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REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-FIFTH SESSION

Draft articles adopted by the International Law Commission on topics considered at its thirty-fifth session

Note by the Secretary-General

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* A/38/150.

I. INTRODUCTION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its thirty-fifth session at its permanent seat at the United Nations Office at Geneva from 3 May to 22 July 1983. The session was opened by the Chairman of the thirty-fourth session, Mr. Paul Reuter.

2. The Commission adopted an agenda for its thirty-fifth session, consisting of the following items:

1. State responsibility.
2. Jurisdictional immunities of States and their property.
3. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.
4. Draft Code of Offences against the Peace and Security of Mankind.
5. The law of the non-navigational uses of international watercourses.
6. International liability for injurious consequences arising out of acts not prohibited by international law.
7. Relations between States and international organizations (second part of the topic).
8. Programme and methods of work.
9. Co-operation with other bodies.
10. Date and place of the thirty-sixth session.
11. Other business.

The Commission considered all the items on its agenda.

3. The work of the Commission during its thirty-fifth session is described in its report to the General Assembly. 1/ Chapter I of the report is concerned with the organization of the Commission's session. Chapter II of the report, on the draft Code of Offences against the Peace and Security of Mankind, contains a description of the Commission's work thereon. Chapter III, on jurisdictional immunities of States and their property, contains a description of the Commission's work on the topic together with three articles and two paragraphs of two other articles and commentaries thereto as provisionally adopted by the Commission at the thirty-fifth session. Chapter IV, on State responsibility, contains a description of the Commission's work on the topic together with the text of four articles and commentaries thereto, as provisionally adopted by the Commission at the

thirty-fifth session. Chapter V, on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, contains a description of the Commission's work on the topic together with eight articles and commentaries thereto, as provisionally adopted by the Commission at the present session. Chapter VI, on the law of the non-navigational uses of international watercourses, chapter VII, on relations between States and international organizations (second part of the topic), and chapter VIII, on international liability for injurious consequences arising out of acts not prohibited by international law, contain a description of the Commission's work on those respective topics. Finally, chapter IX deals with the programme and methods of work of the Commission as well as a number of administrative and other questions.

4. The present document, prepared by the Secretariat pursuant to a decision of the International Law Commission, 2/ contains the texts of the draft articles adopted by the International Law Commission on topics considered at its thirty-fifth session. Section II contains the text of the draft articles on jurisdictional immunities of States and their property as provisionally adopted so far by the Commission, including the text of articles 2 (1) (g), 3 (2), 10, 12 and 15 as provisionally adopted by the Commission at its thirty-fifth session. Section III contains the text of articles 1, 2, 3 and 5 of the draft articles on State responsibility (Part Two of the draft articles), as provisionally adopted by the Commission at its thirty-fifth session. Section IV contains the text of articles 1 to 8 of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, as provisionally adopted by the Commission at its thirty-fifth session.

II. DRAFT ARTICLES ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, AS PROVISIONALLY ADOPTED BY THE INTERNATIONAL LAW COMMISSION

PART I

INTRODUCTION

Article 1

Scope of the present articles

The present articles apply to the immunity of one State and its property from the jurisdiction of the courts of another State.

Article 2

Use of terms

1. For the purposes of the present articles:

(a) "court" means any organ of a State, however named, entitled to exercise judicial functions;

...

(g) "commercial contract" means:

- (i) any commercial contract or transaction for the sale or purchase of goods or the supply of services;
- (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee in respect of any such loan or of indemnity in respect of any such transaction;
- (iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

Article 3

Interpretative provisions

...

2. In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract should also be taken into account if in the practice of that State that purpose is relevant to determining the non-commercial character of the contract.

PART II

GENERAL PRINCIPLES

Article 6

State immunity 3/

Article 7

Modalities for giving effect to State immunity

1. A State shall give effect to State immunity [under article 6] by refraining from exercising jurisdiction in a proceeding before its courts against another State.

2. A proceeding before a court of a State shall be considered to have been instituted against another State, whether or not that other State is named as party

/...

to that proceeding, so long as the proceeding in effect seeks to compel that other State either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect the rights, interests, properties or activities of that other State.

3. In particular, a proceeding before a court of a State shall be considered to have been instituted against another State when the proceeding is instituted against one of the organs of that State, or against one of its agencies or instrumentalities in respect of an act performed in the exercise of governmental authority, or against one of the representatives of that State in respect of an act performed in his capacity as a representative, or when the proceeding is designed to deprive that other State of its property or of the use of property in its possession or control.

