these documents helped to expose instances of gross violations of human rights, they also put the lives of thousands in danger as the names, tribes and families of informants and spies providing information to the US were published. While it is clear that the inviolability status of diplomatic correspondence under the VCDR should be extended to the digital communication. It remains unclear how such provisions should apply especially in terms of the responsibility of governments in ensuring the protection of

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[65] Timpsy Jaipuria, 'Howcustoms officials seized 30kg of gold worth RS 15 Grore from a Diplomatic Cargo' (CNBC TV 18, 6 July 2020) < https : // www. Dnaindia.com/india/report-Kerala – 30kg – gold – smuggling – case – gets – murky – top – bureaucrats – role – in – question – 2831345 / amp > accessed 12 October 2022.

[66] Simona – Nicoleta Voicu, 'Digital Diplomacy. A new micro sphere of Public Communication Postmodern Opening / 2020) 11(3) / 205 > accessed 12 October 2022.

[67] Labat Patricio Grane, Naomi Burke, The Protection of Diploamtic Correspondence in the Digital Age:Time to revise the Vienna convention? In Paul Behrens (ed), Diplomatic law in a New Millenium (OUP 2017) <https://doi.org/10.1093/oso/9780198795940.003.0013 accessed 12 October 2022.

[68] James H. Boykin, Malik Havalic, 'Fruits of the poisonous Tree (2015) 12 (5) OGEL <https://www.ogel.org/article.asp? Key = 3571 > accessed 12 October 2022.

[69] Declan Mc Cullagh Steven Musil 'wikileaks-releases-massive-set-of-Afghan-war-files' > accessed 12 October, 2024.

digital diplomatic correspondence. This is because in Public International Law, International Obligations exist among states and not private individuals. As such, a breach of an International Organization attracts the responsibility of States and not that of private individuals[70]. This means that every State bears the burden of ensuring that all individuals and private institutions within their jurisdiction comply with the provisions of the VCDR on the inviolability of the Diplomatic correspondence[71]. However, the Vulnerability of digital information makes this a Herculean task, especially for under developed and developing nations. Les developed nations face numerous challenges in the digital age including inadequate access to latest technology, lack of sophisticated telecommunications infrastructure, as well as other cultural and socio-economic factors. Also, these nations do not have the financial and technical resources required to effectively regulate digital communications. The limited resources of less developed nations are expended on policy priorities such as the provision of sustainable housing, ensuring access to clean water, and tackling poverty and hunger[72].

4.2.4 Declaration of *Persona Non Grata*

A diplomatic agent can be declared *persona non grata* at any moment, even prior to their entry into the territory of the receiving state. In such a hypothesis, they could be denied access to the territory and would not be endowed with the privileges or immunities attached to their function.

In practice, a formal declaration *persona non grata* by the receiving state is rarely issued; it is normally sufficient to request the removal of a diplomat or consular. Very

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[70] Nick Davies, Jonathan Steele and David Leigh, 'Iraq war logs: secret files show how US ignored Torture'Guardian.com/world/2010/oct/22/1 war-logs-military-leaks > accessed 12 October 2022.

[71] Vienna Convention on Diplomatic Relations, *Article 29.*

[72] *Ibid.*

often, the diplomatic or consular agent leaves or is withdrawn before any formal notification.

The sending state is not entitled to expel the agent following a *persona non grata* declaration. The declaration of *persona non grata* only obliges the sending state to *recall* the agent concerned. Only if the sending state does not recall its agent, the receiving state is allowed to consider the agent an ordinary foreign person without any immunity or privilege. According to the International Court of Justice, if the sending state does not recall the agent concerned, the loss of diplomatic and consular privileges is "almost immediate." This means that this person can be expelled if not recalled by the receiving state or if they fail to voluntarily leave the country, provided that the conventional and customary rules related to the treatment of foreigners are respected. Expulsion is, thus, not the automatic consequence of the declaration *persona non grata*. In any case, the agent concerned must be offered a reasonable time to leave the country, while they remain entitled to the privileges and immunities attached to their function. The[73] 1932 Harvard Research explained similar principles, but added, "if a sending State refuses, or after a reasonable time fails, to recall a member of a mission whose recall has been requested by the receiving State, the receiving State may declare the functions of such person as a member of a mission to have been terminated." In fact, the receiving state may refuse to accept or receive a foreign diplomat. Although it might not dismiss or terminate them, the Harvard Research reflected the then-widespread practice of the receiving state's desire for recall prevailing over the sending state's resistance, suggesting it reflected customary international law.

