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

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

Note by the Secretary-General

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* A/39/150.

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-sixth session at its permanent seat at the United Nations Office at Geneva from 7 May to 27 July 1984.

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

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

The Commission considered all the items on its agenda, with the exception of item 8, "Relations between States and international organizations (second part of the topic)".

3. The work of the Commission during its thirty-sixth 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 relates to the draft Code of Offences against the Peace and Security of Mankind. Chapter III relates to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and sets out the articles and commentaries provisionally adopted by the Commission at its thirty-sixth session. Chapter IV

relates to jurisdictional immunities of States and their property and also sets out the articles and commentaries provisionally adopted by the Commission at its thirty-sixth session. Chapter V relates to international liability for injurious consequences arising out of acts not prohibited by international law. Chapter VI relates to the law of non-navigational uses of international watercourses. Chapter VII relates to State responsibility. Chapter VIII of the report concerns the programme and methods of work of the Commission and also considers certain administrative and other matters.

4. The present document, prepared by the Secretariat pursuant to a decision of the International Law Commission, 2/ sets out in sections II and III below the texts of the draft articles provisionally adopted by the International Law Commission at its thirty-sixth session. Section II, which relates to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, sets out the texts of the draft articles provisionally adopted so far by the Commission, including the text of draft article 8 provisionally adopted by the Commission at its thirty-fifth and thirty-sixth sessions and the texts of draft articles 9 to 17, 19 and 20, as provisionally adopted by the Commission at its thirty-sixth session. Section III, which relates to jurisdictional immunities of States and their property, sets out the texts of the draft articles provisionally adopted so far by the Commission, including the texts of draft articles 13, 14, 16, 17 and 18, as provisionally adopted by the Commission at its thirty-sixth session.

II. 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 purposes 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 3/

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 4/

Appointment of the diplomatic courier

Subject to the provisions of articles 9 and 12, the diplomatic courier is freely appointed by the sending State or by its missions, consular posts or delegations.

Article 9

Nationality of the diplomatic courier

1. The diplomatic courier should in principle be of the nationality of the sending State.
2. The diplomatic courier may not be appointed from among persons having the nationality of the receiving State except with the consent of that State which may be withdrawn at any time.
3. The receiving State may reserve the right provided for in paragraph 2 of this article with regard to:

(a) nationals of the sending State who are permanent residents of the receiving State;

(b) nationals of a third State who are not also nationals of the sending State.

Article 10

Functions of the diplomatic courier

The functions of the diplomatic courier consist in taking custody of, transporting and delivering at its destination the diplomatic bag entrusted to him.

Article 11

End of the functions of the diplomatic courier

The functions of the diplomatic courier come to an end, inter alia, upon:

(a) notification by the sending State to the receiving State and, where necessary, to the transit State that the functions of the diplomatic courier have been terminated;

(b) notification by the receiving State to the sending State that, in accordance with article 12, it refuses to recognize the person concerned as a diplomatic courier.

Article 12

The diplomatic courier declared persona non grata or not acceptable

1. The receiving State may at any time and without having to explain its decision notify the sending State that the diplomatic courier is persona non grata or not acceptable. In any such case, the sending State shall, as appropriate, either recall the diplomatic courier to terminate his functions to be performed in the receiving State. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State.

[2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this article, the receiving State may refuse to recognize the person concerned as a diplomatic courier.] 5/

Article 13

Facilities

1. The receiving State or, as the case may be, the transit State shall accord to the diplomatic courier the facilities necessary for the performance of his functions.

2. The receiving State or, as the case may be, the transit State shall, upon request and to the extent practicable, assist the diplomatic courier in obtaining temporary accommodation and in establishing contact through the telecommunications network with the sending State and its missions, consular posts or delegations, wherever situated.

Article 14

Entry into the territory of the receiving State or the transit State

1. The receiving State or, as the case may be, the transit State shall permit the diplomatic courier to enter its territory in the performance of his functions.

2. Visas, where required, shall be granted by the receiving State or the transit State to the diplomatic courier as promptly as possible.

Article 15

Freedom of movement

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State or, as the case may be, the transit State shall ensure to the diplomatic courier such freedom of movement and travel in its territory as is necessary for the performance of his functions.

