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**THE PRINCIPLE OF INVIOABILITY OF DIPLOMATIC
CORRESPONDENCE UNDER THE VIENNA CONVENTION ON
DIPLOMATIC RELATIONS (1961): PROBLEMS OF IMPLEMENTATION**

Abstract: the article describes the legal regime for the protection of the inviolability of official correspondence. The problems of this procedure implementing are analyzed.

Keywords: diplomatic correspondence, inviolability, diplomatic bag, admissibility of evidence.

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**ПРИНЦИП НЕПРИКОСНОВЕННОСТИ ДИПЛОМАТИЧЕСКОЙ
ПЕРЕПИСКИ В СООТВЕТСТВИИ С ВЕНСКОЙ КОНВЕНЦИЕЙ
О ДИПЛОМАТИЧЕСКИХ СНОШЕНИЯХ (1961 Г.):
ПРОБЛЕМЫ РЕАЛИЗАЦИИ**

Аннотация: в статье описан порядок защиты неприкосновенности служебной переписки. Анализируются проблемы реализации данного порядка.

Ключевые слова: дипломатическая переписка, неприкосновенность, вализа, допустимость доказательств.

The International Court of Justice (hereinafter – «ICJ») in the Tehran Hostages case emphasized that the Vienna Convention on Diplomatic Relations (hereinafter – «VCDR») represents a self-contained regime with its diplomatic sanctions and remedies – such as declaring persona non-grata or a total breach of diplomatic relations - which may be used by way of response to any violation of the duties under the convention. Indeed, the Court emphasized that the principle of inviolability applies not only towards diplomatic premises but archives as well. During armed conflicts or in case of breach of diplomatic relations states still must respect the fundamental character of the principle of inviolability [6, para. 86].

Under the provisions of VCDR, the content of diplomatic communication enjoys inviolability from search, retention or produce as evidence in judicial proceedings by the receiving state. However, the controversial questions are how authorities of the receiving state can determine whether the documents relate to a diplomatic mission without unlawful seizure of correspondence. In addition to this the notion of inviolability is to be defined.

Diplomatic correspondence includes documents relating to the diplomatic mission and its functions [7, art. 27(2)]. A non-exhaustive list of the functions of a diplomatic mission is contained in Article 3 of VCDR. However, the rules of customary international law should «continue to govern questions» not expressly regulated by the provisions of the Convention [7, preamble, art. 3 (1)(a)] For instance, providing financial support to the think tanks is not clearly permitted under article 3 VCDR but the Spanish Embassy's official functions include funding and supporting the Institute Cervantes [3].

The inviolability of official correspondence of a mission has two aspects-it makes it unlawful for the correspondence to be opened by the authorities of the receiving State and it precludes the correspondence being used as evidence in the courts of the receiving State [2, p. 189].

In respect to the first element, since it is not possible for the authorities to know whether the correspondence relates to the mission and its functions without opening it and reading it, the diplomatic bag should bear «external visible marks» [7, art. 27 (4)]. However, in the case of absence of this requirement the appropriate remedies are to request that the bag be subjected to examination through electronic or other technical devices. They may further request that the bag be opened in the presence of an authorized representative of the sending State or the receiving State may require that the bag be returned to its place of origin [1, art. 28, para.2]. Even if there were some examples in international practice where states used a diplomatic bag to illicit import or export of narcotic drugs, arms or other items, and even for the transport of human beings, the contents of a briefcase enjoy absolute inviolability as it concerns the security and confidentiality of the sending state's communication.

With regard to the use of correspondence as evidence, article 24 VCDR has an absolutely clear meaning that the official correspondence enjoys inviolability «at any time» and «whether they may be» [7, art.24, 27(2)]. Article 31 (1) Vienna Convention on the Law of Treaties provides the basic approach of interpretation of treaty provisions and defines that treaty should be interpreted 1) in good faith; 2) in accordance with the ordinary meaning to be given to the terms of the treaty; 3) in their context; 4) in the light of its object and purpose. The Oxford English Dictionary defines the word «any time» as a time that is not fixed. The UK Court of Appeal in *Fayed v. Al.Tajir* case [4, para.736C-E] and the UK Supreme Court in *Bancoult №3* case [5, para.20] stated that the documents of the mission as well as the copies are impermissible as evidence before the court. Moreover, Denza in its recent commentary also reaffirmed this position. And in respect of the object and purpose of VCDR, the content of diplomatic communication is protected. Thus, as states signed the VCDR they agreed that the wording of the article is absolutely clear, therefore, diplomatic documents cannot be produced to the courts.

Furthermore, the ICJ in the *Tehran Hostages* case ordered Iran to immediately return archives and documents of the mission so the Court suggested that evidence

obtained in grave violation of rules of inviolability are inadmissible [6, para.108]. Indeed, according to some practice there the courts admitted evidence obtained in consequence of a breach of inviolability. However, this only applies to cases where a third party has violated the inviolability of documents and the documents were in a public domain [5, para. 20]. A prime example is the WikiLeaks cables, which some international courts consider admissible as evidence.

In conclusion it should be noted that the inviolability of official documents is absolute and is not conditional upon any visible official signs or location. To seize and provide such documents as evidence for legal proceedings would be contrary to the preamble and provisions of the VCDR.

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