[73] Harvard Research, 1932.

It is not only diplomats who have been slapped with *persona non grata* status. Actor Brad Pitt was declared *persona non grata* by China after starring in the 1997 film 'Seven Years in Tibet,' although the ban was lifted in 2014 when he accompanied his then-wife Angelina Jolie on a film tour. Israel declared Günter Grass, a German novelist, poet, and playwright who won a Nobel Prize in 1999, *persona non grata* in 2012, after he depicted the country as endangering global peace. On May 20, 2009, American actor Alec Baldwin was declared *persona non grata* by the Philippine government after an appearance in an episode of the Late Show with David Letterman, where he joked about availing a "Filipino or Russian mail-order bride." Philippine senator and actor Ramon Revilla Jr. said his (Baldwin's) wife would be "unlucky" and that "there will be trouble" if Alec Baldwin were to travel to the country.
In June 2013, Spanish opera singer Montserrat Caballé was included in a list of *persona non grata* in Azerbaijan for visiting Nagorno Karabakh without the permission of Azerbaijan.

A pertinent example is Queen Elizabeth I of England's expulsion of Don Bernardino de Mendoza, the Spanish Ambassador, once his involvement in the treason plot became clear. Don Bernardino de Mendoza was ordered to depart within 15 days, after investigations identified his participation in a plan to replace the Queen with Queen Mary of Scotland in 1583. At the center of this plot were his diplomatic letters between himself and King Phillip II of Spain. They used a code which only Mendoza and the King could decipher. Although this "participation," therefore, could not be particularized, Queen Elizabeth sent an envoy to Spain, demonstrating that she had a personal disagreement with Mendoza, but not with Spain. Her message was that she would welcome another Ambassador. This attempt to maintain friendly relations naturally failed, the King having understood the correspondence. However, expelling

a diplomat for personal reasons, not attributed to the sending state, afterwards became a norm of diplomatic custom, possibly as a newly standardized method of directing intrigue at the sending state. Presently, we have to conclude that the possibilities to prosecute diplomats or other state officials who have committed serious crimes but enjoy personal inviolability and diplomatic immunity are very much limited, both in number and effectiveness. As amendments to the Vienna Convention are unlikely to be achieved either through treaties or custom, so far we have to hope for greater readiness of sending states, in co-operation with receiving states, to ensure prosecution of serious criminals. Hopefully, we can in the future also rely on proceedings before the ICC, which should be the least biased and restricted. The problem is that the principle of reciprocity prevents states from introducing, through practice, perhaps desirable changes to diplomatic law by establishing a hierarchy between diplomatic laws on the one hand and human rights and international humanitarian law on the other. But besides ensuring prosecution, receiving states should also attribute more importance to the prevention of such crimes by asking sending states to provide general and possible criminal background information on the diplomat and explanations about why the person left prior postings (if not because of normal termination of functions) and also by contacting those countries where the diplomat in question has served prior terms and inquire as to whether any problems arose involving that person.

4.2.5 International Comity and Respect for Sovereignty

The principle of inviolability reflects the importance of respect for sovereignty and International Comity in diplomatic relations. Security concerns in a changing world are of utmost importance in modern diplomacy. In an era of heightened security

concerns the balance between diplomatic inviolability and host Country security needs is increasingly debated.

Thus, in international relations, respect for sovereignty is a fundamental principle that guides interactions between states. Sovereignty refers to the authority of a state to govern itself and make decisions without external interference. By International Law foundation, respect for Sovereignty is a cornerstone of International law, emphasizing the independence and autonomy of States. The principle of non-interference in the internal affairs of other States is key to maintaining peaceful international relations. Respect for sovereignty underscores the principles of equality among states, regardless of their size, power or economic status.

Suffice it to say therefore that municipal laws of the Country shall work in tandem with International law especially as it borders on security and sovereignty of a State.

4.3 Prospects

The inviolability of the diplomatic bag is a long standing principle in International law, crucial for secure diplomatic communications. Here are more details on the prospects of this principle.

4.3.1 Balancing Security and Inviolability

State must balance security needs with respect for diplomatic inviolability. In as much as host Countries must respect the inviolability of diplomatic bags as per International law; there ought to be a balance of security. Host Countries have legitimate security concerns that need to be balanced with diplomatic inviolability. Adhering to international law provides framework for balancing these interests. Countries can navigate the balance between security concerns and the inviolability of diplomatic bags in a manner consistent with International law and conducive to healthy diplomatic relations.