Article 16

Personal protection and inviolability

The diplomatic courier shall be protected by the receiving State or, as the case may be, by the transit State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

Article 17

Inviolability of temporary accommodation

1. The temporary accommodation of the diplomatic courier shall be inviolable. The agents of the receiving State or, as the case may be, of the transit State, may not enter the temporary accommodation, except with the consent of the diplomatic courier. Such consent may, however, be assumed in case of fire or other disaster requiring prompt protective action.
2. The diplomatic courier shall, to the extent practicable, inform the authorities of the receiving State or the transit State of the location of his temporary accommodation.
3. The temporary accommodation of the diplomatic courier shall not be subject to inspection or search, unless there are serious grounds for believing that there are in it articles the possession, import or export of which is prohibited by law or controlled by the quarantine regulations of the receiving State or the transit State. Such inspection or search shall be conducted only in the presence of the diplomatic courier and on condition that the inspection or search be effected without infringing the inviolability of the person of the diplomatic courier or the inviolability of the diplomatic bag carried by him and will not cause unreasonable delays or impediments to the delivery of the diplomatic bag.

Article 19

Exemption from personal examination, customs duties and inspection

1. The diplomatic courier shall be exempt from personal examination.
2. The receiving State or, as the case may be, the transit State shall, in accordance with such laws and regulations as it may adopt, permit entry of articles for the personal use of the diplomatic courier imported in his personal baggage and shall grant exemption from all customs duties, taxes and related charges on such articles other than charges levied for specific services rendered.
3. The personal baggage of the diplomatic courier shall be exempt from inspection, unless there are serious grounds for believing that it contains articles not for the personal use of the diplomatic courier or articles the import

or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or, as the case may be, of the transit State. Such inspection shall be conducted only in the presence of the diplomatic courier.

Article 20

Exemption from dues and taxes

The diplomatic courier shall, in the performance of his functions, be exempt in the receiving State or, as the case may be, in the transit State from all those dues and taxes, national, regional or municipal, for which he might otherwise be liable, except for indirect taxes of a kind which are normally incorporated in the price of goods or services and charges levied for specific services rendered.

III. 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 6/

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 designated 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. Failing 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 7/

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 13

Contracts of employment

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for services performed or to be performed, in whole or in part, in the territory of that other State, if the employee has been recruited in that other State and is covered by the social security provisions which may be in force in that other State.

2. Paragraph 1 does not apply if:

(a) the employee has been recruited to perform services associated with the exercise of governmental authority;

(b) the proceeding relates to the recruitment, renewal of employment or reinstatement of an individual;

(c) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded;

(d) the employee is a national of the employer State at the time the proceeding is instituted;

(e) the employee and the employer State have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

Article 14

Personal injuries and damage to property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from the jurisdiction of the courts of another State in respect of proceedings which relate to compensation for death or injury to the person or damage to or loss of tangible property if the act or omission which is alleged to be attributable to the State and which caused the death, injury or damage occurred wholly or partly in the territory of the State of the forum, and if the author of the act or omission was present in that territory at the time of the act or omission.

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.

Article 16

Patents, trade marks and intellectual or industrial property

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the determination of any right of the State in a patent, industrial design, trade name or business name, trade mark, copyright or any other similar form of intellectual or industrial property, which enjoys a measure of legal protection, even if provisional, in the State of the forum; or

(b) an alleged infringement by the State in the territory of the State of the forum of a right mentioned in sub-paragraph (a) above which belongs to a third person and is protected in the State of the forum.

Article 17

Fiscal matters

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State in a proceeding relating to the fiscal obligations for which it may be liable under the law of the State of the forum, such as duties, taxes or other similar charges.

Article 18

Participation in companies or other collective bodies

1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from the jurisdiction of a court of another State in a proceeding relating to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body:

(a) has participants other than States or international organizations; and

(b) is incorporated or constituted under the law of the State of the forum or is controlled from or has its principal place of business in that State.

2. Paragraph 1 does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body in question.

Notes

1/ Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 10 (A/39/10).

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

3/ Provisional numbering.

4/ Provisional numbering.

5/ It was agreed to return to this paragraph after the examination of draft article 28.

6/ 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.

Notes (continued)

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 future sessions. Owing to lack of time, however, the Drafting Committee was not in a position to consider the question during the present session.

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