Article 8

Express consent to exercise of jurisdiction

A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to any matter if it has expressly consented to the exercise of jurisdiction by that court with regard to such a matter:

- (a) by international agreement;
- (b) in a written contract; or
- (c) by a declaration before the court in a specific case.

Article 9

Effect of participation in a proceeding before a court

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has:

- (a) itself instituted that proceeding; or
- (b) intervened in that proceeding or taken any other step relating to the merits thereof.

2. Paragraph 1 (b) above does not apply to any intervention or step taken for the sole purpose of:

- (a) invoking immunity; or
- (b) asserting a right or interest in property at issue in the proceeding.

3. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be considered as consent of that State to the exercise of jurisdiction by that court.

Article 10

Counter-claims

1. A State cannot invoke immunity from jurisdiction in a proceeding instituted by itself before a court of another State in respect of any counter-claim against the State arising out of the same legal relationship or facts as the principal claim.

2. A State intervening to present a claim in a proceeding before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of any counter-claim against the State arising out of the same legal relationship or facts as the claim presented by the State.

3. A State making a counter-claim in a proceeding instituted against it before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of the principal claim.

PART III

EXCEPTIONS TO STATE IMMUNITY 4/

Article 12

Commercial contracts

1. If a State enters into a commercial contract with a foreign natural or juridical person and by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of another State, the State is considered to have consented to the exercise of that jurisdiction in a proceeding arising out of that commercial contract, and accordingly cannot invoke immunity from jurisdiction in that proceeding.

2. Paragraph 1 does not apply:

(a) in the case of a commercial contract concluded between States or on a government-to-government basis;

(b) if the parties to the commercial contract have otherwise expressly agreed.

Article 15

Ownership, possession and use of property

1. The immunity of a State cannot be invoked to prevent a court of another State which is otherwise competent from exercising its jurisdiction in a proceeding which relates to the determination of:

(a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum; or

(b) any right or interest of the State in movable or immovable property arising by way of succession, gift or bona vacantia; or

(c) any right or interest of the State in the administration of property forming part of the estate of a deceased person or of a person of unsound mind or of a bankrupt; or

(d) any right or interest of the State in the administration of property of a company in the event of its dissolution or winding-up; or

(e) any right or interest of the State in the administration of trust property or property otherwise held on a fiduciary basis.

2. A court of another State shall not be prevented from exercising jurisdiction in any proceeding brought before it against a person other than a State, notwithstanding the fact that the proceeding relates to, or is designed to deprive the State of, property:

(a) which is in the possession or control of the State; or

(b) in which the State claims a right or interest, if the State itself could not have invoked immunity had the proceeding been instituted against it, or if the right or interest claimed by the State is neither admitted nor supported by prima facie evidence.

3. The preceding paragraphs are without prejudice to the immunities of States in respect of their property from attachment and execution, or the inviolability of the premises of a diplomatic or special or other official mission or of consular premises, or the jurisdictional immunity enjoyed by a diplomatic agent in respect of private immovable property held on behalf of the sending State for the purposes of the mission.

III. DRAFT ARTICLES ON STATE RESPONSIBILITY (PART TWO
OF THE DRAFT ARTICLES), AS PROVISIONALLY ADOPTED
BY THE INTERNATIONAL LAW COMMISSION

Article 1

The international responsibility of a State which, pursuant to the provisions of Part One, arises from an internationally wrongful act committed by that State, entails legal consequences as set out in the present Part.

Article 2

Without prejudice to the provisions of articles [4] and 5, the provisions of this Part govern the legal consequences of any internationally wrongful act of a State, except where and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question.

Article 3

Without prejudice to the provisions of articles [4] and 5, the rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of the present Part.

Article 5

The legal consequences of an internationally wrongful act of a State set out in the provisions of the present Part are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security.

IV. DRAFT ARTICLES ON THE STATUS OF THE DIPLOMATIC COURIER AND THE
DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER, AS
PROVISIONALLY ADOPTED BY THE INTERNATIONAL LAW COMMISSION

Article 1

Scope of the present articles

The present articles apply to the diplomatic courier and the diplomatic bag employed for the official communications of a State with its missions, consular posts or delegations, wherever situated, and for the official communications of those missions, consular posts or delegations with the sending State or with each other.

Article 2

Couriers and bags not within the scope of the present articles

The fact that the present articles do not apply to couriers and bags employed for the official communications of international organizations, shall not affect:

- (a) the legal status of such couriers and bags;
- (b) the application to such couriers and bags of any rules set forth in the present articles which would be applicable under international law independently of the present articles.