4.3.2 Adaptation to technological changes

The concept of diplomatic bag may evolve with technological advancements in diplomacy. The increasing use of digital communications may impact traditional notions of diplomatic inviolability. What is imperative here is that there is a secure communication. The inviolability ensures diplomatic missions can communicate securely with their sending states.

4.3.3 Diplomatic Cooperation

Cooperation between states is essential for the effective application of this principle. Disputes over the inviolability of diplomatic bags can strain diplomatic relations. Respect for sovereignty is paramount. Respect for sovereignty is a fundamental principle that guides interactions between states. It is a cornerstone of international law, emphasizing the independence and autonomy of States. The principles of non-interference in the internal affairs of other States are key to maintaining peaceful international relations. Respect for sovereignty facilitates cooperation and diplomacy between states promoting peaceful resolution of disputes.

CHAPTER FIVE

SUMMARY, CONCLUSION AND RECOMMENDATION

5.1 Summary

In 1977, the international law commission included on the agenda of its twenty-ninth session consideration of proposal on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier[1]. During the debate of the status of the diplomatic bag several member of the commission suggested that the implementation of electronic devices to examine diplomatic bags would provide the best communication and curbing abuses of the bag[2]. However the final draft of the article relating to the status of the diplomatic bag indicates that the majority of the commission delegates did not favor the electronic examination of the bag[3].

This was indeed a lost opportunity to mitigate harshness of *Article 27* in particular of the Vienna convention of diplomatic immunity 1961. The import of *Article 27* requires only that the bag not be "opened or detained" and is, thus not completely inviolable. The United Kingdom however, has not implemented such measures to attempt to curb abuses of the diplomatic bag[4]. In fact in mid-1984, when the government of Kuwait started scanning bags, the United Kingdom leads the international protest against the practice[5]. Paragraphs 3 and 4 in *Article 27* of the Vienna convention do not provide the diplomatic bag with absolute inviolability. Paragraph 3 of *Article 27* if construed literally, would only preclude the opening or detaining of a diplomatic but would allow for examination that do not physically

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[1] Summary Records of the 1415 meeting, (1977) I.Y.B. Int'l L COMM N 3, UN DOC A/CN. 4/ SER. A/1977 .

[2] See summary records of the meetings of the 38th session, (1986) I.Y.B INT'L L, COMM'N 36 – 56, U.N DOCA/CN.4/SER.A/1986.

[3] See Hggins, Supra note 4, at 647; see also Cameron *Supra* note 5, at 617.

[4] See Ashman C & Trescott P, *supra* note 2, at 217 – 18.

[5] *Ibid.*

penetrate the bag itself[6]. Also, paragraph 4 of *Article 27* limits the content of the diplomatic bag to "diplomatic documents or articles intended for official use". If the bag is used for non-diplomatic purposes, it is no longer protected by the immunity provided in paragraph 3 and can at the very least, be examined or inspected[7].

There is no gain denying the fact that *Article 27* of VCDR 1961 is in compliant of the functional necessary theory. The rationale behind this theory is the need for a diplomat's privilege and immunities based on necessity to perform his official function[8]. This is also in tandem with the view of Grotius dictum *"Omnes Coatio obese a legate debate*" (which stresses that an Ambassador must be free from all coercion in order to fulfill his duties). However, in the light of abuses of the diplomatic bag, the interest in providing for confidential diplomatic communication should be subservient to the domestic interest a receiving state may have in preventing terrorism, smuggling and other international grimes. Diplomatic bag is widely recognized problem, state have not implemented remedial measures or retained customary international law because the Vienna convention is based on the principle of reciprocity. Moreover, state have reserved the right to practice customary international law with regard to the diplomatic bag, implying that *Article (27)* itself does not provide for the same cause 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; the bags will be subject to the same treatment abroad[9].

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[6] See Goldberg, *Supra* note 5, at 4.

[7] Mc Clanahan Diplomatic Immunity 32 and Parkhill (1997 - 1998) 21 Hasting International and Comparative law Review 572.

[8] See the Association of the Bar of the city of Newyork, Revision of Diplomatic privileges and Immunities Act, 100th congress 1st session 21 n 26 (1988).

[9] See Higgins, *supra* note 4, at 643.

Based on this study, it is established that the diplomatic bag has been abused and misused. This fear is threatening internet security and sovereignty of receiving counties. On April 17, 1984, an unknown assassin fired a machine gun from the Libyan people's bureau into a crowd of demonstrations in London's St. James square, killing a police woman[10]. British intelligence officials believe that the riffle linked the murder was smuggled out of the United Kingdom in a diplomatic bag thus removing evidence crucial to any possible trial. The Soviet Union attempted to expand the definition of the diplomatic bag by trying to send a sealed, mine-non truck into Switzerland, claiming the entire vehicle as a diplomatic bag[11]. Swiss authorities refused to acknowledge the truck as a diplomatic bag and would not allow the truck to be unleaded. The truck was sent back to Moscow. Similarly, is the most wide-spread abuse of the diplomatic bag occurs in drug trafficking[12]. One incident involved Ludovicus Vastenavondt, chancellor at the Belgian embassy in New Delhi, India[13]. On May 25, 1985 Vastenavondt arrived at Kennedy Airport in New York carrying a diplomatic bag. He proceeded to a hotel and gave the bag to a man awaiting him. The bag contained twenty-two pounds of heroin valued in excess of 40 million U.S dollars. The above example represents the various ways the diplomatic bag has been abused and battered.

Suffice it is to say therefore that diplomatic bags have long been a subject of controversy and challenges in international law while they serve a crucial purpose in facilitating communication and transport of sensitive materials between diplomatic mission, they also prevent several complex issues that need to be addressed. One of the primary challenges associated with diplomatic bags is their potential misuse for

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[10] See Ashman C & Trescott P, *supra* note 2, at 191.
[11] *Ibid.*
[12] *Ibid* .
[13] *Ibid.*

illicit activities. This illicit misuse undermines the trust and integrity of the diplomatic system and poses a threat to national security. Another challenge is the ambiguity surrounding the definition and scope of diplomatic bag. The lack of universal guideline or standards, differences in interpretations brings misunderstanding between nations. Furthermore, the rise of technological advancement and digital connections has raised questions about the relevance and security of physical diplomatic bags. The challenges associated with diplomatic bags are multi-faceted and require careful consideration. Striking a balance between preserving diplomatic privileges and preserving their misuse, ensuring compliance with international regulations, enhancing security measures and adapting to technological advancement are all critical aspects that must be addressed to effectively counter emerging threats.

5.2 Findings

The following findings were arrived at from the research carried out so far:

i. Article 27 of Vienna Convention on diplomatic relations 1961 ought to permit non-intrusive examinations. This would result in the examination of Bag used for official purposes.

ii. The re-implementation 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.

iii. The latest results of the International Law commission reflects the need to achieve a more equitable balance than that provided by the Vienna Convention on diplomatic relations.

iv. There ought to be need for diplomatic missions to share information and collaborate with host countries on security matters related to diplomatic bags and exchange best practices to prevent potential misuse.

5.3 Conclusion

No Country survives under threats of internal and sovereign status. This area in international law is non-negotiable. On a large scale, diplomats are accused of using diplomatic bag for the import or export of currency, narcotic drug, weaponry and even human being. The diplomatic bag abuse is also linked as a leeway to kidnapping, money laundering and terrorism. Although these practices violate the permissible use of the diplomatic bag and threaten the security of the receiving state, but never mean a total condemnation of diplomatic bag inviolability. Thus, there ought to be a check of the abuses. Prudence requires that the interest of the receiving state be a consideration in determining the appropriate status of the diplomatic bag. Such abuses pose significant challenges to the principles of diplomatic immunity and sovereignty, as they compromise the trust and integrity of diplomatic relations, and hence the excesses of use of diplomatic bag need to be checked by the receiving state. The latest results of the international law commission reflect the need to achieve a more equitable and comprehensive balance than that provided by the Vienna convention on diplomatic relations 1961.

5.4 Recommendations

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. Hence, if a diplomatic bag is used to convey illegal articles, the Bag is theoretically inviolable and not practically possible.

The following are recommended:

1. There should be transparent screening process. This can include x-ray, scanning, physical inspections and the use of detection technologies to ensure that only legitimate items are transported in diplomatic bags.
2. The work recommends regular training / awareness for diplomatic staff to master the proper use of diplomatic bags as to ensue audits, investigate suspected misuse and corrective measures.
3. This work strongly recommends amendment of Vienna Convention of Diplomatic Immunity of 1961 to redefine the concept ‘Diplomatic Bag’, to include only document and not extraneous materials like weapons or offensive materials.
4. Finally, this work recommends the establishment of a Permanent International Diplomatic Criminal Court to try criminal abuses of diplomatic and Consular privileges and immunities.

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