Article 3

Use of terms

1. For the purpose of the present articles:

(1) "diplomatic courier" means a person duly authorized by the sending State, either on a regular basis or for a special occasion as a courier ad hoc, as:

(a) a diplomatic courier within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(b) a consular courier within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(c) a courier of a special mission within the meaning of the Convention on Special Missions of 8 December 1969; or

(d) a courier of a permanent mission, of a permanent observer mission, of a delegation, or of an observer delegation, within the meaning of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 14 March 1975, who is entrusted with the custody, transportation and delivery of the diplomatic bag, and is employed for the official communications referred to in article 1;

(2) "diplomatic bag" means the packages containing official correspondence, documents or articles intended exclusively for official use, whether accompanied by diplomatic courier or not, which are used for the official communications referred to in article 1 and which bear visible external marks of their character as:

(a) a diplomatic bag within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(b) a consular bag within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(c) a bag of a special mission within the meaning of the Convention on Special Missions of 8 December 1969; or

(d) a bag of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation within the meaning of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 14 March 1975;

(3) "sending State" means a State dispatching a diplomatic bag to or from its missions, consular posts, or delegations;

(4) "receiving State" means a State having on its territory missions, consular posts or delegations of the sending State which receive or dispatch a diplomatic bag;

(5) "transit State" means a State through whose territory a diplomatic courier or a diplomatic bag passes in transit;

(6) "mission" means:

(a) a permanent diplomatic mission within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(b) a special mission within the meaning of the Convention on Special Missions of 8 December 1969; and

(c) a permanent mission or a permanent observer mission within the meaning of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 14 March 1975;

(7) "consular post" means a consulate-general, consulate, vice-consulate or consular agency within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(8) "delegation" means a delegation or an observer delegation within the meaning of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 14 March 1975;

(9) "international organization" means an intergovernmental organization.

2. The provisions of paragraph 1 of the present article regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or the internal law of any State.

Article 4

Freedom of official communications

1. The receiving State shall permit and protect the official communications of the sending State, effected through the diplomatic courier or the diplomatic bag, as referred to in article 1.
2. The transit State shall accord to the official communications of the sending State, effected through the diplomatic courier or the diplomatic bag, the same freedom and protection as is accorded by the receiving State.

Article 5

Duty to respect the laws and regulations of the
receiving State and the transit State

1. The sending State shall ensure that the privileges and immunities accorded to its diplomatic courier and diplomatic bag are not used in a manner incompatible with the object and purpose of the present articles.
2. Without prejudice to the privileges and immunities accorded to him, it is the duty of the diplomatic courier to respect the laws and regulations of the receiving State or the transit State, as the case may be. He also has the duty not to interfere in the internal affairs of the receiving State or the transit State, as the case may be.

Article 6

Non-discrimination and reciprocity

1. In the application of the provisions of the present articles, the receiving State or the transit State shall not discriminate as between States.
2. However, discrimination shall not be regarded as taking place:
 - (a) where the receiving State or the transit State applies any of the provisions of the present articles restrictively because of a restrictive application of that provision to its diplomatic courier or diplomatic bag by the sending State;
 - (b) where States modify among themselves, by custom or agreement, the extent of facilities, privileges and immunities for their diplomatic couriers and diplomatic bags, provided that such a modification is not incompatible with the object and purpose of the present articles and does not affect the enjoyment of the rights or the performance of the obligations of third States.

Article 7 5/

Documentation of the diplomatic courier

The diplomatic courier shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag which is accompanied by him.

Article 8 6/

Appointment of the diplomatic courier

Subject to the provisions of articles [9], 10 and 14, the diplomatic courier is freely appointed by the sending State or by its missions, consular posts or delegations.

Notes

1/ Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 10 (A/38/10).

2/ Yearbook of the International Law Commission, 1977, vol. II (Part Two), p. 133, document A/32/10, para. 130.

3/ Article 6 as adopted provisionally at the thirty-second session read as follows:

"Article 6. State immunity

"1. A State is immune from the jurisdiction of another State in accordance with the provisions of the present articles.

"2. Effect shall be given to State immunity in accordance with the provisions of the present articles."

For the commentary to the article, see Yearbook ... 1980, Vol. II (Part Two), pp. 141-142, document A/35/10, chap. VI.B.

Article 6 was further discussed by the Commission at the thirty-fourth session and still gave rise to divergent views. The Drafting Committee also re-examined draft article 6 as provisionally adopted. While no new formulation of the article was proposed by the Drafting Committee at the thirty-fourth session, the Commission agreed to re-examine draft article 6 at its subsequent session. Owing to lack of time, however, the Drafting Committee was not in a position to consider the question during the present session.

4/ The title of this Part will be re-examined after the Commission has considered all possible exceptions.

5/ Provisional numbering.

6/ Provisional numbering.